SUPREME COURT COPY

In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOSEPH KEKOA MANIBUSAN,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S094890

Monterey County Superior Court
Case No. SM 980798
The Honorable Jonathan R. Price, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
ALICE B. LUSTRE
Deputy Attorney General
ALISHA M. CARLILE
Deputy Attorney General
State Bar No. 264202
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5205
Fax: (415) 703-1234
Email: Alisha.Carlile@doj.ca.gov
Attorneys for Respondent

DEATH PENALTY

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INTRODUCTION

In the late night and early morning hours of January 31, to February 1, 1998, appellant participated in a lethal shooting spree in Monterey County, ultimately leaving two women dead and another seriously injured after being shot in the head. Appellant and his codefendant selected their victims at random, kept score of their kills, and congratulated each other on their exploits.

In September, 2000, appellant proceeded to trial for the shootings and for a 1997 attempted robbery. The jury convicted appellant of two counts of first-degree murder, and one count each of attempted murder, aggravated mayhem and attempted robbery. The jury also returned verdicts of guilty as to the special circumstances of multiple murders, felony murder and drive-by murder and found multiple enhancements to be true.

During the penalty phase, the prosecution introduced evidence of appellant's history of domestic violence, possession of deadly weapons, and incidents of violence while in custody. In mitigation, the defense introduced evidence of appellant's difficult family life and history of drug use. The jury returned a verdict of death for the murders of Priya Mathews and Frances Olivo.

STATEMENT OF THE CASE

By information dated June 25, 1998, the Monterey County District Attorney charged appellant and his codefendant and accomplice, Norman Willover, with five counts each relating to the murders of Priya Mathews and Frances Olivo and the attempted murder of Jennifer Aninger. (2 CT 517-529.) Count 1 charged appellant with the first-degree murder of Priya Mathews (Pen. Code, § 187, subd. (a)).[1] (2 CT 517-519.) It also alleged

[1] All further undesignated section references are to the Penal Code.

four special circumstances—multiple murders, drive-by murder, and two separate felony-murder special circumstances (§ 190.2, subds. (a)(3), (17) & (21)). (2 CT 518.) Count one further alleged an enhancement for discharge of a firearm from a vehicle causing great bodily injury or death (§ 12022.55). (2 CT 519.) Count 2 charged appellant with the attempted premeditated murder of Jennifer Aninger (§§ 664 & 187, subd. (a)). (2 CT 519-520.) Count two also alleged an enhancement for discharge of a firearm from a vehicle (§ 12022.55). (2 CT 519-520.) Count 3 charged appellant with aggravated mayhem (§ 205). (2 CT 520.) Count 4 charged appellant with the first-degree murder of Frances Anne Olivo (§ 187, subd. (a)). (2 CT 520-521.) Count 4 also alleged two special circumstances, multiple murders and drive-by murder (§ 190.2, subds. (a)(3), (21)), and enhancements for personal use of a firearm, (§12022.53, subd. (d)), as well as discharge of a firearm from a vehicle (§ 12022.53). (2 CT 521-522.) Count 5 charged appellant with second-degree attempted robbery occurring on October 14, 1997 (§§ 664 & 211), with an enhancement for a prior juvenile conviction for assault with a deadly weapon causing great bodily injury (§§ 1170.12, subd. (c)(1), 245, subd. (a)(1)). (2 CT 522.) Counts 6-11 alleged similar charges against Norman Willover.

Appellant and Willover were tried separately. Jury selection took place from September 7 to September 18, 2000. (5 CT 1468-1470; 6 CT 1504-1508.) The guilt phase of the trial began on September 19, 2000. (6 CT 1530.) The case was submitted to the jury September 29, 2000, and on October 2, 2000, the jury found appellant guilty on all charges, and found all of the special circumstance and enhancement allegations to be true.[2] (6 CT 1615-1633.)

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[2] The jury found appellant guilty of attempted murder, but did not find that the crime was premeditated. (6 CT 1628.)

Penalty-phase evidence began on October 4, 2000. (6 CT 1640-1667.) The jury began penalty-phase deliberations on October 16, 2000. (6 CT 1668.) On October 19, 2000, the jury returned a death verdict for the murders of Priya Mathews and Frances Olivo. (6 CT 1678.) On January 24, 2001, the court sentenced appellant to death on counts 1 and 4, and imposed determinate sentences on the other counts. (7 CT 1815-1820.) It stayed the service of the determinate terms because the court relied on the facts underlying those offenses to deny the motion for modification of the death penalty judgment. (7 CT 1819.)

STATEMENT OF FACTS

A. Friday, January 30, and Saturday, January 31, 1998

On Friday, January 30, 1998, appellant, codefendant Norman Willover and Adam Tegerdal attended a party together in Seaside. (66 RT 13073.) They used methamphetamine and stayed up all night. (66 RT 13073.) The three stayed together into the next day, Saturday, January 31, 1998. (66 RT 13075.) Sometime in the late afternoon or early evening, Tegerdal, Willover and appellant drove Tegerdal's 1994 Mercury Cougar to a house in the nearby town of Marina. (66 RT 13017.) Willover picked up a backpack from a friend. (66 RT 13017-13018.) Tegerdal later learned that the backpack contained a gun. (66 RT 13017-13018.)

At some point in the early evening, Tegerdal, Willover and appellant took a small additional amount of methamphetamine. (66 RT 13051.) Tegerdal testified that it did not affect him. (66 RT 13052.) He did not observe that it had any effect on appellant, and neither appellant nor Willover appeared to be intoxicated. (66 RT 13052-13053.)

Later that evening, appellant called Melissa Contreras and asked her to meet up with him and some friends. (60 RT 11863-11865). Appellant and Contreras were both staying at the house of a mutual friend, Tim

Frymire. (60 RT 11861-11863.) She had known appellant for about three months at the time of the incident. (60 RT 11861.) Appellant told her that they would pick her up down the street from Frymire's house. (60 RT 11863.) Contreras got in the car with appellant, Willover and Tegerdal. (60 RT 11864.) She thought they were going to drink and hang out. (60 RT 11866.) She did not realize that anyone in the car had a gun. (60 RT 11867.)

Shortly after picking up Contreras, appellant drove to a gas station. (60 RT 11868, 66 RT 13021.) Appellant and Willover began discussing their plan to rob people. (60 RT 11869, 66 RT 13021-13022.) Contreras first saw the gun, a .22 semiautomatic handgun, around the time they arrived at the gas station. (60 RT 11869.)

Appellant told Contreras to take over driving as they left the gas station. (60 RT 118768.) He directed her to drive around various areas of Seaside and Monterey. (60 RT 11868.) After driving around for some time, appellant and Willover spotted a potential robbery victim and told Contreras to park the car near Jacks Park in Monterey. (60 RT 11873, 66 RT 13025.) Appellant and Willover left the car, taking the gun with them. (60 RT 11875, 66 RT 13025.) They returned about 15 minutes later, having been unable to find someone to rob. (60 RT 11875, 66 RT 13027-13028.)

After the failed robbery attempt at Jacks Park, appellant took over driving. (60 RT 11876, 66 RT 13028.) Willover and appellant discussed driving to the wharf area in Monterey to find a potential victim. (66 RT 13028.) Appellant drove them to Municipal Wharf Two in Monterey. (60 RT 11877, 66 RT 13029.) Willover was sitting in the front passenger seat, with Contreras and Tegerdal in the back. (60 RT 11880.)

B. Shootings at Municipal Wharf Two in Monterey

Jennifer Aninger and Priya Mathews were students at the Monterey Institute of International Studies. (69 RT 13673, 83 RT 16409.) Both were studying to become certified English translators. (69 RT 13673, 83 RT 16409.) They met up and went to Morgan's Coffee & Tea in Monterey at about 9:45 p.m. on Saturday, January 31, 1998. (69 RT 13675-13676.) They decided to take their drinks and sit by the wharf, arriving at about 10:30 p.m. (69 RT 13675-13676.) There were not many people around, and they stood looking at the ocean and discussing the scenery. (66 RT 13676.)

Sometime after 11 p.m., appellant, Willover and Tegerdal spotted the two women standing on the wharf. (60 RT 11831, 11877, 66 RT 13030.) Tegerdal asked if they were carrying purses. (66 RT 13030-13031.) Appellant made a U-turn at the end of the wharf so that they could circle back and observe them. (60 RT 11877, 66 RT 13030.) After driving by the women, who were standing on the left, driver's side of the car, appellant made another U-turn and approached where the two were standing, now on the right, passenger's side of the car. (60 RT 11879-11880, 66 RT 13032-13033.) Appellant stopped the car about five or ten feet away from the two women. (66 RT 13032.) Willover stuck his head out the window and demanded money. (60 RT 11881, 66 RT 13032.)

Aninger heard someone shouting off to the side, but she ignored it because it didn't seem to be related to her. (69 RT 13677-13678.) She heard another shout, and again ignored it. (69 RT 13677-13678.) On hearing a third shout, she turned to see what was going on. (69 RT 11378.) She saw a hand pointing a gun toward her and Mathews, and saw shots being fired at them out of a car window. (69 RT 11378.) The next thing she remembers is waking up in the hospital several days later. (69 RT 13677.)

Contreras was sitting behind Willover in the back seat of the car on the passenger's side as appellant drove up to the two women. (60 RT 11880.) She testified that Willover was angry that the women didn't respond to him. (60 RT 11881-11882.) After briefly turning back toward the rest of the occupants of the car, he turned back to face the women and started shooting. (60 RT 11881-11882.) She and Tegerdal heard Willover fire many shots. (60 RT 11881-11882, 66 RT 13033.) As soon as Willover finished shooting, appellant rapidly made a U-turn and sped away. (60 RT 11882-11883.) Willover stated that he didn't want to leave any witnesses. (66 RT 13033-13034.)

Witnesses reported hearing gunfire at about 11:30 p.m. and called the police. (60 RT 11831, 63 RT 12442.) When officers arrived at the scene, Aninger was conscious but incoherent. (61 RT 11837-11838.) She had been shot in the head and arm. (66 RT 13004-13006.) Priya Mathews was dead, having been shot twice in the back and twice in her left thigh. (68 RT 13419-13420.)

Contreras and Tegerdal testified that they were shocked when Willover shot the women on the wharf. (61 RT 12072-12073, 67 RT 13290.) There had been discussion only of robbing someone, not of shooting anyone. (61 RT 12072-12073, 67 RT 13290.)

After the shooting on the wharf, appellant, Willover and Tegerdal agreed that they needed to switch cars to avoid detection. (60 RT 11888; 66 RT 13034.) They drove to Tegerdal's house, dropped off the Mercury Cougar and picked up his 1979 Monte Carlo. (66 RT 13035-13036.) As they drove away, Contreras observed that Willover seemed very proud of himself, and that he and appellant were giving each other "props" and congratulating one another on the shooting. (60 RT 11886, 61 RT 12007.) Appellant said that "he wanted to have his turn." (63 RT 12409.)

C. Shooting at the Corner of Fremont & Amador Street in Seaside

After retrieving the second car, Tegerdal drove the group around Salinas for a while. (60 RT 11889-11890, 66 RT 13035-13036.) Later, appellant once again took over driving and headed back toward Seaside. (60 RT 11890, 55 RT 13036.) Contreras and Tegerdal sat in the back seat. (60 RT 11891, 66 RT 13037.) At about 1 or 2 a.m. on Sunday, February 1st, appellant got off the freeway at Fremont Street. (66 RT 13037.) He and Willover were talking about trying to find someone else to rob. (60 RT 11890; 66 RT 13038.) Appellant said he wanted "to try to show [Willover] up" because Willover had already shot two people. (66 RT 13038.)

As appellant drove down Fremont Street, he and Willover pointed out a woman, Frances Olivo, standing on the corner of Fremont and Amador Streets. (61 RT 12009.) Appellant indicated that he was going to try to rob her. (61 RT 12009.) Olivo was initially standing on the passenger's side of the car, and appellant drove all the way around the block, so that the driver's side of the car was positioned closest to the curb where Olivo stood. (61 RT 12011, 66 RT 13039-13040.) Contreras was sitting on the driver's side in the back seat. (66 RT 12011.) Appellant stopped the car about eight feet from Olivo and motioned for her to approach. (61 RT 12013, 66 RT 13039.) As she moved toward the car, appellant began firing. (61 RT 12013, 66 RT 13041.) Olivo cried out "please don't!" but appellant continued shooting, firing approximately eight or nine shots. (61 RT 12013-12014, 66 RT 13042.) Olivo died of her injuries. (68 RT 13415, 13422-13424.)

Contreras testified that she saw appellant begin to fire before she turned away. (63 RT 12417.) Tegerdal testified that he ducked as the shooting began. (67 RT 13229.) Although they did not watch appellant fire all of the shots, both saw appellant stick the gun out the window, and

were confident that it was appellant, not Willover, who pulled the trigger. (63 RT 12417, 12420, 66 RT 13041, 67 RT 13229, 13302.)

After shooting Olivo, appellant drove off down Fremont Street. (61 RT 12015.) He and Willover were laughing about the shooting. (66 RT 13044.) Tegerdal and Contreras sat silently in the back. (66 RT 13044.) As they were driving away, appellant was upset because he hadn't fired all of the bullets in the gun's clip. (61 RT 12015.) Shortly thereafter, they came upon an occupied vehicle parked on the side of the road. (61 RT 12016, 66 RT 13044.) Appellant stated that he "might as well get rid of the rest of the bullets in the gun" and began firing. (66 RT 13045.) Apparently no one in the parked car was injured. After appellant unloaded the gun into the parked car, the car began chasing them. (61 RT 12017.)

D. Flight from the Scene, Disposal of Gun, and Arrest

Fleeing the car he had fired on, appellant drove to the home of Anthony and Linda McGuiness in Fort Ord, arriving at about 2:30 or 3 a.m. (61 RT 12017, 64 RT 12622, 67 RT 13241.) The McGuiness's were friends of appellant's family, and appellant's father was staying at their house. (61 RT 12017, 64 RT 12622, 70 RT 13856.) The car ran out of gas a few blocks away from the house, so they parked the car on the street and walked the rest of the way. (67 RT 13241.) Tegerdal helped Willover pick up the shell casings from the car. (67 RT 13241.)

Anthony and Linda McGuiness were awakened by the noise of appellant's arrival. (64 RT 12617, 70 RT 13854-13855.) Anthony McGuiness came out of his bedroom and found the group seated in the living room. (64 RT 12619, 12629.) Appellant said his car had run out of gas and asked Anthony McGuiness for a ride to a friend's house in Seaside. (64 RT 12629.) He obliged, and appellant gave him directions to Tim Frymire's house in Seaside. (64 RT 12629-12630.) At appellant's direction, they drove past the scene of the shooting on Fremont Street,

passing a police barricade. (64 RT 12630-12631.) As they arrived, appellant got out and went into the house to talk to Frymire. (64 RT 12631.) A few minutes later, McGuiness saw appellant and Frymire come out of the house and stand near the open trunk of Frymire's car. (64 RT 12632-12633.) Appellant came over to tell McGuiness that he had found another ride, and McGuiness drove back to his house in Fort Ord without appellant. (64 RT 12633.)

Frymire testified that Appellant entered his house at about 3 a.m. on February 1st. (68 RT 13450.) Frymire was awake because he had used methamphetamine earlier in the day. (68 RT 13486.) Although the drugs caused him to stay awake into the late night hours, they did not alter his perception of events that night. (68 RT 13497, 13499-13500.) After he entered the house, appellant asked to talk to Frymire privately in his bedroom. (68 RT 13451-13452.)

Appellant seemed "real antsy" and kept looking out the window. (68 RT 13452.) Frymire testified that appellant "was saying things and I didn't want to hear what he was saying, so I just kind of blocked it out. Put my fingers in my ears. . ." (68 RT 13452.) Appellant asked if Frymire had some .22 shells that appellant had given him a few months earlier, and Frymire replied that he did not. (68 RT 13453.) Frymire told appellant that if he was hiding a gun in his pants, he needed to take it outside, because Frymire's children were in the house and he didn't want guns around. (68 RT 13453.)

Appellant hid the gun outside, but continued to appear anxious. (68 RT 13453-13454.) Frymire offered to let appellant lock the gun in the trunk of his car, and give appellant the key. (68 RT 13454.) They walked out to the car together, and Frymire saw appellant put a semiautomatic handgun in his trunk. (68 RT 13454-13455.) Shortly thereafter, appellant, Frymire's nephew and another man drove off in Frymire's car, with the gun

in the trunk. (68 RT 13457.) When the two other men returned later with the car, the gun was gone and appellant was not with them. (68 RT 13458.) Frymire testified that the gun appellant placed in his trunk was of the same type later recovered by police and identified as the murder weapon. (68 RT 13455-13458.)

Several hours later on Sunday night, Frymire was home watching the evening news on television. (68 RT 13458.) Appellant was also in the room. (68 RT 13459.) A report came on about three women getting shot in Monterey and Seaside the previous night. (68 RT 13458.) When appellant heard the story come on, he repeatedly pointed at his chest and pointed at the television. (68 RT 13459-13460.) He was smiling. (68 RT 13460.) Shortly thereafter, Frymire contacted the Seaside police department and related his suspicion that appellant was involved in the shootings. (68 RT 13460.)

E. Recovery of the Murder Weapon, Appellant's Arrest

On February 4, 1998, Willover asked his friend Joshua Riley to store a dark colored back pack containing a .22 caliber semiautomatic handgun. (64 RT 12604-12605.) Willover told him the gun was "heated"— i.e., that it had been involved in some kind of trouble. (64 RT 12604.) Riley's mother turned the backpack over to police later that night. (63 RT 12472-12473.) Police recovered a gun, some ammunition clips and some extra ammunition from the backpack. (63 RT 12472-124723.) Ballistics analysis established that the bullets recovered at the two crime scenes and from the bodies of the murder victims matched the gun recovered from Riley's house. (65 RT 12841.)

Appellant was arrested on February 4, 1998, at Frymire's house in Seaside. (68 RT 13492.) A few days after, he called Frymire from prison. (68 RT 13463.) Appellant asked him if he was "being true," which Frymire understood as asking him whether he was keeping quiet and not "ratting

him off." (68 RT 13464-13465.) Appellant made a similar call to Contreras. (61 RT 12024.)

F. Investigation and Witness Statements

Contreras contacted the police on February 4, 1998, and agreed to be interviewed. (61 RT 12033, 12035.) She moved out of Frymire's house the same day. (61 RT 12032.) Between March, 1998, and August, 1999, she received $12,920 from the witness protection program to cover food, rent and other necessities. (70 RT 13821, 13829.)

Frymire also agreed to be interviewed by the police on February 4, 1998. (68 RT 13492.) He received approximately $1,800 over the course of three months from the witness protection program to cover food and other necessities. (68 RT 13490.)

Tegerdal voluntarily spoke to the police on February 6, 1998. (67 RT, 13306.) He was not aware at the time that Contreras had already spoken with the officers. (67 RT 13306.) Several weeks after making his initial statement, Tegerdal entered into a plea agreement regarding the shootings on January 31 and February 1, 1998, and the 1997 robbery attempt charged in count 5. (67 RT 13277.) He pleaded guilty to aiding and abetting the attempted robbery, and to being an accessory after the fact in the shootings. (67 RT 13277-13278.) At the time of trial, Tegerdal had not yet been sentenced. (67 RT 13279.) The plea agreement contemplated a sentence ranging from a low of felony probation with a suspended sentence to a high of three years eight months in state prison. (67 RT 13278.)

On cross-examination, Tegerdal admitted that he was a heavy user of methamphetamine during the period in question, and sometimes also sold drugs to support his habit. (67 RT 13248, 13250.) Nonetheless, it did not affect his memory or his ability to perceive the events on January 31 and February 1, 1998. (67 RT 13253, 13295.)

G. Attempted Robbery on October 14, 1997

On October 14, 1997, Tegerdal and appellant drove to the Del Monte shopping center in Monterey looking for someone to rob. (66 RT 13014.) Tegerdal stayed in the car while appellant tried to grab a woman's purse. (66 RT 13015, 68 RT 13506.) Appellant drug the woman on the ground, but she wouldn't release the purse. (66 RT 13015, 68 RT 13506.) Appellant returned to the car after his unsuccessful attempt to steal the bag, and Tegerdal drove away. (66 RT 13016.)

H. Aggravating Evidence Presented in the Penalty Phase

The prosecution introduced evidence of several unadjudicated prior criminal acts as aggravating evidence during the penalty phase. Marina Police Officer Robert Greathouse testified that he responded to a report of a domestic disturbance at the Manibusan residence at about 11:30 p.m. on January 28, 1995. (81 RT 16040.) Appellant had beaten his twin sister, Yolina, to the point of unconsciousness, and stomped on her head. (81 RT 16031-16033, 16042.) A relative who witnessed the incident told police that he thought appellant was trying to kill his sister. (90 RT 17854-17855.)

Paramedics arrived and took Yolina to the hospital. Appellant came to the hospital in the early morning hours of January 29, 1995, while she was receiving treatment. A hospital security guard observed appellant behaving suspiciously and called the police. (79 RT 15687.) Officers arrived and arrested appellant. (80 RT 15810-15812.) During a pat search, they discovered appellant had a sawed-off .22 caliber rifle concealed in his waistband, and .22 caliber ammunition in his pocket. (80 RT 15810.) Appellant was taken to the police station, but released a few hours later. He again returned to the hospital, and threatened the security guard who had reported him to police. (79 RT 15692, 80 RT 15816.)

Police again responded to a report of a domestic disturbance at appellant's residence on August 26, 1995. (79 RT 15676-15677. Leslie Plieankul, appellant's girlfriend at the time and the mother of his child, testified that appellant beat her up, punching her in the face. (79 RT 15663-15664.) She had two black eyes, a swollen nose, and a bump under her eye. (79 RT 15676-15677.) She testified that appellant frequently beat her up. (79 RT 15673-15674.) Also, he never contributed to the support of their child, and blamed her for his chronic lack of money. (79 RT 15673-15674.) In addition to the two assaults, there was also evidence that, on three occasions in 1997, appellant was stopped by police and found in possession of two guns and knives. (79 RT 15679-15682; 80 RT 15826-15828; 80 RT 15832-15842.)

The prosecution introduced evidence that appellant's violent tendencies continued after his arrest. Two correctional officers, who worked at the facility where appellant was being held prior to trial, testified about appellant's initiation of a fight on June 10, 1998. (80 RT 15648-15654.) The officers testified that appellant was briefly placed in the same holding cell as his accomplice and codefendant Norman Willover. (80 RT 15850.) As soon as Willover entered the cell, appellant charged at him, punching him repeatedly. (80 RT 15856.) Willover remained passive and did not fight back. (80 RT 15851.) Officers were eventually able to pull appellant off of Willover. (80 RT 15854.) Willover suffered a bloody nose and torn clothing. (80 RT 15854.)

Finally, on August 21, 2000, appellant participated in a prison riot. (80 RT 15856-15857.) The inmates, including appellant, were throwing things, flooding the floor with their toilets, and yelling and screaming. (80 RT 15857-15858.) After appellant disobeyed orders and refused to come out of his cell peacefully, officers donning protective equipment entered his cell to extract him. (80 RT 15859-15860.) Appellant charged forcefully at

the officer who entered his cell, cracking his protective shield. (80 RT 15861-158962.) Appellant later wrote a letter to a friend bragging about his role in the riot, and stating that he liked to "get rowdy" with the prison guards. (80 RT 15875-15878; 91 RT 18031-18032.)

I. Mitigating Evidence Presented in the Penalty Phase

The defense called 23 witnesses to present mitigating evidence during the penalty phase. Counsel presented evidence that appellant had a long history of drug addiction, and frequently used methamphetamine. Dr. Clark Smith, an expert in drug and alcohol addiction, testified about the effects of methamphetamine. (89 RT 17684- 90 RT 17814.)

Several witnesses testified about appellant's tumultuous childhood. Appellant's father, Pete Manibusan, started drinking when he was approximately 13 years old. (83 RT 16479-16486.) He joined the Army instead of going to college. (83 RT 16484-16486.) Pete Manibusan met appellant's mother, Beulah, while stationed in Hawaii. She became pregnant with appellant and his twin sister, and they married. (83 RT 16487-16498.) The family moved frequently, including stints in Germany, Colorado and Hawaii. In the military, Pete Manibusan continued to drink and began using drugs, and his addiction continued throughout appellant's childhood. (83 RT 16487-16498 16497-16502, 16601-16604.) There was evidence that appellant's father was a cruel and abusive parent. (83 RT 16514-16518; 84 RT 16614-16622.)

Pete Manibusan's drug use intensified as appellant grew up, and appellant's mother also became addicted. (84 RT 16601-16614.) Appellant's father also began selling drugs. (84 RT 16601-16612.) Pete Manibusan was eventually forced to leave the military on account of his drug use, and the family fell on hard times. (84 RT 16602-16603; 16607, 16617-16622.) In 1992, the family moved back to California and lived with Pete Manibusan's extended family. (84 RT 16633.) Pete Manibusan

began manufacturing and selling drugs out of the house. (86 RT 17009-17010.)

Appellant's parents eventually divorced, and his father became involved with another woman who was also addicted to methamphetamine. (84 RT 16656-16661.) Appellant's girlfriend became pregnant and gave birth to their child in 1995. (79 RT 15663-15664.) Psychologist Dr. Thomas Reidy testified that the emotional and developmental trauma appellant suffered during his childhood resulted in psychological damage. He testified that, as a result of years of abuse and a toxic family environment, appellant had no bond with his family, and slipped into drug use and violence. He opined that appellant ultimately wound up with no moral compass or self control. (87 RT 17240-17297.)

ARGUMENT

I. JUROR 58 REMAINED IMPARTIAL AND DID NOT COMMIT MISCONDUCT

Appellant contends that he was denied his Sixth Amendment right to an impartial jury because juror 58, H.S., was improperly influenced by her fear of retribution by individuals associated with the defendant. He also contends that she committed misconduct by receiving extrinsic information and discussing the case with non-jurors during the course of the trial. Appellant argues that the trial court did not adequately investigate juror 58's potential bias, and erred in declining to remove her from the jury and in denying his motion for a mistrial and subsequent motion for a new trial. Contrary to appellant's assertion, the trial court thoroughly investigated any potential bias on the part of juror 58. Finding no demonstrable reality that she would be unable to carry out her duties as a juror, the court properly declined to remove her from the jury. Further, the evidence adduced by defendant in support of his motion for new trial is inadmissible, and, moreover, does not establish misconduct.

A. The Court Fulfilled Its Duty to Investigate Juror 58's Potential Bias, and Did Not Err in Declining to Remove Her from the Jury

1. Background

Jury deliberations began on Friday, September 29, 2000. (6 RT 1620.) As the jury reconvened to deliberate on Monday, October 2, 2000, juror 58 gave the court a letter dated October 1, 2000. Although the court was not aware at the time it received the letter, juror 58 was the foreperson of the jury. The letter stated:

> Please be aware, it has been brought to my attention that my anonymity as a juror for the case People vs. Manibusan has been compromised.
>
> On Thursday, September 28th, a person whom I know personally walked into the courtroom to observe the trial. As you may expect, this came as a shock to me however, I dismissed the incident as a coincidence. However, this weekend I became aware of this person as a close friend of both the defendant and his family. Additionally, I became aware of the fact that my name has already been revealed to the members of his family.
>
> As you may understand, this does not make me feel comfortable to continue as a juror in this case. My safety and the safety of my family may be in jeopardy because of this incident. Please accept my request to step down as a juror in this case.
>
> Thank you very much for your consideration.
>
> Sincerely, [Juror 58]

(77 RT 15201-15202; 7 CT 2011-2013.)

When the court called juror 58 into chambers to discuss her letter, she explained that on Thursday, September 28, 2000, she noticed an acquaintance, Christy Page, come in to the court room to observe the trial.

(77 RT 15205-15206.) Ms. Page was a friend of juror 58's friend Jessica.[3] Over the weekend, juror 58 spoke to her friend Jessica, and learned that Ms. Page recognized juror 58 when she came to court, and was good friends with appellant's mother. (77 RT 15205.) Juror 58's husband was concerned that, because she had been recognized, there might be a risk to their family and urged her to ask to be excused as a juror. (77 RT 15206.)

Despite her husband's concerns, juror 58 stated unequivocally that she did not want to be excused from the jury. (77 RT 15206, 15210.) In response to questions by the court, she said that her knowledge of the connection between her acquaintance, Ms. Page, and appellant's family would not impact her ability to be impartial, and would not affect her ability to objectively consider the evidence. (77 RT 15208.) She was not concerned about the possibility of retribution from someone associated with appellant or his family, but nonetheless wanted the court to be aware of the information, so decided to hand in the letter that morning. (77 RT 15209.) She further stated that she did not discuss the details of the case with anyone during her attempt to find out more information about the potential connection between herself, Ms. Page, and appellant's family. (77 RT 15213.)

At 3:55 p.m. the same day, the jury sent out a note asking if they could switch to a different foreperson for purposes of reading and signing the verdicts. (7 CT 2015; 77 RT 15233-15237.) The court responded that it was within the jury's discretion to change the foreperson during deliberations. (7 CT 2015.)

After the jury sent out the second note, appellant moved for a mistrial. He argued that the note indicated that, despite her earlier assurances to the

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[3] Specifically, she stated that Ms. Page was Jessica's brother's girlfriend. (77 RT 15205.)

contrary, juror 58 clearly feared retribution for her participation on the jury and that fear made her reluctant to sign the verdict forms as foreperson. (77 RT 15235-15236.) He also expressed concern that juror 58 had communicated her fear to the other jurors. (*Ibid.*) The court denied the motion. (77 RT 15237.) It noted that requests to switch the foreperson come up all the time, and appellant was only speculating that the switch was motivated by juror 58's fear, or that she had discussed anything improper with the other jurors. (77 RT 15236-15237.) After the jury delivered its verdict in the guilt phase, appellant moved to remove juror 58 from the jury for the penalty phase. (79 RT 15601.) The court denied the motion, noting that appellant had not presented any new information in support of his request. (*Ibid.*)

2. Legal standards

Under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, a defendant has the right to be tried by an impartial jury. (*Ristaino v. Ross* (1976) 424 U.S. 589, 595, fn. 6; *In re Carpenter* (1995) 9 Cal.4th 634, 677.) The decision of whether to investigate if a juror's impartiality has been compromised by bias or misconduct, as well as the decision to retain or discharge a juror, rests within the sound discretion of the trial court. (*People v. Ramirez* (2006) 39 Cal.4th 398, 461.) A trial court's inquiry into possible grounds for discharge of a deliberating juror should be "as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations" and should focus on "the conduct of the jurors, rather than upon the content of the deliberations." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1054.)

A trial court is not required to investigate any and all new information about a juror during trial. A hearing is required only where the court possesses information which, if proven true, would constitute "good cause"

to doubt a juror's ability to perform his duties and would justify his removal from the case. (*People v. Ray* (1996) 13 Cal.4th 313, 343.) The trial court may not presume bias, and does not err in failing to excuse a juror unless the juror's inability to perform a juror's functions is shown to be a "demonstrable reality" on the record. (*People v. Ramirez*, *supra*, 39 Cal.4th at p. 458; *People v. Jablonski* (2006) 37 Cal.4th 774, 807.)

3. Analysis

Although the court thoroughly questioned juror 58 after receiving her note on the morning of October 2, 2000, appellant nonetheless contends that the court erred because it did not question her again later the same day, after it received the jury's note inquiring about selecting a new foreperson. He also contends that the court should have removed juror 58 from the jury.

Appellant's argument lacks merit. No further inquiry was required. Neither the questioning in the morning nor the note later in the afternoon gave the court any reason to doubt juror 58's ability to remain impartial. When questioned by the court, she unequivocally stated that she did not want to be excused from the jury, that her passing acquaintance with a friend of appellant's family would not affect her consideration of the evidence, and would not compromise her ability to carry out her duty as a juror. (77 RT 15206-15209.) She wrote the letter because she wanted to make the court aware of the information, and because her husband had expressed some concern for her safety. (77 RT 15206, 15210.) She did not fear for her own safety. (77 RT 15209.) As the prosecutor noted, the juror was calm during the questioning, and there was no indication of fear or tension. (77 RT 15217.) The trial court found that, based on the answers she provided and his evaluation of her demeanor, there was no demonstrable reality she would be unable to remain impartial. (77 RT 15218.)

The trial court did not abuse its discretion in declining to further investigate after the second note, received in the afternoon of the same day it had already questioned juror 58. There was no information which, if proven true, would have constituted good cause to doubt juror 58's ability to fulfill her obligations. (*People v. Ray*, *supra*, 13 Cal.4th at p. 343.) The note did not state that juror 58 was renewing her request to be taken off the jury, nor did it state that she had reconsidered her answers earlier that day and that, upon further reflection, her fear of retribution compromised her impartiality. As the trial court noted, "these requests come up all the time," and defense counsel's argument that the request arose from a sense of fear was "pure speculation." (77 RT 15236-15237.) It was just as likely that she requested to be replaced as foreperson to address her husband's concerns. (See 77 RT 15206.)

The court was not required to investigate "any and all" new information received. (*People v. Ray*, *supra*, 13 Cal.4th 313, 343.) The note requesting to change the foreperson contained no substantive information undercutting the answers the juror provided earlier, and the court was entitled to rely on its earlier assessments of the juror's demeanor and credibility. (See *People v. Bennett* (2009) 45 Cal.4th 577, 621 [upholding court's decision not to remove juror when it was persuaded that she could perform her duties based on observations of her demeanor during questioning].) Additionally, the trial court did not abuse its discretion in declining to further investigate when appellant renewed his motion to disqualify juror 58 after the guilt phase. As the court noted, appellant presented no new information in support of his motion. (79 RT 15601.)

Moreover, the court did not err in declining to remove juror 58 from the jury. Appellant asks this Court to speculate that juror 58 was not candid when initially questioned by the court, or that the second note was motivated by a renewed fear of retribution. However, removal of a juror is

required only when there is a demonstrable reality that the juror is unable to fulfill their function. (*People v. Ramirez*, *supra*, 39 Cal.4th at p. 458.) Here, there was no demonstrable reality that juror 58's impartiality was affected by fear.

At best, the note shows that juror 58 had some reluctance about signing the verdict forms as foreperson. Reluctance and anxiety do not, however, create a demonstrable reality that a juror is unable to perform his or her duties. In *People v. Bennett*, *supra*, 45 Cal.4th at pp. 622-623, the trial court did not err in declining to remove a juror who had anxiety about stating his concurrence with a death verdict in open court. (*Ibid.*) While the juror's initial reluctance was understandable given the magnitude of the decision, he subsequently stated that, although it would be difficult, he could fulfill his obligation as a juror and verbally affirm the verdict. (*Ibid.*) Similarly, here, even if juror 58 had some reluctance to sign the verdict forms in the capacity of foreperson of the jury, any hypothetical fear did not prevent her from carrying out her duties. Shortly after the court responded to the note, the jury reached its verdict. (77 RT 15241.) Juror 58 was polled in open court, and stated that she agreed in the verdicts. (77 RT 12547-15252.) Therefore, there was no demonstrable reality that she was biased by fear and unwilling to be publicly connected to the case.[4] (See *People v. Bennett*, *supra*, 45 Cal.4th at pp. 622-623.)

People v. Castorena (1996) 47 Cal.App.4th 1051, relied on by appellant, does not compel a different result. In that case, the court held

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[4] In his declaration, juror A.G. stated that he "understood that [juror 58] feared that she might be in danger later on if she read the verdict." (6 RT 1701.) This statement reflects only A.G.'s subjective evaluation of the situation, and is contrary to the answers that juror 58 gave to the court. Moreover, as discussed above, any fear she felt did not prevent her from fulfilling her duties and affirming the verdict when polled.

that, although the trial court conducted an initial investigation of a claim of juror misconduct, it nonetheless abused its discretion in failing to further investigate when it received an additional note from the jury. (*Id.* at p. 1066.) The court observed that the later note contained new information regarding the allegations of misconduct and contradicted the earlier statements made by other jurors. (*Ibid.*) Here, in contrast, the second note did not provide any new or contradictory information relative to the claim that juror 58 was biased based on her attenuated connection to a person who was friends with appellant's family. Therefore, unlike in *Castorena*, the court did not abuse its discretion in failing to conduct a second investigation.

B. Juror 58 Did Not Commit Misconduct

1. Background

In support of his motion for new trial, appellant provided two affidavits which he claimed demonstrated that juror 58 committed misconduct during the course the trial. The first declaration, from juror 58's acquaintance Christy Page, alleged that juror 58 discussed the case with a sheriff's deputy and received extrinsic information about appellant. The declaration states in pertinent part:

> Approximately two to four weeks after this encounter [seeing juror 58 in court on September 28, 2000], I had a conversation with Jessica [a mutual friend of Page and juror 58.] During that conversation, she told me that [juror 58] told her about a conversation that [juror 58] had with a deputy sheriff. Jessica told me that [juror 58] told her that a deputy sheriff contacted [juror 58] at a little league baseball game. Jessica told me [juror 58] told her that the deputy sheriff told [juror 58] that he had spoken with Joseph Manibusan and that Manibusan had told the deputy that he (Manibusan) had killed that woman and that if was out of jail, he would do it again. Jessica told me that according to what [juror 58] was told by the deputy, Manibusan had no remorse and did not care and that he would not change a

> thing. Jessica told me that the deputy's son was playing in the little league game.

(7 CT 1803.)

Appellant also submitted an affidavit by a defense investigator purportedly relating conversations he had with juror 58 after the trial. The declaration states in pertinent part:

> On January 23, 2001, I spoke with [juror 58]. She told me that sometime in October 2000, she and her husband were at a soccer gave [sic] that her child was playing in. Her husband happened to mention to another parent that she, [juror 58], was on the jury at the Manibusan trial. The other parent happened to be a deputy sheriff. The deputy sheriff told [juror 58] and her husband that he knew Manibusan. [Juror 58] could not tell me precisely when this conversation took place, but she did say that it could have been when the Manibusan case was still in trial.

(7 CT 1807.)

2. Legal standards

A trial court ruling on a motion for new trial based on juror misconduct must undertake a three-step inquiry.

> First, it must determine whether the affidavits supporting the motion are admissible. (Evid. Code, § 1150.) If the evidence is admissible, the trial court must determine whether the facts establish misconduct. (*Krouse v. Graham* (1977) 19 Cal.3d 59, 79-82.) Lastly, assuming misconduct, the trial court must determine whether the misconduct was prejudicial. (*People v. Marshall* (1990) 50 Cal.3d 907, 950-951.)

(*People v. Dorsey* (1995) 34 Cal.App.4th 694, 703-704.)

The trial court has broad discretion in ruling on each of these issues, and its rulings will not be disturbed absent a clear abuse of discretion. (*People v. Dykes* (2009) 46 Cal.4th 731, 809.) The reviewing court must accept the trial court's factual findings and credibility determinations if they are supported by substantial evidence, but exercises its independent judgment to determine whether any misconduct was prejudicial. (*People v.*

Tafoya (2007) 42 Cal.4th 147, 192.) Appellant bears the burden of establishing that misconduct in fact occurred. (*People v. Marshall* (1990) 50 Cal.3d 907, 949.) If misconduct is established, the prosecution must demonstrate that the misconduct was not prejudicial. (*Ibid.*)

3. Analysis

Appellant contends that the court erred in denying his motion for a new trial based on his allegations that juror 58 committed misconduct. In his motion, he argued that juror 58 impermissibly discussed the case with two non-jurors and received extrinsic information from a deputy sheriff during trial. However, appellant failed to meet his burden of establishing that misconduct occurred. None of the evidence offered in support of his motion was admissible.

The declarations appellant offered in support of his claim of misconduct were vague and speculative, containing multiple levels of hearsay. (See *In re Lucero L.* (2000) 22 Cal.4th 1227, 1248 [the "'rule that hearsay evidence is inadmissible because it is inherently unreliable is of venerable common law pedigree'"].)

a. Christy Page's declaration

Christy Page's declaration contains at least four levels of hearsay. She claims that a deputy sheriff told juror 58 that appellant was guilty, showed no remorse, and was likely to kill again. (7 CT 1803-1804.) Purportedly, juror 58 related these statements to her friend Jessica, and Jessica in turn related the statements to Page. (7 CT 1803-1804.) The declaration does not state precisely when this alleged conversation took place. (7 CT 1803; see 77 RT 15206.) Because the declaration is hearsay not within any exception, it is inadmissible and cannot be used to support appellant's claim of misconduct. Therefore, he has failed to satisfy the first

prong of the test for a new trial based on juror misconduct. (See *People v. Dorsey*, *supra*, 34 Cal.App.4th at pp. 703-704.)

Even assuming arguendo that the affidavit was admissible, it does not demonstrate misconduct. The declaration does not state when the purported conversation occurred, only that the encounter was related to Page two to four weeks after September 28, 2000. The jury rendered its verdict in the penalty phase on October 19, 2000. (6 CT 1668-1678.) It is entirely possible that the conversation occurred after the jury was discharged.

b. Defense investigator's declaration

The declaration by the defense investigator is also hearsay, allegedly relating a conversation with juror 58 that occurred after trial. Moreover, even if admissible, the declaration by the defense investigator does not demonstrate misconduct. He claims that when he spoke to juror 58 after the trial, she told him that when she was at her child's soccer game, her husband told another parent that she had been on the jury in appellant's case. (7 RT 1807.) Juror 58 could not remember when this encounter occurred, but allegedly told the defense investigator that it occurred in October, 2000, and that was possible that it occurred during the trial. (*Ibid.*) As noted, the jury rendered its verdict in the penalty phase on October 19, 2000. (6 CT 1668-1678.) Thus, the declaration does not establish that the conversation took place while the trial was ongoing.

Even assuming arguendo that the conversation occurred during the trial, the declaration does not establish that any inappropriate information was shared or that any misconduct occurred. Allegedly, the other parent, a deputy sheriff, said that he knew appellant. (*Ibid.*) The declaration does not state that any further conversation occurred. (*Ibid.*) Indeed, juror 58's comments when she was questioned with regard to the note she sent to the court indicate that she was well aware that she could not discuss anything

relating to the case. (77 RT 15213 [juror 58 told her friend that "I can't talk about anything with you at all, and I can't hear anything."].)

C. Discussion of Case with Non-Jurors

Finally, appellant argues that juror 58 committed misconduct by discussing the case with her husband and her friend Jessica during the trial. Contrary to appellant's argument, the record demonstrates that she had only limited conversations with the two, and was careful not to discuss any of the evidence presented or to learn any outside information about the case. When questioned by the court about her note, she stated that she and her husband had discussed whether she should ask to be excused from the jury. (77 RT 15206.) She did not indicate that they discussed any details of the case. Additionally, she stated that she and Jessica discussed only that Ms. Page had recognized her when she came to observe the trial, and that Ms. Page was a friend of appellant's family. When asked if she had discussed anything about the case or learned any new information in this conversation, juror 58 said "absolutely not" and that when she spoke to her friend, she said "you know, I can't talk about anything with you at all, and I can't hear anything." (77 RT 15213.)

Appellant failed to provide any admissible evidence supporting his claim that juror 58 committed misconduct. In fact, her statements to the court demonstrate that she assiduously observed her duty not to discuss the case or to receive outside information. Therefore, appellant failed to meet his burden to establish misconduct and is not entitled to relief.

II. THE JURY DID NOT COMMIT MISCONDUCT BY CONSIDERING EXTRINSIC INFORMATION REGARDING PRISON CONDITIONS

Appellant claims that the trial court erred in denying his motion for new trial. He contends that he is entitled to a new penalty-phase trial because, during deliberations, a juror committed misconduct by discussing the experience and observations he gained while working as civilian prison

employee. Appellant's argument is unavailing. First, the evidence on which he relies to prove misconduct is inadmissible. Second, even if the information were admissible, it does not demonstrate misconduct because it merely shows that the juror shared information based on his life experience. Finally, any misconduct was not prejudicial.

A. Background

In support of his motion for new trial, appellant relied on an affidavit from a juror, A.G., and two affidavits from a defense investigator describing certain matters discussed during deliberations. In his affidavit, juror A.G. stated:

> 6. During deliberations in the penalty phase of the trial the first poll of the jury showed four in favor of death, five in favor of life without the possibility of parole and three undecided.
>
> 7. I believe that I was the last to vote for life.
>
> 8. The second to the last vote was eleven to one for death.
>
> 9. One of the most compelling arguments that may have convinced the jury to vote for death was from juror [R.M.] who works in a prison and provided the jury with a lot of information about what life in prison was like for inmates.
>
> 10. The information from [R.M.] showed me that while life in prison isn't much of a life, it is still a life.
>
> 11. [R.M.] has spoken to me since trial because he is trying to organize a tour of the prison for the jurors.
>
> 12. I am interesting in touring the prison.

(6 CT 1701.)

Trial counsel stated that, although an investigator working for him had contacted several other jurors, none of them other than A.G. were willing to sign a declaration. (96 RT 19002.) Therefore, trial counsel also submitted two affidavits from the investigator purportedly detailing the conversations

he had with two additional jurors. (7 CT 1806-1807; 1809.) The investigator claimed that the two other jurors confirmed that the jury discussed conditions of imprisonment, as well as other impermissible matters.[5] (*Ibid.*) Counsel argued that the discussion of prison conditions was especially prejudicial because the trial court had denied a defense request to present evidence on the harsh conditions faced by inmates sentenced to life in prison.[6] (96 RT 19016-19018.)

The trial court denied the motion for new trial. (96 RT 19050.) The court held that the declarations from the defense investigator were inadmissible hearsay. (96 RT 19049.) Additionally, it held that the affidavit from juror A.G. was inadmissible under Evidence Code section 1150, and that alternatively, if admissible, it did not reveal misconduct. The court stated:

> The purported affidavit, while cleverly worded does not amount to competent evidence. There is nothing stated that is open to sight, hearing or other senses subject to corroboration. This juror does not say that they would change their vote. The juror impermissibly speculates as to what may, and I emphasize the word may, have been a reason or reasons that other jurors rendered the verdict they rendered. There is no tangible basis for such speculation. It's incompetent evidence and it's improper for any court to consider it.
>
> Assuming arguendo that some reviewing court may later consider the possibility that the affidavit submitted is somehow

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[5] The investigator stated that juror H.S. told him that the jurors knew that juror R.M. worked in a prison. He did not volunteer information, rather some jurors asked him about his observations. Juror H.S. recalled him saying that prison was hard for some inmates, but not for others. (7 CT 1806.) The investigator further stated that juror D.S. told him that jurors asked R.M. questions about what life was like in prison because they knew he worked at a state prison. (7 CT 1809.)

[6] In fact, as discussed below in argument XVIII, trial counsel moved to introduce evidence that appellant would not be released if sentenced to life in prison, not evidence relating to the harsh conditions he would face.

> competent under the statute, I consider it for that purpose only and make the following findings. There is no evidence of juror misconduct.

(96 RT 19046-19047.)

B. Legal Standards

As discussed above, a trial court ruling on a motion for new trial must first determine if the declarations offered in support of the motion are admissible. The admissibility of juror affidavits is governed by Evidence Code section 1150. That section provides in pertinent part:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

Evidence Code section 1150 "distinguishes 'between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning process of the individual juror, which can neither be corroborated nor disproved. . . .'" (*People v. Steele* (2002) 27 Cal.4th 1230, 1261.) This section is grounded in the traditional common law rule and is designed to prevent broad-based attacks on jury verdicts. (See *id.* at pp. 1261-1262.) It reflects "long-recognized and very substantial concerns support[ing] the protection of jury deliberations from intrusive inquiry." (*Tanner v. United States* (1987) 483 U.S. 107, 127.)

It is misconduct for a juror to receive or proffer information received outside of court during deliberations. (*In re Carpenter*, *supra*, 9 Cal.4th at p. 647.) It is permissible, however, for jurors to share information based on their life experiences. "Jurors cannot be expected to shed their

backgrounds and experiences at the door of the deliberation room." (*People v. Fauber* (1992) 2 Cal.4th 792, 839.) "It is an impossible standard to require. . . the jury to be a laboratory, completely sterilized and freed from any external factors. [Citation.]." (*People v. Marshall, supra*, 50 Cal.3d at p. 950.)

"Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience." (*People v. Marshall, supra*, 50 Cal.3d at p. 950.) "Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work." (*In re Malone* (1996) 12 Cal.4th 935, 963.)

It is particularly appropriate for jurors to rely on their life experiences during penalty-phase deliberations. (See *People v. Wilson* (2008) 44 Cal.4th 758, 830.) As this Court recently stated:

> Rather than the fact-finding function undertaken by the jury at the guilt phase, "the sentencing function [at the penalty phase] is inherently moral and normative, not factual; the sentencer's power and discretion . . . is to decide the appropriate penalty for the particular offense and offender under all the relevant circumstances." [Citation.] Given the jury's function at the penalty phase under our capital sentencing scheme, for a juror to interpret evidence based on his or her own life experiences is not misconduct. (*Ibid.*)

"Juror misconduct generally raises a rebuttable presumption of prejudice, but '[a]ny presumption of prejudice is rebutted. . . if the entire record in the particular case. . . indicates there is no reasonable probability of prejudice." (*In re Lucas* (2004) 33 Cal.4th 682, 696.) The test for prejudice is summarized in *In re Carpenter, supra*, 9 Cal.4th at p. 653:

> [W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can

> appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. [Citation.] The judgment must be set aside if the court finds prejudice under either test.

C. The Trial Court Correctly Ruled That the Declarations Were Inadmissible

None of the declarations offered in support of the motion for new trial were admissible. As the trial court observed, the declarations by the defense investigator purporting to describe conversations he had with jurors H.S. and D.S. contained multiple levels of hearsay. (96 RT 19048-19049.) The statements did not fall within an exception to the hearsay rule, and, therefore, they were not admissible to impeach the verdict under Evidence Code section 1150. Appellant acknowledges that the declarations were hearsay, but argues that they corroborated the statements in A.G.'s declaration. (AOB at p. 76.) This does not alter the analysis. Evidence must be otherwise admissible on its own before it can be used to impeach the verdict. (Evid. Code, § 1150; see *People v. Cox* (1991) 53 Cal.3d 618, 697 [court properly denied new trial motion when defendant presented affidavit from defense investigator containing unsworn hearsay] overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.)

Moreover, the declaration signed by juror A.G. was also inadmissible. With regard to discussion of prison conditions, the declaration in essence states: (1) that the jury may have been swayed by information about prison conditions provided by juror R.M., who works in a prison, (2) that the information influenced A.G.'s vote in the penalty phase, and (3) that after the trial, R.M. offered to organize a tour of the prison where he works. (6 CT 1701.)

The third statement, regarding the jurors' potential activities after the trial, is irrelevant. The first and second statements clearly go to "the subjective reasoning process of the individual juror, which can be neither corroborated nor disproved" and are thus inadmissible under Evidence Code section 1150. (*People v. Steele*, *supra*, 27 Cal.4th at p. 1261) As the trial court noted, the statement regarding discussion of prison conditions,

> is likewise couched in words which [are] fatally flawed and render it likewise sheer speculation. Quote, one of the arguments that may have convinced end quote, this court is likewise prohibited from engaging in speculation as to the effect of what one of the jurors speculates may have caused jurors to vote the way they did. . . [t]here is not one scintilla of evidence presented to the senses by any of these speculatory statements.

(96 RT 19048.)

Appellant argues that, even if some of the statements in the declaration were inadmissible because they reflect the jury's thought process, the court could have excised those portions and considered only the factual statements. (AOB at p. 76.) As the trial court observed, however, the wording of the declaration is such that any factual statements about information conveyed to the jury are inexorably intertwined with statements about the effect that information had on deliberations. (96 RT 19048.) Had the court attempted to separate the two types of statements, appellant concedes that it would have been left with the bare assertion that juror R.M., who works in a prison, "provided the jury with a lot of information about what life in prison was like for inmates." (AOB at p. 76; 6 CT 1701.) As discussed below, this statement does not reveal any juror misconduct.

D. Even If a Portion of the Declaration Is Admissible, It Does Not Demonstrate Misconduct

Assuming arguendo that the court should have admitted the portion of the declaration stating that juror R.M. provided information about what life

was like in the prison where he worked, the evidence does not demonstrate misconduct. As discussed above, jurors are expected to draw on their life experiences, including information gained during the course of their employment, during the deliberative process. As this Court has stated, "if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in evaluating and interpreting [the] evidence." (*People v. Steele*, *supra*, 27 Cal.4th at p. 1266.) This is especially true during penalty phase deliberations, where juror are called upon to make a moral judgment rather than a factual finding. (See *People v. Wilson*, *supra*, 44 Cal.4th at p. 830.)

Here, the evidence indicates only that juror R.M. shared observations gained during the course of his employment about what life was like behind bars. (6 RT 1701.) There is no evidence that he set himself up as an expert or injected incorrect or extraneous legal principles. (See *In re Malone*, *supra*, 12 Cal.4th at p. 963 [specialized expertise]; *People v. Marshall*, *supra*, 50 Cal.3d at pp. 949-950 [extraneous and erroneous law].)

Courts have repeatedly found that a juror who shares their experiences gained while working in a prison does not commit misconduct. In *People v. Pride* (1990) 3 Cal.4th 195, 267-268, one juror was employed as a cook at a prison. During penalty phase deliberations, he shared his observation that death-row prisoners face greater surveillance and restrictions, while other prisoners have less supervision and a greater opportunity to escape. (*Ibid.*) The court found that the statements did not constitute misconduct. (*Id.* at p. 268.) It reasoned that the juror shared only the observations gained as a result of his employment and did not profess to be an expert on prison conditions or the chance of a successful escape attempt. (*Id.* at pp. 267-268.) Moreover, the information he shared, that death-row prisoners face greater security, is something that most individuals would assume to be true. (*Id.* at p. 268.) Similarly, in *People v. Riel* (2000) 22 Cal.4th 1153,

1218-1219, one juror formerly worked as a nurse in a county jail. A defense investigator stated that she allegedly told other jurors that, if they voted to give the defendant the death penalty, the judge would commute the sentence. (*Id.* at p. 1218.) The defendant argued that her experience working in a prison added credibility to her assertion. (*Id.* at p. 1219.) The court rejected this argument and found no misconduct. (*Ibid.*) It reasoned that the juror was expressing only her personal opinion based on her life experience, and was not purporting to be an expert. (*Ibid.*)

In re Stankewitz (1985) 40 Cal.3d 391, 399-400, cited by appellant, does not compel a finding of misconduct. In that case, a juror who was a former police officer repeatedly asserted that, based on his experience in law enforcement, he knew that the crime of robbery is complete when a defendant forcibly takes another's property, regardless of whether he intends to keep it permanently. (*Id.* at p. 396.) The juror's statement was contrary to the law as well as to the instructions provided by the court. (*Id.* at p. 400.) The court found that the juror's interjection of erroneous law constituted misconduct. (*Id.* at pp. 399-400.) Here, in contrast, juror R.M. shared his own factual observations. There is no evidence that he introduced incorrect or extraneous legal principles.

E. If Misconduct Occurred, It Was Not Prejudicial

Even if juror R.M. committed misconduct by sharing his observations about prison conditions, no prejudice resulted because there was no substantial likelihood of juror bias. (*In re Carpenter*, *supra*, 9 Cal.4th at p. 652.) It is not enough that a juror may have been exposed to some undesirable information. Rather, "before a unanimous verdict is set aside, the likelihood of bias . . . must be *substantial*." (*Id.* at p. 654 [original emphasis].) The court must reject appellant's claim if the prosecution proves that the misconduct did not involve receipt of information that was

inherently prejudicial and there was no substantial likelihood of actual bias. (*Id.* at p. 653.) In this case, neither test supports a finding of prejudice.

First, the information is not of the type that was inherently and substantially likely to have influenced a juror. (*In re Carpenter*, *supra*, 9 Cal.4th at p. 652.) At best, appellant has established that the jury received some general information about life in prison.[7] General information about prison conditions is a matter of common knowledge. (See *People v. Pride*, *supra*, 3 Cal.4th at p. 268 ["While [the juror's] statements . . . were purportedly based on his experience [working] inside the prison system, he only said what any citizen might assume was true. . ."].) The information provided is not the type of inflammatory or inherently prejudicial information likely to bias the jury. (See, e.g., *People v. Holloway* (1990) 50 Cal.3d 1098, 1107 [juror exposed to newspaper article stating that defendant had violently assaulted woman with a hammer] overruled on other grounds by *People v. Starsbury* (1995) 9 Cal.4th 824.)

Second, examination of the entire record reveals no substantial likelihood of actual bias against the defendant. (*In re Carpenter*, *supra*, 9 Cal.4th at pp. 653-654.) Under this second prong of the test, the information bearing on a finding of likely juror bias "includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant." (*Id.*

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[7] The only potentially admissible portion of A.G.'s declaration does not provide much insight into what sort of information was provided. The declaration states only that juror R.M. "provided the jury with a lot of information about what life was like in prison for inmates." (6 CT 1701.) The hearsay declaration from the defense investigator states that R.M. told fellow jurors that "prison was hard for some inmates, but not for others." (7 RT 1806.)

at p. 654.) Statements regarding the effect that information had on a juror's decision must be excluded. (Evid. Code, § 1150.)[8]

Here, there is no indication that juror R.M. engaged in deceitful behavior of consulted outside experts. (See *In re Hitchings* (1993) 6 Cal.4th 97, 119 [juror intentionally concealed the fact that she had received extrinsic information about the case].) He merely shared observations about the conditions he had observed during his work. There is no indication that he related false or inflammatory information. (*People v. Marshall*, *supra*, 50 Cal.3d 907, 949-950 [juror incorrectly stated that juvenile records are automatically sealed when a defendant turns 18]; *People v. Holloway*, *supra*, 50 Cal.3d at p. 1107.)

Moreover, the prosecution presented strong evidence in support of death during the penalty phase. Witnesses testified that appellant brutally assaulted his sister, beating her to the point of unconsciousness, and leading a relative who observed the fight to conclude that appellant was trying to kill her. (81 RT 16040, 86 RT 17112, 90 RT 17854-17855.) After she was admitted to the hospital, appellant went looking for her, carrying a sawed-off rifle. (80 RT 15808-15811.) His former girlfriend testified that he repeatedly beat her, causing serious injuries to her face and head. (79 RT 15663-15664.) Additionally, there was evidence that appellant started fights and participated in riots while in prison. (80 RT 15848-15855; 15857, 15861-15864.) In light of this strong aggravating evidence, it is

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[8] Interpreting an analogous Federal Rule of Evidence, the Ninth Circuit Court of Appeals recently observed that ignoring a juror's statement that "'she relied on the extrinsic information lends an 'Alice in Wonderland' quality to the discussion [nonetheless] the weight of authority and sound policy reasons support this view.' [Citation.]." (*Estrada v. Scribner* (2008) 512 F.3d 1227, 1237.)

unlikely that information regarding prison conditions had any impact on the jury's decision.

Appellant argues that the information provided by juror R.M. was prejudicial because it is unknown whether he worked with low-level or high-level inmates, and therefore the information he provided may have been misleading. (AOB at pp. 74-75.) Appellant is not entitled to relief based on speculation that the information provided may have painted an inaccurate or overly-idyllic picture of the conditions he would have faced if sentenced to life in prison. Rather, it is his burden to establish that the jury received misleading information. (See *In re Carpenter*, *supra*, 9 Cal.4th at p. 656 [court will not assume misconduct occurred, instead, "the initial burden is on defendant to prove the misconduct."].) He has failed to do so.

In sum, the information shared by juror R.M. was not inherently prejudicial, and review of the entire record demonstrates no substantial likelihood of actual bias. Therefore, the presumption of prejudice arising from any purported misconduct has been rebutted, and appellant is not entitled to relief on this claim.

F. No Evidentiary Hearing Was Required

Finally, appellant contends that the trial court should have conducted an evidentiary hearing to further investigate his claims of juror misconduct. He notes that several of the jurors as well as the defense investigator were present during the hearing on the new trial motion, and it would have been simple for the court to swear them in as witness and examine them about any outside information received during deliberations. (AOB at pp. 78-80.)

Contrary to appellant's argument, the trial court was not required to hold an evidentiary hearing. A trial court has broad discretion to determine whether to conduct an evidentiary hearing to resolve factual disputes raised by a claim of juror misconduct. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 809.) In *People v. Avila* (2006) 38 Cal.4th 491, 604, the court held that a

defendant is not entitled to an evidentiary hearing as a matter of right when he raises a claim of juror misconduct. The court further noted that:

> Such a hearing should be held only when the court concludes an evidentiary hearing is 'necessary to resolve material, disputed issues of fact.' [Citation.] 'The hearing. . . should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing.' [Citation.]

(*Ibid.*) Here, the trial court afforded defense counsel ample opportunity to obtain declarations and other evidence in support of his motion for new trial. Although he was able to contact several of the jurors, only one was willing to sign a declaration, and that declaration was filled almost entirely with inadmissible statements about the jury's deliberative process. The prosecutor did not dispute the statements made in the declaration. Rather, he argued that, even if true and admissible, they did not demonstrate juror misconduct. In short, evidence adduced by the defendant did not present a material conflict that could be resolved only by taking testimony. Therefore, the trial court did not abuse its discretion in failing to conduct an evidentiary hearing. (See *People v. Avila*, *supra*, 38 Cal.4th at p. 604.)

III. JURORS DID NOT COMMIT PREJUDICIAL MISCONDUCT BY DISCUSSING APPELLANT'S FAILURE TO TESTIFY

Appellant further contends that he was entitled to a new trial because the jurors allegedly spoke about his failure to testify in his own defense during their deliberations. Appellant is not entitled to relief on this claim. There is no admissible evidence indicating that jurors discussed his decision not to testify. Furthermore, even if some of the statements regarding appellant's failure to testify are admissible, there is no substantial likelihood that appellant suffered actual harm as a result of the discussion.

A. Background

The trial court correctly instructed the jury that they could not draw any inferences from appellant's decision not to testify. (75 RT 14836.) As discussed above, appellant submitted a declaration by juror A.G. as well as two declarations from a defense investigator in support of his motion for new trial. The declaration from juror A.G. stated:

> 4. The fact that the defendant did not testify came up during deliberations.
>
> 5. It was the general consensus of the jury that if the defendant testified he would subject himself to damage by the prosecutor's questions.

(6 CT 1701.)

The declarations from the defense investigator related hearsay statements purportedly made by two other jurors. According to the declarations, the jurors also recalled that appellant's failure to testify came up during deliberations. (7 CT 1806, 1809.) The trial court ruled that all of the declarations were inadmissible under Evidence Code section 1150 and denied appellant's motion for new trial. (96 RT 19046-19047, 19050.)

B. Legal Standards

A defendant has an absolute right under the Fifth Amendment not to testify at either the guilt or penalty phase of his trial. (*Estelle v. Smith* (1981) 451 U.S. 454, 462-463.) Upon request, the court should instruct jurors that they may not consider a defendant's decision not to testify. (*Carter v. Kentucky* (1981) 450 U.S. 288, 305.) The purpose of this admonition is to prevent the jury from inferring guilt based on a defendant's decision to exercise his right to remain silent. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1424-1425.)

Jurors commit misconduct by discussing a defendant's failure to testify. (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1425; *People v. Hord*

(1993) 15 Cal.App.4th 711, 721, 725.) "This misconduct gives rise to a presumption of prejudice, which 'may be rebutted . . . by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm.'" (*People v. Leonard, supra*, at p. 1425.) "'Transitory comments of wonderment and curiosity' about a defendant's failure to testify, although technically misconduct, 'are normally innocuous, particularly when a comment stands alone without any further discussion.' [Citation.]." (*People v. Avila* (2009) 46 Cal.4th 680, 727.) The question of whether prejudice arose from the misconduct is a mixed question of law and fact and is subject to an appellate court's independent determination. (*People v. Danks* (2004) 32 Cal.4th 269, 303.)

C. The Trial Court Correctly Ruled That the Declarations Were Inadmissible

As discussed above, none of the affidavits offered in support of the motion for new trial were admissible. The declarations by the defense investigator consisted entirely of hearsay statements. Additionally, as the trial court noted, the language used in juror A.G.'s declaration made it impossible to separate out information relating to conduct, conditions or events from information relating to the juror's deliberative process. (96 RT 19048; see Evid. Code, § 1150.)

For example, the declaration states that defendant's failure to testify "came up" and that "it was the general consensus of the jury" that appellant would have been "damage[d]" by questioning by the prosecutor." (6 CT 1701.) Both statements reflect the jury's deliberative process. The statement that appellant's failure to testify "came up," as opposed to a statement that juror X discussed appellant's failure to testify, reveals what information the jury was focusing on during deliberations. Similarly, the statement about the jury's consensus on the effect of cross examination by

prosecutor provides insight into the jury's thought process, and is therefore inadmissible. (Evid. Code, § 1150.)

Even if the trial court had attempted to separate out factual statements from those reflecting the deliberative process, the only statement that was potentially admissible was "[t]he fact that defendant did not testify at trial came up during deliberations." (6 RT 1701.) As discussed below, appellant was not prejudiced by this brief comment.

D. There Was No Prejudice as a Result of Comments on Appellant's Failure to Testify

Generally, a jury's brief discussion of a defendant's failure to testify is not prejudicial. (*People v. Avila*, *supra*, 46 Cal.4th at p. 727.) A review of the entire record demonstrates that, here too, appellant suffered no actual harm as a result of the comment and is not entitled to relief.

First, it appears that the comment was a brief, passing observation. The declaration states that the issue "came up"—not that it was a repeated and pivotal theme in the jury's deliberations. (See, e.g., *People v. Cissna* (2010) 182 Cal.App.4th 1105, 1119-1121 [prejudicial misconduct found when juror discussed case, including import of defendant's decision not to testify, with non-juror every single day of trial].) As the court noted in *People v. Hord*, *supra*, 15 Cal.App.4th at p. 727, jurors are obviously well aware of a defendant's decision not to testify, and it is only natural to have some curiosity about the issue. However, "[t]ransitory comments of wonderment and curiosity," without more, do not give rise to prejudice. (*Id.* at p. 727-728; see also *People v. Avila*, *supra*, 46 Cal.4th at p. 727.)

Second, there is no evidence that the jury drew an adverse inference of guilt from appellant's failure to testify. In *People v. Leonard*, *supra*, 40 Cal.4th at p. 1425, this Court agreed that "'merely referencing that [the defendant did not testify] is not the same as punishing the [d]efendant for not testifying. It is not the same as drawing negative inferences from the

absence of testimony.'" (*Ibid.*) Here, as in *Leonard*, there is no indication that appellant's failure to testify played any role in the verdict. (C.f. *People v. Cissna*, *supra*, 182 Cal.App.4th at p. 1115 [juror and his friend, a non-juror, discussed that "guilty people do not testify, and if the defendant was not guilty he would testify."].) Thus, appellant suffered no actual harm from any commentary on his failure to testify.

Finally, appellant's suggestion that the prosecutor's statement that there was "no defense in this case" amounted to a "flirtation with *Griffin*[9] error" and heightened the possibility for prejudice is inapposite. (AOB at pp. 84-85.) It is well established that a prosecutor's comment on the state of the evidence or the failure of a defendant to introduce material evidence is not tantamount to a comment on his decision not to testify. (See, e.g., *People v. Brady* (2010) 50 Cal.4th 547, 566 ["The [Griffin] rule, however, does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses."].)

In sum, even if this court finds that there is admissible evidence that jurors committed misconduct by discussing appellant's decision not to testify, any discussion was nonprejudicial. A review of the entire record demonstrates that there was no substantial likelihood that appellant suffered actual harm from the brief, transitory observations. Therefore, he is not entitled to relief on this claim.

IV. APPELLANT IS NOT ENTITLED TO RELIEF DUE TO CUMULATIVE JUROR MISCONDUCT

Appellant argues that even if none of the conduct identified in arguments I, II and III individually rose to the level of prejudicial misconduct, considered together, the cumulative impact of the jurors' behavior resulted in a violation of his right to a trial before an impartial

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[9] *Griffin v. California* (1965) 380 U.S. 609.

jury. As discussed above, none of the behavior identified by appellant constituted misconduct, and appellant suffered no resulting prejudice. Therefore he is not entitled to relief based on the cumulative impact of the alleged errors.

V. THE TRIAL COURT DID NOT ERR IN REMOVING JURORS WHO WERE UNSURE THEY COULD CONSIDER IMPOSING THE DEATH PENALTY

Appellant contends that the trial court improperly removed three jurors who expressed concerns about capital punishment but who did not categorically state that they could never vote to impose the death penalty. We disagree. The responses of the jurors in question were equivocal at best, and the trial court did not abuse its discretion in finding that there was no reasonable possibility that they could consider imposing the death penalty. Because the trial court's findings required reconciling conflicting answers, its findings are binding on this court.

A. Legal Standards

The trial court may excuse a prospective juror for cause if his views on the death penalty would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [*Witt*]; accord *People v. Ghent* (1987) 43 Cal.3d 739, 767.) A juror is substantially impaired if there is no reasonable possibility he could consider imposing the death penalty, or if he would always vote to impose the death penalty when a defendant is convicted of murder. (*Morgan v. Illinois* (1992) 504 U.S. 719, 729; *People v. Schmeck* (2005) 37 Cal.4th 240, 262, overruled on other grounds by *People v. MacKinnon* (2011) 52 Cal.4th 610.) If a juror is not substantially impaired, removal for cause is impermissible. (*Uttecht v. Brown* (2007) 551 U.S. 1, 9.)

A juror may not be excused based on their philosophical opposition to the death penalty. (*People v. MacKinnon*, *supra*, 52 Cal.4th at p. 646.) Such jurors may serve "so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.) If a potential juror is equivocal, however, the trial court must make a credibility determination as to whether it believes the juror will follow the law. (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 17.)

The trial court has broad discretion to determine whether to remove a juror. (*People v. Moon* (2005) 37 Cal.4th 1, 14.) "[W]here equivocal or conflicting responses are elicited regarding a prospective juror's ability to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court. [Citation.]." (*Ibid.*) If the juror's statements are consistent, the trial court's ruling will be upheld if supported by substantial evidence. (*People v. Horning* (2004) 34 Cal.4th 871, 896-897.) Deference to the trial court's findings is required regardless of whether the trial court makes explicit findings on whether a juror is substantially impaired in performing their duties, and "the granting of a motion to excuse for cause constitutes an implicit finding of bias." (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 7.)

Potential jurors are often unable to give an "unmistakably clear"[10] answer on whether they could impose a death sentence, and the trial court

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[10] Appellant suggests that the trial court erred by excluding jurors whose answers were not "unmistakably clear" and who did not state that they were "unalterably opposed" to the death penalty. (AOB at pp. 96, 101; see also *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522.) In *Witt*, however, the U.S. Supreme Court adopted a more flexible standard which allows excusals for cause when the trial court is left with the "definite impression" that a juror would be unable to apply the law. (*Witt*, *supra*,

(continued...)

must consider the juror's answers as well as their demeanor in making its determination. (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 7; *Witt*, *supra*, 469 U.S. at p. 425, fn. 6.) "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." (*Uttecht v. Brown*, *supra*, at p. 9.)

B. The Trial Court Did Not Abuse Its Discretion in Removing Jurors Who Gave Conflicting and Equivocal Answers

Jurors 24, 199 and 232 gave conflicting and equivocal answers on their views on capital punishment, and the court acted within its discretion in determining that they would be substantially impaired in their ability to carryout their obligations as jurors. Juror 24 was uncertain as to whether she could consider imposing the death penalty. When questioned by the court, she repeatedly made statements to the effect that "I'm not sure I should sit in judgment on somebody else's life. I'm not sure that I have the right to do that." (52 RT 10267.) When the court asked her if there was a reasonable possibility that she could consider the death penalty, she replied "I don't know. I really don't know if I could." (52 RT 10268.) The court pressed her further, asking her whether "for all practical purposes, could you impose the death penalty on anyone?" (52 RT 10269.) She again stated that she was unsure. (*Ibid.*)

On her questionnaire, juror 199 indicated that she had religious conflicts about the death penalty. (14 CT 4029; 56 RT 11027.) She expressed concern that if she was responsible for sending somebody to his death, it would "reflect on me or on God when I go." (56 RT 11028.)

(...continued)
469 U.S. at p. 424 ["this standard likewise does not require that a juror's bias be proved with 'unmistakable clarity.'"].)

Although she initially told the court there was a reasonable possibility she could consider imposing the death penalty, when questioned subsequently by the prosecutor, she said she didn't think she could vote for such a sentence. (56 RT 11028, 57 RT 11245.) The court asked a series of follow-up questions about her inconsistent answers. (57 RT 11263.) She acknowledged that she was in conflict, and that it was a very emotional issue for her.[11] (57 RT 11263.) She stated that she was having trouble imagining the "reality of this young man's life out on the street" and that she didn't know if she could vote for the death penalty. (57 RT 11263-11264.)

Juror 232 also stated that her religious affiliation "would probably get in the way of voting for the death penalty" and that she would have to weigh her "religious beliefs about not taking a life." (57 RT 11207.) When questioned further by the court, she stated that "I would have a hard time voting for the death penalty" and that there was no reasonable possibility that she could consider imposing such a sentence. (57 RT 11208-11209.)

The record reflects that the trial court carefully reviewed each prospective juror's questionnaire responses and asked follow-up questions about their opinion on the death penalty. (See, e.g., 52 RT 10259, 11023, 11027, 11206-11208.) The prosecutor and defense counsel also questioned potential jurors about their views. When a juror gave an equivocal answer, the court attempted to clarify their position. (See, e.g., 57 RT 11263.) The trial court also observed the potential jurors' demeanor during questioning and took it into account when deciding to remove a juror for cause. (See, e.g., 57 RT 11263, 11272.) Where, as here "the trial court has supervised a

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[11] The court noted that she was crying during this portion of voir dire. (57 RT 11263.) [See *People v. Clark* (2011) 52 Cal.4th 856, 896-897 [court properly excused a juror whose highly emotional responses in voir dire suggested that the juror may lose emotional control.]

diligent and thoughtful voir dire" and there has been "lengthy questioning of a prospective juror," the trial court does not abuse its discretion in excluding jurors who give conflicting answers regarding their ability to impose the death penalty. (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 20.)

Finally, appellant contends that the practice of deferring to the trial court's findings regarding conflicting and equivocal statements is an abdication of the appellate court's review obligations and violates the Sixth Amendment. (AOB at p. 101-102.) Appellant acknowledges that this Court has repeatedly rejected this claim. (See, e.g., *People v. Moon*, *supra*, 37 Cal.4th at p. 14.) Moreover, as discussed above, the United States Supreme Court has recently reaffirmed that deference to the trial court's findings is appropriate because the trial court is in the best position to assess the demeanor of potential jurors and determine if there is a reasonable possibility that they could impose the death penalty. (*Uttecht v. Brown*, *supra*, 551 U.S. at pp. 9-10, 17-18.)

VI. THE TRIAL COURT DID NOT ERR IN DECLINING TO REMOVE JURORS WHO FAVORED THE DEATH PENALTY, BUT STATED THEY COULD CONSIDER IMPOSING A SENTENCE OF LIFE WITHOUT PAROLE

Appellant contends that the trial court erred in denying his challenges for cause to several jurors who he claims indicated that they would always vote to impose the death penalty if a defendant was convicted of first degree murder. As an initial matter, appellant failed to preserve this issue for review because he did not exhaust all of his peremptory challenges. Furthermore, contrary to appellant's argument, all of the challenged jurors indicated that they could consider a sentence of life without parole. Finally, any error in declining to excuse the jurors for cause was harmless, as appellant used peremptory challenges against each of them, and none were ultimately impaneled as jurors on his case.

A. The Challenged Jurors

1. Juror 6

Juror 6 initially stated on her questionnaire that she would not automatically vote to impose the death penalty, but that she did not think that information regarding appellant's background would be helpful in reaching a decision in the penalty phase. (7 CT 2057.) When questioned in voir dire, she explained that, while she "would feel sympathetic to and feel bad for his upbringing," people should be held accountable for their actions. (52 RT 10220.) The trial court then explained that the law requires consideration of mitigating evidence, and juror 6 replied that, "If that's the law, then I would consider it." (52 RT 10220.) When questioned further by defense counsel, she again stated that she would rely on the judge to lay out what specific information should be considered during the penalty phase. (52 RT 10453.) She further stated that, although she "would probably lean more toward the death penalty," she would keep an open mind and listen to everything. (52 RT 10454.) Defense counsel challenged juror 6, arguing that her answers indicated that she was predisposed to vote for the death penalty. (53 RT 10489.) The prosecutor noted that, although she said she leaned toward the death penalty, she unequivocally stated that she would consider both sides. (52 RT 10490.) The court denied the challenge. (52 RT 10490.)

2. Juror 50

Juror 50 stated there was a reasonable possibility that she could consider imposing either a death sentence or life without parole. (53 RT 10419-10420.) When questioned further by defense counsel, she stated that she would automatically vote to impose the death penalty if appellant was convicted of murder with special circumstances. (53 RT 10480.) The court asked her if she meant that she would vote for the death penalty at the end

of the guilt phase without hearing any additional information. (53 RT 10480.) She clarified that she could "choose death if I have the right information" and that she would "absolutely" listen to evidence regarding aggravating and mitigating circumstances before she decided. (53 RT 10481.) She also stated that she would not automatically vote for death, and that she could vote for life without parole. (53 RT 10482.) Defense counsel challenged juror 50 for cause. (53 RT 10493-10494.) In denying the challenge, the trial court stated that he observed her demeanor when asked about her answer that she would not consider evidence in mitigation, and found that:

> She was shocked that we would even be considering the fact that she wouldn't listen to anything. And even when there are conflicting answers, the court can assess the juror's state of mind and is not bound by those statements which if taken in isolation or are equivocal. The state of this juror's mind is in no way in my opinion anything but fair and impartial and does not present any bias or challenge for cause.

(53 RT 10494-10495.)

3. Juror 139

Juror 139 stated that, although she believed the death penalty was biblically sound, she "would be open to listening to everything that was said and make my own decision" and that she would not always vote to impose the death penalty in every case. (55 RT 10831.) During further questioning by defense counsel, he asked if she found that the defendant was guilty, whether her "belief system as to the religion [would] kick in at that point in time and say, well, now I must vote for the death penalty at this point?" (55 RT 10909.) She replied, "yes." (55 RT 10909.) The court then asked her to clarify her answer. She stated that if defendant was found guilty, she would listen to the additional instructions provided by the court, and would strive to be fair. (55 RT 10917.) She stated that she could

follow the law, and that she could impose the death penalty if she felt it was proper under the court's instructions. (55 RT 10917.) Defense counsel challenged her for cause, arguing that juror 139's religious beliefs would prevent her from voting for life without parole. (55 RT 10919.) The prosecutor responded that the question by defense counsel about whether she would automatically vote for the death penalty based on her religious beliefs was unfairly phrased, and that she stated unequivocally in her juror questionnaire and during further questioning by the judge that she could consider both. (55 RT 10920-10921.) The court denied the challenge. (55 RT 10921.)

4. Juror 230

Juror 230 initially stated that she had read about the case in the press, and that she had already formed an opinion as to appellant's guilt. (56 RT 11108.) However, she stated that she would be able to put that information out of her mind, and would be able to judge the case impartially. (56 RT 11109.) Additionally, she stated that she could consider imposing both life without parole or the death penalty. (56 RT 11110-11111.) She initially stated that she would not consider a person's background or life experience as an excuse for their conduct. Nonetheless, when the court informed her that the law required consideration of aggravating and mitigating factors, she agreed that she could follow the law. (56 RT 11111-11112.) When defense counsel asked her again about this topic, she said that information about appellant's family and personal history would not be helpful in her determination. (57 RT 11261.) The court asked additional follow-up questions, and she confirmed that she would follow the law. (57 RT 11266.) Defense counsel challenged juror 230 for cause, citing her equivocal answer on whether she would consider mitigating evidence. (57 RT 11276.) The court denied the challenge. (57 RT 11277.)

5. Juror 234

Juror 234 was a supporter of the death penalty. (57 RT 11219.) He also opined that he thought a defendant convicted of murder should be executed in the same manner their victim was killed, though agreed with the court's statement that such a practice was not allowed under the law. (57 RT 11219.) When asked by the court, he said there was a reasonable possibility that he could impose either the death penalty or life without parole, and would consider aggravating and mitigating factors. (57 RT 11220-11221.) Defense counsel challenged juror 234 for cause, arguing that his answers indicated he would not consider life without parole. The prosecutor countered that he had stated that he would consider both alternatives, and his questionnaire indicated that he would not automatically vote for death. In denying the challenge, the trial court noted that "he indicated that he would consider both possibilities," and that in assessing his state of mind, the trial court believed him to be genuine. (57 RT 11281.)

B. Legal Standards

As discussed above, a juror may be excused for cause if their views in support of the death penalty "prevent or substantially impair" their ability to perform their duty. (*Witt*, *supra*, 469 U.S. at p. 424.) A juror who will automatically vote for the death penalty in every case fails to perform his duty to consider aggravating and mitigating evidence. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729.)

If a juror makes inconsistent statements regarding their ability to consider a sentence of life without parole, the trial court's finding on the juror's state of mind is binding on the appellate court. (*People v. Moon*, *supra*, 37 Cal.4th at p. 14.) A defendant who contends that the trial court wrongly denied a challenge for cause "must demonstrate that the right to a

fair and impartial jury thereby was affected." (*People v. Crittenden* (1994) 9 Cal.4th 83, 121.)

C. Appellant Forfeited His Claim Because He Failed to Exhaust His Peremptory Challenges

In order to maintain his claim, appellant must establish that he exhausted all of his peremptory challenges and that he objected to the jury as finally constituted. (*People v. Hinton* (2006) 37 Cal.4th 839, 860.) As appellant concedes, he exercised only 19 of his 20 allotted peremptory challenges. (AOB at p. 117; 59 RT 11698-11699.) Therefore, he has forfeited this claim on appeal. (See *People v. Davis* (2009) 46 Cal.4th 539, 582.) Appellant quotes at length from this Court's opinion in *People v. Lenix* (2008) 44 Cal.4th 602, 622-623, in support of his argument that he should not be required to exhaust all of his peremptory challenges in order to maintain a claim under *Witt* on appeal. (AOB at pp 119-120.) His reliance on that case is misplaced. As discussed below, that case examines when a court may infer that an advocate improperly exercised a peremptory challenge on the basis of race or ethnicity. The quoted passage explores the possible motivations of an advocate, noting that the decision to exercise a peremptory challenge is complex and likely influenced by many factors other than race and gender. (*People v. Lenix*, *supra*, at pp. 622-623.) In analyzing a *Witt* claim, however, the question is not what subtleties may have influenced an advocate to use a peremptory challenge against a particular juror. Rather, the question is whether the jury seated was so biased that it violated the right to an impartial jury. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 121.) Trial counsel's calculation that a particular juror may be more or less favorable to their client is irrelevant so long as the jury ultimately seated was impartial. Thus, *Lenix* provides no support for appellant's argument that this Court should abandon its long-established requirement that a defendant must exhaust his peremptory challenges in

order to maintain an appeal based on the trial court's erroneous failure to excuse a juror for cause.

D. The Trial Court Did Not Abuse Its Discretion in Declining to Excuse the Challenged Jurors for Cause

Appellant contends that the trial court should have excused jurors 50, 6, 139, 230 and 234 for cause because their answers indicated that they would automatically vote in favor of the death penalty or decline to consider required mitigation evidence.[12] Contrary to appellant's argument, the jurors' responses indicated they were confused about the law, not that they would disregard the court's instructions or automatically vote to impose the death penalty. Once the court explained the relevant duties and obligations, each of the challenged jurors stated they would be able to follow the law. The court did not abuse its discretion in declining to excuse them.

Juror 6 repeatedly emphasized that, although she was in favor of the death penalty, she would carefully follow the instructions provided by the trial court and consider all required information. (See, e.g., 53 RT 10453 ["I think I would have to be more clear on the law. [The court] said that he was going to be lay[ing] it out real specifically on what exactly [should be considered.]"]; see also 52 RT 10220-10221, 53 RT 10454.) When questioned by the court, juror 139 stated that she would not automatically impose the death penalty based on her religious beliefs. (55 RT 10831.) Although she subsequently gave a contradictory answer in response to a question by defense counsel, she later clarified to the court that she would

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[12] Appellant's brief also discusses juror 36, a death penalty opponent excused by the court, for purposes of comparison. Since appellant does not contend that he was improperly excused, respondent does not discuss juror 36's answers.

follow the law and strive to be as "fair as humanly possible." (55 RT 10917.)

Although juror 50 initially stated she would not consider aggravating and mitigating factors, when the court explained that the law required consideration of such information, she agreed that she could do so. (53 RT 10481.) The court specifically noted that her demeanor added to the credibility of her answer. (53 RT 10494; see *Uttecht v. Brown*, *supra*, 551 U.S. at pp. 9-10, 17-18.) Juror 230 likewise provided conflicting evidence on whether she would consider mitigating evidence. She initially stated she would not find it helpful. Upon further questioning, however, she clarified that, while she doesn't consider someone's background to be an excuse for their actions, she confirmed that she would "weigh the good factors and the bad factors and then make a decision." (56 RT 11111.) She again equivocated on this topic when questioned by defense counsel. (56 RT 11111-11112, 57 RT 11261.) The trial court asked her a follow-up question about her equivocal answers and whether she would require the defense to bear the burden of proof in the penalty phase and she indicated that she would follow the law. (57 RT 11266.) Finally, juror 234 assured the court that, although he was in favor of the death penalty, he could consider a sentence of life without parole, and would consider mitigating evidence. (57 RT 11219-11220.)

While the challenged jurors provided contradictory answers on their ability to consider imposing life without parole and their willingness to consider mitigating evidence, the trial court, which had the opportunity observe the jurors' demeanor, was entitled to credit their assurances that they could follow the law. (*Uttecht v. Brown*, *supra*, 551 U.S. at pp. 9-10, 17-18.) The trial court's determination is binding on the appellate court. (*People v. Moon*, *supra*, 37 Cal.4th at p. 14.)

Appellant also contends that the trial court applied disparate standards to challenges to death penalty opponents and death penalty proponents. (AOB 121-123.) He argues that, when a potential juror expressed opposition to the death penalty, the court asked few follow-up questions and tended to readily excuse the juror for cause. With those who stated they would automatically impose the death penalty, appellant contends that the trial court engaged in more extensive rehabilitative efforts.

Contrary to appellant's argument, the record indicates that the trial court applied the same standard to both supporters and opponents of the death penalty. Any difference in the number and the nature of questions asked to prospective jurors was based on the need to gain a definitive understanding of the potential juror's position. As the trial court explained when defense counsel brought up this allegedly differential questioning during jury selection, "if I think there is an equivocal answer [that] needs to be pinned down, [] I'm going to attempt to pin it down" and that it is sometimes necessary to ask a person who may be death qualified different questions than one who is clearly not able to vote for the death penalty under any circumstances.[13] (56 RT 11006-11007.)

Appellant contends that a comparison of jurors 36 and 50 highlights this supposed inequity. Juror 36, however, was completely unequivocal in his opposition to the death penalty. When asked if he could ever imagine considering the death penalty as punishment in any case, he replied "No,

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[13] Appellant also contends that the court's comment that "we're here to do a death qualification, not an LWOP qualification" indicates that it misunderstood the relevant standard. Review of the record demonstrates, however, that the court was aware of its obligations, and excused all jurors who stated they could not consider life without parole, as well as those who stated they could not consider the death penalty. (See, e.g., 53 RT 10488, 10491 [juror 35, would automatically vote for the death penalty], 53 RT 10408-10409 [juror 45, would never vote for the death penalty].)

No, I could not." (53 RT 10404.) Juror 50, in contrast, stated that, although she supported capital punishment and leaned toward the death penalty, she could consider imposing life without parole. (53 RT 10418-10422; see *People v. Clark*, *supra*, 52 Cal.4th 856, 896-897 [trial court did not apply a disparate standard in excusing jurors who demonstrated inability to put aside their personal opinions and follow the law while retaining those who stated they could keep an open mind].)

E. None of the Challenged Jurors Were Impaneled, and Therefore, Any Error in Failing to Exclude Them Was Harmless

Appellant exercised peremptory challenges against each of the challenged jurors, and none ultimately served on his jury. (59 RT 11677 [juror 6], 11678 [juror 50], 11684 [juror 139], 11692 [juror 230], 11693 [juror 234].) Therefore, even if the trial court erred in failing to remove one or more of the challenged jurors, any error was harmless. (*Ross v. Oklahoma* (1988) 487 U.S. 81, 85-86 [defendant not entitled to relief for court's erroneous failure to exclude an allegedly biased juror when juror was removed via peremptory challenge]; *People v. Boyette* (2002) 29 Cal.4th 381, 418.) Furthermore, there is no suggestion that the jury finally seated was anything but fair and impartial. (See *People v. Davis*, *supra*, 46 Cal.4th at p. 582.) Finally, appellant is not entitled to relief on the theory that the court's error prevented him from using peremptory challenges against other potential jurors. (See *Ross v. Oklahoma*, *supra*, at p. 88 ["we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury."].) As discussed above, he did not exhaust all of his peremptory challenges, and did not indicate that, but for the court's failure to excuse the challenged jurors for cause, he would have exercised the peremptory challenges against other

potential jurors. (59 RT 11698-11699.) Appellant's claim should be denied.

VII. THE PROSECUTOR DID NOT EXERCISE HIS PEREMPTORY STRIKES BASED ON IMPERMISSIBLE GROUP BIAS

Appellant contends that his conviction should be reversed because the prosecutor purportedly based six of his peremptory challenges on impermissible group bias. (See *Batson v. Kentucky* (1986) 476 U.S. 79 [*Batson*]; *People v. Wheeler* (1978) 22 Cal.3d 258 [*Wheeler*].) The trial court found that appellant failed to establish a prima facie case regarding two of the challenges, and that the prosecutor offered credible, non-discriminatory reasons for the remaining four. The trial court's rulings were supported by substantial evidence, and therefore, appellant is not entitled to relief on this claim.

A. Proceedings Below

During jury selection, the prosecutor used 18 of his allotted 20 peremptory challenges.[14] Appellant objected to six of the challenges, three against African-American women [Jurors 20, 59 and 32], one against a Hispanic man [Juror 47], one against a Hispanic woman [Juror 156], and one against an Asian woman [Juror 200].

Appellant's final jury consisted of seven women: one African American, two Hispanic, four Caucasian, and five men: one Asian, two Hispanic, and two Caucasian. (63 RT 12494.) The alternates consisted of three women and one man. (16 CT 4697, 4807; 17 CT 4873, 4939.) The record does not disclose the racial or ethnic breakdown of the alternates.

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[14] The prosecutor also used four peremptory challenges during selection of alternate jurors. Appellant did not object to any of these challenges. (59 RT 11693-11696.)

1. Juror 20

The prosecutor exercised his first peremptory challenge against juror 20, a 44-year-old African-American woman. (59 RT 11669.) On her juror questionnaire, she stated that she had served on a jury in a murder trial 15 years earlier, and that the jury did not reach a verdict in the case. (8 CT 2201.) She indicated that she had a niece and nephew who had been arrested on theft and drug-related charges, and that the nephew had been convicted. (8 CT 2204.) Additionally, she checked the box on the questionnaire indicating that she opposed the death penalty, and stated, "I oppose the death penalty because I believe many innocent people have been put to death wrongfully." (8 CT 2209.) She also stated that she believed life in prison was a more severe punishment. (*Ibid.*) During questioning by the court, she clarified that, in the prior case where she served as a juror, a number of the jurors fell ill and the jury never completed deliberations. (52 RT 10251.) She also relented somewhat on her opposition to the death penalty, stating that, "I oppose [the death penalty]. However, if the specifics are there, I would be able to judge fairly on which way to go." (52 RT 10253.)

Although the prosecutor's first challenge necessarily failed to establish any kind of a pattern of discrimination, defense counsel nonetheless objected, noting that there were only six African-Americans total in the jury pool. (59 RT 11670.) The court asked the prosecutor to state his reasons for the challenge on the record. (*Ibid.*) The prosecutor stated:

> All right. In response to the court's request, she stated quite clearly on her written questionnaire that she was opposed to the death penalty. She checked the box that says oppose. She stated in her narrative answer, I oppose the death penalty because I believe many innocent people have been put to death wrongfully. And in answer to the court's follow-up question, she said possibly she could vote for the death penalty. She

> added that life is a more severe punishment. She sat in a previous jury in a different murder case and it was a hung jury. This was some 15 years ago. I have absolute policy of getting rid of people whose only jury experience resulted in a hung jury. I'm not required to accept her answers during the court's questioning as being a truer indicator than her unequivocal repeated statements in the questionnaire.

(59 RT 1167.)

Defense counsel noted that she had not actually served on a hung jury, rather, the jury was dismissed before deliberations began due to a number of jurors falling ill. (*Ibid.*) The trial court upheld the use of the peremptory challenge. (*Ibid.*)

2. Juror 59

The prosecutor exercised his third peremptory challenge against juror 59, a 51-year-old African-American woman. On her juror questionnaire, she stated that she was a Jehovah's Witness, and that her religious beliefs prevented her from sitting in judgment of another person. (9 CT 2685.) She indicated that her husband had been convicted of a drug-related crime. (9 CT 2686.) In the section regarding her views on the death penalty, she wrote in a new category, which she called "neutral." (9 CT 2691.) She wrote that "I cannot sit as a juror and sentence another human to die. I am not a judge." (9 CT 2691 [original emphasis].) She further explained she felt the way she did about the death penalty because "I cannot judge another human being on this earth. This is our creator's right to judge mankind." (9 CT 2691.) When questioned by the court during voir dire, she stated that, although she would not want to sit in judgment, if selected as a juror, she could separate her religious beliefs and "follow the laws of the land" within "these four walls" of the courtroom. (53 RT 10430-10431.)

Defense counsel objected to the exercise of the challenge, again noting that juror 59 was one of the few African-Americans in the jury pool. The prosecutor responded:

> This juror stated in answer to question 25 that she had religious or personal beliefs or opinions that would prevent her from sitting in judgment on another person. She checked the box that says yes, and answered I am one of Jehovah's Witnesses. Based on my personal past history in selecting juries, there have been a number of occasions when Jehovah's Witnesses have made similar statements and indicated they were unable to sit in judgment. That goes for guilt or penalty in this case.
>
> Going further in answer to question 54, she stated in writing, she was asked what are your views on the death penalty, and she is the only prospective juror who invented a new category, and she called it neutral, checked it. And then she explained, I cannot sit as a juror to sentence another human being to die. I am not a judge, and underline the word judge twice. Further in answer to question 54, is there a particular reason why you feel as you do about the death penalty, she said yes, I cannot judge another human being on this either. This is our creator's right to judge mankind. I'm not finished.
>
> [¶]
>
> In addition in discussing this juror with my investigator, who was observing her answers to the court's questions in which they sort of backtracked from this and created kind of artificial distinction between a reference to the four walls of the courtroom and her religious views, he personally felt that she was not being truthful in trying to create that artificial distinction. I have a bad feeling about her.

(59 RT 11673-11674.)

The trial court stated that it recalled he gave a somewhat conflicting answer with regards to being able to sit in judgment, and that he did not believe the challenge was race-based. (59 RT 11675.)

3. Juror 47

The prosecutor exercised his fourth peremptory challenge against juror 47, a 33-year-old Hispanic man. On his juror questionnaire he indicated that he had been convicted of false imprisonment and disturbing the peace in 1989. (9 CT 2533.) During voir dire, he stated that he had been prosecuted by the Monterey County District Attorney's Office, and that two of his older brothers had also been prosecuted by that office for driving under the influence. (53 CT 10410-10412.) Defense counsel objected to the exercise of the challenge, but the trial court found no prima facie case of discrimination. (59 RT 11676.)

4. Juror 32

The prosecutor exercised his eighth peremptory challenge against juror 32, a 44-year-old African-American woman. (59 RT 11678.) On her juror questionnaire, she indicated that her brother had been convicted of a crime. (8 CT 2379.) Although she indicated that she could consider imposing the death penalty, she wrote that, "I feel if a person is found guilty, the death penalty would be an easy way out." (8 CT 2384.) Defense counsel noted that, of the eight challenges exercised by the prosecutor, three had been used against African-Americans, and only one remained in the jury pool. (59 RT 11679.) The prosecutor responded:

> This is a woman who had answered the question, juror stated she is not really sure if she could vote for the death penalty. She is a person whose brother was himself prosecuted for assault and armed robbery. I'm always concerned when jurors have close relatives like that who themselves have been prosecuted on serious offenses. In addition, she is someone who feels that the death penalty is an easy way out, that that person should be made to think about the crime for the rest of their life rather than take the easy way and the death penalty. Between this feeling that that's the easier way out and the fact that she specifically expressly said she is not really sure if she could vote for the

> death penalty, I am extremely uncomfortable with someone sitting on the jury who herself can't vote for death.

(59 RT 11679.)

The prosecutor also noted that the majority of people currently seated on the jury were minorities, and that there was no basis to infer he was singling out minorities in the exercise of his peremptory challenges. (59 RT 11680.) The court ruled that, after listening to arguments from both sides, he did not believe the challenge was race-based. (59 RT 11682.)

5. Juror 156

The prosecutor exercised his thirteenth peremptory challenge against juror 156, a 46-year-old Hispanic woman. (59 RT 11684-11685.) On her juror questionnaire, she stated that she would consider the death penalty, but declined to further explain her views. (13 CT 3654.) When questioned by the court during voir dire, she stated that she could consider the death penalty "only after every avenue of testimony and evidence was exhausted" and that "it would be very difficult" for her to vote for death. (55 RT 10847.) The prosecutor asked a follow-up question to clarify her position on the death penalty. She responded:

> Well, you [are] talking about somebody's life here. I take that with the utmost seriousness. All our lives we are told not to judge others and then here we are requested to do that. So I think when you take somebody's life into consideration, you better make sure that that's exactly, you know, what you have got everything, all your ducks in a row, you know in your heart that that's what's got to be done.

(55 RT 10904-10905.)

Defense counsel objected to the challenge, arguing that five of the prosecutor's thirteen challenges had been exercised against ethnic minorities. (59 RT 11685.) The prosecutor countered that this was only the second Hispanic person he had challenged, and that the majority of his

challenges had been used against Caucasians. (59 RT 11685-11686.) In explaining his rationale for the challenge, he stated:

> She is extremely weak on the death penalty. Although she checked the box that said will consider it, she then failed to put any explanation for and her explanation of the court when she finally gave it was that only after every avenue of testimony and evidence was exhausted would she begin to consider the death penalty. She also characterized it as very difficult for her to consider the death penalty.
>
> Also characterized it as a possibility that she might consider the death penalty. In answer to questions 59 and 60, she did not basically understand either of the questions on here. She has no prior jury experience. Based on what I saw in her answering those questions, as well as filling out this questionnaire, she is not going to come back with a death verdict in any case, so far as I can tell.

(59 RT 116866.)

The court found that the prosecutor's challenge was not based on racial bias. (59 RT 11686.)

6. Juror 200

The prosecutor exercised his sixteenth peremptory challenge against juror 200, a 40-year-old Asian-American woman. (59 RT 11690.) On her juror questionnaire, she indicated that she would consider the death penalty, but it "must really be warranted." (14 CT 4051 [original emphasis].) She further explained that "I've heard instances on television where death penalty was warranted but later found out he/she was innocent due to certain evidence not looked into." (14 CT 4051.) In response to a question about whether she considered life in prison more severe than the death penalty, she stated that, "Being in prison is not exactly living a quality life. Also watching behind your shoulder or living in fear that other inmates might kill you is probably very difficult." (14 CT 4051.) During voir dire she stated that she would impose the death penalty only if "they have really

looked at all the evidence, and they must have really really proven, without, you know, being reasonable doubt that this person did it." (56 RT 11031.)

Defense counsel objected to the challenge; arguing that the prosecutor was systematically excluding women from the jury. (59 RT 11690.) The prosecutor noted that the majority of the jurors seated at the time were women. (59 RT 11690.) The court found no prima facie case of discrimination. (59 RT 11690.)

B. Legal Standards

> Both the federal and state Constitutions prohibit any advocate's use of peremptory challenges to exclude prospective jurors based on race [or gender]. (*Batson*, *supra*, 476 U.S. at p. 97; *Georgia v. McCollum* (1992) 505 U.S. 42, 59; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations].)

(*People v. Lenix*, *supra*, 44 Cal.4th at p. 612; see also *Miller-El v. Dretke* (2005) 545 U.S. 231, 240; *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 130-131 [gender a protected class for purposes of a *Batson* motion].)

> The *Batson* three-step inquiry is well established. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. (*Rice v. Collins* (2006) 546 U.S. 333, 338.) The three-step procedure also applies to state constitutional claims. [Citations].

(*People v. Lenix*, *supra*, 44 Cal. 4th at pp. 612-613.)

The opponent of a challenge establishes a prima facie case of discrimination "by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California* (2005) 545 U.S. 162, 170 [disapproving of previous test requiring opponent prove that it was "more likely than not" that the challenge was based on impermissible discrimination.) When, as here, the trial occurred before the U.S. Supreme Court's decision in *Johnson*, and it is unclear from the record whether the trial court employed this disapproved-of standard, the court must independently review the record to determine "'whether the record supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis.' [Citations.]" (*People v. Bonilla* (2007) 41 Cal.4th 313, 342.)

If the court finds a prima facie case of discrimination, the prosecutor must then explain the non-discriminatory rationale for his challenge. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613.)

> A prosecutor asked to explain his conduct must provide a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." (*Batson*, *supra*, 476 U.S. at p. 98, fn. 20.) "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal.4th 92, 136.) A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. (See *People v. Turner* (1994) 8 Cal.4th 137, 165; *Wheeler*, *supra*, 22 Cal.3d at p. 275.) Nevertheless, although a prosecutor may rely on any number of bases to select jurors, a legitimate reason is one that does not deny equal protection. (*Purkett v. Elem* (1995) 514 U.S. 765, 769.)

(*Ibid.*)

Next, the trial court must determine whether the explanation offered by the prosecutor is credible, and whether, in light of all relevant circumstances, the defendant has shown purposeful discrimination. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252-253.)

> "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." [Citation.] In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]

(*People v. Lenix*, *supra*, 44 Cal.4th at p. 613.)

Review of a trial court's denial of a *Batson/Wheeler* motion is deferential, and its decision must be upheld if it is supported by substantial evidence. (*People v. Bonilla*, *supra*, 41 Cal.4th at pp. 341-342.)

> [The court] presume[s] that a prosecutor uses peremptory challenges in a constitutional manner and give[s] great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]

(*People v. Lenix*, *supra*, 44 Cal.4th at pp. 613-614; accord *Snyder v. Louisiana* (2008) 552 U.S. 472, 477 ["determinations of credibility and demeanor lie 'peculiarly with the trial judge's province'. . . 'in the absence of exceptional circumstances we would defer to the trial court'".].)

C. Appellant Failed to Establish a Prima Facie Case as to Jurors 47 and 200 Because the Record Demonstrates No Basis to Infer That Discrimination Occurred

Appellant contends that the trial court erred in finding that he failed to establish a prima facie case of impermissible discrimination against jurors 47 and 200. When deciding whether there was an inference of discrimination sufficient to support a prima facie case, this Court must consider the entire record before the trial court. (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 342.) It is especially relevant if the record demonstrates

that the prosecutor struck all or most of the identified group, used peremptory challenges to a disproportionate extent against that group, or failed to engage the challenged jurors in meaningful voir dire. (*Ibid.*)

Here, there is no basis to infer that either of the challenges was based on impermissible discrimination. Juror 47 was a 33-year-old Hispanic male. (59 RT 11676.) He was the prosecutor's fourth peremptory challenge, the first exercised against a man, and apparently, the first against a person of Hispanic descent. (59 RT 11675-11676.) Unlike when the prosecutor challenged African-American jurors, defense counsel did not note that there was a paucity of Hispanics in the jury pool. (59 RT 11670, 11676; 11678.) Additionally, two Hispanic men and two Hispanic women were ultimately seated on appellant's jury. (63 RT 12494; see *People v. Lenix*, *supra*, 44 Cal.4th at p. 629 ["The prosecutor's acceptance of the panel containing a [member of the challenged group] strongly suggests that race was not a motive in his challenge."].)

Moreover, the record reflects obvious non-discriminatory reasons for the prosecutor's challenge of juror 47. On the jury questionnaire, juror 47 indicated that he himself had been convicted of a crime, and that he also had relatives who had been convicted of a crime. (9 CT 2533.) Further inquiry by the trial court revealed that juror 47 had been prosecuted by the Monterey County District Attorney's Office, the same office prosecuting appellant, though he maintained that he bore the prosecutor no animosity and that his conviction allowed him to turn his life around. (53 RT 10411.) Additionally, two of his older brothers had also been prosecuted and convicted of crimes by the Monterey County District Attorney. (53 RT 10412.) Although juror 47 stated he did not have a negative opinion of the district attorney's office, the prosecutor was nonetheless entitled to challenge juror 47 based on his conviction and the convictions of two other close family members. (*People v. Davis*, *supra*, 46 Cal.4th at p. 584

[prosecutor properly used peremptory challenge to remove jurors who had criminal records]; see *People v. Bonilla*, *supra*, 41 Cal.4th at p. 342 [peremptory challenge may be used to excuse a juror with relatives who have suffered criminal convictions]; *People v. Garceau* (1993) 6 Cal.4th 140, 172 [same] overruled on other grounds by *People v. Yeoman* (2003) 31 Cal.4th 93.)[15]

There is also no basis to infer that the prosecutor's challenge of juror 200 was based on impermissible discrimination. Juror 200 was a 40-year-old Asian American woman.[16] She was the prosecutor's sixteenth peremptory challenge. (59 RT 11689-11690.) Defense counsel noted that the prosecutor used 12 of his 16 challenges against women. (59 RT 11690.) The prosecutor countered that the seven of the eleven jurors currently seated were women. (59 RT 11690.) The ultimate gender

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[15] Appellant notes that when his trial counsel made a *Batson/Wheeler* motion after the prosecutor's strike of juror 47, the trial court stated "Just need to ask one question. Is this going to happen on every juror now?" (59 RT 11675.) He implies that the comment evinced bias against him, and indicated that the court was derelict in its duty to determine if there was a prima facie case of discrimination. Not so. The comment indicated that the court was attempting to understand the basis for the challenge. Appellant objected to three of the prosecutor's first four peremptory strikes. Juror 47 was the first male and the first Hispanic the prosecutor struck from the jury. It is understandable that court was puzzled about how such a strike could indicate a pattern of discrimination. Moreover, the record indicates that the court was diligent in determining whether there was a prima facie case of discrimination. The court carefully listened to the rationale supporting all of trial counsel's objections, and found a prima facie case requiring an explanation from the prosecutor for three subsequent jurors.

[16] In his brief, appellant suggests that the prosecutor's challenge of juror 200 was motivated by both race and gender. At trial, however, appellant objected only on the basis of gender. (59 RT 11690.) Therefore, he may not object to her exclusion on additional grounds on appeal. (*People v. Jones* (2011) 51 Cal.4th 346, 368.)

breakdown of the jury was five men and seven women. (63 RT 12494; see *People v. Lenix*, *supra*, 44 Cal.4th at p. 629 [inclusion of members of challenged group on jury indicates challenge was not motivated by discrimination].)

As with juror 47, the record demonstrates obvious non-discriminatory reasons for the prosecutor's challenge of juror 200. First, she indicated that her husband had been arrested many years ago. (56 RT 11029.) Second, she was equivocal in her support for the death penalty, and her answers indicated that she was inclined to hold the prosecution to a higher standard than required by law. In her questionnaire, in response to a question asking her to explain her position on the death penalty, she stated "All factors must be weighed or considered and death penalty must really be warranted." (14 CT 4051 [emphasis in original].) She further explained that "I've heard instances on television where death penalty was warranted but later found out he/she was innocent due to certain evidence not looked into." (14 CT 4051.) She also indicated that she felt that life in prison was an extremely severe punishment, stating that, "Being in prison is not exactly living a 'quality' life. Also watching behind your shoulder or living in fear that other inmates might kill you is probably very difficult." (14 CT 4051.) She reiterated these answers when questioned by the court, though stated she could follow the law and would not require proof beyond a reasonable doubt. (56 RT 11031.) Although juror 200's equivocation on the death penalty and assertion that life in prison may be a more severe punishment may not have been enough to support a challenge for cause, it was legitimate basis for the prosecutor's peremptory challenge. (*People v. Mills* (2010) 48 Cal.4th 158, 176 [prosecutor justified in challenging juror who was undecided about the death penalty and indicated that she would hold the prosecution to a higher burden of proof]; *People v. Smith* (2005) 35

Cal.4th 334, 347-348 [a prospective juror's doubts about the death penalty are legitimate, race-neutral reason to exercise a peremptory challenge].)

Because the record does not support the inference that the prosecutor's peremptory challenge of jurors 47 and 200 was based on impermissible discrimination, the trial court correctly found that appellant failed to establish a prima facie case as required by *Batson* and *Wheeler*. (See *Johnson v. California*, *supra*, 545 U.S. at p. 170.)

D. The Trial Court Fulfilled Its Obligation to Evaluate the Prosecutor's Explanation of His Challenges to Jurors 20, 32, 59, and 156

Appellant contends that, where a prima facia case was found, the trial court did not conduct the required third step in the *Batson* analysis because it did not probe the prosecutor about the reasons offered in support of the challenges or make detailed findings on the record. Appellant is incorrect. The record demonstrates that the trial court carefully listened to arguments by both the prosecutor and defense counsel and consulted its own recollection of the relevant jury questionnaires and voir dire answers before ruling on the motion.

As explained in detail below, the prosecutor's explanations were not inherently implausible or contradicted by the record. (*People v. Lewis II* (2008) 43 Cal.4th 415, 471.) Therefore, contrary to appellant's argument, "the trial court was not required to question the prosecutor or explain its findings on the record. . ." (*Ibid.*) A trial court complies with its duty to evaluate the credibility of the prosecutor's explanation of the peremptory challenge when it observes the relevant voir dire, listens to the reasons offered in support of the challenge and to defense counsel's argument supporting its motion. (*Ibid.*) Here, the trial court did all of these things, and also allowed defense counsel an additional opportunity to rebut the

arguments made by the prosecutor. (59 RT 11670-11671, 11673-11675, 11678-1168, 11685-11686.)

Moreover, as in *Lewis*, there is no indication that the trial court was unaware of its obligation, or that it failed to fulfill it. (*People v. Lewis II*, *supra*, 43 Cal.4th at p. 471.) In fact, when ruling on the prosecutor's challenge to juror 59, the court stated:

> I do remember quite well this particular juror . . . in the court's questioning when she did make a differentiation between [not] wanting to sit in judgment [based on her religious beliefs] but could do that because she had to submit to the civil authorities under the civil law. I do not see this is being race based.

(59 RT 11675.)

Although the trial court did not make similarly detailed findings when ruling on the challenges to the other three jurors where it found a prima facie case, its comments regarding juror 59 demonstrate it was aware of its duty to evaluate the credibility of the prosecutor's explanations in light of its own observations and other information obtained during voir dire. (See *People v. Jones*, *supra*, 51 Cal.4th at p. 361, *People v. Lewis II*, *supra*, 43 Cal.4th at p. 471.)

Appellant relies on several Ninth Circuit cases explaining what that court views to be the "ideal procedures" a trial court should follow when ruling on *Batson/Wheeler* motions. (AOB at pp. 153-154.) These cases are, of course, not binding on this Court. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 120, fn. 3; *People v. Bradley* (1969) 1 Cal.3d 80, 86 ["although we are bound by decisions of the United States Supreme Court interpreting the federal Constitution [citation] we are not bound by the decisions of the lower federal courts even on federal questions."].) Additionally, the United States Supreme Court has approved of the manner in which California courts apply the *Batson* framework to evaluate objections to peremptory challenges. (See *Rice v. Collins* (2006) 546 U.S.

333, 342.) Finally, appellant relies on *United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, and *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, two cases in which the Ninth Circuit found that the trial court did not fulfill its obligation under the third step in the Batson analysis. Both cases are readily distinguishable. In *United States v. Alanis, supra*, at p. 967, the court found that the trial court's comment that the prosecutor offered a "plausible explanation" for the challenges demonstrated that it did not understand its duty to determine if the explanation was credible and genuine. Here, however, the court indicated that it had evaluated the reason offered by the prosecutor and was convinced by the rationale. (See, e.g., 59 RT 11682 [noting that with regard to juror 32 "I do not believe after listening to [the prosecutor] that this is race based. The [motion] is overruled."].) In *Lewis v. Lewis, supra*, at pp. 831-832, the trial court stated that the prosecutor's explanation was "reasonable" and declined to hear any argument from defense counsel. In this case, in contrast, the trial court listed to extended argument by defense counsel and stated that it believed the prosecutor's explanations, not merely that they were reasonable.

E. Substantial Evidence Supports the Trial Court's Finding That the Prosecutor Gave Credible, Non-Discriminatory Reasons for Excusing the Challenged Jurors

Appellant argues that the prosecutor's proffered explanations for his peremptory challenges of several of the minority jurors were pretextual and designed to disguise impermissible racial bias. The trial court's findings to the contrary are reasonable and supported by substantial evidence. [17]

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[17] Because appellant does not rely on comparative analysis to support his claim, respondent does not address the issue, and this Court is not required to consider such analysis in reaching its decision. (*People v. Lenix, supra*, 44 Cal.4th at p. 607 [reviewing courts must consider comparative analysis "when the defendant relies on such evidence."].)

1. African-American jurors

The prosecutor exercised peremptory challenges against three African-American women, jurors 20, 32 and 59.[18] Review of all of the relevant circumstances surrounding the challenges demonstrates that the trial court correctly determined that the challenges were based on legitimate, race-neutral reasons. We discuss each juror in the order they were challenged.

a. The juror's answers provided an obvious, non-race based explanation for the challenge

Appellant contends that, although the prosecutor mentioned juror 20's opposition to the death penalty, the reason he relied on to support the challenge was her prior service on a hung jury. (AOB at p. 162.) He argues that juror 20 clarified that the jury was discharged because numerous illnesses among the jurors, not due to failure to reach a verdict, and that the prosecutor's reliance on this demonstrates that the reason was pretextual. Appellant is mistaken. The prosecutor articulated several reasons for the challenge in addition to juror 20's prior jury service. He cited her answer on the jury questionnaire that she opposed the death penalty, believed many innocent people had been executed, and considered life in prison a more severe penalty. All of these reasons were permissible reasons to exercise a peremptory challenge. (*People v. McDermott* (2002) 28 Cal.4th 946, 976

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[18] Although this Court has recognized African-American women as a cognizable subgroup under *Wheeler*, (see *People v. Cornwell* (2005) 37 Cal.4th 50, 70-71, fn. 4, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390) the U.S. Supreme Court has not recognized African-American women as separate subgroup from African-Americans generally. (See *Love v. Yates* (N.D.Cal. 2008) 586 F.Supp.2d 1155, 1168, fn. 8 [noting that the court "has identified no binding [federal] authority finding that groups defined by the intersection of race and gender are cognizable under *Batson*."].)

[prosecutor properly challenged juror who believed life in prison was a more severe punishment]; *People v. Ledesma* (2006) 39 Cal.4th 641, 678 [prosecutor properly challenged juror who was reluctant to impose death penalty, even if reluctance insufficient to support a challenge for cause].) Moreover, although she stated during voir dire that she could consider the death penalty under the right circumstances, the prosecutor indicated that he did not fully credit her answer. While the transcript necessarily gives no insight in to her comportment and physical and verbal cues exhibited while answering the court's question, the prosecutor was entitled to discount her verbal assurances based on her demeanor. (See *People v. Lenix*, *supra*, 44 Cal.4th at p. 623 [prosecutor entitled to consider prospective juror's demeanor when answering question, which may "belie[] the truthfulness of the answer."].)

Appellant claims that the prosecutor's challenge of juror 59 based on her statements that her religious beliefs prevented her from sitting in judgment was pretextual because she explained she could differentiate between her religious beliefs and the law. (AOB at pp. 162-163.) As the trial court ruled, however, the prosecutor's concern was legitimate. In explaining the rationale for the challenge, the prosecutor cited her answers on the questionnaire about being unable to sit in judgment of another, and her statement that she "cannot sit as a juror to sentence another human being to die." (9 CT 2961; 59 RT 11674.) While the prosecutor acknowledged that she revised her position during voir dire and stated that she would be able to apply the law, he indicated that he did not find her answer compelling. He stated that, based on his observations of her demeanor, as well as the observations of his investigator, he believed she was making an artificial distinction. As discussed above, a prosecutor is entitled to consider a potential juror's demeanor during voir dire, and may find that it casts doubt on the answer articulated. (*People v. Lenix*, *supra*,

44 Cal.4th at p. 623.) Although her answers were equivocal enough to avoid being struck for cause, it was permissible for the prosecutor to challenge her based on his belief that she would not be able to vote for the death penalty. (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 678.)

Additionally, appellant contends that the reasons offered by the prosecutor with regard to his challenge of juror 32 were also pretextual. (AOB at p. 163.) He notes that, although her brother had been convicted of a crime, she stated that they were not close and had not been in contact recently. Additionally, he argues that, although she was admittedly equivocal about her ability to vote for the death penalty, she understood the nature of the two penalties and stated she could possibly vote for death.

The trial court's finding that the challenge to juror 32 was not race-based was supported by substantial evidence. The prosecutor stated that he was concerned that she would not be able to impose the death penalty. The record supports these concerns. On her juror questionnaire, she stated that she thought the death penalty was the "easy way out." (8 CT 2384.) When questioned by the court, she stated that she "would go more towards the life in prison" and stated that "I'm not really sure if I could [vote for the death penalty]." (52 RT 10293-10294.) She subsequently clarified that she could possibly vote for the death penalty in some circumstances. (52 RT 10294.)

Although her answer may not have supported a challenge for cause, the prosecutor properly relied on her equivocation and her view that life in prison was a more severe punishment as a basis for a peremptory challenge. (*People v. McDermott*, *supra*, 28 Cal.4th at p. 976; *People v. Ledesma*, *supra*, 39 Cal.4th at p. 678.) Furthermore, although she stated that she was not in close contact with her brother who had been convicted of a crime, appellant cites no case holding that a potential juror must have a frequent interactions with the convicted family member before a prosecutor can rely on it as a basis for a peremptory challenge.

b. Other factors indicate the challenges were not race-based

In addition to the reasons articulated by the prosecutor, other circumstances support the trial court's conclusion that the challenges were not based on racial discrimination. First, the prosecutor expressed concern about each of the three challenged African-American jurors based solely on their answers on the jury questionnaire, which did not contain the jurors' names or note their race.[19] (See e.g., 8 CT 2371 [questionnaire of juror 32].) The prosecutor raised these concerns during a conference to review the jury questionnaires with the judge and opposing counsel, before he had a meaningful opportunity to observe their race.[20] (50 RT 9854-9855 [concern about juror 20's view on the death penalty], 50 RT 10015-10016 [concern about juror 59's inconsistent statements about her religious beliefs and her ability to vote for the death penalty], 50 RT 9871 [concern about juror 32's views on the death penalty and statement that it was the "easy way out"] .) The rationale the prosecutor ultimately articulated for each of the peremptory challenges against the African-American jurors closely matched the concerns initially voiced in the conference, and tends to demonstrate that the challenges were motivated by legitimate concerns about the jurors' ability to return a death penalty verdict.

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[19] The questionnaires contained information about the prospective jurors' age and gender but not their race or name.

[20] The court introduced the prosecutor and defense counsel to the entire jury pool prior to the distribution of jury questionnaires. (47 RT 9216-9217.) There were over 200 people present, and the jury assembly room was very crowded. (47 RT 9248.) The conference occurred after both counsel received copies of the completed questionnaires. Thus, although counsel did come in contact with the jurors prior to reviewing the questionnaires, it is unlikely that they had the opportunity to make any observations correlated to a specific juror because they were not present for a long period of time and because of the large number of people in the room.

Second, although the prosecutor had two peremptory challenges remaining, he accepted the final jury containing members of each of the groups that appellant claims were impermissibly challenged. (63 RT 12494 [final jury had one African-American and four Hispanic members].) As this Court as observed, "[t]he prosecutor's acceptance of the panel containing a [juror who is a member of the challenged group] strongly suggests that race was not a motive in his challenge." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 629.)

Finally, the fact that the prosecutor challenged three of the four African-Americans in the venire does not demonstrate that the challenges were motivated by racial bias. As this court has noted, it is impossible to draw an inference of discrimination when the absolute sample size is small. (*People v. Bell* (2007) 40 Cal.4th 582, 598 [declining to draw an inference of discrimination when the prosecutor struck two of three African-American women in the jury pool].)

2. Hispanic juror

Appellant contends that the prosecutor's challenge of juror 156, a Hispanic woman,[21] was pretextual because he contends that she "had no qualms whatsoever about the death penalty." (AOB at p. 164.) Appellant mischaracterizes the record. During voir dire, juror 156 expressed that she would be extremely reluctant to impose the death penalty. She stated that, although she could possibly impose the death penalty, "it would be very difficult," and she would consider it only "after every avenue of testimony and evidence was exhausted." (55 RT 10847.) Although her answer was equivocal enough to avoid a strike for cause, the prosecutor stated that,

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[21] This court has expressed skepticism about whether Hispanic women constitute a separate cognizable group, distinct from both women and Hispanics generally. (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 344.)

based on his observations, "she is not going to come back with a death verdict in any case, so far as I can tell." A juror's reluctance to impose the death penalty is a proper basis for a peremptory strike. (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 678.)

Appellant also contends that the prosecutor's challenge of juror 156 demonstrated a pattern of excluding racial minorities, and left the panel with little minority representation.[22] As the prosecutor noted at the time, he exercised 7 of his 13 challenges up to that point against Caucasians, and this was only his second challenge to a Hispanic juror. (59 RT 11686.) Moreover, the final jury contained six minority members, including four Hispanics. (63 RT 12494; see *People v. Lenix*, *supra*, 44 Cal.4th at p. 629.)

In sum, considering all the relevant circumstances surrounding the selection of the jury, there is no indication that the prosecutor's use of peremptory challenges was motivated by impermissible bias. When asked by the court, he offered credible, race-neutral reasons for the exclusion of each challenged juror, and his reasons were amply supported by the record. Other circumstances, such as his concern about answers given on the jury questionnaires and the final race and gender breakdown of the jury also indicate that the challenges were used in a non-discriminatory manner. Additionally, there is no evidence of procedural manipulation, deceptive questioning, or other indicia of racial or gender discrimination. Therefore, the trial court's finding that the challenges were proper was supported by substantial evidence, and appellant is not entitled to relief on his claim.

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[22] As this court has held, a generalized minority or "people of color" designation is not a cognizable group for purposes of *Batson/Wheeler* analysis. (*People v. Davis*, *supra*, 46 Cal.4th at p. 583.)

VIII. THE OPENING BRIEF DOES NOT CONTAIN AN ARGUMENT NUMBERED VIII

Appellant's Opening Brief inadvertently skips argument number VIII. For ease of reference, respondent adopts the same numbering scheme.

IX. THE COURT DID NOT ERR IN REQUIRING APPELLANT TO WEAR A STUN BELT

Appellant argues that the trial court wrongly concluded that a stun belt[23] is not a type of physical restraint like shackles or manacles and that it erred in requiring him to wear one during the trial. (AOB at pp. 167-183.) He contends that forcing him to wear the belt violated his Fifth, Sixth and Eighth Amendment rights and requires reversal. Appellant's argument is without merit. At the time of appellant's trial in 2000, this Court had not yet ruled on whether a stun belt qualified as a restraint, and therefore, the trial court was not required to make a finding of manifest need before ordering that he wear one. Furthermore, the record indicates that the belt was not visible to jurors, thus the court correctly declined to provide a curative instruction on this point.

A. Background

On December 22, 1998, the Sheriff's Department informally requested that appellant wear a stun belt during trial. (8 RT 1409-1410.) The court did not rule on the request at that time. On July 22, 2000, defense counsel filed a pretrial motion requesting that appellant not be shackled or forced to wear a stun belt during trial. (40 RT 7929-7932.) The court remarked that, based on emerging case law, he did not consider a stun belt to be a restraint and therefore its use didn't require the same

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[23] Appellant wore a "React Belt" of the same type described in *People v. Mar* (2002) 28 Cal.4th 1201, 1204. (8 RT 1410-1412, 40 RT 7929, 46 RT 9003.)

showing as the use of shackles or other forms of physical restraint. (40 RT 7930.) Defense counsel argued that appellant had no history of misbehavior, and that no restraint was required. (40 RT 7930-7932.) The court deferred ruling on the motion. (40 RT 7932-7933.) During a pretrial hearing on September 6, 2011, defense counsel informed the court that appellant had agreed to wear the stun belt. (46 RT 9003.)

B. Appellant Waived This Issue

Although appellant initially objected to wearing a stun belt or other type of restraint, he subsequently withdrew his objection and agreed to wear a stun belt. (46 RT 9003.) By abandoning his objection, he waived his ability raise this issue on appeal. (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9 ["waiver is the 'intentional relinquishment or abandonment of a known right.'"].)

C. The Rule of *People v. Mar* Does Not Apply to This Case

Appellant contends that, because the stun belt was a form of restraint, the court should have conducted a hearing before requiring him to wear a stun belt during the guilt and penalty phases of his trial. He claims that there was no indication that he posed a security threat, and that the trial court and the prosecutor noted that he had a history of good behavior. (AOB at pp. 178-180; see 8 RT 1410-1412.) Therefore, there was no basis for the court's order that he wear the belt.[24] (See *People v. Mar*, *supra*, 28 Cal.4th at pp. 1218-1221.)

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[24] Although appellant argues that he had a record of good behavior, by the time of trial there was a strong reason to require appellant to wear a stun belt. After the initial argument on the motion, but prior to trial, appellant initiated a fight with Norman Willover when they were both detained in the same cell, and later, participated in a violent prison riot, charging at an officer and breaking his protective shield. (80 RT 15850-15856; 15857-15862.)

Appellant's trial took place in 2000, two years before this Court's ruling in *People v. Mar*, *supra*, 28 Cal.4th at pp. 1220-1221, which held that a stun belt qualified as a restraint and articulated guidance for when a defendant may properly be required to wear one during trial. This Court has recently held that the guidelines articulated in *Mar* do not apply retroactively to trials that occurred before the decision in that case. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1271 ["Because our decision [in *Mar*] was the first to consider use of an electronic stun belt in California criminal trials, however, we expressly stated that our discussion was offered to provide guidance 'in *future* trials.'"].) The trial court was not required to divine years in advance whether this Court would find that a stun belt qualified as a restraint for constitutional purposes or to speculate about what guidelines it would put in place to govern its use. Therefore, the trial court did not err in failing to conduct a hearing to determine if there was a manifest need for appellant to wear a stun belt.

D. No Curative Instruction Was Required

Appellant further contends that the court was required to admonish jurors that they should disregard the stun belt and any effect the belt had on his demeanor. The record indicates that the belt was not visible to jurors, and the device was apparently never activated. (See 8 RT 1410, 81 RT 16013.) Thus, an admonishment would have served only to call attention to the restraint and created a greater potential for prejudice. (*People v. Duran* (1976) 16 Cal.3d 282, 291-292.) Moreover, appellant did not request such an admonishment during the trial. (*People v. Duran*, *supra*, at pp. 291-292 [when restraints are concealed, the court should provide instruction to jury only when requested by defendant].) Therefore, the court did not err by not instructing the jury to disregard the stun belt.

E. Any Error Was Harmless

Even if the court erred in failing to make a finding of manifest need for appellant to wear a stun belt, the error was harmless. (See *People v. Howard* (2011) 51 Cal.4th 15, 30 [applying harmless error standard of *Chapman v. California* (1967) 386 U.S. 18]; *People v. Mar*, *supra*, 28 Cal.4th at p. 1225 [applying the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818].) The jury never saw the belt. (*People v. Anderson* (2001) 25 Cal.4th 543, 596 ["we have consistently held that courtroom shackling, even if error, was harmless if there is no evidence that the jury saw the restraints"].)

Additionally, unlike the defendant in *Mar*, appellant expressed no discomfort with the stun belt, and, in fact, agreed to wear it. (See *People v. Mar*, *supra*, 28 Cal.4th at pp. 1210-1212; 40 RT 7930-7932, 46 RT 9003.) There is no indication that the stun belt affected appellant's decision whether to testify, and no evidence that it affected his demeanor during the trial. (*People v. Howard*, *supra*, 51 Cal.4th at pp. 29-30.) Other than a general objection that no type of restraint was necessary, neither appellant nor trial counsel expressed any apprehension about appellant wearing the belt. (*Ibid.*) Moreover, there was no plausible basis to be concerned that the belt would be activated unjustifiably. (C.f. *People v. Mar*, *supra*, at p. 1224 [appellant concerned that deputies would be too eager to activate stun belt because he was on trial for injuring a law enforcement officer].) Thus, even under the more stringent *Chapman* standard, the error was harmless beyond a reasonable doubt.

Finally, any failure to instruct the jury to disregard the presence of the stun belt was similarly harmless. As this Court has stated, "[w]e have consistently found any unjustified or unadmonished shackling harmless where there was no evidence it was seen by the jury. [Citations.]" (*People*

v. Tuilaepa (1992) 4 Cal.4th 569, 583-584. Appellant's claim is without merit, and he is not entitled to relief on this basis.

X. SUFFICIENT EVIDENCE SUPPORTED APPELLANT'S CONVICTION FOR AGGRAVATED MAYHEM

Appellant was convicted of aggravated mayhem for the shooting of Jennifer Aninger, based on an aiding and abetting theory. He contends that there was insufficient evidence supporting his conviction on this count because there was no evidence that Willover had the requisite intent to maim. He argues that Aninger was wounded in a sudden and unexpected outburst of gunfire during an attempted robbery, and that there is no evidence that any of the participants intended to inflict a permanent of disfiguring injury. Therefore, because insufficient evidence supported Willover's conviction for aggravated mayhem, he cannot be held guilty as an accomplice. Appellant also argues that aggravated mayhem is not a natural and probable consequence of attempted robbery, and therefore, he can not be held guilty as an aider and abettor. (AOB at pp. 184-197.)

Contrary to appellant's argument, there was ample evidence from which the jury could infer that Willover acted with the intent to cause a permanent disability or disfigurement and that appellant provided aid and assistance. Appellant circled the car around the wharf, carefully surveying the victims prior to approaching them. Additionally, Willover took aim at an especially vulnerable area of Aninger's body and fired at close range. Furthermore, although other occupants of the car may not have subjectively anticipated that Willover would fire at the women while trying to rob them, the test for accomplice liability under the natural and probable consequences is an objective one. There was a sufficient basis for the jury to find that a reasonable person in appellant's situation would have known that the use of the gun during the robbery attempt was reasonably

foreseeable. Therefore, appellant was properly convicted as an aider and abettor on the aggravated mayhem count.

A. Legal Standards

1. Sufficiency of the evidence

In evaluating a sufficiency of the evidence claim on appeal, courts must determine "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, italics omitted; see also *People v. Kraft* (2000) 23 Cal.4th 978, 1053.)'" (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1263.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The court must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence and must draw all reasonable inferences in support of the judgment. (*People v. Gonzales* (2011) 51 Cal.4th 894, 941.) "'Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt.'" (*People v. Virgil*, *supra*, at p. 1263.)

2. Aggravated mayhem

Penal Code section 205 provides in pertinent part:

> A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of

another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body.

Aggravated mayhem, in contrast to simple mayhem, is a specific intent crime. (*People v. Ferrell* (1990) 218 Cal.App.3d 828, 832-833.) In order to sustain a conviction, the prosecution must prove that the defendant acted with the specific intent to cause a maiming injury. (*Id.* at p. 833.) "[A] defendant may intend both to kill his or her victim and to disable or disfigure that individual if the attempt to kill is unsuccessful." (*Id.* at pp. 833-834.)

"Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) Although specific intent cannot be inferred based solely on the nature of the injuries inflicted, the jury may infer that a defendant acted with the specific intent to maim from the circumstances surrounding the act. (*People v. Lee* (1990) 220 Cal.App.3d 320, 325.) In particular, the jury may consider the mode of attack, the means used, whether the defendant targeted a vulnerable part of the body, and whether the attack was controlled and focused in scope. (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1163; *People v. Lee*, *supra*, at pp. 325-326.) An indiscriminate attack or an explosion of violence is insufficient to prove specific intent to maim. (*People v. Anderson* (1965) 63 Cal.2d 351, 359-360.) An injury causing disability or disfigurement is permanent for purposes of section 205 even if it can be ameliorated or repaired by medical procedures. (*People v. Newby* (2008) 167 Cal.App.4th 1341, 1348.)

3. Aider and abettor liability

The prosecutor argued that appellant was guilty as an accomplice to aggravated mayhem because he provided assistance to Willover during the

shooting on Wharf Two. An accomplice who aids and abets the commission of a crime is guilty to the same extent as the principal who committed the crime. (§ 31.) A person is guilty of aiding and abetting when he assists the direct perpetrator by aid or encouragement, with knowledge of the perpetrator's criminal intent and with the intent to help him carry out the offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561.) An aider and abettor is guilty not only of the offense he or she intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he or she aids and abets. (*People v. Prettyman* (1996) 14 Cal.4th 248, 261.) "Whether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment." (*People v. Mitchell* (1986) 183 Cal.App.3d 325, 329.)

B. The Jury Could Have Reasonably Inferred That Willover Fired on Aninger with the Intent to Cause a Permanent or Disfiguring Injury

Appellant implicitly concedes that Aninger's injuries—a gun shot wound to the head requiring two surgeries and another to the arm that necessitated a nerve graph to restore function to her hand—were sufficiently severe to support a conviction for aggravated mayhem. (66 RT 13003-13004, 69 RT 13683, 13685.) Rather, he argues that the shooting was a random explosion of violence and there was no evidence that Willover acted with the specific intent to maim. Because Willover did not have the requisite intent to commit aggravated mayhem, appellant contends that he cannot be held liable as an aider and abettor. Appellant's claim is unavailing. There was ample basis for the jury to conclude that Willover acted with the intent to cause permanent disability or disfigurement.

The jury could have inferred intent based on the mode of attack. The evidence showed advance preparation and careful inspection of the victims

prior to the shooting. Willover and appellant made a special trip earlier in the day to retrieve the gun from a friend's house in a neighboring town. (See *People v. Park* (2003) 112 Cal.App.4th 61, 69 [jury could infer intent based on defendant going to the back of restaurant to collect weapon before walking outside and attacking victim].) Moreover, Willover did not immediately begin firing at the women when he saw them on the wharf. Instead, they drove all the way to the end of the wharf, made a U-turn and drove by them again to get a closer look and determine if they were attractive targets. They made an additional U-turn in a parking lot near the top of the wharf so that the passenger's side of the car, where Willover was sitting, was positioned closest to the women.

Willover also demonstrated antagonism toward the victims. When the women did not respond to his demands, he turned back to the other occupants of the car and expressed his frustration, calling them "assholes." (60 RT 11881-11882; see *People v. Park*, *supra*, at p. 69 [infer intent when attack occurred after demonstrated antagonism toward the victim].)

Additionally, the jury could have inferred intent based on the manner in which Willover attacked the women. The shooting was a focused, limited attack. (See *People v. Park*, *supra*, 112 Cal.App.4th at p. 69.) He pointed the gun directly at the women and fired at a distance of 5-10 feet. (66 RT 13032, 69 RT 11378.) He hit Aninger in her head. (See *People v. Ferrell*, *supra*, 218 Cal.App.3d 828, 835 ["It takes no special expertise to know that a shot fired in the neck from close range, if not fatal, is highly likely to disable permanently."].) Had he merely intended to scare them and facilitate the robbery, presumably he would have fired off to the side or up in the air. Furthermore, as they drove away from the wharf, Willover stated that he shot the women because he didn't want to leave any witnesses. (66 RT 13033-13034.) From this statement, the jury could have

inferred that he intended to either kill the women or to injure them so severely that they would not be able to identify their assailants.

Finally, the jury could have inferred that Willover intended to cause permanent disability or disfigurement because he focused his attack on a particularly v7ulnerable part of Aninger's body—her head. (*People v. Park, supra*, 112 Cal.App.4th at p. 69 [infer intent to maim based on blows to victim's head]; *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 831-832 [multiple slashes of victim's face demonstrated intent to maim]; *People v. Quintero, supra*, 135 Cal.App.4th at p. 1163 [slashing of victim's face and chest].)

The cases cited by appellant in which the court found there was insufficient evidence of intent are readily distinguishable. In *People v. Lee* (1990) 220 Cal.App.3d 320, 323, the defendant entered his neighbor's apartment and began hitting and kicking him all over his body for no apparent reason. In finding the evidence insufficient to sustain a conviction for aggravated mayhem, the court noted that the attack appeared to be an unexplained explosion of violence. (*Id.* at pp. 325-326.) The court stressed the random nature of the attack, the unfocused battering of the victim's body, and the fact that the defendant used his fists rather than obtaining a weapon beforehand. (*Id.* at p. 326.) The evidence in this case, however, demonstrates a deliberate, planned attack, the opposite of the inexplicable explosion of violence in *Lee*. (*Id.* at p. 323.) Willover and appellant repeatedly turned to drive by the victims, checking to make sure they were good targets for robbery. (60 RT 11877, 11879-11880, 66 RT 13030, 13032-13033.) Willover started shooting only after becoming frustrated that the women were not responding to his threats. (60 RT 11881-11882.) He aimed at particularly vulnerable parts of their bodies. (66 RT 13003-13006, 69 RT 13677-13679 [Anniger's head], 68 RT 13419-13420 [bullets recovered from Mathews's upper back and chest area].) Furthermore,

unlike the defendant in *Lee*, who apparently spontaneously struck the victim with his fists, Willover and appellant made a special trip hours earlier to obtain a gun. (*Id.* at p. 326; 66 RT 13017-13018.)

In *People v. Anderson* (1965) 63 Cal.2d 351, 356, the defendant killed a ten-year-old girl, stabbing her over 60 times. There were no witnesses to the attack, and the prosecution relied on the grievous nature of the girl's injuries to demonstrate intent to permanently disable or disfigure. (*Id.* at pp. 356-357.) The court found that, standing alone, the nature of the injuries inflicted did not demonstrate the necessary intent for aggravated mayhem. In this case, however, there was substantial additional evidence about the circumstances of the shooting and eyewitness testimony from Aninger, Contreras and Tegerdal. Those witnesses described a calculated act, including the advance retrieval of a weapon, selection and reconnaissance of the victims, and Willover's stated desire to eliminate any witnesses.

Finally, in *People v. Sears* (1965) 62 Cal.2d 737, 742 overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, the defendant stabbed and killed his step-daughter when she attempted to intercede in a violent fight between the defendant and her mother. The court reasoned that the defendant did not specifically intend to disfigure or disable the girl. (*Id.* at p. 745.) Rather, the evidence indicated that the defendant indiscriminately stabbed her when she got in between him and his intended target. (*Id.* at pp. 741, 745.) Here, by contrast, Willover and appellant's victims were purposefully chosen, not ancillary casualties of a different planned attack.

Taken together, the circumstances show that the shooting of Aninger was a cold and purposeful act of violence, the product of deliberation and planning. Appellant carefully circled the car around the victims, assuring that Willover would be well-positioned to execute the attack. Willover shot

Aninger multiple times at close range, aiming for a vulnerable part of her body. The jury could reasonably infer that Willover intended to kill her or leave her permanently injured. Therefore, sufficient evidence supports appellant's conviction and he is not entitled to any relief.

C. The Shooting Was a Natural and Probable Consequence of the Attempted Robbery

It is undisputed that appellant intended to aid and abet the attempted robbery of Aninger and Mathews. He contends, however, that aggravated mayhem is not a natural and probable consequence of attempted robbery. He therefore argues that, even if Willover acted with the necessary intent to inflict a maiming injury, he cannot be held liable as an accomplice to that act. Contrary to appellant's argument, the shooting was a reasonably foreseeable consequence of the planned robbery, and he was properly held liable as an accomplice.

"Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.'" (*People v. Medina* (2009) 46 Cal.4th 913, 920.) A defendant may be held liable as aider and abettor even if he or she did not intend to facilitate the crime ultimately committed. It is enough that he or she intended to assist in the commission of the target crime, here, attempted robbery. (*People v. Montes* (1999) 74 Cal.App.4th 1050, 1056 ["'The only requirement is that defendant share the intent to facilitate the target criminal act and that the crime committed be a foreseeable consequence of the target act.'"].)

Furthermore, "'[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. . . .'" (*People v. Medina*, *supra*, 46 Cal.4th at p. 920.) The "question is not whether the aider and abettor actually foresaw

the additional crime, but whether, judged objectively, it was reasonably foreseeable." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133.) The determination of whether the non-target offense was a reasonably foreseeable consequence of the intended act depends on the circumstances of each case and is a factual question for the jury. (*People v. Medina*, *supra*, at p. 920.)

Here, there was ample basis for the jury to conclude that, under the circumstances, it was reasonably foreseeable that a deadly weapon would be used in connection with the attempted robberies, and that death or grievous injury would result. Appellant and Willover made a special trip to obtain a gun and several clips of ammunition, and they took the loaded gun with them as they set out in the evening. (66 RT 13017-13018.) It was reasonable to infer that they intended to use the gun during the robberies, as appellant and Willover took the gun with them when they got out of the car in Jacks Park to look for a potential victim. (66 RT 13027-13028.) Courts have held that, when a defendant is aware that his confederate possesses a deadly weapon, it is proper for the jury to find that it was reasonably foreseeable that someone could be injured or killed with the weapon during the commission of the target offense. In *People v. Prettyman*, *supra*, 14 Cal.4th at p. 267, this Court provided the following example:

> If, for example, the jury had concluded that defendant Bray had encouraged codefendant Prettyman to commit an assault on [victim] but that Bray had no reason to believe that Prettyman would use a deadly weapon such as a steel pipe to commit the assault, then the jury could not properly find that the murder of [victim] was a natural and probable consequence of the assault encouraged by Bray. [Citation.] If, on the other hand, the jury had concluded that Bray encouraged Prettyman to assault [victim] with the steel pipe, or by means of force likely to produce great bodily injury, then it could appropriately find that Prettyman's murder of [victim] was a natural and probable consequence of that assault.

Additionally, in *People v. Godinez* (1992) 2 Cal.App.4th 492, 501, fn. 5, the court noted that, although it is not necessary to prove that a defendant knew a weapon was present, such a showing "provides grist for argument to the jury on the issue of foreseeability of a homicide." (See also *People v. Jones* (1989) 207 Cal.App.3d 1090, 1098 [defendant properly convicted of attempted murder under the natural and probable consequence doctrine when he knew that his confederate "was a violent, desperate character and that he was armed with a gun for the purpose of committing robbery . . . ."].) Thus, as in *Prettyman*, *Godinez*, and *Jones*, the jury could have relied on appellant's knowledge that Willover was armed with a gun in finding that a crime involving injury or death was a foreseeable consequence of the target offense.

Furthermore, uncontradicted testimony demonstrated that on the night of January 31, 1998, appellant and Willover set out to rob people. (66 RT 13022.) Although we have located no case specifically addressing aggravated mayhem, crimes resulting in severe injury from the use of a gun are often found to be a natural and probable consequence of armed robbery. (See, e.g., *People v. Miranda* (2011) 192 Cal.App.4th 398, 408 [attempted murder was a natural and probable consequence of robbery]; *People v. Bradley* (2003) 111 Cal.App.4th 765 [attempted murder was a natural and probable consequence of armed robbery]; *People v. Hammond* (1986) 181 Cal.App.3d 463, [same]; *People v. Nguyen* (1993) 21 Cal.App.4th 518 [assault with a deadly weapon was a natural and probable consequence of armed robbery].)

Appellant argues that the shooting was not foreseeable because there had been no discussion of it and notes that both Contreras and Tegerdal testified that they were surprised when Willover began firing. Contrary to appellant's argument, it is irrelevant whether the occupants of the car subjectively anticipated the shooting. (*People v. Mendoza*, *supra*, 18

Cal.4th at p. 1133.) The test under the natural and probable consequences doctrine is objective. Based on the evidence presented at trial, the jury could have found that it was reasonably foreseeable that the loaded gun being used in connection with the agreed-to robberies could also be used to kill, disable or disfigure potential victims. Therefore, appellant was properly convicted of aiding and abetting aggravated mayhem under the natural and probable consequences doctrine.

XI. THE COURT PROPERLY DECLINED TO INSTRUCT THE JURY THAT CONTRERAS AND TEGERDAL WERE ACCOMPLICES AS A MATTER OF LAW

The trial court instructed the jury on the general principles of accomplice liability, noting that it was up to the jury to decide whether Contreras and Tegerdal were accomplices and that, if so, their testimony had to be corroborated. Nonetheless, appellant claims that the trial court erred by failing to instruct the jury that the two were accomplices to the attempted robberies and shootings as a matter of law.[25] He contends that Tegerdal supplied the vehicle and that Contreras drove for part of the evening, and therefore, they provided aid and assistance in the commission of the crime. He argues that there was no alternate explanation for their presence, and no basis for the jury to conclude that the two were not accomplices to the shootings. He also contends that, because Contreras and Tegerdal were the key prosecution witnesses, the other evidence adduced at trial was insufficient to corroborate their testimony. Contrary to appellant's argument, there was a factual dispute as to whether Contreras and Tegerdal qualified as accomplices, and thus instruction that they were as a matter of law would have been improper. Additionally, even if the jury found that

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[25] The court instructed the jury that Tegerdal was an accomplice as a matter of law as to count 5, relating to the attempted robbery in October, 1997 at the Del Monte shopping center. (75 RT 14842.)

both of the witnesses were accomplices to all of the crimes charged, their testimony was corroborated by independent evidence and any error was harmless.

A. Background

Appellant requested that Contreras and Tegerdal be designated accomplices as a matter of law both in a pretrial motion and in a motion made at the close of the evidence. (40 RT 7870-7873, 72 RT 14221-14222.) The court held that their status as accomplices was a question for the jury because there was conflicting evidence as to whether they intended to provide aid and assistance in the commission of the crimes. (*Ibid.*) The court instructed the jury that it had to determine whether Contreras and Tegerdal were accomplices and that, if so, their testimony had to be corroborated before it could be relied upon. (75 RT 14843.) The court stated:

> You cannot find the defendant guilty upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense.
>
> Testimony of an accomplice includes any out-of-court statement purportedly made by an accomplice received for the purpose of proving that what the accomplice stated out-of-court was true.
>
> To corroborate the testimony of an accomplice, there must be evidence of some facts or act related to the crime which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged.
>
> However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged or that it corroborate every fact to which the accomplice testifies.
>
> In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been

removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime.

If there is no independent evidence which tends to connect defendant with the commission of the crime, the testimony of an accomplice is not corroborated.

If there is independent evidence which you believe, then the testimony of the accomplice is corroborated.

The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of his or her accomplices, but must come from other evidence.[26]

[¶]. . .[¶]

Merely assenting to or aiding or assisting in the commission of a crime without knowledge of the unlawful purpose of the perpetrator and without the intent or purpose of committing, encouraging or facilitating the commission of the crime is not criminal. Thus, a person who assents to or aids or assists in the commission of a crime without that knowledge and without that intent or purpose is not an accomplice in the commission of the crime.

(75 RT 14841-14842.)

B. Legal Standards

Section 1111 provides that accomplice testimony must be corroborated in order to sustain a conviction. An accomplice is defined as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.)

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[26] Thus, although appellant claims that the jury was not informed that if it found that both witnesses were accomplices, their testimony could not be used to corroborate one another (AOB at p. 199), the record indicates that the jury was in fact so informed.

As discussed above, a person can be held liable as an accomplice when he or she aids or abets the commission of a crime by offering the direct perpetrator aid or encouragement, with knowledge of the perpetrator's criminal intent and with the intent to help him carry out the offense. (*People v. Beeman*, *supra*, 35 Cal.3d at pp. 560-561.) "[M]ere 'presence at the scene of a crime or failure to prevent its commission [is not] sufficient to establish aiding and abetting.'" (*People v. Richardson* (2008) 43 Cal.4th 959, 1024.) It is appellant's burden to establish by a preponderance of the evidence that a witness was an accomplice. (*People v. Fauber*, *supra*, 2 Cal.4th at pp. 833-834.)

Although accomplice testimony must be corroborated, corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. (*People v. Hartsch* (2010) 49 Cal.4th 472, 500.) Moreover, the independent evidence need not corroborate every aspect of the accomplice's testimony. (*People v. Davis* (2005) 36 Cal.4th 510, 543.) The corroborating evidence is sufficient if, without aid from accomplice testimony, it "'tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth.'" (*Davis*, *supra*, at p. 543; see also *People v. Williams* (1997) 16 Cal.4th 635, 680-681.) "Unless there can be no dispute concerning the evidence or the inferences to be drawn from the evidence, whether a witness is an accomplice is a question for the jury." (*People v. Williams* (2008) 43 Cal.4th 584, 636.) Thus, the trial court may instruct that a witness is an accomplice as a matter of law only when the facts concerning the witness's status as an accomplice are "'clear and undisputed.'" (*People v. Avila*, *supra*, 38 Cal.4th at p. 565.) Error in failing to instruct that a witness is an accomplice as a matter of law is harmless if the record contains evidence

corroborating the witness's testimony. (*People v. Williams*, *supra*, at p. 636.)

C. There Was a Factual Dispute as to Whether Contreras and Tegerdal Were Accomplices

Appellant contends that the evidence regarding Contreras and Tegerdal's status as accomplices was clear and undisputed, and that their testimony that they did not have knowledge of appellant's criminal purpose was merely an attempt to "subjectively distance[] themsel[ves] from the actual shootings." (AOB at p. 206.) As discussed below, there was conflicting evidence as to whether either Contreras or Tegerdal had the requisite intent to be held liable as an accomplice. The fact that the witnesses' own testimony created the conflict does not lessen its significance or alter the court's obligation to allow the jury to resolve factual disputes in the evidence. (See *People v. Williams*, *supra*, 43 Cal.4th at p. 637 [witness's denial that he intended to aid and abet created a factual dispute regarding his status as an accomplice].)

1. Contreras

Contreras's status as an accomplice turns on whether she intended to provide aid and assistance in the commission of the offense or whether she was merely present and unable to prevent it from occurring. There was disputed evidence on this point. Contreras testified that when appellant picked her up, she thought they were going to drink and hang out. (60 RT 11866-11867.) Additionally, there was conflicting testimony about when she first learned of the robbery plan and whether she participated in any discussions about it. Although Tegerdal testified that appellant and Willover had discussed the plan to rob people before Contreras took over driving, he later testified that he wasn't sure if anyone ever expressly told her of the plan. (66 RT 13021-13022, 67 RT 13296.) Contreras's own testimony on this point was also equivocal. She initially stated that she did

not know of the plan when she took over driving. (61 RT 12052-12053) But she was subsequently impeached with her prior statement to the police that she may have known about the plan when she got in the driver's seat and drove to Jacks Park. (61 RT 12054-12056.) In any event, she testified that, even when she learned of the plan, she was stuck in the car and unable to leave.[27] (61 RT 12058, 12060, 12063; see *People v. Avila*, *supra*, 38 Cal.4th at p. 565 [factual dispute about whether witness was an accomplice when evidence indicated that he was unwillingly present in the car as defendant drove to the crime scene].) Furthermore, she testified that she never intended to rob or shoot anyone, and that, if she had known of the plan, she would not have gotten in the car that night. (61 RT 12026; see *People v. Williams*, *supra*, 43 Cal.4th at p. 637 [witness's statements that, although present during the crime, he did not intend to further defendant's criminal purpose created a factual dispute as to whether he was an accomplice].) Thus, although it was possible to infer that Contreras knew of the plan to commit robbery and nonetheless agreed to drive, it was also possible to infer that she learned of the plan only later and was unable to either prevent the crimes or to escape. If the jury believed the latter set of inferences, Contreras was not liable for the same offense as appellant and

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[27] When asked during cross-examination why she didn't leave when she learned of the plan to rob and shoot people, Contreras stated:

> It didn't matter even if I did leave. [Appellant] lived with me. He knows where I live. He knows where I was going. If I was out looking for somebody and I was stupid enough to go shooting people for no reason and somebody wants to leave, I'm going to think they are going to snitch on me or I'm going to think they are going to call the cops so I'm going to turn around and shoot them. How do you know he wasn't going to shoot me or Adam or [go] looking [at] the house for me[?]

(61 RT 12060.)

therefore did not meet the definition of an accomplice. (§ 1111; see *People v. Richardson*, *supra*, 43 Cal.4th at p. 1024 [mere presence at the scene of the crime insufficient to establish accomplice liability].) Because it was possible to draw conflicting inferences based on the evidence, it would have been improper to instruct the jury that Contreras was an accomplice as a matter of law. (*People v. Avila*, *supra*, 38 Cal.4th at p. 565.)

2. Tegerdal

The evidence regarding Tegerdal's status as an accomplice was similarly conflicted. He testified to a number of acts that could have constituted aiding and abetting. Specifically, he stated that he owned both of the vehicles used in connection with the shootings, that he knew of the plan to rob people, and that he pointed out the women on the wharf as potential targets. (66 RT 13022, 13030-13031, 13050, 13083, 13107.) Nonetheless, he also gave testimony that tended to show that he lacked the requisite intent to be held liable as an accomplice. He stated that he did not intend to rob the women on the wharf, that he was surprised by the shooting, that he was not driving during the commission of the crimes, and that he never touched the gun. (66 RT 13114, 13028, 67 RT 13290-13291.) Additionally, he testified that he suggested the group switch cars after the first shooting to avoid detection, not to further appellant's shooting spree. (66 RT 13034, 13211.) Based on this testimony, the jury could have concluded that Tegerdal was an accomplice because he knew of appellant and Willover's plan to rob people and provided assistance by allowing them to use his cars. But the jury could have also concluded that, although he furnished transportation, he lacked the intent to aid in the commission of the crimes. (See *People v. Tewksbury* (1976) 15 Cal.3d 953, 960-961 [witness not an accomplice as a matter of law when her own testimony was subject to conflicting inferences].) Therefore, an instruction that Tegerdal

was an accomplice as a matter of law was unwarranted. (*People v. Avila*, *supra*, 38 Cal.4th at p. 565.)

Finally, appellant contends that Contreras and Tegerdal should have been found to be accomplices because their failure to leave the group after the first shooting demonstrated that they tacitly approved of appellant and Willover's actions. (AOB at p. 207.) Failure to leave after a crime begins, however, is not the test for accomplice liability. Rather, appellant must prove that Contreras and Tegerdal offered aid and encouragement in the commission of the crime, with knowledge of appellant's criminal purpose and with the intent to help him achieve his objective. (*People v. Beeman*, *supra*, 35 Cal.3d at pp. 560-561.)

D. Any Error Was Harmless

Even if the evidence indicated that Contreras and Tegerdal aided and abetted the shootings, any error in the court's instructions was harmless. First, the court's instructions did not preclude the jury from finding that the two were accomplices. The court informed the jury that "[y]ou must determine whether the witnesses Adam Tegerdal and Melissa Contreras were accomplices as I have defined that term." (75 RT 14843.) If, as appellant contends, the only possible interpretation of the evidence indicated that Contreras and Tegerdal aided and abetted the crime, the jury would have followed the court's instruction and found that they were accomplices and looked for corroborating evidence before it relied on their testimony. (*People v. Coffman* (2004) 34 Cal.4th 1, 84 [appellate court presumes jurors followed instructions]; see also *Richardson v. Marsh* (1987) 481 U.S. 200, 207 [appellate courts apply the "almost invariable assumption. . .that jurors follow their instructions."].)

Second, the record contained ample corroborating evidence. (*People v. Williams*, *supra*, 43 Cal.4th at p. 636 [error in instruction is harmless if accomplice testimony is adequately corroborated].) If the jury concluded,

for example, that Tegerdal was an accomplice but Contreras was merely present during the commission of the offenses, it could have used her testimony as corroboration. Additionally, even if the jury found that both witnesses were accomplices, there was independent evidence corroborating their testimony.

Tim Frymire testified that, shortly after the shooting on Fremont street on February 1, 1998, appellant came to his house in Seaside. He seemed "real antsy" and kept looking out the window. (68 RT 13452.) After telling appellant that he could not hide a gun in his house or yard, Frymire allowed appellant to place the gun in the locked trunk of his car. (68 RT 13453-13455.) Frymire testified that the gun appellant placed in his trunk was the same type later recovered by police and which ballistics tests indicated was the murder weapon. (68 RT 13455-13458; *People v. Henderson* (1949) 34 Cal.2d 340, 345-346 [accomplice testimony corroborated by defendant's possession of the same type of gun used in robbery]; *People v. Barillas* (1996) 49 Cal.App.4th 1012, 1021 [accomplice testimony corroborated by defendant's possession of the same type of gun used in murder and by evidence that markings on shell casings recovered from the crime scene were consistent with defendant's gun]; *People v. Medina* (1974) 41 Cal.App.3d 438, 466 [corroboration provided by "evidence showing that the murders were committed with weapons of the kinds kept in the immediate possession of the two defendants."].) Furthermore, Frymire testified that the evening after the shooting, when he saw a report of the murders come up on the evening news, appellant smiled and made a gesture indicating that he was responsible for the crimes. (68 RT 13458-13460.) (*People v. Davis*, *supra*, 36 Cal.4th at p. 546 [defendant's own statements and adoptive admissions were sufficient to corroborate accomplice testimony when considered in conjunction with other evidence].)

Furthermore, Anthony and Linda McGuiness provided additional information that tended to corroborate Contreras and Tegerdal's testimony. Anthony McGuiness testified that, when he awoke and went downstairs in the early morning hours of February 1, 1998, he found appellant, Willover, Contreras and Tegerdal together in his living room. (64 RT 12629; *People v. Medina*, *supra*, 41 Cal.App.3d at p. 465 [evidence that codefendants were seen together shortly after murders were committed tended to corroborate accomplice testimony].) Additionally, Linda McGuiness testified that, when police searched her house a few days after the shootings, they recovered a box of .22 caliber bullets from underneath the couch, in the area where appellant had been sitting when he came to the house immediately after the shootings. (64 RT 12619.) The gun ultimately recovered and identified as the murder weapon was .22 caliber. (63 RT 12472-12473, 65 RT 12841-12842.) Expended .22 caliber casings were recovered from the crime scenes, as well as from Tegerdal's Monte Carlo. (64 RT 12699, 12708, 65 RT 12841-12842.) A live .22 caliber bullet was recovered from the Mercury Cougar. (64 RT 12709.) Linda McGuiness also noticed a torn black right-hand glove in the trash the morning after the group came to her house. (64 RT 12617-12618.) The glove did not belong to her, and she pointed it out to the police. (64 RT 12617-12618.) Tegerdal testified that Willover and appellant wore a glove while shooting the gun. (66 RT 13054.) Contreras testified that the glove recovered from McGuiness's house was the same one that Willover and then later appellant wore when shooting the gun. (63 RT 12423.) Police recovered a left-hand glove matching the one recovered from the McGuiness's trash can at Frymire's house, where appellant had been staying prior to the shooting. (64 RT 13663, 13668.)

The physical evidence recovered by police and the testimony of Tim Frymire and Anthony and Linda McGuiness provided the necessary

corroboration for Contreras and Tegerdal's testimony if they were in fact accomplices. Although it did not corroborate every aspect of their testimony, it clearly tied appellant to the murder weapon and tended to connect him to the crimes. (See *People v. Davis*, *supra*, 36 Cal.4th at p. 543.) Therefore, any error in failing to instruct that they were accomplices as a matter of law was harmless. (*People v. Williams*, *supra*, 43 Cal.4th at p. 636.)

Relying on *People v. Robinson* (1964) 61 Cal.2d, 373, 394-395, appellant argues that the trial court's refusal to designate Contreras and Tegerdal accomplices as a matter of law was prejudicial error because it "subtly enhanced their status" and invited the jury to engage in unnecessary speculation. (AOB at p. 209.) The facts of this case, however, are very different than those in *Robinson*. In that case, the witnesses that the defendant sought to have designated accomplices had previously confessed their guilt to police officers, and their statements were introduced at trial. (*Id.* at pp. 380-383.) The court reasoned that in light of the confessions, the trial court should have instructed the jury that the witnesses were accomplices as a matter of law, rather than inviting jurors to speculate on their status. (*Id.* at pp. 395-396.) Here, in contrast, neither Contreras nor Tegerdal confessed to any criminal acts in connection with the shootings, and both denied that they intended to aid appellant in his commission of the crimes.

XII. THE COURT WAS NOT REQUIRED TO INSTRUCT JURORS THAT THEY MUST AGREE UNANIMOUSLY ON THE THEORY OF MURDER

The court instructed the jury on three possible theories of first-degree murder: deliberate and premeditated murder, felony murder, and drive-by murder. (75 RT 14846-14848.) Appellant contends that the trial court should have instructed jurors that they must unanimously agree on which

theory supported the first-degree murder charge in order to convict. (AOB at pp. 210-223.) As appellant concedes, this Court has repeatedly rejected this claim. (See, e.g., *People v. Geier* (2007) 41 Cal.4th 555, 591called into question on other grounds by *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 252; *People v. Silva* (2001) 25 Cal.4th 345, 367; *People v. Carpenter* (1997) 15 Cal.4th 312, 394; *People v. Pride*, *supra*, 3 Cal.4th at pp. 249-250; see also *Schad v. Arizona* (1991) 501 U.S. 624, 645 [instructions that do not require the jury to agree on theory supporting murder conviction do not violate due process].) Appellant cites language from the plurality opinion in *People v. Dillon* (1983) 34 Cal.3d 441 for the proposition that unanimity as to the theory supporting the murder conviction is required because felony murder is distinct from other types of first-degree murder and does not require proof of malice as an element of the offense. (AOB at p. 214.) As this Court has explained, however, the cited language in *Dillon* "means only that the elements of the two kinds of murder differ; there is but a single statutory offense of murder. [Citations.] 'Felony murder and premeditated murder are not distinct crimes. . . .' [Citation.]" (*People v. Silva*, *supra*, at p. 367.) Furthermore, subsequent to its ruling in *Dillon* this Court has repeatedly reaffirmed its holding in *People v. Witt* (1915) 170 Cal. 104, that felony murder is not a separate offense than other forms of malice murder. (See, e.g., *People v. Geier*, *supra*, at p. 591; *People v. Hughes* (2002) 27 Cal.4th 287, 369; *People v. Gallego* (1990) 52 Cal.3d 115, 189.) Appellant offers nothing unique to his case that would justify overturning this Court's long-established precedent. This claim is without merit.

XIII. THE COURT CORRECTLY INSTRUCTED THE JURY THAT IT COULD INFER CONSCIOUSNESS OF GUILT BASED ON APPELLANT'S FLIGHT, SUPPRESSION OF EVIDENCE AND MOTIVE TO COMMIT THE CRIME

Appellant contends that instructions that allowed the jury to infer consciousness of guilt based on his flight after the commission of a crime (CALJIC No. 2.52), his false statements and attempts to suppress evidence (CALJIC Nos. 2.03 & 2.06), and his motive to commit the crime (CALJIC No. 2.51) violated his due process rights. He claims that these consciousnesses of guilt instructions are argumentative and impermissibly lessen the prosecution's burden of proof. As appellant acknowledges, California courts have rejected these claims and held that the challenged instructions are constitutional. This Court has held that CALJIC Nos. 2.03, 2.06 and 2.52 are not argumentative and do not create an unconstitutional permissive inference. (*People v. Jurado* (2006) 38 Cal.4th 72, 125-126 ["We have repeatedly rejected contentions that these standard jury instructions on consciousness of guilt were impermissibly argumentative or permitted the jury to draw irrational inferences about a defendant's mental state during the commission of the charged offenses."]; *People v. Mendoza* (2000) 24 Cal.4th 130, 179-180 [instruction on flight after commission of crime does not create an unconstitutional permissive inference].) Moreover, this Court has repeatedly reaffirmed that none of the standard consciousness of guilt instructions, including CALJIC No. 2.51, impermissibly lessen the prosecution's burden of proof. (*People v. Wilson* (2008) 43 Cal.4th 1, 23.) Appellant cites numerous non-binding, out-of-state cases questioning consciousness of guilt instructions, but offers no reason particular to his case to warrant overturning the precedent of this Court. This claim is without merit.

XIV. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE REGARDING THE SENTENCE OF APPELLANT'S ACCOMPLICE, NORMAN WILLOVER

Appellant contends that the trial court should have permitted him to introduce evidence that Norman Willover, who he contends was more culpable, received a sentence of life without parole. (AOB at pp. 242-249.) He contends that Willover's sentence was relevant mitigation evidence, and the failure to admit it rendered his death sentence arbitrary and unfair in violation of the Eighth Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution, as well as article I, sections 15 and 17 of the California Constitution. This Court has repeatedly rejected this argument, and appellant offers no compelling rationale to abandon the long-established rule. As the Court noted in *People v. Bemore* (2000) 22 Cal.4th 809, 857:

> The sentence received by an accomplice is not constitutionally or statutorily relevant as a factor in mitigation. Such information does not bear on the circumstances of the capital crime or on the defendant's own character and record. "[T]he fact that a different jury under different evidence, found that a different defendant should not be put to death is no more relevant than a finding that such a defendant should be sentenced to death. Such evidence provides nothing more than incomplete, extraneous, and confusing information to a jury, which is then left to speculate [on the matter]."

(*People v. Dyer* (1988) 45 Cal.3d 26, 70; see also, *Lewis v. Jeffers* (1990) 497 U.S. 764, 779 [proportionality review is not constitutionally required]; *Pulley v. Harris* (1984) 465 U.S. 37, 43 [no constitutional requirement of case-specific proportionality review in capital cases].)

This analysis is especially applicable in this case, because, as a minor, Willover was not eligible for a capital sentence. It is possible that if Willover's jury had the option to impose the death penalty, it would have felt that such a sentence was warranted based on the evidence. Thus,

Willover's sentence was not relevant mitigation evidence in appellant's case. His claim for relief on this basis should be denied.

XV. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT APPELLANT WAS FOUND IN POSSESSION OF WEAPONS PURSUANT TO SECTION 190.3, SUBDIVISION (B)

Appellant contends that the court erred in admitting evidence relating to three incidents of uncharged criminal conduct pursuant to section 190.3, subdivision (b). During the penalty phase, the prosecution introduced evidence of one incident where appellant was found in possession of two guns, and two separate incidents where he was found in possession of a large knife. (AOB at pp. 250-271.) Appellant argues that the evidence did not indicate that the acts involved force or violence or an implied threat of force or violence. He also contends that the jury instructions wrongly told jurors to presume that the acts in question involved the threat of force, and failed to define certain elements of the criminal acts. Contrary to appellant's argument, the trial court correctly instructed the jury on consideration of aggravating evidence under 190.3, subdivision (b), and did not abuse its discretion in finding that the acts in question involved an implied threat of force.

A. Background

During the penalty phase, the prosecution introduced evidence of several uncharged criminal acts, pursuant to Penal Code section 190.3, subdivision (b). Appellant contends that three of the acts involving possession of a weapon were improperly admitted, but concedes that the other acts, including assault with intent to cause great bodily injury, possession of a sawed-off rifle, and witness intimidation, were admissible. The three incidents appellant claims were wrongfully admitted are described below.

1. Incidents involving weapon possession

On January 14, 1997, Los Banos Police Officer Bret Torongo conducted a traffic stop of a speeding car in which appellant was a passenger. (79 RT 15679.) Appellant was seated in the right-hand rear seat. (79 RT 15681.) The driver gave permission to search the vehicle. (79 RT 15681.) Officer Torongo discovered two .357 caliber handguns concealed under the right front passenger seat, directly in front of where appellant had been sitting. (79 RT 15681.) Officer Torongo searched appellant's pockets and found a round of .357 caliber ammunition, which could have been used in either of the two guns. (79 RT 15682.) Appellant was arrested and taken to the police station. Appellant was on probation at the time, and his probation officer Kevin Christian was summoned to the Los Banos police station to discuss the incident with appellant. (80 RT 15843.) Appellant admitted that he bought the two guns off of somebody in Seaside.[28] (80 RT 15843.)

On July 25, 1997, Officer George Duffy, a public safety officer in Marina, conducted a traffic stop of a car in which appellant was a passenger. (80 RT 15826.) Appellant was seated in the front passenger seat. (80 RT 15826.) As Officer Duffy walked up and looked into the passenger-side of the car, he observed knife located "in very close proximity to [appellant's] left leg," near his hip, between appellant and the center console. (80 RT 15828.) The knife was about nine inches in overall

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[28] Appellant contends that the prosecutor failed to connect appellant's admission of possessing the guns to the traffic stop. (AOB at p. 267, fn. 70.) However, review of the record as a whole demonstrates that Officer Christian's testimony was specific to the January 14, 1997, traffic stop in which two handguns were discovered. (79 RT 15679-15682; 80 RT 15843.) Moreover, at trial, defense counsel did not argue that Officer Christian's January, 1997 conversation with appellant related to a different incident. (80 RT 15844-15845.)

length, with a blade that was approximately four and a half inches long. The knife was in a tan holster and had a wood handle. (80 RT 15827-15828.)

On October 20, 1997, Officer Jason Tanner, a public safety officer in Marina, conducted a traffic stop of a vehicle in which appellant was a passenger. (80 RT 15832.) Appellant was seated in the front passenger seat. (80 RT 15840.) Appellant's probation officer, Kevin Christian, was called to the scene. Officer Christian ordered the occupants outside of the car and conducted a search of the area where appellant was sitting. He discovered knife that was approximately eight inches long. (80 RT 15843.) The knife was located "right where the door down below next to his seat." (80 RT 15842.) He described the knife as a "survival knife," a "buck knife," "similar to a Rambo knife." (80 RT 15842.)

2. Jury instructions on prior criminal acts

After consulting with the parties, the court instructed the jury on consideration of evidence received under section 190.3, subdivision (b).

> Evidence has been introduced for the purpose of showing that the defendant, Joseph Kekoa Manibusan, has committed the following criminal acts which involved the express or implied use of force or violence or the threat of force or violence, assault by means of force likely to produce great bodily injury on Yolina Manibusan on January 29th, 1995; possession of a sawed-off rifle at Community Hospital on January 30th, 1995; witness intimidation of Dennis Jarvis at Community Hospital on July 30 -- excuse me, January 30, 1995; possession of a firearm concealed on his person at Community Hospital, sawed-off rifle, on January 30th, 1995; making threat to inflict great bodily injury or death on Dennis Jarvis on January 30th, 1995; infliction of injury on Leslie Cline Plieankul, the mother of his child, on August 26th, 1995; possession of concealed firearms in a vehicle on January 14th, 1997; possession of a dirk or dagger on July 25th and October 20th of 1997; battery on a prisoner, Norman Willover, on June 10, 1998; and assault against custodial officer Chad Giraldez on August 21st, 2000.

> 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, Joseph Kekoa Manibusan, did in fact commit the criminal activity. A juror may not consider any evidence of any other criminal acts 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 reason.

(92 RT 182476-18247.)

B. Legal Standards

"Factor (b) of section 190.3 permits the introduction of evidence of '[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.'" (*People v. Michaels* (2002) 28 Cal.4th 486, 535.) "Possession of a firearm is not, in every circumstance, an act committed with actual or implied force or violence." (*People v. Bacon* (2010) 50 Cal.4th 1082, 1127.) Courts have repeatedly held that possession of a weapon in a custodial setting involves an implied threat of violence even when there is no evidence that the weapon was used or displayed in a threatening manner. (*People v. Michaels*, *supra*, at p. 535.) In a noncustodial setting, an implied threat of force or violence may be found based on the circumstances surrounding a possession of the weapon. (*People v. Bacon*, *supra*, at p. 1127.) A trial court's finding that a defendant's actions demonstrated an implied threat of force and are admissible under section 190.3, subdivision (b), is reviewed for abuse of discretion. (*People v. Bacon*, *supra*, at p. 1127.)

C. The Court Did Not Abuse Its Discretion in Finding That Evidence of Appellant's Possession of Weapons Demonstrated an Implied Threat of Violence, and Was Therefore Admissible Under Section 190.3, Subdivision (b)

The trial court properly found that appellant possessed the knife and the guns under circumstances indicating an implied threat of violence. (See *People v. Bacon*, *supra*, 50 Cal.4th at p. 1027.) The two handguns found in the car were concealed beneath the seat directly in front of appellant. (See *People v. Michaels*, *supra*, 28 Cal.4th at p. 536 [implied violence from possession of a concealed weapon].) Live ammunition of the same caliber as the two guns was found in appellant's pocket. Appellant was on probation at the time. (80 RT 15844; see *People v. Bacon*, *supra*, at p. 1127 [infer implied threat of violence from defendant's possession of a weapon while on parole].) Additionally, he possessed the guns under circumstances similar to those of the charged offense. (See *People v. Michaels*, *supra*, at p. 536 [proper to infer implied threat of violence if weapons are possessed under similar circumstances as the charged offense].)

Appellant's possession of a large knife during the two traffic stops in July and October of 1997 also indicated an implied threat of violence. The knife in question was a large, survival knife, not a small pocket knife. Although such knives might be commonly used in hunting, fishing, and other outdoor activities, it is unusual to have such a knife in one's possession while driving around in a car in an urban setting. Additionally, during the October 20, 1997 incident, the knife was concealed between he car door and the seat. (See *People v. Michaels*, *supra*, 28 Cal.4th at p. 536 [implied violence from possession of a concealed knife].) During the July 25, 1997 incident, the knife was near the center console of the car, in a holster which was positioned very close to appellant's hip. Appellant could

have quickly reached for the knife and used it in a rapid, surprise attack. (See *People v. Dykes*, *supra*, 46 Cal.4th at p. 777 [gun possessed "in a manner that rendered it available for instant, surprise use. . ."].) Finally, as noted, appellant was on probation and subject to search at the time of both incidents. (See *People v. Bacon*, *supra*, 50 Cal.4th at p. 1127 [implied threat of violence when defendant possessed a weapon while on parole.)

In light of all the surrounding facts, such as the possession of the knife in an unusual urban setting, the possession of the guns in circumstances bearing similarity to the charged offense, appellant's concealment of the weapons, and his probation status, the trial court did not abuse its discretion in finding that appellant possessed the weapons in circumstances indicating an implied threat of violence.

D. The Court Did Not Err in Instructing the Jury

The court instructed the jury using CALJIC No. 8.87, which stated in pertinent part that "evidence has been introduced for the purpose of showing that the defendant, Joseph Kekoa Manibusan, has committed the following criminal acts which involved the express or implied use of force or violence or the threat of force or violence. . ." (92 RT 182476.) Appellant contends that this instruction essentially directed the jury to presume that the acts in question involved force or the implied threat of violence. He argues that it improperly removed the factual question of force from the jury, in violation of his due process rights. (AOB at pp. 264-266.)

This Court has repeatedly rejected appellant's argument. (See, e.g. *People v. Lewis II*, *supra*, 43 Cal.4th at p. 530; *People v. Dunkle* (2005) 36 Cal.4th 861, 922-923 disapproved of on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390; *People v. Nakahara* (2003) 30 Cal.4th 705, 720.) As this Court has explained,

> We recently held that CALJIC No. 8.87 is not invalid for failing to submit to the jury the issue whether the defendant's acts involve the use, attempted use, or threat of force or violence. [Citation.] The question whether the acts occurred is certainly a factual matter for the jury, but the *characterization* of those acts as involving an express or implied use of force or violence, or threat thereof, would be a legal matter properly decided by the court.

(*People v. Nakahara, supra*, 30 Cal.4th at p. 720 [original emphasis].)

Appellant also contends that the court should have provided more specific instructions to the jury regarding what type of weapon qualifies as a dirk or dagger under section 12020, subdivision (a), and clarified the requirements of possession and constructive possession. (AOB at pp. 260-263, 267-269.) Contrary to appellant's argument, the court was not required to provide additional instructions clarifying the elements of the unadjudicated crimes. Appellant did not request more specific instructions at trial. (*People v. Taylor* (2010) 48 Cal.4th 574, 654 ["We have repeatedly held, however, that absent a request, a trial court has no duty to instruct on the elements of unadjudicated crimes admitted under [Penal Code section 190.3] factor (b)."].) Moreover, when discussing the instructions with the court, trial counsel seemingly expressed a preference for describing the prior violent acts without reference to Penal Code sections. (78 RT 15444-15449.)

Appellant offers no compelling reason to abandon this Court's prior holdings upholding the validity of CALJIC No. 8.87 and declining to require instruction on the elements of unadjudicated prior crimes. His claims of instructional error should be denied.

E. Possession of a Weapon Is Not an Unconstitutionally Broad Aggravating Factor

Appellant argues that possession of a weapon is an unconstitutionally broad aggravating factor. As noted above, however, a defendant's non-

custodial possession of a weapon can be used as an aggravating factor only when other surrounding circumstances indicate there was an implied threat of force or violence. (*People v. Bacon*, *supra*, 50 Cal.4th at p. 1027.) Moreover, this court has held that consideration or unadjudicated criminal conduct under Penal Code section 190.3, subdivision (b) does not violate the state or federal Constitution. (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 358.) Appellant cites no contrary authority holding that consideration of a defendant's possession of a weapon under circumstances indicating a threat of force or violence, in accord with Penal Code section 190.3, subdivision (b), is unconstitutional. His claim should be rejected.

F. Any Error Was Harmless

Even if the trial court erred in admitting evidence that appellant was found in possession of knives and two guns, any error was harmless and appellant is not entitled to relief. "Error in the admission of evidence under section 190.3, factor (b) is reversible only if 'there is a reasonable possibility it affected the verdict,' a standard that is 'essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24.'" (*People v. Lewis II*, *supra*, 43 Cal.4th at p. 527.)

Here, in addition to the challenged weapons evidence, the prosecution introduced evidence of numerous unadjudicated criminal acts by appellant. For instance, the mother of appellant's child testified that he repeatedly beat her badly enough to require medical attention. (79 RT 15663-15664.) There was also evidence that appellant beat his sister to the point of unconsciousness, stomped on her head, and that a relative who witnessed the fight thought he was trying to kill her. (81 RT 16040, 86 RT 17112-17113, 90 RT 17854-17855.) She was admitted to the hospital, and when appellant came looking for her several hours later, he carried a sawed-off rifle and live ammunition with him. (80 RT 15808-15811.) He also

threatened hospital security guard who reported him to the police. (79 RT 15692.)

The prosecution also introduced evidence demonstrating that appellant's violent behavior continued after his arrest. Correctional officers testified that he aggressively beat his accomplice, Norman Willover, in June, 1998, when they were briefly placed in the same holding cell, and that he participated in a prison riot, charging so forcefully into a guard that he split the guard's shield. (80 RT 15848-15855; 80 RT 15857, 15861-15864.) He also wrote a letter to a friend bragging about his role in the riot, and stating that he liked to "get rowdy" with the prison guards. (91 RT 18031-18032.)

Appellant does not argue that this evidence was improperly admitted. Many of these incidents were far more violent and disturbing than possession of knives and two guns. Indeed, the prosecutor focused his closing argument on these other instances of violence and made only passing reference to appellant's possession of weapons. (91 RT 18006.) In light of the other overwhelming evidence of violence, there is no reasonable possibility that evidence demonstrating that appellant possessed guns and knives during several traffic stops affected the verdict. (See *People v. Lewis II*, *supra*, 43 Cal.4th at p. 527.) Therefore, any error was harmless, and appellant is not entitled to relief.

XVI. THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE REGARDING INCARCERATION CONDITIONS OF LIFE PRISONERS

Appellant contends that the trial court erred in excluding mitigating evidence and expert testimony about the conditions of incarceration appellant would face if sentenced to life without parole (LWOP). (AOB at pp. 272-276.) This Court has repeatedly ruled that such evidence is inadmissible because it does not relate to a defendant's character,

culpability, or circumstances of the offense. (See, e.g., *People v. Coddington* (2000) 23 Cal.4th 529, 636; overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1069; see also § 190.3.)

Moreover, appellant mischaracterizes the type of evidence that his trial counsel sought to admit. Contrary to appellant's argument, trial counsel did not seek to admit evidence that LWOP prisoners faced harsh conditions. Rather, trial counsel sought to admit expert testimony informing the jury that if sentenced to LWOP, appellant would in fact spend the rest of his life in prison, and would not be subject to early release.[29] Trial counsel also sought a jury instruction to the same effect.[30] This court has ruled that such an instruction is improper because it misstates the law. (*People v. Frye* (1998) 18 Cal.4th 894, 1028, [holding that the court did not err in refusing to give an instruction substantially similar to the one requested because it was an incorrect statement of law] overruled on other grounds by *People v. Doolin*, *supra*, 45 Cal.4th 390.) By extension, expert testimony to that effect is also impermissible. Furthermore, testimony about the sentences in other infamous murder cases would have been irrelevant. (See Evid. Code, § 352; Pen. Code, § 190.3.)

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[29] In his motion, appellant asserted that, based on several older high-profile cases, it was likely that jurors had a misconception that LWOP prisoners would eventually be released. He moved to admit expert testimony on this topic, stating that "It is anticipated that the expert will explain that many convicted killers, like Archie FAIN, Sirhan SIRHAN and Charles MANSON were convicted under different laws than those which exist today." (3 CT 858.)

[30] Appellant also requested that the jury be instructed that "the penalty of life in prison without the possibility of parole means the defendant will never be paroled nor will he be eligible for parole." (3 CT 863.) A second proposed instruction dealt with the Governor's ability to commute a LWOP sentence. (3 CT 864.

Appellant also argues that, although the court cited *People v. Fudge* (1994) 7 Cal.4th 1075, in its ruling, it failed to understand the type of evidence that was admissible under that ruling. *Fudge* held that expert testimony that a defendant would successfully adapt to the conditions of incarceration and lead a productive life in prison was admissible mitigating evidence. (*Fudge*, *supra*, at pp. 1112-1113, 1117.) Appellant, however, never sought to admit any evidence of this type. His motion was limited to evidence that an LWOP prisoner would never be released. Thus, the court's comments about *Fudge* are irrelevant. In any event, the comments also correctly reflected the law, as the court noted that, if trial counsel at some point sought to offer evidence regarding appellant's ability to assimilate in prison, it "may very well be admissible." (40 RT 7925.)

Additionally, appellant contends that the trial court's erroneous exclusion of evidence of LWOP prison conditions magnified the alleged jury misconduct discussed in Argument II, regarding allegations that jurors improperly discussed prison conditions. Appellant's argument is unavailing. First, as detailed above, the jury did not commit misconduct by discussing the life experiences of one of the jurors who happened to be employed at a local prison. (*People v. Pride*, *supra*, 3 Cal.4th at pp. 267-268.) Second, appellant never in fact sought to admit evidence regarding the incarceration conditions of LWOP prisoners, which would have been inadmissible in any event. Therefore, there was no impact on the alleged misconduct.

Finally, even if the court should have admitted the requested mitigating evidence, any error was harmless beyond a reasonable doubt. (See *People v. Demetrulias* (2006) 39 Cal.4th 1, 35 [improper exclusion of mitigating evidence is not grounds for reversal if it is harmless beyond a reasonable doubt]; see also *Chapman v. California*, *supra*, 386 U.S. at pp. 23-24.) In addition to evidence regarding the random and brutal nature of

the charged offenses, the prosecution also adduced other evidence showing that appellant was extremely violent. As discussed above, his former girlfriend and mother of his child testified that appellant repeatedly assaulted her. (79 RT 15663-15664, 15674.) The prosecution also introduced evidence that appellant viciously attacked his twin sister, stomping on her head after he had already knocked her unconscious. (81 RT 16040, 86 RT 17112-17113.) Because of the overwhelming evidence establishing aggravating factors presented by the prosecution, there is no possibility that mitigating evidence regarding the conditions faced by LWOP prisoners or testimony or instruction regarding the potential for early release would have swayed the jury. Therefore, any error was harmless beyond a reasonable doubt, and appellant is not entitled to relief.

XVII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant asserts a number of challenges to California's death penalty statute, although he acknowledges that they have previously been decided adversely to his position. The specific claims are addressed briefly below.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant asserts that Penal Code section 190.2 is constitutionally defective as it fails to properly narrow the class of death-eligible defendants. This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *People v. Stanley* (2006) 39 Cal.4th 913, 958 [and cases cited therein]; *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 43 [and cases cited therein].)

B. The Aggravating and Mitigating Factors Provided in Penal Code Section 190.3, and the Instructions Explaining the Application of These Factors to the Jury, Do Not Render Appellant's Sentence Unconstitutional

1. Penal Code section 190.3, subdivision (a) is not overbroad

Penal Code section 190.3, subdivision (a) directs the jury to consider the circumstances of the crime of which the defendant was convicted. . .and the existence of any special circumstances found to be true." (See also CALJIC No. 8.85.) Appellant claims that this aggravating factor is too broad, allows for the introduction of extraneous and inflammatory evidence, and allows the jury to impose the death penalty in an arbitrary and capricious manner. Courts have repeatedly rejected this argument, holding that factor (a) is not overboard or unconstitutionally vague. (*Tuilaepa v. California* (1994) 512 U.S. 967, 976; *People v. Lewis* (2009) 46 Cal.4th 1255, 1318-1319.) Appellant offers no reason specific to his case to abandon these prior holdings.

2. Penal Code section 190.3, subdivision (b) did not violate appellant's right to due process, trial by jury or reliable determination of penalty

Appellant contends that Penal Code section 190.3, subdivision (b) is unconstitutional because it allows jurors to consider unadjudicated criminal acts without first requiring that the jurors unanimously agree that the prior acts occurred. This Court has recently rejected this claim, stating that "Section 190.3, factor (b) is not unconstitutional for failing to require . . . jury unanimity with respect to the conduct." (*People v. Famalaro* (2011) 52 Cal.4th 1, 42, citing *Tuilaepa v. California*, *supra*, 512 U.S. at p. 977.) Appellant offers no reason specific to his case for the Court to abandon its prior holdings.

3. The court was not required to delete inapplicable sentencing factors or to delineate between aggravating and mitigating factors

Appellant claims the court erred by not deleting inapplicable sentencing factors from CALJIC No. 8.85. He contends that the failure to

delete inapplicable factors allowed the jury to find aggravation based on non-existent factors and resulted in an unreliable sentencing determination. Contrary to appellant's argument, the court is not required to delete inapplicable factors from CALJIC No. 8.85. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1179; *People v. Cook* (2007) 40 Cal.4th 1334, 1366; *People v. Perry* (2006) 38 Cal.4th 302, 319; *People v. Smith*, *supra*, 35 Cal.4th at pp. 368-369.)

He also contends that the court's failure to differentiate between aggravating and mitigating factors allowed the jury to use intended mitigation evidence to support the imposition of an aggravated sentence. This claim should also be rejected. There is no constitutional requirement that Penal Code section 190.3 define which factors are aggravating and which are mitigating. (*People v. Espinoza* (1992) 3 Cal.4th 806, 827; *People v. Raley* (1992) 2 Cal.4th 870, 919.)

4. The court was not required to instruct the jury that certain factors were relevant solely as mitigation

Similar to his claim above, appellant contends that the trial court should have instructed the jury that certain factors were relevant only as mitigating evidence. There is no requirement, however, to instruct the jury that mitigating factors can only be mitigating. (*People v. Perry*, *supra*, 38 Cal.4th at p. 319; *People v. Farnam* (2002) 28 Cal.4th 107, 191.)

5. The wording of the instructions did not prevent the jury from considering relevant mitigating evidence

Appellant contends that use of adjectives such as "extreme" and "substantial" in CALJIC No. 8.85 to qualify some of the mitigating factors improperly limited the jury's ability to consider mitigating information. Courts have repeatedly rejected this claim, holding that CALJIC No. 8.85 is not unconstitutional for using restrictive adjectives such as "extreme" and

"substantial." (*People v. Perry*, *supra*, 38 Cal.4th at p. 319; *People v. Moon*, *supra*, 37 Cal.4th at p. 42, citing *People v. Weaver* (2001) 26 Cal.4th 876, 993.)

6. The jury was not required to make written findings

Appellant argues that the failure to require the jury to make written findings regarding which aggravating factors it relied on in support of its verdict violates his constitutional rights. There is no requirement, however, that the jury file written findings as to which aggravating factors were relied on in imposing the death penalty. (*People v. Gonzales* (2011) 52 Cal.4th 254, 333; *People v. Davenport* (1995) 11 Cal.4th 1171, 1232; *People v. Medina* (1995) 11 Cal.4th 694, 782; *People v. Turner* (1994) 8 Cal.4th 137, 209.)

C. The Death Penalty Statute and Related Instructions Provide Adequate Guidance to the Jury During Penalty Phase Deliberations

Appellant contends that the instructions given by the court were insufficient to guide the exercise of the jury's discretion during the penalty phase. Courts have rejected this contention, and have held that the standard CALJIC penalty-phase instructions are adequate to inform the jurors of their sentencing responsibilities under federal and state constitutional standards. (*People v. Gurule* (2002) 28 Cal.4th 557, 659.) Appellant's specific claims are discussed in detail below.

1. The instructions are not unconstitutional for failure to assign the state the burden of proof as to aggravating factors

Relying on *Apprendi v. New Jersey* (2000) 530 U.S. 466, and its progeny, appellant argues that California's death penalty law is unconstitutional because it fails to require that the state prove beyond a reasonable doubt the existence of aggravating factors, that aggravating

factors outweigh mitigating factors, and that death is the appropriate punishment. This Court has rejected this argument, finding that California's death-penalty sentencing scheme is not unconstitutional based on the holdings in *Apprendi v. New Jersey*, *supra*, at p. 478, or *Ring v. Arizona* (2002) 536 U.S. 584, or *Blakely v. Washington* (2004) 542 U.S. 296, or *United States v. Booker* (2005) 543 U.S. 220, or *Cunningham v. California* (2007) 549 U.S. 270. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1250 & fn. 22.)

Specifically, as this Court has recently held, "[t]he jury need not. . . find beyond a reasonable doubt that an aggravating circumstance is proved (except for section 190, factors (b) and (c)), find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, or find beyond a reasonable doubt that death is the appropriate penalty." (*People v. Gonzales*, *supra*, 52 Cal.4th at p. 333.)

2. The jury was not required to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors in order to impose the death penalty

Appellant asserts that the court should have instructed the jury that it had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before it could vote to impose the death penalty. This claim should be rejected. As noted, there is no requirement that jury find beyond a reasonable doubt that aggravating factors outweighed mitigating factors and that death was the appropriate penalty. (*People v. Gonzales*, *supra*, 52 Cal.4th at p. 333; *People v. Medina* (1995) 11 Cal.4th 694, 782; *People v. Diaz* (1992) 3 Cal.4th 495, 569.)

3. The court did not err in instructing the jury on the burden of proof at the penalty phase

Appellant asserts that the standard jury instructions informing jurors that there is no burden of proof as to whether death or life without parole is

the appropriate punishment are unconstitutional. This Court has rejected this argument, and holds that the jury need not be instructed as to any burden of proof in selecting the penalty to be imposed. (*People v. Burgener* (2003) 29 Cal.4th 833, 885.) Appellant offers nothing specific to his case to distinguish it from cases previously decided.

4. The jury was not required to reach an unanimous conclusion regarding the applicability of aggravating factors

Appellant argues that the jury should have been required to reach a unanimous agreement on which aggravating factors it found applicable. Contrary to appellant's argument, there is no requirement that the jury achieve unanimity as to specific aggravating circumstances. (*People v. Gonzales*, *supra*, 52 Cal.4th at p. 333; *People v. Morrison* (2004) 34 Cal.4th 698, 731-732.)

5. The jury was not required to make written findings regarding aggravating factors

Appellant contends that the jury should have been required to make written findings regarding which aggravating factors it relied on in imposing the death penalty. He notes that in non-capital cases, the sentencer is required to state the reasons for its sentencing choice on the record, and the lack of a similar requirement in capital cases violates equal protection. As discussed above, this Court has repeatedly rejected this claim and found that written findings are not required. (*People v. Morrison*, *supra*, 34 Cal.4th at pp. 730-731.) Appellant's equal protection claim also fails. As this Court has noted, "capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law." (*People v. Manriquez* (2005) 37 Cal.4th 547, 590.)

6. The trial court was not required to instruct that the jury must presume that life without the possibility of parole is the appropriate sentence

Appellant contends the trial court erred by failing to instruct the jury that it should presume that life without parole is the appropriate punishment. The Court rejected this contention in *People v. Arias*, *supra*, 13 Cal.4th at p. 190. The Court has affirmed that holding on several other occasions. (See, e.g., *People v. Kipp* (2001) 26 Cal.4th 1100, 1137; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064.) Appellant offers no compelling reason for the Court to reconsider its prior holdings.

D. The Instructions Gave the Jury Proper Guidance for the Exercise of Its Discretion During the Penalty Phase

Appellant contends that CALJIC No. 8.88 is unconstitutionally vague and ambiguous, and fails to jurors provide proper guidance during penalty phase deliberations. This Court has repeatedly held that CALJIC No. 8.88 is constitutional. (*People v. Rogers*, *supra*, 46 Cal.4th at p. 1179; *People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Crew* (2003) 31 Cal.4th 822, 858.) Appellant's specific contentions are addressed below.

1. CALJIC No. 8.88 does not provide an impermissibly vague standard for penalty deliberations

Appellant contends that CALJIC No. 8.88 is impermissibly vague because it instructs jurors that they should consider imposing the death penalty if they find "that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." He contends that the "so substantial" language is ambiguous, and fails to provide adequate guidance to the jury. This Court has repeatedly rejected this claim, holding that the instruction is constitutional and that that the challenged language is not vague or ambiguous. (*People v. Chatman* (2006) 38 Cal.4th 344, 409; *People v.*

Arias, *supra*, 13 Cal.4th at p. 170.) Appellant offers nothing specific to his case that would justify a departure from these prior holdings.

2. CALJIC No. 8.88 is not unconstitutional for failing to inform the jury that it must determine if the death penalty is the appropriate punishment, not merely an authorized punishment

Appellant argues that the instructions did not make it clear that jury was supposed to determine whether death was the appropriate punishment, not merely an authorized punishment. Appellant's claim has been repeatedly rejected by the courts of this state. Specifically, this Court has held that CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury that death must be the appropriate penalty, not just the warranted penalty." (*People v. Moon*, *supra*, 37 Cal.4th at p. 43, citing *People v. Boyette*, *supra*, 29 Cal.4th at p. 465.) Nothing in this case justifies a departure from this Court's long-established precedent.

3. CALJIC No. 8.88 is not unconstitutional for the alleged failure to inform jurors that they must impose a sentence of life without parole if they find mitigating circumstances outweigh aggravating circumstances

Appellant contends that CALJIC No. 8.88 does not reflect the language of section 190.3, which states that the jury "shall impose" a sentence of life without parole if it finds that mitigating circumstances outweigh aggravating circumstances. He contends that the language of the instruction fails to adequately inform the jury of this duty. This Court, however, has repeatedly held that CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury that if it finds the circumstances in mitigation outweigh those in aggravation, it is required to impose a sentence of life without possibility of parole." (*People v. Rogers*, *supra*, 46 Cal.4th at p. 1179; *People v. Moon*, *supra*, 37 Cal.4th at p. 42, citing *People v. Dennis* (1998) 17 Cal.4th 468, 552.)

E. California's Lack of Intercase Proportionality Review of Sentences Is Constitutional

Appellant argues that he should have been allowed to present evidence regarding the lesser sentence of his accomplice, Norman Willover, and that California's lack of proportionality review of sentences is unconstitutional. He also argues that, because such review is available in non-capital cases, the failure to provide it in capital cases violates equal protection. This claim has been rejected by the courts. The absence of intercase proportionality review does not violate the Eight and Fourteenth Amendments to the United States Constitution. (*People v. Thompson* (2010) 49 Cal.4th 79, 143; see also, *Lewis v. Jeffers*, *supra*, 497 U.S. at p. 779 [proportionality review is not constitutionally required]; *Pulley v. Harris*, *supra*, 465 U.S. at p. 43 [no constitutional requirement of case specific proportionality review in capital cases].) Additionally, as discussed above, capital and non-capital defendants are not similarly situated for equal protection purposes. (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 590.)

F. Death Penalty Is Not Cruel and Unusual Punishment

Appellant asserts that the death penalty is cruel and unusual punishment and violates the Eighth Amendment of the United States Constitution. This argument has been repeatedly rejected. (See, e.g., *People v. Lomax* (2010) 49 Cal.4th 530, 595 [and cases cited therein].) Appellant offers no reason specific to his case to abandon this Court's long-established precedent.

G. California's Use of the Death Penalty Does Not Violate the Eighth Amendment or International Law

Finally, appellant contends that California's use of the death penalty violates international law, the Eighth Amendment, and lags behind evolving standards of decency. This Court has repeatedly rejected this

claim. (See, e.g. *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Perry*, *supra*, 38 Cal.4th at p. 322; *People v. Brown* (2004) 33 Cal.4th 382, 403-404.) As discussed, appellant's sentence complies with all constitutional and statutory requirements. "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (*People v. Friend* (2009) 47 Cal.4th 1, 90.) Appellant's claim should be rejected.

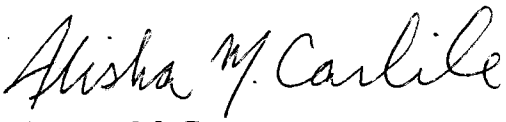
XVIII. APPELLANT IS NOT ENTITLED TO RELIEF BASED ON CUMULATIVE ERROR

Appellant argues that even if none of the errors he alleges with regard to jury selection, jury misconduct, evidentiary error, and instructional error individually entitle him to relief, the cumulative impact of these errors resulted in an unfair trial, and his resulting conviction and death penalty sentence violate due process. (AOB at pp. 315-317.) As set forth above, however, appellant has failed to establish the existence of any errors which could be considered cumulatively. Therefore, appellant is not entitled to relief and his claim should be rejected.

Dated: December 6, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
ALICE B. LUSTRE
Deputy Attorney General



ALISHA M. CARLILE
Deputy Attorney General
Attorneys for Respondent

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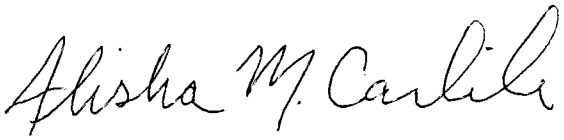
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 39,654 words.

Dated: December 6, 2011

KAMALA D. HARRIS
Attorney General of California



ALISHA M. CARLILE
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Joseph K. Manibusan** No.: **S094890**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On December 6, 2011, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope 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:

David S. Adams
Attorney at Law
P. O. Box 1670
Hood River, OR 97031

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

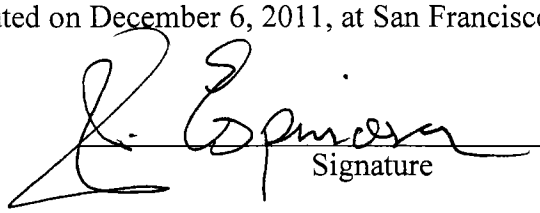
California Appellate Project
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

The Honorable Dean D. Flippo
District Attorney
Monterey District Attorney's Office
P O. Box 1131
Salinas, CA 93902

Monterey County Superior Court
Monterey Division
1200 Aguajito Road
Monterey, CA 93940

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 December 6, 2011, at San Francisco, California.

J. Espinosa
Declarant



Signature

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