In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** v. **JOHN MYLES,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S097189

San Bernardino County Superior Court
Case No. FSB 10937
The Honorable Michael A. Smith, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

In July 1995, John Myles was paroled from state prison after serving a term for robbing a Denny's restaurant in 1992. In February 1996, Myles was at his mother's apartment in San Bernardino when he became perturbed with a guest and pulled out a handgun and shot the guest in the face. The following April, Myles and a confederate used guns to rob a property management firm in San Diego and shot at a motorist when he got too close to the getaway car.

On April 11, 1996, Myles drove into a neighborhood in San Bernardino, stopped near a driveway where some young men were socializing, and asked for help in finding someone. When a nice young man named Ricky Byrd approached Myles's car, Myles shot him down in cold blood and killed him. Nine days later, on April 20, 1996, Myles and Tony Rogers robbed the Pepper Steak restaurant in San Bernardino. They accosted customers and employees and took money from all. During the course of the robbery, one of the customers, retired Colton Police Captain Fred Malouf confronted Rogers after Myles grabbed Malouf's wife Donna by the neck and threatened to blow her head off. Rogers and Malouf shot at each other. Malouf was mortally wounded and Rogers was shot in the stomach. Before running out of the restaurant, Rogers stood over Malouf and executed him with more gunfire. In the meantime, when Myles heard the gunfire, he took the money he had collected, ran away, and temporarily escaped.

Myles was caught and ultimately tried for the murders of Ricky Byrd and Fred Malouf with special circumstances. He was convicted of both crimes and sentenced to death. Myles now appeals his convictions and penalty. All of Myles arguments for the reversal of his convictions and penalty are without merit. Myles received a fair trial and due process. His convictions and penalty should stand.

STATEMENT OF THE CASE

On November 1, 1996, the San Bernardino District Attorney filed an amended information charging Myles with the murder of Ricky Byrd (Pen. Code, § 187, subd. (a) - count 1). Myles and co-defendant Tony Rogers were charged with the murder of Fred Malouf (Pen. Code, § 187, subd. (a) - count 2). It was alleged that this murder was committed during the course of a robbery. (Pen. Code, § 190.2, subd. (a)(17).) A multiple murder special circumstance was also alleged. (Pen. Code, § 190.2, subd. (a)(3).) Myles and Rogers were also charged together with one count of robbery (Pen. Code, § 211 - count 3), and Myles was charged separately with another count of robbery (Pen. Code, § 211 - count 4). It was alleged that all of these crimes were committed with the personal use of a handgun (Pen. Code, § 12022.5, subd. (a)). Myles was also charged with being a felon in possession of a firearm (Pen. Code, § 12021, subd. (1) - count 5.) Finally, a prior strike offense was alleged against Myles. (1 CT 55-60.)

On December 6, 2000, a joint trial started on counts 2 through 5 against Myles and Rogers. (2 CT 338.) For the purpose of the felon in possession of a firearm charge, Myles admitted suffering a prior robbery conviction. He also admitted the truth of the prior strike allegation. (10 RT 2118-2126.) On February 5, 2001, the jury found Myles and Rogers guilty as charged.[1] The jury also made true findings as to the gun use allegations and the special circumstance of murder in the course of a robbery. (2 CT 483-491; 11 RT 2475-2486.)

On February 26, 2001, trial started on count 1 in front of the same jury. (2 CT 510-512; 11 RT 2487-2491.) On March 6, 2001, the jury found Myles guilty and made true findings on Myles as to the personal use

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[1] Rogers was subsequently sentenced to life without the possibility of parole, plus 10 years.

of a firearm and the multiple murder special circumstance.[2] (2 CT 577-580; 12 RT 2798-2803.)

On March 13, 2001, the penalty phase of the trial started in front of the same jury. (3 CT 610-613; 13 RT 2875.) On March 26, 2001, the jury determined that the appropriate penalty was death. (3 CT 718; 14 RT 3212-3213.)

On April 23, 2001, the trial court denied Myles's motions for new trial and to reduce the penalty. Myles was sentenced to death. (3 CT 578-760; 14 RT 3218-3252.)

STATEMENT OF FACTS

A. The Guilt Phase

1. Prosecution's case

a. The murder of Ricky Byrd

On April 11, 1996, about 2:00 p.m., Jshakar "Solo" Morris and Myles approached Juli Inkenbrandt, and Morris asked for a ride "over to the west side" in San Bernardino. Inkenbrandt knew Morris because they were both drug dealers, friends, and Inkenbrandt was a methamphetamine addict. (12 RT 2609-2616.) Inkenbrandt had her year old daughter with her and was concerned for their safety. She did not want to know what the two men were going to do but she wanted to protect her daughter. She asked Morris, "Am I in any danger or my baby in any danger?" (12 RT 2613.) Morris and Myles answered "No," and said they were going to see a man and collect some money. (12 RT 2613-2616.)

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[2] The trial court imposed sentences on counts 3, 4, and 5 but vacated them on April 24, 2001. Myles was resentenced to 10 years in prison on count 3 (stayed), plus 10 years for the gun use (not stayed). On count 4, the sentence was stayed. On count 5, a consecutive term of 1 year, 4 months was imposed. Two consecutive 10-year terms were imposed for the gun use on counts 1 and 2. (3 CT 761-766; 14 RT 3253-3262.)

Inkenbrandt sat in the driver's seat and Morris sat in the passenger seat next to her. Inkenbrandt's baby was in her carseat directly behind Inkenbrandt and Myles sat next to her in the back seat behind Morris. (12 RT 2612-2613.)

Inkenbrandt drove to Magnolia Avenue in the California Gardens area of San Bernardino. She had no idea who Morris and Myles were looking for until Myles told her to pull over next to a group of young men. Inkenbrandt did as she was told and stopped the car in the middle of the street. (12 RT 2617-2619.)

It was now about 3:20 p.m. Ricky Byrd was with his friends LaTroy Campbell, Lewis Hopkins, Robert Gaston, and his best friend, Daniel Robinson, in the front yard of the house at 2005 Magnolia Avenue. (12 RT 2585-2586.) According to Robinson, "Ricky was the nicest guy I ever knew." (12 RT 2592.) Byrd was not prejudiced and did not discriminate against anybody. (12 RT 2592.) All the young men were talking about their future plans as they were all getting their lives on track. They all talked about going to college. Ricky Byrd was the center of the conversation as he had applied for a job at UPS. (12 RT 2586-2587.) They talked about going to the Moreno Valley Mall like "normal teenagers" to hang out and "search for chicks." (12 RT 2587.) The men talked about which car they should take as everyone had just purchased new cars and wanted to show them off. (12 RT 2587.)

As the men continued to wrestle with the hard decision on whose car to take to the mall, Robinson noticed Inkenbrandt's car pull up. Myles called out to the men "You guys know Smoke" or "Where can I find Smoke?" (12 RT 2591.) Byrd and his friends were caught up in their conversation and did not know anything about "Smoke" and did not really care as they were just interested in their conversation. (12 RT 2591.) Byrd and his friends just shrugged their shoulders and said they did not know

anything about Smoke. Byrd told Myles, "Go check on the dark side." (12 RT 2592, 2618.) Inkenbrandt drove off in the direction she had been headed and Byrd and his friends continued their conversation. (12 RT 2592, 2619.)

Morris and Myles, mostly Myles, gave Inkenbrandt directions to drive down a few streets. Apparently, unbeknownst to Morris and Myles, as they drove down Colorado Avenue coming from California Street, they passed Byrd's cousin, Gary Lee, who was standing with Darion "Smoke" Robinson on Coronado Avenue, near Arizona Street. (11 RT 2547-2550.) Eventually, Myles told Inkenbrandt to drive back to where Byrd and his friends were still gathered. Inkenbrandt did so and approached the group from the same direction as she had previously. Myles told Inkenbrandt to pull a little closer to the group. (12 RT 2619.)

Myles called out to Byrd's group and asked them if they could give Smoke a message. They called back "Sure, no problem." (12 RT 2619-2620.) Byrd walked over to the car and said, "Okay, What's the message?" (12 RT 2592.) Myles pulled out two guns, pointing them at Byrd and Robinson, and fired out the back window over Inkenbrandt's baby's head, shooting Byrd. (12 RT 2593, 2621.) Robinson and the rest of Byrd's friends dropped to the ground. (12 RT 2593.) Byrd fell to the ground, mortally wounded in his upper chest near his heart. (12 RT 2664.)

Myles started to hit one of his guns and said, "Oh, shit, this gun is jammed." (12 RT 2621.) Inkenbrandt turned around and said, "Oh, shit." Morris and Myles said, "Go, go," and Inkenbrandt drove off. (12 RT 2621.)

In the meantime, Gary Lee and Darion "Smoke" Robinson were still on Colorado Avenue when they saw the same car they had seen earlier coming the opposite direction toward California Street. The car was coming from Magnolia Avenue. (11 RT 2551.) As the car passed, the rear

passenger, described as a Black male, in his twenties, with sloppy, wet, curly medium-length hair, started shooting at Lee and Robinson with what looked like a revolver and sounded like a .22 caliber. (11 RT 2553-2554.) They ducked down behind a friend's parked car until the other car passed. Then they got in the parked car, Lee driving and Robinson as the passenger, and took off in pursuit but lost sight of the car near the 215 freeway. (11 RT 2554-2555.) Lee then drove to a drug area in San Bernardino to look for the car because he had seen the car before and knew that the driver was "a Black female crackhead" and thought she might be in that type of area. (11 RT 2557.) They ultimately found the car at an apartment complex at E and Acacia but no one was inside. Lee and Robinson turned around and drove to Magnolia Street. (11 RT 2557-2558.)

When Lee and Robinson arrived on Magnolia Street, Lee discovered that his little cousin, Ricky Byrd, had been shot dead. People at the scene were talking about the incident and describing the vehicle. Lee realized that it was the same vehicle from which shots were fired at him and Robinson. (11 RT 2558-2559.) Lee told police officers about it and directed them to Acacia and E but the car was no longer there. He pointed out the spot to the officers where the car had been parked. (11 RT 2559.) Ultimately, Lee spotted the car when it returned and identified it as the one involved in the attack on himself and Robinson. (11 RT 2673.)

In the meantime, Inkenbrandt had driven out of the Gardens area. Myles was very angry and began shooting at people as they drove along. He switched from one side to the other to shoot "at every Black person he saw." (12 RT 2623.) He shot at a Black man who was standing on the side of the street. (12 RT 2622.) When Inkenbrandt came to the end of the street as it intersected California Street, she had to make either a right or left turn. Myles told her to make a left turn but Inkenbrandt decided to turn right. Myles put his gun to Inkenbrandt's head and said, "Bitch, I told you

to make a left." (12 RT 2623.) Inkenbrandt hit the brakes and said, "Fine. What do you want me to do? Do you want me to make the left?" (12 RT 2623.) Myles and Morris said, "No, just get us the fuck out of here." (12 RT 2624.) As this was going on, Inkenbrandt's baby was hollering and screaming and she asked Morris to get her. (12 RT 2624.)

Inkenbrandt eventually got to Baseline and headed east in the direction of her apartment. She stopped at her best friend's house on Pico Street to drop off her daughter but no one was at home. She continued to her apartment in the 1300 block of E Street. Myles and Morris told her to park in the back, which was not her normal parking space but she did as she was told. (12 RT 2625-2626.) Once the car was parked, Myles took the bullet casings out of the car. As he did so, Morris told Inkenbrandt to forget what she had seen. Myles nodded his head in agreement and said, "Yeah," but did not say much. (12 RT 2626.) Thereafter, Morris and Myles left. (12 RT 2626.)

Inkenbrandt drove off and did some errands in the car. She returned 15-20 minutes later to the apartments but parked in her normal parking space in front this time. (12 RT 2626-2627.) When she returned, Morris and Myles came running back and told her to take them somewhere else. Inkenbrandt complied and drove them to an area around 16th and Lugo or 16th and Sepulveda, another area of San Bernardino where Morris and Myles sold narcotics. (12 RT 2627.) After she dropped them off, she went back to her apartment complex, and parked the car. (12 RT 2627.)

Soon thereafter, police arrived on the scene with Latroy Campbell, who was one of the young men with Ricky Byrd when Myles shot him. Campbell identified the white car as the one involved in the shooting and Inkenbrandt as the driver. (12 RT 2559, 2672-2673, 2743-2746.) Police contacted Inkenbrandt and she told them the truth from "the beginning to the end, just for the fact I wasn't going down for a murder I didn't commit

that they were stupid enough to do." (12 RT 2629.) Inkenbrandt eventually identified a photograph of Morris and later attended a lineup where she identified Myles. (12 RT 2628-2630.)

About three weeks after the shooting, two of the other young men in the group with Ricky Byrd, Lewis Hopkins and Daniel Robinson, identified Myles as the shooter. (11 RT 2519-2520; 12 RT 2594-2595, 2602-2604.)

As part of their investigation, police found and recovered a live .380 round and a casing of the same caliber at the Magnolia Street shooting scene. (12 RT 2644-2650.) The .380 round had a "FC" (Federal Cartridge) headstamp. The casing had a Winchester headstamp. (12 RT 2681.) Later, police searched a room at the Phoenix Motel on North E Street. Morris's fingerprints and clothing bearing his name were found in the room along with eight live .380 rounds, one live .22 round, and two expended .22 casings. The .380 rounds had "FC" headstamps. (12 RT 2650-2657.) Police also searched an apartment at 1275 East Date Street, number 105, and a Pontiac FireBird that was located below the apartment. Inside the Firebird's trunk, police found a semiautomatic .380 caliber Lorcin handgun wrapped in white towel. (12 RT 1917-1920.) The gun was loaded; it had a .380 Remington cartridge in the chamber. (12 RT 2680.) The gun's magazine contained two .380 Remington Peters cartridges and two .380 Remington Winchester cartridges. (12 RT 2680.)

Although there were similarities between the bullet fragment recovered from Ricky Byrd's body it and test-fired rounds, ballistics testing could not match the .380 casings and the bullet fragment with the Lorcin handgun but then Lorcin handguns have a unique property of not marking bullets or casings with identifiable marks. (12 RT 2690-2693.) However, the bullet that killed Byrd was of the same variety as the Federal Cartridge rounds that were found at the Phoenix Motel and at the Magnolia Street crime scene. (12 RT 2698-2699.)

2. The murder of Fred Malouf

On Saturday, April 20, 1996, about 8:00 p.m., Fred Malouf and his wife, Donna, along with Donna's mother, drove to the Pepper Steak restaurant in San Bernardino to have a cup of coffee. Donna worked at the restaurant, usually on a morning shift, and had worked that day. Fred was a retired captain in the Colton Police Department. (7 RT 1346-1348.)

There were several other customers in the restaurant, some at tables and a couple at the counter. (7 RT 1355-1356, 1374, 1384.) The Maloufs and Donna's mother sat at a table and waitress Krystal Anderson walked up to the table and started to talk with them. (7 RT 1347-1349, 1377-1379, 1407, 1430-1431.) Just as Krystal started talking, Myles ran into the restaurant yelling, "It's a robbery. I'll shoot. Get your money out." Myles wore black leather gloves and a dark-colored beanie. He also had a mask which covered his mouth and nose. He held a large semi-automatic pistol in his right hand. (7 RT 1350-1353; 8 RT 1548-1552, 1572.)

Donna got up from the booth and started to go to the back entrance to the kitchen because she knew a gun was kept there and a restaurant employee knew how to use it; she thought he could help. (7 RT 1353-1354.) Fred and Krystal stayed in the booth. (7 RT 1383.) Before Donna could get to the kitchen, Myles ran up to her and grabbed her by her hair. He called her a "white bitch" and wanted to know if she was the manager and where the safe was. (7 RT 1353.) Myles said he would blow her head off. (7 RT 1354.) Myles was screaming and yelling so much that his mask slipped and went below his nose. Donna could then see all of his face except for his mouth and the top of his head. (7 RT 1363.) Myles continued to grab her hair with one hand and wrapped the hand that held the gun around her throat. (7 RT 1354.) He then dragged Donna around the corner to the kitchen. (7 RT 1354.)

Donna told Myles that "there wasn't no manager and there was no safe." (7 RT 1354.) Myles took Donna into the kitchen through the swinging doors. (7 RT 1354, 1387.) Once inside the kitchen, Donna saw three restaurant employees and Myles's accomplice, Tony Rogers. Rogers had a hat on but no mask or gloves. He was armed with a large automatic pistol. (7 RT 1355.) Myles told Rogers that if Donna moved to shoot her. (7 RT 1400-1401.) Myles then left the kitchen and went back into the restaurant. (7 RT 1400.)

When Myles went back into the dining area, he approached Mark Suchil who was seated at the counter facing the cash register drinking iced tea. (7 RT 1590-1596.) Myles demanded Suchil's wallet. Suchil responded that he did not carry a wallet and Myles told him to empty his pockets. He did so and brought out a hundred-dollar bill. (7 RT 1596-1597.) Myles took it and shoved in his pocket. (7 RT 1602.) Myles then accosted one of the other customers, Harold Lewis, who was seated in a booth across from the cash register with his wife and grandson. (7 RT 1440-1441, 1505-1506.) He twisted Lewis's arm behind his back and the booth and put his gun behind Lewis's ear. He took Lewis's wallet and money he had taken out of his shirt pocket. (7 RT 1446-1447; 8 1647-1653.)

Myles then grabbed Krystal Anderson by the arm and screamed at her, "fucking white bitch." (7 RT 1501.) Myles moved Anderson toward the cash register by kicking her legs and hitting her. (7 RT 1502-1503.) At the register, Myles told Anderson to open the register "or [I'll] fucking kill [you], 'you dumb white bitch.'" (7 RT 1503.) Anderson was terrified and had trouble opening the register. Myles kept screaming, "Open the register," as he waived the gun around and used it to hit Anderson in her stomach. When she was finally able to open the register, Myles took money out, mostly five and ten dollar bills but also change. (7 RT 1504.)

While all this was going on, Fred Malouf went to the back door of the kitchen. He reached down and took a gun out of his boot. (7 RT 1450.) As Donna stood in the kitchen, she could see the back entrance. Then she saw Fred's face in the window of the kitchen door. (7 RT 1357.) Rogers ran toward that kitchen door just as Fred entered. Fred and Rogers started wrestling for Roger's gun just inside the door. Fred was trying to take the gun away from Rogers. (7 RT 1357-1358.)

Donna heard a gunshot and saw Fred fall down into the women's restroom. Rogers stood over him and shot him several more times but Fred was able to get off a shot with his own gun and hit Rogers in the stomach. Rogers screamed, "I've been shot," and ran out of the kitchen and out of the restaurant on to Valley Boulevard. (7 RT 1358-1359.)

Five or six shots could be heard in the restaurant coming from the kitchen. (8 RT 1653.) Myles went up to the kitchen door and pointed his gun at the pass-through window. He pulled the trigger but nothing happened. Myles then ran out of the restaurant through the front door. (8 RT 1506-1507, 1653-1655.)

About this time, Colton Police Officers Steven Lester and John Nelson were driving a Blazer, coming back from taking a prisoner to jail. They received a dispatch call about the robbery at the Pepper Steak restaurant. The officers drove toward the restaurant and then checked the area. Near the intersection of H Street and Sperry, they found Rogers hunched over on the sidewalk on the south side of H Street. (8 RT 1577-1579, 1584-1585.) Rogers had a black semi-automatic handgun next to him. (8 RT 1579-1580.) The officers approached Rogers with their guns drawn and ordered him to show them his hands but he failed to comply. Instead, Rogers attempted to reach over his body with his right hand toward the handgun. The officers repeated their demands for Rogers not to move and to show them his hands and eventually Officer Nelson was able to

reach the handgun and secure it. (8 RT 1580, 1675-1676.) Rogers complained of a shotgun wound to his stomach, and Officer Nelson saw blood in Roger's stomach area, but Rogers actually had a bullet hole in his upper left chest which was part of a through-and-through wound. (8 RT 1585, 1675; 10 RT 2030.)

Soon thereafter, Officer Nowak arrived on the scene. Officer Nelson approached Rogers, knelt with his knee on Rogers neck, and held the gun on him while Officer Nowak put Rogers in handcuffs. Officer Nelson then guarded Rogers while the other officers started searching for other suspects. (8 RT 1675-1678.) Officer Nelson noticed that Rogers had a brown cotton glove on his left hand, and that the right glove was on the ground next to him. (8 RT 1676-1678.) Rogers also had a wool stocking or watch cap on his head and a black bandana with a white design partially on his chin and tied around his neck. (8 RT 1675.) Officer Nelson examined Rogers's gun. It appeared to be jammed and he was unable to make the gun safe so he put it in the trunk of his patrol car. Later, he was able to examine it more closely and unload it. The hammer to the pistol was back and the safety was off. There was one 9 millimeter round loaded in the gun and there were four additional rounds in the magazine that was inserted into the weapon. (8 RT 1676.) Officer Nelson later gave the pistol, a 9 millimeter Browning semi-automatic, to Colton Police Lieutenant Francis Coe, who supervised the identification, photographing, and collection of evidence at the crime scene. (9 RT 1966, 1982.)

Under Lieutenant Coe's supervision, forensic specialists from the San Bernardino County Sheriff's Crime Lab went through the Pepper Steak restaurant. They found three fired 9-millimeter cartridges in the male employee's bathroom, another one in the doorway area of that bathroom, one more just outside of the bathroom, and two more in the kitchen area for a total of seven fired cartridge cases. (9 RT 1968-1973.) In the female

employee's bathroom, the forensic specialists found a bullet, what appeared to be a bullet jacket, and a slug projectile from a bullet. They also located several strike marks that appeared to be consistent with being struck by a bullet and numerous bullet fragments. (9 RT 1976.)

The forensic specialists also discovered a .38 caliber Smith and Wesson revolver, Model 36, inside the kitchen. This gun was loaded with four cartridges and one expended case. (9 RT 1922.)

Further, forensic examination of the area revealed blood by the south entrance to the restaurant. (9 RT 1978.) Cash was found by the east door of the restaurant and in an alley-way area nearby. Seven $5 bills were found by the east exit door of the restaurant and a $10 bill was found outside. (9 RT 1978-1980.)

Police conducted ballistics testing on Rogers's 9-millimeter Browning high-power pistol which was next to him when he was captured, as well as the .38 Smith and Wesson revolver found inside the restaurant. The testing revealed that all the cartridges found in the restaurant were fired from Rogers's gun. (9 RT 1881-1887.) The bullet found in the kitchen area of the restaurant (Exhibit A6) had been fired from the Smith and Wesson revolver. The bullet fragments from the kitchen could not be matched to either gun because they were too heavily damaged. (9 RT 1893-1894.)

An autopsy revealed that Fred Malouf was shot through-and-through five times at close range with resulting wounds to his face, abdomen, knee, thigh, and wrist. The fatal wound was to the abdomen and was the first shot fired. He also suffered a grazing wound to his abdomen. (9 RT 1936-1961.)

Police investigation revealed that Myles and Rogers had associated with each other as early as February of 1996. Myles lived in an apartment in a complex on Victoria in the City of Highland with Karen King and her boyfriend, Daniel Jackson. Rogers stayed in an apartment downstairs with

his cousin, Earl Williams and Williams's girlfriend, Shanita Thomas. Myles, known as "J-Dog," and Rogers, nicknamed "Tone-Tone," would "kick it together" or "hang together" and were friends. (8 RT 1731-1732, 1742-1744.)

On April 20, 1996, about 10:00 a.m., Myles knocked on the door of Earl Williams's apartment and woke him up. Williams's girlfriend answered the door and Williams heard Myles say, "Well, when you see Tone-Tone tell him I need to talk to him about some cash flow." (3 Supp.'l CT 838.) When Williams got up and talked to Myles, Myles asked him where Rogers was. Williams told him Rogers was over at his friend, "Boogie's" house, around the corner on Pacific and Orange in Highland. (8 RT 1745-1746.) Williams had seen Myles with a gun before, a .25 or .380 caliber automatic. (3 Supp.'l CT 813-814.) He had seen Rogers with a shotgun and had heard reports that he had been "flashing" a pistol around the apartment complex grounds. (3 Supp.'l CT 814-816.)

Williams took Myles to Boogie's house where they met Rogers. Myles wanted to talk to Rogers about "some paper, some cash flow." (3 Supp.'l CT 837.) Myles said "Yeah, Tone we got to do this before 8 o'clock." (3 Supp.'l CT 847.)

Police also contacted Lateshia Winkler. Winkler lived in an apartment on Date Street in San Bernardino with her two boys and a roommate. Myles, who Winkler knew as "J-Dog" or "Rac," occasionally stayed in the apartment. Winkler had seen Myles with a 9mm or a .45 caliber handgun. Myles kept two loaded pistol magazines for the gun on the back of the headboard and kept the gun in the trunk of Winkler's old car, a 1973 Firebird which was parked in a parking lot by her apartment. Winkler saw Myles carry a gun in his coat or under the seat in a car. (9 RT 1786-1789.)

On Saturday, April 20, 1996, Myles was in Winkler's apartment between 6:00 and 6:30 p.m. There were two men with Myles, one of whom was Tony Rogers. Myles used a telephone and then he and the men left. Myles told Winkler he would be gone about two hours. But Myles did not return until about 10:00 p.m. He went straight back to the bedroom and said he was tired of people chasing him and was tired of running. Winkler asked Myles why he was late but he was angry and said he had a lot on his mind and did not want to talk about it: "Don't start. I've got a lot of shit on my mind." Myles left the apartment and returned 30-45 minutes later. At some point when Myles and Winkler were together, Myles appeared to be under the influence of PCP. After Myles returned, he and Winkler had a longer conversation. Myles told her that "his homeboy got shot in a robbery, either by someone who worked there or somebody who was staking it out." (9 RT 1792-1795, 1850-1854.)

On Sunday, April 21, 1996, Myles's mother called Winkler's apartment and asked to speak with Myles. While he was on the phone, Myles said, "'What hospital is he in? What did he say? What are they going to do, did he die?'" Myles told Winkler that his friend had gotten shot and was at Loma Linda Hospital in police custody.. (9 RT 1795-1803.)

3. Defense case

Myles did not present a defense to the Ricky Bird murder. (12 RT 2750.) As to the Pepper Steak robbery and murder of Fred Malouf, the defense presented the testimony of police Sergeant Owens who interviewed Lateshia Winkler about the Pepper Steak restaurant robbery and the murder of Fred Malouf. Sergeant Owners testified that Winkler had told him that on the day of the robbery, Myles was wearing tan or brown clothes in contrast to the dark clothes described by the witnesses. She also told him that when Myles came home the night of the Pepper Steak robbery, Myles

said his friend had been shot while the friend was trying to do a robbery after the friend had hit someone who worked in the restaurant. Sergeant Owens also testified that he never found a ski mask, a black cap, gloves, or a running/sweat suit associated with Myles. (10 RT 2067-2075.)

The defense also presented testimony from several police officers who had individually interviewed Krystal Anderson, and Harold Lewis about the Pepper Steak restaurant robbery. The testimony primarily centered on the descriptions both Anderson and Lewis gave about the robbers the robbery circumstances. (10 RT 2092-2108, 2219-2223.)

Finally, the defense presented the testimony of eyewitness identification expert Dr. Robert Shomer about how various factors or "stressors" affect an individual's ability to take in, perceive, and then communicate what they have seen: life threatening, unexpected, traumatic circumstances; cross-racial factors; differences between the people observed and the people observing; the nature of the identification process and procedure and when and how the procedure was administered; the initial description; and the precision of that description. Dr. Shomer opined that it is very difficult for a person in a violent crime situation to correctly identify the perpetrator in court. (10 RT 2138-2197.)

4. Tony Rogers's defense

Rogers testified that Myles was not at the Pepper Steak Restaurant during the robbery. Rogers claimed someone named "G-Dog" and another person picked him up and drove around. He passed out because he had been drinking and smoking marijuana. When he woke up, the car was in the parking lot of the Pepper Steak restaurant and the driver of the car said the "homies went inside." Rogers testified he went inside the restaurant only to use the bathroom but was shot in the chest when he entered. He claimed he took out the gun that had been tucked in his pants because he was scared, and the gun went off accidently as he struggled with someone.

He said the gun just kept going off. Rogers testified that he ran out of the restaurant to get help and passed out on the sidewalk. (10 RT 2224-2299.)

Rogers testified that he carried a gun because he had witnessed someone kill his mother in front of him, and the murderer had been threatening him. He denied going into the restaurant to rob it or to "back up [his] homeboy." Rogers also denied seeing Donna Malouf or any restaurant employees in the kitchen or that the gloves and handkerchief recovered where he had been found were his. (10 RT 2226-2228, 2259-2265, 2267-2268.)

Rogers testified that he had told a probation officer that he did not use alcohol but admitted using marijuana. Rogers did not recall stealing a teacher's coin purse in April 1991 in elementary school, but stated that taking the coin purse "could have happened." (10 RT 2288-2291.)

5. Prosecution rebuttal

Detective Morenberg testified regarding the layout of the Pepper Steak restaurant to rebut Rogers's testimony as to how he entered the restaurant. The detective stated that it was not possible to enter the public restrooms of the Pepper Steak restaurant through the kitchen from the outside. To get to the public restrooms, one would have to go through the kitchen and then out into the restaurant to get to the public restrooms. (11 RT 2360-2371.)

B. Penalty Phase[3]

1. Prosecution evidence

a. The Denny's restaurant robbery

On October 28, 1992, about 11:30 p.m. three African-American men entered the Denny's restaurant in Victorville. The manager, Mark Repman, greeted the men at the door with menus but then noticed that the men were armed with two pistols and a shotgun. Myles was the biggest of the three and carried the shotgun. (13 RT 2888-2889, 2893.)

One of Myles's companions grabbed Repman around the neck, turned him around, and put a pistol to the back of his head. The man told Repman they were going to go straight into the office. (13 RT 2889, 2893.) Myles pointed the shotgun at the restaurant guests and, along with the other man, told all the customers and employees to stop where they were and lay down. The man who had Repman walked him back to the office and told him to open the safe. Repman complied and gave the man the cash but the man became angry and told Repman to give him all the money including the rolled coins. Repman did so and put all the money, about $1,200 in a Desert Community bank bag.[4] (13 RT 2890, 2894-2895.) The man then told Repman to lay on the floor and then turned and walked out toward the front of the restaurant. (13 RT 2891.) As soon as the man left the office, Repman called 911 and reported a robbery in progress. (13 RT 2892.)

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[3] Myles waived his presence for the penalty phase of the trial. Before the penalty phase began, the jury was informed that Myles had decided not to exercise his right to be present. The trial court instructed the jury that Myles's decision not to be present for the penalty phase of the trial should not be considered for any purpose and should not be discussed in any way during deliberations. (13 RT 2875-2877.)

[4] About $400 was also taken out of the cash register in the restaurant. (13 RT 2890-2891.)

San Bernardino County Deputy Sheriff Matthew Kitchen heard a broadcast about the Denny's robbery. He stationed his patrol car on the southbound on-ramp of the I-15 freeway and watched the traffic. He saw a car that matched the description of the one used in the robbery with three occupants. He followed the car from about a quarter of a mile behind while he waited for backup. The suspect car was in the fast lane traveling about 80 miles per hour and passing traffic. (13 RT 2896-2898.) Deputy Kitchen continued to follow the car and activated the red and blue lights on the patrol car when he reached the Cajon Pass Summit. (13 RT 2898-2899.) The suspect car then accelerated to in excess of 120 miles per hour. It took the exit for Highway 138 but failed to negotiate the turn and went off a 15-20 foot embankment behind a Texaco gas station. (13 RT 2899-2900.) Deputy Kitchen saw two suspects run from the car across the frontage road and down into a wash area toward railroad tracks. Other officers and deputies arrived on the scene and began searching for the suspects. (13 RT 2900.)

Sergeant Steven Urrea with the California Highway Patrol and two other officers were walking along the railroad tracks when they saw Myles look up over a small knoll about 30 yards away. Sergeant Urrea leveled his shotgun at Myles and told him to put his arms in the air. (13 RT 2904-2905.) Myles complied and Sergeant Urrea took him into custody. Myles identified himself as James Brown. (13 RT 2905.) He was not wearing shoes, just socks. (13 RT 2907.) As Sergeant Urrea and the other officers were bringing Myles back, they discovered money and a shotgun under a bush in an area where they had arrested Myles. There were also some shoes. (13 RT 2907.) Myles said he was a transient. (13 RT 2907.)

Later that same evening, sheriff's deputies came to the restaurant, picked up Repman, and took him to the location of the vehicle crash. At that scene, the deputies showed Repman the money from the restaurant still

in the bank bag and guns in the crashed car, one of which was the shotgun. Repman also saw Myles standing nearby and identified him to the deputies as the robber who held the shotgun at the restaurant. (13 RT 2893-2894.)

b. The Shawn Boyd shooting

On February 23, 1996, Shawn Boyd was at Myles's mother's apartment on San Bernardino Avenue in the City of Colton. Myles was there too as were his mother, sister, another man, and some other females. Everyone was just "hanging out." (13 RT 2910-2911.) Boyd said he was doing very well and had a new job and new clothes. Myles, who Boyd knew as "J-Dog," became jealous because he had not been doing well and needed money. "'He began pumping himself up as he was getting agitated.'" Myles told Boyd to "'get into the motherfucking room,'" and motioned toward the master bedroom of the apartment. (13 RT 2926-2927.) Myles told Boyd that if he did not go into the room, "'I will plug you.'" (13 RT 2929.) Myles shoved Boyd toward the bedroom but then pulled out a handgun and shot him in the face causing injury. (13 RT 2929.) Boyd ran through the master bedroom, across a bed, and then jumped out through a second-floor plate glass window . (13 RT 2912-2913, 2929-2930.)

Subsequent police investigation of the scene revealed blood drops and a fired .380 cartridge case stamped RP just outside of the master bedroom. The police also discovered a slug in a door of the apartment that was consistent with .380 caliber. (13 RT 2933-2935.)

c. The Thomas Realtors robbery

On April 3, 1996, about 2:20 p.m., two Black men entered Thomas Realtors in near University Avenue in San Diego. Thomas Realtors is a property management firm that handles apartment rentals and collects rents. Rents are due between the first and fifth of each month. The most money

comes into the office on the third and fourth of each month. (13 RT 2950-2951, 2958.)

Jacqueline Graff was working as the receptionist at the time. She was writing a receipt for one of her tenants when one of the men walked directly up to her and put a gun to her head. This man was tall and heavy and had shoulder-length curly hair that had an oily solution on it. (13 RT 2952-2953.) The man said, "'Open the drawer and give me all your money.'" In the meantime, the other man told other people in the office to sit down, be quiet, and be still. (13 RT 2953.)

Graff told the robber with the curly long hair that the owner had just left for the bank and that they did not have any money.[5] The man pointed to the drawer he wanted Graff to open. Graff eased the drawer open to show that there was no money in it. The curly haired man told her to open the other drawer. Graff did so and then opened all the drawers. The man flipped through the drawers and said, "'I want the money. Somebody is going to die if I don't get the money.'" (13 RT 2954.)

Paul Baumhoefner was talking on the telephone in his office at the time. He heard the commotion in the lobby area and walked out of his office and looked toward the secretary's desk. He was confronted by the same curly haired man who held his gun about four inches from his face. The gun was big with big bullets. (13 RT 2958-2959.) The man said, "'Give me the money,'" or words to that effect. Baumhoefner backed into his office. The man kept demanding money but Baumhoefner told him that his boss had just left and the money was in the bank. (13 RT 2960.)

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[5] This was true as the owner had just left the business for the bank with close to $25,000. (13 RT 2954.)

Baumhoefner tried to show he was cooperating with the man's demands and pulled open all the desk drawers to show he did not have any money. He pulled out his pockets and revealed a wad of money between $20-$30. The robber appeared not to know what to do. Then there was a commotion outside as several customers ran out the office door. The man grabbed the money, left Baumhoefner's office, and headed for the front door. (13 RT 2961.)

Baumhoefner came out of his office and grabbed his boss's gun which was secreted under a desk just outside his office. While Graff called 911, Baumhoefner ran outside to chase the robber. He saw the man and raised the gun to fire at him but the man ran into an alley.

Baumhoefner ran to his truck, got in, and headed in a northern direction. He did not see a car in the alley but some customers told him "'He went up that way. It was a red car. He went up back the alley.'" (13 RT 2964.) Baumhoefner took some tenants as passengers and made his way to 30th Avenue and saw the robbers in a red car waiting for the traffic light. Baumhoefner pulled up right behind them. (13 RT 2966-2967.)

Baumhoefner took down the red car's license plate number and thought his job was done. Even though he had the pistol on the car seat, he did not want to get into any trouble so he said, "'I better break off the chase now and go back and report the license plate number of the getaway vehicle to the police.'" (13 RT 2967.) Baumhoefner drove back to his office and saw that the police were there. When he pulled in, he heard a report on the police radio that shots had been fired on North Parkway by the post office which was where he had given up the chase of the robbers. (13 RT 2967-2968.)

In the meantime, Thomas Stone had been driving east on University Avenue when he noticed several people running toward an alley between Utah and Kansas Streets. Stone drove down the alley and noticed a red car.

There was a driver in the car and Stone saw a large man run up to the car and jump in the passenger side. The car then took off and several bystanders pointed at it. Stone followed the car down the alley and onto Polk and then down another alley off 30th Avenue. As Stone drove down this second alley, he noticed the red car stop. Stone had an intuitive sense something was about to happen so he tried to get his car in reverse. Just then he looked up and saw a large Black male get out of the red car who started shooting at Stone's vehicle. Stone ducked down and heard several gunshots. Several bullets hit his vehicle. (13 RT 2971-2973, 2978-2982.)

Two days after the robbery, police found a 1987 Chevrolet sedan with a license plate number that matched the one jotted down by Paul Baumhoefner, 3PCN592. Police were able to recover Myles's fingerprint from the outside of the passenger side rear window. Police also recovered a bullet near where the robbers had shot at Stone's vehicle. Casings and the bullet were Federal brand ammunition in .380 caliber. The casings could have been fired from a Lorcin handgun. The Federal cartridges found by the police were the same kind as the ones used in Myles's February 1996 attack on Shawn Boyd. (13 RT 2979-2988.)

d. Myles's prior robbery conviction

On December 18, 1992, Myles was convicted of the Denny's restaurant robbery in Victorville. He was sent to prison on January 27, 1993, and released on parole on July 10, 1995. (13 RT 2886-2887.)

e. The December 7,1996 jail incident

On December 7, 1996, Myles was incarcerated in the West Valley Detention Center. About 10:30 p.m., Deputy Joseph Perea was on duty in the jail and was assigned to participate in a shakedown of Unit 6. (13 RT 2990-2991.) During the shakedown, the inmates were ordered out of their cells and searched and as were their cells for contraband. (13 RT 2991.)

When Myles left his cell, he mumbled something and the deputies thought there might be a problem. Deputy Taylor directed Myles to follow him to a multi-purpose room in order to defuse the situation. Deputy Perea decided to follow them as Myles was larger than Deputy Taylor and Deputy Perea sensed something was going to happen. (13 RT 2993-2994.)

When the deputies and Myles got to the multi-purpose room, Myles ignored everything Deputy Taylor told him; it "was going in one ear and out the other." (13 RT 2994-2995.) Deputy James, a senior deputy, asked Myles to pay attention and not disrespect the deputies. Myles was told to look straight ahead. Myles responded "'I can fucking look where I want to.'" (13 RT 3009-3010.) Myles stood up and Deputy James tried to push him back down and told him to sit down. In response, Myles punched Deputy James in the left side of his face. (13 RT 2995.) It appeared to knock him out. When the other deputies moved in, Myles swung again and appeared to knock out Deputy Taylor too. Deputy Perea pulled out his pepper spray and sprayed Myles in the face. Myles picked up a food cart over his head and threw it at Deputy Perea hitting him in his right arm. Then Myles ran down the multi-purpose room and into a utility room. He came out holding a push broom and was swinging it wildly. By this time, Deputy Taylor was up and he sprayed Myles with his pepper spray. The deputy then called on his radio for assistance and several deputies arrived in the multi-purpose room. Myles continued to swing the broom wildly, waiting for someone to advance so he could strike them. (13 RT 2996-2997.)

The deputies threw plastic chairs at Myles and knocked the broom out of his hands. Then they all tackled Myles and tried to gain compliance of his hands and feet. A deputy told Myles to stop resisting but Myles struggled and pushed off the deputies. (13 RT 2998.) When Deputy Gomez used a lateral vascular neck restraint on Myles, Myles bit him. (13

RT 3012-3013.) Eventually, the deputies were able to gain control of Myles with leg shackles, handcuffs, and several deputies using their collective weight. (13 RT 3000.)

f. The May 17, 1997 jail incident

On May 17, 1997, Myles was incarcerated in Unit 5 at the West Valley Detention Center. Myles refused to return to his cell and disrespected one of the deputies. (13 RT 3018-3020.) Myles was on the second tier of the unit and other deputies approached him to get him to comply. As the deputies walked up the stairs to confront Myles, Deputy Llewellyn told Myles to go into his cell and "lock it down." (13 RT 3020.) Myles looked at Deputy Llewellyn, stepped up to the side of the tier, took a combative stance, and told Deputy Llewellyn, "'Fuck you.'" (13 RT 3020-3021.) Deputy Nichols reached around Deputy Llewellyn and sprayed Myles with about a one-second burst of pepper spray. (13 RT 3021.) Deputy Llewellyn and Myles started hitting each other with their fists and Deputy Nichols came around Myles and attempted to apply a lateral vascular neck restraint on him. Myles threw off Deputy Nichols and punched him in the side of his head as he tried to get up off the ground. (13 RT 3023.) Then Myles picked up Deputy Nichols and tried to throw him off the tier. Deputy Nichols was able to grab the railing but Myles continued to try to throw him off. At one point, Deputy Nichols felt Myles's breath on the back of his head so he threw back a head butt and Myles released him and went back after Deputy Llewellyn. (13 RT 3023-3024.)

Other deputies arrived on the scene but Myles still tried to throw a punch at anyone who got near him. Eventually, enough deputies arrived and they were collectively able to push Myles into a comer and subdue him. Myles was placed in leg shackles and handcuffs. (13 RT 3024-3025.)

g. The shank incident

On November 13, 2000, Deputy Alejandro Barrero was on duty in the West Valley Detention Center in Unit 14. On that date, Deputy Barrero took a home-made knife or "shank" from Myles. The shank was made of metal and had been fashioned from the front ledge of one of the desks that the inmates use to write on or eat from. The shank was sharpened and had a cloth handle and a rope leash. (12 RT 2944-2945.) Deputy Barrero recovered another shank that day from anther inmate but this shank was about six inches smaller than Myles's and was much thinner. (13 RT 2946.)

h. Victim impact evidence

(1) The Ricky Byrd murder

Harry Byrd III testified that his sister's fiancée had called him on the phone and told him that his son Harry "Ricky" Byrd IV had been shot and killed. Mr. Byrd testified he fell to his knees and dropped the phone in disbelief. After calling relatives and telling them that Ricky had been murdered, Mr. Byrd and his daughter drove to Mr. Bird's mother's house in San Bernardino which was a few doors away from where Ricky was shot. (11 RT 3039-3942.) Mr. Byrd's mother and sister told him what had happened. He went to the murder scene and saw blood still in the driveway. Mr. Byrd found out more details of the murder from a police detective and some of Ricky's friends who were with him when Myles shot him. (13 RT 3042-3043.)

Mr. Byrd found it very difficult to see his son in a coffin. He and Ricky loved each other and, although he had not seen Ricky for a year or two before the murder, he had just talked to him the weekend before. In fact, he had planned on visiting the next weekend. Mr. Byrd talked about

his grandson, Harry Byrd V, and how Ricky never had a chance to see his son. (13 RT 3042-3047.)

Mr. Byrd testified that 18 months before Myles murdered his son, Mr. Byrd's only brother was murdered. (13 RT 3041-3042.)

Ricky Byrd's grandmother, Dorothy R. McDowell-Byrd, testified that Ricky had lived with her 85-95 percent of his life and she considered him more of like one of her kids than a grandson. She was very close to him. Mrs. McDowell-Byrd testified that Ricky's son reminds her of him because they look so much alike but that Ricky never got to see his son. Ricky never got to fulfill his dreams and go to college and become a marine biologist. He had just applied for a job at UPS. (13 RT 3051 -3055.)

(2) The Fred Malouf murder

Donna Malouf-Lawrence testified that she and her husband, Fred, initially met in 1974, and then again in 1985, and started dating in 1987. They were married in 1994. Mrs. Malouf-Lawrence testified that she and Fred were close to her best friend, Sandy Lawrence and her husband Ron. Sandy died of cancer in 1994, two years before Fred was murdered. After Fred's death, Mrs. Malouf-Lawrence and Ron started dating and they eventually married.

Mrs. Malouf-Lawrence testified she thinks about Fred everyday and has been in weekly counseling to deal with her grief which had turned to anger. Mrs. Malouf-Lawrence testified that "Fred was, is, and always will be, my life." (13 RT 3056-3059.)

Damon Simon testified that Fred Malouf was his uncle. Fred taught him how to hunt, fish, and play cards, chess, and checkers. Mr. Simon testified he was very close to Fred who was like a second father to him. They would hunt and fish together and meet for coffee and play games. Fred counseled Mr. Simon to succeed at whatever he did and the importance of getting a college degree. Mr. Simon obtained a bachelor's

degree in criminal justice and then became a correctional officer and counselor with the California Youth Authority because of Fred and Mr. Simon's father who was a reserve officer with the Colton Police Department. Fred had told Mr. Simon that life was more important than property. (13 RT 3059-3063.)

Mr. Simon found it difficult to talk about his Uncle Fred although he gave one of the eulogies at Fred's funeral. Fred's son, Richard, and Mr. Simon were "pretty tight" with their fathers. They did things together. Fred was a practical joker. Referring to two photographs of Fred, one in uniform and one with Mr. Simon's father, Mr. Simon testified that Fred organized family reunions. Fred enjoyed life to the fullest and the thing Mr. Simon missed most was the loss of Fred companionship. (13 RT 3063-3068.)

Mr. Simon testified that when he was at home with his wife he received a telephone call from Donna Malouf-Lawrence who told him Fred had been shot in the face. Mr. Simon did not think it was fatal because law enforcement officers believe they are bullet proof. Mr. Simon recalled that when he was in high school, Fred would volunteer at the school and come into classes and explain his police experience. Fred had a good sense of humor that could not be replaced. (13 RT 3068-3072.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED MYLES'S MOTION TO SEVER THE TWO MURDER CASES

Myles contends the trial court abused its discretion when it denied his request to sever the Ricky Byrd murder case from case involving the murder of Fred Malouf and the robberies at the Pepper Steak restaurant. Myles argues trying both cases together was fundamentally unfair and denied him his rights to due process, a fair trial, and a reliable

determination of guilt and penalty. He boldly asserts that "[a]s a matter of law, Myles suffered prejudice as a result of the denial of his severance motion." (AOB 69.) He asserts that his conviction for the murder of Ricky Byrd and the death penalty should be reversed. (AOB 64-70.)

A. Procedural History

The amended information charged Myles with the murder of Ricky Byrd (count 1), and Myles and Rogers with the murder of Fred Malouf (count 2), and the robbery of Krystal Anderson (count 3). Myles was charged individually with the robbery of Harold Lewis (count 4), and being a felon in possession of a handgun (count 5). (2 CT 388-392.) Myles moved to sever the Ricky Byrd murder charge from the Pepper Steak charges arguing there was no common element connecting the two cases and that joinder of the charges would be so prejudicial as to result in gross unfairness, amounting to a denial of due process. (1 CT 91-102.) The trial court denied the motion stating,

> I am satisfied that as to Mr. Myles the joinder of both of those counts is appropriate; that it does not create any undue prejudice; that although they are separate incidents, they are certainly the same class of crimes. They are relatively close in time; and it is appropriate that both of those counts as to Mr. Myles be tried together.

(2 RT 348.) Myles renewed his motion to sever later through different counsel and the trial court reiterated that it had already denied it. (2 RT 664-665, 684-685.) In light of the severance motion denial, the trial court adopted a procedure where the jury would hear evidence and render a verdict on the Fred Malouf murder and the related crimes at the Pepper Steak restaurant and then consider the evidence concerning the Ricky Byrd murder and render a verdict for that offense. This procedure was designed to avoid the potential problem of the jury hearing both murder counts against Myles at the same time and using each count to supplement the

other. (3 RT 684.) After the verdict in the Pepper Steak case, Myles renewed the severance motion arguing that it was "just fundamentally unfair" to have the same jury hear the Ricky Byrd murder case. (11 RT 2487.) In response, the court reviewed the procedural history of the case:

> When the motion for severance was denied, one of the grounds for the motion for a severance was that it would be unfair to Mr. Myles to have the jury hear, the same jury hear both cases, because what was viewed as potentially the weaker case, the case involving the Pepper Steak, would be heard at the same time all of the evidence of the other case was heard, and there was a feeling on the defense part that there might be kind of a spill-over effect, that if there was some weakness in one case, that evidence from the other case might be used by the jury to say, "Well, if he did one, maybe he probably did the other."
>
> And so to attempt to alleviate that but still proceed with a joint trial, the court suggested this bifurcated procedure, with the understanding that if that was not accepted by the - - both sides, then the denial of the severance would still stand, and it would be a joint or a unified trial. And, of course, at that point there was also the consideration as to [Rogers], who would not have been involved in the evidence relating to the second set of charges.
>
> But both sides did accept that procedure with the understanding that they were not waiving any of their rights under their request for the severance, which was denied.
>
> In looking at all of the evidence here, I still am convinced that this is a proper case for a joint trial and that a severance is properly denied.
>
> The charges, of course, are the same nature and the same class of crimes and, therefore, are presumed to be joined for trial under Penal Code Sections 954, 954.1; and Proposition 115 added an additional section to the California Constitution, creating a strong presumption of policy in favor of joint trials as opposed to severed trials.
>
> Here the procedure that we adopted is additionally advantageous to Mr. Myles because the jury had the opportunity to hear the evidence and decide the case with regard to the first

incident, the Pepper Steak case, which was viewed as potentially the weaker of the two cases as to Mr. Myles, without hearing the other evidence as to the other charge. And so that supposedly weaker case was determined based solely on that evidence without the jury hearing any additional evidence as to any other crimes.

So I - - really don't see any significant prejudice to Mr. Myles then having the same jury hear both cases, especially in the bifurcated manner they're hearing it.

They'll be instructed again, I will remind them at the beginning today that - - what the charges are and that the defendant has entered a plea of not guilty. That that places, again, on the state, through the prosecution, the burden of proving those charges true beyond a reasonable doubt. And, of course, they'll be instructed on that as well.

It's a different case, different evidence, different circumstances, different witnesses.

I think the time that the jury took in evaluating the evidence as to Mr. Myles suggests that they're very diligent in looking at the evidence separately. They apparently reached a verdict as to the other co-defendant almost immediately, but were out two or three days as to Mr. Myles.

So that certainly indicates that they looked at the evidence separately and independently and realized there are different issues involved with different people and different events.

So, for all of those reasons, the motion for severance is again denied without - - subject - - or without prejudice to being renewed upon review of the Ninth Circuit case that Mr. Young made reference to.

(11 RT 2489-2491.)

B. Law

Pursuant to Penal Code section 954, an accusatory pleading may charge two or more different offenses so long as at least one of two conditions is met: The offenses are (1) "connected together in their

commission," or (2) "of the same class." (*People v. Soper* (2009) 45 Cal.4th 759, 771.) Article I, section 30, subdivision (a) of the California Constitution provides: "This Constitution shall not be construed by the courts to prohibit the joining of criminal cases as prescribed by the Legislature . . . ." Joint trial has long been prescribed, and broadly allowed, by the Legislature's enactment of section 954. (*Soper,* at p. 772; *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1218 (hereafter *Alcala.*) Thus, "[T]he law prefers consolidation of charges." (*People v. Manriquez* (2005) 37 Cal.4th 547, 574, quoting *People v. Ochoa* (1998) 19 Cal.4th 353, 409 (hereafter *Ochoa I.*) Where the offenses charged are of the same class, joinder is proper under Penal Code section 954. (*People v. Kraft* (2000) 23 Cal.4th 978, 1030; *People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

Consolidated charges are beneficial to the state, namely, conservation of judicial resources and public funds. These considerations often weigh strongly against severance of properly joined charges. (*People v. Soper, supra*, 45 Cal.4th at p. 774; *People v. Bean* (1988) 46 Cal.3d 919, 939-940.) Although the assessment of whether severance is appropriate is necessarily dependent upon the particular circumstances of each individual case, this Court has developed certain criteria which provide guidance in ruling upon and reviewing a motion to sever trial. (*Soper,* at p. 774; *Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.)

The first thing to be considered is cross-admissibility of the evidence in hypothetical separate trials. (*Alcala, supra*, 43 Cal.4th at p. 1220.) If the evidence underlying the charges in question would not be cross-admissible, that determination alone does not establish prejudice or an abuse of discretion by the trial court in declining to sever properly joined charges. (*People v. Soper, supra*, 45 Cal.4th at p. 775; *Alcala, supra*, 43 Cal.4th at p. 1221.) Then, the reviewing court needs to consider "whether the benefits of joinder were sufficiently substantial to outweigh the possible 'spill-over

effect of the 'other-crimes' evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses." (*Soper,* at p. 775, quoting *People v. Bean, supra*, 46 Cal.3d 919, 938.) In making this evaluation, three additional factors are considered: (1) whether certain of the charges are unusually likely to inflame the jury against the defendant; (2) whether a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (3) whether any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. (*People v. Soper, supra*, 45 Cal.4th at p. 775; *People v. Arias* (1996) 13 Cal.4th 92, 127; see also *Alcala, supra*, 43 Cal.4th at pp. 1220-1221.) Thus, the potential for prejudice to the defendant from a joint trial is balanced against the countervailing benefits to the state with the recognition that in light of the countervailing benefits of a single trial of properly joined charges, "'[t]he state's interest in joinder gives the court broader discretion in ruling on a motion for severance [of properly joined charges] than it has in ruling on admissibility of evidence' [of uncharged offenses in a separate trial]. [Citations.]" (*Alcala,* at p. 1221.) Joinder may be appropriate even though the evidence is not cross-admissible and only one of the charges would be capital absent joinder. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244-1246.) Even where the People present capital charges, joinder is proper so long as evidence of each charge is so strong that consolidation is unlikely to affect the verdict. (*Arias*, at p. 130, fn. 11; *People v. Lucky* (1988) 45 Cal.3d 259, 277-278; *People v. Ochoa* (2001) 26 Cal.4th 398, 423 (hereafter *Ochoa II.*)

A trial court's denial of a severance motion for abuse of discretion is based on the facts as they appeared at the time the court ruled on the motion. (*People v. Avila* (2006) 38 Cal.4th 491, 575; *People v. Hardy*

(1992) 2 Cal.4th 86, 167.) If the court's joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing that joinder "resulted in 'gross unfairness' amounting to a denial of due process." (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.) To establish error in a trial court's ruling declining to sever properly joined charges, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion. (*People v. Soper, supra*, 45 Cal.4th at p. 774; *Alcala, supra,* Cal.4th at p. 1220.) In other words, whether the denial fell " 'outside the bounds of reason.' " (*Ochoa II, supra,* 26 Cal.4th 398, 423, *Ochoa I, supra,* 19 Cal.4th at p. 408, quoting *People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.) Even if the court abused its discretion in refusing to sever, reversal is unwarranted unless, to a reasonable probability, defendant would have received a more favorable result in a separate trial. (*People v. Avila, supra*, 38 Cal.4th at p. 575; *People v. Coffman* (2004) 34 Cal.4th 1, 41.) In the context of properly joined offenses, a party seeking severance must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial. (*Soper*, at p. 774; *Alcala, supra,* 43 Cal.4th at p. 1222, fn. 11; *People v. Arias, supra,* 13 Cal.4th at p. 127.)

C. Analysis

Myles protests that the trial court abused its discretion when it denied his repeated severance motions. He argues that despite whatever efficiencies a joint trial did provide, they were negligible in comparison to insuring his right to a fair trial was protected. To the contrary, the trial court properly exercised its discretion in denying the motions. Fred Malouf's murder and the other crimes at the Pepper Steak restaurant and Ricky Byrd's murder were, as Myles concedes (AOB 67), of the same class of crimes or offenses and thus were properly joined under Penal Code section 954. Although there may have not been cross-admissibility of

evidence between the two incidents, the trial court properly denied Myles's severance motion given the legitimate goal of the conservation of judicial resources and public funds. Moreover, to guard against any undue prejudice for Myles, the trial court ordered that evidence of Fred Malouf's murder and the other Pepper Steak restaurant crimes would be presented first, with no reference to the murder of Ricky Byrd. In addition, after the jury returned its verdicts on the Pepper Steak crimes, the court instructed the jury that it was still very important for them to observe the court's admonitions and not to form or express any opinions about the Ricky Byrd case and not to discuss the case either among themselves or with anyone else. "Again, that still means not discussing anything about the case, any of the witnesses, parties, attorneys, exhibits, or evidence." (11 RT 2486.)

Thus, because the two incidents were presented separately, the juror's emotions were likely not inflamed by the consolidation of the two cases and, even if there were, Myles has not demonstrated that he was prejudiced. As the trial court recognized, the weaker case was the Pepper Steak incident. The jury heard evidence about that incident first, without hearing any evidence about the murder of Ricky Byrd. (11RT 2491.) Thus, the supposedly weaker case was determined based solely on that evidence relating to that incident without the jury hearing any additional evidence as to any other crimes. This insulated Myles from the jury being influenced by evidence of the callous and poignant nature of the Ricky Byrd murder in its consideration of the murder of Fred Malouf and the Pepper Steak crimes. Moreover, although the murder of Fred Malouf was harrowing and poignant enough in that he died in front of his wife, Ricky Byrd's murder was also compelling. After all, Ricky Byrd was an affable young man who innocently responded to Myles's beckoning and walked up to him when Myles suddenly shot him down in cold blood in front of Byrd's best friend and other friends who witnessed what Myles had done. None of these

facts, nor the manner in which the court orchestrated their presentation, even remotely prevented the jury from evaluating and considering them objectively.

After the jury found Myles guilty of Fred Malouf's murder and the other crimes at the Pepper Steak restaurant, the court instructed the jury that it was "not to form or express any other opinions on the case or any of the other issues that may come up in any additional phase." (11 RT 2485.) At the beginning of the phase of trial regarding the Ricky Byrd murder, the court charged the jury just like it would have done had the Ricky Byrd murder been charged in a separate case; the court read the charge and the armed allegation, informed the jury that Myles had pled not guilty, and reminded the jury that the prosecution had the burden to prove the case beyond a reasonable doubt. (11 RT 2492.) This was sufficient to dispel any chance the jury would have found Myles "more guilty" because they had previously found him guilty of the murder of Fred Malouf and the Pepper Steak crimes. It must be remembered that there is a strong presumption that juries follow court's instructions. (See, e.g., *Richardson v. Marsh* (1987) 481 U.S. 200, 211 [107 S.Ct. 1702, 95 L.Ed.2d 176].) It is only Myles's cynicism, motivated by self-interest, that argues that the jury could not make a fair and reliable determination of his guilt.

The trial court's denial of Myles's severance motions was proper and did not deny his a fair trial or prejudice him in any way.

II. THE TRIAL COURT PROPERLY DENIED MYLES'S MOTION FOR A LINEUP WITH SKI MASKS

Myles contends the trial court erred in denying his motion for a live lineup where individuals would wear ski masks to partially obscure their facial features. He argues such a lineup was essential to ensure his right to a fair trial and a reliable determination of guilt and penalty. (AOB 71-74.)

A. Background

Although there was a lineup close in time to the incident, four years later Myles moved for a live lineup with ski masks partially obscuring the faces of the participants. He argued that the identification evidence was highly suspect since all of the witnesses to the Pepper Steak restaurant robberies stated that the second robber had on a ski mask and they could not see his face. (1 CT 232-249.) Myles complained that it was only fundamentally fair that the witnesses should be tested as to their identification, by viewing individuals with ski masks on, in order to determine the validity of their previous identifications. (1 CT 237.) The prosecution filed opposition. (1 CT 269-271.) After holding a hearing on the motion, the court denied it. (1 CT 298-299.) The court noted, citing *Evans v. Superior Court* (1974) 11 Cal.3d 617, that there was a lineup in this case, necessitated by the fact that the witnesses observed a perpetrator wearing a ski mask. (3 RT 548.) The court also noted that Myles's counsel attended the lineup and suggested

> that since the witnesses didn't have an opportunity to see hair and - - in order to account for that and, and account for, or discount any differences in hairstyle, suggested that all the subjects in the lineup wear a black knit cap or watch cap, or something to that effect, but not pulled down over their faces. But at least pulled down to the forehead, covering the top of their head and perhaps the ears and so forth.

(3 RT 549.) Myles's counsel's suggestions were adopted and thereafter several of the witnesses identified Myles. (3 RT 549.)

The court stated:

> So I think the fundamental principles of *Evans* have been complied with here, that there initially was a circumstance where there was a, a likelihood of either no identification or a misidentification; a physical lineup was had and the witnesses were able to identify the defendant out of a physical lineup of

people not only of similar sizes and descriptions but also wearing similar black knit watch caps.

So I think that satisfies *Evans*.

Secondly, as I mentioned, the purpose of *Evans* is to test a potential unreliable identification.

And here I don't see where conducting a lineup, an additional lineup four years later with the subjects in a ski mask would aid in that regard.

If the witnesses were able to pick out the defendant in the ski mask I don't think that would necessarily bolster their original identification, because certainly it would be subject to the argument they've seen him so many times in court, his picture in the newspaper, they knew who the defendant is, that they'll still recognize him. And that putting a ski mask on him at this point isn't going to be able to disguise him.

So it's certainly not going to bolster the identification.

If they're not able to pick the defendant out of a lineup wearing a ski mask four years later, I don't think that suggests that the identification made four years earlier when the events were fresh in their minds –

I believe the lineup was conducted six days after the offense occurred - -

I don't know that suggests that, well, the - - that the failure to pick out the person wearing a ski mask four years later suggests that the original identification made in a physical lineup is less reliable.

So for all of those reasons - - and so for all of those reasons the motion for an additional physical lineup with defendant wearing a ski mask is denied.

(3 RT 549-550.)

B. Law

In *Evans v. Superior Court, supra*, 11 Cal.3d 617, this Court concluded

> due process requires in an appropriate case that an accused, upon timely request therefore, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve.

(*Evans*, at p. 625, fn. omitted.) The prerequisites for obtaining an *Evans* lineup are (1) a timely request for the lineup, (2) a showing eyewitness identification was a material issue, and (3) a showing a reasonable likelihood of a mistaken identification existed that a lineup would tend to resolve. (*People v. Farnam* (2002) 28 Cal.4th 107, 184.)

There is now a question whether a defendant's right to seek an *Evans* lineup survived the enactment of Proposition 115.[6]

This Court in *People v. Baines* (1981) 30 Cal.3d 143, explicitly recognized the "value of a pretrial lineup is substantially diminished once a preliminary examination has been conducted and a direct confrontation between a defendant and his accusers has occurred." (*Baines*, at p. 148.) When a trial court denies a request for a pretrial lineup, and the defendant elects not to challenge the ruling by writ, the delay effectively thwarts the purposes served by the right conferred under *Evans* and prevents a court reviewing the claim on appeal from the conviction from fashioning any appropriate relief even if it finds error. (Cf. *Reid v. Balter* (1993) 14 Cal.App.4th 1186, 1195 1196 [because failure to challenge ruling by writ

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[6] On August 26, 2009, this Court granted review in *People v. Mena* (2009), previously published at 173 Cal.App.4th 1446.

petition thwarted purposes served by statute, defendant barred from raising issue on appeal from adverse judgment].)

A decision denying a motion for a live lineup is reviewed for an abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 236.)

C. Analysis

Myles contends the trial court prejudicially erred in denying his motion for a second lineup with participants wearing ski masks. But Myles made no such demand or suggestion during the original lineup conducted six days after he committed the crime. He simply requested that the knit caps be worn so that the participant's hair was covered since none of the witnesses were able to see the hair of the second perpetrator during the Pepper Steak robbery. His request was honored. Then, four years later, after a preliminary hearing and repeated media coverage, Myles moved for another lineup but this time with ski masks. Given the untimely nature of Myles's request and that the value of a pretrial lineup is substantially diminished once a preliminary examination has been conducted and a direct confrontation between a defendant and his accusers has occurred (*People v. Baines, supra*, 30 Cal.3d at p. 148), the trial court properly exercised its discretion in denying Myles's motion. Because Myles did not seek writ review of the denial of his lineup motion, he has forfeited its consideration by this Court. Moreover, when the robbery at the Pepper Steak restaurant started and Donna Malouf headed for the kitchen to get help, Myles intercepted her and grabbed her by her hair. He called her a "white bitch" and wanted to know if she was the manager and where the safe was. (7 RT 1353.) Myles said he would blow her head off. (7 RT 1354.) Myles screamed and yelled so much that his mask slipped and went below his nose. Donna could then see all of his face except for his mouth and the top of his head. (7 RT 1363.) Given Donna's ability to see most of Myles's

face, there was really no point to conducting a lineup with Myles and the other participants wearing ski masks to hide their faces.

Given all these considerations, Myles was in no position to legitimately move for a second lineup, let alone one involving ski masks. The trial court's denial of his lineup motion was eminently reasonable. There was no error.

III. THE TRIAL COURT PROPERLY DENIED APPELLANT'S *MARSDEN* MOTION FOR NEW COUNSEL

Myles contends the trial court abused its discretion when it denied his *Marsden* motion for substitute counsel. (AOB 74-80.) To the contrary, the trial court gave appropriate and thoughtful consideration to the *Marsden* [*People v. Marsden* (1970) 2 Cal.3d 118] motion and denied it because Myles had not demonstrated good cause.

A. Background

On February 14, 2000, 10 months before the start of the trial, Myles requested appointment of new counsel. He complained that his counsel, Mr. Chuck Nacsin, had refused to allow him "to have or see discovery since becoming defense attorney" and refused to investigate or have investigated several issues including the fact that there is evidence to support and prove the fact that defense Investigator Frank Pancucci had intentionally sabotaged the investigation of all allegations. (3 RT 517-518.) Myles made reference to several "exhibits" or examples of how Mr. Nacsin had not adequately championed his interests. Myles asked "let the record reflect" that Mr. Nacsin had not properly investigated the case and had been ineffective, had refused to file motions in support of affirmative defenses, had refused to allow Myles "to see all discovery pertaining to the allegations," all in an attempt "to railroad the defendant, while keeping the defendant under the impression that the defense attorney is working in the interest of the client." (3 RT 518-520.) Myles told the court he had

"absolutely no trust or faith in attorney Chuck Nacsin." (3 RT 523.) Myles claimed that Mr. Nacsin only visited him every two or three months, "and the attorney's secretary refuses to accept the defendant's collect calls, so the defendant can leave no messages." (3 RT 523.) Myles asserted that Mr. Nacsin also refused to interview any witnesses Myles requested. (3 RT 524.) Myles claimed

> it is obvious that the defense attorney, Chuck Nacsin, was attempting to take the defendant to trial with a tainted, inadequate, sabotaged investigation with knowledge of a motive for obstruction of justice and knowledge of evidence to support the investigation had been sabotaged. This is beyond inadequate investigation and ineffective assistance of counsel. This is malpractice of law.

(3 RT 524.)

Myles claimed because of Mr. Nacsin's actions and inactions, Myles was afraid to give him and refused to give him the names and locations of defense witnesses. (3 RT 524-525.) Myles also chided Mr. Nacsin for refusing to file a motion to recuse the trial judge on the grounds that the judge appeared to be extremely biased and prejudiced. (3 RT 525.) Myles complained that he wanted two lawyers appointed in his death penalty case but that Mr. Nacsin refused. (3 RT 529-530.) Myles contended Mr. Nacsin was incompetent at every court hearing and was rushed into making decisions "before I could think or ask my attorney what was happening." (3 RT 531.) Myles stated he believed "that the defense attorneys are or were involved in a conspiracy to convict." (3 RT 532.)

Myles concluded his remarks by saying that what he wanted was "all discovery concerning the charges against me on the record" so that he could support a future *Marsden* claim. (3 RT 534.) The trial court sought clarification: "Okay. And you're not making the *Marsden* motion now. You want this to be a discovery motion, so you can get this, so you can

make the *Marsden* motion at the next hearing?" (3 RT 534.) Myles answered in the affirmative. (3 RT 534.)

Mr. Nacsin responded that he had an objection to giving Myles the "three thousand pages of discovery" because of a concern that it would allow a snitch to develop in the jail. (3 RT534-535.) Mr. Nacsin asserted that "whatever he wants to say," Myles knew what was going on in the case. Mr. Nacsin stated that Myles had told him about the facts of the case and had discussed the case with at least three separate investigators before his current one. (3 RT 535.)

The court decided to give Myles a copy of all the discovery in the case despite Mr. Nacsin's security concerns about the jail and the possibility that information could end up being used against Myles. (3 RT 535.) The court denied Myles's request that he be given Mr. Nacsin's work product. (3 RT 537-538.)

At the next hearing on June 14, 2000, Myles claimed that he had reviewed the transcripts he had received but that he had not received all the discovery, particularly the statements of certain witnesses. (3 RT 671-672.) Myles stated that he had asked Mr. Nacsin to pursue certain matters but "to the best of my knowledge he's ignoring it." (3 RT 674.)

When asked by the court to respond, Mr. Nacsin stated he had many discussions with Myles about these matters and represented that he was "pursuing everything I can pursue in this case." (3 RT 674.) Myles responded:

> And maybe he is. Maybe he is, all right; but I, I, I don't see it. And we have a hard time understanding each other. I can not - - I don't - - I don't know what he's doing, you know what I mean. I don't know what he's doing. I mean, when we're not discussing the case we get along just fine, you know what I'm saying. But when we discuss the case we collide. And I just don't have any understanding of what he's doing or anything like that.

> And I ask him for certain parts of the discovery and I don't receive them.
>
> And it makes me worry.
>
> You know, it makes me worry.

(3 RT 674.)

Later, Myles repeated the theme that, although Mr. Nacsin talked to him, he could not understand him. Myles stated that he "had a good understanding of" his previous two attorneys and asked to have them relieved "For reasons." (3 RT 676.) Myles concluded:

> But in order - - you know, in order to have that attorney/client trust, you know what I'm saying, you know what I'm saying, relationship, I got to be able to trust him, for us to have that attorney/client relationship. And I don't trust him because I don't know - - I don't have, I don't know what he's doing.
>
> I don't know if he's working in the interest of the prosecution or working in my best interest, you know what I'm saying? Because witnesses have been threatening and I don't feel that he's pursuing these things right here, you know; I'm afraid to give him the names and whereabouts of certain witnesses needed for my defense because I feel they might be threatened.

(3 RT 676.)

The court stated:

> Well, I can tell you, from everything I've seen not only in this case but in a lot of cases over the last twenty-some-odd years, Mr. Nacsin is one of the more tenacious defense attorneys. If there's anything to pursue, he pursues it.
>
> I have never had anybody suggest, even suggest or hint or infer that Mr. Nacsin would be throwing a case or working with the prosecution or doing anything detrimental to his client.
>
> Quite the contrary. I'm sure law enforcement officers and district attorneys and judges will tell you he is one of the stronger advocates that any defendant can have.

> And from what I've seen him doing in this case and what he's doing with regard to discovery issues, what he's doing with regard to investigation, is all consistent with that, that if there are areas to suggest that a witness has been threatened or intimidated, those are matters that he certainly would intend to pursue in cross-examination.

(3 RT 676-677.)

When the court asked Mr. Nacsin if the court was correct, Mr. Nacsin answered affirmatively. (3 RT 677.)

B. Law

> 'A *Marsden* hearing is not a full-blown adversarial proceeding, but an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's replacement.'

(*People v. Gutierrez* (2009) 45 Cal.4th 789, 803; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1320; *People v. Hines* (1997) 15 Cal.4th 997, 1025.) There is no absolute right to substitute counsel. (*People v. Marsden, supra*, 2 Cal.3d at p. 123.) A trial court is required to substitute counsel "'in a situation where the record clearly shows that the first appointed counsel is not adequately representing the accused.'" (*Ibid.*) Alternatively the trial court must substitute counsel where it is demonstrated that counsel and defendant are embroiled in an irreconcilable conflict. (*People v. Abilez* (2007) 41 Cal.4th 472, 488.) The decision to substitute counsel is within the discretion of the trial court; a reviewing court will not find an abuse of discretion unless the trial court's failure to substitute counsel would "' "substantially impair" the defendant's right to effective assistance of counsel.'" (*Ibid.*)

C. Analysis

In this case, the trial court made a proper inquiry and did not abuse its discretion by concluding that it was unnecessary to substitute counsel.

Marsden requires that a trial court "listen[ ] to [a defendant's] reasons for requesting a change of attorneys." (*People v. Marsden, supra*, 2 Cal.3d at p. 123.) Here, the trial court did just that the trial court asked Myles to list the grounds upon which he believed Mr. Nacsin had provided inadequate representation and the grounds upon which he believed that there was an irreconcilable conflict with counsel. Myles listed his concerns with counsel, to the point of repeating himself. (3 RT 533-534.) Still, the trial court patiently listened and allowed Myles to speak ad nauseam and voice outrageous claims about Mr. Nacsin. The court solicited a response from Mr. Nacsin and he articulated his reasons for handling the case the way he did. Myles was given ample opportunity to respond, and the trial court then denied defendant's motion finding that representation was adequate. The court made a more than adequate inquiry as to the existence of a conflict between Myles and counsel, and as to the adequacy of Mr. Nacsin's representation.

Mr. Nacsin could have been more artful in explaining to Myles the way he was defending him. However, defense counsel's decision not to file a motion he believed will be futile does not "'"substantially impair" . . . defendant's right to effective assistance of counsel.'" (*People v. Abilez, supra*, 41 Cal.4th at p. 488; see *People v. Memro* (1995) 11 Cal.4th 786, 834["The Sixth Amendment does not require counsel '"to waste the court's time with futile or frivolous motions."' [Citations.]"].)

There is no evidence in the record that Mr. Nacsin did not afford Myles adequate, if not more than adequate, representation. To the contrary, the record speaks to Mr. Nacsin's dedication in representing Myles in the face of overwhelming evidence of his guilt and the truly heinous nature of his crimes. The trial court reasonably concluded that no substitution of counsel was necessary. Myles's first request for substitute counsel was really not a request but was more of a request for discovery which was

honored. Given that Myles made several *Marsden* motions and had already had attorneys Grover Porter and David Call appointed to represent him and then replaced, it is reasonable to infer that Myles's real problem was not with his attorneys but a lack of recognition and acceptance that his actions and choices caused him to be in the predicament of a defendant in a capital murder trial. Because Myles was not denied his Sixth Amendment right to counsel, reversal is not warranted.

IV. THIS COURT SHOULD INDEPENDENTLY REVIEW THE REPORTER'S TRANSCRIPTS OF THE IN CAMERA PROCEEDINGS TO DETERMINE WHETHER THE TRIAL COURT PROPERLY DENIED MYLES'S *BRADY/PITCHESS* MOTION

Myles requests this Court review the transcripts of the in camera hearing and the documents reviewed by the trial court in conjunction with that hearing to determine whether the trial court erred in ruling on Myles's *Brady/Pitchess* motion. (AOB 81-83.) Respondent agrees.

A. Background

Myles filed a motion to obtain discovery of the personnel files of several police **officers involved in various aspects** of the case and the People filed opposition.[7] (1 CT 250-265, 272-291; 2 CT 308-312, 313-325, 326-329; 3 RT 550-651.) The trial court indicated that it intended to review the officer's personnel records:

> It appears at this point that the appropriate balance to protect the defendant's right to access to material and at the same time

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[7] Myles sought discovery of the personal files of the following law enforcement officers from the following law enforcement agencies: Colton Police Department: Ken Sschiller, Jack Morenberg, Mark Owens; San Bernardino Police Department: J. G. Voss, Steven Filson; San Bernardino County Sheriff's Department: Joseph Perea, Mark James, Timothy Nichols, David Llewellyn, Ronald Ives. Myles did not articulate a specific justification for the discovery but asserted a general "Brady discovery obligation" for the prosecution. (1 CT 251.)

> protect both the individual officers' rights to privacy of their own personnel records as well as the privacy rights of the agencies, the right to maintain the privacy of their personnel records, that at this point it would be appropriate for the court to have an in-camera review of those records to see if there is anything there that would suggest it would be discoverable as impeachment material; and in that regard anything that would show a pattern or instances of improper conduct, particularly conduct dealing with false testimony, false evidence, things of that nature.

(3 RT 593.) An in camera hearing was held. (3 RT 600-623; 628-638, 641-649.) Thereafter, the trial court denied the disclosure of the records of Officers Morenberg, Owens, and Schiller (3 RT 650), but ordered disclosure "as to the incident between Mr. Myles and a couple of the deputies at the jail." (3 RT 650.)[8]

B. Law

This Court has reviewed at length in several recent cases the background and mechanics of the procedures by which a party may discover relevant evidence in confidential peace officer personnel records. (See, e.g., *Garcia v. Superior Court* (2007) 42 Cal.4th 63; *Warrick v. Superior Court* (2005) 35 Cal.4th 1011; *Alford v. Superior Court* (2003) 29 Cal.4th 1033; *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1.) On a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. (Evid. Code, § 1043, subd. (b).) Good cause for discovery exists when the defendant shows both "'materiality' to the subject matter of the pending litigation and a 'reasonable belief' that the agency has the type of

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[8] Myles notes that neither the transcript of the *Brady/Pitchess* in camera hearing nor the documents reviewed by the trial court are available to his counsel on appeal. (AOB 81.)

information sought." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.) A showing of good cause is measured by "relatively relaxed standards" that serve to "insure the production" for trial court review of "all potentially relevant documents." (*Ibid.*) "This court has held that the good cause requirement embodies a 'relatively low threshold' for discovery" (*People v. Samuels* (2005) 36 Cal.4th 96, 109), under which a defendant need demonstrate only "a logical link between the defense proposed and the pending charge" and describe with some specificity "how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1021.) If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. (*Chambers v. Superior Court* (2007) 42 Cal.4th 673, 679.) Subject to certain statutory exceptions and limitations (see Evid. Code, § 1045, subds. (b), (e)), "the trial court should then disclose to the defendant 'such information [that] is relevant to the subject matter involved in the litigation.'" (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226, quoting Evid. Code, § 1045, subd. (a); see also *Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1019.) The disclosed information from the confidential records should be "relevant to the subject matter involved in the pending litigation" (Evid. Code, § 1045, subd. (a)), provided that the information does not concern peace officer conduct occurring more than five years earlier, the conclusions of an officer investigating a citizen complaint about a peace officer, or facts that are so remote as to make disclosure of little or no practical benefit (*id.* § 1045, subd. (b)).

"It is settled that an accused must demonstrate that prejudice resulted from a trial court's error in denying discovery." (*People v. Memro* (1985) 38 Cal.3d 658, 684; see also *People v. Cruz* (2008) 44 Cal.4th 636, 670-

671; cf. *People v. Snow* (1987) 44 Cal.3d 216, 226 [infringement on right to fair and impartial jury is reversible per se].) A defendant who has established that the trial court erred in denying *Pitchess* discovery must also demonstrate a reasonable probability of a different outcome had the evidence been disclosed. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 960; *People v. Samuels, supra*, 36 Cal.4th at p. 110; *People v. Memro, supra*, 38 Cal.3d at p. 685; *People v. Johnson* (2004) 118 Cal.App.4th 292, 305; *People v. Hustead* (1999) 74 Cal.App.4th 410, 421 422; see also *People v. Gill* (1997) 60 Cal.App.4th 743, 751 [new trial required if the *Pitchess* evidence would have been "helpful" to the defense and of a nature "to affect the outcome of his trial"]; see generally Cal. Const., art. VI, § 13.)

The reasonable probability standard of prejudice this Court has applied in *Pitchess* cases is the same standard the Court has applied generally to claims that the prosecution improperly withheld exculpatory evidence in violation of a defendant's right to due process. *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215], held "that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." (*Id.* at p. 87.) Evidence is material "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" (*Kyles v. Whitley* (1995) 514 U.S. 419, 433, 434 [115 S.Ct. 1555, 131 L.Ed.2d 490].)

C. Analysis

With the above standards in mind, respondent does not oppose Myles's request that this Court review the transcript of the in camera hearing and the documents reviewed by the trial court in conjunction with that hearing to determine whether the trial court erred in ruling on Myles's *Brady/Pitchess* motion.

V. THE TRIAL COURT PROPERLY INSTRUCTED THE PROSPECTIVE JURORS DURING VOIR DIRE NOT TO BE INFLUENCED BY ANY SYMPATHY OR EMPATHY OR COMPASSION FOR EITHER SIDE

Myles argues that his rights to a fair trial and to due process were violated when, during voir dire, the trial court instructed the prospective jurors not to be influenced by sympathy or empathy or compassion for either side. Myles asserts that this instruction was erroneous as a matter of law and mandates reversal of Myles's death sentence. (AOB 84-92.) He is wrong; the instruction applied equally to both sides and was properly given and did not prejudice Myles either during the guilt or penalty phases of his trial.

A. Background

During voir dire, the trial court instructed the prospective jurors:

> It's a normal human reaction or a human emotion, you're going to be here during the course of this trial through the various phases, we get to all of those phases, for several weeks. Mr. Rogers, you'll be seeing Mr. Rogers, Mr. Myles, every day. There may be friends or family of theirs present from time to time.
>
> Likewise, there may be friends or family of the deceased individuals or other people involved in the case in the courtroom from time to time, and a normal human reaction would be to have some feelings of sympathy or empathy with any or all of those people.
>
> And what we're going to be asking you to do as jurors is to set aside any of those feeling of sympathy or empathy or compassion on either side and make an objective decision based solely on the facts and the law that I give you.
>
> Do all of you feel that you're the type of person who can do that, who could set aside any sympathy and emotions and make an objective decision based on the facts?

Anyone feel they would have difficulty doing that?

Okay.

(8 RT 888.) Myles did not object to the instruction or request any modification.

B. Law.

"Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Andrews* (1989) 49 Cal.3d 200, 218; *People v. Hudson* (2006) 38 Cal.4th 1002, 1012.) But that rule does not apply when, the trial court gives an instruction that is an incorrect statement of the law. (*People v. Rundle* (2008) 43 Cal.4th 76, 189, fn. 55; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; *People v. Frazer* (2003) 106 Cal.App.4th 1105, 1116, fn. 5.)

Giving CALJIC Nos. 1.00 or 8.84 in the penalty phase of a capital trial, which advise the jury not to be swayed by mere sympathy, is not federal constitutional error.[9] (*California v. Brown* (1987) 479 U.S. 538

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[9] A modified version of CALJIC No. 1.00 and 8.84 was read to the jury as follows:

Members of the jury:

> You have heard all the evidence, and you will now be instructed as to the law that applies to the penalty phase of this trial. The law requires that I read the instructions to you. You will have these instructions in written form in the jury room to refer to during your deliberations.
>
> You have two duties to perform. First, you must determine what facts have been proven from the evidence received in the trial and not from any other source. A "fact" is something proven by the evidence or by stipulation. A stipulation is an agreement between attorneys regarding the facts. Second, you must apply

(continued...)

[107 S.Ct. 837, 93 L.Ed.2d 934]; *People v. Brown* (1988) 45 Cal.3d 1247, 1253.) Failure to countermand CALJIC No. 1.00 in the penalty phase does not constitute error where the jury was not misled into believing it could not consider sympathy for the defendant in determining the appropriate penalty. (*People v. Frye* (1998) 18 Cal.4th 894, 1025; *People v. Medina* (1995) 11 Cal.4th 694, 779-780.) Determining whether the jury was adequately instructed on the role played by sympathy in the penalty phase, and the breadth of its duty to consider proper matters in mitigation, entails analysis of the record as a whole, including instructions and the prosecutor's and defense counsel's arguments. The key inquiry is whether the jurors may have been misled into believing that mitigating evidence about the defendant's character or background must be ignored. (*People v. Melton* (1988) 44 Cal.3d 713, 758-760; *People v. Howard* (1988) 44 Cal.3d 375, 432.)

(...continued)

> the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict. You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.
>
> If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.
>
> You must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a verdict.

(3 CT 659.)

C. Analysis

Myles contends he can raise the propriety of this voir dire instruction even though he did not object when it was given because, "as a matter of law," his substantial rights were affected and the fundamental fairness of the penalty phase was seriously compromised to the point where a miscarriage of justice has occurred. (AOB 85-86.) However, the trial court's instruction to the jury was a correct statement of the law and appropriate during voir dire to inform the potential jurors that, if they were to become jurors, they should not be influenced by the emotions of the family and friends of both Rogers and Myles and those of the victims. As such, if Myles had a problem with the instruction, he should have objected. Since he did not, he has forfeited this issue. (*People v. Valdez* (2004) 32 Cal.4th 73, 113; *People v. Hart* (1999) 20 Cal.4th 546, 622; but see *People v. Lewis* (2009) 46 Cal.4th 1255, 1315 (hereafter *Lewis III*.)

Assuming Myles can raise this issue, it lacks merit. This particular instruction was given during voir dire and was designed to orient the potential jurors as to the possibility that they might see the families of the defendants and the victims in the courtroom on a regular basis during the course of trial. Prior to the penalty phase of the trial, the court gavė the jury two instructions to give them a general idea of the framework of the penalty phase. After explaining that Myles had decided to exercise his right not to be present during the penalty phase of the trial, the court explained that in determining Myles's penalty, the jurors were to consider all of the evidence received during all phases of the trial, unless instructed otherwise, and to consider and take into account, various factors which were either aggravating or mitigating. The court further instructed, pursuant to CALJIC No. 8.88, that the weighing of aggravating and mitigating circumstances did not involve

> a mere mechanical counting of factors on each side of an imaginary scale or even the arbitrary assignment of weight to any of those factors. Rather, you are free to assign whatever moral or sympathetic value you deem appropriate to each and every and all of the various factors you are permitted to consider.

(13 RT 2879.)

After the presentation of evidence during the penalty phase was complete, the court gave the jury its concluding instructions. It again detailed the factors the jury could consider in determining penalty including "Any sympathetic or other aspect of defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (CALJIC No. 8.85; 3 CT 683; 14 RT 3171-3172.) It then instructed "You must disregard any jury instructions given to you in the guilty phase of the trial which conflicts with this principle." (CALJIC No. 8.85; 3 CT 683;14 RT 3172.) Lastly, the court stated:

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

(14 RT 3172.)

During closing argument, the prosecutor went through the various factors. When he talked about sympathy, he said Myles did not deserve it. He asked the jury not to let Myles "steal Ricky Byrd and Fred Malouf's moral constituency along with their lives." (14 RT 3191.) Myles's defense counsel did not mention sympathy at all but simply pleaded with the jury for mercy for Myles. (14 RT 3206-3207.)

Given the totality of the trial court's instructions, and the tenor of the closing arguments, there is no chance the court's instruction during voir

dire prejudiced Myles. The record shows that the jury was not encumbered by any instructions from the court or the arguments of the prosecutor or Myles's defense counsel from having any notion that they could not consider sympathy for Myles in their consideration of his penalty. The instructions allowed consideration of sympathy for Myles (*People v. Mickey* (1991) 54 Cal.3d 612, 695) and in no way even implied that sympathy for him should be set aside.

Myles argues that because the trial court stated that its instruction, about setting aside any feelings of sympathy or empathy or compassion for either side, applied "during the course of trial through the various phases" and for "all those phases," the jury was precluded from considering any relevant mitigating evidence. (AOB 88.) This is simply incorrect. The court's instruction was for the benefit of the potential jurors during voir dire. The court's later instructions made it clear that the jury could consider mitigating evidence for Myles and that sympathy for him or his situation was not an improper consideration.

In *California v. Brown, supra*, 479 U.S. 538, the United States Supreme Court held that an instruction which informed the jury not to be "swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was not unconstitutional because a jury "would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence." (*Id.* at p. 542.) Contrary to Myles's position, this is exactly what happened in the instant case. The court merely informed the potential jurors that if they became jurors on Myles case, they should make an objective decision based solely on the facts and the law. Later, before the penalty phase, the court clarified that the jurors were "free to assign whatever moral or sympathetic value you deem appropriate to each and every and all of the various factors you are permitted to consider." (13 RT 2879.) At the

penalty phase, the jurors were instructed they could consider "Any sympathetic or other aspect of defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (14 RT 3171-3172.)

Thereafter, the prosecutor never said that the jury was prohibited from considering sympathy for Myles, only that he did not deserve it, which implies the jury can consider sympathy.

Given the totality of the instructions and the arguments of counsel, there is no reasonable possibility that the jury was misled regarding the scope of its sentencing discretion by the trial court's preliminary instruction regarding inappropriate sympathy considerations. There is no error and Myles was not prejudiced.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT RULED THAT EVIDENCE THAT WITNESS KAREN KING RECEIVED A THREATENING PHONE CALL WHICH MADE HER AFRAID TO TESTIFY WAS ADMISSIBLE

Myles contends the trial court abused its discretion in denying his motion for mistrial after Pepper Steak restaurant witness Karen King testified that she received a telephone call which had made her afraid to testify. He argues that the trial court's cautionary instruction was inadequate and that his rights to a fair trial and a reliable determination of guilt and penalty were violated. (AOB 92-99.) To the contrary, the trial court properly exercised its discretion in denying the motion for mistrial and the cautionary instruction adequately protected Myles constitutional rights so that he was not unduly prejudiced by King's testimony.

A. Background

Karen King testified as a prosecution witness that she lived in the same apartment complex as Rogers and Myles and that she had seen Myles

with a gun, and that Myles borrowed her black car sometime after March 1996. (8 RT 1713-1718.) The prosecutor then asked:

Q Are you afraid to be here today?
A No.
Q Not at all?
A No.
Q Okay. Did you receive a phone call from someone?
A Yes.
Q Did that cause you concern?

(8 RT 1718.)

Both Rogers's and Myles's counsels objected on either lack of discovery or hearsay grounds or both. (8 RT 1718.) The court sustained the objections at that point and stated that counsel could be heard on it later. King's direct testimony continued:

Q (By Mr. Young [prosecutor]) Do you want to be here today?
A No.
Q Have you expressed fear about testifying?
A Yes, I have.
Q But you're not afraid?
A Not anymore.

(8 RT 1719.)

Thereafter, at a sidebar conference prior to cross-examination, the issue was discussed. The prosecutor explained that King had received a phone call from the brother of King's boyfriend, Daniel Jackson (8 RT 1713), who lives out of state, who told her that it would be better for her if she did not come to court and if she did not testify. Defense counsels complained that information was not disclosed to them prior to King's testimony. Myles's defense counsel stated that the prosecutor's question implied that somehow Myles was responsible for the call. The court suggested: "Well, I suppose either of you can ask that: 'The phone call that you received was not from Mr. Rogers or Mr. Myles?'" (8 RT 1720.)

The court also stated it would instruct the jury pursuant to a combination of CALJIC Nos. 2.05 and 2.06:

> If you find that an effort to suppress evidence against the defendant was made by another person for the defendant's benefit, you may not consider that effort as tending to show a
>
> defendant's consciousness of guilt unless you also find the defendant authorized that effort.

(8 RT 1721.)

Myles's defense counsel again objected and moved for a mistrial based on a lack of discovery, denial of due process, and resulting prejudice to Myles. (8 RT 1721.) The court denied the motion and stated "I don't see any prejudice, especially if you right now get the information that the phone call referred to was not from Mr. Rogers and Mr. Myles; and [CALJIC No.] 2.05 is given." (8 RT 1721-1722.) The court also stated that, if requested, it would instruct the jury not to consider efforts to suppress evidence against the defendants unless the jury found that the defendant(s) had authorized such an effort. Myles's counsel continued to argue that the prejudicial effect could not be cured. (8 RT 1723-1724.)

On cross-examination, King testified that neither Myles or Rogers had called her, that the caller did not indicate he was calling on behalf of either Myles or Rogers, and that she was just told it would be best if she did not testify. (8 RT 1724-1725.) The trial court then instructed the jury:

> Ladies and gentlemen, with regard to the phone call that the witness indicated that she received, that was not from Mr. Myles or Mr. Rogers.
>
> Let me give you an instruction of law regarding that:
>
> If you find that an effort was made or an attempt was made to suppress evidence against the defendant or to dissuade a witness from testifying, and that was done or made by another person potentially for the defendant's benefit, you may - - you may not

consider that effort as tending to show any consciousness of guilt on the defendant's part.

So since that was not made - - the phone call was not made by either Mr. Myles or Mr. Rogers, and there's - - unless there was evidence to indicate they told someone to do that, which at this point there is not, it cannot be considered against either Mr. Myles or Mr. Rogers.

(8 RT 1726.)

The court continued:

That it can be considered, however, in terms of your evaluating, obviously, the credibility of the witness, and as you would evaluate any witness. And if there's a reason why they would or would not want to be here or any other motives for their testimony, certainly that's something you can consider in evaluating, one of the many factors you can consider in evaluating the testimony of the witness.

(8 RT 1726-1727.)

Prior to the closing arguments, the court instructed the jury:

If you find that an effort was made or an attempt was made to suppress evidence against a defendant or to dissuade a witness from testifying, and that was done or made by another person potentially for the defendant's benefit, you may not consider that as an effort - - you may not consider that evidence as tending to show any consciousness of guilt on the defendant's part.

(11 RT 2381.)

B. Law

When there is no evidence that the defendant authorized threats against a witness made by a third party, evidence of those threats may not be introduced to prove consciousness of guilt on the part of the defendant. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.) However, third party threats against a witness may be admitted for the limited purpose of evaluating the witness's credibility. (See Evid. Code, § 780, subd. (f) [jury may consider the existence or nonexistence of a bias, interest, or other

motive in determining a witness's credibility]; *People v. Olguin, supra*, 31 Cal.App.4th at p. 1368.) Any evidence which tends to impeach the credibility of a witness is relevant (see *People v. Carpenter* (1997) 15 Cal.4th 312, 408.) "For such evidence to be admissible, there is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is 'directly linked' to the defendant." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1141-1142.) Any potential prejudice to the defendant from this type of evidence can be met by a limiting instruction, which can be presumed to have been understood and followed by the jury. (*People v. Panah* (2005) 35 Cal.4th 395, 492.) Objections to a trial court's admission of this type of evidence is reviewed for an abuse of discretion. (*People v. Guerra, supra*, 37 Cal.4th at p. 1113.)

C. Analysis

Here, the prosecutor indicated that he had offered the evidence that someone had told Karen King not to testify for "the only purpose" of judging "the credibility of the witness." (8 RT 1724.) The trial court contemporaneously instructed the jury that this evidence could be used to evaluate the credibility of a witness but that it could not be considered as tending to show any consciousness of guilt on the part of Myles or Rogers. The court made clear that it "cannot be considered against either Mr. Myles or Mr. Rogers." (8 RT 1726.) The court repeated this admonition prior to the closing arguments. (11 RT 2381.) In his closing argument (11 RT 2407-2422), and his rebuttal argument (11 RT 2453-2460), the prosecutor made no mention of the telephone threat against Karen King.

Myles argues that the evidence that King had been told by a third party not to testify was of such prejudicial effect that the limiting instructions given by the court were ineffective and, therefore, his conviction must be reversed. (AOB 98-99.) Given the strong evidence

against Myles, it is hyperbole to suggest that this so-called threat evidence had such an impact. This nature of this evidence is nothing like that in *People v. Hannon* (1977) 19 Cal.3d 588, or *Clark v. Duckworth* (7th Cir. 1990) 906 F.2d 1174, or any of the cases Myles cites, because, contrary to Myles's claim that "[t]here was considerable evidence raising a doubt as to [Myles's] guilt in connection with the Pepper Steak incident" (AOB 98), in reality the case against him was so overwhelming that King's testimony of being hesitant to testify was not a factor in the jury's verdict. Moreover, the complained of testimony could simply not be viewed as insinuating threatening behavior by Myles or Rogers. In addition, a witness's fear of recrimination of any kind by anyone is relevant because the testimony is more credible because of the witness's personal stake in the testimony. (*People v. Olguin supra*, 31 Cal.App.4th at pp. 1368-1369.) Moreover, any prejudice to Myles was eliminated by the trial court's double admonition that there was no evidence that the phone call was made by either Myles or Rogers, and therefore, it could not be considered against them.

Even if admission of such evidence was error, the court's admonition did not clarify that the proper use of this evidence was only to help evaluate the credibility of Karen King, the error was harmless under any standard, given the overwhelming nature of the case against Myles.

VII. THE TRIAL COURT PROPERLY ACTED WITHIN ITS DISCRETION BY ALLOWING WITNESS DONNA MALOUF TO REMAIN IN THE COURTROOM AFTER HER TESTIMONY

Myles asserts the trial court abused its discretion in allowing Donna Malouf to remain in the courtroom with a support person after her testimony and argues he was prejudiced by her continued presence and behavior. (AOB 99-110.) To the contrary, the trial court properly exercised its discretion in allowing Ms. Malouf to remain in the courtroom.

A. Background

Before witnesses were called in the phase of the trial dealing with the murder of Fred Malouf and the robberies at the Pepper Steak restaurant, the trial court indicated that once Donna Malouf had completed her testimony and was excused as a witness, she would be allowed to remain in the courtroom during the rest of the trial. (4 RT 767-768.) Myles's counsel objected and asserted that remaining in the courtroom after her testimony would affect the penalty phase. (4 RT 768-769.) The court responded:

> Well, that perhaps adds to the probative value of the victim-impact evidence, I suppose.
>
> But I - - the purpose of excluding witnesses during the trial is so witnesses will not hear the testimony of other witnesses, and then conform their testimony to be either consistent or inconsistent with other witnesses.
>
> So certainly to the extent that during the guilt phase other percipient witnesses are going to be testifying to the events that occurred at the Pepper Steak restaurant, I would concur with defense counsel that it would be appropriate to exclude Mrs. Malouf, certainly prior to her testimony, to avoid any potentiality of her perhaps hearing what other people may say and then attempting to conform her testimony to any other witnesses's testimony.
>
> But once she has testified fully and been cross-examined fully as to all matters, the rationale for exclusion in my mind no longer exists. So I'll treat that as an objection to her being allowed to remain. Overrule that objection, exercise my discretion to allow her to remain in the courtroom as the surviving spouse of Mr. Malouf during the balance of the trial, after she's completed all of her testimony in the guilt phase.

(4 RT 769-770.)

When Mrs. Malouf was called as a witness, the prosecutor indicated that she had asked that a victim-witness support advocate be present. The prosecutor asked that the support person, Janet Hulse, an employee of the

San Bernardino County District Attorney, be allowed to remain in court and that the jury be instructed at to her status. (7 RT 1346.) The court granted the prosecutor's request and told the jury,

> Ladies and gentlemen, the law provides that an alleged victim in a crime is allowed to have a support person with them in court during testimony. The support person is entitled to sit with them but is, obviously, not the witness and is not going to participate in any manner.
>
> (7 RT 1346.)

After Mrs. Malouf's testimony, she stayed in the courtroom. After her testimony and at the beginning of the testimony of robbery victim Harold Lewis, Myles's defense counsel asked to approach the bench and objected to the continued presence of Mrs. Malouf:

> MR. Nacsin: The witness, Donna Malouf-Lawrence, is in the courtroom. I know the court ruled earlier, even though she wasn't excused, she could be in the courtroom. She's in the first row in the middle section. And I'm not saying she's doing it intentionally, but she's sitting there nodding her head in agreement with Mr. Lewis's answers. Those are the kind of things, whether she's doing them intentionally or unintentionally, are the problems with her being in here or before the jury. I don't know if any jurors do or don't see her, but those are the kinds of things we were worried about.
>
> THE COURT: Well, I did notice that she was in the courtroom, and the record should reflect we had briefly discussed this in chambers, that we had previously had a discussion on the record about this, and the court had indicated I would allow her to remain in the courtroom after she had testified.
>
> I didn't notice her really nodding her head but - -
>
> MR. Nacsin: For the record, I did. And just so the record is clear, I made an objection about this earlier and - - and I objected on the exclusionary rules and the United States Constitutional rules, the Fifth, Eighth and Fourteenth Amendments.

THE COURT: I think exclusion of witnesses during testimony is discretionary with the court. Since Ms. Malouf has already testified, I don't see any prejudice - - I think maybe she should be told, you know, not to do any gesturing or nodding her head in agreement or disagreement with any witnesses, try to be conscious of that.

MR. YOUNG [Prosecutor]: I agree with the court. That's why I instructed her not to do that prior to calling this witness.

THE COURT: Okay. Okay.

MR. Nacsin: All's I can say is, I watched her and she's doing it.

THE COURT: Okay. I'll - - I'll pay more attention to her and see if it continues or if it's a problem. If it is, maybe in the future we'll suggest that maybe she sit at the back of the courtroom where she'll be less noticeable.

MR. Nacsin: Just for the record, I wanted to raise it now before it became a problem later.

THE COURT: I'll take that as an objection to her being present. That objection is overruled for all the reasons stated previously when we had discussed that decision.

MR. Nacsin: Thank you.

(7 RT 1441-1443.)

Later, during the testimony of Carrie Hernandez, and after the noon recess, defense counsel objected again to Ms. Malouf's presence and behavior:

MR. Nacsin: Yes, your Honor. I hate to belabor the point, but out of an abundance of caution and because of the nature of this particular case, because I'm sitting, looking directly at the jury and particularly at the audience, this morning when Carrie Hernandez was testifying about Fred Malouf being shot, Donna Malouf - - I think 'Lawrence' now - - was in the first row here, and she was crying, understandably so, and she was being held by her support people. But the juror in Seat No. 9 looked over at her three or four times and stared at her.

I want the record to reflect that.

THE COURT: I did - - again, I've been paying attention to Miss Malouf. She was present during the part of the testimony describing the actual shooting and the bringing of towels and so forth. She was upset, but she wasn't - - you know, I mean, she wasn't audibly making any disturbance or moving. I mean, if one were to look at her face, you could tell she was upset, as you say, understandably so. That's certainly no different than any other case where there's family members present who are going to have some type of emotional reaction.

And I think she has a right to be here.

MR. LEVINE [Rogers's defense counsel]: But those family members haven't testified in the presence of the jury.

THE COURT: Sometimes they have and sometimes they haven't.

MR. Nacsin: I just feel, out of an abundance of caution, I have to put this on the record.

THE COURT: That's fine, and you've done so.

Anything else?

MR. Nacsin: Yes.

THE CLERK: Was that a motion or just a statement?

THE COURT: No.

MR. Nacsin: It's a statement for the ongoing motion that's been ruled on twice previously.

(8 RT 1561-1562.)

B. Law

Penal Code section 868.5 entitles a prosecuting witness in, inter alia, a murder case to the attendance at trial of one or two support persons "of his

or her own choosing" while testifying.[10] Case law uniformly rejects arguments that section 868.5 is inherently prejudicial, erodes the presumption of innocence, and impermissibly encroaches on confrontation clause and due process clause rights. (See, e.g., *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1077, *People v. Johns* (1997) 56 Cal.App.4th 550, 553-556; *People v. Adams* (1993) 19 Cal.App.4th 412, 435-444; *People v. Patten* (1992) 9 Cal.App.4th 1718, 1725-1733.)

"Misconduct on the part of a spectator is a ground for mistrial if the misconduct is of such a character as to prejudice the defendant or influence the verdict. [Citation.]" (*People v. Lucero* (1988) 44 Cal.3d 1006, 1022.)

> In *Holbrook v. Flynn* (1986) 475 U.S. 560, 572[[106 S.Ct. 1340, 89 L.Ed.2d 525]] . . . the Supreme Court framed the federal constitutional question as whether what the jury "saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial . . ." The trial court is entrusted with broad discretion to determine whether spectator conduct is prejudicial. [Citation.]

(*People v. Chatman* (2006) 38 Cal.4th 344, 369.) The United States Supreme Court has never held "that such private actor courtroom conduct

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[10] Penal Code section 868.5 provides as follows in relevant part:

> (a) Notwithstanding any other law, a prosecuting witness in a case involving a violation of Section 187 . . . , shall be entitled, for support, to the attendance of up to two persons of his or her own choosing, one of whom may be a witness, at the preliminary hearing and at the trial, . . . during the testimony of the prosecuting witness. Only one of those support persons may accompany the witness to the witness stand, although the other may remain in the courtroom during the witness' testimony. The person or persons so chosen shall not be a person described in Section 1070 of the Evidence Code unless the person or persons are related to the prosecuting witness as a parent, guardian, or sibling and do not make notes during the hearing or proceeding.

was so inherently prejudicial that it deprived a defendant of a fair trial." (*Carey v. Musladin* (2006) 549 U.S. 70, 76 [127 S.Ct. 649, 653, 166 L.Ed.2d 482], fn. omitted.)

The exclusion of witnesses from the courtroom is a matter within the trial court's discretion. (See *People v. Valdez* (1986) 177 Cal.App.3d 680, 687.) Evidence Code section 777 provides in pertinent part that "the court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses."

C. Analysis

Myles makes two complaints regarding Donna Malouf's presence in the courtroom. First, he argues the presence of a support person was not justified and distorted Donna Malouf's demeanor while testifying and tacitly vouched for the truth of her testimony. He also complains Malouf's presence in the courtroom after her testimony, and her sobbing and nodding in response to the testimony of other witnesses, prejudiced him because it caused the juror's emotion to rule over their reason. He contends he was denied due process and a fair trial. (AOB 110.)

The trial court properly exercised its discretion in allowing Ms. Malouf to remain in the courtroom after her testimony and to be aided by a support person. After all, she was a percipient witness to the events at the Pepper Steak restaurant, not just a grieving widow. Moreover, once her testimony was complete, Evidence Code section 777's purpose about preventing a witness from hearing the testimony of other witnesses was no longer a concern. Myles confronted her in the restaurant, grabbed her, and forced her into the kitchen area. She was close by when her husband was repeatedly shot and so testified. Thereafter, if jurors saw her in the courtroom, they would not be surprised if Ms. Malouf showed some emotion or reaction to the evidence or testimony. Given that the court had

instructed the jury during voir dire to set aside feelings of sympathy or empathy or compassion in reaction to the presence of family members of either Myles or Rogers or the victims (8 RT 888), it was unlikely the jury was overwhelmed by Ms. Malouf's display of emotion. Neither was the jury likely to be influenced by the presence of a support person for Ms. Malouf. She was entitled by Penal Code section 868.5 to have a support person and the trial court informed the jury that the law authorized one.

This case is factually and emotionally distinct from cases cited by Myles such as *Rodriguez v. State* (Fla.Ct.App. 1983) 433 So.2d 1273, and *Price v. State* (Ga.Ct.App. 1979) 254 S.E.2d 512, in which epithets were shouted by a grieving widow from the witness stand or the murder victim's mother repeatedly had emotional outbursts while in the courtroom. (AOB 106-107.) In both those cases, the emotions of the victim's relatives took over the courtroom and may have overwhelmed the rationality of the juries. However, in the instant case, Ms. Malouf's emotions were quiet and controlled and in no way created an atmosphere in the courtroom where the jurors abandoned their sworn duty to decide the case on the facts and the law and were overcome by Ms. Malouf's sorrow. Rather, considering the trial court's instructions and the record as a whole, it is clear that the jurors decided the guilt and penalty phases of Myles's trial appropriately. Myles has not demonstrated that the guilt and penalty phase verdicts are constitutionally infirm because of Mrs. Malouf's presence and behavior in the courtroom.

VIII. THE COURT PROPERLY INSTRUCTED THE JURY ON THE CONCEPT OF CIRCUMSTANTIAL EVIDENCE AND MYLES WAS NOT DENIED DUE PROCESS AND A FAIR TRIAL BECAUSE OF THE COURT'S INSTRUCTION

Myles contends that the combination of standard jury instructions unconstitutionally undermined the prosecution's burden of proving Myles's guilt beyond a reasonable doubt. He argues that, whereas CALJIC No. 2.90

instructed the jury at the two guilt phases and the penalty phase that Myles was presumed to be innocent until the contrary was proved and that this assumption placed upon the state the burden of proving him guilty beyond a reasonable doubt, two other instructions, CALJIC Nos. 2.01 and 8.83, informed the jury that if one interpretation of the evidence was reasonable and the other interpretation was unreasonable, the reasonable one should be adopted and the unreasonable one rejected. Myles argues that these latter instructions were inconsistent with the instruction on proof beyond a reasonable doubt and allowed a finding of guilt below that standard. (AOB 110-116.) This argument has been repeatedly rejected by this Court and Myles does not present anything new to warrant a different ruling by this Court.

A. Background

The trial court instructed the jury at the two guilt phases that Myles was presumed to be innocent until the contrary was proved and that this presumption placed upon the state the burden of proving him guilty beyond a reasonable doubt pursuant to CALJIC No. 2.90.[11] (2 CT 422, 539; 3 CT 699; 11 RT 2389-2390; 12 RT 2761; 14 RT 3176.) In addition, the court instructed the jury at the two guilt phases on the concepts of circumstantial

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[11] A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt [¶] . . . [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

evidence and proof of specific intent or mental state, pursuant to CALJIC Nos. 2.01[12] and 8.83.[13] (2 CT 403, 438, 528; 3 CT 695; 11 RT 2380-2381; 12 RT 2755-2756; 14 RT 3163-3164.)

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[12] Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact.

Evidence is either direct or circumstantial.

Direct evidence is evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact.

Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

[13] You are not permitted to find a special circumstance alleged in this case to be true based on circumstantial evidence unless the proved circumstance is not only (1) consistent with the theory that a special circumstance is true, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the truth of the special circumstance must be proved beyond a reasonable doubt.

In other words, before an inference essential to establish a special circumstance may be found to have been proved beyond

(continued...)

B. Law

This Court has previously rejected claims that several standard instructions individually and collectively undermine and impermissibly lessen the requirement of proof beyond a reasonable doubt: CALJIC Nos. 1.00 (Respective Duties of Judge and Jury), 2.01 (Sufficiency of Circumstantial Evidence Generally), 2.21.1 (Discrepancies in Testimony), 2.22 (Weighing Conflicting Testimony), 2.27 (Sufficiency of Testimony of One Witness), 2.51 (Motive), 2.90 (Presumption of Innocence Reasonable Doubt Burden of Proof), and 8.83 (Special Circumstances Sufficiency of Circumstantial Evidence Generally), because "[e]ach of these instructions 'is unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof.'" (*People v. Parson* (2008) 44 Cal.4th 332, 358; *People v. Kelly* (2007) 42 Cal.4th 763, 792 [and cases cited]; see also *People v. Howard* (2008) 42 Cal.4th 1000, 1025-1026 & fn. 14[and cases cited]; *People v. Carey* (2007) 41 Cal.4th 109, 129-131 [and cases cited]; *People v. Crew* (2003) 31 Cal.4th 822, 847-848 [and cases cited].)

(...continued)

> a reasonable doubt, each fact or circumstance upon which that inference rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the truth of a special circumstance and other to its untruth, you must adopt the interpretation which points to its untruth, and reject the interpretation which points to its truth.
>
> If, on the other hand, one interpretation of that evidence appears to you to be reasonable, and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

This Court has also repeatedly rejected Myles's contention that CALJIC Nos. 2.01 and 8.83 create an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless defendant rebutted the presumption producing a reasonable exculpatory interpretation. (E.g., *People v. Parson, supra*, 44 Cal.4th at p. 358; *People v. Morgan* (2007) 42 Cal.4th 593, 620; *People v. Stewart* (2004) 33 Cal.4th 425, 521; *People v. Nakahara* (2003) 30 Cal.4th 705, 713-714.)

C. Analysis

Because these instructions were properly given, there is no merit to Myles's contentions. Contrary to Myles's assertions, this case did not have serious weaknesses and gaps in the People's case which would have caused a reasonable juror to harbor a reasonable doubt about Myles's guilt and the appropriateness of death as the proper penalty. (AOB 116.) CALJIC Nos. 2.01, 2.90, and 8.83 properly instruct that the People have the burden of proof and that it does not shift to the defendant.

IX. THE TRIAL COURT DID NOT ERR BY NOT INSTRUCTING THE JURY SUA SPONTE ON VOLUNTARY INTOXICATION

Myles advances that the trial court committed prejudicial error of constitutional magnitude by failing to instruct the jury sua sponte pursuant to CALJIC Nos.4.21, 4.21.1, and 4.21.2 regarding voluntary intoxication.[14]

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[14] CALJIC No. 4.21 states, in relevant part: "If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether defendant had the required [specific intent] [mental state]."

CALJIC No. 4.21.1 states:

> It is the general rule that no act committed by a person while in the state of voluntary intoxication is less criminal by reason of that condition. However, there is an exception to this general rule, namely, where a specific intent or mental state is an

(continued...)

He claims there was an evidentiary basis for these instructions, and without them, the jury never properly considered how the specific intent necessary for murder and robbery could have been negated by intoxication. Therefore, he claims his constitutional rights to due process, a fair trial, and a reliable determination of guilt and penalty were prejudicially violated. (AOB 116-122.) Myles's contentions are without merit; there was no credible evidence that Myles was voluntarily intoxicated on the night he committed the murder of Fred Malouf or the robberies at the Pepper Steak restaurant. Therefore, the trial court was under no obligation to instruct the jury on the concept of voluntary intoxication.

(...continued)

> essential element of a crime. In that event, you should consider the defendant's voluntary intoxication in deciding whether the defendant possessed the required specific intent or mental state at the time of the commission of the alleged crime. Thus, in the crime charged in count 1, as well as the lesser crimes referenced in these instructions, a necessary element is the existence in the mind of the defendant of a certain specific intent or mental state which is included in the definition of the crimes set forth elsewhere in these instructions. If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether or not that defendant had the required specific intent or mental state. If, from all the evidence, you have a reasonable doubt whether the defendant had the required specific intent or mental state, you must find the defendant did not have the specific intent or mental state in question.

CALJIC No. 4.21.2 states in relevant part: "In deciding whether a defendant is guilty as an aider and abettor, you may consider evidence of voluntary intoxication in determining whether a defendant tried as an aider and abettor had the required mental state. However, intoxication evidence is irrelevant on the question whether a charged crime was a natural and probable consequence of the target crime."

A. Background

During the guilt phase of the trial pertaining to the murder of Fred Malouf and the robberies committed by Myles and Rogers at the Pepper Steak restaurant, Lateshia Winkler testified that in April 1996, she lived in an apartment on East Date Street in San Bernardino with her two boys and a roommate named John Vernika. (9 RT 1787.) Sometime in late March or early April 1996, Myles occasionally stayed in the apartment. He had a gun about the size of a 9 millimeter or a .45 caliber. Winkler did not allow guns in the apartment so Myles kept his in the trunk of one of Winkler's old cars but he kept two loaded magazines or clips on the back of her headboard. (9 RT 1788-1789.)

On the evening of Saturday, April 20, 1996, Myles was at Winkler's apartment with two friends, one of whom was Rogers. (9 RT 1790-1791.) Myles left with Rogers and the other man. (9 RT 1792.) Before he left, Myles was acting normal. (9 RT 1804.) However, late that night, Myles returned to the apartment by himself. He was "high" or "Shermed" in a kind of PCP stupor. He walked past Winkler and into the bedroom. Myles eventually told her that "his home boy got shot in a robbery." (9 RT 1794-1795.) Myles said he was tired of people chasing him and he was tired of running. (9 RT 1793.) When Winkler started to talk to him, Myles said something to the effect of "Don't start. I've got a lot of shit on my mind." (9 RT 1793.) Myles spent the night at Winkler's apartment. (9 RT 1795.)

B. Law

An instruction on the significance of voluntary intoxication is a "pinpoint" instruction that the trial court is not required to give unless requested by the defendant. (*People v. Saille* (1991) 54 Cal.3d 1103, 1120; see also *People v. Rundle, supra*, 43 Cal.4th 76, 145; *People v. Clark* (1993) 5 Cal.4th 950, 1022.) If the defendant in a particular case believes

voluntary intoxication is an issue that could affect the jury's determination of the mental state elements of the charged crimes, he or she must request an instruction on that subject. Any lack of clarity regarding the consideration, if any, the jury should give to evidence of voluntary intoxication, in the absence of a request for an instruction on this subject, is of the defendant's doing, and on appeal he cannot avail himself of his own inaction. (*People v. Rundle, supra*, 43 Cal.4th at pp. 145-146; *People v. San Nicolas* (2004) 34 Cal.4th 614, 669-670.)

C. Analysis

Myles strongly argues he was entitled to instructions on voluntary intoxication because of Winkler's testimony but acknowledges this Court's decision in *Saille* is dispositive. (AOB 121.) Still he persists and argues that the trial court's overriding obligation to ensure that a criminal defendant receives a fair trial obligated the trial court to a sua sponte instruction with CALJIC Nos. 4.21, 4.21.1 and 4.21.2. But, even if *Saille* was trumped by general constitutional principles, there was no evidentiary support for an instruction on voluntary intoxication. After all, Winkler only testified that Myles appeared under the influence of PCP when he returned to the apartment after the robbery, not before. In fact, she testified he was normal when he left with Rogers. (9 RT 1804.) Thus, there was hardly any evidentiary support for instructions on voluntary intoxication even if Myles had asked for them, much less sua sponte.

> [A] defendant is entitled to an instruction on voluntary intoxication "only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.'" (*People v. Williams* (1997) 16 Cal.4th 635, 677.)

(*People v. Roldan* (2005) 35 Cal.4th 646, 715.)

Here, there was no evidence that Myles was intoxicated at the time of the robberies at the Pepper Steak restaurant, and no evidence that intoxication may have affected Myles's ability to form specific intent. Thus, there was an insufficient factual basis for an instruction on voluntary intoxication asked for or not.

X. THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE AND DID NOT ERR BY REFUSING TO GIVE MYLES A SPECIAL LIMITING INSTRUCTION

Myles contends the trial court erred by admitting victim impact evidence about the relationships of the victims with their families which was unrelated to his knowledge and moral culpability. Myles argues the court compounded its error by not giving the special instruction Myles proposed which he asserts properly limited the scope of the victim impact evidence within the aggravating evidence. (AOB 122-128.) The victim impact evidence as presented was proper and the trial court did not err by refusing to give Myles's special instruction.

A. Background

1. The Ricky Byrd murder

Harry Byrd III testified that his sister's fiancée had called him on the phone and told him that his son Harry "Ricky" Byrd IV had been shot and killed. Mr. Byrd testified he fell to his knees and dropped the phone in disbelief. After calling relatives and telling them that Ricky had been murdered, Mr. Byrd and his daughter drove to Mr. Byrd's mother's house in San Bernardino which was a few doors away from where Ricky was shot. (11 RT 3039-3942.) Mr. Byrd's mother and sister told him what had happened. He went to the murder scene and saw blood still in the driveway. Mr. Byrd found out more details of the murder from a police detective and some of Ricky's friends who were with him when Myles shot him. (13 RT 3042-3043.)

Mr. Byrd found it very difficult to see his son in a coffin. He and Ricky loved each other and, although he had not seen Ricky for a year or two before the murder, he had just talked to him the weekend before. In fact, he had planned on visiting him the next weekend. Mr. Byrd talked about his grandson, Harry Byrd V, and how Ricky never had a chance to see his son. (13 RT 3042-3047.)

Mr. Byrd testified that 18 months before Myles murdered his son, Mr. Byrd's only brother was murdered. (13 RT 3041-3042.)

Ricky Byrd's grandmother, Dorothy R. McDowell-Byrd, testified that Ricky had lived with her 85-95 percent of his life and she considered him more of like one of her kids than a grandson. She was very close to him. Mrs. McDowell-Byrd testified that Ricky's son reminds her of him because they look so much alike but that Ricky never got to see his son. Ricky never got to fulfill his dreams and go to college and become a marine biologist. He had just applied for a job at UPS. (13 RT 3051-3055.)

2. The Fred Malouf murder

Donna Malouf-Lawrence testified that she and her husband, Fred, initially met in 1974, and then again in 1985, and started dating in 1987. They were married in 1994. Mrs. Malouf-Lawrence testified she and Fred were close to her best friend, Sandy Lawrence and her husband Ron. Sandy died of cancer in 1994, two years before Fred was murdered. After Fred's death, Mrs. Malouf-Lawrence and Ron started dating and they eventually married.

Mrs. Malouf-Lawrence testified she thinks about Fred everyday and had been in weekly counseling to deal with her grief which had turned to anger. Mrs. Malouf-Lawrence testified that "Fred was, is, and always will be, my life." (13 RT 3056-3059.)

Damon Simon testified that Fred Malouf was his uncle. Fred taught him how to hunt, fish, and play cards, chess, and checkers. Mr. Simon

testified he was very close to Fred who was like a second father to him. They would hunt and fish together and meet for coffee and play games. Fred counseled Mr. Simon to succeed at whatever he did and the importance of getting a college degree. Mr. Simon obtained a bachelor's degree in criminal justice and then became a correctional officer and counselor with the California Youth Authority because of Fred and Mr. Simon's father who was a reserve officer with the Colton Police Department. Fred had told Mr. Simon that life was more important than property. (13 RT 3059-3063.)

Mr. Simon found it difficult to talk about his Uncle Fred although he gave one of the eulogies at Fred's funeral. Fred's son, Richard, and Mr. Simon were "pretty tight" with their fathers. They did things together. Fred was a practical joker. Referring to two photographs of Fred, one in uniform and one with Mr. Simon's father, Mr. Simon testified that Fred organized family reunions. Fred enjoyed life to the fullest and the thing Mr. Simon missed most was the loss of Fred's companionship. (13 RT 3063-3068.)

Mr. Simon testified that when he was at home with his wife he received a telephone call from Donna Malouf-Lawrence who told him Fred had been shot in the face. Mr. Simon did not think it was fatal because law enforcement officers believe they are bullet proof. Mr. Simon recalled that when he was in high school, Fred would volunteer at the school and come into classes and explain his police experience. Fred had a good sense of humor that could not be replaced. (13 RT 3068-3072.)

Myles requested that the trial court instruct the jury as follows:

> In assessing to what extent, if any, you should consider any victim impact evidence in your deliberations you may not consider any victim impact evidence unless it was foreseeably

related to the personal characteristics of the victim that were known to the defendant at the time of the crime.

(3 CT 647; 14 RT 3147.)

The trial court declined to give this instruction because it thought it legally erroneous.

B. Law

This Court has frequently upheld the introduction of victim impact evidence. (*People v. Burney* (2009) 47 Cal.4th 203, 258.) "Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a)." (*People v. Lewis* (2006) 39 Cal.4th 970, 1056-1057 (hereafter *Lewis I*).) "The federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair.'" (*Id*. at p. 1056, quoting *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720].)

C. Analysis

Myles's argument is a general attack on this type of evidence and does not claim or point to anything in the record which indicates the testimony of Harry Byrd III, Dorothy R. McDowell-Byrd, Donna Malouf-Lawrence, or Damon Simon was delivered with undue emotion. The victim impact evidence admitted in this case was typical of the type of evidence that this Court routinely allows, and came within the limits established for such evidence. (See, e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 444 [family members spoke of their love of the victims and how they missed having them in their lives; photographs were presented of the victims while alive].) Myles acknowledges that this Court has disagreed with this type of argument. (AOB 122.)

Admission of the victim impact testimony received in the present case did not violate defendant's constitutional rights.

XI. MYLES'S UPPER TERM SENTENCE ON THE FIREARM USE ENHANCEMENT WAS PROPER

Myles argues the upper term sentence on the firearm use enhancement for counts 1 and 3 is unconstitutional because it was imposed without a specific finding by the jury. He argues that his case should be remanded and the trial court be required to impose the middle term. (AOB 128-134.) Not so.

A. Background

Myles's sentencing hearing took place on April 23, 2001. The court fixed the penalty for the murders of Fred Malouf and Rickie Byrd as death. (14 RT 3231-3232.) Thereafter, the court imposed various determinate sentences. For the robbery of Krystal Anderson (count 3), the court sentenced Myles to the aggravated term of five years because the robbery involved considerable planning and sophistication, and a high level of violence and threatened violence to many individuals. For the enhancement that Myles personally used a firearm in the commission of the robbery (Pen. Code, § 12025.5, subd. (a)(1)), the court imposed an additional aggravated 10 year term because the firearm was used against multiple individuals to maintain control in order to carry out the robbery. For the robbery of Harold Lewis (count 4), the court sentenced Myles to state prison for one third the middle term of three years, a total of one year, to be served consecutively to the term imposed for count 3. In regard to the enhancement that Myles personally used a firearm in the commission of that robbery, the court imposed one-third the middle term of four years for a total of one year, four months, to be served consecutively to the terms imposed for count 3. However, the court stayed execution of those terms for count 3 because both counts 3 and 4 were the basis for the special

circumstance of murder during the course of a robbery which was the basis for Myles's eligibility for the death penalty. (14 RT 3246.)

For being a ex-felon in possession of a firearm (count 5), the court sentenced Myles to state prison for one-third the middle term of two years or eight months consecutively to the other terms imposed. It did not stay this term. (14 RT 3246.)

The total aggregate determinate term imposed was 18 years; 17 years, 4 months of which was stayed pursuant to Penal Code section 654. (14 RT 3246.)

On April 24, 2001, the court vacated the previously imposed sentences for counts 3, 4, and 5. Thereafter, the court sentenced Myles to 10 years in prison for count 3 but stayed the imposition. The court imposed and did not stay an additional 10 years for the personal use of a firearm. The sentence for count 4 was stayed. On count 5, a consecutive term of one year, four months was imposed. Two consecutive 10-year terms were imposed for the gun use on counts 1 and 2. (3 CT 761-766; 14 RT 3253-3262.) The court imposed the aggravated 10-year terms "because of the two firearms and multiple shots and lack of any provocation." (14 RT 3254.) The total determinate term imposed was 44 years, 8 months but the trial court stayed 33 years, 8 months pursuant to Penal Code section 654. Eleven years, four months was actually imposed as the determinate term, plus two indeterminate terms of death. (3 CT 763; 14 RT 3260.)

B. Law

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], the United States Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, at p. 490.) In *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], the

court explained that the relevant "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Id.* at p. 303.) Finally, in *Cunningham*, the court held that California's determinate sentencing law, which authorizes a judge to find the facts permitting an upper term sentence by a preponderance of the evidence, violates a defendant's right to trial by jury. (*Cunningham v. California* (2007) 549 U.S. 270, 307 [127 S.Ct. 856,166 L.Ed.2d 856].)

Cunningham vacated the judgment in *People v. Black* (2005) 35 Cal.4th 1238 (hereafter *Black I*), in which this Court held that California's determinate sentencing law did not violate a defendant's right to trial by jury (*id.* at p. 1263), and remanded the case to this Court for further consideration in light of *Cunningham*. In *People v. Black* (2007) 41 Cal.4th 799 (hereafter *Black II*), this Court held that the existence of at least one aggravating circumstance established by means sufficient to satisfy the governing Sixth Amendment authorities "renders a defendant eligible for the upper term sentence" under the determinative sentencing law. (*Black II*, at p. 812.) In a companion case filed on the same day as *Black II*, *People v. Sandoval* (2007) 41 Cal.4th 825, this Court further held that if no aggravating factors have been found in accordance with Sixth Amendment principles (that is, found to be true by a jury beyond a reasonable doubt, admitted by the defendant or included within the recidivism exception recognition in *Cunningham* and *Blakely*), the "denial of the right to a jury trial on aggravating circumstances is reviewed under the harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. . . ." (*Sandoval*, at p. 838.)

> [I]f a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond a reasonable doubt standard, unquestionably would have found true at least a single

> aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless.

(*Chapman*, at p. 839.)

C. Analysis

Assuming that the trial court here committed *Cunningham* error, any error was harmless beyond a reasonable doubt because "the jury, applying the beyond a reasonable doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury." (*People v. Sandoval, supra*, 41 Cal.4th at p. 839.) Myles and Rogers each had a firearm when they robbed the Pepper Steak restaurant and Rogers fired his multiple times hitting Fred Malouf four times and killing him. Myles tried to fire his gun through the window of the kitchen door but it jammed. Given these facts, had the jury been asked to make a special finding that Myles used a firearm, it would have done so.

Moreover, Myles had a prior record; he committed the robbery of Victorville Denny's restaurant and served time in state prison for that offense. Prior convictions are an exception to *Cunningham*, and the court can impose the upper term based on priors alone without a jury finding (*Black II, supra*, 41 Cal.4th at pp. 812-820; *People v. Burch* (2007) 148 Cal.App.4th 862, 873; see also *People v. Lincoln* (2007) 157 Cal.App.4th 196, 204-206 [upper term for enhancements]). In addition, the prior conviction exception is not limited to just the fact of the prior conviction; rather, it applies more broadly to other related issues that may be determined by examining the records of the prior convictions (*Black II*, at pp. 818-820). The prior conviction exception includes the following: defendant's priors are numerous or of increasing seriousness (*Ibid.*; *People v. Velasquez* (2007) 152 Cal.App.4th 1503; *People v. Martinez* (2007) 156 Cal.App.4th 851, 857; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1199-1200; *People v. Tillotson* (2007) 157 Cal.App.4th 517, 546-547;

People v. Garcia (2008) 159 Cal.App.4th 163, 172-173; *People v. Morton* (2008) 159 Cal.App.4th 239, 249-253; defendant served a prior prison term (*People v. Velasquez, supra,* 152 Cal.App.4th 1503); defendant was on probation or parole (*People v. Yim* (2007) 152 Cal.App.4th 366; *Martinez,* at p. 187; *Morton,* at pp. 249-253]).

Given that it is permissible for a sentencing court to impose the upper term based on facts found by the jury, facts admitted by the defendant, or facts relating to prior convictions (*People v. Sandoval, supra,* 41 Cal.4th at pp. 835-837), and that a single aggravating factor found by the jury, admitted by the defendant, or based on a prior conviction makes the upper term the statutory maximum, and allows the court to find additional aggravating circumstances, by a preponderance of the evidence, without a further jury determination (*Black II, supra*, 41 Cal.4th at pp. 812-820), it is likely that if this case were remanded to the trial court, the court would impose the exact same sentence.

Because of the likelihood that on remand the trial court would impose the same 10-year aggravated sentence for the use of a firearm, any sentencing error should be deemed harmless.

XII. PENAL CODE SECTIONS 190.3 AND 190.2 ARE CONSTITUTIONAL IN ALL ASPECTS AND THEIR PROVISIONS DO NOT CONTAIN FLAWS MANDATING REVERSAL OF MYLES'S SENTENCE

Myles raises a number of challenges to California's death penalty, which he acknowledges, have been previously rejected by this Court. Myles has not presented sufficient reasoning to revisit these issues, therefore, extended discussion is unnecessary and Myles's claims should all be rejected consistent with this Court's previous rulings.

A. California's Death Penalty Scheme is not Unconstitutionally Vague

Myles asserts that California's death penalty law is unconstitutional because Penal Code section 190.3, factors (a) and (b) are unconstitutionally vague under the Eighth and Fourteenth Amendments. (AOB 135-139.) This argument has been repeatedly rejected by this Court. (*Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750]; *People v. Young* (2005) 34 Cal.4th 1149, 1207-1208; *People v. Anderson* (2001) 25 Cal.4th 543, 584-585; *People v. Medina, supra,* 11 Cal.4th 694, 780; *People v. Osband* (1996) 13 Cal.4th 622, 702.) Myles has not presented any reason to reconsider this issue.

B. Penal Code Section 190.3, Subdivision (a) Furnishes Principled Guidance for the Choice Between Death and a Lesser Penalty and is Not a Vague Sentencing Factor

Myles contends factor (a) of Penal Code section 190.3 is constitutionally infirm because it allows the jury to separately weigh the "circumstances of the crime" as a factor in aggravation, in violation of the Eighth and Fourteenth Amendments. Myles argues that is tantamount to a standardless sentencing scheme. (AOB 139-143.) To the contrary, this Court has ruled that factor (a) is not illusory or vague and a trial court is not required to give an instruction clarifying what is meant by "circumstances of the crime" as a factor in deciding whether to impose the death penalty under Penal Code section 190.3, subdivision (a). (*People v. Wader* (1993) 5 Cal.4th 610, 663-664 [1978 Law]; *People v. Phillips* (1985) 41 Cal.3d 29, 63 [1977 Law].)

C. The Manner in Which California's Death Penalty Scheme Presents Aggravating and Mitigating Factors is Constitutional

Myles generally complains that Penal Code section 190.3's unitary list of aggravating and mitigating factors is unconstitutional because is does

not specify which factors are aggravating and which are mitigating, does not limit aggravation to the factors specified, and fails to properly define aggravation and mitigation, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. He makes several specific complaints. (AOB 143-172.) All of Myles's contentions are wholly without merit.

1. Penal Code section 190.3's unitary list of aggravating and mitigating factors is unconstitutionally vague.

Myles asserts Penal Code section 190.3's unitary list of aggravating and mitigating factors are too vague and the trial court should have been required to specify which factors applied to his case. (AOB 143-145.) This Court has ruled to the contrary.

The penalty phase jury was instructed to reach its sentencing determination by weighing the factors in aggravation against the factors in mitigation. (CALJIC No. 8.88.) The applicable factors were set forth in the language of CALJIC No. 8.85, which derives from section 190.3, factors (a) through (k). (3 CT 682-684.)

Contrary to Myles's assertions, the trial court had no obligation to advise the jury which statutory factors are relevant solely as mitigating circumstances and which are relevant solely as aggravating circumstances. (*People v. Frye, supra,* 18 Cal.4th 894, 1026; *People v. Bradford, supra,* 15 Cal.4th 1229, 1383.) Moreover, it was proper for the court to instruct the jury in the language of CALJIC No. 8.85 without deleting certain factors that may have been inapplicable to Myles's case. (*People v. Earp, supra,* 20 Cal.4th 546, 899, fn. 13; *People v. Frye, supra,* 18 Cal.4th at p. 1027.)

Given that CALJIC No. 8.85 is not unconstitutionally vague and does not allow the penalty process to proceed arbitrarily or capriciously (*People v. Farnam, supra,* 28 Cal.4th 107, 191-192; *People v. Lucero* (2000) 23 Cal.4th 692, 728; *People v. Earp, supra,* 20 Cal.4th at pp. 898-899),

Myles's contention that Penal Code section 190.3 is unconstitutional is without merit.

2. Penal Code section 190.3 did not allow the jury to consider undefined, non-statutory aggravating factors.

Myles contends that Penal Code section 190.3 is unconstitutionally vague because it fails to limit the sentencer to consideration of specified factors in aggravation. He also faults the section because it allegedly fails to guide the sentencer and permits the prosecutor to argue non-statutory matters as evidence in aggravation. (AOB 145-147.) He is wrong.

There is no constitutional requirement that Penal Code section 190.3 defines 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.) Moreover, factors need not be labeled as exclusively aggravating or mitigating. (*People v. Frye, supra,* 18 Cal.4th at p. 1026; *People v. Carpenter, supra,* 15 Cal.4th 312, 420; *People v. Davenport* (1995) 11 Cal.4th 1171, 1229.)

Myles uses factor (i), the defendant's age, as one basis for his attack on Penal Code section 190.3.[15] He argues that the United States Supreme Court has held that the Eighth and Fourteenth Amendments mandate that a sentencer be permitted to consider a defendant's age as an individualized mitigating factor, citing *Stanford v. Kentucky* (1989) 492 U.S. 361, 375, footnote 5 [109 S.Ct. 2969, 106 L.Ed.2d 306]. Based on this, he concludes that the United States Supreme Court regards age as a factor in mitigation. (AOB 146.) He then chastises this Court for holding in *People v. Lucky, supra,* 45 Cal.3d 259, 302, that age is a metonym for any age-related matter

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[15] Given that Myles's birth date is October 10, 1971, at the time of his offenses, Myles was 25 years old. At the time of his trial and sentencing, Myles was 29 years old.

and may be used in either aggravation or mitigation, because age alone is not a factor over which a defendant may exercise control. Myles believes that this view is incongruous with that of the United States Supreme Court, even in light of this Court's ruling in *People v. Edwards* (1991) 54 Cal.3d 787, 839 that age can mitigate or aggravate in the same case, depending on the sentencer's personal perspective. Myles asks that this Court reconsider its decisions in Lucky and Edwards and conclude that factor (i) is unconstitutionally vague and arbitrary.

Myles's argument is not persuasive and this Court should stick to its prior holdings that factor (i) - the defendant's age at the time of the crime - is not unconstitutionally vague. (*People v. Sanders* (1995) 11 Cal.4th 475, 563-564; *Tuilaepa v. California, supra,* 512 U.S. 967, 977 [114 S.Ct. 2630, 129 L.Ed.2d 750].)

3. Penal Code section 190.3, subdivisions (d), (h), and (k) do not inject unconstitutional arbitrariness into the penalty decision.

Myles declares that the combination of factors (d) [whether the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance], (h) [whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects of intoxication], and (i) [the age of the defendant at the time of the crime] is constitutionally deficient because it injects unconstitutional arbitrariness into the penalty decision, using constitutionally vague terminology which impermissibly invites random choices and biases the process toward death. He argues their use, individually and considered together, are prejudicially violative of his rights to fair trial, to a reliable determination of sentence, to due process, and to fundamental fairness under the Fifth, Sixth, Eighth, and

Fourteenth Amendments. (AOB 147-151.) This argument is academic and does not apply to Myles's case as there was no evidence presented that Myles suffered from any mental diseases or disorders. Considered as a purely academic exercise, Myles's argument is without merit and has been previously rejected by this Court.

CALJIC No. 8.84.1(d), which allows a jury to consider whether a defendant's crime was committed while the defendant suffered "extreme mental or emotional disturbance," does not unconstitutionally preclude the jury from considering mental or emotional disturbances which are not "extreme." The "catch-all" provisions in factor (k) properly allow this. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1429; *People v. Jones* (1997) 15 Cal.4th 119, 190; *People v. Davenport, supra,* 11 Cal.4th at p. 1230; *People v. Ghent* (1987) 43 Cal.3d 739, 776; *People v. Turner* (1994) 8 Cal.4th 137, 208-209.) Factor (d) statutory terms are not vague. (*People v. Holt* (1997) 15 Cal.4th 619, 699.) Although former Penal Code section 190.3, subdivision (g), now section 190.3, subdivision (h), only allows mitigation for a mental disease, the jury should consider mental defect as well. (*People v. Bell* (1989) 49 Cal.3d 502, 550; *People v. Robertson* (1982) 33 Cal.3d 21, 59-60.) "[T]he statutory instruction to the jury to consider 'whether or not' certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors." (*People v. Morrision* (2004) 34 Cal.4th 698, 730.)

Factors (d) and (h), individually and considered together, are constitutional. Myles has not presented any reason to reconsider this issue.

4. The factors listed in Penal Code section 190.3 properly allow the jury to exercise its discretion as to penalty.

In a catch-all argument, Myles contends that all of the Penal Code section 190.3 factors are unconstitutionally vague, arbitrary, and result in unreliable sentences, in violation of the Eighth and Fourteenth Amendments. He argues these factors fail to guide or limit the sentencer's discretion, create a pro-death bias, create the impermissible risk that vaguely-defined factors would result in the arbitrary selection of Myles for execution, and afford no meaningful basis on which this Court can review the sentence. (AOB 152-153.) This claim is simply a variant of arguments this Court has repeatedly rejected. (*People v. Friend* (2009) 47 Cal.4th 1, 90; *People v. Davis* (2009) 46 Cal.4th 539, 627; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779; *People v. Allen* (1986) 42 Cal.3d 1222, 1285.) Myles has offered nothing new to warrant reconsideration of these claims.

5. Penal Code section 190.3 does not require proof beyond a reasonable doubt.

Myles asserts that the failure of Penal Code section 190.3 to require proof of aggravating circumstances beyond a reasonable doubt violates his rights to due process and a reliable determination of penalty under the Eighth and Fourteenth Amendments. (AOB 153-156.) He is wrong. The applicability of a specific Penal Code section 190.3 sentencing factor does not have to be based on proof beyond a reasonable doubt. (*Apprendi v. New Jersey, supra*, 530 U.S. 466; *Ochoa II, supra*, 26 Cal.4th 398, 453.) Thus, the trial court did not need to instruct the jury that it must find any fact in aggravation true beyond a reasonable doubt. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1101-1102; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 145, 146, vacated and remanded, *Bacigalupo v. California* (1992) 506 U.S. 802 [113 S.Ct. 32, 121 L.Ed.2d 5]; *People v. Johnson* (1989) 47

Cal.3d 1194, 1249.) In fact, although it is permissible under the federal Constitution to require a defendant to prove mitigating factors by a preponderance of the evidence, Penal Code section 190.3 does not specify any burden of proof and, except for other crimes evidence, the trial court should not instruct at all on the burden of proving mitigating or aggravating circumstances. (*People v. Holt, supra,* 15 Cal.4th at pp. 682-284; *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418.) Therefore, a jury need not find the death penalty appropriate or unanimously agree that aggravating circumstances outweigh mitigating ones beyond a reasonable doubt. (*People v. Stanley* (2006) 39 Cal.4th 913, 521; *People v. Medina, supra,* 11 Cal.4th at p. 782; *People v. Alcala* (1992) 4 Cal.4th 742, 809; *People v. Diaz* (1992) 3 Cal.4th 495, 569.)

6. The California death penalty statute is not constitutionally mandated to require written findings regarding individual aggravating factors for any death sentence.

Myles contends his constitutional rights to due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated by the failure to require that the jury present written findings on its decision regarding the applicable aggravating factors relied on in determining the appropriate sentence. (AOB 157-158.) Myles acknowledges this Court has previously rejected similar contentions. He is correct in this regard. Written findings regarding the aggravating factors are not constitutionally required. (*People v. Friend, supra*, 47 Cal.4th at pp. 89-90; *People v. Prieto* (2003) 30 Cal.4th 226, 275; *People v. Allen, supra,* 42 Cal.3d at p. 1285.)

7. The lack of intercase proportionality review in California's death penalty is not unconstitutional.

Myles complains that California's death penalty, unlike capital punishment in other states, does not require comparative, or "inter-case,"

appellate sentence review. He argues the lack of such review makes capital punishment in California arbitrary and discriminatory in violation of the Eighth and Fourteenth Amendments, and also violates a defendant's right to equal protection, under the Fourteenth Amendment, because such comparative sentence review is afforded non-condemned inmates, pursuant to Penal Code section 1170, subdivision (d). (AOB 158-160.) He is wrong. The absence of intercase proportionality review does not violate the Constitution. (*People v. Friend, supra,* 47 Cal.4th at pp. 89-90; *People v. Cook* (2007) 40 Cal.4th 1334, 1368; *People v. Moon* (2005) 37 Cal.4th 1, 48; see also *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [104 S.Ct. 871, 79 L.Ed.2d 29] [intercase proportionality review not required by the federal Constitution].) Moreover, this Court has previously held that because capital defendants are not similarly situated to noncapital defendants, the death penalty law does not violate equal protection by denying capital defendants certain procedural rights given to noncapital defendants. (*Lewis III, supra,* 46 Cal.4th 1255, 1320; *People v. Cruz, supra,* 44 Cal.4th 636, 681.)

8. California's death penalty law provides sufficient procedural safeguards.

Although he concedes that this Court has rejected previous similar arguments, Myles contends California's death penalty law is fraught with defects which creates a substantial risk that it is administered in an arbitrary and capricious manner. He argues the law is too broad and fails to perform the constitutionally required function of narrowing the population of death-eligible defendants. He also argues Penal Code section 190.2, subdivision (a)(3), the special circumstance of multiple murder, fails to narrow the class of persons eligible so that the common form of felony-murder is death eligible. He asserts that Penal Code section 190.3, subdivision (a)'s specification of special circumstances as factors in aggravation grants

sentencer unbridled discretion which is weighed in favor of death. Finally, he argues that Penal Code sections 190-190.5 afford a prosecutor complete discretion to determine whether a penalty hearing will be held. (AOB 160-172.) As Myles acknowledges, all of these arguments have been rejected by this Court and Myles presents nothing new which would merit reconsideration.

"California's death penalty statute does not fail to narrow the class of offenders who are eligible for the death penalty, as is required by the Eighth Amendment . . . ." (*Lewis III, supra*, 46 Cal.4th at p. 1318; *People v. Salcido* (2008) 44 Cal.4th 93, 166; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1298; *Lewis I, supra,* 39 Cal.4th at p. 1068.) California's death penalty law adequately narrows the class of death-eligible defendants. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 104; *People v. Combs* (2004) 34 Cal.4th 821, 868.) Prosecutorial discretion in deciding whether to seek the death penalty is constitutional. (*People v. Davis, supra,* 46 Cal.4th at p. 627; *People v. Demetrulias* (2006) 39 Cal.4th 1, 43; *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Keenan* (1988) 46 Cal.3d 478, 505.) Moreover, the United States Supreme Court recognized multiple murder as a narrowing factor in *Lowenfield v. Phelps* (1988) 484 U.S. 231, 246 [108 S.Ct. 546, 98 L.Ed.2d 568].

> Section 190.3, factor (a), which allows the jury to consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1," does not violate the Fifth, Sixth, Eighth, or Fourteenth Amendment to the United States Constitution by allowing arbitrary imposition of the death penalty. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975-976; *People v. Stevens* [(2007)] 41 Cal.4th [182,] 211.)

(*People v. Loker* (2008) 44 Cal.4th 691, 755; see also *People v. Williams* (2008) 43 Cal.4th 584, 648; *People v. Alfaro, supra*, 41 Cal.4th 1277, 1330.)

> As the United States Supreme Court noted in upholding factor (a) against an Eighth Amendment challenge, "our capital jurisprudence has established that the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty. [Citation.]" [Citation.]

(*People v. Page* (2008) 44 Cal.4th 1, 60.)

The prosecutor's discretionary authority to decide in which capital-eligible cases to seek the death penalty does not violate the constitutional principle of separation of powers because the ultimate sentencing power remains in the judicial branch. (*People v. Tafoya* (2007) 42 Cal.4th 147, 198; *People v. Arias, supra,* 13 Cal.4th 92, 189-190; *People v. Crittenden* (1994) 9 Cal.4th 83, 152.) California's death penalty is not constitutionally flawed based on the charging discretion afforded to prosecutors. (*People v. Cornwell* (2005) 37 Cal.4th 50, 105; *People v. Barnett* (1998) 17 Cal.4th 1044, 1179 [a defendant is not denied due process or equal protection because the district attorney has discretion to decide whether to seek the death penalty in any given case].)

This Court has considered and rejected all of Myles's contentions in prior cases and he has presented no reason to reconsider the conclusions previously reached.

XIII. MYLES'S CONVICTION AND DEATH SENTENCE DO NOT VIOLATE INTERNATIONAL LAW

Myles contends that his conviction and sentence of death violate provisions of the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man, and therefore violate international law. (AOB 172-190.) This Court has already rejected these

contentions and concluded that California's death-penalty scheme does not violate international law or norms of humanity and decency. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1143 [imposition of death penalty in accord¬ance with applicable law does not violate the ICCPR]; *People v. Hovarter* (2008) 44 Cal.4th 983, 1029 [specifically dealing with Article 6 of the Covenant on Civil and Political rights and laws of Western Europe]; *People v. Lewis* (2008) 43 Cal.4th 415, 539 (hereafter *Lewis II*); *People v. Tafoya, supra*, 42 Cal.4th at p. 199; *People v. Abilez, supra*, 41 Cal.4th at p. 535; *People v. Perry* (2006) 38 Cal.4th 302, 322; *People v. Moon, supra*, 37 Cal.4th at pp. 47-48 [laws of Western Europe do not render death penalty a violation of international law]; *People v. Blair* (2005) 36 Cal.4th 686, 754; *People v. Brown* (2004) 33 Cal.4th 382, 403-404; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Schmeck* (2005) 37 Cal.4th 451, 304.) There is no reason for this Court to revisit its rejection of these same contentions regarding the death penalty violating interna¬tional law.

XIV. MYLES'S MURDER CONVICTIONS, SPECIAL CIRCUMSTANCE FINDINGS, AND CAPITAL SENTENCE ARE NOT UNDERMINED BY CUMULATIVE ERROR

Myles asserts that a whole host of trial court errors in both phases of his trial, made both trial phases unfair. (AOB 190-192.) Because the errors asserted by Myles did not occur, there was no cumulative effect which rendered any phase of Myles's trial unfair. (*Lewis III, supra*, 46 Cal.4th 1255.)

Contrary to Myles's contention, reversible prejudice cannot be predicated on the alleged errors of trial court and counsel, whether considered singly or in combination. The jury's guilt verdicts were supported by substantial and overwhelming eyewitness and circumstantial evidence. The case was not a close one by any means. (See and compare

People v. Noguera (1992) 4 Cal.4th 599, 637; *People v. Bonin* (1988) 46 Cal.3d 659, 690.)

Myles is entitled only to a fair trial, not a perfect one, even where, as here, he has been exposed to substantial penalties. (Cf. *People v. Marshall* (1990) 50 Cal.3d 907, 945; *People v. Hamilton* (1988) 46 Cal.3d 123, 156; see also *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340].) When a defendant invokes the cumulative error doctrine, "the litmus test is whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) Therefore, any claim based on cumulative errors must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid.*) Applying that analysis to the instant case, Myles's contention should be rejected.

Notwithstanding Myles's arguments to the contrary, the record does not contain numerous errors. The trial court properly denied Myles's severance motion and motion for a ski mask lineup. There was no *Marsden* error. Evidence was properly admitted. Donna Malouf's presence in the courtroom was not prejudicial. To the extent any error arguably occurred, the effect was harmless. And the trial court properly instructed the jury. Review of the record without the speculations and interpretations exacted by appellant, shows that Myles received a fair and untainted trial. The Constitution requires no more. Even when taken together, it is not reasonably probable that absent all the alleged errors Myles would have received a more favorable verdict, and any errors were harmless beyond a reasonable doubt. (*People v. Noguera, supra*, 4 Cal.4th at p. 637.)

Myles's effort to invoke the Chapman test of prejudice is unavailing. Myles has raised an issue of due process. "[T]he Chapman harmless-error standard is more demanding than the `fundamental fairness' inquiry of the Due Process Clause . . . ." (*Greer v. Miller* (1987) 483 U.S. 756, 766, fn. 7

[107 S.Ct. 3102, 97 L.Ed.2d 618].) When fundamental fairness is in issue, the "reasonable probability" standard outlined by cases such as *Strickland v. Washington* (1984) 466 U.S. 668, 694-696 [104 S.Ct. 2052, 80 L.Ed.2d 674], applies. The Due Process test looks to whether the asserted errors "'were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 369 [113 S.Ct. 838, 122 L.Ed.2d 180].) If confidence in the reliability of the outcome is not undermined, no due process violation occurred. (*Id.* at pp. 369-370.) It is essentially the same test as the state *Watson* test.

In the instant case, any errors, if any, were such that the reliability of both the finding of guilt and the determination of the penalty as death was not compromised. Therefore, the judgments against Myles should be affirmed.

CONCLUSION

For the foregoing reasons, respondent respectfully requests the judgment be affirmed in its entirety.

Dated: September 21, 2009

Respectfully submitted,

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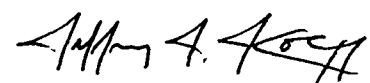

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 29,363 words.

Dated: September 21, 2009

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. John Myles**
Case No.: **S097189**

I declare:

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

On September 21, 2009, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 21, 2009, at San Diego, California.

C. Herrera
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[illegible]
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