In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff & Respondent,* **v.** **PAUL NATHAN HENDERSON,** *Defendant & Appellant.*	**CAPITAL CASE** Case No. S098318

Riverside County Superior Court Case No. INF027515
The Honorable THOMAS N. DOUGLASS, JR., Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On February 16, 2000, the District Attorney of Riverside County filed an information charging Paul Nathan Henderson (Henderson) with the murder of Reginald Baker (Pen. Code,[1] § 187; count 1); the attempted murder of Peggy Baker (§§ 664/187; count 2); assault by means likely to produce great bodily injury (§ 245, subd. (a)(1); count 3); robbery (§ 211; count 4); residential burglary (§ 459; count 5); the unlawful taking of a vehicle (Veh. Code, § 10851, subd. (a); count 6); and attempted auto theft (Pen. Code, § 664 & Veh. Code, § 10851; count 7). As to count 1, it was alleged the murder was committed with special circumstances, specifically, while Henderson was engaged in the crimes of robbery and burglary. (§ 190.2, subd. (a)(17)(a) & (g).) As to count 1, it was also alleged that Henderson personally used a deadly and dangerous weapon, a knife. (§§ 12022, subd. (b), & 1192.7, subd. (c)(23).) It was further alleged that Henderson had one prior serious and violent felony conviction (§§ 667, subds. (c) & (e); 1170.12, subd. (c)), and four prior convictions for which he served prison terms. (§ 667.5, subds. (a) & (b)).[2] (2 CT 573-577.)

On January 29, 2001, a jury trial commenced. (38 CT 10477.) On March 1, 2001, a jury found Henderson guilty as charged in counts 1 through 7. The jury found true the special circumstance, that Henderson committed the murder of Reginald Baker while engaged in the crimes of robbery and burglary. (§ 190.2, subds. (a)(17)(A) & (G).) The jury also found it true that Henderson used a deadly and dangerous weapon during the commission of the murder (§§ 12022, subd. (b) & 1192.7, subd. (c)(23)). (39 CT 10822-10830.)

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[1] Unless otherwise noted, all further statutory references are to the Penal Code.

[2] Henderson admitted these allegations prior to jury deliberations. (19 RT 4179-4185.)

On March 12, 2001, the penalty phase of the trial commenced. (40 CT 10867.) On March 19, 2001, the jury returned a verdict of death. (40 CT 11015, 11017.) On March 25, 2001, the trial court denied an automatic motion to modify the judgment and sentenced Henderson to death for murder committed with special circumstances (count 1). Henderson was sentenced to life on count 2, and to a total determinate term of 15 years on the remaining charges and enhancements to be served consecutively with the sentence imposed on count 4. (40 CT 11073, 11076-11077, 11083-11084.) This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

On the night of June 22, 1997, Henderson invaded the mobile-home residence of an elderly couple, Reginald and Peggy Baker. The Bakers' ordeal began with Henderson holding a knife to Reginald's throat and demanding the keys to the Bakers' car. Before Henderson fled with less than $25 in cash in the Bakers' car, Henderson killed Reginald and beat Peggy so badly that her neighbor could not recognize her when she rang his door bell and asked him to call 9-1-1. The facts and circumstances surrounding Henderson's crimes are detailed below.

A. Guilt Phase — Prosecution

On June 22, 1997, sometime between 10:30 p.m. and 10:50 p.m., 65-year-old Peggy Baker[3] and her 71-year-old husband, Reginald Baker, were

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[3] Peggy passed away before Henderson's trial. Counsel stipulated to the admission of Peggy's preliminary hearing testimony at trial, a video of which was played for the jury. (XI RT 2491-2496.) Accordingly, this (continued...)

watching television in their mobile home at Canyon Mobile Park in Cathedral City, when Henderson[4] entered and told them, "If you don't yell or scream, you'll be alright." (2 CT 434-438, 442, 449-450, 464; XI RT 2471.) Henderson held a knife to Reginald's throat and said he wanted the keys to the couple's car. (2 CT 442.)

Henderson ordered the couple into their bedroom and told them to sit on the bed. He used two neck ties to bind Reginald, and made cloth strips from a sheet in order to bind Peggy. (2 CT 442-443, 438, 457.) Henderson then "plunged" his butcher knife into a pillow so it stood straight up. He turned Reginald over, and put a gag on Reginald's mouth. Peggy asked Henderson not to put the gag on Reginald because he was a "mouth-breather" and she feared Reginald would have a heart attack. Henderson said that after he was gone, Reginald could lean over and push the gag off. Henderson tied Peggy's ankles together and tied her hands to the binding around her ankles. Henderson made Peggy put a sweatband in her mouth. (2 CT 443-444, 460.)

Henderson took the couple's "Bingo money," less than $25, from a can on a dresser, and searched for other items to take. At some point, Henderson went into the kitchen and returned to the bedroom with a paring knife. He cut the ties on Peggy's ankles, and Peggy untied her hand. Henderson ordered Peggy into the bathroom, and kept the bathroom door open a crack with a shoe. Peggy saw Reginald on his knees on the floor against the bed. (2 CT 443-444, 462.)

(...continued)
Statement of Facts references the transcript of her preliminary hearing testimony. (2 CT 433-467.)

[4] Although Peggy was unable to identify Henderson as the intruder, (2 CT 454-456, 447; XIII RT 2825, 2827), Henderson admitted his involvement in the crimes.

When Peggy asked, "Why are you doing this? We don't have anything," Henderson replied, "You have that nice looking car out there and you have a T.V." Henderson left the bedroom. Peggy heard the car door shut. (2 CT 444-445, 458, 463-464.) Henderson returned to the bedroom and Peggy asked him if she could come out of the bathroom and remove the gag on Reginald's mouth because he was a "mouth breather." Peggy could not recall if Henderson responded but she exited the bathroom and sat on the foot of the bed. The next thing Peggy knew, Henderson had his arm around her in a "strangle hold." Henderson held her nose as he choked her. Peggy struggled, trying to pull Henderson's fingers off her nose, and Henderson attempted to "crack" her neck. Suddenly, Henderson let go of Peggy and hit her on the side of her head causing her to fall onto the floor. While Peggy was on the floor, Henderson lifted Peggy's arm to see if it was limp. It was, so he pulled a sheet over her and left. (2 CT 445, 461, 463.)

Peggy was conscious the entire time. After Peggy heard the car leave, she crawled to the bed and pulled herself up. Peggy looked at Reginald and realized he was dead. The gag was pulled down from his face, and there was a "blood ring" on his throat. (2 CT 445-446.) Unable to call 9-1-1 from her home because Henderson had pulled out the telephone cords (2 CT 461-462; XI RT 2501), Peggy went to a neighbor's house to ask them to call 9-1-1. (2 CT 445, 467.)

Morton Schuman and his wife were watching television when they heard their doorbell ring. Mr. Schuman opened his door and saw a "battered and bleeding" woman who said "Please dial 911, get the police for me. Reggie's dead." While Mr. Schuman normally could easily recognize Peggy, she was so badly injured that Mr. Schuman did not recognize the "grotesque figure in front of him" as his neighbor. (XI RT 2497-2500.) After calling 9-1-1, Mr. Schuman followed Peggy back to the

Bakers' home. Mr. Schuman entered Peggy's home and saw Reginald Baker. He had a "slice across his throat" and appeared to be dead. (XI RT 2499-2502.) Peggy waited for the police to arrive. (2 CT 448.)

At around 11:18 p.m., Cathedral City Police Officer Rudy Salinas was dispatched to the Bakers' residence. (XI RT 2470-2471, 2474, 2483.) Cathedral City Detective Carl Wolford also responded to the scene. (XI RT 2573, 2575.) Officer Salinas located Peggy. Peggy was bleeding from her head, nose, and mouth, had cuts on her scalp, and several bruises around her eyes and mouth area. (XI RT 2472, 2483, 2487.) After Officer Salinas called the paramedics, he found Reginald — dead on the floor in the master bedroom. (XI RT 2472, 2480, 2482.)

At the scene, Peggy described the intruder as having no facial hair, pale light skinned,[5] he wore brown cotton gloves, a black stocking cap, a black sweat shirt, and black pants. He also had a "butcher knife." (XI RT 2485-2486; XII RT 2780.) Peggy told Salinas the intruder ordered the couple into the bedroom, beat her, and she pretended to pass out. (XI RT 2488.)

Peggy was taken to the hospital and treated. (XI RT 2487; XII RT 2761-2763.) Peggy suffered a broken nose, a "left periorbital contusion," and multiple facial contusions. (XII RT 2763-2764.) Peggy was at the hospital until about 4:00 a.m., and then she returned home. (2 CT 448-449, 467; XI RT 2487.)

The Bakers' home had been ransacked. (2 CT 462.) Photographs and a video taken at the scene (XI RT 2473-2481; XIII RT 2837-2839, 2841), depicted the following: open kitchen drawers; Reginald on the master bedroom floor; a wallet and purse that had been gone through; credit cards on the floor; open cabinets and dresser drawers; a steak knife on the bed; a

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[5] Henderson is African-American. (I RT 14.)

second steak knife on the floor next to bloodstains; a jewelry box that had been gone through; and torn bed sheets. (XI RT 2477, 2479-2481, 2574, 2581.) The knife found on the bed appeared to have blood on it. (XII RT 2627-2628.) The television was not taken. (2 CT 466.) Henderson took the Bakers' maroon 1992 Chevy. (2 CT 446-447.)

On June 22, 1997, just after midnight, Latesha Wasson was visiting a friend, Dana Flowers, at Noble's Ranch in Indio. (XI RT 2530-2531.) As Wasson and Flowers sat in a car talking, Henderson pulled up beside them in a big burgundy car with a gray stripe. At trial, Wasson was shown a photograph of a car which she identified as looking similar to the one she saw Henderson in that night. (XI RT 2532-2535, 2544-2546, 2551.) Henderson told Wasson the car belonged to a lady for whom his mother worked. (XI RT 2539.)

On the morning of June 23, 1997, Beverly Brune, who lived in the same mobile park as the Bakers, Canyon Mobile Park, noticed the driver's door of her 1988 Oldsmobile Cutlass Ciera was slightly ajar. Inside, the key insert for the ignition switch was on the floor of the passenger side of the car. (XI RT 2505-2512, 2516.) Brune managed to hold the ignition switch so she could start the car. (XI RT 2510.) Brune called police and reported the incident.[6] (XI RT 2512.) That Sunday night, Brune heard noise but she thought it was just a loud television or "something." She did not hear anyone talking or walking around outside. (XI RT 2516.) Footprints were found outside on Brune's property. (XIII RT 2862-2875.) Criminalist Michelle Merritt compared Henderson's shoe print to shoe impressions found at scene. She could not eliminate Henderson's shoe from having made the impressions. (XIV RT 3121-3127.)

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[6] This evidence supports Henderson's conviction for attempted vehicle theft (Count 7).

Also on the morning of June 23, Officer Adam Elders was on patrol when he heard a broadcast over his radio regarding a description of the vehicle taken in the Baker homicide and the suspect was described as African-American. Around 8:51 a.m., as Officer Elders drove down Ocotillo, he noticed a maroon Chevy Caprice, which matched the description of the dispatch, approach a stop sign. The driver appeared to be an African-American male. As Officer Elders made a u-turn to follow the Caprice and conduct a traffic stop, the driver accelerated at a high-rate of speed. Elders caught up with the vehicle after it came to a stop, apparently after spinning around in the middle of the road. (XII RT 2691-2695.)

Officer Elders requested back up, and then drove up next the vehicle. Officer Elders exited his patrol car with his service weapon drawn, and ordered the driver to put up his hands. (XII RT 2695-2696.) The driver initially complied with Officer Elders's order, but when the officer approached the passenger side of the Caprice, the driver exited and fled. A foot-pursuit ensued (XII RT 2697-2698), and the suspect got away. (XII RT 2699, 2703.) In the area near chase scene, another officer collected a brown glove and a brown shoe. (XIII RT 2880-2883.) The Caprice, which belonged to the Bakers', was impounded and processed for evidence.[7] (XII RT 2706; XIII RT 2828-2829, 2877; 2 CT 465-466.) No prints were recovered, but a brown paper bag marked with a 7-11 logo was found in the backseat. (XIII RT 2878.)

On June 24, 1997, Dr. Garber performed the autopsy on Reginald. Dr. Joseph Cohen, the Chief forensic pathologist for Riverside County reviewed Dr. Garber's autopsy protocol and associated notes (XV RT

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[7] Elders was unable to identify the suspect he observed driving the Bakers' car from the photographic line-up he was shown. (XIII RT 2827-2828, 2831.)

3231), Detective Wolford's police report, and photographs taken at the scene and autopsy. (XV RT 3233-3235.) Reginald had suffered from heart disease consistent with the scar that went from his neck to his pubic bone from previous bypass surgery. (XV RT 3237-3238.) Reginald's body disclosed a contusion on his right upper chest; an abrasion on his left shin; and a side-to-side four-inch cut across his neck that was about one-third of an inch in depth. (XV RT 3235-3236.) Dr. Cohen opined that the knife wound on Reginald's neck was consistent with having been caused by a serrated knife. (XV RT 3246.) Detective Wolford brought the knife that was found on the Bakers' bed to the autopsy. That knife had a serrated edge. (XV 3226-3227.) Dr. Cohen also testified that Reginald suffered from heart disease. Reginald's heart was "markedly enlarged," and "the arteries in the heart were significantly narrowed or occuled with atherosclerosis, *i.e.*, the arteries were hardened. (XV RT 3237.) According to Dr. Cohen, "blocked arteries and a big heart together [were] a set-up for a cardiac death, a sudden death." Reginald had four bypass grafts from a previous surgery, and that two of the grafts were "completely blocked." When asked about the effect of a stressful or terrorizing situation on someone with Reginald's heart condition, Dr. Cohen, based on his own training and experience, opined that "the individual even without any stress [would be] a set-up for sudden death." (XV RT 3238.)

Based upon a hypothetical presented by the prosecutor, Dr. Cohen opined that Reginald died primarily of heart disease but it was more likely than not that he would have survived had it not been for the stressors of the incident, and that the neck injuries inflicted on Reginald would have been stressful on his heart. (XV RT 3239-3240.) Dr. Cohen confirmed that other than the stress of the robbery, there was no other explanation for Reginald's death, and he reiterated that Reginald died from a combination

of "natural disease plus physical and emotional stressors." (XV RT 3241-3242.)

On June 26, Detective Wolford interviewed Ronald Brown, Henderson's stepfather. (XII RT 2602, 2616.) Brown told Detective Wolford that Henderson was not home the evening of June 22, 1997. Henderson left sometime Sunday afternoon, and Brown did not see him again until sometime between 6:30 and 7:00 a.m., the next morning. (XII RT 2618-2619.)

In June 1997, Tamara Elam and Michael White[8] lived together in Desert Hot Springs. Elam recalled a car chase occurred in June 1997. Earlier that same morning that the car chase occurred, Elam and White were still asleep, and the phone rang. Elam answered the phone and the caller identified himself as "Paul," and asked to speak to White. Neither Elam nor White knew a "Paul," so Elam hung up. (XII RT 2710-2712, 2751.)

Later after White left the house, "Paul" called again asking for White. Elam contacted White and told him that "Paul" had called again. (XII RT 2713-2715.) Later, Henderson showed up at White's residence and identified himself as the person who called earlier. He indicated he was a friend of White's, and Elam let Henderson inside. Elam contacted White. (XII RT 2718-2721, 2752-2753.) While Elam and Henderson waited for White to return, the television news ran a report about a car chase earlier that day in Desert Hot Springs. Henderson told Elam he was in Desert Hot Springs and the police had chased him.[9] (XII RT 2721-2722.) When White

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[8] White's sister is Latesha Wasson. As noted above, Wasson was with Dana Flowers when they saw Henderson just after midnight on June 22, pull up beside them in a car. (XI RT 2530-2551; XII RT 2752.)

[9] At trial, Henderson admitted that he called White's house and that he went to White's house. (XVII RT 3817-3819.)

returned home, Elam left White and Henderson to themselves. According to White, Henderson was at his house for about one hour, during which time he and Henderson went out for food. (XII RT 2726, 2752-2754.)

Elam contacted police a couple of days later. (XII RT 2727.) Elam told police she had seen Henderson the day of the car chase. Elam initially claimed she saw Henderson driving a car while she was walking down the street, and described the car based on what she learned from news reports. She then told police that Henderson had come to their house. (XII RT 2728-2731.)

On July 3, 1997, Detective Wolford interviewed White. (XII RT 2766.) Twice, White stated that Henderson told him he was running through the desert being chased by police. (XII RT 2768.)

In late June 1997, Gregory Clayton met Henderson[10] at the Weingart Center in Los Angeles. (XIII RT 2924-2925.) During their stay at the Weingart Center, Henderson told Clayton several times that he killed someone. Henderson said he entered a trailer home and cut a man's throat and beat the man's wife. (XIII RT 2927-2928, 2942-2943; 2964-2965, 2970; XIV RT 3064.) After Clayton eventually spoke to someone at the Cathedral City Police Department and learned that a murder had occurred in a mobile home (XIII RT 2928-2929), Clayton talked to Henderson again and learned more details of the crime. (XIII RT 2931.) Henderson told Clayton it was a "home-invasion," and that he cut the man's throat to quiet him because he was yelling and making a lot of noise, and he beat the man's wife "profusely." (XIII RT 2926, 2930, 2968.) Henderson admitted he took the couple's car, and mentioned a maroon Chevy Caprice. (XIII RT 2934-2936, 2966.) Henderson claimed he only got a few dollars

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[10] According to Clayton, Henderson claimed his name was Caylin Hawk. (XIII RT 2026-2027, 3059, 3062.)

from the couple's house, and showed no remorse and acted as if nothing happened. (XIII RT 2940.) Henderson also told Clayton that he thought about raping the man's wife and that he had planned to leave the state. (XIII RT 2938-2939; XIV RT 3058-3059.)

Clayton contacted authorities and asked if there was a murder in Cathedral City in which a man's throat was cut and an older woman was beaten in a trailer park. When told yes, Clayton said he had their person, *i.e.*, Caylin Hawk, as that was the name Henderson had given Clayton. Clayton was told that was not the person whom authorities were looking for and the conversation ended. Eventually, Clayton told Sergeant Hanlon that Henderson was at the Weingart Center. The next morning, several officers went to the Weingart Center[11] and arrested Henderson. (XIII RT 2932-2933, 2937; XV RT 3358-3360.)

After his arrest, Henderson was transported to the Cathedral City Police Station where he was interviewed by Detective Wolford and Officer Paul Herrera.[12] Henderson was advised of and waived his constitutional rights, and agreed to speak to the officers. (XVI RT 3481, 3488, 3623-3625; 39 CT 10599.) Henderson claimed that on the evening of June 22, 1997, he was at his brother's, Dominique's, house in Wishing Well, in Cathedral City, and that he smoked two or three marijuana cigarettes laced with methamphetamine. Henderson left Dominique's house on foot because he wanted to steal a car. Henderson walked down Dinah Shore and stopped at the Canyon Mobile Home Park. He looked through the slats of a fence and saw a white car he wanted to steal. (XV RT 3363-3366, 3376.) He jumped the fence into the complex. The car was unlocked. Henderson

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[11] Clayton subsequently received a $1000 reward. (XIII RT 2934, 2975.)

[12] The interview was recorded. (XV RT 3394.) A tape of Henderson's interview was played for jury. (XV RT 3404, 3407-3408.)

entered the car and attempted to break the ignition switch. Henderson's effort to steal that car failed. (XV RT 3367-3368.)

Henderson walked towards the Bakers' mobile home, and saw their car parked in the driveway. The lights inside the residence were on, and the slider leading inside was open. Henderson saw two sets of keys inside the home. Henderson walked around the mobile home, and smoked another marijuana cigarette "to gather the courage to enter the Bakers' home." (XV RT 3369.)

Henderson entered the Bakers' home, announced his intent to rob the couple, and demanded the keys to their car. (XV RT 33370, 3398.) As Henderson spoke to Peggy, and he placed his hand on Reginald's shoulder to prevent him from getting up. Peggy cried and had trouble breathing. Reginald tried to calm her. (XV RT 3371.) Henderson told the couple he was going to tie them up so they would not call the police, then he ordered the couple into the master bedroom. Henderson tied Reginald's hands and feet with neckties, and tied Peggy with strips he tore from sheets. (XV RT 3373.)

Henderson admitted he obtained a knife from the kitchen and brought it back into the bedroom, and stabbed a pillow in the bedroom. (XV RT 3374.) Henderson also admitted Peggy had told him Reginald had a heart problem. (XV RT 3375.) After Henderson initially tied Reginald and Peggy, he untied Peggy and made her go inside the bathroom because he could not "watch her." (XV RT 3376-3378.)

Initially, Henderson claimed he could not recall if he hurt Reginald, but then he stated Reginald's injuries had to be caused by him because he was the only person in the house who could have hurt Reginald. At one point, Henderson thought Reginald was having a heart attack. Henderson saw blood on Reginald's neck and shirt, but claimed he did not know if he had slashed Reginald's throat. Henderson put his hand over Reginald's

mouth to see if he was breathing and he was not. Henderson admitted he placed a sheet over Reginald because he thought Reginald was dead. (XV RT 3378-3380.)

Henderson also claimed he could not recall if he hurt Peggy, then he admitted he beat her, and stated it must have been him who beat her because there was no one else in the house. Henderson stated, "I think I beat her," and admitted he saw blood coming from Peggy's face. He saw blood on his gloves. Henderson placed a sheet over Peggy because she was beat up so bad and he did not want anyone to see what she looked like. He also thought she was dead. (XV RT 3380-3382.)

Henderson left the Bakers' home and took their car. He also took $9 or $10. Henderson tried to take their television but it was too heavy. (XV RT 3382.) Henderson drove to the Nobles Ranch area to buy drugs. He saw Wasson and Flowers, and then he picked up two unidentified males in the area to help him get drugs. Afterwards, Henderson went to a 7-11 Store in Indio, bought a coke, and then went to his parent's home in Rancho Mirage. He parked the Bakers' car down the street from his parent's home. (XV RT 3383-3386.)

The next day, Henderson drove to Desert Hot Springs in the Bakers' car. (XV RT 3386-3387.) As Henderson drove down Estrella in Desert Hot Springs, a sheriff's deputy attempted to pull him over. Henderson crashed the car and when the deputy approached the passenger side of the car, he fled and escaped to "Amber's" home.[13] From Amber's, Henderson went to White's home. (XV RT 3388-3390.) Henderson left White's house at 7:00 p.m., and went to his brother's house in Cathedral City,

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[13] Henderson stated that as he fled from the deputy (XV RT 3389), he threw off the gloves he had worn inside the Bakers' home. (XV RT 3369-3370.) Officers found a glove in the area. (XIII RT 2880.)

where he spent the night. The following Tuesday or Wednesday, Henderson took a bus to the Palm Springs Greyhound station. He learned from news reports that Peggy was still alive. Henderson took a bus to Los Angeles and checked into the Weingart Hotel. (XV 3390-3392.) During the interview, Henderson never used the phrase "My friend, Leon." (XVIII RT 4009, 4029-4030.)

After the interview, Henderson called his mother and aunt who subsequently came to station and spoke to him. (XV RT 3291-3293, 3303, 3314-3318.) Officer Raymond Griffith, who stood at the open door, heard Henderson tell his aunt and mother, "I'm sorry, I didn't mean to kill him." (XV RT 3318, 3321, 3324.)

B. Defense

Henderson testified on his own behalf and was permitted to testify in the narrative. At trial, Henderson denied his involvement in the crimes. He claimed his companions that night, "Knuck" and "Leon," were responsible for the crimes. Specifically, "Knuck" was the one who entered the Bakers' mobile home and beat Peggy. "Knuck" tried to get Henderson to help him steal the Bakers' television. (XVII RT 3792-3793, 3801-3804; XVIII RT 3923-3924, 3931.) "Knuck" also told Henderson what he had done to Reginald. (XVIII RT 3928-3929.) Leon tried to get Henderson to help him steal a car. (XVII RT 3801-3804.) Henderson claimed he stuck around to see if he could resist the urge to steal. (XVIII RT 3921-3923.) Henderson refused to reveal "Knucks" last name (XVII RT 3853; XVIII RT 3919-3920), and he admitted that during his interview, he never told Wolford "Knuck" was the one who committed the crime. (XVIII RT 3919.)

On cross-examination, Henderson admitted it was a home-invasion robbery that occurred at the Bakers' (XVIII RT 3932), and that he told Clayton that Reginald died, and Peggy had been severely beaten.

(XVIII RT 3943-3945.) Henderson admitted he was in the Bakers' car that night when Wasson saw him. (XVIII RT 3929.)

Henderson admitted that he told Wolford the following details about the crime: when he entered the home, he wore gloves and the Bakers were watching television as he approached them. He announced to the Bakers he was robbing them, and he held Reginald in the chair. Peggy talked about Reginald's bad heart. He told the couple he was going to tie them up so they could not call the police, and he did in fact tie them up. He cut the sheets with a knife he retrieved from the kitchen, and tied Peggy's hands and feet. He made Peggy go inside the bathroom. The television was too heavy for him to move. Reginald started to have heart attack. He checked Reginald for vitals, and then put a sheet over Reginald. He beat Peggy, and had blood on his gloves. He put a sheet over Peggy. He took the Bakers' car, and eight or nine dollars. (XVIII RT 3948-3959, 3966-3968, 3970.)

Henderson recalled that he told Wolford that, "... he was bleeding, he was dead and she was on the ground and ...," and "Yeah, yeah I remember all the blood. Blood on his face, blood on the floor. Man I was, I was scared cause I stop, I started...." (XVIII RT 3946.) Again, Henderson admitted that he killed Reginald. (XVIII RT 3977.)

Henderson admitted that he was released from prison two weeks prior to committing the instant crimes (XVII RT 3851; XVIII RT 3920), and that he had several prior convictions involving auto theft, firearm possession, and bank robbery. (XVII RT 3831-3834; XVIII RT 3984-3985, 3987.)

C. Penalty Phase-Prosecution

1. Prior In-Custody Misconduct

On October 23, 1990, at a prison hearing, while incarcerated at Avenal State Prison, Henderson pled guilty to having engaged in a fistfight

with another inmate on October 20, 1990. (XXI RT 4705-4706, 4708-4711, 4715-4716.) At some point, Henderson was transferred from Avenal to Corcoran State Prison. (XXI RT 4719-4720.)

On December 23, 1990, Henderson engaged in a fistfight with his cellmate while incarcerated at Corcoran State Prison. (XXI RT 4718-4720.)

On September 22, 1992, while incarcerated at Calipatria State Prison, after a doctor terminated an interview with Henderson, after the two had argued and Henderson became "extremely agitated," Henderson lunged at the doctor. Two infirmary officers had to take Henderson to the ground. (XXI RT 4728-4733.)

On September 16, 1996, Henderson engaged in a fistfight with another inmate while he was incarcerated at Calipatria State Prison. (XXI RT 4723, 4725-4726.)

On December 28, 2000, Henderson initiated a "punching match" with another inmate while in custody and awaiting trial in the instant matter at the Indio jail. (XXI RT 4737-4744.)

2. Prior Offenses

On January 29, 1993, between 11:30 a.m. and noon, Joaquin Peraza, who lived in the Las Flores apartment complex in Indio, discovered his white, 1987 Toyota Celica, license plate number 3AYL228, was missing. Peraza reported the car stolen. The car was found five or six days later. (XX RT 4595-4597.)

On February 9, 1993, Susan Gould worked at the California Federal Bank in Rancho Mirage. At around 9:40 a.m., while Gould was cleaning the break room, she looked out the window and observed a car back into a handicapped parking spot. Someone inside the car pulled something over their head, and exited the car with a gun. (XX RT 4599-4601.)

Gould ran to the area where the other tellers and operations desks were and told her co-workers that she saw someone with a gun and thought they were going to be robbed. Gould ran back down the hall and watched out the window. (XX RT 4601-4602; 4608, 4615-4616.) At some point, Gould saw a male, who wore sunglasses and a stocking cap over his face, exit the bank and return to the car. As the car left the parking lot, Gould wrote down the car's license plate number. (XX RT 4603-4605, 4611, 4619, 4626.) She did not see anyone else in the car. (XX RT 4606.)

Angel Mendez was also present the day of robbery. (XX RT 4606-4607.) After Gould's warning, the branch manager, Pete Donnelly, positioned at the bank's entrance and said something to the effect of, "It's show time folks." The suspect entered the bank, pointed his gun at Donnelly and told Donnelly to stand up. (XX RT 4608-4609, 4623-4625.) The gunman walked over to Mendez and teller, Gina Cleaver, and pointed his gun at them. The gunman gave Mendez a white plastic bag. Mendez put money inside the bag, and gave it back to the gunman who left in a hurry. (XX RT 4609-4611, 4616-4618, 4620, 4625-4626.) The police were called. (XX RT 4611.) Cleaver and Donnelly described the gunman as "Black/African American." (XX RT 4620, 4626.) The gunman got away with less than $2000. (XX RT 4627.)

That same day, Deputy Peter Herrera was on patrol when he received a broadcast regarding a robbery at the California Federal Bank in Rancho Mirage, and a description of the suspect's vehicle, a white Toyota Celica, license plate 3AYL228. Around 10:18 a.m., Herrera found the unattended Celica in a parking lot at the Village Mirage Apartment complex. (XX RT 4634-4636.)

Deputy Dean Dunlap responded to the area where the Celica was located. Dunlap eventually noticed Henderson, who appeared nervous, walking in the area with a white baggie in his hand. Dunlap and Henderson

watched each other. Dunlap exited his vehicle, called out to Henderson, and identified himself. Henderson said something like "what." Dunlap called out to Henderson again, and as he approached Henderson, Henderson ran. The bag Henderson carried contained 10 and 20 dollar bills. (XXI RT 4656-4663, 4677-4678.)

Dunlap returned to his vehicle and pursued Henderson who had jumped a nearby fence. Dunlap stopped his car and pursued Henderson on foot, but he and another deputy who joined him did not catch Henderson. When Dunlap returned to where he had left his vehicle, it was gone. Dispatch announced that a passerby had observed Henderson in a vehicle similar to Dunlap's vehicle. Dunlap's vehicle was recovered 10 to 15 minutes later, one or two miles away in Cathedral City. (XXI RT 4662-4663.)

Tom Fisher, a forensic technician with the Riverside County Sheriff's Department, recovered several items from the Celica including: two pairs of sunglasses; a brown pouch that contained Henderson's Social Security card; a court document with Henderson's name; an eye glass case with Henderson's name printed on the inside; a black leather jacket; a gray knit cap; a blue and white handkerchief; and a "Crossman 357 style pellet pistol serial No. 193307372." (XXI RT 4665-4670, 4679-4680.) Detective Mark Peters opined the pellet gun looked "very real" to the untrained eye. (XXI RT 4674-4675.) Peters also took items of clothing found in the car to the bank, and the victims of the robbery recognized the items. (XXI RT 4680.)

Later that evening, Peters went to Brown's residence in search of Henderson. Brown claimed Henderson had been driving a white Toyota for about a week and a half, and said he had borrowed it from his girlfriend. (XXI RT 4640-4641, 4675-4676.) Henderson left that morning, around 9:00 a.m., wearing a black leather jacket, a knit cap, and carrying a plastic

bag with blue writing on it. There was "something" in the bag. (XXI RT 4677.)

On February 20, 1993, at around 4:00 p.m., Henderson took Heather Teed's black 1983 300 SD Mercedes with an Oregon license plate, just after she had parked in the K-Mart parking lot in Desert Hot Springs. Henderson approached Teed with a gun and told her, "Get in the car." Teed told Henderson to take the keys. Henderson did and told Teed to grab her infant daughter who was inside the car. Teed gave Henderson her purse and then he took off in the car. (XXI RT 4683-4687.) Teed entered the K-Mart, told the manager what had happened and the manager called the police who arrived moments later. (XXI RT 4687-4688.)

That same day Henderson was taken into custody after engaging law enforcement in a vehicle pursuit which ended when Henderson eventually crashed the Mercedes, ran from the vehicle, and was captured after a brief foot pursuit. (XXI RT 4693-4701, 4703-4704, 4760, 4765.) A Crossman .177 caliber pellet gun and Teed's purse were subsequently collected from Teed's Mercedes. (XXI RT 4760-4764.)

D. Victim Impact Evidence

Duane Baker was five years old when his mother Peggy married his stepfather Reginald. The couple was married on Valentine's Day in 1970. Duane was the ring-bearer. (XXI RT 4767-4768.) Reginald worked as an interstate truck driver for a few years. Life on the road was hard so he took a job at General Electric, where Peggy worked, as a jet engine mechanic. (XXI RT 4769.)

Reginald and Duane participated in father-son activities. Reginald attended Duane's little league games when work permitted and was "an ardent supporter" of Duane. Reginald was a "wonderful dad," and a "[v]ery old-fashioned man with very old-fashioned values that he instilled"

in Duane. Reginald was "absolutely" a "supportive and involved dad" in Duane's life. Reginald and Peggy were not wealthy but they "scraped and saved to make sure [Duane] got an education," something they did not have themselves. Reginald was "very supportive" of Peggy, and was there for Duane when Peggy performed in her singing group. Reginald was "a loving husband." (XXI RT 4770-4771.)

As an adult, Duane remained close with his parents and he visited them often with his own children. Reginald was a loving grandfather, and during visits, he often took his grandchildren to a nearby duck pond to feed the ducks. Reginald instilled values in his grandchildren, as he did Duane, and he was fun to be around. (XXI RT 4771-4774.)

Reginald and Peggy moved to the Canyon Mobile Home Park after they retired. They lived there for eight or nine years. Duane's aunt and uncle lived in the same location. Reginald was active in the community, and involved in the Neighborhood Emergency Safety Team with his friend Mort. Reginald and Mort volunteered at the fire department, collected emergency and first-aid supplies, and were trained to help others in the mobile park if there was ever an emergency. (XXI RT 4774-4775.)

Reginald and Peggy ran the bingo game at the mobile park. Peggy continued her singing when they moved to the desert. Peggy volunteered at the La Quinta Senior Center and directed the "Golden Tones" a senior citizen musical group that performed at convalescent homes and other mobile parks. (XXI RT 4775-4776.)

In the early morning hours of June 23, Duane received a call from the Cathedral City Police Department and was informed that Reginald was dead, and that Peggy had been hurt. Duane had just celebrated his 12-year anniversary, with his now ex-wife, the previous day. Duane was shocked and in disbelief. After Duane and his wife sent their children off to school, they went to Cathedral City. (XXI RT 4777.) Duane found Peggy at a

neighbor's home. She was beaten and bruised on her face and chest. Peggy, who had always been strong for Duane, broke down and cried. When Duane entered his parent's home to obtain some items for Peggy, he saw the bloodstains on the floor where Reginald had been laying. (XXI RT 4778-4779.)

Peggy stayed with Duane for several weeks after Reginald was murdered. She was too frightened to be alone in her home and feared Henderson would return to finish the job and kill her. Duane had Peggy's home cleaned, and added security measures to her home. After Henderson was apprehended, Peggy felt a little more comfortable about returning home. (XXI RT 4779-4780.) Peggy stayed at her home until she was diagnosed with cancer, sometime in late 1998 or early 1999. After Peggy was initially treated for cancer, Duane moved her closer to him. Peggy had a difficult time dealing with her cancer without Reginald's support, and she was lonely during that period of her life. (XXI RT 4780, 4782, 4784-4785.)

Before Reginald was murdered, Peggy and Reginald were married for 27 years and they were very close in their retirement years. After Reginald's murder, Peggy missed Reginald very much, and she lost interest in being involved in the community. She stopped volunteering, stopped attending bingo, and she quit her music group. (XXI RT 4781-4782.) Duane was upset his children could not have a relationship with their grandfather. Duane's life was different with Reginald gone. When asked what he missed most about Reginald, Duane said, "[h]is smile. [Reginald] was a pretty happy guy most of the time and just that was a comfort." (XXI RT 4785-4786.)

Henderson did not present any witnesses on his behalf. (XXI RT 4787, 4790.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED HENDERSON'S MOTION TO DISTRIBUTE A MINI-QUESTIONNAIRE

Henderson claims the trial court abused its discretion when it denied his motion to distribute a mini-questionnaire designed to obtain statistical information that he wanted to use to prepare a challenge the petite jury panel. (AOB 65-75.) While Henderson is correct that a prima facie showing of underrepresentation is not necessary to obtain discovery, his argument ignores his failure to make the particularized showing that is a prerequisite to obtaining discovery for purposes of bringing an underrepresentation challenge. Accordingly, his claim of an abuse of discretion for failing to distribute a mini-questionnaire is meritless.

In California a defendant is guaranteed the right to a trial by jury drawn from a representative cross-section of the community by both the Sixth Amendment and California Constitution. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1194.) Before it is the burden of the state to either prove no constitutionally significant disparity existed, or a compelling justification for the procedure resulting in disparity in the jury pool, a defendant must first make a prima facie showing of a violation of the fair cross-section requirement.

> "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." [Citation.] Once a prima facie case has been made, "the burden shifts 'to the state to come forward with either a more precise statistical showing that no constitutionally significant disparity existed or that there was a compelling justification for the procedure which results in the disparity in the jury pool.'" [Citation.]

(*People v. Jackson*, *supra*, 13 Cal.4th at p. 1194.)

While a defendant is not required to make a prima facie case of underrepresentation in order to obtain discovery of information necessary to make a prima facie case, the defendant nevertheless is required to make a "particularized showing supporting a reasonable belief that underrepresentation in the jury pool or the venire exists as the result of practices of systematic exclusion ...." (*Ibid.*) Once a defendant makes such a "particularized showing," the court then "must make a reasonable effort to accommodate the defendant's relevant requests for information designed to verify the existence of such underrepresentation and document its nature and extent." (*Ibid.*) Such information

> must "relate to" the defendant's particularized showing and, in particular, the information's potential relevance or probative value in verifying the existence of underrepresentation and documenting its nature and extent based on the particularized showing made by the defendant.

(*Roddy v. Superior Court* (2007) 151 Cal.App.4th 1115, 1138, fn. 13, citing *People v. Jackson*, *supra*, 13 Cal.4th at p. 1194.)

An appellate court "generally review[s] a trial court's ruling on matters regarding discovery under an abuse of discretion standard." (*People v. Ayala* (2000) 23 Cal.4th 225, 299.)

> "The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power."

(*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

As explained below, Henderson has failed to show the trial court abused its discretion in denying him discovery because of the lack of a particularized supporting a reasonable belief of underrepresentation.

A. The Trial Court Denied Discovery Due to Henderson's Failure to Make a Particularized Showing of a Reasonable Belief of Underrepresentation

Prior to trial, Henderson filed a motion seeking permission to distribute a mini-questionnaire to the venire so that he could obtain statistical information to prepare a challenge the petite jury panel.[14] (3 CT 649-655.) The People filed a motion in opposition. (3 CT 761-765.) At a hearing on the motion (I RT 13-28), defense counsel admitted the motion was premature. (I RT 14.) Nonetheless, noting that Henderson was African-American, defense counsel argued the mini-questionnaire would provide evidence necessary to determine whether or not there was a disparity between the percentages of African-Americans in the judicial district which in turn could be used to determine whether there was a cross-section of the community present in the petite jury panel. Defense counsel emphasized that he was not seeking to discover the procedures used by the jury commissioner in collecting the pool,[15] and thus *People v. Jackson*, *supra*, 13 Cal.4th 1164, was not on point. Rather, defense counsel, who

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[14] Along with that motion, Henderson also filed a "Motion to Quash Petite Jury Panel" (3 CT 656-661), and "Motion to Transfer For Unrepresentative Venire" (3 CT 662-666). Neither of the motions are the subject of this appeal, nor does anything provided in support of those motions satisfy the particularized showing necessary for Henderson's discovery request regarding the mini-questionnaire.

[15] "'The jury 'pool' is the master list of eligible jurors compiled for the year or shorter period from which persons will be summoned during the relevant period for possible jury service. A 'venire' is the group of prospective jurors summoned from that list and made available, after excuses and deferrals have been granted, for assignment to a 'panel.' A 'panel' is the group of jurors from that venire assigned to a court and from which a jury will be selected to try a particular case.'" (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1193, fn. 2, quoting *People v. Bell* (1989) 49 Cal.3d 502, 520, fn. 3.

had hoped to distribute the mini-questionnaire to five venires, was "simply after" the percentages of African-Americans in the venires. (I RT 14-16.)

In reference to his anticipated expert's testimony, defense counsel asserted,

> If we did have 500 panel venires with no African Americans, that would indicate to him a possible bias in the system, in the selection process. But if I don't have access to this data, there is absolutely no way that I can proceed.

(I RT 16.)

Noting that defense counsel was attempting to seek discovery of information necessary to quash the jury, the prosecutor argued that counsel had failed make "the particularized showing" required by *Jackson* (I RT 17), indicated that the motion was premature, and argued it would be more appropriate for the defense to seek distribution of the mini-questionnaire when the jury was to be selected. (I RT 19.) The prosecutor also objected to defense counsel's request that the jury commissioner be ordered to inform the potential jurors that they may use their discretion in deciding whether or not to fill out the form; that the mini-questionnaire be anonymous; and that it sought educational background information. (I RT 20-21.)

The trial court found the motion was premature and expressed concern that the proposed mini-questionnaire "ha[d] problems many of which [were] pointed out by the People in their response." The court denied the motion "without prejudice to renew when it [became] appropriate." (I RT 23-24, 28.)

At a subsequent hearing on defense counsel's related motions to quash the petite jury panel and transfer of venue, defense counsel renewed his motion to distribute the mini-questionnaire. (I RT 202-270.) At this hearing, the parties stipulated to what would have been the prosecution's cross-examination of defense expert Steven Day. (I RT 202-204.) Notably,

it was stipulated that Day "has never conducted any research to determine whether underrepresentation of African-Americans in the Indio/Palm Springs judicial district exists," and "has never conducted any research that confirms, supports, or suggests that the representation of African-Americans in venires from which juries are selected in Riverside County is not fair and reasonable in relation to the number of African-Americans in the community." (See 2 Supp. CT 11.) Defense counsel also proffered a report prepared by Day on the demographics of the Indio/Palm Springs judicial district; a copy of Riverside County Superior Court Local Rules, Rule 1.0056 Juror Lists; and a report on "Data from U.S. Census Bureau." (See 2 Supp. CT 1-67.) Royann Nelson, then the acting executive officer of the Riverside County Superior Court and in charge of the jury selection process for the Indio Superior Court, testified on behalf of the defense. (I RT 205-241.)

After Nelson testified, noting that it had reviewed Day's stipulation and the documents proffered by defense counsel, the trial court heard argument on various motions. (I RT 242-244.) At that point, defense counsel renewed his motion to distribute the mini-questionnaire and essentially argued that, based on the data obtained by the mini-questionnaire, Day would be able to determine whether the jury selection process and the inclusion of African-Americans was fair. (I RT 244-246.)

The trial court interjected and pointed out that in his report, Day at one point emphasized, "*But there is a real possibility the data will prove to be inconclusive.*" (I RT 246; see 2 Supp. CT 7, emphasis added.) Defense counsel was unable to explain Day's comment, but nonetheless, contrary to his previous assertion that *Jackson* did not apply(see I RT 15-16), he perfunctorily stated his request to distribute the mini-questionnaire was supported by *Jackson*. (I RT 247-248.) After further comments by defense counsel, the trial court stated that defense counsel was "putting the cart

before the horse," and pointed out that even if the information collected from the mini-questionnaire turned up a "statistical disparity," that meant nothing if there had been no showing of any impropriety of the selection process. (I RT 250.) A short while later the trial court stated,

> So it seems to me that what we need to do is show that there's something wrong with the way we pick the jurors first and then see if there's a disparity because if there's nothing wrong with the way we do it, we don't need to go to that effort.

(I RT 252.)

The prosecutor argued defense counsel had failed to meet his burden under *Jackson* and make the "particularized showing supporting a reasonable belief that underrepresentation of African-Americans occur in this particular district," thus the trial court was not required to accommodate the request to distribute the questionnaire. The prosecutor pointed out that defense counsel was essentially arguing that if he could not distribute the mini-questionnaire, he could not make the *Jackson* showing, and asserted he had other avenues to do so. She reiterated the trial court's prior observation that the defense's own expert stated in his report that, "*There is a real possibility that the data would prove to be inconclusive.*" (I RT 256-257, emphasis added.)

After further argument, the trial court concluded, "Here we don't have a particularized showing supporting a reasonable belief that underrepresentation in the pool or venire exists," and pointed out that Day's stipulation spoke for itself in that therein Day had indicated that he had no reason to think there was any underrepresentation. (I RT 263; see 2 Supp. CT 11.) The trial court reiterated these reasons and denied the motion. (I RT 269-270.)

B. The Trial Court Properly Exercised Its Discretion in Denying the Motion to Distribute the Mini-Questionnaire

Here, the proffered mini-questionnaire was designed to obtain information from members of the venire which the defense hoped to use to challenge the petite jury panel. (3 CT 649.) However, as pointed out by the trial court, in seeking to distribute the mini-questionnaire, defense counsel was "putting the cart before the horse." Moreover, as emphasized by the trial court, even if the information defense counsel collected from the mini-questionnaire turned up a "statistical disparity," it would not be significant absent defense counsel showing an impropriety in the selection process. (I RT 250.)

Thus, before being permitted to distribute the mini-questionnaire, defense counsel first needed to show there was something wrong with the selection process, *and then* see if there was a disparity, because if there was nothing wrong with the jury selection process then the mini-questionnaire was not relevant. (I RT 252.) Additionally, as pointed out by the trial court and the prosecutor, defense counsel's own expert, Day, emphasized in his report that, *"[t]here [was] a real possibility that the data would prove to be inconclusive*." (I RT 256-257, 263; see 2 Supp. CT 7, emphasis added.) Day's stipulation fully supports the trial court's denial of the request for the mini-questionnaire. (I RT 263; see 2 Supp. CT 11.)

Based on the above circumstances, the trial court properly concluded that defense counsel had failed to make a particularized showing supporting a reasonable belief that underrepresentation in the pool or venire exists (I RT 263, 269-270), and thus it did not abuse its discretion when it denied defense counsel's motion to distribute the mini-questionnaire. Accordingly, this claim should be rejected.

II. THE TRIAL COURT PROPERLY DENIED HENDERSON'S DISCOVERY REQUEST FOR INFORMATION REGARDING THE RIVERSIDE COUNTY DISTRICT ATTORNEY'S DEATH PENALTY CHARGING PRACTICES

Henderson claims the trial court erred when it denied his request for discovery of information regarding the Riverside County District Attorney's death penalty charging practices. Henderson argues that he was entitled to discovery of this information in order to determine whether the People's decision to seek the death penalty was the result of racial bias. (AOB 75-83.) The trial court properly exercised its discretion when it denied this request.

Prior to trial, Henderson filed a motion seeking discovery of the following:

> [1] The Riverside County District Attorney's death penalty charging guidelines, procedures, and practices in this case;
>
> [2] The Riverside County District Attorney's charging guidelines, procedures, and practices in death eligible cases over the past 10 years;
>
> [3] The disposition of all death eligible multiple murder and robbery-murder cases handled by the Indio Branch in the past 10 years; and,
>
> [4] The disposition of all other death eligible multiple murder and robbery-murder cases handled by the Riverside County District Attorney's Office.

(3 CT 680.) In support of his motion, Henderson's counsel attached his own declaration listing the names and races of 11 individuals charged with the death penalty in Eastern Riverside County since October 1989 and asserted that 80% of those cases involved African-Americans. (3 CT 685.) The prosecution filed a motion in opposition. (3 CT 734-740.)

At the hearing on the motion (I RT 44-56), Henderson argued there was a "possibility of subtle discrimination," and submitted on his motion.

(I RT 46-47.) The prosecution argued this case was analogous to *People v. McPeters* (1992) 2 Cal.4th 1148, 1169-1171 (disapproved on another point in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107), and that Henderson had failed to meet his "plausible justification burden." The trial court agreed, and relying on *McPeters*, denied Henderson's discovery request. (I RT 55-56.)

The trial court did not abuse its discretion in denying Henderson's discovery request. A trial court's ruling on a motion to compel discovery is reviewed for an abuse of discretion. (*People v. Ashmus* (1991) 54 Cal.3d 932, 979.) As this Court explained in *McPeters*,

> "Apparent disparities in sentencing are an inevitable part of our criminal justice system." [Citation.] "[C]onstitutional guarantees are met when 'the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible.' [Citation.] Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious." [Citation]. In *McCleskey*, the Supreme Court held that an extensive study of 2,000 Georgia murder cases showing an apparent discrepancy in capital sentencing based on race of victim did not demonstrate a "constitutionally significant risk of racial bias affecting the Georgia capital sentencing process." [Citation.]
>
> "Many circumstances may affect the litigation of a case chargeable under the death penalty law. These include factual nuances, strength of evidence, and, in particular, the broad discretion to show leniency. Hence, one sentenced to death under a properly channeled death penalty scheme cannot prove a constitutional violation by showing that other persons whose crimes were superficially similar did not receive the death penalty." [Citation.]
>
> Although a defendant seeking discovery is "not required to meet the standard of proof requisite to the dismissal of a discriminatory prosecution" [citation], discovery is not a fishing expedition. A motion for discovery must "'describe the requested information with at least some degree of specificity and ... be sustained by plausible justification.'" [Citation.]

(*People v. McPeters*, *supra*, 2 Cal.4th at pp. 1170-1171.)

In *McPeters*, the defendant sought to justify a discovery request almost identical to the one at issue in this case by citing a study prepared by the local public defender purporting to compare death penalty and non-death penalty cases in Fresno solely based on the race of the victim. (*Id.* at p. 1170.) This Court found the defendant's showing to be wanting and explained,

> No "plausible justification" was offered by the defense in this case. Defendant showed no more than the barest form of "apparent disparity." His presentation ignored readily available, case- specific data that could, if favorable, have supplied a plausible justification for further inquiry. We are directed to no authority that requires the kind of wide-ranging foray sought by defendant based on such a meager showing. No right of defendant, constitutional or otherwise, was infringed by the denial of his discovery motion.

(*People v. McPeters*, *supra*, 2 Cal.4th at p. 1171.)

However, in *United States v. Armstrong*, the United States Supreme Court addressed the specific issue of what showing a criminal defendant must make to warrant discovery in support of a discriminatory prosecution claim based on the United States Constitution's guarantee of equal protection. The Court determined that the threshold requirement is to "produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not" or in other words, "a credible showing of different treatment of similarly situated persons." (*United States v. Armstrong* (1996) 517 U.S. 456, 469 [116 S.Ct. 1480, 134 L.Ed.2d 687]; see also *United States v. Bass* (2002) 536 U.S. 862, 864 [122 S.Ct. 2389, 153 L.Ed.2d 769] [raw statistics regarding race and death-eligible charges are insufficient to entitle a defendant to discovery as it "says nothing about charges brought against similarly situated individuals"].)

The Supreme Court articulated a higher showing than "plausible justification," because it specifically observed the need to produce evidence, and, to make a credible showing of disparate treatment. (*People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177, 1187; see also *People v. McKay* (2002) 27 Cal. 4th 601, 640 (Brown, J., concurring and dissenting, stating this is "a hurdle that has proved to be higher in the lower courts than one would initially suspect.") This higher burden applies to Henderson, and he acknowledges as much (see AOB 76-77), as his crime occurred in 2000. As the court in *Baez* explained,

> In sum, although the burden on a California criminal defendant prior to 1990 did not require that he or she produce "some evidence" in support of his or her discriminatory prosecution claim in order to justify discovery in support of that claim, the enactment of Penal Code section 1054, subdivision (e) in 1990 subjected California criminal defendants to the burden necessary to justify disclosure under the United States Constitution. That burden is the one set forth in *Armstrong*. Baez was entitled to discovery only if the trial court concluded that he had produced "some evidence" in support of his discriminatory prosecution claim. The trial court determined that he had met this burden. The only remaining question is whether the trial court's decision was an abuse of discretion.

(*People v. Superior Court (Baez)*, *supra*, 79 Cal.App.4th at pp. 1190-1191.)

In this case, and despite the higher burden provided in *Armstrong*, the trial court applied the lesser plausible justification standard and determined that Henderson failed to meet his burden for obtaining the discovery order. (I RT 54, 56.) Despite evaluating the claim under the lesser standard that he was not entitled to, Henderson still failed to meet his burden. Accordingly, he necessarily failed to meet the proper standard that required him to produce "some evidence" and making a "credible showing" of "different treatment of similarly situated persons." (*United States v. Armstrong*, *supra*, 517 U.S. at p. 470.)

Here, defense counsel's declaration "showed no more than the barest form of 'apparent disparity.'" As the trial court stated, "the only statistic provided was the race of a party involved, ..." (I RT 54.) The declaration provided by defense counsel examined 11 death penalty cases filed in Riverside County based on a single dimension: the race of the defendant. (3 CT 685.) Defense counsel made no effort to account for other non-racial factors that could explain the apparent statistical discrepancy he identified in his trial counsel's declaration. This was legally insufficient to establish a plausible justification, as applied by the trial court, for the requested discovery. (See *People v. McPeters*, *supra*, 2 Cal.4th at p. 1171; see also *In re Seaton* (2004) 34 Cal.4th 193, 202-203.) Likewise, that did not satisfy the "some evidence" standard of *Armstrong*.

Based on the above, the trial court did not abuse its discretion in denying the motion for discovery. After reviewing the pleadings and conducting an extensive hearing, the trial court reasonably determined that Henderson failed to meet his burden. There was simply no plausible justification for the requested discovery. Henderson merely provided a limited statement of statistical evidence that suggested a greater number of African-American defendants may be subject to the death penalty.

Accordingly, because the information Henderson sought would not have aided his defense or otherwise shown that racial discrimination played any role in the decision to charge him with the death penalty, the trial court did not abuse its discretion in denying his discovery request. (See *In re Seaton*, *supra*, 34 Cal.4th at pp. 202-203; *People v. McPeters*, *supra*, 2 Cal.4th at p. 1171; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 979.) Consequently, this claim should be rejected.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENSE'S DISCOVERY REQUEST FOR INFORMATION OF SIMILAR CRIMES IN THE AREA BEFORE AND AFTER THE INSTANT CRIME

Henderson contends that trial court abused its discretion when it denied his motion for discovery of information from the police and prosecution of similar crimes in the area at or about the time of the crime in this case. (AOB 83-98.) The trial court properly exercised its discretion in denying this motion. Alternatively, Henderson has failed to demonstrate that any prejudice resulted from the trial court's denial of the discovery request.

> "As a rule, a criminal defendant 'may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial.' [Citation.] But the trial court has discretion '"to protect against the disclosure of information which might unduly hamper the prosecution or violate some other legitimate governmental interest,"' or when there is an '"absence of a showing which specifies the material sought and furnishes a 'plausible justification' for inspection ...."' [Citation.] Although policy may favor granting liberal discovery to criminal defendants, courts may nevertheless refuse to grant discovery if the burdens placed on government and on third parties *substantially* outweigh the demonstrated need for discovery. [Citations.]"

(*People v. Littleton* (1992) 7 Cal.App.4th 906, 910, quoting *People v. Kaurish* (1990) 52 Cal.3d 648, 686.)

A trial court's ruling on such a request for discovery is reviewed for abuse of discretion. (*People v. Ashmus*, *supra*, 54 Cal.3d at p. 979; *People v. Kaurish*, *supra*, 52 Cal.3d at p. 687; *People v. Littleton*, *supra*, 7 Cal.App.4th at p. 911; see also *People v. Jackson* (2003) 110 Cal.App.4th 280, 291.) "On appeal, the defendant must show prejudice from the erroneous denial of discovery." (*People v. Jackson*, *supra*,

110 Cal.App.4th at p. 286, citing *People v. Memro* (1985) 38 Cal.3d 658, 684.)

As explained below, the trial court did not abuse its discretion in denying Henderson's discovery motion.

A. Henderson's Motion

Prior to trial, Henderson filed a motion for discovery of similar crimes on the grounds the People where in possession of evidence that raised a reasonable doubt as to his guilt, including third-party culpability. (1 CT 158-168.) In the motion, defense counsel asserted the defense was "informed that similar crimes took place in Palms Springs and Cathedral City in the one year prior to the crime in this case, and since that date." Thus, the defense sought "records and statics regarding the similar crimes involving the same or similar method for Palm Springs and Cathedral City from 6/22/96 up to the present," and asserted, "[t]he fact that the information must be gathered by the prosecution and is not presently available [did] not insulate the prosecution from its duty of disclosure." (1 CT 160-161; emphasis added.) The motion continued,

> Henderson was incarcerated for the entire year before the crime in this case, and was only released three weeks before this crime. He has been incarcerated since. As such, if others committed similar crimes while Henderson was incarcerated, those people may be responsible for this crime.

(1 CT 161-162.) Asserting the instant crime was "only one in a string of home invasion robberies and auto thefts that took place at mobile homes in the area" (1 CT 162), the defense requested "statistics" for the following:

> MO: home invasion burglaries or robberies at mobile home parks in Palm Springs and Cathedral City that took place at night after dark, where the automobile was stolen or there was an attempt to steal the automobile, from June 1996 to the present.

(1 CT 162.)

The People filed a motion in opposition, which included two supporting declarations from the individuals in charge of managing the records for the Cathedral City and Palms Springs Police Departments. (1 CT 215-223.) In their opposition, citing, among other cases, *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118 (*Alhambra*), the People acknowledged Henderson's motion was timely and the time required to obtain the information, should the trial court so order, would not "necessitate an unreasonable delay of the trial." However, pursuant to *Alhambra*, the People argued that (1) Henderson failed to show a sufficient plausible justification for the information sought; (2) the material requested was not adequately described; (3) production of the records would violate third-party confidentiality or privacy rights, and may infringe on the protected governmental interest in confidentiality of ongoing police investigations; and (4) production of records would place an unreasonable burden on the governmental entities involved. (1 CT 216-220.)

At the hearing on this motion (1 CT 273-280), after confirming the Cathedral City Police Department was the investigating agency in this case and the Palm Springs Police Department was a third party and had no investigative authority, the trial court heard from counsel. (1 CT 274-275.) Defense counsel readily admitted the instant discovery request was "*to some extent a fishing expedition* to the extent we are seeking to discover evidence" (1 CT 275; italics added), but proffered,

> We are seeking to discover the identity of the perpetrator of this crime whom we believe to be a third party who participated in a home invasion robbery. And I am informed and believe there were some home invasion robberies that took place in this area around the time of the crime that is before the Court, and that is what we are seeking to discover. We've tailored and narrowed the request as narrowly I believe as we can. Although I am always open to suggestions. [¶] We're asking to discover home

> invasion robberies that took place, and we've asked for Palm Springs and Cathedral City, that took place after, target for mobile home parks where an automobile was stolen.

(1 CT 275-276.)

The prosecutor reiterated her position, as stated in the People's opposition (1 CT 276-278), and argued defense counsel had failed to meet his burden of showing a plausible justification pursuant to *Alhambra*, which indicated

> that just a minimum demonstration of motive or opportunity for someone else to commit the crime is not enough. There has to be some actual linking of the crime with some other person or possible person.

(1 CT 276.) Noting this was "a whole fishing expedition," the prosecutor argued the requested material was not adequately described and there was no way to know how many reports might match the criteria, and that the victims, witnesses, and defendants would have a right to privacy. She argued this case was distinguishable from *Alhambra*, because the information sought in that case was specifically described and easily obtained. Here, based on the required man-hours it would take to find any reports and match them to the circumstances of this case and cross-index them, "[t]he burden [was] huge, [and] the justification [was] weak." Thus, she asked the motion be denied. (1 CT 277-278.)

Defense counsel reasserted his belief that "the detective in this case did indicate there were some other similar crimes that were committed around the time of this one." He also proffered the fact that Peggy was unable to provide a positive identification was a significant material factor to be considered. (1 CT 278.) Although the trial court agreed Peggy's inability to identify Henderson was significant, material, and added to defense counsel's justification, the trial court concluded,

> However, even with that added information, I don't believe it brings it to the level required. [¶] For the reason expressed from the District Attorney's points and authorities and ... — under the authority cited therein and in accord with her comments this morning, I'm going to deny the defendant's motion. I don't believe the plausible justification that's required has been shown. [¶] While saying that, I recognize that much of a requirement is shown — is necessary except there is a balancing, as in most legal situations, to be done by the Court, balancing the defendant's right to have all potentially helpful information versus the burden and third-party confidentiality privacy interests to be considered. Weighing those competing interests, *the request*, through no fault of the defense, *is so unfortunately vague and ambiguous* that I believe the number of person hours needed, the amount of work that would be necessary to determine what police reports, what cases come within the defense request would be such as to be prohibitive and to make the scales fall on the prosecution's side.

(1 CT 278-279, emphasis added.) Relying on *People v. Kaurish*, *supra*, 52 Cal.3d 648, *People v. Littleton*, *supra*, 7 Cal.App.4th 906, *Alhambra*, and *Lemelle v. Superior Court* (1978) 77 Cal.App.3d 148, the trial court denied the request. (1 CT 279-280.)

Defense counsel sought leave to reopen the motion "if we should discover through our own efforts more specific information." The request was granted. Then, presumably in reference to the initial discovery request, the trial court reiterated that the information before it provided "an insufficient basis of which to grant the request." (1 CT 280.)

B. The Trial Court Did Not Abuse Its Discretion When It Denied Henderson's Motion Seeking Discovery of Similar Crimes

On appeal, Henderson relies heavily on *Alhambra*, wherein the trial court granted the defendant's request for discovery of 12 police reports pertaining to other crimes "which bore some similarities to the crimes with which the defendant was charged." (*Alhambra*, *supra*, 205 Cal.App.3d at

p. 1136.) The People appealed, and the reviewing court affirmed noting that "[a] minimal demonstration of plausible justification was made" (*ibid.*) and that "no serious question has been raised that the release of this information would have violated any protected governmental interests or any third party confidentiality or privacy rights. (*Alhambra*, *supra*, 205 Cal.App.3d at p. 1135.)

Here, Henderson argues defense counsel made a limited request with sufficient specificity and articulated a plausible justification pursuant to *Alhambra*. (AOB 86-90.) On the contrary, Henderson's request for "statistics" of home invasion robberies similar to the instant crime that occurred in Cathedral City and Palm Springs from June 1996 to the present (see 1 CT 162), was broad and burdensome, with regard to both the expenditure of law enforcement resources to research data and the privacy interests of potential victims and witnesses. As readily admitted by defense counsel, his discovery request was nothing more than "a fishing expedition." (1 CT 275.) That admission alone supports the trial court's ruling that the defense failed to satisfy the required "plausible justification" burden and denial of the motion. (1 CT 278-279.)

As noted in *Alhambra*,

> information characterized by such broad descriptions as "all other similar crimes" or "all crimes [e.g., murders] committed during [a certain time frame] with a similar modus operandi," may be so inadequate as to make the discovery and location of such information an unreasonable burden on the governmental entity. The only practical effect of such an order may be simply to postpone the defendant's trial indefinitely. Such broad requests must be scrutinized carefully by the trial judge as part of the balancing process in which he must engage.

(*Alhambra*, *supra*, 205 Cal.App.3d. at p. 1134, fn. 16.)

Here, the "statistical" information Henderson hoped to find in his "fishing expedition" (1 CT 275), "would have been of no value to [him]

unless he was able to solve the other crimes and identify the perpetrator." (*People v. Littleton*, *supra*, 7 Cal.App.4th at p. 911.) As indicated by the prosecution (1 CT 277-278), "[w]eighed against this speculative benefit was the government's legitimate need for confidentiality of ongoing police investigations and the privacy interests of the victims and witnesses identified in those other reports." (*People v. Littleton*, *supra*, 7 Cal.App.4th at p. 911.)

Furthermore, as also argued by the prosecutor, defense counsel failed satisfy his burden of showing a plausible justification for the request pursuant to *Alhambra*, because "a minimum demonstration of motive or opportunity for someone else to commit the crime is not enough. There has to be some actual linking of the crime with some other person or possible person." (1 CT 276; see *Alhambra*, *supra*, 205 Cal.App.3d at p. 1133.)

As pointed out by the trial court when it denied the motion, the defense failed to show the required plausible justification. (1 CT 278.) Noting it's duty to balance a "defendant's right to have all potentially helpful information versus the burden and third-party confidentiality privacy interests to be considered," the court found that in "[w]eighing those competing interests," the request here "was so unfortunately vague and ambiguous." The trial court reasonably concluded that "the number of person hours needed, the amount of work that would have been necessary to determine what police reports" and what cases would have come within the defense's request would have been "prohibitive" so as to "make the scales fall on the prosecution's side." (1 CT 278-279.)

Because Henderson failed to provide greater specificity or a greater showing of relevance in his broad discovery request, this Court should uphold the trial court's ruling.

C. Even Assuming Error, Henderson Was Not Prejudiced

For essentially same reasons as discussed above, even if the trial court erred in denying discovery, no prejudice resulted. (*People v. Memro*, *supra*, 38 Cal.3d at p. 684.) Other than self-serving assertions, there is no indication that similar crimes did in fact take place in the Cathedral City area during the relevant period. On the contrary, defense counsel merely proffered his belief that, at some unidentified time, a detective in this case indicated that there were "other similar crimes that were committed around the time of this one." (1 CT 278.) Under these circumstances, Henderson has failed to demonstrate there is a reasonable probability the outcome of his trial would have been different had the discovery request been granted. (See *People v. Kaurish*, *supra*, 52 Cal.3d at p. 687.)

IV. THE TRIAL COURT DID NOT ERR IN GRANTING THE PEOPLE'S REQUEST TO EXCUSE PROSPECTIVE JUROR N. FOR CAUSE

Henderson argues that the trial court abused its discretion when it excused a juror for cause. (AOB 98-109.) As demonstrated below, Juror N. was excused because she claimed to have psychic abilities. However, throughout his argument, Henderson repeatedly asserts the prosecutor's challenge was pretextual and that Juror N. was actually improperly excused for her views on the death penalty in violation of *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841], and *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776]. Contrary to Henderson's argument, the trial court properly granted the prosecution's request to excuse Juror N. for cause.

A criminal defendant facing the death penalty has the right to "an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." A state

"has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." "[T]o balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible." (*Uttecht v. Brown* (2007) 551 U.S. 1 [127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014].)

The Sixth Amendment right to an impartial jury is protected when the standard utilized for excusing a prospective juror for cause based on his or her views regarding capital punishment is "whether the [prospective] juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt*,[16] *supra*, 469 U.S. at p. 424; *People v. Clark* (2011) 52 Cal.4th 856, 895.) In *People v. Ghent* (1987) 43 Cal.3d 739, 767, California adopted the *Witt* standard as the test for determining whether a defendant's right to an impartial jury under article I, section 16, of the state Constitution was violated by an excusal for cause based on a prospective juror's views on capital punishment. (*People v. Thomas* (2011) 51 Cal.4th 449, 462.)

Henderson's complaint that Juror N. was improperly excused for cause based on her views on the death penalty is not borne out by the record. Not because her views on the death penalty rendered her unsuitable for serving on the jury, but because she was excused for an entirely different — and valid reason.

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[16] The *Witt* standard superseded one where it had to be "unmistakably clear" that the prospective juror would "automatically vote against imposition of capital punishment without regard to any evidence that might be developed at the trial of the case." (See *Witherspoon*, *supra*, 391 U.S. at p. 522, fn. 21.)

The trial court did not abuse its discretion in granting the prosecutor's challenge for cause. A juror may be discharged for cause if, at any time before or after final submission of the case, the court finds the juror "'unable to perform his or her duty.'" (*People v. Lomax* (2010) 49 Cal.4th 530, 565, quoting Penal Code, § 1089.)

A. Voir Dire of Juror N.

During voir dire, the trial court questioned Juror N. about her questionnaire and her views on the death penalty. Based on this exchange, it is clear Juror N. was not a proponent of the death penalty. Nonetheless, after the trial court clarified the process for Juror N., she confirmed she would vote for the death penalty if she found it appropriate after weighing all of the evidence presented at the penalty phase. (VII RT 1618-1624.)

Immediately thereafter, the trial court asked Juror N. if there was anything else she thought they should discuss. Juror N. said yes and asked to speak confidentially. In the ensuing chambers conference, Juror N. stated:

> ... in filing [*sic*] out the questionnaire, I did not even think of it but today when you said, you know, that there could be a mistrial declared if, if there was anything found out about any of the jurors. I do need to let everyone know that there are times when I get information psychically. I have been giving psychic readings since the late sixties and I do need also to let you know that I just don't walk into a room and pick up information about people. The only time I get information about anyone is when they ask me to give them a psychic reading.

(VII RT 1625.) Juror N. claimed her psychic abilities would not affect her being a juror, and she acquired information by putting herself into "a relaxed state and concentrating." (VII RT 1625-1626.)

The prosecutor inquired,

> [Juror N.], sometimes evidence can be so dry that sometimes it's kind of hypnotic. I can imagine a scenario where you might be sitting on the jury. It's kind of dry and you are kind of following along. If you find yourself in that relaxed state and if something comes through to you ... — some information comes through to you, whatever that might be, of course you don't have any way of knowing and nor do I whatever that information might be, is that something then you think that you would consider with all the other things that you have heard in making a decision?

(VII RT 1626-1627.) Juror N. replied, "No. I would not." (VII RT 1627.)

After further questioning from the prosecutor, Juror N. claimed that even if she received "a flash" of information during, for example, an officers testimony, that would not factor in her evaluation of the testimony. Pursuant to defense counsel's inquiry, Juror N. again claimed she had to be asked for information before it came to her and that she "was not a mind reader." (VII RT 1627-1628.)

B. Challenge for Cause of Juror N.

Based on Juror N.'s voir dire, the prosecutor requested to excuse Juror N. for cause, stating:

> Finally, [Juror N.], not because she didn't answer I suppose all the questions with the magic words but I don't suppose I have to tell the Court of my concern of her indicating psychic impressions coming to her. Only when she calls upon them. I think it's going to substantially impair her in every part of her ability to deliberate and I am going to challenge her for cause.

(VII RT 1689-1690.)

Defense counsel objected and asserted that being a psychic did not mean a person was "a nut" or "crazy," and noted "the police use psychics to find people." (VII RT 1690.) The trial court stated:

> Okay. Frankly, I'm surprised. I thought there was going to be unanimity of opinion on this one. Let me reason it out though. It just seems to me though, Mr. Head, that we're taking such a chance that [Juror N.'s] reaction to the evidence is going to be ... affected by things we can't control that I am inclined to believe she could not conform her conduct to the requirements of law as a fair juror. In other words, we don't know how her brain system is going to filter the evidence she hears from the witness stand, and I think we're taking too much of a chance that even though she says she only gets psychic information when she is asked to — I don't think I've been presented before with the question of is the Court required to leave a psychic on the jury. I will say that's the only concern that I have about her.

(VII RT 1690-1691.) Defense counsel asserted that Juror N. did not appear "to be insane or anything like that" to him. (VII RT 1691.) The trial court ruled as follows:

> I am going to bite the bullet. I don't believe [Juror N.] can follow the requirements of basing her judgment only on the evidence she hears from this witness stand and nothing else. I will grant the challenge.

(VII RT 1691.)

C. The Trial Court Properly Excused Juror N. for Cause

Through his argument, Henderson insists that the prosecutor's excusal of juror N. based upon her claimed psychic abilities was pretextual. Nothing in the record supports this assertion.

Here, "[t]]he trial judge was best situated to observe the prospective juror's demeanor and evaluate [her] competence to serve." (*People v. Lomax*, *supra*, 49 Cal.4th at p. 567; see *Patton v. Yount* (1984) 467 U.S. 1025, 1038 [104 S.Ct. 2885, 81 L.Ed.2d 847] [trial court's decision to excuse potential juror is entitled to special deference].)

> A trial court's ruling on a cause challenge is entitled to deference on appeal because "a trial judge who observes and speaks with a prospective juror and hears that person's responses

> (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record. [Citation.]"

(*People v. Lomax*, *supra*, 49 Cal.4th at p. 569, citing *People v. Stewart* (2004) 33 Cal.4th 425, 451.) The trial court's ruling in this case was proper.

This Court's ruling in *People v. Jenkins* (2000) 22 Cal.4th 900, is instructive. In *Jenkins*, a prospective juror stated in his voir dire questionnaire that the most effective protection against crime was to rely on an "aura of light" which surrounds each person and is like their "life energy," and he made repeated references to following the dictates of his "inner voice." The trial court removed the prospective juror for cause. This Court held the trial court's removal of the juror for cause was properly based upon a reasonable concern that the prospective juror's mysticism and other observable characteristics would impair his ability to deliberate rationally, rather than any impermissible prejudice against mystic religious beliefs. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 987.)

Likewise here, the trial court's removal of Juror N. for cause was properly based upon a reasonable concern that her alleged psychic abilities and other observable characteristics would impair her ability to deliberate rationally, rather than any impermissible prejudice. Under the circumstances, the trial court reasonably concluded that it was not appropriate to take "such a chance" on Juror N.'s reaction to the evidence because it could have been affected by things the court and counsel could not control. (VII RT 1690-1691.) Indeed, the trial court might have impaired Henderson's right to be tried by a competent tribunal had it not granted the challenge for cause against a juror whom it believed could not follow the requirements of basing her judgment only on the evidence she

hears from this witness stand and nothing else. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 988.)

In the event this Court determines the trial court erred in granting the challenge for cause, reversal is not warranted. In order to obtain relief based on the erroneous denial of a challenge for cause, the defendant must show the "'court's rulings affected his right to a fair and impartial jury.'" (*People v. Clark*, *supra*, 52 Cal.4th at p. 895, quoting *People v. Mills* (2010) 48 Cal.4th 158, 187.) Put another way, even if the defendant was denied a juror with scruples against the death penalty who could not have been disqualified on *Witherspoon-Witt* grounds, reversal is not required because the defendant has a right to jurors who are qualified and competent, not to any one particular juror. Thus, where a defendant does not show he was tried before a jury that was not fair and impartial, there is no basis for disturbing either the guilt or penalty judgments. (*People v. Tate* (2010) 49 Cal.4th 635, 672.) Henderson has made no such showing here. Consequently, this claim fails.

V. THE TRIAL COURT PROPERLY DENIED HENDERSON'S *WHEELER* MOTION

Henderson claims his state and federal constitutional rights were violated because the trial court erred in denying his motion pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).[17] Specifically, he contends reversal is required because the trial court applied an incorrect standard and erroneously determined the defense failed to establish a prima

[17] Although defense counsel referred only to *Wheeler* (X RT 2392), an objection under *Wheeler* suffices to preserve a *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*), claim on appeal. (*People v. Lancaster* (2007) 41 Cal.4th 50, 73; *People v. Young* (2005) 34 Cal.4th 1149, 1174; *People v. Cornwell* (2005) 37 Cal.4th 50, 66, fn. 3.)

facie case of discrimination. (AOB 110-137.) As demonstrated below, because Henderson failed to establish a prima facie case giving rise to the inference of a discriminatory purpose on the part of the prosecution in exercising its peremptory challenge against one potential African-American juror, the trial court's ruling was proper. Moreover, even if the trial court erred, a remand to conduct the second and third steps of the *Batson* analysis would be the appropriate remedy, and not the reversal appellant urges (AOB 110, 137).

> As stated by this Court in *People v. Hartsch* (2010) 49 Cal.4th 472,
>
> "Under *Wheeler*, *supra*, 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748], '[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias — that is, bias against "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds" — violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. [Citations.]' (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1008 [47 Cal.Rptr.3d 467, 140 P.3d 775].) 'Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment. [Citations.]' (*Ibid.*, citing *Batson*, *supra*, 476 U.S. at p. 88 [106 S.Ct. 1712].)

(*Id.* at 486, quoting *People v. Hawthorne* (2009) 46 Cal.4th 67, 77-78.) As this Court recognized,

> The applicable procedure is now well established. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*Johnson v. California* (2005) 545 U.S. 162, 168 [162 L.Ed.2d 129, 125 S.Ct. 2410], fn. omitted; see also *Hawthorne*, *supra*, 46 Cal.4th at p. 78 [92 Cal.Rptr.3d 330, 205 P.3d 245].)

(*People v. Hartsch*, *supra*, at 486.)

Here, the trial court applied the "strong likelihood" standard from *Wheeler* which was subsequently disapproved of in *Johnson v. California* (2005) 545 U.S. 162, 166-168 [125 S.Ct. 2410, 162 L.Ed.2d 129] (*Johnson*). However, contrary to Henderson's assertion, "that alone is [not] sufficient to compel reversal." (AOB 110, 121, 123.) Generally, a trial court's ruling on a *Batson/Wheeler* motion is reviewed for substantial evidence, with deference to the trial court's factual assessments. (*People v. Huggins* (2006) 38 Cal.4th 175, 176, 227, 228, fn. 13.) When a trial court applies an incorrect legal standard, this Court considers the matter de novo without affording deference to the trial court's decision, and may resolve the issue if the record supports a particular conclusion as a matter of law. (*People v. Avila* (2006) 38 Cal.4th 491, 553-554; *People v. Cornwell*, *supra*, 37 Cal.4th at p. 73.)

A. Henderson's *Wheeler* Motion

Prospective Juror Bowens's ("Bowens") questionnaire (27 CT 7381-7417) indicated the following: she was African-American (27 CT 7381); previously married to a policeman (27 CT 7386); involved with several organizations including: the Palm Springs Youth Center Board; N.A.A.C.P.; Desert Highland Board; Black History Month Board; youth group, church; Block Grant Committee; and she was the Vice-President of the Palm Springs Police Advisory. (27 CT 7387-7388.)

Bowens's ex-husband was retired from the Palm Springs Police Department. Bowens had friends at the same police department whom she talked to about police-related subjects about once a month at meetings. (27 CT 7393.) Bowens knew or thought she knew three individuals on the prospective witness list. (27 CT 7400-7401.) Bowens thought racial

discrimination against African-Americans was "a somewhat serious problem in this country." (27 CT 7404.)

During voir dire, Bowens stated that her ex-husband, John Parker, was a former Palms Springs police officer, but that would not affect any decision she might have to make in this case or her ability to judge the credibility of a law enforcement witness. (VII RT 1510-1511.)

During a chambers conference, the prosecutor informed the court that, at some point, Parker had been charged with the attempted murder of his wife, Amy Parker. (VII RT 1513-1515.) Bowens was subsequently questioned about that matter. Bowens was aware of Parker's criminal charges and verified she was not the victim, and that Parker's situation would not affect any decision she might have been asked to make in this case. She did not have any feelings about how the district attorney's office handled Parker's case or any concerns about the outcome of the case. (VII RT 1516-1517.) Later, Bowens stated that her previous marriage to a police officer would not cause a disadvantage to the defense. (VII RT 1546.)

During the process of peremptory challenges, after the defense exercised its fourth peremptory, Bowens was seated in the jury box. Bowens was seated for three rounds before the prosecutor used her seventh peremptory to excuse Bowens. (X RT 2387-2392.) A chambers conference followed and defense counsel made an oral *Wheeler* challenge citing Bowens's race, and claimed the prosecution's excusal of Bowens "constitute[d] a systematic exclusion of her based upon her race." (X RT 2392.) Defense counsel argued,

> [A]s we know, there are only 1.5 percent population is African American anyway, and on this panel of a hundred four jurors, the order of which we know that they are going to be called, there were three African Americans who qualified for this panel, and the other two are back in the hundreds, Miss Gadson, and

> Miss Bolen. Miss Bolen is 110. Ms. Gadsen is 116.[18] ... We all know that there is no possible way, I mean I guess it is conceivable, but it is a million to one that we would ever get to those jurors, therefore, the only conceivably eligible juror is ... Miss Bowens, the one who was just excused, so we would make that challenge.

(X RT 2392.)

The trial court stated,

> Some of the cases report that when a judge invites the district attorney to be heard in such a situation, that that constitutes a prima facie finding that the challenge or the objection is well taken. I want the record to specifically reflect that that is not the case in this instance. I am going to invite [the prosecution] to be heard, but it is simply because, having interviewed hundreds of jurors now, I simply don't recall the remarks that Miss Bowens made, so I am going to invite a response without having made any particular finding. [¶] I will say for the record I do recall Miss Bowens is the lady who was previously married to a Palm Springs police officer who himself had been charged with some spousal abuse type crimes, but other than that, I don't remember her interview....

(X RT 2393.)

Citing *People v. Christopher* (1991) 1 Cal.App.4th 666, the prosecution argued that because defense counsel merely stated that Bowens was African-American and failed to give any other reason why he thought the challenge was improper, "without more, it's not enough," and she took the trial court's "ruling" or "finding at this point that a prima facie case hasn't been made to heart ..." and declined to state reasons for exercising a peremptory challenge of the challenged juror on the record. Pursuant to *Christopher*, the trial court offered defense counsel the opportunity to

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[18] Neither the trial court nor the prosecution challenged this alleged circumstance, nor was respondent able to verify this information from the current record. As it stands, such allegation is purely speculative.

explain his basis for inferring the challenge was based on group bias. (X RT 2393-2395.)

Based on his recollection of Bowens's answers in her questionnaire, and her answers to questions about her ex-husband, defense counsel did not see any problems with Bowens qualifying for jury service and stated, "if it wasn't for the fact that she is the only Black person as a potential juror, I would question whether or not she should be challenged." (X RT 2395.)

Citing *People v. Trevino* (1997) 55 Cal.App.4th 396, 406, the prosecutor asserted,

> merely noting that a party has used a challenge to exclude members of a particular group is insufficient to support a prima facie showing of group bias. [¶] Also People versus Howard which is found at 1 Cal.4th 1132 at page 1154 stands for the proposition that the fact that the district attorney challenged the first two African American jurors completely inadequate to meet the burden, ...

(X RT 2395-2396.)

Upon its review of *Christopher*, *Trevino*, and *Howard*,[19] the trial court ruled,

> *the defense has not carried their burden of establishing a prima facie case*. [¶] It is the case that Miss Bowens is African American, however there is a requirement, according to these cases, of a strong likelihood that the challenges were the result of the potential juror's membership in the cognizable group, and that proposition is found at Trevino 55 Cal.App.4th 396 at 407 citing People versus Rousseau 129 Cal.App.3d at 536.

(X RT 2396-2397, emphasis added.) Defense counsel proffered,

> My recollection of her is that she was — of the three, she was one of the more qualified. I believe she stated that she had no position on the death penalty. I think she marked the higher box, and I think she stated that she thought the death penalty

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[19] *People v. Howard* (1992) 1 Cal.4th 1132.

accomplished some things. She was not morally or philosophically opposed to it.

(X RT 2397.) The court replied,

> That is true, however, the reason I am thinking I need make no further inquiry is that I can see a reasonable, constitutionally-permissible reason why the People might seek to excuse Miss Bowens, and that is her former marriage to a police officer. Just as it is the case that sometimes folks are biased for the police, being divorced from police officers, particularly police officers who have themselves been charged with violent crimes, might cause a person to be biased against police and police witnesses, and therefore, I can find, without even inquiring of the prosecution, that there certainly is at least one constitutionally-permissible reason for the exercise of a peremptory, and having found no other basis other than that, it is the defense's assertion that she gave good answers, to paraphrase, and the fact that she is African American. I don't believe the presumption that an exercise of a peremptory challenge has been made in a constitutionally-permissible manner has been overcome, and I will therefore deny the challenge.

(X RT 2397-2398.)

B. Because Defense Counsel Failed to Make a Prima Facie Showing of Discrimination, the Trial Court Properly Denied Henderson's *Wheeler* Motion

During the process of peremptory challenges, after Bowens was seated for three rounds, the prosecutor used a peremptory challenge to excuse Bowens. (X RT 2387-2392) Citing Bowens's race, defense counsel made an oral *Wheeler* motion on the ground that Bowens's excusal "constitute[d] a systematic exclusion of her based upon her race." Defense counsel argued that based upon the composition of the panel, and the position of the two other qualified African-Americans on the panel, Bowens was conceivably the only eligible African-American juror. (X RT 2392.)

Solely in an effort to refresh its recollection of Bowens's remarks, and without making a particular finding at that point, the trial court invited the prosecutor to respond. Based upon the relevant case law, the prosecutor argued that merely stating that Bowens was African-American, without more, was not enough to support the motion and deferred to the trial court. (X RT 2393-2394.)

The trial court permitted defense counsel to respond. Defense counsel asserted that based on Bowens's questionnaire and her response about her ex-husband he saw no issue with her qualifications for jury service and because she was "the only Black person as a potential juror," he questioned her being challenged. The prosecutor reiterated that merely noting that a party used a challenge to exclude a member of a particular group was insufficient to establish a prima facie showing of group bias. (X RT 2395-2396.)

The trial court ruled the defense failed to "carry their burden of establishing a prima facie case." (X RT 2397.)

These circumstances do not raise an inference that the prosecutor exercised a peremptory challenge based on race. There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 131 L.Ed.2d 834]; *People v. Griffin* (2004) 33 Cal.4th 536, 554.) It is "presumed that the prosecutor uses peremptory challenges in a constitutional manner." (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) While the use of even a single peremptory challenge because of a prospective juror's race is improper under both *Batson* and *Wheeler* (*People v. Silva* (2001) 25 Cal.4th 345, 386), it does not follow that such a single challenge establishes the necessary inference of discriminatory purpose necessary to establish a prima facie case. (*People v. Bell* (2007)

40 Cal.4th 582, 598.) It is very difficult to establish a prima facie case of discriminatory jury selection based on the excusal of a single prospective juror, as is the situation here. (*People v. Bell*, *supra*, 40 Cal.4th at p. 598, fn. 3; see also *People v. Bonilla* (2007) 41 Cal.4th 313, 343.)

Henderson's assertion below and on appeal that Bowens would have been the only seated African-American seated in the jury box (see X RT 2392; AOB 123-124), is pure conjecture.

While the defendant need not be a member of the excluded group, it is significant if the defendant is; and it is also significant, if, in addition, his victims are members of the group to which the majority of the remaining jurors belong. (*People v. Clark*, *supra*, 52 Cal.4th at p. 906.) Henderson is African-American and his victims' were Caucasian. (See I RT 14; 3 CT 685.) However, notwithstanding that consideration, Henderson failed to meet his burden of showing a prima facie case of group bias. The prosecutor's use of a peremptory challenge to excuse prospective juror Bowens did not establish a prima facie case of group bias and there was no discernable pattern from which to infer discrimination. Notably, after Bowens was seated in the jury box, the prosecutor passed Bowens during two subsequent rounds of peremptory challenges before excusing her. (*People v. Clark*, *supra*, 52 Cal.4th at p. 906.)

On appeal, Henderson attempts to compare Bowen to two other prospective jurors. (AOB 129-136.) As Henderson recognizes (see AOB 110) his appeal involves the "first-stage" *Wheeler/Batson* analysis.[20] (X RT

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[20] The trial court's observation that there was an obvious constitutionally permissible reason to exclude Bowens, *i.e.*, her former marriage to a police officer who had been charged with a violent crime (X RT 2397-2398), does not serve to convert a first stage *Wheeler/Batson* case into a third stage analysis on appeal. (*People v. Clark*, *supra*,

(continued...)

2396.) This case does not involve a "third-stage" analysis, where the trial court concluded a prima facie case had been made, solicited an explanation of the peremptory challenges from the prosecutor, and only then determined whether defendant had carried his burden of demonstrating group bias. (*People v. Howard*, *supra*, 42 Cal.4th at p. 1019.)

Comparative juror analysis has little or no use where a group bias analysis does not hinge on the prosecution's actual proffered rationales for peremptory challenges. As this Court has concluded: "'Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales, and we' may properly 'decline to engage in a comparative analysis here.'" (*People v. Carasi* (2008) 44 Cal.4th 1263, 1295-1296, quoting *People v. Bonilla*, *supra*, 41 Cal.4th at p. 350.) While the trial court noted an obvious constitutionally permissible reason for excluding Bowens that does not alter the lack of evidentiary value to comparative analysis where the prosecutor has not provided the rationale for exercising a challenge. This Court should decline to undertake the comparative analysis urged by Henderson.

The totality of facts in this case did not give rise to an inference of discrimination. The prosecutor challenged only one African-American prospective juror (*People v. Bell*, *supra*, 40 Cal.4th at p. 598), Bowens was in the box for three rounds before the prosecutor exercised a peremptory challenge (*People v. Clark*, *supra*, 52 Cal.4th at p. 906), and the record not only fails to support an inference of group bias for the peremptory

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(...continued)
52 Cal.4th at p. 908, fn. 13; *People v. Howard* (2008) 42 Cal.4th 1000, 1019.)

challenge — it shows an obvious race-neutral reason (*People v. Taylor* (2010) 48 Cal.4th 574, 644). Accordingly, the record demonstrates Henderson failed to make a prima facie showing of a *Batson/Wheeler* violation, as he failed to show that "the totality of the relevant facts [gave] rise to an inference of discriminatory purpose." (*Batson, supra*, 476 U.S. at p. 94; *Johnson, supra*, 545 U.S. at p. 168.)

Henderson argues that reversal is required based on the prosecutor's exercise of a peremptory challenge of prospective juror Bowens. (AOB 110, 137.) He is wrong. Even if this Court were to conclude the trial court erroneously found that Henderson had not presented a prima facie case, the case should be remanded to allow the trial court to conduct the second and third steps of the *Batson* analysis. (*People v. Johnson* (2006) 38 Cal.4th 1096, 1103.) In any event, as the record amply demonstrates, the trial court did not err in finding that Henderson failed to make out a prima facie showing of an inference of discriminatory purpose against a cognizable group in the prosecutor's use of a peremptory challenge to excuse prospective juror Bowens.

VI. HENDERSON'S STATEMENTS TO POLICE WERE PROPERLY ADMITTED AT TRIAL

Henderson claims that his statements to police were erroneously admitted at trial because they were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694], and *Edwards v. Arizona* (1981) 451 U.S. 477 [101 S.Ct. 1880, 68 L.Ed.2d 378]. (AOB 137-180.) This claim is meritless, and any error was harmless beyond a reasonable doubt.

It is well established that once a suspect has waived his or her *Miranda* rights, any subsequent assertion of the right to counsel must be articulated "sufficiently clearly that a reasonable police officer in the

circumstances would understand the statement to be a request for an attorney." (*Davis v. United States* (1994) 512 U.S. 452, 459 [114 S.Ct. 2350, 129 L.Ed.2d 362] (*Davis*).

As this Court recently explained in *People v. Nelson* (2012) 53 Cal.4th 367:

> In *Davis*, *supra*, 512 U.S. 452 [114 S.Ct. 2350], the United States Supreme Court meticulously addressed the principles applicable to a ... suspect's postwaiver invocation of *Miranda* rights during a custodial interrogation. Although law enforcement officers are free to question a suspect who knowingly, intelligently, and voluntarily waives his rights under *Miranda*, "if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." (*Davis*, at p. 458 [114 S.Ct. 2350] [relying on *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [68 L.Ed.2d 378, 101 S.Ct. 1880].) The prohibition against further questioning in these circumstances is not a constitutional requirement, but rather a prophylactic rule "'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.'" (*Davis*, at p. 458 [114 S.Ct. 2350] [quoting *Michigan v. Harvey* (1990) 494 U.S. 344, 350 [108 L.Ed.2d 293, 110 S.Ct. 1176].)
>
> Whereas the question whether a waiver is knowing, intelligent, and voluntary calls for an evaluation of the suspect's state of mind, the same cannot be said for determining whether a suspect's postwaiver statement requires the immediate cessation of police questioning. (*Williams*, *supra*, 49 Cal.4th at p. 428 [111 Cal.Rptr.3d 589, 233 P.3d 1000].) *Davis* could not make this more plain: "To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. [Citation.] Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' [Citation.]" (*Davis*, *supra*, 512 U.S. at pp. 458-459 [114 S.Ct. 2350].)
>
> Under the *Davis* standard, it is not enough that a suspect makes a reference to an attorney "that a reasonable officer in light of the circumstances would have understood only that the

suspect might be invoking the right to counsel." (*Davis*, *supra*, 512 U.S. at p. 459 [114 S.Ct. 2350]; see *McNeil v. Wisconsin*, *supra*, 501 U.S. at p. 178 [111 S.Ct. 2204] ["the *likelihood* that a suspect would wish counsel to be present is not the test ..."].) Rather, the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Davis*, at p. 459 [114 S.Ct. 2350]; see *Williams*, *supra*, 49 Cal.4th at p. 432 [111 Cal.Rptr.3d 589, 233 P.3d 1000]; *Gonzalez*, *supra*, 34 Cal.4th at p. 1126 [23 Cal.Rptr.3d 295, 104 P.3d 98] ["question is not what defendant understood himself to be saying, but what a reasonable officer in the circumstances would have understood defendant to be saying"].)

Thus, because a postwaiver invocation determination contemplates reference to a reasonable officer's understanding of a suspect's statements in light of known or objectively apparent circumstances, the suspect's subjective desire for counsel is not relevant. As *Davis* explained, while "requiring a clear assertion of the right to counsel might disadvantage some suspects who — because of fear, intimidation, lack of linguistic skills, or a variety of other reasons — will not clearly articulate their right to counsel although they actually want to have a lawyer present," it is the *Miranda* warnings themselves, which — when given to the suspect and waived prior to questioning — are "'sufficient to dispel whatever coercion is inherent in the interrogation process.'" (*Davis*, *supra*, 512 U.S. at p. 460 [114 S.Ct. 2350].) Even though officers may ask questions to clarify whether the right to counsel is being invoked, they are not obligated to do so. (*Id.* at p. 461 [114 S.Ct. 2350].)

(*People v. Nelson*, *supra*, 53 Cal.4th at pp. 376-377.)

As this Court further explained:

The rationale for requiring clarity is to protect lawful investigative activity, an obviously vital component of effective law enforcement. The Supreme Court has repeatedly emphasized that voluntary confessions are "'a proper element in law enforcement'" and "'"essential to society's compelling interest in finding, convicting, and punishing those who violate the law."'" (*Maryland v. Shatzer*, *supra*, 559 U.S. at p. ___ [130 S.Ct. at p. 1222].) Hence, after a suspect makes a valid

> waiver of the *Miranda* rights, the need for effective law enforcement weighs in favor of a bright-line rule that allows officers to continue questioning unless the suspect clearly invokes the right to counsel or right to silence.
>
> There are important practical and policy reasons supporting this rule. When the interrogating officers "reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning 'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity,' ... because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present." (*Davis*, *supra*, 512 U.S. at p. 460 [114 S.Ct. 2350], citation omitted.)

(*People v. Nelson*, *supra*, 53 Cal.4th at pp. 377-378.)

This Court recently confirmed,

> "On review of a trial court's decision on a *Miranda* issue, [this Court] accept[s] the trial court's determination of disputed facts if supported by substantial evidence, but [] independently decide[s] whether the challenged statements were obtained in violation of *Miranda*."

(*People v. Gonzales* (2012) 54 Cal.4th 1234, 1269, quoting *People v. Davis* (2009) 46 Cal.4th 539, 586; *People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 217.)

A. Henderson's Statements and *Miranda* Motion

After his arrest, Henderson was interviewed by Detective Wolford and Officer Herrera.[21] (5 CT 1172-1224.) After being advised of and waiving his constitutional rights, Henderson agreed to speak to the officers. (5 CT 1172-1173; XVI RT 3481, 3488, 3623-3625.) In regards to the

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[21] The interview was recorded and transcribed. Respondent refers to the revised transcript submitted by the prosecution. (See 5 CT 1171-1224.)

evening in question, when questioned about his whereabouts just prior to the incident at the Bakers home, Henderson indicated that he did not want to say where he was or whom he was with because he was concerned about incriminating[22] someone else and stated, "I don't want her to be in trouble." (5 CT 1175-1176.)

Detective Wolford asked, "You don't want to talk about that person, is that what you're talking about?" Henderson replied, "I don't know, I'm contemplating, I don't want to (sigh). Henderson then admitted he was in Cathedral City on the night in question. When asked how he got to the trailer park, Henderson was non-responsive, then he stated, "Uhm, there's some things that I, uhm, want uh ...," at which point Detective Wolford interrupted Henderson's remark and asked, "Did you go into the trailer park that night?," at which point Henderson finished his statement, "what uh, want to, speak to an attorney first, because I, I take responsibility for me, but there's other people that ...." (5 CT 1176-1177.) He then twice stated, "I need to find out." The officers explained to Henderson that they only wanted to talk about what happened to the victims so the family could get closure, and told him he should not be concerned about who he was with before or after the incident. At that point, Henderson asked to use the restroom. After a brief break in the questioning, the interrogation resumed. (5 CT 1178-1179.)

When the officers asked Henderson why he held a knife to Reginald's throat and cut him, and why he punched Peggy, Henderson claimed he could not remember. He then stated, "I don't remember anything anyway. When I came, when I saw what was happening myself, he was bleeding, he

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[22] The transcript states that Henderson stated, "in criminals someone else" (5 CT 1176), but at the hearings on this issue it was inferred he meant to say "incriminate." (See X RT 2289-2290, 2309-2310, 2339.)

was dead and she was on the ground and ...." When Officer Herrera asked, "Paul, so you remember hitting ...," Henderson interrupted and said, "Yeah, yeah, I remember all the blood. Blood on his face, blood on the floor. []." (V CT 1181.) Thereafter, Henderson admitted his involvement in the crimes against the Bakers. (V CT 1185-1196.)

On January 27, 2000, at the preliminary hearing, during Detective Wolford's direct examination, when the prosecution asked Detective Wolford if he asked Henderson whether or not he was at the Bakers' on the night on June 22, 1997, defense counsel moved to exclude any statements made by Henderson during the interrogation "after" he requested to speak to an attorney, and asserted the questioning should have ceased at that point. (2 CT 513.) The court overruled the objection finding that based on what it had heard so far, the evidence suggested

> only a reluctance to talk about a particular area of the discussion and I'm not aware of any case that if a defendant says I'll talk to you about this but I wouldn't talk to you about that, and the officer doesn't talk to him about the second 'that,' I'm not aware of any requirement that questioning must cease.

(2 CT 513-514.)

On October 25, 2000, defense counsel filed a motion to set aside the information on the ground that Henderson's statements to police were obtained in violation of *Miranda*, and improperly admitted at the preliminary hearing. (3 CT 600-610.) After a hearing,[23] the motion was denied. (4 CT 1145-1161.)

On December 8, 2000, defense counsel filed a motion *in limine* to exclude Henderson's statements to police on the ground they were obtained in violation of *Miranda*. (4 CT 999-1009.) On December 13, 2000, the

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[23] Judge James S. Hawkins presided over this hearing. (See 4 CT 1145.)

prosecution filed a motion to introduce Henderson's statements, accompanied by a copy of a transcript of the interview. (4 CT 1016-1089.) On January 2, 2001, the prosecution filed a revised transcript of the interview. (5 CT 1171-1224.) On January 19, 2001, the defense filed a "partial transcript" in support of his motion to suppress Henderson's statements to police. (36 CT 9951-9963.)

At the January 25, 2001 hearing on this matter, the trial court acknowledged it had received and considered documents submitted by the parties.[24] (X RT 2256, 2280-2282.) The prosecution then called Wolford to the stand. Prior to interrogating Henderson, Detective Wolford advised Henderson of his constitutional rights. Henderson said he understood and waived his rights, and agreed to speak to the officers. (X RT 2276-2279.) A portion of the audiotape of the interview was played and the prosecutor referred the trial court to the revised transcript. (X RT 2283-2284.) Thereafter, questioning of Detective Wolford resumed.

Detective Wolford explained that before Henderson mentioned that he wanted to speak to an attorney, he and Officer Herrera tried to question him about his whereabouts the night of the incident at the Bakers', starting from the beginning of the evening. That was problematic however because Henderson would only answer certain questions and he "definitely" was not willing to talk about where he was or who he was with before the incident. (X RT 2285-2290, 2330-2331.) In regards to Henderson's remark, "Want uh, want to speak to an attorney first because I, I accept responsibility for me but there's other people that —," Detective Wolford believed that

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[24] Later, in regards to the tape of the interview and the transcripts provided by the parties, the trial court proffered what it heard on the tape, and noted that sometimes it found the prosecution's transcript more accurate, and sometimes it found defense counsel's transcript more accurate. (X RT 2291-2292.)

Henderson accepted responsibility for himself (X RT 2284-2285), but he did not want to incriminate anyone, and specifically stated, "I don't want her to be in trouble." (X RT 2289-2290.) Once the questions focused on what it was that Henderson accepted responsibility for, Henderson became more responsive and eventually he told Detective Wolford what happened that night. (X RT 2286.)

Thereafter, the trial court heard argument from counsel. (X RT 2336.) The prosecutor argued that, taken in context, Henderson's statements of "I don't want her to be in trouble," and that he "accepted responsibility for me but there's other people that — I need to find out," clearly indicated that he did not want to involve other people in what was going on, especially whomever he was with and whose house he came from prior to the incident. Thus, Henderson's request to speak to an attorney was so ambiguous that, at the time, the officers thought Henderson did not want to get other people in trouble so he wanted to talk to an attorney on their behalf before he answered the officers' questions. This was clear based on the officer's subsequent remarks in which they told Henderson they were not interested in him getting other people in trouble. (X RT 2337-2338.)

The prosecutor argued the request to speak to an attorney was not clear and unambiguous, or unequivocal such that the officers were required to cease questioning. She also proffered that if the court were to find the request was a clear invocation, it was obviously only an invocation as to one topic, namely that Henderson did not want to talk about where he was before the incident because he did not want to incriminate other people, in which case suppression was not required. (X RT 2338-2339.)

Defense counsel disagreed at length, and eventually asserted that Henderson's request to speak to an attorney related to his own criminal liability, and was made in response to the officers' question about whether he went to the trailer park. (X RT 2339-2346.) The prosecutor disagreed,

and pointed out that the transcript showed Henderson had been interrupted when he mentioned an attorney. (X RT 2346-2347.) Referring to *Davis*,[25] the prosecutor asserted that if a request is unclear, equivocal, or ambiguous, the questioning need not cease, nor were the officers required to ask any clarifying questions. The prosecutor also noted that case law[26] held that it was not improper for officers to encourage a defendant to take responsibility for one's actions during an interrogation. (X RT 2347-2349.)

The trial court found the prosecution had proven by a preponderance of the evidence, albeit by a "slim but significant margin," that there was no invocation of counsel. (X RT 2355.) The trial court stated,

> [H]e might have wanted an attorney before he said anything further to Detective Wolford and Detective Herrera, but *that is not clear that that was his position.* It may also have been that he simply wanted to talk to an attorney about the issue of incriminating others at some point in time before he would answer any such of those questions. [¶] *The bottom line to the court is that there are several reasonable interpretations that can be placed on Mr. Henderson's statement about an attorney,* and that choice of reasonable interpretation suggests to me that his comment was not at all unambiguous or unequivocal as defined in the Davis case.

(X RT 2355-2356, emphasis added.) The trial court also noted that *Davis* did not require officers to ask clarifying questions. (X RT 2356.)

The trial court agreed with the prosecutor that Henderson's statement about an attorney was part of a longer statement that had been interrupted and began as, "There's some things that I, um, want, um," and ended as, "want to speak to an attorney first...." Based on "the totality of the circumstances," the trial court concluded that the officers reasonably inferred from Henderson's remark that his reluctance to answer their

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[25] *Davis*, *supra*, 512 U.S. 452.

[26] Citing *People v. Jacobo* (1991) 230 Cal.App.3d 1416, 1425.

questions was related to his concern of possibly incriminating other people. (X RT 2357-2358.) Thus, although it was "a fairly close call," based on *Davis*, the prosecution established Henderson's request was ambiguous and Henderson's motion to suppress his statements was denied. (X RT 2359-2360.)

B. The Trial Court Correctly Concluded That Henderson's Request for an Attorney Was Ambiguous and Equivocal

Here, applying the reasonable-officer approach from *Davis*, the trial court correctly ruled that Henderson's statement was an ambiguous request for an attorney. (X RT 2355-2360.) In determining whether a defendant has invoked his right to counsel, his statements are to be considered in context. (*People v. Thompson* (1990) 50 Cal.3d 134, 156.) Here, the context in which Henderson's remark was made supports the trial court's ruling that Henderson's request for an attorney was ambiguous. Henderson was advised of and waived his *Miranda* rights. As for his subsequent remark about speaking to an attorney, taken in context, the trial court correctly concluded the request was made because Henderson was concerned about incriminating others, not himself. (X RT 2357-2358.)

As the trial court recognized when it first considered the issue at the preliminary hearing, the evidence suggested that Henderson was only reluctant to talk about a particular area of the discussion and it was not aware of any case that required questioning to cease "if a defendant says I'll talk to you about this but I wouldn't talk to you about that, and the officer doesn't talk to him about the second 'that.'" (2 CT 513-514.)

Statements similar to Henderson's have been determined to be insufficient to invoke *Miranda*, including the following: "'Did you say I could have a lawyer?'" (*People v. Crittenden* (1994) 9 Cal.4th 83, 123,

130-131); and "'I think it'd probably be a good idea for me to get an attorney'" (*People v. Bacon* (2010) 50 Cal.4th 1082, 1104). Recently, this Court held that the statement, "'If you can bring me a lawyer, that way I[,] I with who ... that way I can tell you everything that I know and everything that I need to tell you and someone to represent me,'" was an ambiguous invocation of the defendant's *Miranda* rights. (*People v. Sauceda-Contreras*, *supra*, 55 Cal.4th at pp. 206-207; see also *People v. Williams* (2010) 49 Cal.4th 405, 431-433 ["'I want to see my attorney cause you're all bullshitting now.'"].)

Here, considered in context with being questioned about his whereabouts before the crimes and his concern about not wanting to cause trouble for a certain female individual or incriminate anyone, the trial court's conclusion that Henderson's statement of "there's some things that I want to speak to an attorney first because I take responsibility for me, but there's other people that, ..." was unclear and ambiguous was correct.

As discussed above, there was no *Miranda* violation during the interview before the brief break when Henderson requested to use the restroom. Accordingly, there was no subsequent violation of *Edwards*, *supra*, 451 U.S. at pages 484-485, when the questioning resumed. (See AOB 163-165.)

C. Henderson Was Not Prejudiced by Admission of His Statements

Even assuming the trial court erred in allowing Henderson's statements into evidence, Henderson was not prejudiced. A violation of a defendant's *Miranda* rights is subject to the "harmless beyond a reasonable doubt" standard propounded in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*). (See, *e.g.*, *People v. Thomas*, *supra*, 51 Cal.4th at p. 498.) Given the balance of the evidence

introduced at his trial, as discussed below, Henderson would have still been convicted absent his statements to police.

Henderson was seen in the Bakers' car the night of the incident. (XI RT 2532-2534.) Early the next morning, the Bakers' car was recovered after a chase during which the driver fled. (XII RT 2695-2699; XIII RT 2877.) On the day Henderson visited White's home and spoke to Elam, as the two waited for White to return, the television news ran a report about a car chase earlier that day in Desert Hot Springs. Henderson told Elam he was in Desert Hot Springs and the police had chased him. (XII RT 2721-2722.)

During his stay at the Weingart Center, where he was eventually arrested, Henderson confessed his crimes against the Bakers' to another resident, Clayton. Several times, Henderson told Clayton that during a "home-invasion" he entered a trailer home and cut the man's throat to quiet him because he was yelling and making a lot of noise, and that he beat the man's wife "profusely." (XIII RT 2926-2928, 2930, 2942-2943, 2964-2965, 2968, 2970; XIV RT 3064.) Henderson admitted he took the couple's car, a maroon Chevy Caprice (XIII RT 2934-2936, 2966), and that he only got a few dollars from the couple's home. (XIII RT 2940.) After his interview with the detectives, Henderson's mom and aunt came to station and Henderson was heard to have told them, "I'm sorry, I didn't mean to kill him." (XV RT 3318, 3321, 3324.) This evidence alone established Henderson's guilt of the crimes against the Bakers.

Accordingly, based on the above, any error in admitting Henderson's challenged statements during the interview was harmless beyond a reasonable doubt. Consequently, his claim should be rejected.

VII. PEGGY'S PRELIMINARY HEARING TESTIMONY WAS PROPERLY ADMITTED AT TRIAL

Henderson claims that the admission of Peggy's preliminary hearing testimony at trial violated Evidence Code section 1237, and, alternatively, his confrontation rights pursuant to *Crawford v. Washington* (2004) 541 U.S. 36, 53-54 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*). (AOB 181-207.) As discussed below, his claim should be rejected.

By the time the preliminary hearing took place, Peggy, who had been diagnosed with cancer, had received chemotherapy treatments and she had trouble with her memory. (2 CT 436.) At the preliminary hearing, Peggy stated that the morning after Reginald was murdered, she wrote down in a book what had happened during the attack while it was still fresh in her memory. (2 CT 439-440.)

Pursuant to Evidence Code section 1237, the prosecution requested to have Peggy read her description of the attack, directly from the book. Defense counsel objected and asserted the proffered evidence did not fall within the requirements of Evidence Code section 1237. The trial court overruled the objection finding that the prosecution had laid a proper foundation. (2 RT 441.) Thereafter, Peggy read from her book and described the attack.

At trial, at which point Peggy was not available to testify because she had passed away, both parties stipulated to the admission of Peggy's preliminary hearing testimony, and a video of her testimony was played for the jury. Defense counsel did not renew his prior objection pursuant to Evidence Code section 1237. (11 RT 2491-2496.)

A. Admissibility Pursuant to Evidence Code Section 1237

At the outset, because, at trial, defense counsel stipulated to the admission of Peggy's preliminary hearing testimony, in its entirety,

Henderson's assertion that Peggy's testimony was erroneously admitted under Evidence Code section 1237 is forfeited. Failure to object below to the admissibility of the preliminary hearing testimony of the unavailable witness forfeited any claim on appeal that the prior testimony was inadmissible. (See *People v. Blacksher* (2011) 52 Cal.4th 769, 805; *People v. Cowan* (2010) 50 Cal.4th 401, 465-466.)

In any event, Henderson's contention is meritless. As Henderson readily concedes (AOB 193, fn. 63), this Court has previously rejected this argument in *People v. Cowan, supra*, 50 Cal.4th at page 465. Statements were deemed admissible although made months after the event in question where there was sufficient basis for concluding the events were reasonably fresh in the witness' mind at the time of the subsequent statements. (*Id.*) Here, the trial judge had sufficient basis for concluding that events were reasonably fresh in Peggy's mind at the time she wrote down her recollection of what happened the previous evening. Accordingly, her statements were properly admitted pursuant to Evidence Code section 1237. This Court should reject Henderson's invitation to reconsider its decision in *Cowan* as he provides no persuasive basis for doing so. Henderson's contention regarding admissibility under Evidence Code section 1237 is meritless.

B. Henderson's Confrontation Clause Challenge Is Meritless

Alternatively, relying in large part on *Crawford*, Henderson contends the admission of Peggy's preliminary hearing testimony violated his rights to confront and cross-examine a witness pursuant to the Sixth Amendment of the federal Constitution. (AOB 193-202.)

The Sixth Amendment's Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at

trial unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross examination." (*Crawford, supra*, 541 U.S. at pp. 53-54.)

> "'[W]hen a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [citation], regardless of whether subsequent circumstances bring into question the accuracy or completeness of the earlier testimony.'"

(*People v. Harris* (2005) 37 Cal.4th 310, 333, quoting *People v. Wilson* (2005) 36 Cal.4th 309, 343.)

As evidenced by the transcript, defense counsel cross-examined Peggy at the preliminary hearing. (See 2 CT 447-464.) Therefore, Henderson's assertion that Peggy was not previously subject to cross-examination (AOB 198), is contradicted by the record below. Henderson has failed to establish that the trial court abused its discretion in allowing Peggy's preliminary hearing testimony to be introduced at trial.

Should this Court determine that Peggy's preliminary hearing testimony was erroneously admitted at trial, respondent submits that, under the circumstances of this case, especially in light of Henderson's admissions to Detective Wolford and to a fellow resident at the Weingart Center, Gregory Clayton, any error was harmless under any standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837; *Chapman, supra*, 386 U.S. at p. 22.) Accordingly, Henderson is not entitled to relief.

VIII. THERE WAS NO CONFRONTATION CLAUSE VIOLATION BASED ON A PATHOLOGIST TESTIFYING TO CAUSE OF DEATH WHO HAD NOT PERFORMED THE AUTOPSY ON REGINALD

Henderson next claims his Sixth Amendment Confrontation Clause rights were violated when a different pathologist than the one who performed the autopsy on Reginald described the findings in the autopsy

report before giving his expert opinions regarding the cause of death. (AOB 207-229.) Even assuming error, Henderson cannot be heard to complain on appeal because any error was invited. In any event, Henderson's confrontation rights were not violated based on the testimony of a pathologist who did not perform the actual autopsy on Reginald. Finally, Henderson's contention he was prejudiced because thorough cross-examination of the pathologist who performed the autopsy could have "collapsed" the prosecution's theory of a crime-induced heart attack (AOB 226-229) is untenable.

A. Henderson Invited Any Error in Permitting Another Pathologist to Rely on the Report of the Pathologist Who Performed the Autopsy

During a chambers conference at trial, defense counsel noted that Dr. Garber, who performed the autopsy on Reginald, was not going to testify. Defense counsel did not object to Dr. Cohen testifying in place of Dr. Garber and instead inquired of the trial court whether the contents of Dr. Garber's "autopsy protocol" (the autopsy report) would be admitted as a business record. Defense counsel noted that Dr. Garber had opined in his report that the knife wound inflicted on Reginald's neck was not fatal and that Reginald died of a heart attack, and defense counsel wanted that information admitted into evidence even though Dr. Garber was not going to testify. The prosecutor proffered that Dr. Cohen's opinion would be consistent with Dr. Garber's conclusions. (XI RT 2597-2598.)

Henderson notes his trial was conducted in 2001, prior to the Supreme Court's decision in 2004 in *Crawford*, and therefore he has not waived or forfeited his Sixth Amendment claim based on his failure to object. (AOB 213, citing *People v. Saffold* (2005) 127 Cal.App.4th 979, 984 ["Any objection would have been unavailing under pre-*Crawford* law"]; *People v.*

Johnson (2004) 121 Cal.App.4th 1409, 1411, fn. 2 ["the failure to object was excusable, since governing law at the time of the hearing afforded scant grounds for objection"].) Even assuming arguendo Henderson's assertion of a violation of his confrontation rights is not foreclosed on appeal due to his failure to object, it is the subject of invited error. As noted, upon learning the People would not be calling Dr. Garber to testify, the defense's concern was with ensuring that Dr. Garber's opinions regarding the neck wound and cause of death would come before the jury regardless of whether he testified. (XI RT 2597-2598.) Under these circumstances, Henderson's current challenge to Dr. Cohen having described Dr. Garber's findings during his testimony should be rejected as invited error. (*People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 49 ["'[i]f defense counsel intentionally caused the trial court to err,'" acting for tactical reasons and not out of mistake, the claim is barred on appeal as invited error], citing *People v. Catlin* (2001) 26 Cal.4th 81, 150; *People v. Wader* (1993) 5 Cal.4th 610, 657-658; *People v. Hardy* (1992) 2 Cal.4th 86, 152.) Here, defense counsel did not merely acquiesce, but affirmatively joined in the presentation of Dr. Cohen's testimony. Consequently, Henderson cannot now claim Dr. Cohen's testimony was improperly admitted.

B. The Testimony of Dr. Cohen Did Not Violate Henderson's Sixth Amendment Right to Confrontation

In *Crawford, supra*, 541 U.S. 36, the United States Supreme Court held that the Sixth Amendment's confrontation clause prohibits the admission of "testimonial" statements of a witness unless the witness is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination. (*Id.* at pp. 53-54, 59.) Although the court did not provide a comprehensive definition of "testimonial," it stated that the term

"applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Crawford, supra*, 541 U.S. at p. 68.) The *Crawford* court thus held that admission of a witness's out-of-court statement to a police officer while the witness was in custody violated the confrontation clause. (*Id.* at pp. 68-69.)

Williams v. Illinois (2012) 567 U.S. ___ [132 S.Ct. 2221, 183 L.Ed.2d 89] (*Williams*), is one of three cases decided since 2009, wherein the Supreme Court has applied *Crawford* to the admission of forensic evidence at trial. In *Williams*, the Supreme Court held that testimony by an Illinois State Police forensic biologist about a DNA match which relied in part on a DNA profile generated at another laboratory did not violate the confrontation clause. (*Williams, supra*, 132 S.Ct. at pp. 2243-2244.) In *Williams*, five justices agreed that the uncertified results of a DNA analysis, performed by nontestifying Cellmark analysts, were nontestimonial. (*Williams, supra*, 132 S.Ct. at pp. 2238-2242.) Justice Thomas concurred with this conclusion solely because the uncertified analysis lacked the requisite formality and solemnity to be considered testimonial. (*Id.* at p. 2255 (conc. opn. of Thomas, J.).) Justice Thomas reaffirmed that he would not join in any definition of "testimonial" that reaches beyond "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." (*Id.* at p. 2260.)

In *People v. Dungo* (2012) 55 Cal.4th 608, this Court analyzed those decisions in addressing a claim that introduction of statements from an autopsy report through a pathologist who did not prepare the report violated the defendant's confrontation rights. (*Id.* at pp. 616-619.) This Court has extracted two critical components from the "widely divergent" views of the United States Supreme Court justices. (*Ibid.*) This Court explained that there were two "critical components" in determining whether a statement is testimonial. First, the statement must be made with "some degree of

formality or solemnity." (*People v. Dungo*, *supra*, 55 Cal.4th at p. 619.) Second, the primary purpose of the statement must pertain in some fashion to a criminal prosecution. (*Ibid.*)

In the specific context of an autopsy report, this Court in *Dungo* found that such reports typically contain two types of statements: "(1) statements describing the pathologist's anatomical and physiological observations about the condition of the body, and (2) statements setting forth the pathologist's conclusions as to the cause of the victim's death." (*People v. Dungo*, *supra*, 55 Cal.4th at p. 619.) This Court noted that statements in the first category are less formal than those in the second category, and are comparable to observations made by an examining physician for treatment purposes; statements which the United States Supreme Court has held are not testimonial. (*Ibid.*, citing *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 312, fn. 2 [129 S.Ct. 2527, 174 L.Ed.2d 314].) This Court further noted that state law requires autopsy reports in many cases not involving criminal conduct and that the reports serve purposes other than criminal investigation and prosecution, including helping a decedent's relatives decide whether to file a wrongful death lawsuit. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 620.) "In short, criminal investigation was not the primary purpose for the autopsy report's description of [the victim's] body; it was only one of several purposes." (*Ibid.*)

Thus, this Court held that the defendant's confrontation rights were not violated when the testifying pathologist related to the jury some of the observations made by the non-testifying pathologist, which the testifying pathologist partly relied upon in forming his opinion that the victim died of prolonged strangulation. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 621.) "The autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial." (*Ibid.*)

It is now settled in California that a statement is not testimonial unless both criteria, degree of formality and primary purpose, are met. (*People v. Holmes* (2012) 212 Cal.App.4th 431 [2012 WL 6674411].) This Court has also concluded that lack of formality alone rendered a blood alcohol report nontestimonial regardless of its primary purpose. (*People v. Lopez* (2012) 55 Cal.4th 569, 582.) Accordingly, since the autopsy report in this case lacked both formality and criminal investigation as a primary purpose, the report was not testimonial. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 621.)

Most recently, the holding in *Dungo* was applied by the Court of Appeal in *People v. Westmoreland* (Feb. 5, 2013, A127394) ___ Cal.App.4th ___ [2013 WL 428642], and it concluded that autopsy reports are not testimonial. In *Westmoreland*, the testifying pathologist testified not only to the non-testifying pathologist's anatomical observations but also to his conclusion as to the cause of death. Additionally, the non-testifying pathologist's entire autopsy report was introduced into evidence. In rejecting the defendant's confrontation claim, the court concluded "autopsy reports, and the findings and conclusions therein, are generally not prepared for the primary purpose required to make them testimonial." (*Ibid.*)

In light of *Dungo*, Henderson cannot possibly prevail on his claim that Dr. Cohen's testimony violated his rights under the confrontation clause. Here, as was the case in *Dungo*, the People, without indicating unavailability of the pathologist who performed the autopsy on the victim, called a forensic pathologist to testify at trial who did not perform the autopsy. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 613.) Similarly, as in this case, the autopsy report and autopsy photos were not admitted into evidence in Dungo's trial. (*Id.* at p. 613.) The testifying pathologist in *Dungo* did not describe to the jury the opinion of the pathologist who performed the autopsy regarding a cause of death; "instead; he gave only

his own independent opinion as a forensic pathologist." (*People v. Dungo*, *supra*, 55 Cal.4th at p. 614.) Likewise, in this case, Dr. Cohen did not relay to the jury Dr. Garber's opinion as to the cause of death but rather merely described the condition of Reginald's body, both externally and internally, after having reviewed the autopsy report and photographs from the autopsy and crimes scene (XV RT 3235, 3237-3238), before giving his own opinion as to the cause of death. (XV RT 3239-3240, 3242.)

While Dr. Cohen may have relied upon Dr. Garber's anatomical observations of Reginald's body in forming his expert opinion, that reliance did not violate Sixth Amendment protections. For instance, after having reviewed the photographs, and Dr. Garber's autopsy report and Detective Wolford's police report, Dr. Cohen described what the external and internal examinations of Reginald's body revealed. As for the external condition of Reginald's body, Dr. Cohen testified that Reginald had a long scar from a previous bypass cardiac surgery that ran from his neck down to his pubic bone; a contusion on his upper chest; and an abrasion on his left shin. Dr. Cohen stated that the only significant external injury Reginald had, was the four-inch cut on his neck. (XV RT 3235-3236.) Dr. Cohen next described the findings of the internal examination of Reginald's body. Dr. Cohen described the injury to Reginald's neck as "relatively superficial," because it did not injure any major organs. (XV RT 3236.) Dr. Cohen also testified that the internal examination revealed that Reginald suffered from heart disease. Dr. Cohen stated that Reginald's heart was "markedly enlarged," and that "the arteries in the heart were significantly narrowed or occuled with atherosclerosis," *i.e.*, the arteries were hardened. (XV RT 3237.) According to Dr. Cohen, "blocked arteries and a big heart together [were] a set-up for a cardiac death, a sudden death." Dr. Cohen also testified that Reginald had four bypass grafts from a previous surgery, and that two of the grafts were "completely blocked."

(XV RT 3238.) When asked about the effect of a stressful or terrorizing situation on someone with Reginald's heart condition, Dr. Cohen, based on his own training and experience, opined that "the individual even without any stress [would be] a set-up for sudden death." (XV RT 3238.) Finally, based upon a hypothetical presented by the prosecutor, Dr. Cohen opined that Reginald died primarily from his heart disease. (XV RT 3239-3240, 3242.) However, because those statements were not testimonial, Henderson did not have a constitutional right to confront and cross-examine Dr. Garber about his observations. (See *People v. Dungo*, *supra*, 55 Cal.4th at p. 619 [observations by examining pathologist about the condition of the victim's body "are not testimonial in nature"].)

Similarly, Dr. Cohen was not a surrogate witness for Dr. Garber. Rather, based on his review of the autopsy report, the photographs, and the police report, Dr. Cohen proffered his own opinions, about which his testified. The record clearly demonstrates that Dr. Cohen gave his own opinion that Reginald's cause of death was heart disease. Dr. Cohen emphasized that Reginald's heart was so enlarged and his arteries so diseased that he was "a set-up for a sudden death," and that the physical and emotional stress of the incident was "plenty to top [Reginald] over the edge thereby leading to his death." (XV RT 3239-3240.) Dr. Cohen then reiterated that Reginald died from "a combination of natural disease plus physical and emotional stressors. (XV RT 3242.)

C. Even Assuming a Violation of the Sixth Amendment Right to Confrontation, Henderson Was Not Prejudiced

In any event, any error in admitting any of the objective findings in Dr. Garber's autopsy report through the testimony of Dr. Cohen was harmless. This is particularly true in light of the fact that, as previously

discussed, the defense did not object to Dr. Cohen testifying but instead sought to ensure that, as Dr. Garber opined in his report, the evidence showed that Reginald died of a heart attack and that the knife wound inflicted by Henderson was not fatal. That is exactly what happened in this case. Additionally, Henderson was well aware of Reginald's fragile condition. During the incident, Peggy twice pleaded with Henderson to take the gag off of Reginald because he was a "mouth breather," and she feared he would have a heart attack. (2 CT 444-445, 460.) During his interview with police, Henderson admitted that Peggy had warned him that Reginald had a heart problem (XV RT 3375), and that at one point he thought Reginald was having a heart attack (XV RT 3379), and, at trial, Henderson testified that he was aware that Reginald started to have a heart attack during the home invasion robbery. (XVIII RT 3955.) Under these circumstances, it is clear that even if Dr. Garber's opinions were found to have been improperly conveyed to the jury in contravention of Henderson's right of confrontation, there is no reasonable possibility that absent Dr. Garber's opinions, the jury would have reached a different verdict as to either guilt or penalty. The medical opinion of Dr. Cohen, without reference to any opinion as to cause of death formulated by Dr. Garber, would necessarily lead any reasonable juror to conclude that Reginald died from a heart attack as a result of the physical and emotional stress caused by Henderson's home invasion robbery which included cutting Reginald's throat.

Furthermore, having charged Henderson with felony-murder, *i.e.*, murder committed during a robbery and burglary, the prosecution was not require to prove that Henderson intended to kill Reginald, rather only that Henderson committed either robbery or burglary and that Reginald was killed during the commission of either crime. The jury was so instructed. (See 39 CT 10771-10772, 10777-10778; XIX RT 4361-4362, 4365-4366;

CALJIC Nos. 8.10 [Murder-Defined], 8.21 [First Degree Felony Murder], 8.80.1 [Special Circumstances-Introductory].) Therefore, any error based on the admission of Dr. Cohen's testimony was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 22.)

IX. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO PERMIT THE DEFENSE TO CALL AN EXPERT ON EYEWITNESS IDENTIFICATION

Henderson contends his constitutional right to present a defense was violated when the trial court refused to admit the proffered testimony of an eyewitness-identification expert. (AOB 229-268.) This claim is meritless, and even assuming arguendo error, Henderson was not prejudiced.

Pursuant to Evidence Code section 801,

> [t]he requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and be based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates.

(*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371.) The jury need not be wholly ignorant of the subject matter of the opinion to justify its admission; even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would assist the jury. (*People v. McDonald* (1984) 37 Cal.3d 351, 367, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.)

However, "expert testimony is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness." (*People v. Singleton* (2010) 182 Cal.App.4th 1, 20-21, quoting *People v. Torres* (1995) 33 Cal.App.4th 37, 45.) "When expert opinion is offered, much must be left to the trial court's discretion." (*People v. Pollack* (2004) 32 Cal.4th 1153, 1172,

quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 403; see also *People v. Bui* (2001) 86 Cal.App.4th 1187, 1196 ["[i]n determining whether to admit expert testimony, the trial court has broad discretion"].)

At trial, in support of Henderson's claim that he was not the person who entered the Bakers' mobile home, the defense proffered the testimony of Dr. Scott Fraser, an expert on eyewitness memory and identification principles, for the purpose of explaining the possible significance of Peggy's description of the intruder to police and her non-identification of Henderson from the photographic line-ups she was shown. An Evidence Code section 402 hearing was held, and Dr. Fraser was questioned, extensively, by both parties and the trial court about his knowledge of eyewitness identification and memory principles and various factors related to the reliability of a witness's identification or non-identification. (XVII RT 3652-3704.)

Afterwards, the trial court heard argument. Citing cases such as *McDonald*,[27] *Fudge*,[28] and *Kelly*,[29] defense counsel argued, at length, that Dr. Fraser's testimony would assist the jury in weighing Peggy's description of the suspect as being clean shaven, and her rejection of the photographic line-ups. (XVII RT 3706-3712.)

The prosecutor objected, and argued case law held that the testimony of an eyewitness identification expert was less likely to be instructive in cases where the prosecution's case did not rest primarily on eyewitness identification. She pointed out the People were not relying on anyone's identification of Henderson as proof of his guilt, and the defense had other avenues to attack Henderson's three confessions. To the extent Dr. Fraser

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[27] *People v. McDonald, supra*, 37 Cal.3d 351.
[28] *People v. Fudge* (1994) 7 Cal.4th 1075.
[29] *People v. Kelly* (1976) 17 Cal.3d 24.

would have testified there was some significance that Peggy did not select Henderson from the photographic line-up, the prosecutor argued the jury did not need an expert to understand the significance of that fact. She also pointed out that if Henderson's defense was that he was not even at the scene, the fact that Peggy did not pick out his photograph from the line up and did not identify him at the preliminary hearing was "potent evidence for the defense in and of itself," and an expert would not assist the jury in understanding those circumstances. Defense counsel would thus be arguing the obvious to the jury, *i.e.*, because Peggy did not identify Henderson, that was evidence that he was not there. The prosecutor proffered the jury would be focused on the credibility of Henderson's confessions, and whether or not Peggy was able to identify him did not address the credibility of his confessions. (XVII RT 3713-3716.)

Defense counsel maintained that Dr. Fraser's testimony would assist the jury in determining whether or not Peggy's description of the assailant was accurate, as well as the significance of her rejection of the photographic line-up. (XVII RT 3718.)

Having read *Fudge* and *McDonald*, the trial court found defense counsel's offer did not meet the requirements of *McDonald*. (XVII RT 3722-3723.) The trial court pointed out the People's case did not rely substantially, or at all, on eyewitness identification. Thus, the trial court found that Dr. Fraser's testimony should not be permitted and it was an "appropriate exercise of [it's] discretion to [exclude] it in this case." Citing *Johnson*,[30] the trial court also found that the admission of "Dr. Fraser's testimony would likely result in undue delay and I believe particularly confusion in the judicial process and could lead to parades of expert witnesses." (XVII RT 3724-3725.) Finally, the trial court concluded,

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[30] *People v. Johnson* (1993) 19 Cal.App.4th 778.

> It is perhaps going too strongly to say, as the People do, that the defense in this case will argue that Mrs. Baker's non-identification of the defendant is significant. That is an argument that requires no expert support. It does not require a psychologist to explain to a jury that if a witness cannot ID a suspect, perhaps the suspect is not guilty. Expert testimony purporting to explain this most obvious conclusion is superfluous and silly. As I say, those are the prosecution's words and certainly not mine. That may be stating the case too strongly. [¶] I do believe however that considering all of the law and the facts of this case, that it would be inappropriate to have Dr. Fraser testify for those reasons to the issues he has addressed today. That will be the Court's ruling.

(XVII RT 3725.)

A. The Trial Court Properly Exercised Its Discretion in Excluding the Proffered Testimony of Dr. Fraser

The trial court properly exercised its discretion in refusing to admit Dr. Fraser's testimony. Succinctly put, because the People's case was not dependent on any witness having identified Henderson, as pointed out by the trial court:

> It [did] not require a psychologist to explain to [the] jury that if a witness [could not] ID a suspect, perhaps the suspect is not guilty. Expert testimony purporting to explain this most obvious conclusion is superfluous ....

(XVII RT 3725.)

In any event, any error was harmless and no prejudice resulted. This Court has stated that "expert testimony on the psychological factors affecting eyewitness identification is often unnecessary. For this reason, the trial court's discretion regulating its use is rarely disturbed." (*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 995.) Certainly that is the case here. Based on this record, the absence of Dr. Fraser's testimony did not impede Henderson defense, and he has failed to show any prejudice resulted from

the trial court's ruling. (*Id.* at pp. 995-996.) Consequently, this claim must fail.

X. CALJIC No. 2.92 Was Not Warranted

Henderson argues the trial court committed reversible error when it refused to submit CALJIC No. 2.92 (factors to be considered in evaluating eyewitness testimony)[31] to the jury. (AOB 255-268.) This claim is meritless, and, in any event, any error was harmless.

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[31] CALJIC No. 2.92, Factors to Consider in Proving Identity by Eyewitness Testimony, states:

> Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:
>
> [The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;]
>
> [The stress, if any, to which the witness was subjected at the time of the observation;]
>
> [The witness' ability, following the observation, to provide a description of the perpetrator of the act;]
>
> [The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;]
>
> [The cross-racial [or ethnic] nature of the identification;]
>
> [The witness' capacity to make an identification;]
>
> [Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act;]

(continued...)

A. Relevant Background

During a discussion of applicable instructions, in relation to defense counsel's request for CALJIC Nos. 2.91 and 2.92, both eyewitness instructions, the prosecutor asserted the instructions should not be given because they were only to be used "where evidence of identification includes the testimony of eyewitnesses." (XIX RT 4189-4199.) The trial court agreed the instructions were not warranted because "there simply [was] no eyewitness identification testimony in this case. Nobody identified Mr. Henderson as being the perpetrator, []." (XIX RT 4190.) After further discussion, the trial court agreed to submit CALJIC No. 2.91 to the jury but not CALJIC No. 2.92. The parties and the trial court agreed that defense counsel could argue the lack of identification to the jury. (XIX RT 4191-4192.)

(...continued)

> [Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;]
>
> [The period of time between the alleged criminal act and the witness' identification;]
>
> [Whether the witness had prior contacts with the alleged perpetrator;]
>
> [The extent to which the witness is either certain or uncertain of the identification;]
>
> [Whether the witness' identification is in fact the product of [his] [her] own recollection;]
>
> [_____;] and
>
> Any other evidence relating to the witness' ability to make an identification.

B. CALJIC No. 2.92 Was Not Warranted

This Court has previously held that CALJIC No. 2.92, or a comparable instruction, should be given when requested in a case where identification is a crucial issue and there is no substantial corroborative evidence. (*People v. Wright* (1988) 45 Cal.3d 1126, 1143.) Because this was not a case in which identification was a crucial issue, CALJIC No. 2.92 was not warranted. As pointed out by the trial court, "there simply [was] no eyewitness identification testimony in this case. Nobody identified Mr. Henderson as being the perpetrator." (XIX RT 4190.) Henderson's assertion that CALJIC No 2.92 is equally applicable in a case where there is no evidence the perpetrator was identified by an eyewitness as it does when the defendant has been identified is simply unavailing. (See AOB 258-259.)

For essentially the same reasons, even assuming any error, no prejudice resulted. (*People v. Fudge*, *supra*, 7 Cal.4th at p. 1111, *People v. Wright*, *supra*, 45 Cal.3d at p. 1144.) As explained in *Fudge*, one of the factors to be considered in assessing likely prejudice is whether the issue omitted from the instructions was addressed in counsel's closing argument. "Although counsel's arguments are not a substitute for a proper jury instruction, ... detailed argument supports [a] conclusion that the error in refusing the instruction was harmless .... [Citation.]" (*People v. Fudge*, *supra*, 7 Cal.4th at p. 1111.)

In his closing argument, defense counsel emphasized the fact that Peggy was unable to identify Henderson. (XIX RT 4292-4293, 4295.) The jury did not need any further assistance in understanding the significance of this fact, and CALJIC No. 2.92 would not have provided any further assistance. On this record, it is not reasonably probable the jury would have reached a different result had it received CALJIC No. 2.92. Consequently, this claim should be rejected.

XI. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING THE GUILT PHASE ARGUMENT

Henderson contends the prosecutor committed misconduct during argument at the guilt phase and claims she "manufactured evidence," made "unnecessarily disparaging remarks" about him, and argued a theory of the crime that was inconsistent with the evidence. (AOB 268-278.) As demonstrated below, this claim is meritless and any error was harmless.

It is well established that "[i]mproper remarks by a prosecutor can '"so infect [] the trial with unfairness as to make the resulting conviction adenial of due process."' (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 40 L.Ed.2d 431]; cf. *People v. Hill* (1998) 17 Cal.4th 800, 819 [72 Cal.Rptr.2d 656, 952 P.2d 673].)" (*People v. Earp* (1999) 20 Cal.4th 826, 858, quoting *People v. Frye* (1998) 18 Cal.4th 894, 969.)

However, a prosecutor's conduct violates a defendant's constitutional rights only when the behavior comprises a pattern of conduct so egregious as to infect the trial with such unfairness as to make the conviction a denial of due process. Conduct that does not render the criminal trial itself fundamentally unfair may be prosecutorial misconduct only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. The burden of proof is on the defendant to show the existence of such misconduct. (*People v. Smithey* (1999) 20 Cal.4th 936, 960; *People v. Ochoa* (1998) 19 Cal.4th 353, 427-432; *People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1215.) Henderson has failed to meet his burden.

Indeed, none of the alleged errors were so egregious as to deny Henderson due process. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 960,

citing *People v. Samayoa*, *supra*, 15 Cal.4th at p. 841, internal quotations omitted; see also *People v. Morales* (2001) 25 Cal.4th 34, 44.) Moreover, any federal constitutional error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

A. Alleged Manufactured Evidence and Disparaging Remarks

In reference to Henderson's trial testimony wherein he claimed two individuals, identified only as "Knuck" and "Leon," where involved in the crimes against the Bakers', and that "Knuck" was responsible for the crime against Reginald (XVII RT 3792-3793, 3801-3804; XVIII RT 3923-3924, 3928-3929, 3931), the prosecutor proffered a hypothetical conversation between Henderson and Knuck to demonstrate why the jury should reject Henderson's testimony. (XIX RT 4264-4265.) The prosecutor argued for some time before defense counsel finally objected and asked to be heard in chambers. Defense counsel asserted the prosecutor's argument was "totally inappropriate" and that she had turned the case into a "melodramatic soap opera" by "making up this big ole mean Knuck." (XIX RT 4265-4266.)

The trial court disagreed and stated,

> Counsel are given wide latitude in their representation to the jury of what they believe the evidence shows. Obviously [the prosecutor] is engaging in sarcasm and hyperbole, but I don't believe it's beyond the bounds of legitimate argument.

(XIX RT 4266.) Defense counsel also complained that it was inappropriate and disparaging for the prosecutor to have referred to Henderson as a "dope" within the hypothetical. (XIX RT 4266.) The trial court replied,

> Well, in the context of the remark, it is this hypothetical conversation between this alleged person Knuck and the defendant, and again she's suggesting a hypothetical conversation that may have occurred between them. I don't think, on that ground alone I don't think it's objectionable.

(XIX RT 4266.) The trial court reiterated that "counsel has quite a bit of leeway" in final argument and it did not believe the prosecutor had crossed the line. (XIX RT 4266.)

The trial court properly overruled defense counsel's objection. A prosecutor has broad discretion to argue his view as to what the evidence shows and what inferences may be drawn there from. (*People v. Sims* (1993) 5 Cal.4th 405, 463.) Vigorous representation is not misconduct. (*People v. Valencia* (2008) 43 Cal.4th 268, 301.) Here, the challenged remarks were merely a comment on the weakness of Henderson's unlikely version of what happened.

In any event, Henderson was not prejudiced by the remarks. The challenged comments did not deny Henderson "a fair trial, divert the jury from its proper role, or invite an irrational, purely subjective response." (*People v. Visciotti* (1992) 2 Cal.4th 1, 83, citing *People v. Lewis* (1990) 50 Cal.3d 262, 284.) The jury was instructed with CALJIC Nos. 1.01 and 1.02, which stated that the instructions given to it were to be considered as a whole and that the statements of counsel were not evidence. (See XXXIX CT 10730-10731.) It is presumed "'the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.'" (*People v. Morales*, *supra*, 25 Cal.4th at p. 47, quoting *People v. Sanchez* (1995) 12 Cal.4th 1, 70; see also *People v. Seaton* (2001) 26 Cal.4th 598, 646.) Henderson has failed to establish the prosecutor used deceptive or reprehensible methods to attempt to persuade the jury or that there is a reasonable likelihood the jury construed or applied the challenged remarks in an objectionable fashion. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1019; see also *People v. Samayoa*, *supra*, 15 Cal.4th at p. 871; *People v. Sanchez*, *supra*, 12 Cal.4th at p. 69; *People v. Rowland* (1992) 4 Cal.4th 238, 279-281.)

B. Alleged Improper Theory

In relation to the alleged special circumstances, that the murder was committed during the course of a robbery or burglary, the prosecution argued Henderson

> ... bound [Reginald] in order to facilitate the commission of his robbery, in order to facilitate the commission of his burglary, and it was the fear that was caused by all of these actions, by the binding, by the gagging, by the ransacking, *by the cutting of the throat that caused Mr. Baker to die*, so was this killing committed in order to carry out the crime? Obviously.

(XIX RT 4239-4240.) A short while later, the prosecutor argued:

> We don't have to get to intent to prove the special circumstances as long as you are satisfied beyond a reasonable doubt that the defendant actually caused the death, killed this human being. Didn't have to intend to kill him although *I think the evidence is clear that Mr. Henderson intended to kill Mr. Baker*, but you don't have to find that. You only have to find that the killing was committed in the course of carrying out and for the purpose of carrying out the commission of the robbery or burglary or to facilitate the escape therefrom or to, sorry, avoid detection.

(XIX RT 4240.) The prosecutor continued,

> Why else would he pull out the telephone cords. Why else would he tie these people up, so they couldn't get to help, if it wasn't to facilitate his escape from the crime scene or to avoid detection at the crime scene. *Why else would he kill Mr. Baker other than to leave no witnesses alive*, so in the terms of the special circumstance, those are the two things you have to find.

(XIX RT 4240-4241.)

Henderson challenges the above highlighted comments on two grounds. First, he claims the evidence did not demonstrate Reginald died as a result of being bound or gagged, or from the knife wound Henderson inflicted on his neck, or that he intended to kill Reginald. (AOB 272.) Second, he claims the aforementioned error was compounded by the prosecutor's statement to the jury that they did not have to find that he

intended to kill Reginald in order to find the special circumstance to be true, if they found he was the perpetrator. (AOB 273.)

Because defense counsel did not object to any of the aforementioned comments Henderson know complains of (see XIX RT 4239-4241), this portion of Henderson's claim is forfeited. Claims of prosecutorial misconduct are ordinarily forfeited unless defendant interposes a timely objection and asserts misconduct and requests an admonition of the jury unless an admonition would not have cured the harm. (*People v. Clark*, *supra*, 52 Cal.4th at p. 960; *People v. Dykes* (2009) 46 Cal.4th 731, 774-775; *People v. Prince* (2007) 40 Cal.4th 1179, 1294.)

Nonetheless, the challenged comments were not even objectionable. At best, Henderson has taken the comments out of context. To the extent Henderson argues "the prosecutor's argument that Mr. Baker died from stress from being bound and gagged and from 'the cutting of the throat' is simply unsupported by the evidence" (see AOB 272-273), he is wrong. At trial, based on a hypothetical presented by the prosecutor, Dr. Cohen agreed that the circumstances of having one's hands and feet bound, mouth gagged, and neck sliced, pointed to serious stress and terror that would have caused Reginald to expire from a heart attack. Dr. Cohen opined that Reginald died from a combination of "natural disease plus physical and emotional stress." (XV RT 3241-3242.) This evidence supported the prosecutor's argument and did not "distort the evidence" (AOB 275). Consequently, this portion of Henderson's claim must fail.

Henderson also claims the prosecutor "used the special circumstances as a ruse to inject premeditation and deliberation into the case." (AOB 275.) Because Henderson concedes defense counsel did not object below (AOB 276), this portion of his claim should be summarily rejected. (*People v. Clark*, *supra*, 52 Cal.4th at p. 960.) Moreover, contrary to Henderson's interpretation of the challenged remarks, nothing revealed in

the comments suggest that the prosecutor was attempting to argue a theory of premeditation and deliberation.

This Court has stated,

> "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements."

(*People v. Dykes*, *supra*, 46 Cal.4th at pp. 771-772, quoting *People v. Frye*, *supra*, 18 Cal.4th at p. 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) This Court should not be "persuaded that the jury drew the damaging inference suggested by [Henderson], but even if the comment[s] [were somehow] inappropriate, [they] constituted a mere passing reference of no real import to the case." (*People v. Dykes*, *supra*, 46 Cal.4th at p. 772.)

Furthermore, any error was harmless. Based on the evidence against Henderson and Henderson's far-fetched trial testimony, it is not reasonably possible a result more favorable to Henderson would have been reached absent the challenged comments. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1019; see also *People v. Samayoa*, *supra*, 15 Cal.4th at p. 871; *People v. Sanchez*, *supra*, 12 Cal.4th at p. 69; see *People v. Rowland*, *supra*, 4 Cal.4th at pp. 279-281.) Consequently, this claim fails.

XII. THERE WAS NO CUMULATIVE ERROR DURING THE GUILT PHASE

Henderson asserts, taken together, the trial court's errors during the guilt phase "stacked the deck against" him. (AOB 278-283.) Contrary to Henderson's assertion, there are no errors to cumulate. (See *People v. Thornton* (2007) 41 Cal.4th 391, 453.)

A criminal defendant is entitled to a fair trial, but not a perfect one, even where he has been exposed to substantial penalties. (See *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]; see, *e.g.*, *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96] ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and ... the Constitution does not guarantee such a trial."].) Any claim based on cumulative error must be assessed to see if it is reasonably probable the jury would have reached a result more favorable to the defendant in their absence. (*People v. Holt* (1984) 37 Cal.3d 436, 458.) Applying this analysis to the instant case, this contention should be rejected.

Notwithstanding Henderson's arguments to the contrary, the record contains no errors and no prejudicial error has been shown. To the extent any error arguably occurred, the effect was harmless. Review of the record without the speculation and interpretation offered by Henderson shows that he received a fair and untainted trial. The Constitution requires no more.

XIII. HENDERSON WAS NOT PREJUDICED BY THE TRIAL COURT'S ORDER THAT HE BE PHYSICALLY RESTRAINED

Henderson claims the trial court violated his state and federal constitutional rights when it required him to wear a stun belt at the end of the guilt phase and during the penalty phase. (AOB 283-325.) Applying the then applicable "good cause" showing, the trial court ordered the use of the stun belt, without making a "manifest necessity" finding. Because the record does not demonstrate the jury was aware of the stun belt, or that Henderson was negatively affected by it when the verdict was read at the

guilt phase or at any point of the penalty phase, the order to wear the stun belt was harmless under any standard, and no prejudice resulted.

Penal Code section 688 provides that "[n]o person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge." As reiterated by this Court in *People v. Virgil* (2011) 51 Cal.4th 1210:

> The "court has broad power to maintain courtroom security and orderly proceedings." [Citation.] On appeal, its decisions on these matters are reviewed for abuse of discretion. [Citation.] Under California law, "a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." [Citation.] Similarly, the federal "Constitution forbids the use of visible shackles ... unless that use is 'justified by an essential state interest' — such as the interest in courtroom security — specific to the defendant on trial." [Citation.] These principles also apply to the use of an electronic "stun belt," even if the device is not visible to the jury. [Citation.] "In deciding whether restraints are justified, the trial court may 'take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial.' [Citation.] These factors include evidence establishing that a defendant poses a safety risk, a flight risk, or is likely to disrupt the proceedings or otherwise engage in nonconforming behavior." [Citation.]

(*People v. Virgil*, *supra*, 51 Cal.4th at p. 1270.)

A. Courtroom Security Concerns

Prior to the People's rebuttal argument in the guilt phase, the trial court advised counsel that Henderson was "very upset" apparently about remarks about his grandmother made by the prosecutor during argument, and he made a statement: "Well, there are [better] ways to commit suicide than by attacking a D.A." (XIX RT 4311; XX RT 4413, 4449.) Noting that during closing arguments prosecutors "argue what we have to argue,"

the prosecutor expressed concern about what Henderson's reaction might be when she "point[ed] [her] finger at him and call[ed] him a killer." Defense counsel confirmed it upset Henderson if anything was said about his family. The court acknowledged Henderson may have just been "blowing off steam," but noted "[o]n the other hand, there's the other possibility." (XIX RT 4313-4314.)

The next day, the prosecutor informed the court that after the previous day's discussion about Henderson's statement, she learned that, about a week earlier, the bailiff found a razor blade in the courtroom near the desk where Henderson sat. (XX RT 4407-4408.) Thus, after reviewing Henderson's CDC and jail records, the prosecutor was concerned for everyone and asked the court to order Henderson wear a stun belt. Finding Henderson's statement was logically indicative "of suicide by cop," the prosecutor noted that Henderson had previously attempted suicide in prison "a couple" of times, and "interestingly enough, with a razor blade." She also asserted that Henderson's classification notes from jail showed that he had said something to the effect of "I'm going to go down anyway. I am going to take a deputy with me meaning at that time a corrections deputy et cetera." (XX RT 4408-4411.) The prosecutor argued,

> I, frankly have some concerns. I know that ..., outside the presence of the jury Mr. Henderson has also expressed the thought that he, I think as he put it to the Court, I am going to jail anyway, and that's when he was telling you why he wasn't going to provide us with the information about who was Knuck. I think it's a real reasonable inference that his attitude, whether it is going to ultimately be a correct one or not is that he is going to be convicted. He has really got nothing to lose. [¶] The razor blade incident really disturbed me along with the threat, and when you think about it, what is to prevent him from making some kind of heroic gesture, and, you know, yesterday I was the object of desire. I don't know that somebody else might not be the object of desire, but I'm wondering if we all wouldn't be a lot safer if we didn't put a stun belt on him. That

way if he does jump the table, then somebody can incapacitate him before he gets to anyone of us.

(XX RT 4409-4410.)

After both parties indicated they had not been previously informed of the razor blade incident, the trial court explained what happened and recalled, at the time, it determined the evidence was insufficient to conclude Henderson was responsible for the razor blade being in the courtroom. (XX RT 4411-4412.) Defense counsel asserted a stun belt was "pretty intrusive," and after having talked to Henderson, he was "very sure" there was no risk Henderson would do anything prior to the verdict. Counsel then admitted "if the verdict [came] back bad for [Henderson], of course," there could be an issue, and he was not sure a stun belt would make a difference to Henderson if he was going to do something. (XX RT 4412-4413.)

The prosecutor argued a stun belt was less obtrusive then a leg-brace because it could not be seen if the person were to stand up and walk around the courtroom. She cited *People v. Hawkins* (1995) 10 Cal.4th 920, in support of her request, stating the case held restraints were proper "when there have been instances of the defendant's fist fights in custody while the trial is pending." Defense counsel asserted a stun belt was psychologically coercive and obtrusive. (XX RT 4414.)

After determining the razor blade issue should be discussed in Henderson's presence (XX RT 4415-4416), the court pointed out that since they were waiting for the jury to render its verdict, Henderson would not be prejudiced by a stun belt since he would not be wearing it throughout trial. However, if a stun belt were employed, Henderson would have to wear it from that point on, and during any potential penalty phase. Defense counsel argued a stun belt would affect Henderson's demeanor during the penalty phase. (XX RT 4417-4418.)

Thereafter, with Henderson present, Deputy Smith recalled the razor blade incident. One day during trial, as Smith was walking Henderson back to the holding cell, Henderson pointed out a razor blade on the floor. The blade appeared to have been broken out of a plastic shaving razor provided to inmates in jail. Henderson denied it was his. The next day, Henderson told Smith that that type of razor was not used in the Indio jail. Smith never confirmed that, and she disposed of the razor blade. (XX RT 4419-4421, 4424.)

The trial court reiterated that it had not taken further action on the razor blade incident when it occurred, because it did not conclude that Henderson was responsible. The prosecutor did not believe that the fact Henderson pointed out the blade ameliorated concern over courtroom security. (XX RT 4422.) The trial court was more concerned about Henderson's threat than the razor blade incident. (XX RT 4424.)

As for Henderson's statement, defense counsel noted it was Henderson's "first act of flare-up." The prosecutor indicated matters could escalate if there was a penalty phase. Defense counsel argued the "psychological constraint of a stun belt," would prejudice Henderson if the jury learned of it, and asked if it could wait until and if there was a penalty phase. The trial court replied no. The court agreed with the prosecutor about tensions rising as a trial got close to a verdict, and reasoned that Henderson, "the one who has the potentially most to lose of all of us presumably [would] get[] even tenser, and none of us have up to this point threatened [the prosecutor's] life." (XX RT 4424-4425.)

When defense counsel suggested Henderson had not threatened the prosecutor's life, the trial court responded that it did not think Henderson had "invit[ed] her to a birthday party." The court acknowledged Henderson's statement was open to interpretation but its "paramount concern" was courtroom security and it preferred to err on the side of

caution. Although it expressed concern about the effects of the belt on Henderson and of the jury learning about it, the court was also concerned about the prosecutor's safety. (XX RT 4425-4428.)

In a subsequent chambers conference, the court advised counsel that it wanted Henderson to understand that if it granted the People's request for a stun belt it would do so mostly because of Henderson's threat rather than the razor blade issue. However, because the information about the threat apparently came from defense investigator Nancy Kilday, the court did not want to "burn anybody" and felt it necessary to hear from Kilday. (XX RT 4431-4432.) Thereafter, Kilday informed the court,

> What I actually said was he was unhappy with the way things were, and he was kind of antsy, and then I was asked specifically what was said, so then I said specifically what was said.

(XX RT 4433-4434.)

Shortly thereafter, the prosecutor provided the court with 10 pages of Henderson's classification notes from jail. (XX RT 4435-4436.) One of the pages showed an entry made by Deputy Bishop which stated, "Deputy Garcia and I overheard Henderson tell Inmate Evans when he gets sentenced, he is going to reach out and touch someone." The prosecutor thus argued that Henderson made at least one documented threat in addition to his statement about there "being better ways to commit suicide than attacking a D.A." She also noted Henderson had "a couple of fights in jail," the most recent one having occurred on December 28, 2000, when he attacked another inmate. (XX RT 4437.)

The prosecutor also learned from Sergeant Lavin, who worked in the jail that Henderson was "pretty stressed out." Based on Henderson's "attempted suicide[s] on a couple of other occasions," and his comment that "there being worse ways to commit suicide than by attacking a D.A.," the prosecutor reasoned it was hard to know what Henderson was thinking.

Defense counsel proffered Henderson had behaved well in court, and was worried about the effect of a stun belt at that stage of the trial. (XX RT 4437-4439.)The trial court stated it had not made a decision, and was reluctant to impose any restraint "absent a showing of a real good need for it." The prosecutor asked the court to also consider the psychological effects on her and the entire courtroom staff in making its decision. (XX RT 4439-4440.)

After a recess, the matter resumed with Henderson present. Based on its responsibility for courtroom security, the trial court found it had a duty to determine whether there was a security issue in light of the razor blade incident and Henderson's statement, "about there being worse ways to commit suicide than by attacking a deputy district attorney," which whether intended to be a threat or not, was made "in a rather agitated state." The court was also concerned about two other circumstances noted by the prosecutor: (1) Henderson's physical attack on another inmate in jail-the photographs of the victim provided to the court reflected violence and Henderson's potential for violence; and (2) Henderson's comments to another inmate that the staff took inmates too lightly and that when he got sentenced he was going to "reach out and touch someone." (XX RT 4441-4442.)

After the court and prosecutor briefly discussed *People v. Garcia* (1997) 56 Cal.App.4th 1349 (XX RT 4443), the trial court stated it recognized

> the deleterious potential effect that restraints in the courtroom ha[d] regarding the jury, and, of course, that is one of the reasons [it was] considering one of the least restrictive or least observable restraint mechanisms that [it was] aware of.

(XX RT 4443-4444.) Noting that cases had held that restraints had a psychological effect on a defendant, the court "was reluctant to impose such restraints," but at that point, it was considering granting the People's

request. The court was more concerned about Henderson's statement and his "in-custody violence" than the razor blade incident, and pointed out that because they were at the verdict stage, any prejudice to Henderson was "vastly diminished." (XX RT 4444.)

Defense counsel maintained that Henderson's statement was not a threat, and asserted the prosecutor's response was unwarranted because she did not actually hear it and because of Henderson's past conduct in court. The court interrupted and said that it had "never had reason to be concerned about Mr. Henderson's behavior in court up until [it] heard that alleged threat." Defense counsel acknowledged Henderson's statement was possibly uncalled for, and suggested that if Henderson acted on the statement in front of the jury, he would jeopardize his case. Counsel asserted people were "just drawing conclusions about something" they did not hear. He maintained Henderson was not a threat to anyone, and suggested an extra deputy in the courtroom. (XX RT 4445-4446.)

The trial court considered less restrictive restraints but "given the juxtaposition of [Henderson] to the prosecution, [it was] not able to come up with something that satisfie[d] it," *i.e.*, an additional deputy; a chair that could be shackled to floor; or that Henderson wear two leg braces. The trial court found a stun belt was not oppressive if a defendant did nothing that required the belt to be activated, and noted the jury would probably not see the belt. Defense counsel reiterated his objection, but admitted if the case continued tensions could rise. (XX RT 4446-4447.) The prosecutor then pointed out that, on September 15, 2000, Henderson was found to have improperly possessed two razor blades while in custody. (XX RT 4448.)

Henderson spoke up and claimed that when he said, "there are better ways to commit suicide than jumping on a D.A.," he was just "venting" to Kilday and "wanted to express how he felt about Ms. Carter talking about [his] grandmother." The court "appreciated" Henderson's explanation but

was concerned about what would happen if the prosecution mentioned Henderson's grandmother again or said anything else Henderson did not like. (XX RT 4449.)

The trial court addressed Henderson and ruled as follows,

> [I]n the face of the request, based on a reasonable fear and concern, given all the information that has been provided to me, and weighing ... the pros and cons, I think I would be remiss, sir, if I didn't grant the request to do it, so I am going to request of the sheriff's department that hence forth ... when Mr. Henderson appears in court that he be outfitted with that belt.

(XX RT 4449-4450.) Defense counsel reiterated his objection, asserted a stun belt was cruel and unusual punishment and "drastically affect[ed] [Henderson's] right to a fair trial," including a possible penalty phase. (XX RT 4450.)

Later, after the verdict and prior to the penalty phase, defense counsel again addressed the use of the stun belt and argued,

> And now to have him sitting here with I don't know how many deputies are available are going to be around him waiting to zap him at any moment like a caged animal, I believe is going to create an atmosphere of oppression.

(XX RT 4481-4482.) Defense counsel expressed concern about the jury finding out about the stun belt. The court thought that was unlikely, and even if they did, the court did not think it would be

> prejudicial for a juror to know that the Court has taken security precautions in a case where they have already found the defendant guilty of a first-degree murder with special circumstances and a premeditated and deliberate attempted murder.

(XX RT 4483.)

Defense counsel thought the jury would perceive Henderson "as some sort of wild animal," that would kill someone at any moment. The court repeated it had not wanted to use the stun belt and stated "but given the

factors that were present before me when I made the ruling, I think it was necessary and appropriate and I haven't heard anything to change my mind." (XX RT 4483-4484.)

B. The Trial Court Did Not Abuse Its Discretion When It Ordered Henderson to Wear a Stun Belt

The trial court, in good faith, relied on the then applicable decision in *People v. Garcia*, *supra*, 56 Cal.App.4th at page 1357, which held that the use of such a belt could be justified under a "good cause" standard, when it ordered Henderson to wear a stun belt. (See XX RT 4443.) However, subsequent to the trial court's determination, this Court decided *People v. Mar* (2002) 28 Cal.4th 1201, 1215-1220, in which this Court found that use of a stun belt required the same showing of manifest necessity as any other type of restraint and rejected Garcia's application of the lesser good cause standard.

This Court has also urged great caution in approving the use of a stun belt based on the potential for accidental activation and noted that the "requiring an unwilling defendant to wear a stun belt during trial may have significant psychological consequences that may impair a defendant's capacity to concentrate on the events of the trial, interfere with the defendant's ability to assist his or her counsel, and adversely affect his or her demeanor in the presence of the jury." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1205.)

However, this Court expressly stated the above guidelines enunciated in *Mar* were provided to guide "*future* trials." Henderson's trial occurred well over one year before this Court issued the *Mar* decision. Accordingly, contrary to Henderson's assertion (see AOB 309-311), and notwithstanding the fact the record demonstrates that the trial court acknowledged the psychological effect of restraints (see XX RT 4444), the "trial court was not

required to foresee and discuss each of the concerns detailed in [*Mar*]." (*People v. Lomax*, *supra*, 49 Cal.4th at p. 562, emphasis in original, internal quotation marks omitted; see also *People v. Virgil*, *supra*, 51 Cal.4th at pp. 1269-1270; *People v. Gamache* (2010) 48 Cal.4th 347, 367, fn. 7.)

To the extent the trial court's order that Henderson wear a stun belt was based upon the former "good cause" standard of *Garcia*, as opposed to a manifest necessity, any error was harmless. (See *People v. Howard* (2010) 51 Cal.4th 15, 30 [applying harmless-error standard of *Chapman*, *supra*, 386 U.S. 18]; *People v. Mar*, *supra*, 28 Cal.4th at p. 1225 [applying the harmless error standard of *People v. Watson*, 46 Cal.2d 818].) Henderson argues at length that the erroneous use of a stun belt constitutes structural error and invites the Court to revisit its holding to the contrary in *Howard*. (AOB 311-316.) The Court should decline to do so.

As previously discussed, the trial court was very concerned about ordering the stun belt and it gave significant consideration to the following factors in deciding this matter. The court considered Henderson's threatening statement that "there were better ways to commit suicide than by taking out a D.A.," as well as his remarks to another inmate while in jail that the staff took inmates to lightly and when he was sentenced he was "going to reach out and touch someone." (XX RT 4442, 4437.) The court also considered Henderson's classification notes from jail which revealed he attacked another inmate in jail and demonstrated his potential for violence. (XX RT 4442.) These same factors demonstrated a manifest necessity justifying the use of the stun belt. As stated by the trial court when it ruled on this issue, based on all information it had been provided and considered, it would have been "remiss" if it did not grant the prosecutor's request that Henderson wear a stun belt. (XX RT 4449-4450.)

Moreover, Henderson was not prejudiced as a result of having to wear the stun belt. As pointed out by the trial court, any prejudice to Henderson

was "vastly diminished," because when this matter was raised below, the presentation of evidence had already ended and they were at the verdict stage. (XX RT 4444.) Additionally, unlike the defendant in *Mar*, Henderson expressed no discomfort with the stun belt. (See *People v. Mar*, *supra*, 28 Cal.4th at pp. 1210-1212.) There is no indication that the stun belt affected Henderson's demeanor during when verdict was read or during the penalty phase, or that it affected his decision not to testify at the penalty phase. (*People v. Howard*, *supra*, 51 Cal.4th at pp. 29-30.) Furthermore, there is no evidence in the record that the jury actually saw the stun belt. (*People v. Anderson* (2001) 25 Cal.4th 543, 596 ["we have consistently held that courtroom shackling, even if error, was harmless if there is no evidence that the jury "saw the restraints"].) As stated by the trial court, in the unlikely event the jurors saw the belt, it would hardly be

> prejudicial for a juror to know that the Court [took] security precautions in a case where they have already found the defendant guilty of a first-degree murder with special circumstances and a premeditated and deliberate attempted murder.

(XX RT 4483.)

Consequently, any error in ordering Henderson be restrained with a stun belt, was harmless under either *Watson* or *Chapman*.

XIV. THE COURT HAD NO DUTY TO APPOINT "SPECIAL COUNSEL" TO PRESENT MITIGATING EVIDENCE DURING THE PENALTY PHASE

After the guilt phase, pursuant to Henderson's insistence, the court granted his request to discharge defense counsel and proceed pro per at the penalty phase. At the penalty phase, Henderson chose not to present any mitigating evidence. Henderson now assigns error to the trial court for failing to sua sponte appoint "special counsel" to present mitigating

evidence at the penalty phase. (AOB 325-352.) This claim is without merit.

Soon after the jury returned its verdicts and prior to the penalty phase, defense counsel advised the court of Henderson's wish to dismiss defense counsel. (XX RT 4466-4467.) Henderson asserted, "This is a thought that I have contemplated for the last three and a half years, so it is not some rash or irrational thought. It is something that I prepared for, and I am ready to." The court and counsel agreed to discuss the matter the following day to give Henderson time to consider the issue. (XX RT 4472-4474.) The next day, Henderson advised the court he had changed his mind and "decided to fight this." (XX RT 4475-4476.)

Several days later, Henderson again requested to discharge defense counsel and stated from that point forward he wanted to represent himself. The court considered Henderson's request to be a *Faretta*[32] motion and explained to Henderson the request was untimely and whether to grant the request was its discretion. The court asked Henderson why he wanted to represent himself at that point. (XX RT 4502-4503.)

Henderson asserted he was "not wholly confident ... in the direction of the penalty phase defense," and a "slight conflict of interest" had arisen between himself and counsel because they did not agree on how to conduct the penalty phase. Henderson said his request was not an effort to "throw in the towel," and he believed he could represent himself "effectively." (XX RT 4503.) Upon the court's inquiry, Henderson confirmed he intended to fight the aggravating evidence but he had not yet decided what mitigating evidence he intended to present. He also confirmed he would not seek a continuance if the court granted his request. Defense counsel

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[32] *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].

clarified there had not been a breakdown in the attorney-client relationship and there was no reason defense counsel could not or should not continue to represent Henderson. The court deferred ruling on the matter. (XX RT 4504-4506.) The next day, Henderson reiterated he wanted to discharge defense counsel. (XX RT 4507-4509.)

Later, Henderson confirmed he had not changed his mind about proceeding *pro per*. When asked whether the issue was one in which he did not want any mitigating witnesses to be called or whether he wanted some witnesses called but not others, Henderson declined to respond stating, "that would negate any strategy I might have in not disclosing my strategy for counsel." (XX RT 4524-4525.)

After further discussion during which Henderson remained adamant about representing himself, the court inquired about advisory or stand-by counsel. (XX RT 4527-4528.) Defense counsel was not interested in that position. Shortly thereafter, Henderson confirmed he did not want the services of advisory counsel. (XX RT 4528-4529.) In reference to case law such as *Bigelow*,[33] the court noted it was not required to appoint advisory counsel over the objections of a defendant seeking to represent himself. (XX RT 4530.)

After reviewing and citing relevant case law, and after a lengthy exchange with Henderson regarding his ability to represent himself, advising him of his rights and warning him of the dangers of self-

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[33] *People v. Bigelow* (1984) 37 Cal.3d 731. In *Bigelow*, this Court held, in a capital case, the denial of a defendant's motion to appoint advisory counsel is reversible if the lower court abused its discretion. (*Id.* at pp. 743–746.)

representation, the court granted Henderson's request to represent himself at the penalty phase.[34] (XX RT 4530-4544.)

Henderson chose to present no witnesses on his behalf at the penalty trial. (XXI RT 4787, 4790.)

A. The Court Had No Duty to Appoint Advisory Counsel at the Penalty Phase

Henderson does not refute that he knowingly, voluntarily, and competently waived his right to counsel after being duly warned of the consequences. (See *Godinez v. Moran* (1993) 509 U.S. 389, 400-401 [113 S.Ct. 2680, 125 L.Ed.2d 321]; *Faretta*, *supra*, 422 U.S. at pp. 835-836.) Rather, he claims the judgment must be reversed and the case remanded for a new penalty trial because the court did not appoint advisory counsel to present mitigating evidence after he chose to represent himself at the penalty phase. He claims the alleged error resulted in an unreliable death verdict. Henderson's claim is meritless.

As Henderson acknowledges (see AOB 340), a defendant's choice not to present mitigating evidence while representing himself is not grounds for reversal of the penalty phase. A *pro se* defendant cannot be forced to present mitigating evidence. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1227, rev'd on other grounds, *Bloom v. Calderon* (9th Cir. 1997) 132 F.3d 1267.) As stated in *People v. Bradford* (1997) 15 Cal.4th 1229,

> [This Court has] rejected similar arguments that the Eighth Amendment interest in a reliable penalty determination overcomes the defendant's Sixth Amendment interest in self-

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[34] Thereafter, over the prosecutor's objection (XX RT 4545-4547), with the court's permission and outside the presence of the prosecution, defense counsel made on offer of proof solely for the record as to the mitigating evidence counsel would have presented at the penalty phase. (See XX RT 4548-4558 [sealed transcript], 4559.)

> representation. Although a defendant has no right to waive the statutory automatic appeal from a judgment imposing the death penalty (*People v. Massie* (1985) 40 Cal.3d 620, 624 [221 Cal.Rptr. 140, 709 P.2d 1309]), or otherwise seek the state's assistance in committing suicide, it does not follow that a defendant's right of self-representation must be circumscribed in order to thwart his or her decision not to present mitigating evidence at the penalty phase of the trial. (*People v. Stansbury* [(1993)] 4 Cal.4th 1017, 1062-1063 [17 Cal.Rptr.2d 174, 846 P.2d 756].)

(*People v. Bradford*, *supra*, 15 Cal.4th at pp. 1371-1372.)

Henderson's contrary assertions provide no reason for this Court to deviate from its prior decisions.[35] That Henderson's decision to represent himself without the assistance of advisory counsel may have failed, it does not follow that the court abused its discretion in not appointing advisory counsel to present mitigating evidence. "The Sixth Amendment teaches that we should accord the competent defendant, even in a capital case, this much control over his destiny." (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1063.)

Here,

> [Henderson's] argument would effectively preclude death penalty prosecution of self-represented capital defendants who decline to present mitigating evidence, as there is no effective means to compel a pro se defendant to make an affirmative penalty defense.

(*People v. Stansbury*, *supra*, 4 Cal.4th at p. 1064, quoting *People v. Bloom*, *supra*, 48 Cal.3d at p. 1223.) Consequently, this claim must fail.

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[35] Likewise, Henderson's reliance on decisions from other jurisdictions (see AOB 347-351), which are not binding on this Court, are in direct conflict with this Court's well established and well reasoned decisions which hold the Eighth Amendment interest in a reliable penalty determination does not overcome a defendant's Sixth Amendment interest in self-representation.

XV. HENDERSON HAS FORFEITED HIS CLAIMS OF PROSECUTORIAL MISCONDUCT DURING THE PENALTY PHASE ARGUMENT; ALTERNATIVELY, THE CLAIMS ARE MERITLESS

Henderson asserts the prosecutor engaged in several instances of misconduct during her penalty phase argument. (AOB 353-369.) Henderson has forfeited his assertions because, as he concedes (see AOB 364-365), he failed to object to the challenged remarks below. In any event, Henderson has failed to establish any error.

A. Henderson Has Forfeited His Claims of Misconduct

It is well established that generally a defendant may not complain on appeal of prosecutorial error "'unless in a timely fashion — and on the same ground — the defendant made an assignment of [error] and requested that the jury be admonished to disregard the impropriety.'" (*People v. Gray* (2005) 37 Cal.4th 168, 215, quoting *People v. Hill*, *supra*, 17 Cal.4th at p.820.) A trial court is not expected to recognize and correct all possible or arguable error on its own motion, and it is the defendant's responsibility to seek an admonition if he believes the prosecutor has "overstepped the bounds of proper comment, argument, or inquiry." (*Ibid.*, quoting *People v. Visciotti*, *supra*, 2 Cal.4th at p. 79.)

"In the absence of a timely objection, [a] claim [of prosecutorial error] is reviewable only if an admonition would not have otherwise cured the harm caused by the misconduct." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1146; *People v. Boyette* (2002) 29 Cal.4th 381, 432; *People v. Coddington* (2000) 23 Cal.4th 529, 595, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.) This requirement extends to assignments of misconduct based on the federal Constitution. (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1242, fn. 20 [failure to object on the basis of any federal constitutional provision waives claim that

misconduct violated the constitution]; see also *People v. Hart* (1999) 20 Cal.4th 546, 617, fn. 19.)

Henderson concedes defense counsel failed to object to any of the above challenged comments. (AOB 364-365.) Consequently, his assertions are waived. (*People v. Avila*, *supra*, 38 Cal.4th at p. 609; *People v. Gray*, *supra*, 37 Cal.4th at p. 215; *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1146; *People v. Boyette*, *supra*, 29 Cal.4th at p. 432; *People v. Coddington*, *supra*, 23 Cal.4th at p. 595.)

Henderson has forfeited his assertions herein due to his failure to interpose timely and specific objections below. Should this Court find Henderson's assertions are not forfeited because an objection would have been futile (see AOB 364-365), they are nevertheless without merit. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 432.)

B. There Was No Prosecutorial Misconduct

As previously discussed, "[i]mproper remarks by a prosecutor can '"so infect [] the trial with unfairness as to make the resulting conviction a denial of due process."' (*People v. Earp*, *supra*, 20 Cal.4th at p. 858.) Conduct that does not render the criminal trial itself fundamentally unfair may be prosecutorial misconduct only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. The burden of proof is on the defendant to show the existence of such misconduct. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 960; *People v. Ochoa*, *supra*, 19 Cal.4th at pp. 427-432; *People v. Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Samayoa*, *supra*, 15 Cal.4th at p. 841; *People v. Gionis*, *supra*, 9 Cal.4th at pp.1214-1215.) Henderson has failed to meet his burden.

None of the remarks identified by Henderson were so egregious they denied him due process. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 960,

citing *People v. Samayoa*, *supra*, 15 Cal.4th at p. 841, internal quotations omitted; see also *People v. Morales*, *supra*, 25 Cal.4th at p. 44.) Moreover, any federal constitutional error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

1. Improper Argument of Premeditation and Deliberation

Citing to the prosecutor's comments that the murder of Reginald was "gratuitous," "cold-blooded," and that Henderson "by his own choice committed the ultimate crime" (AOB 354-355), Henderson claims the prosecutor argued the murder was the product of premeditation and deliberation, and her interpretation of the crime "presupposed Mr. Baker was alive at the time his neck was cut and clearly described the killing as a product of premeditation and deliberation," which was not a theory supported by the evidence, pursued at trial, nor one submitted to the jury. (AOB 354-357.)

This assertion should be summarily rejected. A prosecutor has broad discretion to argue her view as to what the evidence showed and what inferences may be drawn there from. (*People v. Sims*, *supra*, 5 Cal.4th at p. 463.) Vigorous representation is not misconduct. (*People v. Valencia*, *supra*, 43 Cal.4th at p. 301.) The challenged remarks were nothing more than vigorous argument.

2. Falsely Implied Reginald Alive When Henderson Cut His Throat

Henderson next contends the prosecutor falsely implied that Reginald was still alive when he cut Reginald's throat. (AOB 357-360.) Henderson's repeated suggestions that Reginald may have already been dead when Henderson cut his throat (AOB 354-355), is illogical. As

discussed below, the evidence at trial indicates that Reginald was alive when Henderson cut his throat.

Peggy testified Henderson held his knife to Reginald's throat while the couple was still in the living room. (2 CT 442.) Clearly Reginald was still alive while in the living room, since he went into the bedroom after Henderson's demand to do so, and it may be inferred it was at that point in time when Reginald's throat was cut. Moreover, Henderson told Clayton that he slit Reginald's throat because he was yelling and making a lot of noise. (XIII RT 2926, 2930, 2968.) Obviously, a dead man cannot yell and make a lot of noise.

Even though Dr. Cohen stated it was "possible" Reginald died of a heart attack before his throat was cut (XV RT 3244; see AOB 358), he agreed one would then have to assume Reginald was lying dead on the floor and then the intruder came up afterward and slit his throat. (XV RT 3247.) Moreover, Dr. Cohen also stated the pain caused by the knife wound would have been stressful on Reginald's heart. (XV RT 3239-3240.) Based on this evidence, it is highly unlikely Henderson cut Reginald's throat after he was already dead. In any event, the evidence supports the argument that Reginald was alive at the time his throat was cut, and therefore the prosecutor's argument was properly based on reasonable inferences from the evidence. Consequently, the evidence does not support Henderson's assertions, so this portion of his claim fails.

3. Under This Court's Precedents, the Prosecutor's "Bengal Tiger" Analogy Was Not Misconduct

During argument, the prosecutor compared Henderson to a Bengal tiger. The prosecutor told a brief story to illustrate that a Bengal tiger may be peaceful in a zoo, but dangerous in its natural habitat. Likewise, argued the prosecutor, Henderson might have seemed harmless in the courtroom,

but he was dangerous out on the streets. (XIX RT 4876-4876.) Henderson (who is African-American) claims this argument was inflammatory, an improper use of character evidence as an aggravating factor, and racist. (AOB 360-364.)

As Henderson concedes (see AOB 363-364), this Court has rejected similar arguments in *People v. Duncan* (1991) 53 Cal.3d 955, and more recently in *People v. Brady* (2010) 50 Cal.4th 547. In *Duncan*, the prosecutor used the metaphor of a Bengal tiger: in captivity the tiger seems docile; but in its natural habitat the tiger is different. In *Duncan* the defendant was African-American and the victim was Caucasian. This Court concluded that the Bengal tiger argument was not misconduct. The prosecutor did not want the jury misled by Duncan's docile courtroom behavior. This Court rejected Duncan's assertion that the Bengal tiger metaphor was racist: likening a vicious murderer to a wild animal did not invoke racism. (*People v. Duncan*, *supra*, 53 Cal.3d at pp. 976-977.) In Brady, the prosecutor made a similar Bengal tiger argument at the penalty phase and this Court rejected the contention that it was a racist allusion. (*People v. Brady*, *supra*, 50 Cal.4th at p. 585.)

The reasoning of *Duncan* and *Brady* is sound: comparing a vicious murderer to a dangerous animal is permissible. Indeed, as explained below, this Court has upheld the use of epithets involving non-human entities. The Bengal tiger metaphor is used for a legitimate purpose: to explain that a defendant's behavior on the streets may be different from the behavior he exhibits in the courtroom. The tiger analogy has a non-racial purpose which does not invoke any alleged stereotypes about African-Americans.

Equally unavailing is Henderson's assertion that the Bengal tiger metaphor was inflammatory. (AOB 361.) This Court has declined to find misconduct in the use of similar epithets. (See *People v. Thomas* (1992) 2 Cal.4th 489, 537 [prosecutor called defendant a perverted murderous

cancer and a walking depraved cancer]; *People v. Sully* (1991) 53 Cal.3d 1195, 1249-1250 [prosecutor called defendant a human monster and a mutation]; see also *People v. Farnam* (2002) 28 Cal.4th 107, 167-168 [in opening statement, prosecutor called defendant monstrous and a predator].)

C. Even if Improper, the Prosecutor's Argument Does Not Warrant Reversal of Henderson's Death Sentence

Henderson claims the alleged misconduct requires reversal of his death sentence. (AOB 366-369.) He is wrong. Based on the People's aggravating evidence and the absence of mitigating evidence, it is not reasonably possible Henderson would have received a more favorable result absent the challenged comments. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1019; see also *People v. Samayoa*, *supra*, 15 Cal.4th at p. 871; *People v. Sanchez*, *supra*, 12 Cal.4th at p. 69; see *People v. Rowland*, *supra*, 4 Cal.4th at pp. 279-281.)

XVI. HENDERSON'S DEATH SENTENCE DOES NOT CONSTITUTE CRUEL AND/OR UNUSUAL PUNISHMENT

Henderson claims that the sentence of death is disproportionate to his individual culpability and thus, constitutes cruel and unusual punishment. (AOB 369-373.) This claim is meritless. Upon request, this Court reviews the facts of the case before it to determine whether a death sentence is so disproportionate to a defendant's culpability so as to violate the California Constitution's prohibition against cruel or unusual punishment. (*People v. Howard*, *supra*, 42 Cal.4th at p. 1032.) Both the federal and state Constitutions, under the "cruel and unusual punishment" provisions, preclude the imposition of punishment that is disproportionate to the crime or the criminal. (*Solem v. Helm* (1983) 463 U.S. 277 [103 S.Ct. 3001, 77 L.Ed.2d 637]; *Enmund v. Florida* (1982) 458 U.S. 782 [102 S.Ct. 3368,

73 L.Ed.2d 1140]; *People v. Young*, *supra*, 34 Cal.4th at p. 1231; *People v. Dillon* (1983) 34 Cal.3d 441, 477-482, abrogated by statute as stated in *People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1185-1186 [re whether Legislature intended to abrogate common felony-murder rule]; *In re Lynch* (1972) 8 Cal.3d 410, 424.) Under both the state and federal tests, the same three factors are considered in examining a proportionality claim: (1) the nature of the offense and the offender, plus the harshness of the punishment; (2) the punishment meted out for similar crimes in this jurisdiction; and (3) the punishment imposed for the same offense in different jurisdictions. (*Solem v. Helm*, *supra*, 463 U.S. 277 at pp. 290-292; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 477-482; *In re Lynch*, *supra*, 8 Cal.3d at pp. 425-428.)

Henderson's crimes are not disproportionate to his punishment as his victims were elderly and particularly vulnerable, and Henderson displayed an unusual level of emotional and physical brutality toward his victims. He ignored the pleas of both Reginald and his wife about his frail health, and was needlessly violent toward his unresisting elderly victims. Under these circumstances it cannot be said that Henderson's death sentence is so disproportionate to his personal culpability as to shock the conscience. (See, *e.g.*, *People v. Bennett* (2009) 45 Cal.4th 577, 629.)

XVII. THERE WAS NO CUMULATIVE ERROR

Henderson once again asserts that the cumulative effect of the claimed errors in both the guilt and penalty phases warrants reversal of the judgment and sentence. (AOB 373-377.) There are no errors to cumulate. (See *People v. Thornton*, *supra*, 41 Cal.4th at p. 453.) Accordingly, the cumulative error doctrine does not apply. (See *People v. Booker* (2011) 51 Cal.4th 141, 195; *People v. Jennings* (2010) 50 Cal.4th 616, 691; *People v. Beeler* (1995) 9 Cal.4th 953, 994 ["[i]f none of the claimed errors were

individual errors, they cannot constitute cumulative errors that somehow affected the... verdict"].)

Because no error was committed in either the guilt or penalty phase of trial or, to the extent error did occur, because Henderson has failed to demonstrate prejudice, reversal of the death verdict is not warranted. Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 591; *People v. Seaton*, *supra*, 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa*, *supra*, 19 Cal.4th at pp. 447, 458; *People v. Catlin*, *supra*, 26 Cal.4th at p. 180.) Henderson was entitled only to a fair trial, not a perfect one. (*Schneble*, *supra*, 405 U.S. at p. 324; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219; *People v. Mincey* (1992) 2 Cal.4th 408, 454.) Henderson received a fair trial, and his claim of cumulative error should be rejected.

XVIII. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE FEDERAL CONSTITUTION

Henderson presents several arguments challenging the constitutionality of California's death penalty statute. (AOB 377-392.) Henderson concedes these claims have been repeatedly rejected by this Court. Because Henderson offers no valid basis for revisiting this Court's prior holdings rejecting these claims, this Court should again reject each of the constitutional challenges presented herein.

A. The Application of Penal Code Section 190.3 Factor (a) Did Not Violate Henderson's Constitutional Rights

Henderson contends that factor (a) under section 190.3, which requires penalty phase jurors to consider the circumstances of the present

offenses leads to the arbitrary and capricious imposition of the death penalty. (AOB 378-380.) However, "[t]he 'circumstances of the crime' factor stated in section 190.3, factor (a) does not foster arbitrary and capricious penalty determinations. [Citation.]" (*People v. Bramit* (2009) 46 Cal.4th 1221, 1248; see also *People v. Virgil*, *supra*, 51 Cal.4th at p. 1288; *People v. Williams* (2008) 43 Cal.4th 584, 648.) Henderson offers no reason for this Court to reconsider its previous holdings.

B. The Application of Penal Code Section 190.3 Factor (b) Did Not Violate Henderson's Constitutional Rights

Henderson contends that factor (b) under section 190.3, which requires penalty phase jurors to consider criminal activity involving force or violence is unconstitutional because application of factor (b) does not require the jury to unanimously find beyond a reasonable doubt that the criminal activity occurred. (AOB 380-381.) This Court has consistently rejected the claim that the constitution requires jury unanimity or a particular burden of proof on aggravating factors. (*People v. Blacksher*, *supra*, 52 Cal.4th at p. 848; *People v. Lewis* (2009) 46 Cal.4th 1255, 1319; *People v. Burney* (2009) 47 Cal.4th 203, 267-268.) Henderson additionally asserts "allowing a jury that has already convicted the defendant of first degree murder to decide if the defendant has committed other criminal activity violated [his] Fifth, Sixth, Eighth, and Fourteenth Amendment rights" (AOB 381, sub-claim c.) He concedes this Court has repeatedly rejected similar arguments. (See, *e.g.*, *People v. Hawthorne* (1992) 4 Cal.4th 43,77, citing *People v. Balderas* (1985) 41 Cal.3d 144, 204-205, and *People v. Medina* (1990) 51 Cal.3d 870, 906-907.) Henderson presents no reason for this Court to reconsider its prior holdings.

C. Factor (c) of Section 190.3 Provides Adequate Guidance and Is Constitutional

Henderson contends factor (c) under section 190.3, which requires penalty phase jurors to consider prior felony convictions, is unconstitutional because application of factor (c) does not require the jury to unanimously find Henderson committed prior felonies. (AOB 381-382.) As previously discussed, this Court has consistently rejected the claim that the constitution requires jury unanimity or a particular burden of proof on aggravating factors. (*People v. Blacksher*, *supra*, 52 Cal.4th at p. 848; *People v. Lewis*, *supra*, 46 Cal.4th at p. 1319; *People v. Burney*, *supra*, 47 Cal.4th at pp. 267-268.) Henderson gives this Court no reason to reconsider its previous decisions.

D. Consideration of Evidence of Prior Crimes Does Not Violate Double Jeopardy Clause

Citing factors (b) and (c) of section 190.3, Henderson claims that permitting the jury to consider evidence of his prior crimes violated the Double Jeopardy Clause of the federal Constitution. (AOB 383.) As Henderson acknowledges, this Court has consistently previously rejected arguments that double jeopardy principles apply to the admission of evidence in aggravation presented at the penalty phase. (*People v. Hart*, *supra*, 20 Cal.4th at p. 641, see also *People v. Cain* (1995) 10 Cal.4th 1, 71-72; *People v. Johnson* (1992) 3 Cal.4th 1183, 1241; *People v. Visciotti*, *supra*, 2 Cal.4th at p. 71.) Henderson presents no persuasive reason to reconsider these holdings.

E. Consideration of Defendant's Age Constitutional

Henderson asserts that factor (i), which permits consideration of a defendant's age, is unconstitutionally vague. (AOB 838.) It is well

established a defendant's age at the time of the crime is not unconstitutionally vague. (*Tuilaepa v. California* (1994) 512 U.S. 967, 977 [114 S.Ct. 2630, 129 L.Ed.2d 750]; *People v. Sanders* (1995) 11 Cal.4th 475, 563-564; see also *People v. Box*, *supra*, 23 Cal.4th at p. 1215.) Henderson gives this Court no reason to reconsider its previous holdings.

F. CALJIC No. 8.85 Adequately and Correctly Instructs the Jury on the Penalty Phase Sentencing Factors

Henderson next raises several challenges to CALJIC No. 8.85, the pattern jury instruction setting forth penalty phase sentencing factors, and claims the instruction: (1) failed to delete inapplicable sentencing factors; (2) contained vague and ill-defined factors, particularly factors (a) and (k); (3) limited factors (d) and (g) by adjectives such as "extreme" or substantial"; and (4) failed to specify a burden of proof as to either mitigation or aggravation. (AOB 384, sub-claim g.) This Court has previously found that "CALJIC No. 8.85 is both correct and adequate." (*People v. Bramit*, *supra*, 46 Cal.4th at p. 1248, quoting *People v. Valencia*, *supra*, 43 Cal.4th at p. 309.)

A trial court is not required to delete inapplicable sentencing factors from the instruction. (*People v. Bramit*, *supra*, 46 Cal.4th at p. 1248; *People v. Watson* (2008) 43 Cal.4th 652, 701; *People v. Perry* (2006) 38 Cal.4th 302, 319.) The sentencing factors set forth in CALJIC No. 8.85 are not unconstitutionally vague and arbitrary. (*People v. Famalaro* (2011) 52 Cal.4th 1, 43; *People v. Moon* (2005) 37 Cal.4th 1, 42; *People v. Earp*, *supra*, 20 Cal.4th at p. 899.) The use of the adjectives "extreme" and "substantial" in factors (d) and (g) do not unconstitutionally limit the mitigating factors the jury may consider. (*People v. Bramit*, *supra*, 46 Cal.4th at p. 1249; *People v. Perry*, *supra*, 38 Cal.4th at p. 319; *People v. Smith* (2005) 35 Cal.4th 334, 374.) Finally, there is no constitutional

requirement that the jury be instructed regarding a burden of proof as to sentencing factors. (*People v. Virgil*, *supra*, 51 Cal.4th at pp. 1277-1278; *People v. Young*, *supra*, 34 Cal.4th at p. 1233; *People v. Earp*, *supra*, 20 Cal.4th at p. 899.) Henderson's challenges to CALJIC No. 8.85 are without merit, and he offers no justification for this Court no to reconsider its previous decisions.

G. California's Capital Punishment Statute Adequately Narrows the Class of Eligible Offenders

Henderson next contends California's death penalty statute violates the Eighth Amendment because it fails to meaningfully distinguish between those defendants subject to capital punishment and those defendants not subject to capital punishment. (AOB 385.) As this Court has observed,

> 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, nor has the statute been expanded "beyond consistency with" the Fifth and Fourteenth Amendments. [Citations.]

(*People v. Salcido* (2008) 44 Cal.4th 93, 166; see also *People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Demetrulias* (2006) 39 Cal.4th 1, 434.) Henderson gives this Court no reason to reconsider its earlier holdings.

H. There Is No Constitutionally Required Burden of Proof at the Penalty Phase

Henderson contends the failure to assign a burden of proof in California's death penalty scheme should be revisited in light of the United States Supreme Court's decision in *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]. (AOB 385-386.) However, this Court has determined on many occasions that Penal Code section 190.3 and the pattern instructions are not constitutionally defective because they fail to

require the state to prove beyond a reasonable doubt that an aggravating factor exists, and that aggravating factors outweigh mitigating factors. This Court has also consistently rejected the claim that the pattern instructions are defective because they fail to mandate juror unanimity concerning aggravating factors. (See, *e.g.*, *People v. Russell* (2010) 50 Cal.4th 1228, 1271-1272; *People v. Bramit*, *supra*, 46 Cal.4th at pp. 1249-1250; *People v. Burney*, *supra*, 47 Cal.4th at pp. 267-268.)

> "'[U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole.' [Citation]."

(*People v. Ward* (2005) 36 Cal.4th 186, 221, quoting *People v. Prieto* (2003) 30 Cal.4th 226, 263.) As this Court explained in *Prieto*, "in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.'" (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263, quoting *Tuilaepa*, *supra*, 512 U.S. at p. 972; accord *People v. Virgil*, *supra*, 51 Cal.4th at pp. 1278-1279.) Henderson offers no justification for this Court to reconsider its previous holdings.

I. The Absence of Written Findings as to Mitigating and Aggravating Factors Is Constitutional

Henderson contends that the Constitution requires the jury to make written findings as to the aggravating and mitigating factors relied on in the jury's penalty determination. (AOB 387, sub-claim j.) This Court had repeatedly held "[t]he absence of written findings reflecting the jury's consideration of the sentencing factors does not violate a defendant's constitutional rights." (*People v. Gonzales* (2011) 51 Cal.4th 894, 957; see

also *People v. Jackson* (2009) 45 Cal.4th 662, 700-701; *People v. Stanley* (2006) 39 Cal.4th 913, 965.) Henderson gives this Court no reason to reconsider its previous decisions.

J. The Instructions Are Not Unconstitutional for Failing to Inform Jury That if Circumstances in Mitigation Outweigh Those in Aggravation, It Must Impose Life Without Possibility of Parole

Henderson asserts the instructions failed to inform the jury that if it determined that the mitigating factors outweighed the aggravating factors it had to return a sentence of life without parole. (AOB 387-388.) This Court's previous decisions rejecting this claim are sound and need not be reconsidered. (*People v. McDowell* (2012) 54 Cal.4th 395, 444; *People v. Tate*, *supra*, 49 Cal.4th at p. 712; *People v. McWhorter* (2009) 47 Cal.4th 318, 379.) Henderson offers no reason for this Court to reconsider its previous holdings.

K. CALJIC No. 8.88 Is Not Impermissibly Vague for Using the Phrase "So Substantial"

Henderson claims that the phrase "so substantial" as used in CALJIC No. 8.88 (see XXI RT 4910; XL CT 11003-11004), created at unconstitutionally vague standard. (AOB 388.) This Court has repeatedly rejected this claim. (*People v. Tate*, *supra*, 49 Cal.4th at pp. 712-713; *People v. Friend* (2009) 47 Cal.4th 1, 90; *People v. Salcido*, *supra*, 44 Cal.4th at p. 117; *People v. Coffman & Marlow*, *supra*, 34 Cal.4th at p. 123.) Henderson offers no justification for this Court to reconsider its prior decisions.

L. Inter-Case Proportionality Review Is Not Constitutionally Mandated

Henderson contends that the absence of intercase proportionality review in California's death penalty law is unconstitutional. (AOB 389.) However, "[i]ntercase proportionality review is not constitutionally required." (*People v. Gonzales*, *supra*, 51 Cal.4th at p. 957; see also *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. Murtishaw* (2011) 51 Cal.4th 574, 597.) Henderson offers no reason for this Court to reconsider its previous holdings.

M. Disparate Sentence Review Is Not Required in Capital Cases

Henderson contends that a capital defendant in California is constitutionally entitled to the same sort of disparate sentence review available to non-capital defendants under California's determinate sentencing law. (AOB 389-390.) However, this Court has routinely rejected the notion that capital defendants are constitutionally entitled to disparate sentence review. (*People v. Thomas*, *supra*, 51 Cal.4th at p. 507; *People v. Bunyard* (2009) 45 Cal.4th 836, 861; *People v. Lewis & Oliver*, *supra*, 39 Cal.4th at p. 1067.) Henderson offers no basis for this Court to reconsider its prior rulings.

N. California's Death Penalty Statute Does Not Violate the International Covenant on Civil and Political Rights and Prevailing Civilized Norms

Henderson contends that the California Death Penalty Law violates the International Covenant on Civil and Political Rights. (AOB 390-391.) This Court has repeatedly rejected similar arguments and should do so again here. International law does not prohibit a sentence of death where,

as here, it was rendered in accordance with state and Federal Constitutional and statutory requirements. (*People v. Blacksher*, *supra*, 52 Cal.4th at p. 849 [rejecting claim "again"]; *People v. Gonzales* (2011) 52 Cal.4th 254, 334; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1322; accord *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Panah* (2005) 35 Cal.4th 395, 500; *People v. Ward*, *supra*, 36 Cal.4th at p. 222; *People v. Elliot* (2005) 37 Cal.4th 453, 488.) Henderson offers no justification for this Court to reconsider its earlier rulings.

O. Henderson's Punishment Is Commensurate With His Crimes

Henderson contends that the death penalty violates the Eighth Amendment's prohibition against cruel and unusual punishment. (AOB 391.) However, this Court has repeatedly held that California's death penalty statute does not constitute cruel and unusual punishment. (*People v. McWhorter*, *supra*, 47 Cal.4th at p. 379; *People v. Brasure* (2008) 42 Cal.4th 1037, 1072; *People v. Moon*, *supra*, 37 Cal.4th at p. 47.) Henderson offers no reason for this Court to reconsider its previous holdings.

P. There Are No Constitutional Errors to Cumulate

Henderson contends that the constitutional defects identified in claims (a)-(o), *ante*, cumulatively demonstrate that California's death penalty law violates the Eighth and Fourteenth Amendments. Henderson's argument fails for the simple reason that, as discussed in Argument XVIII (a)-(o), *ante*, this Court has soundly and repeatedly rejected each of Henderson's constitutional challenges to the death penalty. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 154 ["Having concluded that none of

defendant's challenges to our state's capital sentencing scheme have merit, we reject this general claim as well."].) Henderson offers no reason for this Court to reconsider its prior decisions.

CONCLUSION

Based on the above, respondent respectfully requests this Court affirm the judgment in its entirety.

Dated: March 1, 2013

Respectfully submitted,

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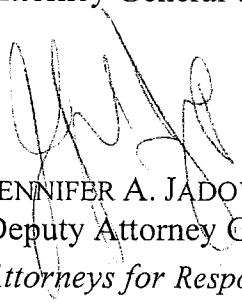
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 36, 582 words.

Dated: March 1, 2013

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Henderson*
No.: **S098318**

I declare:

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

On March 1, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 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 March 1, 2013, at San Diego, California.

STEPHEN MCGEE
Declarant


Signature