SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **DANIEL GARY LANDRY,** Defendant and Appellant.	Case No. S100735 CAPITOL CASE

San Bernardino County Superior Court, Case No. FCH02773
The Honorable Paul M. Bryant, Presiding

RESPONDENT'S BRIEF

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INTRODUCTION

A. Guilt Phase

Unprovoked, appellant, Daniel Gary Landry, murdered inmate Daniel Addis (counts one and two) in broad daylight in the exercise yard at the California Institute for Men in Chino, California, (CIM) on August 3, 1997, in front of several guards and inmates. Landry used a prisoner fabricated stabbing weapon.

On September 18, approximately six weeks following the murder, Landry slashed inmate Joseph Matthews as he was being transferred back to his own cell (count three). Less than a month later, on October 15, Landry was found to have an inmate manufactured weapon and a razor blade in his cell (count four).

The defense argued Landry was coerced by the Nazi Low Rider (NLR) prison gang to murder Addis because if he did not do so, he himself may have been murdered. Most of this evidence came in through the testimony of "expert witnesses" who were former California Department of Correction employees. Landry's experts also suggested the prison officers helped orchestrate the murder in retaliation for Addis having attacked a guard approximately a month prior to Addis' murder.

On appeal Landry makes a total of 11 guilt phase arguments. Landry makes 10 meritless arguments challenging the trial court's refusal to sever the counts, refusal to allow two questions of the jury venire, the admission of certain evidence, the excusal of a sick juror, the refusal to instruct the jury on the defense of duress, and five other instructional related issues. Respondent does not oppose Landry's argument that this Court should review certain sealed records which the trial court reviewed and refused to

release to the defense, but should this Court decide to release such records after reviewing them, the records should be released to all parties, including the prosecution.

B. Penalty Phase

The prosecution presented evidence of Landry's proclivity to attack other inmates, make prison weapons, transport such weapons in his rectum, and attack prison officials. Between July 22, 1994, and May 6, 1997, Landry committed approximately 26 such acts while in prison.

In his defense, Landry presented evidence of his horrible early childhood, being raised between birth and the age three-and-one-half by neglectful, abusive, deaf parents. From the age of three and one-half until he entered the judicial system, Landry was raised by his grandparents who sought psychological treatment and care for Landry because of his behavioral problems. Landry presented expert witnesses who opined that once Landry entered the juvenile system, with the exception of one placement, his treatment was inadequate and unsuccessful. Likewise, once Landry became an adult and was placed in prison, experts opined he did not receive adequate psychological and medical care.

The remainder of Landry's 17 arguments are meritless. Landry challenges his status as a life prisoner at the time he committed the murder, the constitutionality of Penal Code section 4500, the disparity with which the death penalty is sought in various counties in California, the cross-examination of a defense witness by the prosecution, the admission of certain evidence, the failure to instruct on defenses to his attacks on the prison officers, four other instructional issues, certain aspects of his sentencing, and the constitutionality of the death penalty. While Landry acknowledges that many of his arguments have been addressed and rejected by this Court in other cases, he does not present a substantial reason for this Court to re-examine, let alone overturn, these precedents.

STATEMENT OF THE CASE

On July 27, 1998, the District Attorney of San Bernardino County filed a four count Information charging Landry in count one with the August 3, 1997 willful, deliberate, premeditated murder (Pen. Code, § 187, subd. (a)) of Daniel John Addis,[1] in count two with assault by a life prisoner with malice aforethought (Pen. Code, § 4500), in count three with the September 18, 1997 assault by a life prisoner with malice aforethought (Pen. Code, § 4500) of Joseph Matthews, and in count four with the October 15, 1997 offense of custodial possession of a weapon (Pen. Code, § 4502, subd. (a)). (I CT 42-48.) It was further alleged regarding counts one through three that Landry personally used a deadly weapon, to wit, a knife which was not an element of the offense (Pen. Code, § 12022, subd. (b) (1)) and regarding counts one through four that Landry had been convicted of two prior strike convictions (Pen. Code, § 1170.12, subds. (a) through (d) and 667, subds. (b) through (i)).[2] (I CT 42-48.)

Following pretrial motions, a jury trial commenced on February 20, 2001. (II CT 545-546.)[3] On April 20, the jury found Landry guilty as charged, with true findings on the weapon use enhancements as well as the prior conviction allegations. (IV RT 916-924, 939-941.)

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[1] Addis was alleged to be the victim of both counts one and two which were alleged to have occurred on the same date. (I CT 43-44.)

[2] The Information alleged Landry had been convicted on July 10, 1987, and again on April 2, 1992, of violating Penal Code section 459 in Superior Court case numbers A472413 and 495013. (I CT 42-47.)

[3] On March 5, 2001, jury selection concluded with the panel being sworn. (II CT 571-572.) However, because of intervening evidentiary matters, opening statements did not occur until March 26. (II CT 571-III CT 743.)

Following pretrial motions, on May 2, 2001, the penalty phase trial began. (IV CT 953, 957.) On May 25, 2001, the jury found the appropriate penalty to be death. (IV CT 1046, 1048.) On September 11, 2001, the trial court denied Landry's automatic motion to modify his sentence (IV CT 1056-1064) and imposed a judgment of death for count two (IV CT 1065-1067). Additionally, the court imposed a sentence of 129 years to life for the remaining counts and allegations as follows: for count one, a term of 75 years to life, with a one-year consecutive term for use of a weapon; for count three, a consecutive term of 27 years to life, plus 1 year for use of a weapon; and for count four a consecutive term of 25 years to life; the sentences for counts one, three and four were stayed pending imposition of the sentence for count two, to be permanently stayed upon execution. (IV CT 1063-1064, 1071.)

STATEMENT OF FACTS

A. Prosecution's Guilt Phase Evidence

Counts One and Two

Several prison officers and inmates testified to the standard protocols concerning inmate use of the exercise yard and movement throughout the Administrative Segregation Unit of CIM. The Administrative Segregation Unit of CIM, known as Palm Hall, constitutes the maximum security unit of the prison. (V RT 1059.) Inmates who posed a security threat, who had rule violations, or who required protection were placed in the Administrative Segregation Unit and the Deep Segregation Unit within the Administrative Segregation Unit. (VI RT 1292-1294, 1469-1467.) The Administrative Segregation Unit had three floors, each floor containing a tier of inmate cells. (V RT 1074.)

The classification process determined an inmate's compatibility for purposes of their housing situation. (VI RT 1294-1295.) Classification

hearings were held when an inmate arrived at CIM, when they were placed in the Administrative Segregation Unit, and once a month for inmates in the Administrative Segregation Unit. (VI RT 1294-1295, 1300-1302; VII RT 1662-1663.)

Inmates were entitled to 10 hours a week in the exercise yard. (VII RT 1668.) Inmates highly valued the yard time privilege since it gave them additional access to showers and time outside of their cells. (VI RT 1448-1450.) An inmate's use of the exercise yard was based on their classification and whether they wanted to use the yard. (V RT 1070-1072.) Exercise yard privileges could not be taken away from an inmate without a hearing; they could not be revoked based on rumor. (VI RT 1338-1340; VII RT 1669.)

An inmate who expressed fear for their safety during a classification hearing could change their status to "tier exercise" which allowed them to exercise on the tier by themselves. (VII RT 1667-1668.) Likewise, on any given day an inmate could refuse to go out into the exercise yard. (V RT 1072, 1233; VI RT 1285.) Addis had a classification hearing on July 30, 1997, and during that time did not express any concern about his safety, housing situation or desire not to exercise his yard privilege. (VII RT 1664-1665.)

Addis had "rolled off" tier three and moved to tier one after taking cigarettes from Nazi Low Rider (NLR) gang members on tier three when he was housed with them. (V RT 1184; VII RT 1595-1596.) In prisoner vernacular, "rolling off the tier" was when an inmate requested to be moved to get away from individuals who were on the tier. (V RT 1136.) On July 15 when Officer Kaffenberger was passing meal trays, Addis told him he needed to get off of the tier, so Officer Kaffenberger escorted Addis to a holding cell where none of the other inmates could hear them talking. (VII RT 1594.) Addis informed him he had taken tobacco from the NLR

gang. (VII RT 1594.) Addis related he had been told to get off the tier because he did not fit the criteria to be on it, i.e., he was not a member of the NLR gang. (VII RT 1598-1599.) While taking cigarettes could put an inmate's safety in jeopardy, it was not uncommon for gang members to give an inmate a "pass" so long as the inmate knew he owed the gang. (V RT 1188-1190.)

For safety reasons, the tiers and exercise yards for the Administrative Segregation Unit were segregated based on gang affiliation and race. (V RT 1066-1067; VI RT 1294-1295.) There were a total of four exercise yards for the Administrative Segregation Unit with a guard tower positioned so that two guards could watch all four yards. (VRT 1065-1066.) The African-Americans, whites, and Hispanics each had their own yard, depending on their gang affiliation: in yard one were the northern California Hispanics, non-gang affiliated, and a few Blood gang members; in yard two were the whites, the NLR gang and Aryan Brotherhood (AB) gangs; in yard three were the African-American Crips; and in yard four were the southern California Mexican's and Mexican Mafia. (V RT 1067-1068.)

The protocol for moving inmates into the yard involved several stages. Prior to allowing inmates on the exercise yard, it was thoroughly inspected for weapons, metal, trash or anything that could be used as a weapon or fashioned into a weapon. (V RT 1060.) Because of the tight security protocols, it took approximately 45 minutes to an hour to move inmates from their cells out on to their respective yards. (VIII RT 1834.) Each yard was filled one at a time, each tier of inmates was let out on to their respective yard a tier at a time, and inmates were allowed into their respective exercise yard one at a time. (V RT 1073-1074, 1121-1123.) Which yard was allowed out first and in what order varied so the inmates could not predict a schedule. (V RT 1074.)

Prior to going out onto the yard, while still in their cells, inmates were required to remove their clothing and submit to a visual strip search during which they would turn around, spread their butt cheeks, squat, and cough. (V RT 1069, 1115; VIII RT 1776.) The squat and cough procedure was done because inmates smuggled contraband, including weapons, by inserting them high in their rectum; a technique known as "keistering." (V RT 1137-1138; VII RT 1549-1550.) The inmate would then put on their boxer shorts, turn around, put their hands through an open port in the cell door, and be handcuffed. (V RT 1115-1117.) Inmates were allowed to bring a T-shirt, shower shoes, and a towel from their cell and were escorted one at a time to a "sally port"[4] where their items were searched. (V RT 1069, 1115-1116, 1118.) After their bundles were checked the inmates went to a sally port where a metal detector wand was used to search their personal belongings as well as their bodies.[5] (V RT 1069-1070, 1119.) Finally, their handcuffs were removed, and they were allowed out the gate to their respective yard. (V RT 1119.) After release into the yard, the inmates were required to lineup up against the back fence until all of the inmates for that yard were in the yard. (V RT 1119-1122.)

On August 3, 1997, Sergeant Sams, who was new to Palm Hall, learned during informal conversation with staff from the prior shift that Addis may not want to go onto the yard. (VI RT 1333-1334.) Sergeant Sams was informed Addis had been moved from tier three down to tier one but did not know the details of why Addis moved. (VI RT 1323-1325.)

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[4] A "sally port" has double doors separated by a space; with the exception of an emergency, an inmate entered the space through one door which had to be closed and locked before the other door could be unlocked and opened. (VI RT 1314.)

[5] However the wand was not infallible, and metal weapons had been found in inmates' rectums when the wand failed to alert. (V RT 1070.)

Nonetheless, Sergeant Sams wanted to give Addis the opportunity to express any concerns before he was released onto the yard. (VI RT 1325, 1337-1338.)

At approximately 8:30 a.m. on August 3, tier three, where the white inmates affiliated with the NLR gang were housed, was the first to be released onto their yard – yard two. (V RT 1109-1110.) Officer Maldonado was the officer assigned to the gate which allowed the inmates out onto the yard. (VIII RT 1771-1772.) Because Addis was on tier one, he was the last inmate to be processed out to the exercise yard – yard two. (V RT 1123; VIII RT 1778-1779.)

After all of tier three was out on yard two, but before Addis was processed through security from tier one, inmate Green began yelling at Officer Maldonado about the fact Addis was not on the yard. (V RT 1079.) Inmate Green was yelling, "bring down that wood on the first tier. Tell him to come out to the wood pile[6] and do exercises with us." (V RT 1232-1233; VI RT 1270-1271; VIII RT 1806-1807.) Inmate Green was known by both inmates and prison officers as a "shot caller" for the NLR white prison gang, and as such had power and influence over members of his gang but not over the prison officers. (V RT 1133; VI RT 1268-1277; VIII RT 1782.) The shot callers typically lead group calisthenics on the prison yard, and Landry was known to do this with inmate Green for the NLR gang. (V RT 1228-1229.) Nonetheless, a shot caller could not demand an inmate to be brought onto the yard because going onto the yard was voluntarily. (VRT 1190.) In response to inmate Green's rantings, Officer Maldonado told him to let her do her job. (VIII RT 1809.)

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[6] The"wood pile" was a colloquialism for where the white inmates were housed. (VI RT 1270-1271.)

After helping get all the inmates out on to the exercise yard, Officer Ginn and his partner were ordered by Sergeant Sams to discuss with Addis whether he wanted to go on the yard. (VI RT 1323-1324; VIII RT 1778, 1786, 1788.) Officer Ginn spoke with Sergeant Sams about the fact Addis might not be accepted on the yard, and Sergeant Sams stated their hands were tied because Addis was classified as eligible to go out on the yard, unless he personally declined. (VIII RT 1778-1779.) Neither Officer Ginn, his partner, nor Sergeant Sams were aware of inmate Green's statements to Officer Maldonado about Addis being brought out to the exercise yard prior to Addis going on to the yard. (VI RT 1341-1342; VIII RT 1780-1781.) When Officer Ginn and his partner asked Addis if he wanted to go in the yard, informing him he did not have to go, Addis replied, "No. Fuck that. I want to go." (VIII RT 1779.) Therefore, Addis was brought out to the yard.

Officers Esqueda and Bisares were in the tower to watch the yards; Officer Esqueda watched yards one and two. (V RT 1068.) Sergeant Sams watched Addis go into the yard without incident and observed no suspicious conduct amongst any of the inmates. (VI RT 1343-1344.) At this point Officer Maldonado told Sergeant Sams about the statement's inmate Green made about Addis coming onto the yard, but everything in the yard appeared normal. (VI RT 1305-1307, 1341-1344, 1346.) Before going back into Palm Hall, Sergeant Sams watched Addis on the yard to make sure everything was as it should be, contacted the tower officers to make sure nothing unusual or out of the ordinary was occurring, and received confirmation everything was fine. (VI RT 1305-1307.)

When Addis went out onto the yard, he was greeted by inmate Allen, mingled with the other inmates, and participated in calisthenics. (V RT 1233; VI RT 1275, 1278; VI RT 1353-1354; VIII RT 1844-1845.) After calisthenics, Addis and inmate Rogers played handball.

(VI RT 1278.) Inmate Green and Landry were later seen squatting down in the corner with other NLR gang members. (V RT 1233-1234.) At some point inmate Green spoke to Addis, shook his hand, told him everything was okay, and told him to go play cards with some of the other inmates. (V RT 1084, 1139-1140, 1246.) Inmate Rogers went with Addis when Addis went to play cards. (VI RT 1278-1279.)

As the group was playing cards, Green and Landry approached the table, and Landry stood between Addis and inmate Rogers. (VI RT 1281-1282.) Landry engaged Addis in friendly conversation about another inmate; there were no threatening words or raised voices between the two of them.[7] (V RT 1100; VI RT 1282-1284.)

Without warning Landry hit Addis in the side of the neck, making a quick thrusting motion which caused a dull thud when connecting with Addis. (VI RT 1282, 1286.) Addis then grabbed his neck and started to bleed profusely as he backed away from the table. (V RT 1094; VI RT 1282-1283.) Using a homemade stabbing weapon, Landry had sliced through Addis' jugular vein and blood shot out of Addis' neck in an arc. (V RT 1238; VI RT 1386-1387.)

Landry's stabbing of Addis set off a rapid series of simultaneous events. When Officer Esqueda in the tower saw Landry strike Addis, he ordered everyone on the yard to get down as Addis looked up at him, bleeding. (V RT 1087, 1094-1095, 1238-1239; VI RT 1283.) When Officer Bisares heard Officer Esqueda yell for everyone to go down, he turned and saw Addis bleeding excessively from the neck and activated the yard alarm. (V RT 1094-1095, 1260-1261.) This occurred as Addis, still

[7] Inmate Allan, who was away from those playing cards, stated for the first time at trial that he thought he heard Landry and Addis having words and that Landry sounded angry, but he was too far away to hear what was being said. (V RT 1247-1248.)

bleeding profusely from his neck, fell to his knees with a perplexed look on his face as if to ask, "Why me? Why did this happen to me?" (V RT 1094, 1239; VI RT 1282-1283.)

When ordered down, all of the inmates in the yard complied except Landry and inmate Green who both began running away. (V RT 1087.) Officer Esqueda fired two wooden bullets from his gas launcher before both Landry and inmate Green went down. (V RT 1087.) When Landry went down, Officer Esqueda saw a weapon come out of Landry's hand and land approximately 2 feet away. (V RT 1087-1090.) The activation of the yard alarm put all the officers into action, and all the inmates in the other yards were ordered down as well. (V RT 1094-1095, 1260-1261.)

The officers in Palm Hall heard the yard alarm sound at approximately 11:10 a.m., alerting them that an incident had occurred in the yard. (V RT 1172-1173.) Officer Valencia ran into the yard as fast as he could and saw Addis bleeding profusely, hobbling towards the tower area before collapsing. (V RT 1173.) One of the tower guards activated the locking mechanism on the gate to the yard, and Officer Valencia was the first to reach Addis and attempt to apply pressure with a cloth to Addis' gushing wound. (V RT 1176-1177.) Addis' wound continued to pour blood despite the pressure as other officers came onto the yard, unsuccessfully trying to bring a stretcher[8] in an attempt to get Addis emergency medical attention. (V RT 1177-1178; VI RT 1311-1313.) Officer Bisares in the tower provided cover for the officers who went into the yard to help Addis; he could see blood on Landry's hands as he lie prone in the yard. (V RT 1261-1262.)

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[8] The stretcher was known as a "stokes litter" and was a wire mesh basket similar to those used to transport people by helicopter. (V RT 1177.)

Because the officers could not get the stretcher onto the yard, they had to carry Addis off the yard to the stretcher while attempting to maintain pressure to Addis' still gushing wound.

(VI RT 1312.) It was difficult to carry Addis because he was slippery with blood. (VIII RT 1848.) The officers also had difficulty getting Addis through the sally port doors and onto the stretcher. (VI RT 1314-1315.) Within a minute and a half of getting Addis off the yard, an ambulance and medical team arrived. (VI RT 1313-1314.)

Officer Maldonado was one of the officers who responded to the yard and attempted to render aid to Addis. (VIII RT 1448.) Officer Maldonado accompanied Addis in the ambulance to the hospital and attempted CPR. (VIII RT 1448-1449.) Addis was unconscious as Officer Maldonado administered CPR, and she felt his life slip away. Addis died before they reached the hospital. (VIII RT 1849-1850.)

After Addis had been removed from the yard and placed in the ambulance, Officer Valencia cleaned the blood off his hands and returned to the yard to help remove the inmates and help photograph the yard. (V RT 1179.) It took approximately a half-hour to clear all the inmates one at a time from the yard, and the inmates had to remain prone on the ground until they were removed. (V RT 1103.) Photographs of the yard showed the massive amount of blood Addis lost. (V RT 1089-1092, 1096.) The weapon was found near Landry's hand as he lay prone in the yard, and it had blood on it as did Landry's hand. The jurors viewed photographs of Landry and the weapon in the yard. (V RT 1109, 1180-1181; VII RT 1315-1317, 1321.) Officer Esqueda collected the weapon. (V RT 1103.)

While the yard was being cleared, Landry remained on the ground, giggling and laughing. (V RT 1154, 1179-1180, 1244; VIII RT 1908.) Inmate Green said to Landry, "I don't think he's going to make it, Smurf."[9] (VRT 1244) However, inmate Green also yelled to the other inmates on the yard to follow the officers' instructions and not to get involved; he did not giggle or laugh. (V RT 1181.) Landry was handcuffed, removed from the yard, and placed in a holding area.[10] (V 1103-1104.) In the holding area he had a smirk on his face and acted "cool." (VI RT 1287.) Landry was photographed while in the holding area, and he had no injuries but did have blood on his left hand as well as on his boxer shorts. (VI RT 1317-1319.) Landry was examined by the facility medical assistant and found to have dried blood on both hands but no wounds on any part of his body. (V RT 1197-1201.) Additionally, Landry's boxer shorts had blood on them, were confiscated, and admitted into evidence. (V RT 1201.)

The weapon Landry used to murder Addis, which was shown to the jury at trial, had two parts; the stabbing portion made of flat metal stock approximately five-inches long with approximately two-and-one-half inches on both sides at the end sharpened to a point; and a sheath to cover the sharp portion of the weapon which was made out of cellophane and cardboard wrapped with string (all items readily available to inmates). (VRT 1105-1108.) The weapon fit into the sheath. (V RT 1108.) The sheath was found in the shower area in yard two amongst towels and t-shirts. (V RT 1045, 1108.)

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[9] Smurf was Landry's gang moniker and how he was known by the officers. (V RT 1076, 1225-1226, 1228-1229; VI RT 1271-1273; VII RT 1596.)

[10] The holding area was known as "the barbershop" because it had windows on all sides. (VI RT 1286-1287.)

On August 17, 1997, while Landry was in the Deep Segregation Unit of Palm Hall, known as Cypress Segregation, he confessed to the murder of Addis. Officer Rounds was sweeping and mopping the floors of Cypress Segregation as part of her duties. (VIII RT 1902.) As she was working in front of Landry's cell, Landry told her he wanted to talk to a lieutenant, stating if they did not move him out of Cypress Segregation, "I'm going to go off and I mean it. I'm going to go off. I'll plug my toilet and flood the tier. I'll bang the rails." (VIII RT 1906-1907.) Officer Rounds told him such conduct would not get him what he wanted because there was an ongoing investigation into the death of Addis. (VIII RT 1906.) Landry interrupted Officer Rounds and told her, "I killed him, so I confess I killed him. The investigation is over." (VIII RT 1906-1907.) Officer Rounds reported Landry's comment to her supervisor and it was documented. (VIII RT 1907.)

An autopsy on Addis[11] established he died from a massive loss of blood, i.e., exsanguination, as a result of hemorrhaging caused by the severance of two major veins – the jugular and subclavian veins – which are very close to each other in the neck area. (VI RT 1386-1389.) A great deal of force was required to inflict the fatal wound; it cut through skin and muscle as well as partially penetrated Addis' lung. (VI RT 1387-1388.) The weapon found by Landry's hand was consistent with having inflicted the fatal wound. (VI RT 1377-1378.) Besides the massive amounts of blood at the crime scene and on the officers who attempted to help Addis, two liters of blood were in Addis' chest cavity. (VI RT 1389.) Addis' injuries caused death within minutes of having been inflicted, and the only

[11] Addis was approximately 26 years old, 6 feet tall, and 180 pounds at the time of death. (VI RT 1372.)

way he could possibly have survived was if the wounds had been inflicted in an emergency room with the proper personnel and medical equipment on hand. (VI RT 1390-1391.)

Two letters (one dated September 9, 1997, and the other September 22, 1997) which Landry had written to other inmate gang members of the NLR gang at Corcoran were reviewed by prison gang expert, Glenn Willett. (VII RT 1734-1741.) Willert opined in the letters Landry, using his Smurf moniker, used phraseology common to the NLR gang and referenced having had to work hard to commit a murder – a "187."[12] (VII RT 1735-1736.) Willet opined both letters specifically referenced the murder of Addis by Landry. (VII RT 1753-1754.)

Count Three

On September 18, 1997, Officers Lourenco and Perez as well as Medical Technical Assistance (MTA) Jeffery Killian were working in Cypress Segregation. (VI RT 1469, 1508-1509; VII RT 1533-1534.) The Cypress Segregation unit was where inmates who committed rule violations in Palm Hall were housed, and it was separated from the rest of Palm Hall by a locked door. (VI RT 1469-1471.) Landry and inmate Joseph Matthews were both housed in the Cypress Segregation unit. (VI RT 1471-1472; VII RT 1607.) Officers Lourenco and Perez were escorting inmates to the showers, and MTA Killian was dispensing medication to inmates. (VI RT 1469, 1508-1510; VII RT 1534.)

[12] Penal Code section 187 is the statute for murder.

When dispensing medications, MTA Killian would notify the officers which inmates needed medication, and the officers would unlock and open the porthole[13] in the inmates' doors. (VI RT 1498-1499, 1510.) However, on September 18, MTA Killian did not know who opened the portholes in the inmates' doors nor who closed them after medications were dispensed. (VI RT 1509-1510.) MTA Killian recalled dispensing medication to Landry through his porthole and then briefly talking with him. (VI RT 1509-1510.)

At approximately 5:30 p.m. Officer Lourenco was escorting inmate Matthews from the showers back to his cell along with Officer Pérez. (VI RT 1471-1472; VII RT 1534.) MTA Killian recalled inmate Matthews being escorted by the officers around the time he was talking with Landry. (VII RT 1510-1511.) Inmate Matthews had his hands cuffed behind his back, and Officer Lourenco was holding inmate Matthews with one hand on Matthews' right upper biceps while Officer Pérez walked in front of inmate Matthews to open the locked gate to the section where Matthews was housed. (VI RT 1473-1474; VII RT 1534-1536.)

As Matthews was being escorted past Landry's cell, Landry yelled out, "Joe, want a cigarette?" (VI RT 1474-1475, 1511; VII RT 1534.) At this point, Matthews broke away from Officer Lourenco and ran towards Landry's cell, turning his back to Landry's cell door and putting his handcuffed hands towards the porthole opening in Landry's cell door. (VI RT 1474-1475, 1479, 1487-1494, 1511-1512.)

Inmate Matthews stepped away from Landry's cell and said "I'm cut." (VI RT 1475; VII RT 1534-1535.) Officers Lourenco and Perez as well as MTA Killian saw inmate Matthews' back was bleeding and cut open.

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[13] The porthole opening was how medication, food and other items were passed into the cell. (VI RT 1479.)

(VI RT 1475, 1512-1513; VII RT 1537.) Blood was running down inmate Matthews' back and turning his boxer shorts pink. (VII RT 1512-1513.) Matthews had a deep gash approximately 7 to 8-inches long and three quarters of an inch wide. (VI RT 1475, 1480, 1513-1514; VII RT 1535.) MTA Killian placed gauze pads on the gash until an ambulance arrived and took inmate Matthews to the hospital. (VI RT 1514; VII RT 1541-1542.) It took 14 stitches to close inmate Matthews' wound, and the jury viewed Matthews' scar from the wound. (VII RT 1610.) The jury also viewed photographs of inmate Matthews' wound at the time it was inflicted. (VI RT 1513-1514.)

Within seconds after inmate Matthews walked away from Landry's cell door, officers Lourenco and Pérez heard the sound of the toilet flushing in Landry's cell. (VI RT 1476; VII RT 1537.) Landry's cell was searched but nothing was found that could have inflicted inmate Matthews' wound. It was impossible to retrieve items flushed down the toilet. (VI RT 1478.) Neither of the officers nor MTA Killian saw Landry reach through the porthole. (VI RT 1494-1495, 1512.) However, MTA Killian opined inmate Matthews' wound was inflicted with a razor. (VI RT 1515.) Inmates were allowed razors during specified periods of time but were required to return them after use, were not permitted to keep them, and at the time of the slashing Landry should not have had one. (VII RT 1543-1544.) Officer Pérez did acknowledge that despite precautions and tight security, razors and other sharp instruments were smuggled into and around the prison. (VII RT 1544-1553.)

Inmate Matthews' was on psychotropic medication at the time Landry slashed him. (VI RT 1497; VII RT 1611.) At trial he was on lithium which affected his attention, but he recalled someone offering him a cigarette while he was in deep segregation, and after reaching into the cell for it, he felt something dripping down his back but did not recall feeling the

infliction of the wound. (VII RT 1608-1609.) Inmate Matthews did not have a cigarette in his hand when he walked away from Landry's cell with the slash wound, and Officer Pérez opined Landry's offer of a cigarette was a subterfuge to lure Matthews to Landry's cell. (VII RT 1540-1541.) Inmate Matthews was known to be on medication and "do crazy things," so he was an easy target. (VII RT 1555.) While inmate Matthews at trial did not recall seeing a weapon or Landry dispose of it, less than three weeks after being slashed inmate Matthews told an investigator he recalled Landry pulling out "Mr. Razor blade on a toothbrush" which Landry then disposed of in the "trash" – a euphemism for the toilet. (VII RT 1612, 1758-1759.)

Count Four

On October 15, 1997, Officers Lopez and Flores were assigned to the Cyprus Segregation unit. (VII RT 1563-1564, 1584.) In the morning they were conducting tier exercise for the inmates. (VII RT 1565, 1584.) Tier exercise was time when inmates were allowed to walk around on the tier for approximately an hour to an hour and a half rather than being allowed in the exercise yard. (VII RT 1565, 1668.)

At 11:00 a.m. Officers Lopez and Flores went to Landry's cell to prepare him for release for his time on the tier. (VII RT 1564, 1584.) Landry was and had been the sole occupant of the cell since his assignment to Cyprus Segregation. (VII RT 1568.) The standard protocols were followed, i.e., a visual unclothed search was conducted and his hands were cuffed behind his back through the porthole, before Landry's cell door was opened. (VII RT 1565-1566.) Landry's cell door, like all of the other cell doors, was mounted on a track so that it slid open sideways.
(VII RT 1566.)

As Officer Lopez slid open Landry's cell door, Officer Flores saw something fall in front of her which caused her to jerk back.
(VII RT 1585.) Both Officers Lopez and Flores heard a metallic object hit

the floor, and when they looked down saw a sharp metal object on the floor. (VII RT 1566, 1585.) After the object was discovered, Officer Flores saw Landry smile and shrug his shoulders. (VII RT 1586.) It had fallen from a part of the door's track to which Landry had access. (VII RT 1586.) Officer Lopez covered the object with his foot, ordered Landry to back out of the doorway, and had Officer Flores escort and secure him in the showers. (VII RT 1567, 1586-1587.)

Officer Lopez retrieved the object, which was a one-inch long piece of metal, shaped like a dagger. (VII RT 1567, 1571-1572, 1585.) It was sharpened at both ends, could cause bodily damage and was known as a "spearhead." (VII RT 1571-1572, 1577.) Such objects were made by inmates taking a piece of metal and sharpening it by scraping it on the floor. (VII RT 1572.)

After Landry was secured in the showers, Officers Lopez and Flores searched Landry's cell and found a razor blade on the back edge of Landry's toilet. (VII RT 1567-1569, 1587-1588.) The razor blade was consistent with the disposable razors provided by CIM for inmates to shave. (VII 1572-1573.) Officer Lopez described how inmates removed the blades from the razor and replaced them with readily available aluminum foil to authentically replicate the look of a disposable razor when collected by prison staff after their use. (VII RT 1573-1575.) Both the spearhead and razor blade were taken from Landry and introduced at trial. (VII RT 1570-1571.)

B. Guilt Phase Defense

On August 3, 1997, Officer Maldonado was responsible for releasing inmates into their appropriate yards, so she was the last officer to have contact with the inmates before they went out onto their respective exercise yards. (VIII RT 1803-1804.) Officer Maldonado claimed she told Sergeant Sams she had a gut feeling Addis was going to be hurt or possibly

killed because after inmate Green made a commotion about Addis being brought to the yard and "wanting him out so bad, they sure didn't give him any love."[14] (VIII RT 1816-1818.) Officer Maldonado claimed Sergeant Sams response was simply to state that they had a lot of work to do and basically ignored her expression of concern.[15] (VIII RT 1817.)

Additionally, Officer Maldonado stated that even though she thought it odd that Addis was not greeted by inmate Green, this was not out of the ordinary and the yard ran normally until the stabbing. (VIII RT 1836-1837.) Besides inmate Green's behavior before Addis was released onto the yard, none of the other inmates gave her cause for concern there was any danger to Addis once he was on the yard. (VIII RT 1839.) Officer Maldonado also conceded that most of the time her instincts and "gut feelings" about something bad happening were wrong. (VIII RT 1839-1840.)

While Officer Maldonado acknowledged talking with a psychologist in May 1999, she asserted that statements attributed as her quotes – that she told her supervisor Addis would be killed if let out of his cell, that everyone knew Addis would be killed, that although she had tried to stop the killing by telling her Sergeant, he ignored her – were statements taken out of context. (VIII RT 1856-1869.) The psychologist testified that when Officer Maldonado was interviewed, statements in quotation marks in the report were verbatim statements by Officer Maldonado. (IX RT 2126-2127.)

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[14] They did not hug him or greet him warmly when he went on to the yard as they did with other inmates. (VIII RT 1817.)

[15] However, Sergeant Sams testified during the prosecution's case that Officer Maldonado never stated these concerns to him. (VI RT 1309.)

Additionally, two experts testified on Landry's behalf. William Rigg had worked for the Department of Corrections for 17 years as a correctional officer and had worked at CIM from 1982 through 1986, and during that time he had worked in Palm Hall. (VIII RT 1911-1912.) Additionally, Anthony Casas testified on Landry's behalf. Casas had worked with the California Department of Corrections for 23 years as a parole agent and in a special unit involved in investigating the Mexican Mafia and prison gangs.[16] (VIII RT 1992-1998.)

Rigg left the Department of Corrections for medical reasons and brought a lawsuit against the Department of Corrections for wrongful termination which he lost when the state court granted a summary judgment dismissing it. (VIII RT 1913-1914, 1960.) Rigg had also brought federal lawsuits against officers at California State Prison, Corcoran, which resulted in juries acquitting the officers. (VIII RT 1960.) These lawsuits stemmed from claims of a purported cover-up regarding the shooting by a guard of an inmate. (VIII RT 1914.)

In Rigg's opinion, the entire matter with Addis had been mishandled from the time inmate Green had yelled at Officer Maldonado through the way inmate Green's disciplinary hearing (CDC 115 administrative violation hearing) was handled. (VIII RT 1921-1929, 1933-1938, 1970-1971, 1974-1977.) Both Rigg and Casas opined Landry was pressured to assault Addis

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[16] By the time of trial, Casas had not worked for the Department of Corrections for 14 years. His livelihood since 1987 had been exclusively based on testifying for the defense (including in several capital cases), and he had several memberships in professional organizations against the death penalty. (VIII RT 2017-2018.) Furthermore, Casas never worked as a correctional officer and only worked in administration at a correctional institution. (VIII RT 2019-2020.)

by the NLR gang, and Landry's failure to follow through would have resulted in his demise or punishment by the gang. (VIII RT 1838-1842, 2001-2009.)

Rigg opined, based on inmate Green's behavior, that Addis should never have been let out onto the yard, that inmate Green should have been removed from the yard, and that inmate Green's behavior should have resulted in the entire exercise yard being shut down. (VIII RT 1925-1928.) Additionally, Rigg opined the way an inmate was greeted on the yard was significant and the fact Addis was not greeted, the fact he was engaged by a shot caller (inmate Green) and told to play cards should have triggered the officers watching the yard to have known Addis was being set up and should have resulted in an administrative review. (VIII RT 1933-1936.) Rigg believed Officer Maldonado should have gone up the chain of command after she reported inmate Green's behavior but Sergeant Sams did nothing about it. (VIII RT 1954-1956.) Furthermore, rather than Officer Esqueda using a gas launcher, Rigg opined Landry should have been shot. (VIII RT 1937-1938.) However, he later acknowledged his ignorance of the fact the "shoot to kill" policy had been abrogated at the time of Addis' murder. (VIII RT 1961, 1965-1966.)

Both Rigg and Casas testified to their understanding how prison gangs recruited members to commit illegal acts at the behest of the shot caller and opined Landry could have been pressured to commit the assault on Addis, believing if he did not commit the assault he himself would have been killed. (VIII RT 1938-1942, 2001-2004.) Based on Casas's review of the information in the instant case, he believed inmate Green was the shot caller for the NLR gang[17] who ordered Addis' death because Addis stole

[17] However, Casas conceded that when he worked for the Department of Corrections the NLR gang was not a recognized group in the (continued...)

cigarettes from the NLR gang. (VIII RT 2007-2009.) Casas testified that prison gangs maintain discipline by using threats and that when orders came from the gang to perform a criminal act – i.e., assault, rape, murder, etc. – an inmate would be killed or disciplined for not carrying out the order. (VIII RT 2004-2005.) Casas opined that a person who carried out an order such as an assault would be expected to act with no emotion or "quiet, subtle pride, or just plain quiet. Ignore it totally." (VIII RT 2006.)

However, Casas also stated an inmate who committed a criminal act on behalf of the gang would likely brag about it in a letter to inmates at other institutions. (VIII RT 2007.) Furthermore, inmate gang members who committed an act of violence enhanced their status in the gang, and Casas agreed a murder committed by a gang member would definitely enhance the inmate's reputation. (VIII RT 2022.) Also, reputations of gang members followed them from institution to institution, and gang members tried to get transferred from one institution to another because some institutions, such as CIM, were considered neutral territory for gang members. (VIII RT 2022-2024.)

Rigg opined that had Landry sought help from staff, he would not have received it. (VIII RT 1945-1946.) Similarly, Casas opined the situation of allowing Addis out onto the yard was "screwed up" based upon inmate Green's conduct, and the officers had the authority to keep Addis off the yard if they believed, as Officer Maldonado purportedly stated she had believed, that Addis' life was in danger. (VIII RT 2009-2010.)

(...continued)
prison system and he had no experience with them; nonetheless, he opined they were like a "Junior Arian [sic] Brotherhood."

Rigg set forth his theory that the guards in the instant case were in on the assault, stating officers manipulated inmates who were weak by placing them on tiers with gang members. (VIII RT 1942-1945.) However, Rigg conceded there were no facts that established beyond a reasonable doubt that there was a conspiracy to murder Addis as well as the fact there was no evidence that the guards had set up Addis to be murdered. (VIII RT 1966-1967.)

Regarding count three, Rigg opined the Administrative Segregation Unit was not following proper protocols because inmate Matthews should have been escorted by one officer holding him by his handcuffs and the other with his baton ready in the event Matthews attempted to break away from him. (VIII RT 1946-1947.) Furthermore, Landry's porthole should not have been open while Matthews was being escorted. (VIII RT 1947-1948.)

Regarding count four, Casas opined there were a number of reasons why inmates would make and keep weapons, which included the fact they were "actually beautiful works of art . . . [they were not] something that's just thrown together, . . . these things [take] a lot of artistry, . . . if you want to call it that, to do." (VIII RT 2012.) However, he also conceded inmates made weapons to attack people and defend themselves. (VIII RT 2012.) Casas opined approximately 70% of inmates either possessed weapons or had ready access to them. (VIII RT 2012-2015.)

C. Penalty Phase

Between 1994 and 1997, Landry committed numerous acts of violence and was caught with weapons on numerous occasions, resulting in administrative disciplinary action in accordance with the CDC 115 administrative hearing process. The jury heard of eight instances in which Landry slashed or beat other inmates (X RT 2543-2549; XI RT 2582-2589, 2751-2755; XII RT 2775-2778, 2784-2789; XI RT 2670-2675; XII

RT 2793-2798, 2807-2817), two attempts to attack other inmates with inmate manufactured weapons (XI RT 2556-2562, 2565-2564), two violent confrontations with guards (X RT 2469-2475, 2442-2456), eight instances when Landry was caught with weapons in his cell (X RT 2476-2483; XI RT 2592-2597, 2597-2600, 2676-2681, 2695-2699, 2731-2733, 2757-2758; XII RT 2772-2773, 2879-2881), five instances when he was caught with inmate manufactured weapons in his rectum (X RT 2485-2492, 2496-2501; XI RT 2522-2532, 2533-2541, 2623-2626; XII RT 2771-2772), and one instance of being caught with a weapon in his cell during trial (XII RT 2879-2881). In fact, many of the prison officers who testified had vivid recollections of Landry because of his many disciplinary problems; he was an inmate with whom they had to contend on a regular basis. (XI RT 2555-2556, 2579-2580, 2611, 2630, 2684, 2695, 2714, 2747-2748; XII 2775, 2871.)

1994 Acts of Violence and Incidents with Weapons at Calipatria State Prison

On July 22, Officer Townsel, a correctional officer, conducted a routine search of Landry's cell and found a weapon and weapon stock. (X RT 2476-2479.) In Landry's cell next to the toilet was a milk carton partially filled with a colored liquid. (X RT 2477-2478.) Upon examination of the carton, it appeared too heavy and inside the carton he found an inmate manufactured weapon. (X RT 2477-2478.) The weapon measured approximately four and one-half inches long and consisted of part of a prison issued plastic cup fashioned into a handle with a sharpened piece of the metal attached to it. (X RT 2480-2481.) Additionally, under the mattress on the top bunk Officer Townsel found a piece of metal stock with which a weapon could be fashioned; inmates are not allowed to have metal stock. (X RT 2477-2479.) Metal stock is sharpened by scraping it against the cement floor to create a point. (X RT 2479.) At a CDC 115

hearing[18] Landry admitted possessing the weapon and the weapon stock, asserting they were his and not his cell mate's. (X RT 2479-2482.)

On August 5, Landry and inmate Goldsberry attacked inmate Cross on the exercise yard. (XI RT 2544-2549.) At approximately 1:40 p.m. Landry and inmate Goldsberry approached inmate Cross, and Landry stabbed and sliced inmate Cross' face. (XI RT 2545-2546.) Inmate Goldsberry hit Cross with his closed fist. (XI RT 2547-2548.) As soon as the tower gunner saw the attack, he ordered everyone on the yard to get down, and everyone complied, including Landry and Goldsberry. (XI RT 2546, 2549.) After the attack, Cross' face bled and he had blood on his shirt, suffering three to four lacerations on the right side of his face where Landry had been hitting him. (XI RT 2546-2548.) The lacerations appeared to have been made with a sharp instrument. (XI RT 2547.) Following the attack, Landry pled guilty to charges that resulted in Landry being sentenced to 25 years to life. (XI RT 2551.)

On August 23, at approximately 10:25 a.m. Landry attacked another inmate but was foiled before he could inflict an injury. (XI 2556-2562, 2564, 2575, 2615-2619, 2714-2719.) Sargent Spock was escorting inmate Hemphill, whose hands were cuffed behind his back, to his cell in Palm Hall. (XI RT 2556.) Suddenly, Landry and his cell mate, Lowery, came running naked from the shower area armed with inmate manufactured weapons. (XI RT 2557-2560, 2619.) While Lowry went after Sargent Spock and took a swing at him, Landry went after inmate Hemphill. (XI RT 2560-2561, 2614-2615.) Officer Fisher, who was conducting

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[18] Inmates with serious disciplinary problems were subject to the CDC 115 administrative hearing process, and if guilt was admitted or they were found guilty, the inmate was subject to loss of credits, movement to the Administrative Segregation Unit or other disciplinary measures. (XI RT 2631-2634.)

routine cell searches at the time, saw inmate Hemphill running across the day room with Landry approximately 10 to 15 feet behind him with a weapon. (XI RT 2514-2516.) Officer Fisher placed himself between inmate Hemphill and Landry, ordering Landry to get down on the floor. (XI RT 2616.) Officer Juan Diaz, who was working in the "bubble,"[19] saw Landry running naked after an inmate and heard Officer Fisher yelling for him to get down. Officer Diaz grabbed his weapon and racked it. (XI RT 2716-2719.) The sound of racking a weapon was loud and could be heard throughout the Administrative Segregation area. (XI RT 2725-2727.) Immediately after the rifle was racked, Landry put his weapon down, slid it across the floor, laid down on the floor, and Officer Fisher handcuffed him. (XI RT 2616.) Landry's weapon was approximately five-inches long; a three-and-a-half inch handle made from a plastic cup with a one-and-a-half inch blade sharpened out of metal stock. (XI RT 2617-2618.)

The next day, August 30, Landry was found with an inmate manufactured weapon inside his rectum. (XI RT 2496-2501, 2533-2541, 2620-2623.) On August 29, both Landry and inmate Lowery were on walk alone yard status, which meant they were only allowed on the exercise yard by themselves, with Lowery in the yard adjacent to Landry's yard. (XI RT 2534-2535.) Landry and Lowery conversed with each other through the fence, took turns standing next to the fence and then walking away from it. (XI RT 2535.) It became apparent to the tower officer Landry and Lowery were distracting him, so he called for assistance. (XI RT 2537-2538.) Landry and Lowery's furtive movements gave the tower officer reason to believe they had removed part of the fence even

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[19] The control center in the Administrative Segregation Unit, known as "the bubble," had a 360 degree view of the entire unit with windows on all sides and was manned by an officer armed with a rifle to watch over the entire unit. (XI RT 2714-2715, 2719, 2722- 2725.)

though he did not see them do it. (XI RT 2538-2539, 2621.) As a result, the chain-link fence near the gate was inspected by another officer and a piece of it was found missing. (XI RT 2621-2622.) Lowery was searched and found clean. (XI RT 2622.) The next day, August 30, Landry was taken to the infirmary on "potty watch,"[20] and upon arrival he volunteered that he had a weapon in his rectum. (X RT 2498-2499.) Landry defecated into a plastic bag. (X RT 2498-2500.) Landry's stool contained a five-inch long piece of wire stock from the chain-link fence which had been sharpened at the tip and wrapped in a piece of sheet. (X RT 2500-2501.)

On September 11, a routine search of Landry and inmate Lowery's cell in Palm Hall resulted in officers finding an inmate manufactured weapon. (XI RT 2731.) After running a metal detector over the lower bunk mattress, which was assigned to Landry, officers found a broken piece of a handcuff and a fabricated weapon. (XI 2731-2733, 2736-2737.) The weapon was made out of a clear plexiglass, almost three-inches long and one-inch wide which was sharpened to a point. (XI RT 2733.) As a result of this finding, a CDC 115 hearing was held at which Landry pled guilty, lost 360 days of credit and assessed 75 points.[21] (XI RT 2738-2739.)

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[20] Inmates suspected of having contraband in their bodies were moved to the infirmary and given the option of voluntarily removing the contraband from their rectums or having a doctor check inside them. (X RT 2497, 2499.)

[21] Inmates were assessed points for security purposes, and the amount of points accumulated by a defendant determined his level of security at prison. (XI RT 2633-2634.) Once an inmate attained 60 points, they were placed in level four security which was the Administrative Segregation Unit. (XI RT 2633-2634.) One source of points was from CDC 115 hearings, and if an inmate received points as a result of a CDC 115 assessment while in the Administrative Segregation Unit for certain offenses, they were moved to an institution with a Secure Housing Unit (SHU) when the space was available. (XI RT 2634.) When Landry went

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On September 22, Landry attacked the associate chief deputy warden. (X RT 2470-2474.) Landry was scheduled for a routine classification hearing and was escorted to the hearing room with his hands cuffed behind his back. (X RT 2470-2472.) When the officer escorting Landry opened the door to the hearing room, Landry broke free from his grip and dove across the table headfirst at the associate chief deputy warden seated at the table. (X RT 2473.) Landry slid most of the way across the table as everyone at the table got up and backed away, and Landry would have made contact with the associate chief deputy warden if she had not moved out of the way. (X RT 2473-2474.) Landry was placed in leg restraints and removed from the room. (X RT 2474-2475.)

On October 21, Landry refused to give up his food tray when the officer came around to collect it, and Landry fought with the officers who eventually entered his cell to retrieve it. (X RT 2443-2446; XI RT 2641-2642.) Food trays could readily be made into weapons, so it was important to retrieve them. (X RT 2448-2449; XI RT 2635.) Landry barricaded his cell with his mattress. (XI RT 2636-2637.) Prior to officers entering Landry's cell, Landry was given several opportunities to peaceably relinquish his tray but refused. (X RT 2447.) As a last resort an extraction team consisting of several officers entered Landry's cell to retrieve the food tray. (X RT 2444-2446.) Before entering Landry's cell, he was shot with a taser gun but it had no effect on him. (X RT 2453-2456; XI RT 2639-2941.) When the door to Landry's cell was opened, he jumped onto the middle of the bed, and then struggled with and kicked the officers who attempted to put handcuffs and leg restraints on him. (X RT 2446-2447,

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into the Administrative Segregation Unit at Calipatria he had 75 points but accumulated approximately 400 points by the time he was moved to a SHU. (XI RT 2738-2739.)

2452-2454; XI RT 2641-2642.) It took four officers, two sergeants and a lieutenant to remove Landry from his cell. (XI RT 2642.)

On November 27, officers conducting a routine search of Landry's cell found him in possession of a weapon. (XI RT 2696-2699.) The metal weapon was approximately two and one-half inches long, three quarters of an inch wide and had been sharpened to a point. (XI RT 2697-2699.) Landry hid the weapon on the side of his metal bedframe next to the wall of his cell by applying soap or shampoo to the weapon which held it in place after it dried. (XI RT 2698-2699.)

1995 Acts of Violence and Incidents with Weapons

On February 12, Landry stabbed and slashed inmate Singson in the face in the exercise yard at Calipatria. (IX RT 2582-2589.) Prior to the attack, Landry walked unsuspectingly around the exercise yard, and no interchange occurred between Landry and Singson. (XI RT 2583-2584.) As Singson sat up against the fence, Landry suddenly approached him and took approximately eight or nine stabs and swings at Singson's upper body. (XI RT 2584-2586.) The officer in the tower ordered everyone on the yard down, but Landry did not comply until after the officer fired a rubber bullet. (XI RT 2585-2586.) Landry then yelled, "let's see if you can find this one" and tossed the weapon over a brick wall and into the general population exercise yard. (XI RT 2586.) The tower officer immediately called over into the general population exercise yard and it was also ordered down. (XI RT 2587-2588, 2685-2688.) The weapon was retrieved, a rolled piece of metal sharpened to point. (XI RT 2588, 2689-2690.) Inmate Stinson suffered approximately four wounds to the head and face. (XI RT 2589.)

On March 3, Officer Din was doing rounds in Palm Hall at Calipatria at approximately 11:40 p.m. when he came upon Landry and Lowery's cell and found them fighting. (XI RT 2751-2753.) Approaching their cell,

Officer Din heard a commotion and saw Landry and Lowery wrestling and hitting each other on the bottom bunk of the bunk beds. (XI RT 2752.) Despite Officer Din's order to stop fighting, they continued to do so but eventually stopped. (XI 2753.) Both Landry and Lowery were examined for injuries, and while Landry only had some bruising and swelling on his hands, Lowery had two lacerations to his head and scalp area which required stitches. (XI RT 2753-2755.) Lowery's injuries appeared to have been inflicted with a slashing weapon but none was found in the cell, and Officer Din's reports indicated Landry told him he had flushed the weapon down the toilet. (XI RT 2754.) Following a CDC 115 hearing, Landry was found guilty of having committed a slashing assault and lost 360 days of credit. (XI RT 2755.) While Officer Din stated fights between cell mates were not uncommon, Landry and Lowery were friends and continued to be friends following the fray. (XI RT 2755.)

On March 23, Landry was found to have an inmate manufactured weapon in his rectum. (XI RT 2623-2626.) Landry had set off a metal detector when he came off the exercise yard at Calipatria. (XI RT 2623-2624, 2626.) An x-ray confirmed Landry had contraband in his rectum. (XI RT 2624.) Landry was placed on contraband watch, during which he had a bowel movement in which was found an inmate manufactured weapon – a four-and-a-half inch long piece of a state-issued comb that had been sharpened to a point. (XI RT 2624-2625.) Additionally, Landry had a three and one-quarter inch piece of a state issued cup in his rectum, and both objects in his rectum were wrapped in toilet paper and cellophane. (XI RT 2625-2626.)

On April 10, Landry was again found with an inmate manufactured weapon stored in his rectum. (XI RT 2528-2531.) On that date, Landry had been transported from Calipatria to court along with inmate Lowery. (XI RT 2523-2524.) Wearing manacles which held their hands to their

waist as well as leg irons, they were placed in a holding tank that had a metal folding chair. (XI RT 2524-2525.) Every ten to fifteen minutes the transportation officer would check on Landry and Lowery in the holding tank, and during one of these checks the officer observed Lowery had freed one of his hands from the waist chain and also noticed the metal folding chair had been broken and pieces of it were missing. (XI RT 2526-2527.) Upon returning to Calipatria, both Landry and Lowery were x-rayed, and the x-ray revealed Landry had a piece of metal in his rectal cavity. (XI RT 2528.) Landry volunteered to relinquish the objects and did so by squatting and pushing them out of his rectum. (XI RT 2528.) Wrapped in plastic wrap, paper and tied with string officers recovered a metal rod approximately four-inches long which had been sharpened to a point as well as additional plastic wrap. (XI RT 2529-2531.)

On May 31 Landry was found in possession of an inmate manufactured weapon in his cell and also found to have one in his rectum. (X RT 2487-2490.) At approximately 12:50 a.m., Officer Din saw Landry's cell mate, inmate Moore, kneeling down at the back of their cell, scraping an unknown object against the concrete floor. (XI RT 2756-2757.) Officer Din surreptitiously notified his sergeant, and Landry and inmate Moore were removed from their cell so it could be searched. (XI RT 2757.) In Landry's mattress the officers found a flat piece of metal stock approximately four-inches long that had been sharpened to a point. (XI RT 2758.) Additionally, the metal seat of the desk in the cell had been tampered with and pieces of it removed; a blanket had been placed over the seat to conceal it. (XI RT 2758-2761.) At a CDC 115 hearing, Landry admitted culpability stating the weapon was his. (XI RT 2762.)

On the same date at approximately 3:15 a.m., Landry was escorted by Officer Jones to the infirmary on contraband watch because it was believed he had a weapon in his rectum. (X RT 2485-2487, 2492.) While

Officer Jones was with Landry observing him, Landry asked "do you want it?" (X RT 2488.) When Officer Jones responded in the affirmative, Landry had a bowel movement which contained an inmate made weapon wrapped in toilet paper and string. (X RT 2488-2491.) The weapon was approximately four and one-half inches in total length with a one and one-half inch blade fashioned out of nail clippers. (X RT 2490.) Officer Romasantana relieved Officer Jones at approximately 1:15 p.m. (X RT 2502-2503.) Landry requested a glass of water, and when Officer Romasantana returned with it he found a three-inch long piece of metal wrapped in white paper between Landry's cell and the cell where inmate Moore was being housed. (X RT 2504.) When asked about the object, Landry stated he had kicked it out of his cell because he did not want it in his cell. (X RT 2505.)

On June 24, Landry and inmate Moore were found fighting inside their cell. (XII RT 2775-2776.) Officer Lopez was the floor officer of Palm Hall, and at approximately 4:40 p.m. he heard a loud banging coming from Landry and inmate Moore's cell. (XII RT 2775-2776.) Officer Lopez found Landry on top of inmate Moore, striking him with clenched fists in the upper torso and face. (XII RT 2776.) Officer Lopez ordered them to stop and they did. (XII RT 2776.) Both Landry and Moore were removed from their cell, restrained with handcuffs and examined by an MTA. While Landry had some mild swelling to his hands, Moore had to be transported to the infirmary to treat lacerations on his hands. (XII RT 2776.) At a CDC 115 hearing, Landry admitted guilt to having a cell fight and was put on confined to quarters status (CTQ) which prohibited him from participating in activities or being out of his cell, and he lost 90 days of credit. (XII RT 2777-2778.)

On July 14, while inmate McGarvey was being escorted out to the exercise yard Landry and inmate Day attempted to attack him. (XI RT 2565-2568.) Landry and Day were in the Palm Hall showers, and they forced open the locked shower door to charge inmate McGarvey who was being escorted by Sergeant Spock. (XI RT 2565- 2568, 2573, 2719-2721, 2576.) Officer Diaz was in the bubble and saw them escape from the shower area. (XI RT 2719-2720.) Officer Diaz yelled at them to get down and at this point Sergeant Spock saw Landry and Day charging at him. (XI RT 2565-2567, 2719-2721.) Landry was armed with an inmate manufactured stabbing weapon in each hand. (XI RT 2568, 2721.) After Officer Diaz yelled for them to get down, he chambered a round into his rifle, and as soon as the sound resonated through the building, Landry and Day went to the ground. (XI RT 2569-2571, 2725-2727.) One of the weapons Landry had was a state issued razor fixed to a small handle and the other was a piece of metal sharpened to a point. (XI RT 2568.)

On July 21, Landry was on walk alone status in the Palm Hall yard but, nonetheless, slashed inmate Bongiorno who was also on walk alone status in the area next to Landry. (XII RT 2784-2787.) Landry was in the Palm Hall yard and inmate Bongiorno was in the "dog run" – the area between the two exercise yards. (XII RT 2784-2785.) No words were exchanged between Landry or Bongiorno while they were outside. (XII RT 2786-2787.) As Bongiorno was walking up and down the dog run, the tower gunner officer saw Landry – out of the blue – reach through the cuffing port of the door and slash Bongiorno's left arm. (XII RT 2784, 2787.) Bongiorno's arm began bleeding, and Landry ran towards the toilets, despite the tower gunner's order for him to get down, and flushed an object down the toilet. (XII RT 2785.) Bongiorno suffered a six- to eight-inch laceration on his arm. (XII RT 2786-2787.) As a result of the attack on Bongiorno, a CDC 115 hearing was conducted resulting in Landry being

found guilty, and he was assessed a loss of 360 days of credit, received a 24 month SHU (Secured Housing Unit) term and lost 10 days of yard privileges. (XII RT 2788.)

Sergeant Bentley at Calipatria worked in Palm Hall and knew Landry because of his numerous weapons violations, fights, slashings, and other misconduct. (XI RT 2729.) Landry was known as a troublemaker with numerous CDC 115 reports filed against him. (XI RT 2729- 2730.) Calipatria did not have a SHU (Secured Housing Unit), and Landry spent two and one- half years in the Administrative Segregation Unit because of the multiple disciplinary violations he accrued. (XI RT 2730-2731.) Calipatria had a policy that an inmate could not be sent to another institution with a SHU until all of the inmate's disciplinary actions had been resolved, so the officers simply stopped filing disciplinary actions against Landry so they could send him to Corcoran which had a SHU. (XI RT 2730-2731.)

The parties entered into a stipulation that on December 13 Landry was transferred to Corcoran State prison and found to have multiple inmate manufacture weapons in his rectum. (XII RT 2771-2773.) Upon arrival at Corcoran a scan with a metal detector indicated he had metal in his rectum. (XII RT 2771.) After the metal detector alerted, Landry stated, "I give up. I have weapons." (XII RT 2771.) Landry then produced from his rectum four objects wrapped in plastic including two plastic stabbing weapons, one slashing weapon, 13 pencil leads, and one bundle of string. (XII RT 2771-2772.) Landry pled guilty at a CDC 115 hearing and was assessed 360 days lost credit. (XII RT 2772.)

1996 Acts of Violence and Incidents with Weapons

On March 11, while being temporarily housed at RJ Donovan Correctional Center for purposes of court appearances, Landry stabbed inmate Miller while they were in the Administrative Segregation exercise

yard. (XI RT 2670 -2672.) At approximately 3:20 p.m. the tower gunner on the exercise yard saw Landry running towards the toilets and then noticed inmate Miller staggering with blood running down his back. (XI 2671-2672.) The tower gunner ordered everyone down, and everyone but Landry complied. (XI RT 2673.) Rather, Landry ran to the toilets, flushed an object which he dropped into it, and then went down to the ground. (XI RT 2673-2674.) Inmate Miller suffered two puncture wounds – one to the left side of his head and one to the left side of his neck. (XI RT 2674.)

On March 21, while still housed at RJ Donovan, Landry was found in possession of inmate manufactured weapons in his cell. (XI RT 2676-2678.) Additionally, the metal surface of the desk in Landry's single inmate cell was found to be scored with the outline of a five-inch pointed weapon which was in the process of being cut from the top of the desk. (XI RT 2679-2680.) The fabricated weapon was found hidden inside Landry's mattress, attached to the inside service of the mattress with caulk taken from around the windows in the cell, and consisted of a piece of metal which had been folded to form sharp pointed corners. (XI RT 2677-2679.) The score marks and grooves in the top of the desk forming the outline of the weapon were consistent with having been carved using the weapon found in the mattress. (XI RT 2679-2680.)

On August 6, Landry and inmate Myers attacked inmate Labat at Centinela State prison while they were all in the exercise yard of the Administrative Segregation Unit. (XII RT 2793-2796.) At approximately 11:15 a.m. the officer in charge of the yard saw Landry and inmate Myers stabbing and slashing inmate Labat in the upper body. (XII RT 2794, 2801-2804.) The officer ordered the yard down, and they complied. (XII RT 2794.) Underneath Landry, officers found an inmate manufactured weapon consisting of a plastic handle with a sharpened piece of metal from

the chain-link fence attached to it. (XII RT 2794-2795, 2797.) Officers found a second inmate made weapon on the ground between Myers and Labat which also consisted of a plastic handle with a piece of sharpened metal attached to it.[22] (XII RT 2794-2796.) Inmate Labat suffered lacerations to his upper arms, right elbow, triceps and forearm; they were consistent with having been made by the weapon found underneath Landry. (XII RT 2796.) Landry had a minor abrasion on one of his fingers and a minor bruise on his elbow. (XII RT 2797.) At the CDC 115 hearing generated as a result of this incident, Landry pled guilty and stated both of the weapons were his, asserting Myers did not use a weapon but, rather, his fists. (XII RT 2798.)

On October 27, Landry attacked and slashed inmate Sanson on the exercise yard at Corcoran and then disposed of his weapon down the toilet. (XII RT 2808- 2810, 2812-2815.) At approximately 11:30 a.m., the tower gunner in the control booth overlooking the exercise yard for the SHU notified the inmates yard time was over. (XII RT 2808-2809.) As the inmates were coming in off the yard, the officer noticed inmate Sanson was bleeding from his head and backing away from Landry. (XII RT 2809-2810.) At this point, the officer ordered the yard down, and everyone but Landry complied. (XI RT 2810.) When Landry did not go down, the officer made several more demands and chambered a bullet into his rifle, making a loud noise. (XII RT 2810.) Landry still did not go down but, instead, proceeded towards the toilet area and flushed an object before getting down on the ground; Landry was the only inmate the officer ever pulled a lethal weapon on and almost had to shoot. (XII RT 2810-2812.) Later, the officer watched a videotape of the yard which depicted Landry

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[22] On the yard, officers found a piece of plastic wrap, rolled into a cylindrical shape with fecal matter on it. (XII RT 2797.)

standing in front of Sanson, who was squatting on the ground against the wall, as Landry slashed him. (XII RT 2813-2815.) Sanson suffered injuries to his head and chest requiring 19 sutures and requiring Sanson to wear a bandage around his head for a long period of time. (XII RT 2812 - 2813.)

1997 Incidents of Unlawful Weapons Possession

On April 16, Landry's cell in the SHU at Corcoran was searched, and in it was found two pieces of plexiglass sharpened to a point as well as a piece of a plastic cup which had been sharpened to a point. (XI RT 2591-2195.) All three items were found in Landry's mattress. (XI RT 2494-2495, 2599-2601, 2603-2604.)

It was stipulated that on April 19, 1997, a search was conducted of Landry's cell at Corcoran, and he was found in possession of a partially sharpened piece of metal stock. (XII RT 2772-2773.) The metal stock was in the shape of a half-moon and was between pages of legal paperwork with Landry's CDC number on it found adjacent to Landry's bunk bed. (XII RT 2772-2773.) At the CDC 115 hearing Landry was found guilty and assessed 120 days of credit forfeiture. (XII RT 2773.)

On May 6, Landry's cell was searched and in it was found an inmate manufactured weapon. (XI RT 2599-2600.) The weapon was found in Landry's mattress and was made from a part of a plastic cup approximately four-inches long and one-inch wide which was sharpened to a point. (XI RT 2599.) It was also wrapped in toilet paper, plastic wrap and string, which was the way weapons were prepared for insertion into the rectum. (XI RT 2599.)

April 2001 Unlawful Possession of a Weapon.

On April 28 while Landry was housed at the West Valley detention center in San Bernardino County, a search of Landry's cell resulted in the finding of a razor blade. (XII RT 2878-2879.) Landry was housed in the Administrative Segregation Unit in a single person cell, and he was supplied with an electric razor for purposes of shaving. (XII RT 2779-2780.) Landry was not given or permitted to have a razor blade. (XII RT 2780-2781.) When confiscated, the razor blade was sharp and could have been used as a weapon. (XII RT 2883.)

D. Defense Penalty Phase Evidence

Landry's aunts, father and grandparents testified on his behalf regarding his upbringing. Landry admitted into evidence his juvenile case history. Additionally, five experts testified on behalf of Landry: a caseworker, two psychologists, a psychiatrist and a former employee from the Department of Corrections. These witnesses gave Landry's case history and assessment as a juvenile, a current psychological clinical evaluation of Landry, a psychiatric evaluation of Landry based upon his medical records of the Department of Corrections, and a psychological evaluation based on interviews with Landry and a review of his records. They opined Landry failed to receive adequate mental health treatment, despite the best efforts of his grandparents who adopted him, and after he entered the penal system as a juvenile and then an adult.

Family Life

Landry's mother was born deaf and had behavioral problems as a child. (XII RT 2886-2888.) Landry's mother liked being the center of attention and acted destructively to get attention. (XII RT 2939-2940.) When Landry's mother was a child she would scream loudly like an animal, was believed to have started fires in and around their home and

went after a pregnant neighbor with a knife. (XII RT 2886-2892, 2938-2940.) Following the incident with the knife and the neighbor, she was removed from the home and stayed in various foster care homes until age 19 when she married Landry's father. (XII RT 2915-2916, 2937, 2940-2941.)

Landry's father, Gary Landry ("Gary"), married Landry's mother when he was approximately 20 years old. (XII RT 2988-2989.) Landry's father was also deaf. (XII RT 2989, 2998-2999.) Landry was born approximately a year following their marriage. (XII RT 2894.) Landry's mother had a difficult birth and stayed with her family while they took care of Landry for several weeks until she was able to take Landry home. (XII RT 2941, 2966-2967.)

By all accounts, Landry's mother was not a good housekeeper or mother. (XII RT2895-2900, 2944-2947, 2991-2992.) Landry's father was a good provider who worked all day, worked around the house when he got home, and then spent time with his friends. (XII RT 2897, 2919, 2992-2993.) When Gary saw Landry was not cared for by his wife, he would bring him to his in-laws home. (XII RT 2919, 2992.) As a baby, Landry would be left unattended for lengthy periods of time, his diapers were not changed regularly, and his mother did not display affection towards him. (XII RT 2898-2900, 2942-2945.) Landry's aunt recalled Landry's father and mother having heated fights when Landry was a baby. (XII RT 2902-2903.)

Early in their troubled marriage, Landry's father found his wife in bed with a woman and learned of her lesbian lifestyle, eventually leaving to start a new life in Las Vegas when Landry was approximately 5 years old. (XII RT 2989-2991, 2994-2996.) While Landry's family heard rumors

about Landry's father torturing animals, he adamantly denied doing so. (XII RT 2928-2930, 2948 2949, 2996-3003.) By all accounts, Landry's father did not drink alcohol or use drugs. (XII RT 2919, 3004.)

Landry's grandparents from both sides of the family and his aunts involved themselves in Landry's life from an early age when they saw the lack of attention Landry's mother gave him. (XII RT 2930-2931, 2968.) They would go over to Landry's house on a regular basis to visit and help care for Landry. (XII RT 2930-2931.) Landry's aunt saw drawings on the walls in Landry's bedroom done by Landry's mother depicting women having sex. (XII RT 2947-2948, 2984.) When Landry was approximately one and one-half years old Landry's Aunt Peggy (his mother's sister) and her husband moved in with Landry's mother and father to help care for Landry. (XII RT 2920-2921.)

While Peggy and her husband lived with Landry's family, Landry's mother's family decided to take Landry out of the environment because he was not receiving care from his parents. (XII RT 2906-2908, 2920-2921.) Landry then went to live with his maternal grandparents, Clarence and Esther Renfro, when he was approximately three and one-half years old. (XII RT 2907-2908, 2949; XIII RT 3345, 3366, 3368.) After Landry went to live with his grandparents, Landry's father's friend, Jerry, and his wife moved in with Landry's parents for a period of time. (XII RT 2993.)

Landry stayed with his grandparents for approximately eight months to a year, but Landry's mother brought legal action to obtain custody of Landry and won. (XII RT 2952; XIII RT 3345, 3366.) Four months after obtaining legal custody of Landry, she abandoned him to her in-laws and her parents. (XII RT 2953-2955; VIII RT 3366-3368.) Landry ended up back with the Renfro's permanently when he was approximately 5 years old. (XII RT 2922, 2999-3000; XIII RT 3368, 3390.)

When Landry went to the Renfros, he shared a bedroom with his Aunt Cindy, Landry's mother's younger sister, who was approximately 15 years older than him. (XII RT 2949, 2965.) Cindy moved out of the family home when she was 19 years old. (XII RT 2966.) The Renfro family was close and everyone visited the house at various times to help out and show Landry love. (XII RT 2971-2972.) After Landry's Aunt Cindy moved out of the house, she remained an active part of his life and helped tutor him while he was in junior high. (XII RT 2924-2925, 2973.) At age nine, Cindy coached Landry's baseball team because he needed to be pushed and coaxed to perform. (XII RT 2958-2959.)

When Landry first came to live with the Renfros, he was very sensitive to sound and did not verbally communicate other than by grunting. (XII RT 2950-2951; XIII RT 3349-3350.) By the time he was five to six years old, he would talk but still would point and grunt. (XII RT 2977-2978.) When Landry was with his grandparents, he was well behaved but would act out when his mother would come over and visit or when she would take him out in public. (XII RT 2906-2907, 2959-2961, 2979-2980.)

After moving in with the Renfro's, they installed a backyard swimming pool and took Landry on two cruises. (XII RT 2923; XIII RT 3347, 3369.) The Renfro's started taking Landry to get professional help when he was approximately five years old because when he started school he got into trouble and did not get along with others. (VIII RT 3346-3351, 3368.) Landry started getting therapy at Children's Mental Health Service Clinic three times a week when in kindergarten. (XIII RT 3350-3351; XIV RT 3376.) Because of continuing behavioral problems, when Landry was between the ages of seven and eight years old, he spent several months as an inpatient at La Habra Children's Hospital Mental Services. (XIII RT 3352; XIV RT 3376.) When Landry was a

teenager, he spent several months as an inpatient at College Hospital. (XIII RT 3353-3354; XIV RT 3376.)

On one or two occasions Landry went to stay with his father in Las Vegas, but these stays were short-lived. (XIII 3355-3356.) When Landry was in high school, Landry's father, who had a new family, recalled Landry coming to stay but not being able to control him. (XII RT 2994-2996, 3001-3003; XIII RT 3356.) Landry's stealing caused problems, so he brought Landry back to his in-laws. (XII RT 3002.) Landry's grandmother recalled an incident when Landry's father brought him back from Las Vegas and threw all of Landry's clothing on the driveway saying, "I don't want, I don't want." (XIII RT 3355-3356.) Landry also went and stayed with his mother because his grandparents needed a break, but she brought him back after a few days and he remained with the Renfro's. (XIV RT 3382-3383.)

When Landry was in high school between the ages of 14 and 15, he broke into a neighbor's home, committed a burglary, went joy riding in a car, and so began his forays in the judicial system. (XII RT 2927-2928, 2976-2977; XIV RT 3376-3377.) Landry went from placement to placement and was released from the juvenile justice system to live with the Renfro's when he was 18 years old. (XIV RT 3377-3378.) Because Landry did not have a high school diploma, the Renfro's bought Landry a motor scooter so he could go to night school and get his GED; however, one night they found him out on the streets when he should have been at night school. (XIV RT 3378-3379.) While Landry lived with the Renfro's, before ending up in prison, he worked a few jobs but was not required to pay rent. (XIV RT 3380-3381.)

Landry's grandmother believed Landry's life was still worth saving, even if he had to spend the rest of his life in prison. (XIII RT 3361-3362.) Landry's grandfather also loved Landry and believed Landry got a "raw

deal" because he did not get his medications while incarcerated and did not believe Landry had been given a fair chance. (XIV RT 3392.) Landry's father also loved him, and even though he was disgusted with the situation, he did not want to see his son die. (XII RT 2297.)

Appellant's Juvenile Record

Landry's investigator obtained permission from the juvenile court to view the Landry's juvenile file and dictated the contents of various reports into a recording device. (XIII RT 3309-3310.) At Landry's request, the investigator played a tape recording of the investigator's dictation for the jury. (XIII RT 3305-3306, 3311-3343.)

The jury heard a chronological summary of Landry's juvenile court records which had been considered by the experts. (XIII RT 3312-3314.) Landry was born on July 20, 1968. (XIII RT 3342.) On April 2, 1984, Landry was voluntarily placed at College Hospital because a behavior problems at home and school and released on June 10, 1984, due to limits on insurance coverage. (XIII RT 3314.) It was believed Landry needed more supervision and it was recommended Landry do an additional six to twelve months of residential treatment. (XIII RT 3316-3318.)

A June 5, 1984, letter from College's Hospital diagnosed Landry with atypical depression and attention deficit disorder with hyperactivity, requiring treatment with 50 g of Mellaril four times a day which showed definite gains. (XIII RT 3319-3320.) Nonetheless, Landry showed continued signs of vulnerability with episodes of depression, hopelessness, and suicidal ideation which required further acute psychiatric hospitalization, so it was recommended Landry be placed at Vista Delmar or Hawthorne Home for Children. (XIII RT 3320, 3322.)

A probation report showed Landry adjudicated a ward of the court following his admission that he participated in a burglary. (XIII RT 3312.) The probation report noted Landry's placement at College Hospital and diagnosis. (XIII RT 3312-3314.)

An August 29, 1985, petition in the juvenile court and probation report detailed Landry's juvenile court history after he was found to be a ward of the court on July 20, 1985. Following Landry's placement in College Hospital he was placed in Rancho San Antonio for two months where he got in trouble which resulted in a restriction on home visits. (XIII RT 3323-3324, 3326.) Landry went AWOL and then broke into the facility, stole property, and was found staying in a shed in the backyard of his cohort's home. (XIII RT 3325.) Because of Landry's persistent rule violations, defiance, and provocative behavior he was not accepted back into the program. (XIII RT 3326.)

As a result of the break-in at Rancho San Antonio, Landry was charged with burglary, and was sent to Camp Page, but after two weeks he went AWOL from this program as well. (XIII RT 3331.) On October 30, 1984, Landry was then ordered to senior security camp, Camp Gonzalez, but because of disciplinary problems and lack of maturity, was transferred on November 8, 1984, to a junior security camp, Camp Kilpatrick. (XIII RT 3331-3332.)

Landry was at Camp Kilpatrick for over 42 weeks, during which he attempted to escape three times, was placed in isolation following multiple instances of being caught out of bed, saw the Camp psychiatrist on the weekly basis, and was sent to central juvenile hall for a psychiatric evaluation on two occasions. (XIII RT 3332.) Because all counseling and other rehabilitative efforts had been ineffective, Landry was placed at the Kirby Center to receive individual and family counseling. (XIII RT 3333, 3335.) Landry was diagnosed with attention deficit disorder and

hyperactivity, prone to periodic depressions during which he lapsed into a severe apathetic state and was prone to suicidal gestures without being aware of his depression. (XIII RT 3330.) A letter in Landry's psychiatric evaluation indicated Landry had a history of severe abuse which included being forced to watch his mother's lesbian lovemaking, causing fights between Landry's mother and father, and indicated Landry's father was an alcoholic who abused him when drunk. (XIII RT 3331, 3339-3340.)

Probation reports dated February 27, 1996, and July 18, 1996, showed Landry's September 10, 1985 placement in the Kirby Center resulted in considerable growth and maturity by Landry, despite periodic setbacks. (VIII RT 3339.) Landry claimed that from age five to age six he was sexually molested by a male living with his parents and, as a result, sexually molested a four-year-old cousin, resulting in his placement in College Hospital. (XIII RT 3336-3337.) The reports indicated Landry's grandparents were supportive throughout Landry's treatment program, his behavior improved and was stable, he had healthy relationships with peers and staff, and had resolved his emotional traumas from the past. (XIII RT 3341.) Landry's prognosis for the future appeared good. Landry received the maximum benefit from the program, so probation recommended his release on his 18th birthday – July 20, 1986 – to his grandparents with juvenile jurisdiction over Landry to be terminated. (XIII RT 3341-3342.)

Expert Opinions

Jimmie Cueva, a California Youth Authority casework specialist, prepared a 1987 report[23] on Landry for purposes of determining services to provide Landry and recommend a possible placement; at the time Landry

[23] His 97 page report was admitted into evidence (Exh. 95). (XII RT 3018-3019.)

was housed at the Youth Authority. (XII RT 3018-3073.) Cueva interviewed Landry who provided a social history and family background. (XII RT 3025-3026.) Landry stated he could not bond with his parents – they could not provide adequate parenting, were divorced and had emotional problems – and lived with his grandparents who provided a close, loving, caring and structured environment. (XII RT 3025-3026.) Landry also claimed he was sexually molested twice; by a male friend of his father's who purportedly forced Landry to orally copulate him and a female friend of his mother's who forced him to orally copulate her and orally copulated him. (XII RT 3027-3028.)

Cueva had Landry's placement history and court record up until 1987, stating an assessment of Landry's criminal history and convictions was important to his assessment; he went through Landry's history.[24] (XII RT 3021-3026, 3051-3064.) During the interview, Landry acknowledged his delinquent behavior in school, stating he felt isolated and liked to be sneaky. (XII RT 3029-3032.) Landry also volunteered he had stolen money or goods when working at various jobs. (XII RT 3031-3032.)

Cueva's report noted Landry's various placements proved unsuccessful, and during the interview he was psychologically absent, as well as defensive and guarded. (XII RT 3034-3035.) As the interview progressed, Landry volunteered he was obsessed with suicide, claimed to have attempted suicide previously, claimed he likes to cut himself, and displayed a loss of interest in pleasure with feelings of worthlessness, self reproach and guilt. (XII RT 3036-3038.) Cueva's long-range plan

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[24] Landry had juvenile petition sustained for a February 10, 1984, burglary (XII RT 3054), a September 12, 1984, burglary (XII RT 3055), three counts of first degree residential burglary, one count of grand theft auto, one count of commercial burglary, and one count of second degree commercial burglary (XII RT 3055).

included Landry's completion of intensive individual psychotherapy, group therapy, a high school program, and a pre-vocational program. (XII RT 3039-3040.)

Landry was not substantially different from many other wards whom he had interviewed over the years and was a fairly common type of person. (XII RT 3066.) Cueva's assessment concluded with five priorities: first, Landry was an adult committed by the superior court and not the youth authority; second, Landry needed treatment; third, Landry needed to be kept secure; fourth, Landry needed schooling; fifth, Landry was too sophisticated to be housed with other 18-year-olds who were immature. (XII RT 3068-3071.)

Dr. Joseph Lantz, a clinical psychologist, assessed Landry. (XIII RT 3075-3113.) His assessment included tests and interviews to assess intellectual ability, academic ability, and personality, as well as anxiety, depression, and child and adolescent problems. (XIII RT 3075.) Dr. Lantz interviewed Landry, his grandmother and his grandfather, and reviewed interviews of his aunts as well as juvenile reports such as the one prepared by Cueva. (XIII RT 3098-3100, 3207-3208.)

Testing of Landry's intellectual ability established he did not have any impairments or cognitive deficits, and in fact, he had a higher intellectual ability than his academic experience would indicate, scoring between the 63rd and 75th percentiles (above average) on his IQ test. (XIII RT 3080-3090, 3179-3182.) However, Dr. Lantz diagnosed Landry with a basic personality structure diagnosis of schizoid personality disorder (not schizophrenia), the hallmarks of which were detachment from relationships, no bond or connection with other people, anxiety around other people, a desire to be alone, and being easily manipulated by other people. (XIII 3089-3109.) Dr. Lantz also believed Landry had attention deficit/hyperactivity disorder, indicated by hyperactivity, inattention, and

impulsivity. (XIII RT 3110-3111.) When interviewed by Dr. Lantz, Landry denied any suicide ideation or thoughts of homicide. (XIII RT 1385.)

Dr. Lantz believed that all of the treatment which Landry's grandparents sought for him was ineffectual because by the time he received it, the damage was already done. (XIII RT 3107-3108.) Dr. Lantz stated Landry's formative years were between the ages of five and seven. (XIII RT 1392-1393.) His assessment of Landry was based upon the supposition that Landry did not move in with his grandparents until he was between five and seven years old; even though his grandparents had some involvement prior to the age of seven, it was not enough to provide a stable environment. (XIII RT 3189-3193.)

Dr. Frank Gawin, a psychiatrist, reviewed Landry's prison records provided by the Department of Corrections but never interviewed Landry. (XIII 3116-3173.) After reviewing Landry's medical records, Dr. Gawin opined Landry did not receive adequate medical attention in three respects: his requests, and the requests of family members on his behalf for treatment were ignored; there was inadequate staffing and the staff was poorly trained; Landry was placed in a highly stressful environment, despite being bipolar. (XIII RT 3129-3158.)

Landry's records indicated he stated he had ingested crack cocaine, cocaine, alcohol, LSD, and PCP. (XIII RT 3160.) The side effects from use of PCP and LSD could manifest organic brain function disorders for prolonged periods of time. (XIII RT 3160-3162.) Landry's prison records indicated a doctor treating him noted Landry appeared to be a substance abuser with the expected side effects of PCP, and Landry told the doctor he used PCP and committed crimes to obtain money to purchase it. (XIII RT 3162-3163.)

Dr. Gawin acknowledged Landry's prison records indicated in March 1995 a doctor prescribed lithium, but Landry deferred taking it for a few weeks; he could not be forced to take it.[25] (XIII RT 3169.) Landry's medical records also indicated in June 1996 Landry refused to take 50 mg of Thorazine, and in February 1997 Landry stopped taking his medications for eight months, claiming he felt fine, did not believe he needed medication, and preferred to serve the remainder of his sentence off of medication. (XIII RT 3170.) Landry's medical records indicated a psychiatrist made observations of Landry and noted he was cooperative, relaxed, had the appropriate affect, was goal oriented, coherent, logical, had no detectable delusions or psychoses, and appeared stable without medication. (XIII RT 3170-3171.) The doctor's notes also indicated Landry could be discontinued from medication if he remained crisis free for one year. (XIII RT 3171-3172.)

Dr. Glenn Lipson, a psychologist who had worked with the federal government as well as the states of Nevada and Kansas to implement programs to provide inmates with psychological care, interviewed Landry and reviewed his files to evaluate his treatment in prison. (XIII RT 3218-3281.) Considering Landry's family history, Dr. Lipson opined Landry had a serious mental disorder with a biological predisposition to depression and being bipolar. (XIII RT 3247-3248.) Dr. Lipson opined Landry had depression, bipolar disorder, detachment disorder, and was schizoid.[26] (XIII RT 3248-3249.) An important aspect of Dr. Lipson's evaluation was

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[25] Dr. Gawin was not a prison doctor but was aware inmates could refuse treatment and could not be forced to take medication. (XIII RT 3163-3164.)

[26] Dr. Lipson defined "schizoid" meaning Landry's preoccupation with his own family life and his own world and failure to connect with other people. (XIII RT 3248-3249.)

the fact Landry's records indicated he had been subjected to an extended period of molestation by his father's roommate. (XIII RT 3251.) Dr. Lipson acknowledged it was important not to just take a person's word at face value but to look for verification of facts within their records. (XIII RT 3251.)

However, Dr. Lipson believed Landry's records established he feigned mental illness on occasion. (XIII RT 3249 -3250.) Specifically, he did not believe Landry ever heard the voice of "Jerry," the person who purportedly molested him. (XIII RT 3271-3272.) Dr. Lipson also acknowledged multiple times in Landry's records he stated on questionnaires he had not been diagnosed or treated for mental illness and denied taking medication. (VIII RT 3269- 3270.)

Dr. Lipson opined Landry's poor behavior as an adolescent was understandable because he did not have the resources of better hospitals. (XIII RT 3255.) With his history of trauma and attachment problems, group therapy was ineffectual because Landry needed the right person and the right program for an extended period of time. (XIII RT 3255.) Dr. Lipson believed Landry needed six to twelve months of treatment at a very early age. (XIII RT 3255.) Reading "between the lines" of Landry's prison records between 1987 and 1994, suggested he may have been victimized, and to protect himself he started bodybuilding, keeping to himself and acting strangely to keep people away from him. (XIII RT 3256-3257, 3272-3273.) Dr. Lipson opined Landry affiliated with a gang for purposes of protection. (XIII RT 3257.)

Dr. Lipson opined Landry should have been closely evaluated, with all his prison records taken into consideration, to get a proper psychiatric evaluation, and without a proper psychiatric evaluation, it was predictable he would act out. (XIII RT 3257-3260.) Dr. Lipson believed Landry was bipolar and should have been treated with medication such as lithium, with

warnings regarding its side effects. (XIII RT 3259-3260.) However, Dr. Lipson acknowledged a treatment plan in Landry's files dated September 4, 1997, which included treatment with lithium. (XIII RT 3263.) Nonetheless, Dr. Lipson stated this treatment plan was not appropriate and was not properly followed through. (XIII RT 30, 261-3264.)

Dr. Lipson acknowledged Landry's file included letters by Landry, his grandparents, and their assemblyman requesting treatment for Landry. (VIII RT 3266-3267.) However, Landry's file also reflected the fact Landry refused treatment and medication. (VIII RT 3267.)

Anthony Casas, who testified on Landry's behalf during the guilt phase, stated when Calipatria opened in 1992, it was difficult to get people to work there, so most of its employees were new and unexperienced. (XIII RT 3285-3287.) Calipatria had difficulties with blind spots and personnel, and as a result there were a high number of violent instances with inmates; it had a reputation for being violent and uncontrolled. (XIII RT 3288-3289.) Nonetheless, Casas acknowledged several correctional officers stayed at Calipatria their entire careers and not all of the staff at Calipatria was inexperienced. (XIII RT 3293-3294.) In 2000, Casas attempted to broker a deal for Landry to become an FBI informant regarding the NLR gang but was unsuccessful because the information Landry had was stale. (XIII RT 3289-3292, 3296.)

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GUILT PHASE ARGUMENTS

I. THE ENTIRE RECORD MUST BE REVIEWED, INCLUDING THE SEALED DOCUMENTS CONTAINING INFORMATION ABOUT APPELLANT, INMATE GREEN, ADDIS AND THE PRISON OFFICERS, TO DETERMINE WHETHER THE TRIAL COURT ABUSED ITS DISCRETION REGARDING DISCOVERY

In argument one, Landry challenges the denial by the trial court of his requests to review confidential prison records of himself, Addis (the victim), and inmate Green, the confidential files of the 14 correctional officers[27] who witnessed the murder as well as additional records of Officer Maldonado[28] concerning her separation from employment with the state. (I AOB 80- 99.) Landry asks this Court to review those records and release them for purposes of additional briefing, if appropriate. Landry acknowledges the trial court addressed these issues prior to trial below, reviewed the requested records and denied Landry's discovery requests. (1 AOB 88-89, 91, 94, 96-99.) This Court possesses the entire appellate record and should objectively review it, including those records which were sealed by the trial court below.

Well established law acknowledges that the defense is not entitled to review confidential documents to determine which materials suit its purposes but, rather, it is the trial court's duty to review such documents and determine which, if any, are material and should be disclosed. (*People v. Martínez* (2009) 47 Cal.4th 399, 453 [appellate court reviewed

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[27] Correctional officers Frank Esqueda, David Bisares, Arioma Sams, Ernest Valencia, Rosemaria Maldonado, Timothy Ginn, Larraine Rounds, Cervantes, K. J. Asher, Laramie McAlmond, David Lacey, Michael Lourenco, Angel Perez, and Thomas Lopez. (I AOB 92.)

[28] Officer Maldonado was one of the 14 officers whom Landry initially sought discovery.

undisclosed confidential juvenile records on appeal]; *People v. Prince* (2007) 40 Cal.4th 1179, 1285 [appellate court independently reviewed police officers' records].) An accused's right to obtain discovery is not absolute, and the trial court retains wide discretion to protect against the disclosure of information which might unduly hamper the prosecution or violate some other legitimate government interest. (*People v. Avila* (2006) 38 Cal.4th 491, 606.) A party who challenges "on appeal the trial court orders withholding information as privileged or otherwise not discoverable 'must do the best they can with the information they have, and the appellate court will fill the gap by objectively reviewing the whole record.' [Citations omitted.]" (*People v. Martínez*, *supra*, 47 Cal.4th at p. 453.) This Court reviews the trial court's determinations on Landry's discovery request for abuse of discretion. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1285.)

Concerning Landry's arguments addressing the Department of Corrections' central files for himself, inmate Green, and Addis, Landry's procedural summary shows he did receive a considerable amount of discovery after the trial court's in camera review of the files. (I AOB 86-89.) This Court must review the transcript of the hearing which the trial court sealed along with the packages of materials from Landry, inmate Green, and Addis' files to determine whether the trial court abused its discretion not to disclose the sealed evidence. (*People v. Martínez*, *supra*, 47 Cal.4th at p. 453.)

Landry asserts the trial court only disclosed one page from Addis' central file, finding it is "difficult to believe that documents related to the investigation would not be in [Addis'] C- file" because "the Department of Corrections investigated" Addis' murder. (I AOB 89.) This assertion fails for two reasons. First, the parties directly addressed this issue and counsel representing the Department of Corrections assured all parties there was no

investigative information addressing Addis' murder in his central file, and the litigation coordinator for CIM indicated internal affairs only handled officer/inmate killings and not inmate/inmate killings. (IV RT 969-971.) Second, logic dictates the Department of Corrections would not continue keeping a central file on Addis as an inmate following his murder because he would no longer be an inmate. That is, Landry's murder of Addis terminated Addis' status as an inmate.

Landry on appeal also seeks to review Addis' entire central file because information which the trial court did not initially turn over to him was later provided by the prosecutor; i.e., an incident report that on May 27, 1997, Addis assaulted a correctional officer. (I AOB 89-92.) Landry asserts this implicates the prosecution had access to information from Addis' central file to which defense counsel did not, and defense counsel should have had the same access as the prosecutor. On appeal, Landry also asserts the government did not identify a state interest overcoming his due process right to information from Addis' central file. (I AOB 91.) Landry is wrong. First, the record establishes the prosecution did not have access to Addis' file and, second, Addis' central file was a government record the same as Landry's and inmate Green's central file records; Addis' death did not change this fact or the fact that confidential information about others still living may have been in it. Furthermore, as Landry acknowledges (I AOB 90-91), the trial court twice reviewed Addis' central file and determined what documents were appropriate discovery.

Landry erroneously asserts the prosecution had access to material in Addis' central file that had not been disclosed to the defense after the court went through it and provided discovery from it. (I AOB 89-90.) The record establishes the prosecutor, in fact, did not have any access to Addis' Central file but, rather, had received a document from an investigator in 1997, and this document was overlooked by the trial court when it had gone

through Addis' Central file.[29] (IV RT 963-969.) Twice counsel representing the Department of Corrections assured the court and defense counsel that the prosecution did not have access to Addis' central file, and the court found this assurance credible. (IV RT 964, 967-968.) The court gave defense counsel the opportunity to present witnesses from the Department of Corrections to establish the prosecution did have access to the file, but defense counsel declined, stating "I will accept the representations that have been made." (IV RT 968-969.) Furthermore, the court specifically held, "there are no other documents in that file that are discoverable and the Court will deny your request to go through the file." (IV RT 968.) Therefore, Landry is not entitled to review Addis' central file, but, rather, this Court should review the sealed records and determine whether the trial court abused its discretion regarding the discovery released from Addis' central file. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1285.)

Concerning the 14 officers for whom defense counsel sought extensive discovery (see II CT 329-331), the trial court only found good cause was established to review the files of three officers – Officer

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[29] Specifically, after the trial court accepted the prosecution's assertions that they had not had access to Addis' central file, the court explained it had overlooked the document about which trial counsel complained:

> I will indicate on the record at this time I do not have a prior recollection of seeing it before I went through it the other day page by page, but it is clearly there and I don't recall if I didn't give it to you because I didn't think it was relevant or quite frankly because I didn't see it. Because as I indicated, it's attached. I put that on the record for later review, should it become relevant. But there are no other documents in that file that are discoverable and the Court will deny your request to go through the file.

(IV RT 968; emphasis added.)

Esqueda, Sergeant Sams, and Officer Maldonado. (II RT 309.) The court reviewed the records of each of these officers and found no discoverable materials, so their records were placed in sealed packets which this Court has as part of its record. (II RT 370-371.) Landry notes the importance of the testimony provided by these witnesses, asserting "their knowledge and credibility were important issues in the case," and because Maldonado left the Department of Corrections and did not testify on behalf of the prosecution, Landry speculates it "is difficult to believe there were no discoverable records in Maldonado's personnel file." (I AOB 94-95.) Under a separate heading, Landry addresses additional discovery that was sought concerning Maldonado. (I AOB 95-99.) The import of an officer's testimony or speculation about their personnel files or other files have no place in this Court's independent examination of the sealed records to determine whether the trial court abused its discretion in denying Landry's motion for disclosure of records. (See *People v. Prince*, *supra*, 40 Cal.4th at p. 1284-1285.)

This Court should review the sealed records and documents to determine whether the trial court abused its discretion concerning the numerous discovery decisions it made. Landry is not entitled to any additional discovery on appeal regarding Addis or any of the witnesses, so his request for Addis' central file should be rejected. Should this Court determine the trial court should have released discovery, necessitating additional briefing on the issue, it should be released to both Landry and respondent. However, considering the vast amount of evidence establishing Landry's guilt, any discovery requests the trial court improperly denied would likely be harmless under any standard of review.

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II. LANDRY'S OFFENSES WERE PROPERLY JOINED PURSUANT TO PENAL CODE SECTION 954

In argument two, Landry claims the trial court committed error by refusing to sever the murder counts (counts one and two) from assault by an inmate (count three) and possession of a stabbing weapon by an inmate (count four) because they did not relate to the murder. (I AOB 99-120.) While Landry acknowledges counts one through three involved assaultive conduct and therefore are statutorily the same class of crime, he argues count four (inmate possession of a weapon) was not assaultive and not of the same class as the other crimes. (I AOB 105-107.) Additionally, Landry complains even though the statutory requirements for joinder were met, the court abused its discretion by denying his motion to sever. (I AOB 108-120.) Landry's arguments lack merit and should be rejected.

In general, the law prefers consolidation of charges because it promotes efficiency. (*People v. Soper* (2009) 45 Cal.4th 759, 771-772 and cases cited therein.) Penal Code section 954 provides for joinder when the crimes charged are "connected together in their commission" or belong to the "same class of offenses." (Pen. Code, § 954;[30] *People v. Soper*, *supra*,

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[30] Penal Code section 954 provides:

An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense ***or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated.*** The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that ***the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the***

(continued...)

45 Cal.4th at p. 771.) The trial court's decision to join counts is reviewed for abuse of discretion. (*People v. Gray* (2005) 37 Cal.4th 168, 221.)

When seeking to prevent consolidation of properly joined charges, a defendant bears the burden to make a "clear showing of prejudice." (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220; *People v. Geier* (2007) 41 Cal.4th 555, 578.) A trial court's denial of a motion for severance of properly joined charged offenses amounts to a prejudicial abuse of discretion when it "falls outside the bounds of reason. [Citations omitted .]" (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at p. 1220.)

When determining whether the trial court abused its discretion in denying a severance motion, this Court reviews the record before the trial court at the time it ruled on the motion. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120; *People v. Catlin* (2001) 26 Cal.4th 81, 110-111.) "A pretrial ruling that was correct when made can be reversed on appeal only if joinder was so grossly unfair as to deny due process." (*People v. Stitely* (2005) 35 Cal.4th 514, 531.) When charges and offenses were properly joined, Landry must make a stronger showing of prejudice than that necessary to establish prejudice under Evidence Code section 352; the standard considered in reviewing the admission of other-crimes evidence. (*People v. Soper*, *supra*, 45 Cal.4th at pp. 774, 783.)

Prior to trial, the question of severance of the counts was fully litigated and rejected by the trial court. Landry brought a motion to sever counts three and four (II CT 489-500) which the prosecution opposed

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(...continued)
accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count. (Emphasis added.)

(II CT 501-509). As part of the motion to sever, Landry stated his defense to counts one and two would be hampered by the joining of counts three and four, and the court allowed defense counsel to state reasons supporting this assertion in camera. (II RT 375-380.) After considering Landry's motion, the opposition, as well as the statements proffered by defense counsel in camera the trial court denied the motion, making the following holding:

> Defendant's motion to sever is denied. Defendant has failed to make an adequate showing that there exists a substantial danger of prejudice resulting from a joint trial of the charges contained in the information. The court finds that the four charges involved conduct by the defendant while in prison in the California Institution for Men within a two-month period. Each occurred at Palm Hall unit of California Institution for Men.
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> The offenses are of the same class of crime, either assaultive conduct by a prisoner or the possession of a prison-made weapon necessary to commit similar assaults. Each of the offenses involved prison-made weapons. Each of the assaults were committed with prison-made weapons against fellow prisoners. None of the charges appear to be weak in relation to the other. And the prejudice to the defendant would appear to be small.

(II RT 403-404.) Landry fails to establish the trial court abused its discretion.

A. Pursuant to Penal Code Section 954, All the Offenses Were Properly Joined Because They Were of the Same Class and Were Connected Together in Their Commission

Count four was properly joined with counts one through three. Clearly, counts one through three were of the "same class of crimes" as conceded by Landry on appeal. (I AOB 103.) So too, count four was the same class of crime as the other counts and all four counts were connected in their commission, pursuant to Penal Code section 954.

For purposes of Penal Code section 954, offenses are of the same class of crime when they possess common characteristics or attributes. (*People v. Lucky* (1988) 45 Cal.3d 259, 276; *People v. Moore* (1986) 185 Cal.App.3d 1005, 1012.) In *Lucky*, the defendant was charged with several counts of robbery, attempted robbery, and murder arising from separate transactions on separate dates. (*People v. Lucky*, *supra*, 45 Cal.3d at p. 270-272.) The court in *Lucky* found all the offenses were of the same class because they shared the common characteristic of being assaultive crimes against persons. (*People v. Lucky*, *supra*, 45 Cal.3d at p. 276.) Similarly, the crimes of attempted murder and felon in possession of a firearm are of the same class of crime. (*People v. Thomas* (1990) 219 Cal.App.3d 134, 140.) The court in *Thomas* held that attempted murder, robbery and felon in possession of a firearm were the same class of crime because they involved "assaultive crimes against the person and were properly joined." (*People v. Thomas*, *supra*, 219 Cal.App.3d at p. 140.) Like the crimes in *Lucky*, *Thomas* involved several different offenses on different days against different victims. (*People v. Thomas*, *supra*, 219 Cal.App.3d at p. 138-139.)

In the instant case, all of the offenses involved the same class of crime because they shared the common characteristic and attribute of having been committed by a prisoner, in custody who possessed an inmate - manufactured weapon. All three counts were part of the same title and chapter of the Penal Code prohibiting the use or possession of weapons by inmates. That is, Landry was charged in counts two and three with violating Penal Code section 4500 and in count four with violating Penal Code Section 4502, all of which are included in Title V of the Penal Code entitled "Offenses Relating to Prisons and Prisoners", and Chapter 1 of Title V entitled "Offenses by Prisoners." (West Annotated Codes.) As the trial court noted when finding all the offenses were of the same class, each

offense involved either assaultive conduct by a prisoner with an inmate manufactured weapon or the possession by a prisoner of an inmate manufactured weapon necessary to commit an assault. (II RT 404.) Just as the court in *Thomas* found robbery and felon in possession of a firearm of the same class of crimes, so too were the crimes in the instant case. (See *People v. Thomas*, *supra*, 219 Cal.App.3d at p. 140.) The trial court properly found the offenses were of the same class of crime.

Additionally, all the offenses were connected together in their commission. Offenses are considered to have been connected in their commission when there exists a common element of substantial importance. (*People v. Valdez* (2004) 32 Cal.4th 73, 119; see also *Alcala v. Superior Court* (2008) 43 Cal.4th at 1218-1219.) Offenses can be connected together in their commission even though the offenses do not relate to the same transaction and were committed at different times and places against different victims. (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at p. 1218.) The defendant in *Valdez* was charged with capital murder, and two years after arraignment for the murder, Valdez attempted to escape. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 119.) This Court upheld the trial court's joinder of Valdez's attempted escape charge with the capital offense because the motive for the escape was to avoid prosecution for the murder; i.e., the capital offense was the common element of substantial importance. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 119.) Similar to *Valdez*, the common element of substantial importance in the instant case was the possession of an inmate manufactured weapon within a short time of having committed two offenses using an inmate manufactured weapon.

In the instant case, the common element of substantial importance was Landry's possession of inmate manufactured weapons while housed in the most secure area of CIM within a short period of time of previously

committing two offenses with inmate manufactured weapons; the time between the murder and Landry being found in possession of the prisoner manufactured weapon was only 73 days. Landry committed counts one and two (the murder of Addis) using an inmate manufactured weapon on August 3, 1997, without provocation or warning while he and Addis were both in the Administrative Segregation yard at CIM. (I RT 24-27, 30-32, 39-40.) Forty-six days following the murder, on September 18, while Landry was confined in Cyprus Segregation (deep segregation), he used an inmate manufactured weapon to slash inmate Matthews without warning or provocation. (I RT 81, 83-85, 90.) Twenty-seven days following the slashing of Matthews, on October 15, Landry was found in possession of two inmate manufactured weapons in Cyprus Segregation; the very kind of weapons used to commit the other offenses. (I RT 123-130.) The possession of inmate manufactured weapons close in time while housed in a secured area of the prison constituted the common element of substantial importance to all four offenses, so they were properly joined. While Landry concedes counts one through three were properly joined, he argues count four was neither of the same class of offenses as counts one through three nor was there a common element of substantial importance. (I AOB 103-107.) As shown above, Landry is wrong. Moreover, Landry fails to establish the trial court's denial of his motion to sever was an abuse of discretion. (*People v. Gray, supra*, 37 Cal.4th at p. 221.)

Landry asserts that count four did not involve assaultive conduct, so it was not of the same class of crimes as the other offenses. (I AOB 103-105.) Landry's analysis too narrowly construes what constitutes "common attribute and characteristic" for purposes of establishing the offenses were of the same class of crime pursuant to Penal Code section 954. All of the offenses were of the same class because they involved incarcerated

prisoners and the possession of weapons. Just as the court in *Thomas* found attempted murder and felon in possession of a firearm were the same class of crimes (*People v. Thomas*, *supra*, 219 Cal.App.3d at p. 140), even more so were the offenses in the instant case. Here, the offenses were not simply assault and possession of a weapon, but assault by a state prisoner (Pen. Code, § 4500) and possession of an inmate manufactured weapon by a state prisoner (Pen. Code, § 4502). (I CT 42-48.) Therefore, all the offenses were of the same class of crime within the meaning of Penal Code section 954, and Landry's arguments to the contrary should be rejected.

Landry argues count four was not connected in its commission with the other counts because it did not share a common element of substantial importance with counts one through three. (I AOB 106-107.) Even though all of the offenses involved a state prisoner and possession of an inmate manufactured weapon, Landry reasons the offenses were not connected in their commission because Landry did not determine his custody placement within CIM and each offense involved a different weapon. (I AOB 106-107.) These distinctions fail to establish the offenses were not connected in their commission.

First, Landry's argument that he did not control his placement within CIM ignores the obvious elements of substantial importance – Landry was a state prisoner and all of the offenses involved inmate manufactured weapons. Landry's specific placement within CIM was irrelevant because it was the fact he was an inmate at CIM that was important; the fact Landry was in Administrative Segregation when he committed each of the offenses only highlighted the substantiality of its importance. Who determined Landry's placement within CIM was also irrelevant, and in fact Landry's murder of Addis determined his placement in Administrative Segregation.

Second, the fact the same weapon was not involved in each offense was inconsequential in light of the fact each offense involved inmate

manufactured weapons; i.e., weapons made with materials such as sharpened metal stock wrapped in cellophane and string (I RT 37), a razor blade mounted on a toothbrush (I RT 108-109), metal stock sharpened at both ends (I RT 127-129), and a razor blade removed from a prison issued razor (I RT 129-131). In light of this Court's decision in *Valdez*, Landry too narrowly construes the common element factor required to find the offenses were connected in their commission for purposes of Penal Code section 954. This Court in *Valdez* did not look to the elements of the offenses– capital murder and escape – when determining they shared a common element of substantial importance but, rather, how the offenses related to each other in their commission. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 119.) As the trial court found in the instant case, each of the offenses related to the other by the fact Landry was an inmate at CIM and each offense involved possession of inmate manufactured weapons. (II RT 404.)

Despite the fact inmate manufactured weapons were common to all offenses, Landry argues there was no element of substantial importance by relying on three decisions involving joinder of felon in possession of a firearm offenses with other offenses and one case which did not involve felon in possession of a firearm; *People v. Cunningham* (2001) 25 Cal.4th 926, 984; *People v. Pike* (1962) 58 Cal.2d 70, 84; *People v. Scott* (1944) 24 Cal.2d 774, 779; and *Walker v. Superior Court* (1974) 37 Cal.App.3d 938, 940-942. (I AOB 106-107.) However, these cases are distinguishable or support the joinder in the instant case. These cases are addressed in turn.

Cunningham supports the proposition that possession of an inmate manufactured weapon was a common element amongst the offenses. Cunningham was charged with murder, attempted murder, robbery and being a felon in possession of a firearm. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 957.) However, the actual firearm was never found, and

Cunningham's conviction of being a felon in possession of a firearm was based upon the fact he stipulated to having been convicted of a felony, witnesses to the murder having heard Cunningham tell his victim the gun he was pointing at the victim was a ".357 Magnum," and the fact a .357 Magnum bullet was recovered from the victim's chest. (*People v. Cunningham*, *supra*, 35 Cal.4th at pp. 957-963.) Cunningham does not support Landry's assertion that the prosecution must prove the same weapon was used but, rather, that the joined offenses must share common elements of substantial importance. In *Cunningham*, the circumstantial evidence was that Landry was an ex-felon who used a .357 Magnum even though the weapon was never found. In the instant case, the common element of all four counts was the possession of inmate manufactured weapons even though they were not the same weapon and Landry prevented one of the weapons from being recovered.

Landry's reliance on *Pike* is misplaced because it is distinguishable and, if anything, supports joinder in the instant case. *Pike* is distinguishable because it did not involve a weapon possession offense being joined with other offenses but, rather, involved several robberies using the same gun. (*People v. Pike*, *supra*, 58 Cal.2d at pp. 83-84.) The court found the fact the robberies involved the same gun supported joinder of the offenses based upon this common element. (*People v. Pike*, *supra*, 58 Cal.2d at pp. 84-85.) *Pike* supports the joinder in the instant case because even though Landry did not use the same weapon to commit counts one through three, he did use inmate manufactured weapons to commit those offenses. The common element of all the offenses was that they involved inmate manufactured weapons. Therefore, Landry's possession of inmate manufactured weapons was properly joined with the assault counts.

Likewise, the *Scott* decision supports rather than undermines joinder in the instant case. *Scott* involved a charge of tampering with the identification number of a gun being joined with several counts of rape, one of which was a count of rape by force; Scott apparently used the gun to commit the rape. (*People v. Scott*, *supra*, 24 Cal.2d at pp. 776, 779.) The *Scott* decision supports respondent's position because the instant case involved possession of an inmate manufactured weapon being joined with other counts in which inmate manufactured weapons were used. Even though the same weapon was not used in each offense, they were inmate manufactured weapons, nonetheless. It is the uniqueness of an inmate manufactured weapon which supports the fact the offenses had a common element of substantial importance.

The last case upon which Landry relies is *Walker*. (I AOB 106-107.) The court in *Walker* found the motion to sever a count of possession of a concealed firearm by an ex-felon from a charge of armed robbery should have been granted. (*Walker v. Superior Court*, *supra*, 37 Cal.App.3d at p. 940.) The armed robbery involved three masked robbers, whom no one could identify, armed with pistols and one rifle, which was committed 106 days before Walker was arrested. Walker was arrested in a house, and in the bedroom where Walker was found was a closet containing a coat with a revolver in the pocket. (*Walker v. Superior Court*, *supra*, 37 Cal.App.3d at pp. 940-941.) The court found Walker's motion to sever should have been granted even though both offenses involved a handgun because the court believed the offenses were too far apart in time, the evidence was not cross-admissible and because the handgun was not identified as being used during the robbery. (*Walker v. Superior Court*, *supra*, 37 Cal.App.3d at p. 938.) The court found potential for prejudice because the felon in

possession count would require the jury to hear evidence Walker had been convicted of at least one prior felony conviction. (*Walker v. Superior Court, supra*, 37 Cal.App.3d at pp. 942-943.)

Walker is distinguishable and its continued validity is questionable. First, unlike *Walker*, identity was not an issue in the instant case and the offenses in the instant case are close in time. Furthermore, there is no question Landry used the inmate manufactured weapons in counts one through three, and there was no potential for prejudice based on the jury learning of Landry's prior convictions. Finally, the continued validity of *Walker* is questionable since it predates Penal Code section 954.1[31] which provides that the absence of cross-admissible evidence does not preclude joinder of offenses that are of the same class. (See *People v. Gómez* (1994) 24 Cal.App.4th 22, 28-29.) *Walker* does not support Landry's position that possession by an inmate of an inmate manufactured weapon must involve the same weapon in order for there to be a common element with the other offenses. Therefore, the concerns of the court in *Walker* do not exist in the instant case, and *Walker's* continued validity is questionable.

The offenses in the instant case were properly joined pursuant to Penal Code section 954, and Landry's arguments to be contrary should be

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[31] Penal Code section 954.1 provides:

> In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact.

rejected. As will be established, joinder of the counts was not prejudicial to Landry.

B. Appellant Fails to Establish Joinder of the Offenses Was an Abuse of Discretion, Falling Outside the Bounds of Reason

Because the charged offenses were properly joined, Landry must make a stronger showing of potential prejudice than that required to exclude other-crimes evidence in a severed trial; Landry must establish the trial court's denial of his motion was outside the bounds of reason. (*People v. Soper*, *supra*, 45 Cal.4th at p. 774.) The prejudice analysis is made in the context of four traditional factors: "'(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a stronger case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charge converts the matter into a capital case." (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220-1221, quoting *People v. Mendoza* (2000) 24 Cal.4th 130, 161.)

The question of cross-admissibility concerns whether evidence in hypothetical separate trials would be cross-admissible. (*People v. Soper*, *supra*, 45 Cal.4th at pp. 774-775.) If evidence is cross-admissible, this factor alone "is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's views not to sever properly joined charges." (*People v. Soper*, *supra*, 45 Cal.4th at p. 775.) Contrary to Landry's assertions otherwise, evidence of the other crimes was cross admissible. (I AOB 108-110.)

Landry's offenses displayed a common scheme or plan. It is well established that in order for evidence to prove a common scheme or plan, it need not be unusual or distinctive but, rather, need only support the inference that Landry employed that plan when committing the charged offenses. (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at p. 1226.) Landry's offenses demonstrated not only a similarity in the results, but a concurrence of common features. (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at pp. 1225-1226.) Those features included Landry's use of inmate manufactured weapons. Concerning counts one through three Landry lured his victims into a false sense of security before attacking them with an inmate manufactured weapon, despite the presence of correctional officers and other witnesses. Evidence of counts one through three was cross-admissible with Landry's possession of an inmate manufactured weapon (count four) because all of the offenses were committed in prison and involved inmate manufactured weapons. Therefore, evidence concerning the security procedures, how inmates made weapons, and how they moved them within the institution would have been cross-admissible regarding all the offenses.

Landry argues the evidence was not cross-admissible to establish motive because his attack on Addis occurred on the exercise yard and was purportedly orchestrated by inmate Green, while the attack on inmate Matthews (counts three) occurred while Landry was alone in his cell, and count four did not involve any assaultive conduct. (I AOB 109-110.) However, "the existence of some factual differences between or among the charged offenses" does not defeat the fact it was admissible to establish a common scheme or plan. (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at p. 1225.) Furthermore, even though count four did not involve an act of violence by Landry, it involved the very kind of implement Landry used to carry out counts one through three. As previously established, the evidence

about inmate manufactured weapons and the security procedures at CIM would have been cross-admissible regarding all four counts.

Finally, even assuming evidence of count four was not cross-admissible, cross- admissibility is not the *sine qua non* for joinder of offenses. (*People v. Geier* (2007) 41 Cal.4th 555, 575.) Penal Code section 954.1 codified this fact, and this Court recognizes that when properly joined offenses are of the same class, "the circumstance that the evidence underlying those charges would not be cross-admissible at hypothetical separate trials is, standing alone, insufficient to establish that a trial court abused its discretion in refusing to sever those charges." (*People v. Soper*, *supra*, 45 Cal.4th at p. 775.) The remaining factors must be considered to determine whether they support the benefits of joinder. (*People v. Soper*, *supra*, 45 Cal.4th at p. 775.)

Consideration of the other factors also supports the fact the court did not abuse its discretion in the instant case. The next factor is whether some of the charges were likely to inflame the jury against Landry. (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at pp. 1220-1221.) None of the charges were particularly likely to inflame the jury against Landry more than the others. Landry was charged in counts one through three with violent, unprovoked assaults against other inmates with prisoner manufactured weapons and in count four with possessing this very type of weapon. Even though count four did not involve a violent act, the weapons found in Landry's cell were similar to the ones used against the victims of counts one through three. Specifically, the weapon used against Addis was a sharpened piece of metal stock much like the one found in Landry's cell, and the weapon used against inmate Matthews – "Mr. Razor blade on a toothbrush" – was consistent with the razor blade found in Landry's cell. Therefore, the joinder of the counts was not likely to unusually inflame the jury against him.

Landry complains the joint trial of the offenses was likely to influence the jury against his attempt to defend against the capital murder charge because the attack against inmate Matthews and the possession of inmate manufactured weapons suggested Landry had a disposition to violence. (I AOB 110.) Such reasoning would always preclude the joinder of violent crimes, and this Court in *Alcala* allowed the joinder of five counts of murder. (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at pp. 1208-1209, 1228-1229.) This Court does not evaluate the trial court's denial of the motion to sever in retrospect, and nothing before the court at the time it denied the motion indicated joinder would emotionally bias the jurors. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1246.)

Landry relies on *People v. Ewoldt* (1994) 7 Cal.4th 380, 393, addressing Evidence Code section 1101, when arguing joinder of the offenses biased the jurors against him. (I AOB 110-111.) However, this Court has established the joinder of the crimes requires the moving party to establish a much higher burden than that for admitting evidence of other crimes addressed in *Ewoldt*. (*People v. Soper*, *supra*, 45 Cal.4th at p. 774 ["'a party seeking severance must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial.'"]) Landry's argument that joining counts together would prejudice the jury against him lacks support in logic and law.

Additionally, Landry complains joining the assault and possession offenses with the murder undercut his defenses of duress and prison staff complicity by "creating an emotional bias against [him]" regarding the murder. (I AOB 111.) This argument fails for two reasons. First, with one exception addressed later, Landry's ability to put on a defense is not part of the calculus of whether the joinder of the offenses was likely to inflame the jury against him. As established, nothing in the record indicated Landry's defense at the time the trial court denied his motion and this Court does not

retrospectively review a trial court's decision. (*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1246.) Second, the authority upon which Landry does rely, *People v. Crittenden* (1994) 9 Cal.4th 83, 133, concerns determining the admissibility of evidence in the context of Evidence Code section 352; whether the prejudicial effect of the evidence outweighs its probative value. (I AOB 111.) However, as already established, this is not the standard for reviewing a trial court's decision to join offenses. (*People v. Soper*, *supra*, 45 Cal.4th at p. 774.) Landry's arguments that joinder of the crimes was likely to inflame the jury against him should be rejected because they are not supported either in law or fact.

As the trial court found, the third factor did not support severance because none of the charges were weak in comparison to the others. (II RT 404.) The evidence at the preliminary hearing included eyewitness testimony of the correctional officer present who saw Landry stab Addis and then run away with the murder weapon which the officer saw come out of Landry's hand. (I RT 31-34.) Likewise, the evidence at the preliminary hearing concerning the attack against inmate Matthews was equally strong; the correctional officer escorting inmate Matthews heard Landry lure inmate Matthews over to his cell and shortly thereafter inmate Matthews stated he had been cut and had been slashed in his back. (I RT 83-89, 99-100.) Inmate Matthews was heard to say Landry used "Mr. Razor blade on a toothbrush." (I RT 108.) Finally, the piece of sharpened metal stock fell from the track of Landry's cell door when it was opened, and when Landry's cell was searched, a razor blade from a prison issued razor was found on the back of his toilet seat. (I RT 123-130.) Therefore, there was no spillover effect militating against joinder of the offenses.

While Landry acknowledges the evidence of the murder was strong, he argues the evidence of his assault on inmate Matthews and the finding of the prison manufactured weapons in his cell was comparatively weak.

(I AOB 111-112.) Landry is wrong. Landry complains no correctional officer saw the assault of inmate Matthews, the weapon was not found, and Landry made no admission. (I AOB 111-112.) In fact, Officer Lourenzo did see the assault but just did not see it from an angle where he could observe Landry actually slicing inmate Matthews, inmate Matthews described the weapon he saw Landry holding, and Landry's toilet was heard flushing immediately thereafter, supporting the fact he got rid of the weapon. (RT 86-89, 99-100.) The evidence of the assault against inmate Matthews was not weak. Regarding finding the weapons in his cell, Landry asserts even though the sharpened metal stock fell when his door was opened, there was no evidence he was the one that sharpened it. (I AOB 112.) However, whether Landry sharpened the metal stock was irrelevant and not a factor the prosecution needed to prove because the offense involved possession of such a weapon.

Landry's complaints that evidence was comparatively weak lacks merit. This Court recognizes, "it always is possible to point to individual aspects of one case and argue that one is stronger than the other. A mere imbalance in the evidence, however, will not indicate a risk of prejudicial 'spillover effect,' militating against the benefits of joinder and warranting severance of properly joined charges." (*People v. Soper*, *supra*, 45 Cal.4th at p. 781.)

Furthermore, Landry argues the evidence of the assault against inmate Matthews and his possession of prison manufactured weapons caused a prejudicial spillover effect by negatively impacting his defense of duress and prison staff complicity regarding the murder; Landry references Evidence Code section 1101, subdivision (b). (I AOB 112.) But, as previously established, this standard is not the standard used for purposes of determining prejudice from the joinder of offenses. (*People v. Soper*, *supra*, 45 Cal.4th at p. 774.)

In the same vein, Landry asserts joinder caused the jury to regard him with a more "jaundiced eye" and to aggregate all of the evidence against him. (I AOB 112.) Later, Landry argues there was no judicial economy based upon joinder of the offenses. (I AOB 116.) However, in *Soper* this Court rejected these notions by finding, "the benefits of joinder are not outweighed-and severance is not required-merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried." (*People v. Soper*, *supra*, 45 Cal.4th at p. 781.) While Landry argues the evidence at the preliminary hearing did not establish overlap between all the counts (I AOB 116-117), clearly in separate trials the prosecution would have been required to put on evidence about the security procedures at CIM as well as about prison manufactured weapons. The potential for judicial economy existed as a result of one trial rather than two trials. Therefore, based upon the law and facts, Landry's arguments that the spillover effect of refusing to grant his motion to sever was an abuse of discretion lack merit and should be rejected.

The fourth factor – the fact one of the offenses was a capital offense or joining the charges converted the case into a capital case – supports the trial court's decision to deny severance. The charge of capital murder did not result from the joinder of the various offenses. (*People v. Geier* (2007) 41 Cal.4th 555, 576.)

Landry argues joinder of the capital offense with noncapital offenses requires a higher degree of scrutiny than with noncapital cases, and in the instant case, it affected his defense because he had a separate defense to his capital case. (I AOB 113.) However, the trial court's denial of the motion must be based upon the facts before the court at the time the court decided the motion. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244.) At the preliminary hearing, Landry did not put on a defense. When the trial court

heard and denied the motion to sever, nothing in the record indicates Landry's planned defense. (II RT 373- 381, 403-404.) Musselwhite argued he would have adopted a different defense if the motion to sever had been granted, but this Court refused to evaluate the trial court's exercise of discretion retrospectively but, rather, based on the circumstances known to the court at the time it ruled. (*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1246.) This Court in *Musselwhite* upheld the trial court's denial of the severance motion. (*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1246; *People v. Balderas* (1985) 41 Cal.3d 144, 173-177.) In the instant case, based upon the record before the trial court, nothing suggests Landry's defense to the capital offense or that joinder of the cases would impact it. Therefore, Landry's argument should be rejected.

When arguing joinder of the offenses caused prejudice, Landry mentioned in his motion he wanted to testify regarding counts one and two but not three and four, and did not elaborate or explain why. (II CT 497.) Defense counsel made an offer of proof in camera, outside the presence of the prosecutor which is part of the sealed record in the instant case. (II RT 375-381.)

Landry references the in camera offer of proof in the opening brief, arguing severance should have been granted. (I AOB 113-115.) The fact Landry wanted to testify to some counts but not others does not require severance. (*People v. Sandoval* (1992) 4 Cal.4th 155, 173-174.) Nonetheless, respondent agrees with Landry that this Court should review the in camera offer of proof when deciding whether the trial court abused its discretion when denying his motion to sever. (I AOB 114.) After reviewing the sealed records, should this Court believe the trial court did abuse its discretion when denying his motion, respondent requests the in camera proceedings to be unsealed to allow the parties to review this record and address the offer of proof to the trial court. Respondent notes, the trial

court recessed for the day in order to consider the offer of proof and stated its denial took into consideration Landry's offer of proof as well the case authority relied upon by the parties in their briefing, supporting the fact the trial court did not abuse its discretion. (II RT 403.)

Landry argues prejudice resulted because the trial court did not sua sponte instruct the jurors it had to decide each offense separately and references Ninth Circuit finding there is a high degree of risk when offenses are joined because juries may not be able to "compartmentalize" the evidence. (I AOB 117-119.) However, Landry acknowledges the trial court had no sua sponte duty to instruct the jury to decide each offense separately, and he did not request such an instruction. (I AOB 118.) Landry complains the prosecutor's closing argument improperly urged the jury to consider the offenses together, but did not object to this argument. (I AOB 118.) Therefore, this claim should be deemed forfeited for purposes of appeal, and in any event fails to establish prejudice.

Landry does not argue that as a result of joinder, he was denied due process of law. (I AOB 99-120.) If the trial court's joinder ruling was proper at the time it was made, a reviewing court may only reverse a judgment upon showing the joinder resulted in gross unfairness amounting to a denial of due process. Even if the trial court abused its discretion in refusing to sever, reversal is unwarranted unless, to a reasonable probability, Landry would have received a more favorable result in a separate trial. (*People v. Avila* (2006) 38 Cal.4th 491, 575.) Landry does not even make this argument, and such an argument would fail.

This Court has recognized there is no prejudicial effect from joinder when the evidence of each crime is simple and distinct even though it might not have been admissible in separate trials. (*People v. Soper, supra*, 45 Cal.4th at p. 784.) The evidence in the instant case was simple and distinct and there was no great disparity in the nature of the offenses which would

likely inflame the jury. (*People v. Soper*, *supra*, 45 Cal.4th at p. 784.) In any event, there was no prejudice or spillover effect from joining counts three and four with counts one and two. (*People v. Geier, supra,* 41 Cal.4th at p. 578.) Therefore, Landry's claims the trial court abused its discretion when denying his motion to sever should be rejected.

III. BECAUSE APPELLANT AGREED TO THE MODIFICATIONS TO HIS PROPOSED QUESTIONS FOR THE JURY QUESTIONNAIRE, APPELLANT'S COMPLAINTS ABOUT THE MODIFICATIONS TO THE QUESTIONS ARE FORFEITED

In argument three Landry claims the trial court caused a miscarriage of justice by refusing to allow two questions in the jury questionnaire: first, whether prisoners were safer in jail or on the street; and second, whether the jury would consider evidence that the primary task of some prisoners was staying alive. (I AOB 121-136.) Landry complains that without these questions defense counsel could not adequately select a jury because the questions which the court did permit in the questionnaire did not address the subject of prisoner safety and survival. (I AOB 131.) While Landry does acknowledge the court modified his original questions and that he did not object to any of the trial court's determinations on a constitutional basis, he argues the failure to object does not bar the issue on appeal. (I AOB 123-124.) Landry's arguments should be rejected for two reasons: first, he agreed to the questionnaire as modified, so his claims are forfeited for purposes of appeal; and second, his arguments lack merit because the purpose of voir dire is not to indoctrinate the jury.

The purpose of voir dire is to uncover prospective jurors' potential biases. (*In re Hitchings* (1993) 6 Cal.4th 97, 110-111.) "The United States Constitution 'does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury.' [Citations.]" (*People v. Avila* (2006) 38 Cal.4th 491, 536.) Voir dire provides a means to achieve the ends of an impartial jury. (*People v. Robinson* (2005) 37 Cal.4th 592, 613.)

"'[T]here is no constitutional right to any particular manner of conducting the voir dire and selecting a jury so long as such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries are not transgressed.' [Citation omitted.]" (*People v. Robinson*, *supra*, 37 Cal.4th at p. 613.) Furthermore, a defendant has the right to jurors "'who are qualified and competent, not to any particular juror.' [Citation omitted.]" (*People v. Kelly* (2007) 42 Cal.4th 763, 777.)

Voir dire in a criminal case is governed by Code of Civil Procedure section 223.[32] (*People v. Box* (2000) 23 Cal.4th 1153, 1178.) This statute

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[32] Code of Civil Procedure section 223 provides:

> In a criminal case, the court shall conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.
>
> The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion

(continued...)

provides the trial court shall conduct the initial examination of prospective jurors and provides counsel shall be allowed to conduct voir dire, subject to limitations imposed at the discretion of the trial court. (Code Civ. Proc., § 223.) The trial court maintains considerable discretion to place reasonable limits on voir dire. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1286.) This Court has recognized "trial courts have 'great latitude in deciding what questions should be asked on voir dire.'" (*People v. Earp* (1999) 20 Cal.4th 826, 852 quoting *Mu'Min v. Virginia* (1991) 500 U.S. 415, 424 [111 S.Ct. 1899, 1904, 114 L.Ed.2d 493].) The trial court is in the best position to assess the amount of voir dire required to ferret out latent prejudice. (*People v. Robinson* (2005) 37 Cal.4th 592, 617.) Challenges to the trial court's determination to limit questioning of prospective jurors necessitates a review of the entire voir dire record. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 617.) A trial court abuses its discretion only when its decision falls outside the bounds of reason, resulting in a miscarriage of justice. (Code Civ. Proc., § 223; *People v. Navarette* (2003) 30 Cal.4th 458, 486.)

The trial court's discretion to limit voir dire includes deciding whether to use a jury questionnaire as well as what questions to allow in a questionnaire. (*People v. Tafoya* (2007) 42 Cal.4th 147, 168; *People v. Navarrette*, *supra*, 30 Cal.4th at p. 486.) In *Navarrette*, this Court upheld the trial court's exclusion of several questions proposed by the defense which purported to expose bias. This Court found no error based upon the exclusion of the questions because the defense had an opportunity to

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(...continued)

has resulted in a miscarriage of justice, as specified in Section 13 of article VI of the California Constitution.

question the venire, some of the questions were redundant of other questions and some were confusing. (*People v. Navarrette*, *supra*, 30 Cal.4th at pp. 486-487.)

It is well-established that the examination of prospective jurors should not be used "'to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.'"' [Citations.]" (*People v. Butler* (2009) 46 Cal.4th 847, 859; *People v. Abilez* (2007) 41 Cal.4th 472, 492-493; *People v. Sanders* (1995) 11 Cal.4th 475, 538-539.) The trial court does not abuse its discretion by prohibiting such questions. (*People v. Butler, supra,* 46 Cal.4th at p. 861.) This Court in *Butler* upheld the trial court's refusal to allow inquiry about an uncharged jail killing, holding a defendant cannot insist upon questions so specific that they expose the jurors to the facts of the case. (*Ibid.*) Defense counsel in *Butler* had the opportunity to ask potential jurors questions directed towards their attitudes about jailhouse killings and whether the death penalty was always appropriate under such circumstances. Similarly, this Court in *Sanders* upheld the trial court's refusal to allow voir dire using a case specific hypothetical. (*People v. Sanders*, *supra*, 11 Cal.4th at pp. 538-539.)

In the instant case, after discussing the jury questionnaire and the coming to an agreement on modifications to Landry's proposed questions, Landry agreed to it. (II RT 406.) Therefore, Landry's claims should be deemed forfeited for purposes of appeal. Assuming arguendo his claims are not forfeited, Landry's claims lack merit because the proposed questions which the court did not allow in the instant case were an attempt to educate the potential jurors of the facts of the case and to argue it, so the trial court properly restricted and modified his requested questions.

A. Factual and Procedural Background

On October 26, 2000, the prosecution and defense agreed to work together on composing a jury questionnaire which they would go over with the court; the court reserving the right to have the final say as to any questionnaire which the parties put together. (I RT 276-278.) On December 19, 2000, while discussing pretrial matters the parties again discussed the fact of their intention to present a unified questionnaire to the court for discussion on January 10, 2001. (II RT 286-291, 298.) At this point, there were three versions of the questionnaire the prosecution and defense planned to unify. (II RT 298-300.) During discussions defense counsel indicated he was uncertain as to the witnesses he would be calling, stating it depended on the prosecution's case and explaining,

> I can imagine that the witnesses I might call could be some inmates who were in the unit at the time. I could probably list those, and I don't anticipate a lot of others except maybe a couple of experts, and those ***I would like to refrain from mentioning at this time till I have a better idea where I am actually going, where the case is.***

(II RT 298; emphasis added.)

On January 11, 2001, defense counsel and the prosecutor provided the court with a jury questionnaire to which they both agreed, with the exception of two proposed defense questions. At this point discussion occurred with the court about defense counsel's two proposed questions and their subparts. (II RT 314-329.) Defense counsel indicated the two proposed questions concerned "the way guards interact with prisoners" and were to determine if any jurors had "preconceived attitudes about that one way or the other." (II RT 317.) Defense counsel conceded if the wording of his questions was "too argumentative, [he was] certainly open to. . . considering other wording." (II RT 317.)

The two questions and their subparts proposed by defense counsel were as follows:

40. What are your views on the prison system in the State of California?

A. To what extent can you consider evidence that living in the prison system, that is to say being a prisoner, is an ongoing experience entirely different from living in society as you know it?

B. Please indicate which statement best describes your opinion of life in the prison system prior to hearing evidence in this case:

Prisoners are safer on the inside than they would be on the outside

Prisoners are about as safe on the inside as they would be on the outside

Prisoners are less safe on the inside than they would be on the outside

C. Whenever your opinion as to the safety of living in the prison system may be, how willing are you to consider evidence that many prisoners' primary task on the inside is staying alive?

41. Please describe what, if anything you have seen, read, or heard about prison guards and allegations of abuse of prisoners in the prison system in California:

A. Are you willing to consider evidence that suggests that some guards take advantage of their power over prisoners, to compromise the safety of some prisoners and enhance the safety of other prisoners?

Yes No

B. Please indicate what statement best describes your attitude towards the abuse of prisoners by prison guards:

Under no circumstances can I imagine such abuse occurring

Under some circumstances can I imagine such abuse occurring

Under most circumstances I can imagine such abuse occurring

Please explain your answer:

(IV CT 1084-1085; II RT 318-319.)

The court found Landry's proposed question 40 clearly vague and the prosecutor asserted it was cumbersome and difficult to understand. (II RT 318.) However, the court permitted the introductory portion of the question without change; "What are your views on the prison system in the State of California?" (I Supplemental CT A 11.)

Concerning proposed subpart 40.A., the prosecutor suggested changing the question to ask, ***"Would you be willing to*** consider evidence that living in the prison system, that is to say being a prisoner, is an ongoing experience entirely different from living in society as you know it?" (II RT 319; emphasis indicates modification.) Defense counsel responded, "No problem" to the proposed change. (II RT 319-320.) At Landry's request, the court later agreed to add, "Please explain." (II RT 322.)

Concerning subpart 40. B., the prosecutor objected that it was argumentative, that it asked the jury to prejudge, and was ambiguous. (II RT 320-321.) The court stated it would not give defense proposed question 40.B. (II RT 321.) Regarding 40.C., defense counsel agreed the question was argumentative, and the trial court found that in light of the rewritten form of 40.A., counsel could do follow-up questions during voir dire depending on the potential jurors' answers. (II RT 321-322.) Defense counsel agreed to this modification. (II RT 322.)

The parties then discussed defense counsel's proposed question 41. (II RT 322-327.) Following discussion by all parties, the entire question was reworded so that Landry's proposed question 41.B. became question 97. a)[33] with only minor revisions to the wording. (II RT 324-326.) All parties, including defense counsel, agreed to this modification. (II RT 325.) At the request of defense counsel, his subpart 41.A. was rewritten as a follow up to question 97. a), so it became 97. b) inquiring "Are you willing to consider evidence regarding the subject matter?" (II RT 326-327.)

On February 13, 2001, when the court inquired about the agreed upon modifications to the jury questionnaire, defense counsel stated he had reviewed it and did not object. Specifically, defense counsel stated, "I have reviewed the third amended addition of the jury questionnaire which was turned in at the last appearance and ***I have no objection and would agree that that questionnaire can be used."*** (II RT 406; emphasis added.) Therefore, contrary to Landry's arguments otherwise (I AOB 123 -124), he should be deemed to have forfeited this issue for purposes of appeal.

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[33] The finalized jury questionnaire asked:

97 a) Please indicate which statement best describes your attitude toward the alleged abuse of prisoners by prison guards:

Under no circumstances could I imagine such abuse occurring
Under some circumstances I could imagine such abuse occurring
Under most circumstances I could imagine such abuse occurring

(1 Supplemental CT A 11; emphasis in original.)

B. Because Appellant Acquiesced to the Modification to the Subparts of His Proposed Question, His Claims Should Be Deemed Forfeited for Purposes of Appeal

Landry may not acquiesce to a procedure in the trial court, and then assert it as error on appeal. (*People v. Benavides* (2005) 35 Cal.4th 69, 88.) In *Benavides*, this Court held acquiescence to the voir dire procedure complained about on appeal resulted in forfeiture of the issue. (*People v. Benavides, supra,* 35 Cal.4th at p. 88.) In *Benavides*, defense counsel and the prosecutor agreed to the dismissal of eight prospective jurors based solely on their answers in the jury questionnaires, but Benavides complained on appeal this violated his rights because it departed from the statutory procedures for selecting a jury. (*People v. Benevides*, *supra*, 35 Cal.4th at pp. 87-88.) This Court in *Benavides* found the issue waived based on acquiesced. (*People v. Benavides*, *supra*, 35 Cal.4th at p. 88.) So too in the instant case.

Just as in *Benavides*, Landry acquiesced to the use of the questionnaire after going through it, participating in the modification of it, and informing the court he had no objection to its use as modified. (II RT 406.) Therefore, Landry's complaints should be deemed waived for purposes of appeal. In any event, Landry's arguments lack merit.

C. The Modifications to the Subparts of Appellant's Proposed Question for the Jury Questionnaire Did Not Result in a Miscarriage of Justice

The only subparts of his question which the trial court would not permit defense counsel to ask did not go to the prospective jurors potential bias or their ability to be impartial but, rather, constituted impermissible attempts to argue the case and indoctrinate the jury. (See *People v. Abilez*, *supra*, 41 Cal.4th at p. 493.) Specifically, Landry's questions asking potential jurors whether prisoners were safer on the inside than on the outside and whether they would be able to consider "evidence that many

prisoners' primary task" was staying alive directly correlates to the questions this Court held properly prohibited in *Butler* (question about uncharged jail killing) and *Sanders* (prohibition against using fact specific hypotheticals). (*People v. Butler*, *supra*, 46 Cal.4th at p. 861; *People v. Sanders*, *supra*, 11 Cal.4th at pp. 538-539.)

Landry analysis ignores the fact the jury was fully informed prior to filling out the questionnaire that the charged offenses were committed in prison and three of them (counts one through three) involved violence by Landry against other prisoners. (II RT 476-478.) In light of this fact, the questions in the jury questionnaire addressing prison life and abuse by prison guards, provided defense counsel with ample opportunity to determine whether jurors would be biased based on preconceived notions about life in prison.

In context with the entire jury selection process, Landry's questions were attempts to indoctrinate the jury with his defense. In fact, Landry's analysis shows his motivation to indoctrinate the jury. Landry details the defense theory of the evidence, arguing "no other question in the jury questionnaire addressed the issues of inmate safety and survival" (I AOB 127-129) and arguing he "needed to be able to probe the jurors' minds to determine their attitudes and prejudices, both known and unknown, about inmate safety and survival" (I AOB 136). However, voir dire and the use of juror questionnaires serve the purposes of uncovering jurors' biases, i.e., their ability "impartially to follow the court's instructions and evaluate the evidence," (*In re Hitchings*, *supra*, 6 Cal.4th at p. 110-111), and not whether potential jurors will favor the defense or the defense's theory of the case. The very fact the charges involved a murder in prison by an inmate and an assault by an inmate upon another inmate established the case concerned inmate safety and survival, prior to the potential jurors looking at the questionnaire. Clearly, defense counsel had the opportunity to question

potential jurors about potential biases they may have had about prison conditions, but the trial court's decision to limit and modify his questions was not beyond the bounds of reason because it simply prohibited Landry from presenting his defense theory to the jury on voir dire. (*People v. Butler*, *supra*, 46 Cal.4th at p. 859; *People v. Abilez*, *supra*, 41 Cal.4th at pp. 492-493.)

As the trial court noted, rather than allowing Landry's argumentative questions, defense counsel had the opportunity to question potential jurors based on their answers to the questions which all the parties agreed were appropriate. (II RT 321-322, 390-391.) This Court's decision in *Navarette* applies to the instant case because like the questions in *Navarrette*, the questions which the trial court prohibited about prisoner safety were confusing and defense counsel had the opportunity to follow up with potential jurors on their responses to the questions to expose bias. (*People v. Navarette*, *supra*, 30 Cal.4th at pp. 486-487.) Landry fails to establish the trial court's decision to limit and reword his proposed questions exceeded the bounds of reason. (Code Civ. Proc., § 223; *People v. Navarette*, *supra*, 30 Cal.4th at p. 486.)

Landry argues the trial court's elimination of those portions of his proposed question concerning prisoner safety completely removed this concept from the jury questionnaire and it was not adequately covered by other questions, resulting in a denial of his constitutional right to an unbiased jury. (I AOB 127-131.) While Landry goes through the seated jurors' responses, he ignores the fact he had the opportunity to question them and fails to explain how follow-up questioning was insufficient to reveal potential jurors' preconceptions amounting to an unconstitutional bias against him. Landry asserts it was critical "to determine during voir dire whether potential jurors had any bias, prejudice, particular knowledge, or viewpoint" on prison safety and survival but fails to explain why he

could not address this during voir dire. (I AOB 128.) Arguing prejudice, Landry asserts defense counsel relied primarily upon the questionnaires (I AOB 132), but the fact defense counsel did not employ follow-up questions on this issue fails to establish the entire voir dire process and jury questionnaire were fundamentally unfair.

Landry references *Witherspoon-Witt*[34] in his legal analysis, claiming he was prevented from "the seating of a jury 'uncommonly willing to condemn a man to die.'" (I AOB 127.) However, this Court has acknowledged *Witherspoon-Witt* voir dire seeks only to determine the views of prospective jurors about capital punishment in the abstract and is directed to whether, without knowing the specific facts of the case, a juror has an open mind on a penalty determination. (*People v. Butler*, *supra*, 46 Cal.4th at p. 859.) Landry was not entitled under *Witherspoon-Witt* to ask specific questions concerning the theory of his defense. Furthermore, as previously established, the jury was informed prior to filling out the jury questionnaire and voir dire of the charges against Landry and knew the charges against him involved offenses committed in prison, including murder. (II RT 476-478.) Considering this context, Landry's argument that the trial court's decision to omit some parts of his proposed question concerning the theory of his defense fails to establish he was denied due process of law.

In light of the fact Landry ultimately agreed to the questionnaire as given to the jury, his participation in the formulation of the jury questionnaire and the editing of his proposed questions, and his agreement with the restructuring of his initial questions, Landry should be deemed to

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[34] *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841] and *Witherspoon v. Illinois, et al.* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776].

have forfeited any complaints about the jury questionnaire. On the merits and considering the voir dire in its totality, Landry fails to establish he was denied due process based on the trial court's decision to edit his proposed questions and allow him to conduct voir dire regarding potential jurors' bias. Landry's argument to the contrary should be rejected.

IV. THE TWO LETTERS APPELLANT SENT TO LOWERY WERE PROPERLY ADMITTED UNDER THE SECONDARY EVIDENCE RULE AND WERE PROPERLY AUTHENTICATED; ANY ERROR WAS HARMLESS

In argument four, Landry claims the trial court committed error by allowing the admission of letters he wrote to a fellow gang member in another prison following Addis' murder because they were not properly authenticated. (II AOB 137-160; III CT 760-772.) Landry complains the copies of the letters should not have been admitted into evidence under the Secondary Evidence Rule. (II AOB 143-148.) Landry also argues the letters were not properly authenticated and were, therefore, irrelevant, inadmissible hearsay. (II AOB 148 -155). Landry asserts prejudice resulted from the admission of the letters. (II AOB 155-157.) However, Landry did not object to the admission of the letters based upon the Secondary Evidence Rule, so this argument should be deemed forfeited for purposes of appeal. Furthermore, the letters were properly authenticated and admitted into evidence. In any event, if they were improperly admitted, any error was harmless.

In general, a trial court's decision to admit or exclude evidence is reviewed on appeal for an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717- 718*; People v. Williams* (1997) 16 Cal.4th 153, 197.) Error only occurs when the trial court's decision exceeds the bounds of reason. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1519.) In addition, this Court reviews the trial court's ruling, not its reasoning. (*People v. Mason* (1991) 52 Cal.3d 909, 944.)

A. The Letters Were Properly Admitted Under the Secondary Evidence Rule

Landry complains the copies of the letters should not have been admitted into evidence under the Secondary Evidence Rule. (II AOB 143-148.) Not only is this issue forfeited for purposes of appeal but Landry is wrong. The copies of the letters were admissible under the Secondary Evidence Rule, pursuant to Evidence Code sections 1520-1522. Landry did not argue the letters were inadmissible under the Secondary Evidence Rule in the trial court below, so the argument should be forfeited for purposes of appeal. Assuming arguendo Landry did not forfeit his claim based upon the Secondary Evidence Rule, any error was harmless. The letters were properly authenticated under Evidence Code sections 403 and 1400, et. al. As will be established, the letters are properly admitted and Landry's arguments lack merit.

In support of his Secondary Evidence Rule argument Landry references two objections made at trial during the testimony of the prosecutor's NLR gang expert, Investigator Glenn Willett, neither of which addressed the Secondary Evidence Rule. (II AOB 145-146.) The first objections Landry references in support of his argument addressed questions asked by the prosecutor which were objected to on the basis of being vague and lacking relevance and not the Secondary Evidence Rule.[35]

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[35] Landry first objected to a question asked by the prosecutor on the basis that the question was speculative and irrelevant, and the court overruled the objection. (VII RT 1745.) Shortly thereafter, Landry objected to a question about who was being referred to in the letter on the basis there was nothing in the letter to make the "assumption" upon which the question was based, and the court sustained the objection. (VII RT 1745.) Immediately thereafter, Landry objected that the prosecutor was "testifying" when asking the next question, and the trial court sustained this objection before having a discussion outside the presence of the jury. (VII RT 1745-1746.)

(continued...)

(VII RT 1745-1748.) The next objections which Landry references were based upon lack of foundation or authentication that Landry wrote the letters: "There has been no authenticating witness called to establish that they are, in fact, appropriate records of the Department of Corrections. . . . And so under those circumstances, there hasn't been a proper authentication and they are just hearsay." (VIII RT 1886 -1887.)

Clearly, none of Landry's objections upon which he bases his claims on appeal addressed the Secondary Evidence Rule he now argues. The Secondary Evidence Rule only applies when the contents of a writing are at issue. (*People v. Panah* (2005) 35 Cal.4th 395, 475, citing *Hewitt v. Superior Court* (1970) 5 Cal.App.3d 923, 930.) Landry's objections at trial concerned questions by the prosecutor to the gang expert and went to the foundation for admitting the evidence and not to the contents of the letters. Objections must be specific, and Landry's failure to object on the grounds asserted on appeal results in forfeiture of the issue; the fact some objection, a "placeholder objection," was made but not the one asserted on appeal does not suffice to preserve an issue. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 22; *People v. Cain* (1995) 10 Cal.4th 1, 28.) In any event, Landry's secondary evidence argument lacks merit.

In 1998, the Legislature repealed the "Best Evidence Rule" and enacted the "Secondary Evidence Rule." (Evid. Code, §§ 1520-1523; *People v. Samuels* (2005) 36 Cal.4th 96, 129 [Secondary Evidence Rule not applied because trial started before January 1, 1999]; *In re Kirk* (1999) 74 Cal.App.4th 1066, 1073.) Since the instant trial commenced after

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(...continued)

Outside the presence of the jury, Landry objected the prosecutor's questions were vague and lacked foundation, and the trial court overruled this objection. (VII RT 1746.)

January 1, 1999, the Secondary Evidence Rule applies to this action. (*People v. Samuels*, *supra*, 36 Cal.4th at p. 129.)

The Secondary Evidence Rule allows the content of a writing to be proved by either: (1) an otherwise admissible original, or (2) by otherwise admissible secondary evidence, unless the court determines the secondary evidence should be excluded because either a genuine dispute exists about the material terms of the writing and justice requires the exclusion, or admission of the secondary evidence would be unfair. (Evid. Code, §§ 1520, 1521, subd. (a)(1) & (2)[36].) In addition to the general exceptions specified in Evidence Code section 1521, the court in a criminal action must exclude secondary evidence if it determines "that the original is in the proponent's possession, custody, or control, and the proponent has not made

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[36] Evidence Code section 1521 provides:

> (a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following:
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> (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.
>
> (2) Admission of the secondary evidence would be unfair.
>
> (b) Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1523 (oral testimony of the content of a writing).
>
> (c) Nothing in this section excuses compliance with Section 1401 (authentication).
>
> (d) This section shall be known as the "Secondary Evidence Rule."

the original reasonably available for inspection at or before trial," unless it involves "a duplicate as defined in section 260."[37] (Evid. Code, § 1522, subd. (a).) Landry's complaint concerns electronic reproductions of the letters, i.e., a duplicate as defined in Evidence Code section 260, so the exclusions under Evidence Code section 1522 do not apply.

While respondent is not aware of any criminal case authority directly addressing Evidence Code sections 1521 and 1522, Witkin as well as case authority prior to enactment of the Secondary Evidence Rule addressing the same concepts provide instruction:

> Unlike the former best evidence rule, the new rule does not make secondary evidence presumptively inadmissible to prove the content of a writing. Instead, the new rule makes that evidence generally admissible. [Citation omitted.] Thus, Evid. Code section 1521, entitled ***the "Secondary Evidence Rule" (Evid. Code, § 1521(d)), expressly permits proof of the content of a writing "by otherwise admissible secondary evidence."*** (Evid. Code, § 1521(a).) "The nature of the evidence offered affects its weight, not its admissibility." [Citation omitted.]

(2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, § 31, 157-158; emphasis added.)

In the instant case, the copies of the letters were not presumptively inadmissible. (Evid. Code, § 1521.) "The foundation for admission of a writing or copy is satisfied by the introduction of evidence sufficient to sustain a finding that the writing and copy are what the proponent of the evidence claims them to be." (*People v. Garcia* (1988) 201 Cal.App.3d

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[37] Evidence Code section 260 provides:

> A 'duplicate' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

324, 329.) At trial, the prosecutor explained the original letters were copied and then sent on to the intended recipient, so they were no longer in the possession of the institution. (VIII RT 1887-1888.) Landry's complaints at trial and on appeal do not attack the prosecution's representation that copies admitted were prison letters. Landry raised no "genuine issue as to authenticity of the original or. . . that under the circumstances it would be unfair to use the duplicate in lieu of the original." (*People v. Atkins* (1989) 210 Cal.App.3d 47, 55.) Although both *Garcia* and *Atkins* involved the repealed Best Evidence Rule, the same principles should apply in the instant case, if not more so, because Evidence Code section 1521 expressly permits proof of a writing by a secondary source.

At trial, Landry objected to the admission of the letters, claiming there was no evidence Landry authored them. (VIII RT 1885-1887.) The prosecution countered the letters were self authenticating and then made an offer of proof how they were intercepted and copied pursuant to standard prison procedure. (VIII RT 1887-1888.) However, there was no question that the copies were authentic reproductions of the original letters intercepted by the prison. They were therefore properly admitted under the Secondary Evidence Rule.

Even if Landry's Secondary Evidence issue is preserved for purposes of appeal, when "no dispute exists regarding the accuracy of the evidence received in lieu of the original writing, any error in admitting such evidence is harmless." (*People v. Panah*, *supra*, 35 Cal.4th at p. 475.) Therefore, contrary to Landry's arguments on appeal, the copies of the letters were properly admitted because there is no dispute regarding the accuracy of the copies received in lieu of the original letters.

Landry complains the Secondary Evidence Rule should have resulted in the exclusion of the letters because a dispute existed concerning whether the letters were actually sent on to their recipients, whether Landry actually

authored the letters, and whether the subject matter of the letters addressed the Addis murder. (II AOB 144-147.) However, Landry's arguments concern a question of authenticity of the originals and not the accuracy of the copies. Therefore, the letters were properly admitted under the Secondary Evidence Rule as accurate copies. As will be established, the letters were also properly admitted because they were properly authenticated. Landry's arguments to the contrary should be rejected.

B. The Letters Were Properly Authenticated

A writing must be authenticated before it may be received into evidence. (Evid. Code, § 1401.) Evidence Code section 1400 provides: "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (*People v. Miller* (2000) 81 Cal.App.4th 1427, 1445.) Objecting that a document was not authenticated concerns whether the introduction of evidence was sufficient to sustain a finding that it was the writing the proponent claimed it to be and not whether the contents of the document were true. (*Interinsurance Exchange v. Velji* (1975) 44 Cal.App.3d 310, 318; *City of Vista v. Sutro & Co.* (1997) 52 Cal.App.4th 401, 412.)

Under Evidence Code section 403, authentication is a preliminary fact that is first determined by the trial court and that is then subject to redetermination by the jury. (Evid. Code, § 403, subds. (a)(3), (c)(1); *People v. Fonville* (1973) 35 Cal.App.3d 693, 708-709.) The proponent of the proffered evidence has the burden to produce evidence as to the existence of the preliminary fact. (Evid. Code, § 403, subd. (a).) The trial court decides whether the evidence is sufficient to permit the jury to find the preliminary fact true by a preponderance of the evidence, even if the trial judge would personally disagree. (*People v. Guerra* (2006) 37 Cal.4th

1067, 1120; *People v. Marshall* (1996) 13 Cal.4th 799, 832-833.) The fact conflicting inferences can be drawn concerning authenticity goes to the document's weight as evidence, not its admissibility. (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321.) The trial court should only exclude the proffered evidence if the showing of preliminary facts is too weak to support a favorable determination by the jury. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1120; *People v. Lucas* (1995) 12 Cal.4th 415, 466.) This Court reviews a trial court's decision as to the existence of a preliminary fact under the abuse of discretion standard. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1120.)

The Evidence Code enumerates various ways in which a document may be authenticated. (See Evid. Code, §§ 1401-1421.) Authentication need not be established by an investigator recounting the chain of custody or, indeed, in any particular manner: "The law is clear that the various means of authentication as set forth in Evidence Code sections 1410-1421 are not exclusive." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1372-1373; *Young v. Sorenson* (1975) 47 Cal.App.3d 911, 915.) "'[L]ike any other material fact, the authenticity of a letter may be established by circumstantial evidence . . . .'" (*Chaplin v. Sullivan* (1945) 67 Cal.App.2d 728, 734.) If "there is sufficient evidence to sustain a finding that the writing is what the proponent claims, the authenticity of the document becomes a question of fact for the trier of fact." (*McAllister v. George* (1977) 73 Cal.App.3d 258, 262.)

While one method of establishing the genuineness of a document involves comparing the handwriting on a questioned document to an authenticated exemplar of the alleged author's handwriting (Evid. Code, § 1417; *People v. Rodriguez* (2005) 133 Cal.App.4th 545, 554), this is not the only way of authenticating. Matters such as content, location, or other

circumstantial evidence may also show authentication. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383 [statutory methods not exclusive]; *Chaplin v. Sullivan* (1945) 67 Cal.App.2d 728, 734.) Innumerable ways exist in which a document may be authenticated. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1372; *People v. Gibson* (2001) 90 Cal.App.4th 371, 383; *McAllister v. George* (1977) 73 Cal.App.3d 258, 263.)

Evidence Code section 1410 provides: "Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved." Evidence Code section 1421 provides: "A writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing." Furthermore, Evidence Code section 1421 uses the word "author" and not the word "writer," so a document need not be written by an individual in order for that person to be the author for purposes of authentication. (*People v. Lynn* (1984) 159 Cal.App.3d 715, 736, fn. 10.) "Accordingly, it is not necessary for purposes of authentication of a writing that the writing be physically created by the author's hand." (*People v. Lynn*, *supra*, 159 Cal.App.3d at p. 736, fn.10.)

As to authentication based on content, pursuant to Evidence Code section 1421, appellate courts have upheld a trial court's preliminary finding of authentication based on the contents of a writing under circumstances where it was "improbable that anyone could have forged them" (*Chaplin v. Sullivan*, *supra*, 67 Cal.App.2d at p. 734), and where it was "unlikely anyone other than [the alleged author] authored the notes" (*People v. Lynn* (1984) 159 Cal.App.3d 715, 735). Therefore, this method of authentication applies if it is unlikely that someone other than the alleged author would have authored the document given the information it contained.

The court in *Olguin* upheld the admission of lyrics to two rap songs because they referenced the author by the defendant's gang moniker and an easily derived nickname and because the lyrics referenced the defendant's gang and his part-time job. (*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1372.) In *Gibson* – a case involving charges of pimping and pandering – the court upheld the admission of transcripts found in Gibson's hotel room and home based on their location, because they described in first-person the business of prostitution, and because the author's name was one of Gibson's aliases. (*People v. Gibson*, *supra*, 90 Cal.App.4th at pp. 375-376, 382-383.) Just as *Olguin* and *Gibson*, the letters in the instant case were properly admitted. Not only did the envelope for one of the letters have Landry's name and location at CIM for the return address, but also the letters were signed by "–S –" and "Smurf" – Landry's known NLR gang moniker. Also, the contents of the letters was such that it was unlikely anyone other than Landry wrote them. (*People v. Lynn*, *supra*, 159 Cal.App.3d at p. 739.)

As Officer Lacey testified, the two letters, People's Exhibits 66 and 67, were intercepted by prison officers and sent to his office. (VII RT 1759-1761.) Pursuant to standard prison protocols, the letter dated September 9, 1997, (hereinafter, Exhibit 66) was intercepted and sent to Officer Lacey before it left CIM. (VII RT 1759-1760.) Officer Lacey made a copy of the letter as well as the envelope, stamped the copy with his office stamp, and sent the letter on to its intended recipient. (VII RT 1760-1762.) Exhibit 66's envelope return address had Landry's name, prison number, and address in Cyprus segregation. (VII RT 1761; III CT 766.)

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Additionally, the letter itself contained circumstantial evidence establishing Landry as its author. The letter made references to the murder ("Yeah this 187 kinda put me at ease, had to earn it, bein' in prison for nothin' aint happenin."[38]); plans to claim self-defense ("I'll be calling Joey down to testify that he heard dude threatening to kill me on the yard, he was upstairs in the vent, and heard it all!"), and Landry's plan to present a mental defense ("Buz will be down to testify on my personality disorder (Bi-polar), and it gets bad when I don't get my meds. He knows this, also, if you could let him know I need em too, and will be callin'. They weren't given me my meds here, their fault! [Smiling face]"). (VII RT 1734-1736; III CT 767.) Additionally, the letter used NLR gang lingo throughout and was addressed to a prominent NLR gang member, Joseph Lowery. (VII RT 1701-1702, 1734-1736; III CT 766-767.) This circumstantial evidence – the letter being confiscated at CIM where Landry was housed with the return address identifying Landry with his CIM prison information, discussing the murder as well as his plans to claim self-defense and a psychological disorder, along with the unique gang lingo peppered throughout the letter and a prominent NLR gang member as the intended recipient – established the authenticity of the letter and supported its admission into evidence pursuant to Evidence Code sections 1400, 1410, 1421. Sufficient evidence established the preliminary fact that Landry was the author of Exhibit 66, pursuant to Evidence Code section 403, in order to place it before the jury for them to consider.

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[38] During the hearing on the offer of proof regarding the testimony of Investigator Glenn Willett, he opined this referenced Landry earning a place in the gang. (VII RT 1711.)

Similarly, circumstantial evidence established Landry authored the second letter, Exhibit 67, because it contained matters unlikely known to anyone other than Landry. The second letter was intercepted by Officer Harrison at Corcoran State prison and was faxed to Officer Lacey at CIM who was conducting the investigation into the murder of Addis by Landry. (VII RT 1761-1762.) After leaving CIM, Landry was housed at Corcoran from which the fax was sent and was dated December 22, 1997, corresponding with the time when Landry was at Corcoran. (VII RT 1761-1762; III CT 769-771.) Additionally, the letter is again addressed to "Mr. Lowry", the same recipient of Landry's first letter (Exh. 66), it refers to his transfer from CIM to Corcoran ("I been relocated. . ."), it uses the same NLR gang lingo, it refers to Landry's anticipated court appearances in January and a possible competency proceeding ("I should be truckin to court in Jan. sometime, . . . they have until Feb. on the 1381, possible D.A. reject? [angry face] Possible!"), and it was signed using Landry's NLR gang moniker, "Smurf". (VII RT 1737-1740; III CT 771.)

Just as with Exhibit 66, Exhibit 67 was properly entered into evidence pursuant to Evidence Code sections 403 and 1400 et al. because sufficient circumstantial evidence established by a preponderance of the evidence the preliminary fact Landry authored the letter. (Evid. Code, § 403; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1120.) Likewise, circumstantial evidence supported the authenticity of the letters. (Evid. Code, §§ 1400, 1410, 1421; *People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1372; *People v. Gibson*, *supra*, 90 Cal.App.4th at pp. 382-383.) Landry's arguments that the letters were improperly admitted lack merit because he focuses on individual details without considering the totality of the evidence supporting their admission.

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Arguing the copies of the letters were not properly admitted under the Secondary Evidence Rule, Landry asserts the prosecution did not establish the original letters were unavailable because the postage stamp on Exhibit 66 was not canceled and there was no testimony by Officer Harrison that he mailed Exhibit 67 rather than retaining it at Corcoran. (II AOB 143-145.) However, Landry ignores the testimony of Investigator Lacey that Exhibit 66 (the September 1997 letter) was intercepted at CIM where Landry was still confined and Investigator Lacey was located, Investigator Lacey copied the envelope and letter, and then sent it off to the addressee. (VII RT 1760-1762.) Therefore, the stamp would not be canceled until after it was mailed, i.e., after Investigator Lacey copied the envelope and letter. Furthermore, Investigator Lacey explained letters were sent to their intended recipients and not kept after they were copied so the inmates would not know they had been intercepted. (VII RT 1762.) The same is true regarding Exhibit 67 (the December 1997 letter) because the fax copy of the letter came from Corcoran where Landry was then housed, and it can be assumed the letter was sent on to Lowery after it was copied pursuant to the standard protocol outlined by Investigator Lacey. The fact only copies of the letters existed supported the authenticity of the letters rather than defeated their admission under the Secondary Evidence Rule.

In his argument that the letters were improperly admitted under the Secondary Evidence Rule, Landry also asserts there was a genuine dispute about the material terms of the letters, especially whether Landry authored them and whether they reflected his involvement in the Addis homicide. (II AOB 145-146.) As previously established, this was not a question for purposes of admitting the letters under the Secondary Evidence Rule except to the extent it addressed the authenticity of the letters. (Evid. Code, § 1521, subd. (c).) There was no dispute over the accuracy of the evidence

received in lieu of the original writing, so any error in admitting the evidence under the Secondary Evidence Rule was harmless. (*People v. Panah*, *supra*, 35 Cal.4th at p. 475.)

Landry asserts the letters themselves indicated they were written by different persons because the first one was written in block print which bore no resemblance to the cursive script of the second letter. (II AOB 145, 150.) Landry is wrong. While the letter portion of Exhibit 66 is written in block print, the envelope is written in both cursive as well as block print. (III CT 766-768.) Specifically, on the envelope Landry wrote "Mr. Joseph Lowery" in cursive and the rest of the envelope in block print which matches the letter. (III CT 766.) Landry's cursive writing of "Mr. Lowery" on the envelope in Exhibit 66 matches the cursive writing of "Mr. Lowery" in Exhibit 67. (III CT 766, 771.) Therefore, contrary to Landry's argument otherwise, the writing in both letters match, and the fact Exhibit 66 identifies Landry as the writer based on the return address strongly supports the fact he wrote both letters. Furthermore, the prosecution did not need to establish Landry wrote both letters in his own hand to establish authenticity. (*People v. Lynn*, *supra*, 159 Cal.App.3d at p. 736, fn. 10.)

Landry complains it was debatable the subject matter of the letters addressed the Addis murder and there are several references in the letters for which no explanation was provided. (II AOB 145-146.) Landry also complains much of the information in the letters was known by many people, i.e., his gang moniker Smurf, his CDC prison number, and the facts of the murder, so the letters could not have been authenticated on the basis that they contained information "unlikely to be known by anyone other than" Landry. (II AOB 151-154.) While the testimony of Investigator Lowrey and Investigator Willett put many of the statements in both letters into context, establishing Landry authored both letters, the fact portions of

the letters referenced matters unexplained did not detract from those statements in the letters referencing the murder and Landry's defense strategy. That is, many of the statements in the letters referenced Landry's planned self-defense, his "bipolar" psychological condition, as well as his court appearances; not facts generally known to everybody.

The fact Landry signed Exhibit 67 with his gang moniker and used his name in the return address of Exhibit 66 also supported the fact he authored both letters just as the use of aliases and monikers supported authenticity in *Olguin* and *Gibson*. The fact other people knew Landry by his gang moniker, Smurf, did not detract from the fact he signed the second letter using this name. Landry's arguments to the contrary should be rejected.

Landry argues that because the letters were not properly authenticated, they were improper hearsay and not admissible as statements by a party opponent. (II AOB 154-155.) Contrary to Landry's underlying premise, the letters were properly authenticated as having been written by him. The case referenced by Landry is distinguishable; *People v. Lewis* (2008) 43 Cal.4th 415, 497-498. Lewis involved drawings which the prosecution conceded someone other than the defendant made, so they were not admissions under Evidence Code section 1220. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 498 [prosecutor's theory was that the codefendant drew the drawings].) All of the evidence in the instant case already set forth above established Landry authored the letters; therefore, the letters were admissible as admissions by a party opponent.

Landry fails to establish the trial court's decision to allow the letters to go to the jury exceeded the bounds of reason. The letters were properly admitted under the Secondary Evidence Rule and were properly authenticated for the jury's consideration. Landry's arguments to the contrary lack merit and should be rejected.

C. Even If the Letters Were Improperly Admitted, No Prejudice Resulted

Assuming arguendo the letters were improperly admitted, Landry fails to establish prejudice. To establish prejudice Landry asserts that without the letters, the defense expert testimony at the guilt phase established he committed the murder under duress, and at the penalty phase without the letters there was no foundation for the prosecution's argument that he committed the murder to elevate his status in the gang. (II AOB 157-159.) Landry also notes the jury deliberated for four days during the penalty phase and in light of the expert testimony regarding his mental disease, it was a close case so the admission of the evidence was prejudicial. (II AOB 159-160.)

Landry's argument lacks merit because duress is not a defense to murder. (*People v. Maury* (2003) 30 Cal.4th 342, 421-422; *People v. Anderson* (2002) 28 Cal.4th 767, 772.) While Landry attacks this well-established principle of law later in his briefing (II AOB 172- 208; Argument 6), it does not change its validity. Landry's argument that the admission of the letters prejudiced him by countermanding his duress defense lacks merit because duress is not a defense to murder. (*People v. Maury*, *supra*, 30 Cal.4th at p. 421.) That he was allowed to present evidence of duress does not change this fact.

Furthermore, Landry overstates the import of the letters during the guilt and penalty phases while ignoring other critical evidence establishing his guilt. Likewise, Landry ignores the vacuous void in the evidence – other than rank speculation – supporting his duress defense.

Evidence other than the letters established Landry's connection to and voluntary involvement with the NLR gang at the guilt phase. Investigator Willett identified numerous NLR gang tattoos on Landry's body. (VII RT 1727-1729, 1732-1734.) NLR gang shot callers led exercises.

(V RT 1228; VII RT 1729-1730.) Landry, inmate Green (a shot caller for the NLR gang) and other NLR gang members openly associated with each other, and Landry on occasion led exercises on the exercise yard with inmate Green. (V RT 1133, 1228-1229, 1233-1234; VI RT 1266-1277; VIII RT 1782.) Landry's gang tattoos and leading exercises with inmate Green and other NLR gang members established he was more than just a frightened NLR prison gang patsy as argued by Landry but, rather, a respected and feared NLR gang member.

Furthermore, there was absolutely no evidence inmate Green coerced Landry to murder Addis. Officer Maldonado's speculations that Addis was in jeopardy because of Green's rantings prior to Addis' release on the yard did not establish Landry had been coerced to kill Addis. While there was testimony aplenty of repercussions to an inmate who failed to follow a gang order, there was nothing but speculation that Landry was coerced to assault Addis. Landry's entire defense was based upon the premise that because he killed Addis, he must have been coerced or forced to do so by NLR gang duress. Missing from the defense was a single shred of direct or circumstantial evidence establishing Landry was coerced or forced to commit the murder. The fact Landry committed a vile act in no way established he was forced to do so under duress.

Regarding the penalty phase, Landry completely overlooks the fact he committed numerous violent acts against other inmates and prison officials as well as the fact he was found on numerous occasions with weapons either in his cell or in his rectum. Landry's out-of-control violent behavior in prison caused the officers at Calipatria to stop the filing of new disciplinary violation actions against him just so he would be transferred to a facility with a Secured Housing Unit, establishing the fact Landry was beyond rehabilitation or a life of civility even in prison. (XI RT 2730-2731.) As Landry acknowledges (II AOB 151-152), the guilt phase

evidence tied Landry to Lowery because they not only shared a cell together at one point but, also, attacked another inmate together and worked together to conceal a weapon in Landry's rectum on two occasions. (XI RT 2528-2531, 2533-2541, 2556-2562, 2564, 2575, 2615-2619, 2621-2622, 2714-2719, 2731.) Considering the abundant evidence supporting the imposition of the death penalty, the admission of the letters was inconsequential.

Assuming arguendo the two letters were improperly admitted into evidence, any error was harmless under any standard. Landry's conviction and death penalty should remain intact.

V. THE TRIAL COURT PROPERLY DISCHARGED THE SICK JUROR

In argument five Landry asserts the trial court's dismissal of a sick juror prior to the jury instruction during the guilt phase was an abuse of discretion. (II AOB 160-172.) Landry claims the need to discharge Juror No. 10 was not established as a "demonstrable reality" even though she was ill and anticipated being out the remainder of the week (Wednesday through Friday). (II AOB 165-172.) Landry asserts Juror No. 10 would have been available in three days and argues that because there was a two week interval between the time the jury returned a verdict and the beginning of the penalty phase, a "three-day" delay was reasonable. (II AOB 170.) Landry's arguments lack merit because the trial court did not abuse its discretion by refusing to wait for Juror No. 10's health to return.

Established law governs the dismissal of an ill or sick juror. Penal Code section 1089 provides in pertinent part that "If at any time, whether before or after the final submission of the case to the jury, a juror. . . becomes ill, . . . the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box. . . . " Whether to replace an ill juror lies within the sound discretion of the trial

court. (*People v. Roberts* (1992) 2 Cal.4th 271, 325; *People v. Dell* (1991) 232 Cal.App.3d 248, 253.) As the court in *Dell* noted, "Thus, the grounds for use of the alternates are: 1) death of a juror; 2) illness of a juror; 3) good cause shown to the court; and, 4) request of a juror for good cause." (*People v. Dell* (1991) 232 Cal.App.3d 248, 253; emphasis added.) The juror's inability to perform their functions as a juror must appear in the record as a "demonstrable reality." (*People v. Zamudio* (2008) 43 Cal.4th 327, 349.) However, the trial court need not require a juror to appear in court ill or have a hearing on the issue of a juror's illness to discharge such a juror. (*People v. Dell*, *supra*, 232 Cal.App.3d at pp. 254 -256.)

This Court reviews the trial court's determination to excuse a juror for abuse of discretion. (*People v. Zamudio* (2008) 43 Cal.4th 327, 349; *People v. Bell* (1998) 61 Cal.App.4th 282, 287.) An abuse of discretion occurs where the court's decision exceeds the bounds of law or reason. (*People v. Bell*, *supra*, 61 Cal.App.4th at p. 287.) This Court has found when a juror has good cause to be absent from trial for an indefinite period of time, the trial court's decision to replace the juror is not an abuse of discretion. (*People v. Smith* (2005) 35 Cal.4th 334, 349.) The decisions in *Roberts*, *Bell* and *Smith* are instructive to the instant case and do not support Landry's analysis that the trial court was obligated to wait for the sick juror to become well.

In *Roberts*, a juror notified the court during deliberations that she was ill with a sore throat and high blood pressure and informed the court she "might be able to return in three days." (*People v. Roberts*, *supra*, 2 Cal.4th at pp. 323-324.) Defense counsel objected to replacement of the juror. (*People v. Roberts*, *supra*, 2 Cal.4th at p. 324.) This Court upheld the trial court's decision to replace the juror, finding "the [trial] court did its

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duty by telephoning the ill juror, discussing the matter on the record with counsel, and stating its reasons." (*People v. Roberts*, *supra*, 2 Cal.4th at p. 325.)

In *Bell*, a juror informed the trial court his son needed to be taken to the doctor due to a medical emergency. (*People v. Bell*, *supra*, 61 Cal.App.4th at p. 287.) The juror was vague about the nature of the emergency, believed that he could be in court by 1:30 p.m. later that day, and agreed to phone by 10:30 a.m. to update the trial court about his situation. (*Ibid.*) Over Bell's objection to wait for the juror's return phone call and availability to return to jury duty, the trial court replaced the juror. (*People v. Bell*, *supra*, 61 Cal.App.4th at pp. 287-288.) The trial court's decision to excuse the juror was upheld, and the trial court rejected the argument the trial court should have followed a different course of action. Specifically, the trial court found "these arguments completely overlook the applicable standard of review. We will not second-guess the trial court's discretionary decisions. We review only for an abuse of discretion. ***'The exercise of that discretion is not rendered abusive merely because other alternative courses of action may have been available to the trial judge.'*** [Citation omitted.]" (*People v. Bell*, *supra*, 61 Cal.App.4th at pp. 288-289; emphasis added.)

In *Smith*, a juror's elderly mother became ill in another state, and the juror informed the court he needed to see her but was willing to continue as a juror if the court waited for his return. (*People v. Smith*, *supra*, 35 Cal.4th at p. 348.) Over Smith's objection, the trial court replaced the juror. Upholding the trial court's decision this Court relied upon *Bell* with approval to conclude that when a juror has good cause to be absent from trial for an indefinite period of time, the trial court does not abuse its discretion by replacing that juror. (*People v. Smith*, *supra*, 35 Cal.4th at p. 349.)

In the instant case, the trial court did not commit error by discharging Juror No. 10 as a result of illness rather than further delaying the proceedings in order to wait for Juror No. 10 to become well. On April 12, 2001, the jury heard the close of testimony and were dismissed until April 18. (IX RT 2109, 2161, 2206.) On Wednesday, April 18, court reconvene for closing arguments and instruction of the jury, but outside the presence of the jury, the court informed the parties that Juror No. 10 was out sick with the flu. (IX RT 2209.) The previous day, all jurors had reported with the court. (IX RT 2211.)

Landry requested time to consider his position, and then informed the court he objected to the discharge of the juror because it would only leave one alternate juror. (IX RT 2210.) Defense counsel asked the court to wait until the following day to see how Juror No. 10 was feeling, and the prosecutor asked the court to contact the juror to "find out what her prognosis is for getting better." (IX RT 2211.) The court agreed to contact the juror on speakerphone with counsel present. (IX RT 2211.)

When the court obtained a telephonic connection with Juror No. 10 and asked about her symptoms as well as how long she expected it would take to be well enough to return to jury service, Juror No. 10 responded: "Urn, I've been sick all night throwing up. I've got some kind of a bug, and I don't anticipate that I'd be well this week." (IX RT 2212-2213.) When the court asked Juror No. 10 if she thought she would be better on Monday, Juror No. 10 answered affirmatively but also informed the court she had not been to a doctor. (IX RT 2213.)

After the telephone call, defense counsel asked the court to continue the proceedings for Juror No. 10 to get better even though it meant missing three court days. (IX RT 2213-2214.) The court thanked defense counsel for his comments, excused Juror No. 10 from further jury service and substituted in alternate Juror No. 1. (IX RT 2214.) Landry fails to

establish the trial court's decision to excuse Juror No. 10 exceeded the bounds of reason. (*People v. Bell*, *supra*, 61 Cal.App.4th at p. 287.)

Just as the trial court in *Roberts* did not abuse its discretion when excusing an ill juror who believed she might have been able to return in three days to jury duty, so too the trial court did not abuse its discretion in the instant case. (*People v. Roberts*, *supra*, 2 Cal.4th at pp. 323-324.) The trial court in the instant case followed the same protocols as the trial court in *Roberts*, informing the parties of the ill juror's problem, contacting the juror, obtaining an estimate of three days for the juror to become well and excusing the juror. (*People v. Roberts*, *supra*, 2 Cal.4th at p. 325.) Clearly, Juror No. 10's illness appears on the record as a demonstrable reality, so the trial court's decision to excuse her was not an abuse of discretion. Landry's arguments to the contrary lack merit.

Initially, when arguing the record fails to establish Juror No. 10's ability to deliberate as a "demonstrable reality" Landry relies upon *People v. Barnwell* (2007) 41 Cal.4th 1038. (II AOB 164.) However, *Barnwell* involved a question of whether a juror was refusing to deliberate, not a juror who was ill. (*People v. Barnwell*, *supra*, 41 Cal.4th at pp. 1048-1051.) As the court in *Dell* noted, Penal Code section 1089 recognizes four different grounds for discharging a juror and replacing them with an alternate, one of which is illness of a juror. (*People v. Dell*, *supra*, 232 Cal.App.3d at p. 253.) The question of whether the facts establish as a demonstrable reality that a juror was ill is substantially different from the question of whether the facts establish as a demonstrable reality whether a juror's refusal to deliberate constituted good cause. (*People v. Dell*, *supra*, 232 Cal.App.3d at pp. 254-256 [analysis recognizing difference between excusing juror based on illness and based on good cause or other request of juror].) While a trial court's determination of the facts must appear on the

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record as a demonstrable reality, nothing in the record in the instant case contradicts the fact Juror No. 10 suffered from an illness which precluded her continuing in her duties as a juror.

Landry does not challenge the fact Juror No. 10 was sick but, instead, argues the discharge of Juror No. 10 "was not required as a demonstrable reality because of her temporary illness." (II AOB 165.) Landry attempts to argue Juror No. 10's illness was not "a sufficiently debilitating condition to excuse her from juror duty" as a juror with stomach problems[39] or severe arthritis[40] (II AOB 166-167), was not of a comparable severity as a juror in a case who waved her arms wildly, screamed and conducted herself in an uncontrollable manner[41] (II AOB 167-168), nor as severe as a juror who had seizures[42] (II AOB 168-169). However, none of the authority referenced by Landry purported to establish a benchmark standard of severity of illness which a juror must obtain before being released from duty by the trial court. Landry has simply found cases spanning from 1934 through 1984 which involved jurors with different illnesses than Juror No. 10. Furthermore, most of the cases referenced by Landry predate the current version of Penal Code section 1089.

As already established, this Court more recently than any of the cases referenced by Landry upheld the trial court's decision to discharge a juror who was sick but believed she would be able to return to jury duty in three

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[39] *People v. Lanigan* (1943) 22 Cal.2d 569, 577-578. (II AOB 165-166.)

[40] *People v. Pervoe* (1984) 161 Cal.App.3d 342, 355-356. (II AOB 166-167.)

[41] *People v. Tinnin* (1934) 136 Cal.App. 301, 318-319. (II AOB 167-168.)

[42] *People v. VonBadenthal* (1935) 8 Cal.App.2d 404, 410-412. (II AOB 168-169.)

days just as Juror No. 10 did in the instant case. (*People v. Roberts*, *supra*, 2 Cal.4th at p. 325.) Furthermore, the plain language of Penal Code section 1089 states that "If at any time. . . a juror. . . becomes ill. . . the court may order the juror to be discharged. . . " Nothing in Penal Code section 1089 suggests a degree of illness a juror must attain to be discharged or, more importantly, that the trial court must wait some unspecified amount of time for the juror to become well before discharging them. In fact, *Roberts*, *Bell* and *Smith* established the trial court's decision to excuse a juror will not be reversed simply because there was an alternative course of action or because a juror believed they could return at a later time. (*People v. Roberts*, *supra*, 2 Cal.4th at pp. 324-325; *People v. Smith*, *supra*, 35 Cal.4th at p. 349; *People v. Bell*, *supra*, 61 Cal.App.4th at pp. 288-289.) Additionally, the court in *Dell* recognized the substantive difference between excusing a juror for illness and excusing a juror who purportedly could not continue based on non-health-related reasons. (*People v. Dell*, *supra*, 232 Cal.App.3d at pp. 254-256.)

Landry also argues a three-day delay in the proceedings was not unreasonable in light of previous delays and in light of the two-week delay between the guilty verdict and the penalty phase. (II AOB 169-170.) However, the question on appeal is not whether a three-day delay was reasonable but whether the trial court abused its discretion, i.e., its decision exceeded the bounds of reason, when excusing Juror No. 10 because of her illness. (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 349.) Landry references no authority that the trial court has a duty to wait for an ill juror to become well, and this would defeat the language of Penal Code section 1089 providing for the discharge of a juror who "becomes ill."

Furthermore, another three-day delay would have kept the jury from being instructed and beginning deliberations for eleven days rather than six days after the close of evidence; from April 12 through April 23, the

Monday following Wednesday, April 18. Keeping the jury from deliberating for eleven days rather than just six days would have been unreasonable in light of the circumstances of the instant case and not vice versa as argued by Landry. This also assumes Juror No. 10 would have been well enough to come in on Monday, and if she was not well, the delay would have been for naught.

Additionally, as already established, the fact the court had alternatives and could have waited for the juror to feel better fails to establish an abuse of discretion. (*People v. Smith*, *supra*, 35 Cal.4th at p. 349; *People v. Bell*, *supra*, 61 Cal.App.4th at pp. 288-289.) Equally irrelevant is the fact that the jury waited two weeks after finding Landry guilty and the beginning of the penalty phase because the trial court's determination is based upon the situation at the time it existed and not on facts which occurred later. (*People v. Lanigan* (1943) 22 Cal.2d 569, 578.) Landry's arguments that the court should have waited for Juror No. 10 to feel better lacks merit, having no support in the law or the facts.

Landry fails to establish the trial court abused its discretion by discharging Juror No. 10 due to her illness rather than waiting five additional days for Juror No. 10 to feel better. There was no guarantee Juror No. 10 would have been better the following Monday, and the court did not abuse its discretion by discharging Juror No. 10 so the jury could hear instruction and argument and then begin deliberations. Landry's arguments to the contrary should be rejected and the verdict upheld on appeal.

VI. THE TRIAL COURT PROPERLY REJECTED LANDRY'S REQUESTED SPECIAL INSTRUCTIONS ON DURESS

In argument six Landry claims that even though duress is not acknowledged in California as a defense to murder, there was sufficient evidence of duress to justify his four proposed and rejected special

instructions to mitigate premeditation and deliberation as well as malice aforethought, and Landry challenges the constitutionality of this Court's decision in *People v. Anderson*, *supra*, 28 Cal.4th at p. 770, rejecting duress as a defense to murder. (II AOB 172-208.) Landry argues he was denied constitutional due process of law because he was not allowed to have the jury instructed with a duress defense. Landry makes a multifaceted attack on the trial court's refusal to give his four requested special duress instructions, even though the court did give a modified version of CALJIC No. 4.40 on duress applicable to count one, first degree murder. Landry's arguments lack merit and should be rejected.

As Landry acknowledges (II AOB 186-189), this Court in *Anderson* and subsequent cases resoundingly rejected the underlying premise of Landry's argument that duress is a defense to murder – capital murder or otherwise. (*People v. Burney* (2009) 47 Cal.4th 203, 249; *People v. Wilson* (2005) 36 Cal.4th 309, 331-332; *People v. Maury* (2003) 30 Cal.4th 342, 421; *People v. Anderson*, *supra*, 28 Cal.4th at pp. 770, 780.) While this Court in *Anderson* did acknowledge duress may provide a defense to a felony murder by negating the underlying felony (*People v. Anderson*, *supra*, 28 Cal.4th at p. 784), the instant case does not involve felony murder.

Additionally, this Court in *Anderson* did acknowledge, "a killing under duress, like any killing, may or may not be premeditated, depending on the circumstances. If a person obeys an order to kill without reflection, the jury might find no premeditation and thus convict of second degree murder. ***As with implied malice murder, this circumstance is not due to a special doctrine of duress but to the legal requirements of first degree murder.***" (*People v. Anderson*, *supra*, 28 Cal.4th at p. 784; emphasis added.) This Court in *Anderson* found the instruction on deliberate and premeditated first degree murder (CALJIC No. 8.20) addressing "sudden

heat of passion or other condition *precluding the idea of deliberation*" adequately addressed the issue, holding the jury's finding of premeditation resolved the issue against Anderson. (*People v. Anderson*, *supra*, 28 Cal.4th at p. 784; emphasis in original.) So too in the instant case.

Prior to instruction of the jury, the trial court and counsel discussed Landry's proposed duress special instructions and CALJIC No. 4.40 at length. (IX RT 2053-2065, 2091-2108, 2112- 2117, 2164-2168, 2182-2192.) Landry's four requested special instructions were properly rejected, and this Court's decisions in *Anderson* and its progeny support the trial court's decision not to give them even though *Anderson* had not been decided at the time.

Two of Landry's four special instructions addressed first degree murder (count one) and two addressed assault by an inmate serving a life sentence (count two). (III CT 790-791, 794-795.) Landry's first special instruction addressed first degree murder and the element of intent, asking the jury to find he lacked the requisite intent because he "honestly and reasonably held the belief that his own life was in danger."[43] (III CT 790.) His second special instruction addressed reducing first degree murder to

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[43] In this case, you may consider evidence showing the existence of threats, menaces or compulsion that played a part in inducing the unlawful killing of a human being for such bearing as it may have on the question of whether the murder alleged in Count 1 was of the first or second degree. If you find from the evidence that at the time the alleged crime was committed the defendant honestly and reasonably held a belief that his own life was in danger, you must consider what effect, if any, this belief had on the defendant and whether he formed any of the specific mental states that are essential elements of murder.

Thus if you find he had an honestly and reasonably held the belief that his life was in peril and as a result did not maturely and meaningfully premeditate, deliberate and reflect on the gravity of his contemplated act or

(continued...)

manslaughter based on a finding that "the act causing death, though unlawful, [was] done under the actual and reasonable belief in the necessity to act because of imminent peril to life or great bodily injury" and sought to put the burden on the prosecution "to establish that the killing [was] murder and not manslaughter" by proving beyond a reasonable doubt "the act which caused the death was not done under the actual and reasonable belief in the necessity to act because of imminent peril to life or great bodily injury."[44] (III CT 794.) This Court in *Anderson* and its progeny resoundingly rejected the legal basis for reducing any form of murder on the basis of duress; "fear for one's own life does not justify killing an innocent person." (*People v. Anderson*, *supra*, 28 Cal.4th at p. 770.) Killing an innocent person to save one's own life does not negate malice

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(...continued)
form an intent to kill, you cannont find him guilty of a willful, deliberate and premeditated murder of the first degree.

Also, if you find the defendant did not form the mental state constituting express malice, you cannot find him guilty of murder of either the first or second degree. You may however, find him guilty of the crime of voluntary manslaughter as defined in these instructions. (III CT 790)

[44] The distinction between murder and manslaughter is that murder requires malice while manslaughter does not.

When the act causing death, though unlawful, is done under the actual and reasonable belief in the necessity to act because of imminent peril to life or great bodily injury, the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.

To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused death was not done under the actual and reasonable belief in the necessity to act because of imminent peril to life or great bodily injury. (III CT 794)

and is not a form of manslaughter. (*People v. Anderson*, *supra*, 28 Cal.4th at pp. 783-784.)

Landry's third requested special instruction addressed assault by a life prisoner with malice aforethought (count two). Landry wanted the jury instructed that if Landry "acted under the actual and reasonable belief in the necessity to act because of imminent peril to life or great bodily injury, there [was] no malice aforethought and the crime alleged in count two [was] not committed," placing the burden "on the People to prove beyond a reasonable doubt each of the elements of the offense and that the act which caused death was not done under the actual [and] reasonable belief in the necessity to act because of imminent peril to life or great bodily injury."[45] (III CT 795.) Landry's fourth special instruction also addressed assault by a prisoner with malice aforethought. Much like the other instructions, Landry sought to have the jury consider whether "threats, menaces or compulsion. . . played a part in inducing the unlawful assault upon inmate Addis" resulting in Addis' death such that if the jury believed at the time Landry committed the crime he "honestly and reasonably held the belief that his own life was in danger" they could consider this belief to determine

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[45] With respect to Count 2, the crime of Assault By A Life Prison With Malice Aforethought is not committed unless the element of malice aforethought is proved.

If you find that the defendant acted under the actual and reasonable belief in the necessity to act because of imminent peril to life or great bodily injury, there is no malice aforethought and the crime alleged in Count 2 is not committed.

As to this alleged offense, the burden is on the People to prove beyond a reasonable doubt each of the elements of the offense and that the act which caused death was not done under the actual and reasonable belief in the necessity to act because of imminent peril to life or great bodily injury. (III CT 795)

whether Landry formed the necessary mental state.[46] (III CT 791.) If the jury found Landry "had an honestly and reasonably held belief that his life was in peril and as a result did not form the mental state constituting malice aforethought. . . they could find him not guilty" of count two. (III CT 791.) As already established, this Court in *Anderson* resoundingly rejected this premise and found that killing an innocent person to save one's own life does not negate malice. (*People v. Anderson*, *supra*, 28 Cal.4th at pp. 783-784.) Therefore, Landry's four requested special instructions were properly rejected

While the prosecutor conceded some form of CALJIC No. 4.40 addressing duress as it applied to count one should be given, the trial court requested briefing from counsel and did its own research. (IX RT 2056-2064.) Both counsel submitted briefing on the issue. (III CT 796-818.) Following briefing and argument, the court found there was no evidence of

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[46] In this case, you may consider evidence showing the existence of threats, menaces or compulsion that played a part in inducing the unlawful assault upon inmate Addis resulting in death of the inmate as alleged in Count 2, for such bearing as it may have on the question of whether that crime was committed. If you find from the evidence that at the time the alleged crime was committed the defendant honestly and reasonably held a belief that his own life was in danger, you must consider what effect, if any, this belief had on the defendant and whether he formed any of the specific mental states that are essential elements of this particular crime.

Thus if you find he had an honestly and reasonably held belief that his life was in peril and as a result did not form the mental state constituting malice aforethought, which is an element of the crime, you may not find him guilty of said crime.

You may however, find him guilty of the crime of any lesser included offenses such as assault with a deadly weapon as defined in these instructions. (III CT 791)

duress and held the Landry's special instructions on it did not apply. (IX RT 2164-2168.) Specifically, the court found:

> As I indicated twice before, it's the Court's belief that the accused must entertain a good faith belief that his act was necessary. And the Court recognizes that while [ ] Courts, as to sufficiency of the evidence to justify a particular instruction, should be resolved in the defendant's favor, the Court need not give instructions based solely on conjecture and speculation.
>
> And while the Court had indicated previously that it believed that there was evidence that if he actually had such a belief, that it might be reasonable in that there might be sufficient evidence of immediacy of the threat and harm, ***the Court has not seen any circumstantial evidence that, in fact, would indicate that Mr. Landry held the requisite belief personally. And absent that, I don't believe that the pinpoint instructions as suggested by counsel are appropriate.*** Therefore, I would deny them.

(IX RT 2164-2165; emphasis added.)

The court then allowed defense counsel to further argue his position, but the court did not change its ruling. (IX RT 2165-2168.)

Prior to instructing the jury, there was further discussion concerning modification to the duress instruction (CALJIC No. 4.40). (IX RT 2182-2192.) During these discussions, defense counsel conceded the instruction did not apply to count two. (IX RT 2189-2190.) Ultimately, after further discussion with both counsel, the court instructed the jury with the agreed-upon instruction as follows:

> A person is not guilty of a crime other than Assault By A Life Prisoner as alleged in Count 2 when he engages in conduct, otherwise criminal, when acting under threat and menace under the following circumstances:
>
> 1. Where the threat and menace are such that they would cause a reasonable person to fear that his life would be in immediate danger if he did not engage in the conduct charged, and

2. If this person then believed that his life was so endangered.

This rule does not apply to threats, menaces, and fear of future danger to his life, nor does it apply to the crime of Assault By A Life Prisoner as alleged in Count 2.

(IX RT 2232.)

The trial court in the instant case gave the same instruction this Court in *Anderson*, *supra*, 28 Cal.4th at p. 784, found adequately addressed duress[47] as well as the modified form of the duress instruction (CALJIC No. 4.40). Furthermore, the jury was instructed on the lesser offense of second degree murder regarding count one. (X RT 2330.) However, the only evidence of duress derived from the defense experts' opinions. Respondent submits the expert opinions were not substantial evidence to support the giving of any duress instruction because it was too speculative. (*People v. Wilson*, *supra*, 36 Cal.4th at p. 331 [substantial evidence must exist to support a duress instruction, i.e., "evidence sufficient 'to deserve consideration by the jury,' not 'whenever any evidence is presented, no matter how weak.'"].) Therefore, Landry received the benefit of a duress instruction – the modified CALJIC No. 4.40 – to which he was not entitled; "the instructions were unduly favorable" to him. (*People v. Maury*, *supra*, 30 Cal.4th at p. 421; emphasis in original.) To the extent evidence existed

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[47] The jury was instructed as follows:

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was a result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection ***and not under a sudden heat of passion or other condition precluding the idea of deliberation***, it is murder of the first degree.

(IX RT 2234-2235, emphasis added; III CT 874-875.)

of duress which could have possibly mitigated premeditation and deliberation, the jury was allowed to consider it. Because the jury found Landry guilty of first degree premeditated murder, they necessarily rejected any notion Landry killed without reflection based on duress. (See *People v. Anderson*, *supra*, 28 Cal.4th at p. 784.) Indeed, the facts in no way showed Landry obeyed an order without reflection, mitigating premeditation and deliberation.

Contrary to Landry's assertions otherwise (II AOB 179-186) there was no evidence to support giving any duress instructions. (*People v. Burney*, *supra*, 47 Cal.4th at pp. 249-250.) In *Burney*, the defendant claimed he was entitled to an instruction on duress because he feared that if he did not shoot the victim, his codefendant would shoot him. (*People v. Burney*, *supra*, 47 Cal.4th at p. 249.) The evidence did not support a duress instruction but rather only showed Burney shot the victim at his codefendant's behest out of fear his codefendant, who was drunk, would accidentally shoot him, Burney. (*People v. Burney*, *supra*, 47 Cal.4th at pp. 249-250.) Furthermore, Burney's codefendant's repeated assertions "you gotta kill him" did not constitute threats, menace, or compulsion. (*People v. Burney*, *supra*, 47 Cal.4th at p. 250.) In the instant case, there was even less evidence of duress than there was in *Burney*.

Absolutely no evidence existed that anyone threatened or ordered Landry to kill Addis. At trial and on appeal Landry employs circular reasoning to argue duress. Simply put, Landry reasons as follows: because he murdered Addis, he must have been ordered to do so; because he was ordered to murder Addis, he must have been in fear of his life; because he was in fear of his life, he murdered Addis. That is, the very fact he murdered Addis establishes he did so under duress. However, not one shred of either direct or circumstantial evidence supports the notion Landry was ordered to kill anyone, let alone evidence he was threatened in any way

by anyone. The trial court considered extensive argument by defense counsel and the prosecutor before finding no evidence existed to support Landry's special duress instructions and only gave the modified duress instruction (CALJIC No. 4.40) because it mistakenly believed some evidence of duress could mitigate noncapital murder.

Landry purports some circumstantial evidence supports his circular analysis, but it does not change the fact it is circular reasoning. Landry starts with the murder of Addis. Landry references the CDC 115 administrative hearing against inmate Green which resulted in disciplinary action based on the finding inmate Green orchestrated the events on the yard on the date Landry murdered Addis. (II AOB 183.) However, the administrative hearing did not constitute a finding of guilt beyond a reasonable doubt, inmate Green did not admit ordering a hit on Addis or state he ordered Landry to commit the murder, and – most importantly – no evidence established threats were levied against Landry if he refused or failed to commit the murder. Even assuming inmate Green was involved in a plan to murder Addis, no evidence existed that Landry was coerced into murdering Addis. Landry takes a giant speculative leap when asserting the CDC 115 administrative hearing established Landry committed the murder under duress.

Landry also argues the NLR gang shot caller "had power over the white inmates" and "made the rules about what was done or not done amongst the white inmates." (II AOB 183.) Based on speculation inmate Green ordered Landry to murder Addis, Landry provided "expert testimony" that failure to carry out an order by a prison gang could result in death. (II AOB 183-185.) Landry's argument ignores the fact abundant evidence established Landry actively participated in the NLR gang, often leading exercises which demonstrated a position of authority in the NLR gang, so rather than establishing Landry acted under duress or threats, it

established he helped plan the murder of Addis. Landry, arrives at his defense of duress by speculation that because he murdered Addis, he must have done so by order of the NLR gang shot caller, and if the shot caller ordered the murder, then he must have committed murder because he feared for his life. However, just as the trial court found, there was absolutely no evidence Landry personally had been threatened or feared immediate harm. (IX RT 2164-2165.)

Not only is Landry's reasoning circular, but there are multiple factual problems with it. First, the only statement Landry made to anyone about the murder was his confession to the murder so the prison officials would stop investigating it. (VIII RT 1906-1907.) Landry made the admission in conjunction with a threat to flood his cell unless they moved him to a different section; hardly demands of a man who feared for his life. Landry never claimed he murdered Addis because he was ordered to do so or that he did so out of fear for his life.

Second, immediately after murdering Addis while still on the yard, Landry was seen by witnesses laughing. (V RT 1154, 1179-1180, 1244; VIII RT 1908.) Later, an inmate saw Landry with a smirk on his face in an enclosed holding room. (VI RT 1287.) Contrary to Landry's behavior, Landry's own expert testified an inmate carrying out an assault order given by a gang would be expected to act without regret and "with a quiet, subtle pride, or just plain quiet. Ignore it totally." (VIII RT 2006-2007.) By all accounts, Landry's jocular attitude about the murder exemplified anything but a quiet, subtle pride or a showing of totally ignoring the murder.

Third, Landry erroneously asserts "the shot caller rather than the guards controlled" the inmates. (II AOB 183.) Landry references the testimony of Sergeant Sams and Officer Maldonado. Landry's analysis is not supported by the record.

Landry asserts Sergeant Sams was aware Addis was in danger, and the inmates controlled the guards. (II AOB 183.) Landry refers to Sergeant Sams' testimony claiming "the guards told Sergeant Sams. . . that Addis would not be safe on the yard," but Landry's references to the reporter's transcript do not support this assertion. (II AOB 183.) In fact, considering the testimony of Sergeant Sams in its totality, and not just selected portions of it, Sergeant Sams only heard rumors about Addis possibly not wanting to go on to the yard and not that Addis was in danger if he went out onto the yard. (VI RT 1333-1340.) Landry also erroneously asserts "when Green demanded that the guards bring Addis to the yard, the sergeant sent guards to Addis' cell and they brought him to the yard." (II AOB 183.) In fact, neither Sergeant Sams, Officer Ginn nor his partner, Officer McAlmond, knew of inmate Green's rantings about bringing Addis to the exercise yard until after Addis was on the yard. (VI RT 1341-1342; VII RT 1625-1628; VIII RT 1780-1781.) The concerns of Sergeant Sams, Officer Ginn and Officer McAlmond were whether Addis wanted to go onto the yard, and the officers did not bring Addis to the yard because of inmate Green's demands. Contrary to Landry's assertions otherwise, there is no evidence the inmates controlled the staff and, in fact, the evidence establishes the opposite.

Landry also references Officer Maldonado's testimony to reason the inmates controlled the guards. (II AOB 183.) Landry asserts Officer Maldonado told Sergeant Sams she thought the other inmates were going to "to take [Addis] out." (II AOB 183; VIII RT 1815-1817.) However, Officer Maldonado testified that based on inmate Green's rantings to bring Addis out onto the exercise yard she joked with Addis, telling him she thought he was "packing," i.e., concealing drugs or a weapon; she did not tell Addis he was in any danger. (VIII RT 1813.) While Maldonado thought it was unusual for inmate Green not to greet Landry when he went

onto the yard, she also saw nothing unusual for approximately 2 hours before she went in Palm Hall prior to the murder. (VIII RT 1836-1837.) While Sergeant Sams recalled Officer Maldonado telling him about inmate Green's behavior while he was watching Addis on the yard, he watched for several minutes after Addis was released to make sure everything was as it should be, phoned the tower officers to see if everything appeared normal, and relied upon the training of his tower officers to monitor the exercise yard. (VI RT 1305-1307, 1341-1346.) None of this evidence supports Landry's theory that the inmates controlled the guards or that he murdered Addis under duress or threats.

Landry also details the experts' opinions about prison life, how prison gangs operated and recruited members, discipline within the prison gang, and the authority structure within prison gangs. (II AOB 183-185.) However, Landry's experts only reviewed reports about the murder and considered testimony by some of the officers but none actually spoke with Landry or knew of any order for Landry to murder Addis.[48] The best evidence of fear Landry could muster existed only in theory conjured by his experts, but the potential for duress did not establish it in fact existed in the mind of Landry. Based only on the experts' opinions, Landry asserts "this evidence provided circumstantial evidence from which the jury could find" Landry murdered Addis in compliance with the gang shot caller's orders because the prison guards would not protect him. (II AOB 185.) Nowhere else is Landry's circular reasoning more evident: he reasons he committed

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[48] William Rigg reviewed CDC 115 reports and considered the testimony of Officer Esqueda, Sergeant Sams, Officer Valencia, another officer whom he could not remember, inmate Allan and another inmate whom he could not remember. (VIII RT 1922-1923, 1958-1959.) Anthony Casas reviewed reports about the incident but did not identify them; Casas's only vaguely referenced materials relating to Addis' murder he considered. (VIII RT 2007-2009.)

the murder based on inmate Green's order, despite the absence of evidence of such an order other than the murder itself. Landry claims he feared retaliation, despite the absence of any evidence of threats of retaliation. And Landry argues the inability of the staff to protect him because the officers put Addis on the yard, even though the prison officers responsible for putting Addis on the yard never knew of inmate Green's statements to Officer Maldonado, and Addis insisted on being allowed his yard time.

No evidence supported Landry's theory of duress other than speculative opinion testimony of expert witnesses who never spoke with Landry. If Landry's offer of proof was sufficient to require instructions on duress, then all murder prosecutions in prison would require such instructions every time an expert opined a defendant could have been acting under threats of duress, and so the trial court acknowledged. (IX RT 2097.) This Court in *Anderson* specifically recognized this potentiality in the context of street gang and prison gang murders – the exact scenario in the instant case. (*People v. Anderson*, *supra*, 28 Cal.4th at pp. 777-778.) Without so much as a wisp of evidence of duress, Landry created a duress defense based upon speculation, theory, opinion and innuendo.

Nonetheless, the trial court instructed the jury with a modified version of CALJIC No. 4.40 concerning duress. (VIII RT 2232.) Just as in *Maury*, the jury instructions in the instant case were unduly favorable to Landry. (*People v. Maury*, *supra*, 30 Cal.4th at p. 421.)

Landry argues this Court's decision in *People v. Anderson*, *supra*, 28 Cal.4th at p. 775, rejecting duress as a defense to murder did not address the issue in the context of federal constitutional law; primarily the Eighth and Sixth Amendments. (II AOB 186-189.) Landry then makes a multipart argument that the Eighth Amendment's "evolving standards of decency and heightened requirements for reliability" contradict this Court's *Anderson* analysis which looks back to Blackstone's reasoning in the 1800s

rather than to current applications of the Eighth Amendment, depriving Landry of his constitutional right to counsel and to present the defense of duress. (II AOB 189-208.)

Landry's invocation of the Eighth Amendment's "evolving standards of decency" does not support his argument that he should have been allowed to argue duress as a defense to murder. (II AOB 189-190.) The Eighth Amendment concerns excessive bail and cruel and unusual punishment. (*Kennedy v. Louisiana* (2008) __ U.S.__ [128 S.Ct. 2641, 2649, 171 L.Ed.2d 525].) Specifically, the "Eighth Amendment, applicable to the States through the Fourteenth Amendment, provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' [Citation omitted.]" (*Kennedy v. Louisiana*, *supra*, [128 S.Ct. at p. 2649].) The High Court in *Kennedy* addressed the issue of punishment when discussing "evolving standards of decency" and not any concept remotely related to the legal defenses to murder. (*Kennedy v. Louisiana*, *supra*, [128 S.Ct. at pp. 2649-2650].) Landry's reasoning invoking cruel and unusual punishment legal analysis fails to discredit this Court's reliance upon the statutory genesis of Penal Code section 26 and the legal reasoning of Blackstone when deciding *Anderson*. (II AOB 190-191.)

Likewise, Landry's reasoning that cases involving capital punishment require heightened standards of scrutiny does not defeat this Court's thorough analysis and reasoning finding duress is not a defense to murder. (II AOB 190.) Similarly, Landry's reliance upon treatises and law review articles concerning the consideration of duress in the context of murder are equally unpersuasive for purposes of undermining this Court's analysis in Anderson. (II AOB 192-193.) Therefore, this Court should reject Landry's analysis that the Eighth Amendment requires this Court to reconsider its decision in *Anderson*.

Landry also invokes the Sixth Amendment right to present a defense, claiming he was deprived of this right by not being allowed to present a defense of duress. (II AOB 194-205.) However, Landry was not precluded from putting on a defense. Rather, the evidence established Landry murdered Addis, and Landry was simply not permitted to manufacture a defense where no evidence of it existed and which was legally untenable based upon the evidence. Contrary to Landry's assertion otherwise, the prosecution's burden of proof was not lowered because the trial court refused to give his requested instructions; instead, Landry was precluded from raising the prosecution's burden of proof through the employment of instructions which were contrary to the law and the facts. Landry's arguments to the contrary should be rejected.

The trial court properly rejected Landry's special instructions on duress and Landry received the benefit of the modified duress instruction (CALJIC No. 4.40) to which he was not entitled. This Court should not reconsider the decision in *Anderson* and its progeny, and this Court's analysis in *Anderson* does not violate the constitutional principles claimed by Landry. Therefore, Landry's convictions should be upheld and his punishment remained intact.

VII. THE INSTRUCTION ON PREMEDITATION AND DELIBERATION (CALJIC NO. 8.20) WAS PROPER AS GIVEN

In argument seven, Landry asserts the instruction on deliberation and premeditation (CALJIC No. 8.20) was constitutionally deficient because it used the word "precluding." (II AOB 209-224.) While Landry acknowledges this Court's decision in *People v. Nakahara* (2003) 30 Cal.4th 705, 715, rejected his argument, he asserts this Court did not address his specific complaints and argues the issue is not forfeited by defense counsel's failure to object to the instruction. (II AOB 211-218.) Landry's arguments lack merit because his argument is forfeited, but even

if it is not, when the instructions are considered in their totality, they do not suffer the infirmity about which Landry complains.

Because Landry did not object to the wording of CALJIC No. 8.20 on any of the grounds asserted on appeal, his objections are forfeited. (*People v. Catlin* (2001) 26 Cal.4th 81, 149.) While Landry argues he did not "invite the error" because he did not request the instruction (II AOB 211), he has forfeited the issue, nonetheless. This Court in *Caitlin* acknowledge the well-settled principle, "a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Caitlin*, *supra*, 26 Cal.4th at p. 149.) Though the instructions were thoroughly scrutinized, Landry did not object to the instruction on deliberation and premeditation (CALJIC No. 8.20).

The instruction defining premeditation and deliberation required the prosecution to establish the murder was "willful," "deliberate" and "premeditated" and that the "killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill. . . and not under a. . . condition precluding the idea of deliberation." (IX RT 2233-2234; III CT 874; CALJIC No. 8.20.) The entire defense consisted of relentless assault on Landry's willful and deliberate participation in the murder based on the theory the NLR gang shot caller coerced Landry into killing Addis, Landry's fear for his own life and inability to obtain refuge from the guards, which precluded the idea of deliberation. (II AOB 182-185, 205-207; X RT 2288-2293, 2300-2304, 2309-2312.) This instruction, therefore, played right into the Landry's theory of why he was innocent, so it is apparent there was no objection to the wording of the instruction for tactical reasons.

The instructions were hotly contested in many respects, especially regarding murder, and the trial court specifically went through the instructions to give both Landry and the prosecutor the opportunity to request modification of the wording of the instructions. (IX RT 2065-2066.) After asking if the instruction on malice aforethought (CALJIC No. 8.11) was appropriate as written, defense counsel and the prosecutor agreed it was by stating "Yes" and "Right," respectively. (IX RT 2066.) The court then asked about CALJIC No. 8.20, and defense counsel and the prosecutor responded "Agree" and "Agreed," respectively. (IX RT 2066.) Therefore, Landry's claim should be deemed forfeited for purposes of appeal because he did not request modification of or clarification of the word "precluding." (*People v. Caitlin*, *supra*, 26 Cal.4th at p. 149.) Based upon the theory of the defense and the scrutiny given to the instructions, it is apparent Landry had a tactical reason for not requesting a different instruction, so the issue should be deemed forfeited for purposes of appeal.

Assuming arguendo the issue is not forfeited, it lacks merit. Landry argues this Court's decision in *Nakahara* did not address his specific claims and seeks resolution of his complaint that the word "precluding" is inherently ambiguous so as to deprive him of due process. (II AOB 213-224.)

The jury was instructed regarding premeditation and deliberation as follows:

> All murder which is perpetrated by any kind of willful, deliberate, and premeditated killing with express malice aforethought is murder of the first degree.
>
> The word "willful," as used in this instruction, means intentional.

> The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.
>
> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was a result of deliberation and premeditation, ***so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree***.

(IX RT 2234-2235; emphasis added.)

This Court reviews claims of instructional error by determining whether the challenged instruction states the applicable law correctly and whether it is reasonably likely that the jury misunderstood the challenged instruction in light of all the other instructions given. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-527.) This Court has repeatedly rejected attacks on the premeditation and deliberation instruction (CALJIC No. 8.20). (*People v. Morgan* (2007) 42 Cal.4th 593, 620-621; *People v. Jurado* (2006) 38 Cal.4th 72, 127; *People v. Nakahara* (2003) 30 Cal.4th 705, 715.) Likewise, Landry's attack on the premeditation and deliberation instruction should be rejected.

Landry contends this Court's decision in *Nakahara* did not address the dictionary meaning (II AOB 214), the statutory usage (II AOB 215), or the California and Supreme Court usage of the word "precluding" (II AOB 215-218), and these sources indicate the use of the word "precluding" is ambiguous and lowers the prosecution's burden of proof by impairing the jury's ability to find reasonable doubt. (II AOB 213-219.) Landry is wrong, and this Court's decisions in *Nakahara* and cases applying it defeat his claim.

In *Nakahara*, this Court specifically considered the propriety of using the word "precluding" in CALJIC No. 8.20. This Court concluded that "this instruction [CALJIC No. 8.20] is unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof. These instructions make it clear that a defendant is not required to absolutely preclude the element of deliberation." (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 715; see also *People v. Millwee* (1998) 18 Cal.4th 96, 135, fn. 13 [stating that CALJIC No. 8.20 "is a correct statement of law"].) Additionally, this Court in *Morgan* rejected the argument that the premeditation and deliberation instruction along with others diluted the constitutionally-mandated standard of proof beyond a reasonable doubt. (*People v. Morgan* (2007) 42 Cal.4th 593, 620-621.) Also, this Court in *Jurado* held the definition of premeditation and deliberation "does not suggest that a defendant must absolutely preclude the possibility of premeditation rather than merely raising a reasonable doubt." (*People v. Jurado*, *supra*, 38 Cal.4th at p. 127.) Although these cases do not address each of Landry's individual assertions and sources, they reject Landry's argument that the use of the word "precluding" in the premeditation and deliberation instruction lowers the prosecution's burden of proof or the ability of the jury to find reasonable doubt in light of the totality of the instructions. Landry's argument invoking sources not previously specifically mentioned by this Court is unavailing and does not change the validity this Court's reasoning in *Nakahara*, *Morgan*, and *Jurado*.

When arguing prejudice, Landry asserts there is evidence he "acted upon a sudden quarrel or heat of passion sufficient to find reasonable doubt of deliberation even if the evidence did not preclude formation of that mental state." (II AOB 233.) Landry relies on the testimony of former inmate Allan who claimed for the first time at trial that Landry and Addis

were "having words" just prior to Landry murdering Addis as well as one of the letters Landry wrote[49] to another inmate in which he stated someone intended "to do me harm". (II AOB 223.) However, at trial Landry fervently argued, and on appeal Landry fervently asserts, he was ordered to murder Addis by inmate Green, the shot caller of the NLR gang. His assertion now on appeal that the evidence suggests he committed the murder based upon some sort of provocation is mutually exclusive to his argument that he murdered Addis out of fear for his life. In any event, the jury was not prevented from considering any of the evidence based upon the use of the word "precluding" in the definition of premeditation and deliberation. Landry's arguments to the contrary should be rejected.

Landry's attack on the definition of premeditation and deliberation (CALJIC No. 8.20) based on its use of the word "precluding" should be deemed forfeited and, nonetheless, lacks merit as this Court has already upheld its use in at least three prior cases. Landry's arguments asking this Court to reconsider its decision in *Nakahara* and subsequent cases applying it should be rejected. The jury was properly instructed and Landry suffered no prejudice. Landry's conviction and judgment should remain intact.

VIII. THE TRIAL COURT PROPERLY REFUSED TO GIVE INSTRUCTIONS ON VOLUNTARY MANSLAUGHTER AND NO ERROR OCCURRED BASED UPON THE JURY NOT BEING SPECIFICALLY INSTRUCTED ON SECOND-DEGREE IMPLIED MALICE MURDER (CALJIC NO. 8.31)

In argument eight Landry asserts the trial court committed error by not sua sponte instructing with second degree, implied malice murder (CALJIC No. 8.31), and only instructing with second degree murder (CALJIC No. 8.30). (II AOB 224-231.) As part of his argument, Landry

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[49] Notably, Landry argues the letters were improperly admitted against him and were prejudicial. (AOB 137-160.)

asserts that because the jury was not instructed regarding duress, and duress can negate premeditation and deliberation, the jury was precluded from finding second degree murder. (II AOB 229-230.) Similarly, in argument nine Landry asserts the trial court committed error by not instructing the jury on voluntary manslaughter based on sudden quarrel or heat of passion, imperfect self-defense, and assault with a deadly weapon without malice aforethought. (II AOB 231-238.) Landry's arguments are predicated upon his assertion there was evidence of an argument or dispute between Addis and Landry – they were having words – and that Addis had threatened to harm him. (II AOB 226-227, 232-233, 235-237.) Landry's arguments lack merit.

It is well settled that the trial court must instruct the jury on all general principles of law relevant to the issues raised by the evidence, regardless of whether the defendant makes a formal request. (*People v. Burney* (2009) 47 Cal.4th 203, 250.) The trial court has a duty to instruct on lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present, but only when there is evidence the offense was less than that charged. (*People v. Moye* (2009) 47 Cal.4th 537, 548.) The court must instruct with lesser included offenses when there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not the lesser. (*People v. Burney*, *supra*, 47 Cal.4th at p. 250.)

To instruct on lesser included offenses, there must be substantial evidence to support the instruction; i.e., evidence from which a jury composed of reasonable persons could conclude the facts underlying the particular instruction exist. (*People v. Burney*, *supra*, 47 Cal.4th at p. 250.) To determine whether evidence is "substantial" to support a lesser included offense, the trial court "determines only its bare legal sufficiency, not its weight." (*People v. Moye*, *supra*, 47 Cal.4th at p. 556.) Nonetheless, "the

existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citation omitted.]" (*People v. Moye*, *supra*, 47 Cal.4th at p. 553.) This Court in *Moye*, when finding there was no evidence to support a voluntary manslaughter instruction based on heat of passion, held "no fundamental unfairness or loss of verdict reliability results from the lack of instructions on a lesser included offense that is unsupported by any evidence upon which a reasonable jury could rely. [Citation omitted.]" (*People v. Moye*, *supra*, 47 Cal.4th at p. 555.)

Murder involves an unlawful killing of a human being committed with malice. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988, citing Pen. Code, § 187, subd. (a).) In the context of second degree murder, the element of malice can be expressed, as when a defendant intends to kill, or implied. (*People v. Coddington* (2000) 23 Cal.4th 529, 593; CALJIC No. 8.11.) Implied malice does not involve an express intent to kill but, rather, an intent to commit an act which poses a high risk of death. (*People v. Knoller* (2007) 41 Cal.4th 139, 155.) Implied malice has both a physical and mental component; the physical component involves an act, the natural consequences of which are dangerous to life, and the mental component requires the act be deliberately performed with knowledge the conduct endangers the life of the other, with conscious disregard for life. (*People v. Nieto-Benitez* (1992) 4 Cal.4th 94, 106-107.)

Manslaughter, a lesser included offense of murder, involves an unlawful killing without malice. (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) Typically, manslaughter involves a killing during sudden quarrel or heat of passion or a case of imperfect self-defense. (*People v. Cruz*, *supra*, 44 Cal.4th at p. 664.) A jury should not be instructed with manslaughter

based on sudden quarrel or heat of passion or on imperfect self-defense unless there is adequate evidence of provocations by the victim to support such instructions. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1305-1306.) There must be evidence the killer's reason was actually obscured as a result of a strong passion aroused by a provocation sufficient to cause an ordinary person of average disposition to act irrationally or without deliberation, and the victim must have initiated the provocation. (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1306.) Imperfect self-defense involves the existence of provocation insufficient to reduce murder to manslaughter but which raises a reasonable doubt the defendant formed an intent to kill after deliberation and premeditation. (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1306.) In *Carasi* the court upheld the trial court's decision not to instruct on voluntary manslaughter, sudden quarrel or heat of passion, or provocation based upon a lack of evidence. (*People v. Carasi*, *supra*, 44 Cal.4th at pp. 1307-1308.) Furthermore, this Court in *Anderson* rejected the idea duress reduces murder to manslaughter. (*People v. Anderson*, *supra*, 28 Cal.4th at pp. 781- 784.)

In the instant case, during the discussions of jury instructions defense counsel stated instructions on voluntary and involuntary manslaughter were stricken over his objection. (IX RT 2193-2194.) However, the trial court did instruct on both express and implied malice. (IX RT 2233-2234.) The jury also received instruction on second degree murder. (IX RT 2235-2236.) Therefore, the jury was instructed on implied malice and second degree murder. The jury simply did not receive instruction on second degree murder resulting from an unlawful act dangerous to human life (CALJIC No. 8.31). None of the authority Landry references held prejudicial error occurred when a jury was instructed on express malice and implied malice as well as second degree murder (CALJIC No. 8.30) but not

second degree implied malice murder (CALJIC No. 8.31). The jury in the instant case was properly instructed regarding all legal issues before it.

Furthermore, there was no substantial evidence from which the jury could have found either second degree implied malice murder or voluntary manslaughter because the evidence which Landry references on appeal does not support the bare legal sufficiency necessary to make such findings. (*People v. Moye*, *supra*, 47 Cal.4th at p. 56.) That is, there was no evidence from which the jury could have found Landry intentionally stabbed Addis in the neck with a prisoner-manufactured weapon without an express intent to kill. Landry had to get the weapon out on the prison yard through the layers of security designed to prevent prisoners from possessing weapons or contraband each time they went to the exercise yard. Towards the end of yard time, Landry sidled up next to Addis and struck the fatal blow. The uncontradicted evidence established Landry thrust the weapon so hard and deep into Addis' neck that it penetrated muscle and severed the jugular and subclavian veins. (VI RT 1386-1389.) Shortly thereafter, Addis bled to death while Landry laughed.

Preceding the attack, Landry had been on the exercise yard with Addis without incident, and Landry inconspicuously approached Addis while Addis was playing cards. By all accounts, Landry's attack took Addis unaware. Given these facts, there was no evidence from which the jury could find implied malice, second degree murder; i.e., the lack of an intent to kill but an intent to commit an act imposing a high risk of death along with the intent to commit the act knowing it to be dangerous to life. (*People v. Nieto-Benitez*, *supra*, 4 Cal.4th at pp. 106-107.) This is especially true when Landry's entire defense was that he was forced to participate in Addis' murder at the risk of deadly repercussions by the NLR prison gang if he did not participate. Likewise, there was no evidence from which the jury could find voluntary manslaughter based on sudden quarrel

or heat of passion, imperfect self-defense or assault with a deadly weapon without malice aforethought.

The jury was instructed with duress[50] (CALJIC No. 4.40) and rejected the idea it impacted Landry's ability to premeditate and deliberate, finding him guilty of premeditated and deliberated murder instead. Because the jury found Landry guilty of premeditated and deliberated murder, they necessarily rejected Landry's duress defense or the fact he was guilty of second degree murder. (*People v. Beams* (2007) 40 Cal.4th 907, 928.) Their verdict also precluded any finding Landry was guilty of voluntary manslaughter based on a lack of malice.

Landry argues the jury's guilty verdict of first degree premeditated and deliberated murder does not negate the fact the jury could have found him guilty of second degree, implied malice murder. (II AOB 227-228.) Landry is wrong. This Court in *Anderson* acknowledged a killing under duress "may or may not be premeditated, depending on the circumstances." (*People v. Anderson, supra*, 28 Cal.4th at p. 784.) While this Court in *Anderson* did compare duress with implied malice murder, it found duress to be a "condition precluding the idea of deliberation" and not mitigating or eliminating intent to kill. (*People v. Anderson, supra*, 28 Cal.4th at p. 784.) Therefore, Landry erroneously asserts duress can reduce premeditated and deliberated murder to second degree, implied malice murder. As this Court explained in *Anderson*, duress does not eliminate intent to kill; "a person who kills an innocent believing it necessary to save the killer's own life intends to kill unlawfully, not lawfully." (*People v. Anderson, supra*, 28 Cal.4th at p. 783.) Landry's arguments the jury should have been

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[50] (IX RT 2232.)

instructed on second degree, implied malice murder (CALJIC No. 8.31) or voluntary manslaughter should be rejected because they are unsupported by the law.

In argument nine Landry asserts the jury should have been instructed on voluntary manslaughter based on evidence Landry committed assault with a deadly weapon without malice aforethought, relying upon *People v. Garcia* (2008) 162 Cal.App.4th 18. (II AOB 234-236.) However, *Garcia* is distinguishable for two reasons. First, it did not involve first degree murder but rather a charge of second degree murder and the question of whether the trial court should have instructed with involuntary manslaughter. (*People v. Garcia*, *supra*, 162 Cal.App.4th at p. 22.) The court in *Garcia* concluded the trial court properly refused to instruct with involuntary manslaughter, but the court did not address the propriety of giving instructions on voluntary manslaughter or the sufficiency of the evidence necessary to give such an instruction in the context of a charge of first degree, premeditated and deliberated murder. (*People v. Garcia*, *supra*, 162 Cal.App.4th at pp. 24-33.) An opinion only addresses the facts and issues before it and is not authority for propositions not considered. (*People v. Knoller*, *supra*, 41 Cal.4th at pp. 154-155.)

Second, in *Garcia* there was "no allegation Garcia actually intended to kill Gonzalez" but, rather, only facts that Garcia reflexively hit the victim in the face with the butt of a gun as the victim advanced upon him. (*People v. Garcia*, *supra*, 162 Cal.App.4th at pp. 25, 32.) Therefore, the facts in *Garcia* are not analogous to those in the instant case. *Garcia* does not stand for propositions which it did not address and does not support Landry's argument on appeal.

Landry argues evidence inmate Allan saw Landry "having words" with Addis, Landry's statements in his letters that Addis had made threats, and the fact that he stabbed Addis establishes the jury could have found

implied malice murder or voluntary manslaughter based on a reasonable doubt he committed deliberate and premeditated murder. (II AOB 227-228, 230.) This evidence was too weak to justify the lesser included offense instructions because simply pointing out "any evidence" does not constitute evidence substantial enough to merit consideration by the jury. (*People v. Moye*, *supra*, 47 Cal.4th at p. 553.) The evidence Landry references did not constitute sudden quarrel or heat of passion because there was absolutely no evidence of provocation. (*People v. Moye*, *supra*, 47 Cal.4th at p. 550; *People v. Carasi*, *supra*, 44 Cal.4th at pp. 1306-1307.) Neither was there any evidence Addis attacked Landry to justify an instruction on imperfect self-defense. Landry's arguments based upon the modicum of evidence he references must fail when they are considered.

First, Allen did not recall he saw Landry and Addis "having words" immediately before Landry stabbed Addis until at trial during cross-examination, upon prompting by defense counsel.[51] (V RT 1247-1248.) Allen could not hear what was going on and gave no context to the situation he observed other than that Landry was angry. (V RT 1248.) The best Allan could recall was "Mostly the way Smurf [appellant] was speaking to him [Addis] sounded angry." (V RT 1248.) The fact Landry was angry with Addis in no way suggested Addis provoked Landry's anger or that they were in fact arguing. Absolutely no evidence exists of provocation other than the fact Landry was angry and possibly arguing with Addis, so

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[51] Allen specifically testified,

> You know, thinking back, I just thought about this right now. I think I saw Smurf and Danny Addis having words, you know, before that happened. I just thought about that right now. They were -- it was like they were kind of arguing about something. (V RT 1248.)

there was no evidence to support instructions on manslaughter based on either sudden quarrel or heat of passion or unreasonable self-defense. Allen simply thought they were arguing because Landry was angry.

In fact, Allan's testimony supports the fact Landry committed premeditated and deliberated murder rather then second degree murder or voluntary manslaughter because by all other accounts Addis simply went and played cards at the direction of inmate Green before Landry angrily stabbed him. There was no evidence of an argument or provocation by Addis, even by Allen's account, and Allen only thought they were "kind of arguing" because Landry was angry. (V RT 1248.) This evidence hardly constituted substantial evidence of sudden quarrel or heat of passion or imperfect self-defense and, instead, established Landry murdered Addis in anger.

Second, while the letters admitted against Landry which he wrote to another inmate discussed Landry's commission of the murder, Landry's statements in the letter referenced by Landry are vague, hearsay and self-serving. (II AOB 227, 232-233.) Specifically, in his first letter Landry stated, "upon my 'return, this punk decides to disrespect me, and threatened to do me harm, what nerve! . . . I'll be calling Joey down to testify that he heard dude threatening to kill me on yard, he was upstairs in the vent, and heard it all!" (V CT 1228.) It is unclear from either the letter or any of the evidence at trial how Addis "disrespected" Landry. However, the fact Landry was disrespected was motive enough to kill Addis.

Landry's statement about calling Joey to testify to a threat he purportedly overheard constitutes hearsay – an after-the-fact, self-serving statement by Landry that did not establish Addis actually threaten Landry. Rather, it simply established at one point in time Landry intended to call "Joey" to testify he heard a threat. In fact, "Joey" was never called and Landry did not even attempt to develop or argue any theory of self-defense

based upon Addis allegedly threatening him. At trial Landry focused on fear the NLR gang would kill him if he failed to kill Addis and not that Addis in any way threatened him. By Allan's account, Addis kept to himself, was not a member of any gang, and was weak. (V RT 1246-1247.) Landry's vague statements in the letters about being disrespected and threatened, either by themselves or considered together with the other facts to which Landry points, did not constitute substantial evidence to require giving instructions on implied malice murder or instructions on voluntary manslaughter. (*People v. Moye*, *supra*, 47 Cal.4th at p. 553.)

Third, Landry erroneously argues an instruction on implied malice murder is appropriate when murder is committed by means of a deadly weapon during an argument; Landry's reasoning is unsupported by the law to which Landry references or the facts in the instant case. (II AOB 227-228, 230.) Landry references authority which stand for the unremarkable proposition that the very nature of implied malice invites consideration of the circumstances preceding the fatal act; *People v. Goodman* (1970) 8 Cal.App.3d 705, 708; *People v. Nieto-Benitez*, *supra*, 4 Cal.4th at p. 107; *People v. Love* (1980) 111 Cal.App.3d 98, 104-107 [sufficient evidence supported second degree murder instruction and conviction]; *People v. Memro* (1985) 38 Cal.3d 658, 700 [sufficient evidence supported retrial of two separate counts of first and second degree murder]; *People v. Pacheco* (1981) 116 Cal.App.3d 617, 627. (II AOB 227-228.) However, none of the cases referenced by Landry support the proposition that all assaults with a deadly weapon require the jury to be instructed with second degree, implied malice murder or voluntary manslaughter. In fact, *Carasi* establishes that there must be sufficient evidence of provocation in order for the jury to receive instruction on sudden quarrel or heat of passion or imperfect self-defense. (*People v. Carasi*, *supra*, 44 Cal.4th at pp. 1307-1308.) In the instant case, there was simply no evidence of provocation or

facts upon which to find unreasonable self-defense, so the evidence referenced by Landry did not constitute substantial evidence to support the instructions about which Landry complains.

Furthermore, even if the trial court did commit error by not giving the full panoply of lesser included instructions complained about by Landry – implied malice second degree murder or voluntary manslaughter based on sudden quarrel with heat of passion, imperfect self-defense, or assault with a deadly weapon without malice aforethought – any error was harmless. Landry fails to establish it is reasonably probable he would have obtained a more favorable outcome had the jury been so instructed. (*People v. Moye*, *supra*, 47 Cal.4th at p. 556.) The evidence of Landry's guilt of first degree murder was so strong and the evidence upon which he relies to claim instructional error so comparatively weak, there is no reasonable possibility any error affected the results. (*People v. Moye*, *supra*, 47 Cal.4th at p. 556.)

The evidence of Landry's guilt of first degree murder was overwhelming. The murder of Addis took deliberation and planning, defeating any notion Landry committed the murder based upon a sudden quarrel or heat of passion, imperfect self-defense or without the intent to kill. The evidence established Landry attacked Addis without provocation, completely catching him off guard, with a weapon which had been secreted out onto the prison yard through the multiple security checks. Landry had to obtain the weapon from someone who secreted it out onto the yard or he, himself, had to have secreted it. Landry inflicted a single fatal blow with such force it penetrated muscle and severed two major veins, causing Addis' death almost before he left the prison. Contrary to being fearful of NLR gang members, Landry affiliated with the NLR gang leadership by leading calisthenics; this defeated Landry's argument that he committed the murder under duress or out of fear he would be killed if he did not commit

the murder. The fact former inmate Allen suddenly recalled Landry appearing angry with Addis immediately prior to murdering him in no way established provocation or imperfect self-defense. Landry's boasting in his letters that the "187 kind of put [him] at ease" and having earned it contradicts any implication in the letter that Addis threatened Landry in any way. (V CT 1228.) Therefore, assuming arguendo the trial court committed instructional error, Landry cannot establish prejudice under any standard.

The jury was properly instructed with the law applicable to the instant case. The lack of jury instructions on second degree implied malice murder and voluntary manslaughter was not error. There was no substantial evidence to support such instructions, and the evidence which Landry references was slight. Furthermore, assuming the court committed error, it was harmless. Therefore, Landry's arguments to the contrary should be rejected and his convictions and judgment should remain intact.

IX. THE JURY WAS PROPERLY INSTRUCTED REGARDING THE CONSIDERATION OF CIRCUMSTANTIAL EVIDENCE AND EXPERT TESTIMONY

In argument 10, Landry asserts the trial court committed error by not sua sponte modifying the pattern instructions on circumstantial evidence (CALJIC Nos. 2.01 & 2.02) to apply to expert testimony; Landry fails to specify which instruction(s) should have been modified or how. (II AOB 238-249.) Landry acknowledges he did not request a modification to the instruction(s). (II AOB 240.) Landry's arguments are forfeited for failure to request a modification to the instructions about which he complains and, nonetheless, they lack merit. Landry's argument is vague, ignores the totality of the instructions, and rests upon the faulty premise the prosecution primarily relied upon circumstantial evidence.

Because Landry did not object to the wording of the instructions on circumstantial evidence (CALJIC Nos. 2.01 or 2.02) or expert witnesses (CALJIC Nos. 2.80, 2.82, 2.83) on any of the grounds asserted on appeal, his objections are forfeited. (*People v. Catlin* (2001) 26 Cal.4th 81, 149; *People v. Dennis* (1998) 17 Cal.4th 468, 514.) If Landry believed the instructions were incomplete or needed elaboration, it was his obligation to request additional or clarifying instructions. (*People v. Dennis*, *supra*, 17 Cal.4th at p. 514.) Dennis, convicted of murdering his former wife and second degree murder of her unborn child, complained the instructions on express malice allowed a second degree murder verdict of the unborn child without a separate finding of malice. (*People v. Dennis*, *supra*, 17 Cal.4th at p. 514.) This Court held Dennis waived his claim for failing to request additional or clarifying instructions.

In the instant case, the court and counsel specifically discussed the instruction on circumstantial evidence of specific intent at some length on two occasions. (IX RT 2043-2046, 2176.) However, at no point did Landry raise the issues or concerns about which he now complains on appeal, request elaboration, or request any clarifying instruction. Therefore, just as in *Dennis*, the issue should be deemed forfeited for purposes of appeal.

Assuming arguendo the issue is not forfeited for purposes of appeal, the jury received proper instruction in light of the totality of the instructions. This Court considers the instructions in their totality as given to the jury and not in isolation. (*People v. Ledesma* (2006) 39 Cal.4th 641, 718; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1396.) While Landry only complains about the circumstantial evidence instructions, these must be considered in light of all the instructions.

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The jury received instruction on the sufficiency of circumstantial evidence in general (CALJIC No. 2.01)[52] as well as the instruction directed to the sufficiency of circumstantial evidence to prove specific intent (CALJIC No. 2.02).[53] (IX RT 2219-2221.) Both of these instructions

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[52] However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which the inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence and reject that interpretation which points to his guilt.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (III CT 846; IX RT 2219-2220)

[53] The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crimes charged in Count 1, 2, or 3 unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or mental state but (2) cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other its absence, you must adopt the interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation to be

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informed the jury that if the circumstantial evidence permitted two reasonable interpretations, one of which pointed to Landry's guilt and the other to innocence, the jury was to adopt the interpretation that pointed to innocence. (IX RT 2220-2221.) The jury also received instruction on the consideration of testimony by expert witnesses (CALJIC No. 2.80),[54] hypothetical questions to expert witnesses (CALJIC No. 2.82),[55] and the

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(...continued)
unreasonable, you must accept the reasonable interpretation and reject the unreasonable. (III CT 847; IX RT 2220-2221)

[54] Witnesses who have special knowledge, skill, experience, training, or education in a particular subject have testified to certain opinions. Any such witness is referred to as an expert witness. In determining what weight to give to any opinion expressed by an expert witness, you should consider the qualifications and believability of the witness, the facts or material upon which each opinion is based, and the reasons for each opinion.

An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based.

You are not bound by an opinion. Give each opinion the weight you find it deserves. You may disregard any opinion if you find it to be unreasonable. (III CT 862; IX RT 2228-2228)

[55] In examining an expert witness, counsel may ask a hypothetical question. This is a question which -- in which the witness is asked to assume the truth of a set of facts and to give an opinion based on that assumption.

In permitting such a question, the Court does not rule and does not necessarily find that all the assumed facts have been proved. It only determines that those assumed facts are within the probable or possible range of the evidence. It is for you to decide from all of the evidence whether or not the facts assumed in a hypothetical question have been

(continued...)

resolution of conflicts between the testimony of expert witnesses (CALJIC No. 2.83).[56] (IX RT 2227-2229; III CT 862, 864-865.) And the jury was instructed Landry was presumed innocent and that the prosecution had the burden of proof to establish Landry guilty beyond a reasonable doubt (CALJIC No. 2.90.) (IX RT 2229; III CT 866.) These instructions considered together and in light of the entire charge to the jury correctly stated the law, correctly stated the burden of proof and presumptions, and allowed the jury to consider all the evidence – including the expert witness testimony – on the issues to which it was pertinent. Landry fails to establish otherwise.

The expert witness instructions in no way limited consideration of the expert's testimony on any issue before the jury, including the issue of intent. Likewise, the circumstantial evidence instructions in no way precluded the jury from considering the expert testimony on any issue, including the issue of intent. Therefore, respondent is at a loss as to how the instructions about which Landry complains were deficient in any way, did not adequately state the correct presumptions, or precluded the jury from considering the expert testimony on any issue.

(...continued)
proved. If you should find that any assumption in a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumed facts. (III CT 864; IX RT 2228-2229)

[56] In resolvirig any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and credibility of the expert witnesses as well as the reasons for each opinion and the facts and other matters upon which it is based. (III CT 865; IX RT 2229)

Landry's argument relies on authority holding sua sponte instruction on circumstantial evidence is required when the prosecution relies primarily upon such evidence (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49) and upon authority generally describing expert testimony as circumstantial evidence. (II AOB 240-242.) In fact, unless the prosecution relies primarily upon circumstantial evidence, the instructions on circumstantial evidence are unnecessary. (*People v. Brown* (2003) 31 Cal.4th 518, 562.) Landry references no authority which requires the court to instruct the jury that expert testimony is circumstantial evidence.

In the instant case, contrary to Landry's assertion otherwise, the prosecution did not rely primarily upon circumstantial evidence to establish Landry's guilt simply because an expert witness testified on prison gangs. (II AOB 241.) During the guilt phase, circumstantial evidence played a small part in the prosecution's case. Rather, the prosecution relied primarily upon the testimony of witnesses who worked in the prison where Landry was housed, who saw Landry murder Addis in broad daylight, who witnessed the assault on inmate Matthews and who found the weapons in Landry's cell. Therefore, arguably the circumstantial evidence instruction was unnecessary.

Nonetheless, Landry references no authority requiring the court to instruct the jury that expert witness testimony is circumstantial evidence. More importantly, because the jury in the instant case was instructed on the definition of circumstantial and direct evidence (IX RT 2219), and expert testimony obviously was not direct evidence, any such instruction would simply have stated the obvious. Jurors must be credited with possessing intelligence and common sense which they do not abandon when presented with jury instructions. (*People v. Bragg*, *supra*, 161 Cal.App.4th at p. 1396.)

While Landry complains that the instructions on circumstantial evidence should have been modified, conspicuously absent from his argument is any suggestion as to how they should have been modified. (II AOB 238-249.) If Landry contends the trial court had a sua sponte duty to create a new instruction, he fails to provide a hint as to what that instruction should have been. Similarly, Landry fails to identify any deficient language in any instruction but, rather, refers to amorphous "core concepts" purportedly extracted from the circumstantial evidence instructions (CALJIC Nos. 2.01 & 2.02) which he labels the "the benefit of the interpretation rule" and which he purports the jury somehow would have not understood applied to the expert testimony. (II AOB 239.) Completely absent from Landry's argument is any explanation or analysis identifying which instruction or instructions were defective or how the defect should have been remedied[57]. Landry simply makes the bald assertion that the instructions were inadequate concerning the jury's consideration of the expert testimony, resulting in prejudice.

The closest Landry comes to setting forth any purported deficiency in the instructions is his assertion "[t]he failure to instruct the jury that the benefit of the interpretation rule applied to expert testimony in several respects violated Landry's federal constitutional rights." (II AOB 243.) However, as best can be ascertained from Landry's argument, his own definition of the "interpretation rule" is simply that if circumstantial evidence "permits two reasonable interpretations, one of which points to the existence of specific intent and/or mental state and the other to its absence, you must adopt that interpretation which points to its absence."

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[57] While Landry identifies CALJIC's Nos. 2.01 and 2.02 as the instructions on circumstantial evidence, he does not claim these instructions are incorrect or deficient but only that the concepts in them should have been expanded. (II AOB 238-240, 243-249.)

(II AOB 239.) What Landry fails to establish is how the jury was precluded from applying these basic instructions about consideration of circumstantial evidence to the expert testimony about intent. If it is Landry's complaint that the expert testimony was not specifically identified as "circumstantial evidence" or that the circumstantial evidence instructions did not specifically state expert testimony came within its ambit, then his claim must fail as forfeited for failure to request an appropriate pinpoint instruction. Also, Landry fails to show how or why the jury would not understand the circumstantial evidence instructions included evidence about intent or expert testimony. More importantly, Landry fails to provide any authority to support his claim the trial court has a sua sponte duty to instruct the jury that expert testimony is circumstantial evidence. In fact, such an instruction would simply state the obvious.

Arguing prejudice, Landry asserts he had "a right to jury instructions to ensure that the jury properly considered the evidence under the applicable law." (II AOB 244.) Indeed, Landry was not deprived of this right based upon the instructions the jury received. While Landry describes the experts' testimony and the differences between the prosecution's expert and the defense's experts (II AOB 245-247), Landry ignores the fact the jury received instruction on conflicts between the testimony of expert witnesses. Furthermore, the circumstantial evidence instructions did not exclude, either expressly or by implication, their application to the expert testimony. Just as Landry cannot establish error based upon a vague and bald claim that the trial court improperly instructed the jury, he cannot establish prejudice based upon the same vague claim.

Landry's argument that the trial court committed error by failing to sua sponte fashion an instruction tailored to the consideration of expert testimony other than the instructions the jury already received lacks merit. Landry's fails to identify an instruction which should have been given or to

explain how the existing instructions should have been modified. Landry's failure to request a pinpoint instruction should result in forfeiture of this issue on appeal. Landry's vague and undeveloped assertions of error and prejudice should be rejected and his conviction and judgment upheld.

X. THE TRIAL COURT PROPERLY REJECTED APPELLANT'S PROPOSED MODIFICATION TO THE INSTRUCTION ON UNJOINED PERPETRATORS (CALJIC NO. 2.11.5)

In argument 11, Landry claims the trial court committed error by denying his request to modify the instructions on unjoined perpetrators of the same crime (CALJIC No. 2.11.5). (II AOB 249-257.) Landry argues the requested modification was supported by the evidence and his theory of the defense – i.e., that he committed the murder under duress by the NLR gang and that the prison staff was complicit in the murder – which necessitated the modification to CALJIC No. 2.11.5. (II AOB 251-255.) Arguing prejudice, Landry asserts the trial court's denial of his four requested instructions on duress (Arg. IV) and the failure of the trial court to modify the unjoined perpetrators instruction prevented the jury from considering inmate Green's complicity in the murder, inmate Green's release only 10 months after the murder as well as the fact Landry could not turn to the prison staff for protection. (II AOB 255-257.) Landry's argument lacks merit because his requested modification was not a correct statement of the law and was confusing.

The purpose of the unjoined perpetrators instruction is to discourage the jury from irrelevant speculation about the prosecution's reasons for not jointly prosecuting all those shown by the evidence to have participated in the perpetration of the charged offenses and to discourage speculation about the eventual fates of unjoined perpetrators. (*People v. Brown* (2003) 31 Cal.4th 518, 560.) As Landry acknowledges (II AOB 251), the instruction focuses the jury's attention on an individualized evaluation of the evidence

against the defendant without extraneous concern for the fate of other participants irrespective of their culpability. (*People v. Cox* (1991) 53 Cal.3d 618, 668 disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 fn 22.)

The trial court instructed the jury in accordance with these basic principles. Specifically, the court instructed the jury:

> There has been evidence in this case indicating that a person other than the defendant was or may have been involved in the crime for which the defendant is on trial.
>
> There may be many reasons why that person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of the defendant on trial.

(IX RT 2221-2222; CALJIC No. 2.11.5.)

The trial court did not commit error or by refusing to modify the pattern instruction because Landry's proposed modification was confusing and asked the jury to consider inmate Green's fate.

During initial discussion about instructions, Landry made no request to change the standard instruction on unjoined perpetrators of the same crime (CALJIC No. 2.11.5). (IX RT 2046-2047.) Later when discussing the jury instructions, it was agreed that the jury would receive instruction on aiding and abetting (CALJIC No. 3.01) because there had been evidence of inmate Green's involvement in Addis' murder as an aider and abetter; evidence "there was a criminal conspiracy afoot with Mr. Green involved." (IX RT 2052-2053.)

When going over the final draft of the instructions to be given to the jury, defense counsel stated that although the instruction on unjoined perpetrators "correctly states the law," he wanted it modified. (IX RT 2198-2200.) Specifically, defense counsel asked the court to

modify the pattern instruction (CALJIC No. 2.11.5) by adding the following sentence: "You may, however, consider the actions taken against Mr. Green by members of the Department of Corrections to the extent same have been proved in this case as they may bear upon issues of fact which you are asked to determine." (IX RT 2199.)

The prosecutor objected to Landry's proposed modification for three reasons. First, the proposed modification contradicted the intent of the instruction which was to stop the jury from speculating why an additional person was not being prosecuted. (IX RT 2199-2200.) The District Attorney's Office made the determination whether to prosecute and it was not appropriate for the jury to speculate about any actions taken or not taken against inmate Green. Second, the proposed modification to the instruction was confusing because it was contradictory to the pattern instruction. (IX RT 2200.) Third, Landry could argue conspiracy without the proposed modification concerning inmate Green.

Defense counsel persisted that while he did not want the jury to consider the province of the district attorney's office decision to prosecute, he wanted the court to "clarify the behavior of the Department of Corrections towards Mr. Green." (IX RT 2200.) The trial court properly denied Landry's requested modification.

The trial court did not commit error by refusing to instruct the jury they could consider the Department of Correction's actions against inmate Green – the prison's administrative hearing and sanctions – when determining Landry's guilt. The instruction which the trial court gave (CALJIC No. 2.11.5) correctly told the jury their only concern was whether the prosecution proved Landry's guilt and not to consider whether inmate Green had been or would be prosecuted. (*People v. Brown, supra*, 31 Cal.4th at p. 560.) Landry's requested modification improperly asked the jury to consider the fate of inmate Green when determining Landry's guilt.

(*People v. Brown* (2003) 31 Cal.4th 518, 560.) As the prosecutor argued, Landry's modification was confusing and vague in the context of the entire instruction. Landry's proposed modification on the one hand told the jury to consider the Department of Correction's administrative action against inmate Green while at the same time telling them not to consider why inmate Green was not being prosecuted or whether he had been or would be prosecuted.

Landry erroneously argues "the Department of Corrections treatment of Green was not an extraneous concern to the circumstances of this case." (II AOB 251.) Landry is wrong because the Department of Correction's treatment of Green had nothing to do with Landry's guilt. Landry's assertion that inmate Green's power over the correctional officers was "confirmed by the fact that the Department of Corrections released [him] on parole" exemplifies the speculation the unjoined perpetrators instruction addresses because the actions of the Department of Corrections involving inmate Green were irrelevant to Landry's guilt. (II AOB 256.) The instruction on unjoined perpetrators did not prevent the jury from considering any of the evidence about inmate Green, did not preclude the jury from considering any of the facts developed during the investigation into inmate Green's involvement in the murder, any of the defense evidence or the defense's theory of the case. Rather, the instruction precluded the jury from speculating about inmate Green's eventual fate – a matter completely unrelated to Landry's guilt or his defense.

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Landry gives a lengthy and inaccurate recitation of the evidence[58] and the defense's theory of the case. (II AOB 251-255.) However, Landry fails to provide any legal support for the modification to the jury instruction other than general law addressing instructions on the defense theory of the case. (II AOB RT 255.) Additionally, Landry's argument relies upon the erroneous legal predicate that duress is a defense to murder. (*People v. Anderson, supra*, 28 Cal.4th at pp. 770, 783-784.) Furthermore, Landry fails to establish how the brief one sentence modification proposed by defense counsel would have affected the jurors ability to consider the evidence any more favorably than the instruction on unjoined perpetrators as given. Simply put, while Landry argues the trial court should have

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[58] Landry erroneously asserts "most of the officers on duty at Palm Hall knew that Addis' safety was at risk," referencing Officer Esqueda, Sergeant Sams, Officer Valencia, and Officer Ginn. (II AOB 251-252.) In fact, Officer Esqueda never testified he knew Addis was at risk but, rather, testified that while he knew Addis had been moved from the third tier to the first tier, he was unaware of any problem Addis had with any other inmates. (V RT 1136-1138.) While Officer Sams had heard Addis "might not be in favorable conditions with the inmates," he testified he did not know why and did not testify he thought Addis' safety was at risk. (VI RT 1123-1125.) While Officer Valencia believed Addis had been moved to tier one after being caught with "pruno" and had heard Addis had smoked some of the NLR gang's tobacco, he did not know of any threats to Addis' safety. (V RT 1182-1184.) While Officer Ginn testified he thought Addis might get "beat up" because he did not fit in with the other inmates, he also testified he was unaware of any safety concerns, risks or problems with Addis being on the yard. (V RT 1778-1779, 1781-1785.) Landry also erroneously states that after inmate Green demanded Addis be brought out to the yard, "Sergeant Sams then sent Officer Ginn to Addis' cell to tell him that he had been cleared to go to the yard" (AOB II 252) because both Sergeant Sams and Officer Ginn testified they were unaware of any statements made by inmate Green on the yard before Addis was released on it. (VI RT 1341-1342; VIII RT 1780-1781.) The only concern was whether Addis wanted to exercise his yard privilege. (VI RT 1323-1324; VIII RT 1778-1779, 1786, 1788.)

modified CALJIC No. 2.11.5, he fails to provide authority in support of it or establish why the modification proposed by defense counsel would have made a difference in the jury's ability to consider the evidence or the defense theory of the case.

Landry's argument that the trial court committed error by refusing to modify the instruction on unjoined perpetrators lacks merit. The modification which Landry sought was confusing, created a contradiction within the instruction itself, is contrary to the law regarding consideration of unjoined perpetrators, and in no way affected the defense theory of the case or Landry's ability to argue it to the jury. Therefore, Landry's argument should be rejected and his conviction and punishment affirmed.

XI. THERE WAS NO CUMULATIVE ERROR DURING THE GUILT PHASE

In argument 12, Landry asserts cumulative error resulted in prejudice during the guilt phase of his trial based upon his 11 previous arguments. (II AOB 257-259.) Landry argues that the errors in the instant case "synergistically impaired" his ability to defend against the charges and resulted in a violation of his state and federal constitutional rights. (II AOB 258.) Respondent submits that no errors were committed during the pretrial and guilt phase of his trial, that any errors that were committed did not result in prejudice either singularly or cumulatively, and that Landry was not denied due process under either the state or United States constitutions. Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box*, *supra*, 23 Cal.4th at pp. 1214, 1219.) The record shows Landry received a fair trial. Landry's arguments to a contrary lack merit and should be rejected.

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PENALTY PHASE ARGUMENTS

XII. AT THE TIME APPELLANT MURDERED INMATE ADDIS AND ASSAULTED INMATE MATTHEWS HE WAS SERVING A LIFE PRISON TERM WITHIN THE MEANING OF PENAL CODE SECTION 4500

In argument 13 Landry asserts he was not serving a life sentence at the time he committed the offenses because he was still serving his determinant prison term for his 1992 burglaries. (II AOB 259-275.) Landry reasons that under Penal Code section 1170.1, prison terms imposed consecutively are served consecutively, so he did not begin serving his life sentence until February 10, 2000 – after he murdered Addis – so he was not serving a "life sentence" for purposes of Penal Code section 4500 at the time of the murder. (II AOB 262-270.) While Landry acknowledges authority contrary to his analysis, he argues this Court should rely upon Penal Code section 1170.1 to determine when he began serving his life sentence for purposes of Penal Code section 4500. (II AOB 270-275.)

Landry's argument should be rejected for two reasons. First, Landry's argument should be deemed forfeited to the extent he argues as a matter of law he was not serving a life sentence because he not only failed to make this argument at trial but also conceded he was a life prisoner during the penalty phase closing argument. Second, Landry's argument lacks merit because Penal Code section 1170.1 does not establish the status of a prisoner but only how prison terms are calculated.

A. Appellant's Legal Argument That He Was Not a Life Prisoner at the Time He Committed the Murder Should Be Deemed Forfeited for Failure to Assert in the Trial Court

To the extent that Landry argues as a matter of law he was not serving a life sentence at the time he committed the instant offenses, his argument should be deemed forfeited. The failure to challenge evidence in the trial

court, results in forfeiture of the claim for purposes of appeal. (*People v. Williams* (1997) 16 Cal 4th 153, 194-195; *People v. Roberts* (1992) 2 Cal 4th 271, 298; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1433-1434.) Furthermore, to the extend Landry argues the evidence he was serving a life sentence violated his constitutional rights, his failure to make this argument below results in its forfeiture on appeal. (*People v. Waidla* (2000) 22 Cal.4th 690, 720, 726, fn 8; *People v. Carpenter* (1997) 15 Cal.4th 312, 385; *People v. Davis* (1995) 10 Cal.4th 463, 501-502, fn. 1; *People v. Champion* (1995) 9 Cal.4th 879, 918.)

This Court repeatedly has ruled that arguments asserting that admission or exclusion of evidence violated the defendant's constitutional rights are not cognizable on appeal unless the point was first presented to the trial court. In *Davis*, this Court summarily rejected a constitutional challenge to exclusion of certain testimony, as follows: "At trial, defendant failed to make any argument whatever based on federal constitutional provisions. He may not do so now for the first time on appeal." (*People v. Davis*, *supra*, 10 Cal.4th at pp. 501-502, fn. 1.) In *Waidla*, this Court concluded that defense counsel's objections to admission of certain testimony on grounds of hearsay and excessive prejudice were insufficient to preserve constitutional claims. (*People v. Waidla*, *supra*, 22 Cal.4th at pp. 720, 726, fn. 8.) Again, in *Carpenter*, this Court rejected defendant's claim that admission of certain photographs violated his federal constitutional rights, reasoning that "[b]ecause defendant objected only on statutory grounds, the constitutional arguments are not cognizable on appeal." (*People v. Carpenter*, *supra*, 15 Cal.4th. at p. 385; see also *People v. Rowland* (1992) 4 Cal.4th 238, 265, fn. 4.) This Court also rejected an argument that the excusal of a juror during the penalty phase violated the

defendant's constitutional rights because the defendant failed to assert a constitutional claim in the court below. (*People v. Earp* (1999) 20 Cal.4th 826, 893.)

Likewise here, Landry not only failed to interpose a specific and timely objection to the admission of this evidence based on his constitutional rights but, also, he agreed to its admission. He neither argued he was not undergoing a life sentence nor did he assert there was constitutionally deficient evidence to establish he was undergoing a life sentence at the time he murdered Addis. Accordingly, such arguments are not cognizable on appeal. (*People v. Davis, supra*, 10 Cal.4th at pp. 501-502, fn. 1; *People v. Waidla, supra*, 22 Cal.4th at p. 726, fn. 8; *People v. Carpenter, supra*, 15 Cal.4th at p. 385.)

Landry agreed to the admission of the prison packet establishing his conviction and life sentence (VII RT 1645-1647, 1657-1658), agreed to the jury instruction defining the status requirement of finding Landry was serving a life sentence (IX RT 2067-2070), and conceded during the penalty phase closing arguments that he had committed an assault which made him "a lifer" (XIV RT 3527, 3539-3540). In fact, Landry participated in the discussion of the jury instruction defining the offense of assault by a life prisoner with malice aforethought (CALJIC No. 7.35), requesting a modification[59] to the instruction but not objecting to the definition of a life prisoner. (IX RT 2067-2070.) The instructions specifically provided:

> Every person ***while undergoing a life sentence who is sentenced*** to state prison within this state and who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument is guilty of a violation of Penal Code Section 4500, a crime.

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[59] The modification which Landry requested did not concern the issue raised on appeal.

> . . . A prisoner is a life prisoner when undergoing a sentence the maximum term of which is life imprisonment if no term less than life has been fixed. A term of 25 years to life is a life sentence within the meaning of these instructions.
>
> ***A person is a life prisoner after the imposition of a sentence of life imprisonment*** regardless of the place of confinement.

(IX RT 2238-2239; emphasis added; III CT 882-883.)

The jury instruction to which Landry agreed defined a prisoner as a life prisoner at the imposition of the life sentence and not when the prisoner began serving a life sentence as Landry argues on appeal. Because at no time did Landry challenged this instruction or disagree with this legal definition, he should be foreclosed from doing so on appeal.

B. The Evidence Definitively Established Appellant's Status as a Life Prisoner, Pursuant to Penal Code Section 4500, at the Time He Murdered Addis and Assaulted Inmate Matthews

Assuming arguendo Landry's argument is not forfeited for purposes of appeal, it lacks merit. The argument which Landry makes in the instant case has been considered and rejected. (*People v. Superior Court* (*Bell*) (2002) 99 CalApp.4th 1334, 1342-1344.) So too this Court should reject the Landry's argument.

Landry does not contest the fact a life sentence had been imposed as a result of his 1995 guilty plea to possession of a deadly weapon by a person confined in a penal institution (Pen. Code, § 4502). (II AOB 262.) Landry does not contest the fact he was, therefore, subject to serving that life sentence. Rather, Landry argues his status at the time he committed the murder was not of an inmate serving a life sentence because he was still serving his determinant sentence for robbery. It is this contention which the court in *Bell* addressed and rejected.

A prisoner sentenced to both a determinate term sentence and a life sentence is considered to be serving a life sentence for purposes of Penal Code section 4500. (*People v. Superior Court (Bell), supra*, 99 Cal.App.4th at p. 1344.) *Bell* is directly on point, and while Landry acknowledges *Bell*, he fails to distinguish it. (II AOB 272 fn 30.) Bell was convicted of multiple offenses, resulting in a determinate sentence of 27 years 8 months and two consecutive indeterminate terms of life with the possibility of parole. (*People v. Superior Court (Bell), supra*, 99 Cal.App.4th at pp. 1336, 1342.) While serving the determinant prison term, Bell committed an assault against an inmate. (*People v. Superior Court (Bell), supra*, 99 Cal.App.4th at pp. 1336-1337, 1342.) Just as Landry in the instant case, Bell argued he was not serving a life sentence at the time he committed the offense against the inmate and, therefore, was not "undergoing a life sentence" pursuant to Penal Code section 4500; the trial court agreed with Bell and the prosecution appealed. (*People v. Superior Court (Bell), supra*, 99 Cal.App.4th at p. 1338.) The Court of Appeal reversed the trial court by finding that a prisoner serving a determinate term to be followed by a consecutive life sentence was serving one aggregate term of confinement, so Bell "falls into the class of prisoners who are undergoing a life sentence within the meaning of [Pen. Code], section 4500." (*People v. Superior Court (Bell), supra*, 99 Cal.App.4th at pp. 1343-1344.)

The court in *Bell* relied upon the reasoning of *People v. McNabb* (1935) 3 Cal.2d 441 as well as other case law addressing a similar issue. (*People v. Superior Court (Bell), supra*, 99 Cal.App.4th at pp. 1339-1341.) Both *McNabb* and *Bell* acknowledged the Legislature intended Penal Code section 4500 and its predecessor "to deter those who are serving life sentences who might otherwise believe they have nothing to lose. [Citation omitted.]" (*People v. Superior Court (Bell), supra*, 99 Cal.App.4th at

pp. 1340-1341.) The court also acknowledged prison discipline and protection of guards and inmates constituted a cogent reason for the enactment of Penal Code section 4500. (*People v. Superior Court (Bell)*, *supra*, 99 Cal.App.4th at pp. 1341.) Landry unpersuasively attempts to distinguish *McNabb* and argue it does not apply in the instant case. (II AOB 270-274.)

First, Landry argues that unlike *McNabb*, if he had appealed one of his burglary convictions and that conviction had been reversed, then he would not have been serving a life sentence for his violation of Penal Code section 4502. (II AOB 272-273.) Landry's argument suffers two fatal flaws.

First, it mattered not that if one of his robbery convictions had been overturned he would not have been subject to a life sentence. (*In re Carmichael* (1982) 132 Cal.App.3d 542, 546.) The court in *Carmichael* rejected a similar claim, finding Carmichael's "status of lifer at the time of the assault is what the Legislature was focusing on in attaching the severe penalties which flow from a section 4500 conviction. . . even though the conviction under which he became a life prisoner is later declared invalid." (*In re Carmichael*, *supra*, 132 Cal.App.3d at p. 546, see also *People v. Superior Court (Bell)*, *supra*, 99 Cal.App.4th at pp. 1341-1342.) In the instant case, it matters not what Landry's sentence could have been if his situation had been different either at the time he murdered Addis or after the murder as the result of a hypothetical appeal.

Second, Landry's hypothesis is meaningless because Landry was in fact serving a life sentence at the time he murdered Addis. The court in *McNabb* found "the contention of appellant McNabb to the effect that a person is not undergoing a life sentence within the purpose and meaning of the law, when imprisoned on a judgment which imposes the longest term known to the law and to which nothing further may be added, because,

forsooth, he is also held on a prior uncompleted sentence for years does not stand the test of reason." (*People v. McNabb*, *supra*, 3 Cal.2d at p. 457.) The fact Landry, under other circumstances, might not have been serving a life term is irrelevant and does not defeat the reasoning of *McNabb*.

Additionally, Landry asserts his claim is not based on Penal Code section 669 but Penal Code section 1170.1, subdivision (c). (II AOB 273.) The courts in *Bell* and *McNabb* did not address Landry's claim in the context Penal Code section 1170.1 but, rather, Penal Code section 669. However, the reasoning of the courts in *Bell* and *McNabb* applies to Landry's argument based upon Penal Code section 1170.1. Penal Code section 669 simply addresses the imposition of consecutive or concurrent sentences (or the failure to do so) as well as the calculation of credits while Penal code section 1170.1 addresses how multiple consecutive terms imposed are to be served.

Landry notes Penal Code section 1170.1, subdivision (c), provides that consecutive prison terms imposed as a result of offenses committed while a defendant is confined in prison "shall commence from the time the person would otherwise have been released from prison" and argues he was, therefore, not serving a life term because he was still serving the prison term for his robbery convictions. (II AOB 262-270.) Landry's argument ignores the language in Penal Code section 1170.1, subdivision (c), which provides "If the new offenses are consecutive with each other, the principle and subordinate terms shall be calculated as provided in subdivision (a)." And Penal Code section 1170.1, subdivision (a), refers to the "aggregate term of imprisonment" as being the sum of the individual sentences, including the principle and subordinate terms as well as on the other terms imposed as a result of enhancements. Therefore, the fact Landry was technically serving the remainder of his robbery prison term at the time he murdered Addis did not change his status as a life prisoner

because his aggregate term of imprisonment included a life sentence. The reasoning of the court in *McNabb* applies to the instant case; the contention Landry was not "undergoing a life sentence" when he was imprisoned on a judgment for "the longest term known to the law and to which nothing further may be added, because, forsooth, he [was] also held on a prior uncompleted sentence for years does not stand the test of reason." (*People v. McNabb*, *supra*, 3 Cal.2d at p. 457.)

Landry had the status of a life prisoner at the time he murdered Addis and, therefore, was serving a life sentence at the time of the murder for purposes of Penal Code section 4500. Landry's argument that he was not serving a life sentence because three years remained to his determinate term at the time he committed the murder and assault ignores the decision in *Bell* rejecting his argument, ignores his aggregate sentence, and ignores the reasoning in *McNabb*. Therefore, Landry's arguments should be rejected and his judgment and penalty remain intact.

XIII. CONSIDERATION OF APPELLANT'S CUSTODY STATUS TO DETERMINE DEATH ELIGIBILITY WAS NOT UNCONSTITUTIONAL BECAUSE APPELLANT'S STATUS AS AN INMATE UNDERGOING A LIFE SENTENCE SERVED TO NARROW HIS ELIGIBILITY FOR THE DEATH PENALTY

In argument 14 Landry claims Penal Code section 4500 is unconstitutional because it is overly broad with regard to death eligibility; Landry argues he should not have been eligible for the death penalty simply because he was in prison serving a life term. (II AOB 276-334.) Landry makes a three faceted challenge to the constitutionality of Penal Code section 4500. First, Landry asserts Penal Code section 4500 is arbitrary, vague and overbroad because it does not sufficiently narrow those who are death eligible or provide a meaningful basis for distinguishing extreme cases for which death may be the appropriate punishment. (II AOB 280-288.) Second, Landry argues prior authority upholding the constitutionality

of Penal Code section 4500 does not pass current constitutional muster. (II AOB 288-315.) Third, Landry complains an interjurisdictional comparison shows other jurisdictions would not have made Landry eligible for the death penalty. (II AOB 315-334.) Landry's arguments lack merit because his custody status as serving a life prison term constitutionally narrowed his eligibility for the death penalty.

In order to receive the death penalty, a defendant must be found guilty of homicide with an aggravating circumstance at either the guilt phase or the penalty phase of the trial. (*Tuilaepa v. California* (1994) 512 U.S. 967, 971-972 [114 S.Ct. 2630, 129 L.Ed.2d 750].) "The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)." (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 972 citing *Lowenfield v. Phelps* (1988) 484 U.S. 231, 244-246 [108 S.Ct. 546, 554-555, 98 L.Ed.2d 568].) The aggravating circumstance serves to limit the class of murderers to which the death penalty may be applied. (*Brown v. Sanders* (2006) 546 U.S. 212, 216 [126 S.Ct. 884, 163 L.Ed.2d 723].)

The United States Supreme Court in *Tuilaepa* distinguished the two aspects of a capital trial: the eligibility phase and the selection phase. (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 971.) In the eligibility phase the jury determines whether a defendant is eligible for the death penalty and at the selection phase whether the death penalty is the appropriate penalty. (*Buchanan v. Angelone* (1998) 522 U.S. 269, 275 [118 S.Ct. 757, 139 L.Ed.2d 702].) "What is of common importance at the eligibility and selection stages is that 'the process is neutral and principled so as to guard against bias or caprice in the sentencing decision.' [Citation omitted.]" (*Jones v. U.S.* (1999) 527 U.S. 373, 402 [119 S.Ct. 2090, 144 L.Ed.2d 370].) In the instant case, Landry only challenges the constitutionality of Penal Code section 4500's eligibility phase. (II AOB 280.)

The court in *Buchanan* noted "[i]t is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition." (*Buchanan v. Angelone*, *supra*, 522 U.S. at pp. 275-276.) The narrowing function is accomplished in the eligibility phase if two criteria are met: first, the aggravating factor only applies to a subclass of defendants convicted of murder and not all murderers; and second, the aggravating circumstance is not constitutionally vague. (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 972.) Vagueness claims are reviewed with deference, and the Supreme Court has held, "[a]s long as an aggravating factor has a core meaning that criminal juries should be capable of understanding, it will pass constitutional muster." (*Jones v. US*, *supra*, 527 U.S. at p. 400.)

Penal Code section 4500 passes constitutional muster, despite Landry's claims it does not sufficiently narrow the defendants eligible for the death penalty. (II AOB 280-288.) Simply put, Penal Code section 4500 limits the eligibility of the death penalty to a small subclass of defendants and does not apply to all murderers. (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 972.)

Penal Code section 4500 specifically provides in pertinent part:

> Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

The elements of assault with malice by a prisoner serving a life term, within the meaning of Penal Code section 4500, are an aggravated assault with malice aforethought by a state prisoner serving a life term. (*People v. Staples* (1988) 204 Cal.App.3d 272, 276; *People v. Superior Court (Gaulden*) (1977) 66 Cal.App.3d 773, disapproved on another point in *People v. Sumstine* (1984) 36 Cal.3d 909, 919, fn. 6.) While *Staples* involved an assault that did not result in death, it set forth the basic elements of the offense as follows, "(1) an aggravated assault, (2) by a state prisoner, (3) serving a life term, and (4) with malice aforethought." (*People v. Staples*, *supra*, 204 Cal.App.3d at p. 276 [striking any of these elements for sentencing purposes prevents prosecution of the crime and results in "legal mumbo-jumbo"].) However, the instant case involves an important additional element – the assault must be the proximate cause of death within a year and a day. (Pen. Code, § 4500.) The elements of the offense are sufficiently narrow for purposes of the selection phase to pass constitutional muster.

By definition, Penal Code section 4500 provides the requisite constitutional narrowing function because it only applies to a subclass of defendants convicted of murder and not all murderers. (*Tuilaepa v. California, supra*, 512 U.S. at p. 972.) Not only does it apply solely to convicted defendants serving a prison term, but then only to those serving a life term. Furthermore, the homicide victim must die within a year and a day of the assault with malice aforethought. The court in *Tuilaepa*, *supra*, 512 U.S. at p. 972, acknowledged the aggravating circumstance may be contained in the definition of the crime, and such is the case with Penal Code section 4500 because it narrows those death eligible to convicted felons serving a life sentence who commit murder with malice aforethought. (*Brown v. Sanders*, *supra*, 546 U.S. at p. 216 including fn 2.)

Landry argues Penal Code section 4500 is unconstitutionally vague because the determination of death eligibility is based on a "yes or no answer" to a "single, specific question: was the defendant undergoing a life sentence at the time of the crime? [Citation omitted]." (II AOB 286-288.) Landry relies upon the analysis in *Tuilaepa* addressing a vagueness challenge to sentencing factors when arguing Penal Code section 4500 fails to impose any inherent restraint on death eligibility. Acknowledging *Tuilaepa* addressed a vagueness challenge to sentencing factors penalty phase, Landry claims the same analysis should apply to factors at the eligibility phase, relying upon *Stringer v. Black* (1992) 503 U.S. 222, 235 [112 S.Ct. 1130, 117 L.Ed.2d 367]. (II AOB 286-287.)

But the concern of the court in *Tuilaepa* was not that the sentencing factor required the jury to answer a question yes or no but, rather, the fact the question itself involved "pejorative adjectives . . . that describe a crime as a whole." (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 974.) The court in *Tuilaepa* gave examples of such questions: "whether the murder was 'especially heinous, atrocious, or cruel' [citation omitted]" and "whether [the] murder was 'outrageously or wantonly vile, horrible and inhuman.' [Citation omitted.]" (*Tuilaepa*, *supra*, 512 U.S. at p. 974.) Indeed, such questions could apply to all murders, but the question before the jury in the instant case was qualitatively and quantitatively different than the problematic ones in *Tuilaepa*. That is, not all murders are committed by inmates sentenced to life prison terms.

Furthermore, the court in *Tuilaepa* acknowledged, "[e]ligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to 'make rationally reviewable the process for imposing a sentence of death.' [Citation omitted]." (*Tuilaepa*, *supra*, 512 U.S. at p. 973.) The court in *Tuilaepa* held a factor was "not unconstitutional if it has some 'common-sense core of meaning . . . that

criminal juries should be capable of understanding.'" (*Tuilaepa, supra*, 512 U.S. at p. 973 quoting *Jurek v. Texas* (1976) 428 U.S. 262, 279 [96 S.Ct. 2950, 49 L.Ed.2d 929].) Determining whether a defendant was or was not serving a life sentence when he committed an assault with a deadly weapon with malice aforethought certainly addresses a question with a common-sense core meaning capable of understanding by a jury. (Pen. Code, § 4500.)

Landry argues "all life prisoners, regardless of the nature of the life sentence and the crime for which it was imposed, are treated the same for purposes of determining death eligibility." (II AOB 288.) Landry may be correct, as far as it goes. But so too all persons who commit murder during the commission or attempted commission of a robbery (Pen. Code, § 190.2 subd. (a) (17) (A)) or by the administration of poison (Pen. Code, § 190.2 subd. (a) (19) are treated the same regardless of the nature of the robbery or its success or the type of poison. The factors set forth under Penal Code section 190.2 constitutionally narrow death eligibility. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 43.) By its definition, Penal Code section 4500 only applies to a subclass of those who commit murder, and Landry fails to reference any authority supporting the proposition that such a subclass must be capable of being further subdivided.

Landry finds fault with the trial court's denial of his demurrer because the trial court relied upon *Tison v. Arizona* (1987) 481 U.S. 137 [107 S.Ct. 1676, 95 L.Ed.2d 127].[60] (II AOB 278, 284-285.) Landry asserts *Tison* did not "relate to the question of eligibility but to selection of the death penalty." (II AOB 285.) However, Landry's demurrer did not address the specific issue Landry raises on appeal that Penal Code section 4500 fails to adequately narrow those defendants who are death eligible. Rather, Landry

[60] Landry errantly cites *Tison* as "487 U.S. 137". (II AOB 284-285.)

argued Penal Code section 4500 was unconstitutional because the punishment was disproportionate and Penal Code section 4500 was vague and arbitrary because it did not require first degree murder. (I CT 56-61.)

Specifically, Landry's demurrer asserted two grounds: first, arguing only two other states allow for the imposition of the death penalty based on a person's status as a life prisoner even though they had not committed premeditated murder (I CT 57-61); and second, Penal Code section 4500 violated the Eighth Amendment because it was overbroad by permitting the imposition of the death penalty based on second degree murder rather than first degree murder (I CT 61-64). When denying Landry's demurrer, the trial court noted the limited issues appropriate for consideration in a demurrer, pursuant to Penal Code section 1004, and held Landry to answer on the charges filed in the complaint. (I RT 154-156.) The trial court referenced the *Tison* decision in response to Landry's argument Penal Code section 4500 permitted the death penalty without first degree murder because *Tison* upheld the death penalty based on a finding of murder caused by "reckless indifference to human life." (I RT 155.) Additionally, the trial court found some of Landry's constitutional challenges were appropriate to raise at the penalty phase, if the proceedings got that far. (I RT 155-156.) However, Landry did not reassert these issues. The trial court's reference to *Tison* addressed Landry's arguments made in the court below and does not support Landry's argument on appeal that reference to it "was a non sequitur." (II AOB 284.)

Landry argues at length that because the predecessors to the current Penal Code section 4500 were held unconstitutional, the current version is unconstitutional. (II AOB 288-315.) Landry starts by reviewing cases rejecting challenges to former Penal Code section 4500 and its predecessor (II AOB 288-300), asserting these cases do not withstand scrutiny under current constitutional standards (II AOB 300-302), and then reasoning that

because Penal Code section 4500 only requires the prosecution to establish second degree murder and because it applies to all prisoners with life terms without distinguishing the reason for the imposition of the life term, prior authority finding it constitutional no longer passes muster (II AOB 302-306). Landry's argument fails because even though certain aspects of the former Penal Code sections have been repudiated by United States Supreme Court authority, Penal Code section 4500 does not include those aspects.

As already established, Penal Code section 4500 constitutionally narrows death eligibility because by definition it applies solely to those who commit murder while not only serving a prison term, but serving a life sentence. Additionally, Penal Code section 4500 provides that the determination of whether to impose the death penalty must be made under the rubric of Penal Code sections 190.3 and 190.4. (Pen. Code, § 4500.) Former Penal Code section 4500 and its predecessor differed in two significant aspects: first, they permitted the imposition of the death penalty even if the assault did not result in death; second, the death penalty was mandatory and not a decision made by the jury under the rubric of Penal Code sections 190.3 and 190.4. (See *People v. Finley* (1908) 153 Cal 59; *People v. Oppenheimer* (1909) 156 Cal 733, *People v. Wells* (1949) 33 Cal.2d 330.) While these differences are substantial, they did not completely undermine this Court and the United States Supreme Court's previous decisions upholding the decisions under former Penal Code sections 4500 and its predecessor.

The United States Supreme Court has found unconstitutional two aspects of former Penal Code section 4500 and its predecessor – imposition of the death penalty for crimes other than one involving death and imposition of the death penalty without allowing the jury to consider the nature of the offense and the offender. (See *Kennedy v. Louisiana, supra,* __ U.S.__ [128 S.Ct.at p. 2650]) ["death penalty can be

disproportionate to the crime itself where the crime did not result, or was not intended to result, in death of the victim."] and *Sumner v. Shuman* (1986) 483 U.S. 66, 78 [107 S.Ct. 2716, 97 L.Ed.2d 56] ["departure from the individualized capital-sentencing doctrine is not justified and cannot be reconciled with the demands of the Eighth and Fourteenth Amendments."].) Landry relies primarily upon *Shuman* to argue Penal Code section 4500 does not adequately narrow death eligibility to pass constitutional muster based on the fact it applies to inmates serving a life sentence. (II AOB 304-308.) While Landry acknowledges *Shuman* involved a mandatory death sentence (II AOB 304), he underplays the importance of this fact in the court's decision finding that a defendant's status as a prisoner serving a life sentence was insufficient – in and of itself – to constitutionally narrow the imposition of the death penalty.

Shuman was convicted under a Nevada statute which enumerated a list of situations which, if found in conjunction with murder, mandated the death penalty, and the legislature stated the enactment of the mandatory death penalty was "intended to prevent the arbitrary and capricious imposition of the death penalty." (*Sumner v. Shuman*, *supra*, 483 U.S. at pp. 70-71.) The court in *Shuman* explained in some detail the preceding decisions which developed and underscored the necessity in capital cases for consideration of the offense and the offender for purposes of determining whether to impose the death penalty. (*Sumner v. Shuman*, *supra*, 483 U.S. at pp. 72-76.) The critical difference between the offense in *Shuman* and Penal Code section 4500 is obvious:

> Redefining the offense as capital murder and specifying that it is a murder committed by a life-term inmate revealed only two facts about respondent--(1) that he had been convicted of murder while in prison, and (2) that he had been convicted of an earlier criminal offense which, at the time committed, yielded a sentence of life imprisonment without possibility of parole. These two elements had to be established at Shuman's trial to

> support a verdict of guilty of capital murder. ***After the jury rendered that verdict of guilty, all that remained for the trial judge to do was to enter a judgment of conviction and impose the death sentence. The death sentence was a foregone conclusion.***

(*Sumner v. Shuman*, *supra*, 483 U.S. at p. 78; emphasis added.)
Unlike *Shuman*, in the instant case the death penalty was not a foregone conclusion following the eligibility phase of Landry's trial.

The two elements of capital murder in *Shuman* – conviction of murder while in prison and a prior conviction resulting in a sentence of life imprisonment – did not "provide an adequate basis on which to determine whether the death sentence is the appropriate sanction" because these two elements did "not reflect whether any circumstance existed at the time of the murder that may have lessened [Shuman's] responsibility for his acts even though it could not stand as a legal defense to the murder charge." (*Sumner v. Shuman*, *supra*,483 U.S. at p. 78-79.) Such is not the case with Penal Code section 4500.

Before a jury can impose the death penalty under Penal Code section 4500, it must consider all the factors under Penal Code sections 190.3 and 190.4, which include the nature of the offense and the offender. Unlike the statute in *Shuman*, Penal Code section 4500 simply narrows death eligibility; it does not mandate a death sentence. Rather, Penal Code section 4500 expressly provides for consideration of the offense and the offender, as well as other mitigating factors, before the jury decides whether to impose death or life imprisonment without the possibility of parole. Therefore, Penal Code section 4500 does not suffer the infirmities addressed in *Shuman* and constitutionally narrows the question of death eligibility. (*Brown v. Sanders*, *supra*, 546 U.S. at p. 216 including fn 2.)

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Relying on *Shuman*, Landry reasons that because a life sentence can be imposed for a number of reasons, including under the three strikes law for the conviction of minor nonviolent offenses, life sentence status fails to genuinely narrow the class of persons death eligible. (II AOB 306-309.) However, *Shuman* does not apply in the instant case because it involved the imposition of the mandatory death sentence and not simply the issue of death eligibility. Furthermore, the United States Supreme Court held, "'the 'life termers,' as has been said, while within the prison walls, constitute a class by themselves, a class recognized as such by penologists the world over." (*Finley v. California* (1911) 222 U.S. 28, 31 [32 S.Ct. 13, 56 L.Ed.2d 75].) This Court rejected claims similar to those Landry makes in the instant case that the predecessor to Penal Code section 4500 as well as this Court and the United States Supreme Court's decisions in *Finley* never contemplated that one in three inmates would be a life prisoner. (*People v. Dorado* (1965) 62 Cal.2d 338, 357 overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509.) Dorado's life sentence resulted from a drug conviction and a probation violation. (*People v. Dorado*, *supra*, 62 Cal.2d at p. 358.) Despite Landry's claims to the contrary, Penal Code section 4500 serves to constitutionally narrow death eligible defendants on the basis of their status as inmates who are serving life terms because the jury must still determine the propriety of the death penalty under Penal Code sections 190.3 and 190.4.

Relying on *Shuman*, Landry claims Penal Code section 4500 is not a deterrent. (II AOB 309.) However, the court in *Shuman* held, "a guided-discretion sentencing procedure does not undermine any deterrent effect that the threat of the death penalty may have. Those who deserve to die according to the judgment of the sentencing authority will be condemned to death under such a statute." (*Sumner v. Shuman*, *supra*, 483 U.S. at p. 83.) The jury in the instant case weighed all of the constitutionally requisite

factors before imposing the death penalty rather than life without the possibility of parole. Penal Code section 4500 gave them this option and, therefore, passes constitutional muster as a deterrent.

Likewise, Landry argues the death penalty does not serve as retribution, again referencing *Shuman* for the proposition that there are other sanctions less severe than execution that can be imposed even on a life-term inmate. (II AOB 312-315.) While *Shuman* held a mandatory death sentence was not justified by a state's retribution interests based on the fact that defendant was serving a life sentence at the time he committed murder, it held under "a ***guided-discretion*** statute, a life-term inmate does not evade the imposition of the death sentence if the sentencing authority reaches the conclusion, after individualized consideration, that the inmate merits execution by the State." (*Sumner v. Shuman*, *supra*, 483 U.S. at p. 84; emphasis added.) Penal Code section 4500 is a "guided-discretion" statute and not a mandatory death penalty statute, so it passes muster under *Shuman*.

In the instant case, the jury determined the appropriate penalty in the instant case was death rather than life without the possibility of parole. Landry had already served time in a Secured Housing Unit (SHU) as well as Administrative Segregation Units but was undeterred from his violent ways. In fact, he committed the murder of Addis while in the Administrative Segregation Unit at CIM, and this was the highest security unit at that institution. Despite Landry's arguments to the contrary, Penal Code section 4500 is not overly broad and does serve a retributive function.

Landry asserts interjurisdictional comparison does not support considering custody status for purposes of death eligibility because there is a lack of societal consensus. (II AOB 315-333.) Landry's argument lacks merit for two reasons. First, this Court has recognized that comparative

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intercase proportionality review of death sentences is not constitutionally required. (*People v. Taylor* (2009) 47 Cal.4th 850, 900.) Furthermore, Landry's own statistics belie his claim.

Landry's own data support considering custody status to determine death eligibility. According to Landry, only three jurisdictions[61] with the death penalty do not consider custody status for any purpose. (II AOB 316.) That is, according to Landry over 90% of the jurisdictions with the death penalty consider custody status as a factor at either the eligibility or penalty phase (or both); 37 jurisdictions have the death penalty and 34 consider custody status. (II AOB 316.) Of the jurisdictions that consider custody status, 38% consider it for purposes of determining death eligibility; a total of 34 jurisdictions consider custody status and 13 of those jurisdictions consider it for purposes of determining death eligibility. Assuming without conceding that interjurisdictional comparison is appropriate, contrary to Landry's assertion otherwise, California's consideration of custody status for purposes of determining death eligibility is consistent with the objective indicia of society's standards. (II AOB 316 citing *Kennedy v. Louisiana, supra,* __ U.S. __ [128 S.Ct. at p. 2650].)

Landry asserts 75 percent of 52 American jurisdictions "do not use custody status for determining death eligibility." (II AOB 316, 330-333.) But Landry includes in his percentage jurisdictions without the death penalty; it is axiomatic that a jurisdiction without the death penalty would not consider

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[61] Landry's statistical analysis includes the 50 states plus the District of Columbia and the federal government for a total of 52 jurisdictions. (II AOB 316.)

custody status for a penalty they do not impose, so those jurisdictions which do not have the death penalty should not be included in this statistical calculation.

Finally, Landry asserts that the death penalty is only reserved for extreme cases reflecting so grievous an affront to humanity that the only adequate response may be the death penalty, citing *Gregg v. Georgia* (1976) 428 U.S. 153, 184 [96 S.Ct. 2909, 49 L.Ed.2d 859]. (II AOB 333-334.) Landry's unprovoked murder of Addis in broad daylight in the exercise yard at CIM in front of inmates and guards while serving a life sentence certainly constitutes an extreme case of murder so grievous an affront to humanity that it justifies imposition of the death penalty. Furthermore, between August 1994 and June 1997 while in custody Landry committed eight assaults on other inmates, attempted to stab two other inmates, twice attacked prison personnel, and on 13 occasions was found with weapons either in his cell or in his rectum, but the jury only considered the fact he was serving a life term at the time he committed the offense for purposes of determining death eligibility. The consideration of Landry's custody status to determine death eligibility withstands constitutional scrutiny, and Landry's arguments to the contrary should be rejected. Therefore, Landry's conviction and judgment should remain intact.

XIV. APPELLANT'S SENTENCE DOES NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION ON THE BASIS OF HOW OTHER COUNTIES MAY CHARGE CAPITAL CASES

In argument 15 Landry asserts that because the San Francisco County District Attorney has not sought the death penalty since 1996, Landry was denied due process and equal protection because the death penalty is arbitrarily enforced. (III AOB 335-344.) Although acknowledging several cases by this Court rejecting arguments attacking prosecutorial discretion in

charging the death penalty, Landry argues similarly situated defendants in San Bernardino County and San Francisco County are treated differently as far as when the death penalty is sought. (III AOB 336, 338-339, 342.) Landry also attempts to distinguish the instant case because it involves Penal Code section 4500 rather than Penal Code section 190.2. Landry's arguments are unavailing.

It is well-established in both this Court and the United States Supreme Court that the exercise of prosecutorial discretion in charging capital offenses does not violate the Eighth Amendment. (*Proffitt v. Florida* (1976) 428 U.S. 242, 254 [96 S.Ct. 2960, 49 L.Ed.2d 913]; *Gregg v. Georgia* (1976) 428 U.S. 153, 199 [96 S.Ct. 2909, 49 L.Ed.2d 859]; *People v. Gutierrez* (2009) 45 Cal.4th 789, 833; *People v. Williams* (1997) 16 Cal.4th 153, 278.) This Court has addressed and rejected arguments that the death penalty statute unconstitutionally grants unfettered discretion to prosecutors to decide whether to charge eligible defendants with the death penalty. (*People v. Salcido* (2008) 44 Cal.4th 93, 168; *People v. Snow* (2003) 30 Cal.4th 43, 126.) "Prosecutorial discretion in deciding whether to seek the death penalty is constitutional." (*People v. Davis* (2009) 46 Cal.4th 539, 628.)

Furthermore, this Court has rejected Landry's argument that the exercise of prosecutorial discretion to seek capital punishment in eligible cases within a particular county violates equal protection. (*People v. Bennett* (2009) 45 Cal.4th 577, 629.) Also, this Court has rejected Landry's argument (III AOB 338-340) that *Bush v. Gore* (2000) 531 U.S. 98 [121 S.Ct. 525, 148 L.Ed.2d 388], warrants revisiting the issue. (*People v. Bennett, supra*, 45 Cal.4th at p. 629 fn 19.)

Also lacking merit is Landry's argument that the charging of his case pursuant to Penal Code section 4500 requires a different outcome. (III AOB 341-344.) "Prosecutorial discretion to select those death-eligible

cases in which the death penalty will actually be sought is not constitutionally impermissible." (*People v. Snow*, *supra*, 30 Cal.4th at p. 126.) While this Court's decisions typically involve cases charged under Penal Code section 190.2, this Court's decisions addressing "death penalty" cases apply to Penal Code section 4500 capital cases. (*People v. Bennett*, *supra*, 45 Cal.4th at p. 629; *People v. Gutierrez* (2009) 45 Cal.4th 789, 833; *People v. Cornwall* (2005) 37 Cal.4th 50, 105.) All death penalty cases are charged under either Penal Code sections 190.1 and 190.2 or 4500 and sentencing is done pursuant to Penal Code sections 190.3 and 190.4. (See Penal Code §§ 190.3 and 4500.) Therefore, Landry's argument the outcome should be different because his case was charged under Penal Code section 4500 should be rejected. That is, the prosecutor's discretion to seek the death penalty under Penal Code section 4500 does not violate any provision of either the California or the United States Constitution.

Landry's argument that his sentence should be reversed because the prosecution exercised its discretion to charge him with capital murder pursuant to Penal Code section 4500 should be rejected. Landry's argument claiming the death penalty is charged inconsistently between various counties, resulting in a violation of equal protection and due process, lacks merit. Therefore, his judgment and sentence should remain intact.

XV. THE TRIAL COURT PROPERLY RULED WHEN ALLOWING THE PROSECUTION TO CROSS-EXAMINE APPELLANT'S EXPERT ABOUT HIS EVALUATION OF APPELLANT

In argument 16 Landry asserts the prosecutor was improperly allowed to cross-examine his expert, Jimmie Cueva, about the details of his juvenile offenses even though Cueva relied on Landry's entire criminal background and his juvenile record to make his assessment. (III AOB 344-364.) Landry argues cross-examination about his juvenile offenses was

impermissible pursuant to Penal Code section 190.3, subdivisions (b) and (c), because his juvenile adjudications did not involve criminal activity involving the use or attempted use of force or violence and juvenile adjudications are not convictions. (III AOB 350-356.) Landry also argues cross-examination of Cueva violated his Sixth Amendment rights under the federal Constitution, but did not assert this issue below. (III AOB 356-362.)

Landry's arguments lack merit for two reasons: first, the prosecutor was allowed to cross-examine Landry's expert about the basis of his opinions; and second, the cross-examination of Landry's expert did not involve the admission of evidence pursuant to Penal Code section 190.3. Furthermore, Landry's claims of constitutional error are forfeited because they were not asserted below.

Well-established law recognizes expert witnesses can be cross-examined more extensively and searchingly than lay witnesses, and the prosecution is entitled to attempt to discredit an expert's opinion. (*People v. Wilson* (2005) 36 Cal.4th 309, 358; see also *People v. Lancaster* (2007) 41 Cal.4th 50, 105, *People v. Alfaro* (2007) 41 Cal.4th 1277, 1325.) Additionally, an expert can be cross-examined broadly and with facts beyond the scope of direct examination. (*People v. Loker* (2008) 44 Cal.4th 691, 739.) Finally, cross-examination need not relate to a specific aggravating factor under Penal Code section 190.3. (*People v. Mecham* (1992) 1 Cal.4th 1027, 1072-1073 [references to juvenile record in cross-examining defense witnesses did not exceed the scope of direct examination and directly related to defense witnesses' testimony].)

In the instant case, prior to the testimony of California Youth Authority casework specialist Jimmie Cueva called by Landry to testify about his evaluation of Landry, defense counsel asked the court to impose limitations on the prosecutor's cross-examination based on Penal Code

section 190.3, subdivisions (b) and (c). (XII RT 3013-3015.) The prosecutor responded the restrictions of Penal Code section 190.3 did not apply because Cueva was the defense's witness and subject to cross-examination about his opinions. (XII RT 3014-3015.) The court stated objections would be entertained at the appropriate time, depending on the direct examination. (XII RT 3015.)

Cueva, a casework specialist correctional officer, functioned as a social worker performing diagnostic evaluations for both the court and the California Youth Authority. (XII RT 3016.) In 1987 Cueva worked as the lead person with a team of psychologists, psychiatrists, social workers, youth counselors and youth correctional officers to provide his professional judgment in preparing a treatment plan for Landry. (XII RT 3020-3021, 3024.[62]) Cueva identified a 97 page report prepared and entered into evidence[63] (Exh. 95) and testified to Landry's background including his various juvenile placements, his family dysfunction, Landry's self-destructive tendencies and the treatment plan Cueva developed. (XII RT 3018-3040.) Cueva took into consideration for purposes of the evaluation Landry's juvenile offenses. (XII RT 3033-3034.)

Following Cueva's direct testimony, the court held a Evidence Code 402 hearing to address the prosecutor's cross-examination. (XII RT 3041-3048.) Cueva acknowledged during the hearing that Landry's prior offenses as a juvenile were "extremely important"[64] to his analysis, opinions, and the evaluation. (XII RT 3042-3048.) Landry objected to the

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[62] Cueva has a master's degree in social work, but he was not a licensed psychologist. (XII RT 3016, 3024.)

[63] (XII RT 3018; XIV RT 3398)

[64] (XII RT 3042, 3044)

prosecution cross-examining Cueva about Landry's prior criminal history, even though it was considered by Cueva, arguing it was not admissible pursuant to Penal Code section 190.3. (XII RT 3045.) The prosecutor countered Penal Code section 190.3 did not apply; Landry's juvenile history was not entered as a factor in aggravation by the prosecution but to address Cueva's evaluation since he repeatedly acknowledged Landry's criminal juvenile background played an important part in the evaluation process. (XII RT 3045-3046.) The court held the prosecution could address this area on cross-examination. (XII RT 3048.)

On cross-examination Cueva explained at the time of the evaluation Landry was on "M" status, meaning Landry had been processed through the Superior Court rather than the juvenile court system, but because he was too old for juvenile hall (i.e., 18 years old), he was placed with the Youth Authority. (XII RT 3050.) Important to Cueva's assessment was Landry's criminal history, and he detailed various factors about Landry's previous placements as well as the offenses which he considered for purposes of his evaluation and how they impacted his assessment. (XII RT 3051-3064.) Additionally, Landry candidly told Cueva about thefts he had committed at almost every job he held for which he had never been caught, and Cueva agreed Landry had very little impulse control. (XII RT 3064-3066.)

Cueva's evaluation prioritized five factors. First, the fact Landry was a juvenile processed through Superior Court rather than the juvenile system. Second, considering Landry's history of escapes from previous facilities, he needed treatment. Third, Landry needed a secure environment. Fourth, Landry needed schooling. Fifth, Landry was too sophisticated to be housed with immature 18-year-olds. (XII RT 3068-3071.)

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The trial court did not commit error by allowing the prosecutor to cross-examine Cueva about Landry's criminal history since it played an extremely important part in his evaluation of Landry. Cueva testified as an expert about his evaluation of Landry based upon his special skill, experience, training and education. (Evid. Code, § 720, subd. (a); *People v. Loker*, *supra*, 44 Cal.4th at pp. 738-739.) Therefore, the prosecutor was allowed to bring in facts beyond those introduced on direct examination to explore the grounds and reliability of Cueva's opinion. (*People v. Loker*, *supra*, 44 Cal.4th at p. 739.)

Landry's argument the cross-examination of Cueva involved improper Penal Code section 190.3 evidence lacks merit. (III AOB 350-353.) This Court has recognized cross-examination of defense witnesses and rebuttal need not fit within Penal Code section 190.3. (*People v. Mecham*, *supra*, 1 Cal.4th at pp. 1072-1073.) This Court in *Mecham* acknowledged,"[r]ebuttal evidence is not subject to the notice requirement of section 190.3 and need not relate to any specific aggravating factor under section 190.3." (*People v. Mecham*, *supra*, 1 Cal.4th at pp. 1072-1073.) Therefore, the trial court did not commit error by allowing the prosecutor to cross-examine Cueva about Landry's juvenile history.

The *Wilson* case is on point. (*People v. Wilson*, *supra*, 36 Cal.4th at pp. 358-359.) Wilson claimed the prosecutor committed misconduct during the cross-examination of Wilson's forensic psychologist because the prosecutor asked the witness about criminal behavior by Wilson when he was a juvenile which had resulted in Wilson's hospitalization. (*People v. Wilson*, *supra*, 36 Cal.4th at pp. 358-359.) Wilson's witness was unaware of the criminal behavior, and this Court found the prosecutor's cross-examination was proper. (*People v. Wilson*, *supra*, 36 Cal.4th at p. 359.) In so holding, this Court acknowledged when "'cross-examining a psychiatric expert witness, the prosecutor's good faith questions are proper

even when they are, of necessity, based on facts not in evidence. [Citation]." (*People v. Wilson*, *supra*, 36 Cal.4th at p. 358 quoting *People v. Dennis* (1998) 17 Cal.4th 468, 519.)

While Cueva was not a psychologist, he employed his professional opinion and expertise as a social worker to evaluate Landry for purposes of a suitable placement when Landry was 18 years old. Therefore, just like the expert in *Wilson*, the basis of Cueva's opinions was subject to broad cross-examination, including about Landry's juvenile background, that went into his evaluation. (*People v. Wilson*, *supra*, 36 Cal.4th at p. 358-359.)

Landry's argument that the direct examination of Cueva did not "open the door" to cross-examination about his juvenile criminal activity lacks merit. (III AOB 353-356.) Landry analyzes the issue as though Cueva was a lay witness and not an expert, referencing case authority concerning the cross-examination of lay witnesses and not experts; *People v. Loker*, *supra*, 44 Cal.4th at pp. 709-710. (III AOB 354-355.) The section of *Loker* relied upon by Landry addressed a situation in which the defense put on Penal Code section 190.3 good character evidence which was introduced through the testimony of lay witnesses which the prosecution impeached with a report prepared by a defense psychiatrist who never testified. (*People v. Loker*, *supra*, 44 Cal.4th at p. 708.) In this context, this Court recognized the scope of proper rebuttal is determined by the breadth and generality of the direct evidence. (*People v. Loker*, *supra*, 44 Cal.4th at p. 709.) When a witness testifies generally, then broad rebuttal evidence is appropriate, but when a witness testifies "to a number of adverse circumstances that defendant experienced in early childhood," it is error to permit the prosecution to go into the defendants background and introduce evidence of a course of misconduct that defendant had engaged in throughout his

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teenage years, unrelated to the mitigating evidence. (*People v. Loker*, *supra*, 44 Cal.4th at pp. 709-710.) This section of *Loker* does not apply to the instant case.

In the instant case, Cueva was an expert witness who evaluated Landry. Specifically, Cueva analyzed the Landry's background from childhood through the commission of the offenses for which Landry required evaluation. Therefore, the trial court properly ruled the prosecutor could cross-examine Cueva about the various aspects he took into consideration, including Landry's juvenile criminal background.

Assuming arguendo the trial court committed error by allowing the prosecution to cross-examine Cueva about the specifics of Landry's juvenile history, any error was harmless. (*People v. Loker*, *supra*, 44 Cal.4th at p. 726; *People v. Bramit* (2009) 46 Cal.4th 1221, 1239.) Landry argues the admission of this evidence violated his constitutional rights, relying upon *Apprendi* and other cases. (III AOB 356-362.) His argument lacks merit for three reasons. First, Landry acknowledges he failed to raise this issue below, so contrary to his argument on appeal, it is forfeited. (*People v. Carpenter* (1997) 15 Cal.4th 312, 385 ["Because defendant objected only on statutory grounds, the constitutional arguments are not cognizable on appeal."].) Second, this Court has rejected Landry's argument based upon *Apprendi* that juvenile adjudications do not afford the same protections as a jury trial and therefore cannot be considered for purposes of sentencing. (*People v. Nguyen* (2009) 46 Cal.4th 1007.) Third, even if error occurred, it was harmless.

Landry argues prejudice occurred based on the trial court's decision to allow the prosecutor to cross-examine Cueva because it "permitted the prosecution to rebut this mitigating evidence by extensive but irrelevant evidence of Landry's criminal misconduct as a teenager and an adult," and allowed the prosecutor to argue Landry was a chronic offender with a

criminal history starting as a juvenile delinquent and as an adult once he turned 18. (III AOB 363-364.) However, the cross-examination of Cueva went directly to his evaluation of Landry included in Exhibit 95 which the jury received in its entirety.[65] Cross-examination of Cueva about his report was appropriate. Nonetheless, the jury received this report and could see

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[65] The report the jury received include Landry's "Self-Perceptions"; Landry perceived himself as "***the kind of person who is always planning something or doing something that is illegal (how to disconnect alarms, how to break windows on stores, and how to steal stereos).***

He defined himself as a person that is just taking up space, he likes isolation, likes to be sneaky." (I Supp CT B 10; emphasis added.)

Additionally, under "Clinical Impressions" Cueva's report indicated Landry was a "***19 year old Caucasian male who was committed to the Youth Authority as a result of sustained convictions, three counts of Residential Burglary, 1st degree, one count of Grand Theft Auto, and one count of Commercial Burglary, 2nd degree. His YA commitment time is 2 years, 7 months, and 7 days. He has sustained convictions: burglary on two separate occasions and five non-sustained convictions for Grand Theft Auto and Commercial Burglar [sic], 2nd degree.***" (I Supp CT B 10; emphasis added.)

Another part of included a report identifying Landry as a 19-year-old committed to CIM for his first prison term for burglary with a sentence of 6 years and had been also committed to CYA "for the same thing." (I Supp CT B 25.)

Landry was quoted as having said, "'***I was breaking into people's houses so I could get my drugs, PCP'***," and the report indicated. . . "***He says he was arrested in the tenth grade when he was in regular classes in Los Angeles***. . . ." (I Supp CT B 25; emphasis added.)

also included crime incident reports regarding Landry's assault on March 3, 1995, of inmate Lowery and the administrative action taken (I CT Supp 47), the July 21, 1995, slashing of inmate Bongiorno and the administrative action taken concerning this incident (I CT Supp B 49).

for itself Landry's juvenile criminal history so, necessarily, there was no prejudice under any standard.

This Court in *Loker* did find error occurred based upon the prosecution's cross-examination of his lay witnesses but found no prejudice. (*People v. Loker*, *supra*, 44 Cal.4th at pp. 710, 725-726.) This Court considered the testimony of 12 lay witnesses who were improperly cross-examined about Loker's juvenile history. (*People v. Loker*, *supra*, 44 Cal.4th at 710-724.) Nonetheless, considering the undisputed evidence of Loker's crime spree, the strength of the evidence against him, and the nature of the penalty phase defense, there was no reasonable possibility the improper cross-examination affected the verdict. (*People v. Loker*, *supra*, 44 Cal.4th at p. 726.)

Additionally, this Court in *Bramit* held improperly admitted evidence about juvenile conduct, pursuant to Penal Code section 190.3, was harmless. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1239.) In *Bramit*, the prosecutor was improperly allowed to admit evidence of juvenile misconduct by Bramit when he was 12 years old. (*People v. Bramit*, *supra*, 46 Cal.4th at p. 1239.) This Court found the error was harmless in light of Bramit's prior violent crimes as an adult.

Just as in *Loker* and *Bramit*, any error in the instant case was harmless. Here, the staggering evidence of Landry's criminal behavior while in prison – i.e., his close affiliation with the NLR prison gang, his multiple stabbings of other inmates, his attacks on other inmates and staff, as well as concealing weapons in his rectum and his cell – along with the brutality of the instant offense pales in comparison to Landry's juvenile history of burglary, grand theft auto, commercial burglary, and escape from a juvenile facility. Assuming arguendo error occurred, there was no prejudice under any standard.

The trial court properly allowed the prosecutor to cross-examine Cueva about the evaluation he prepared of Landry. Landry's attempts to quash the cross-examination of his expert are not supported by the law or the facts of the instant case and should be rejected. Even if error occurred, it was harmless. Therefore, Landry's judgment should remain intact.

XVI. ALL OF THE PENAL CODE SECTION 190.3, SUBDIVISION (B), EVIDENCE WAS PROPERLY ADMITTED, THE COURT WAS NOT REQUIRED TO SUA SPONTE INSTRUCT WITH DEFENSES, AND THE JURY RECEIVED PROPER INSTRUCTION ON HOW TO CONSIDER THIS EVIDENCE

Landry makes a multifaceted attack on the admission of and instruction about the Penal Code section 190.3, factor (b), evidence. In argument 17 Landry claims the trial court committed error by allowing the admission of evidence he possessed an illegal razor in his cell during trial because it was not admissible pursuant to Penal Code section 190.3, factor (b). (III AOB 365- 381.) In argument 18 Landry complains the trial court improperly permitted the prosecution to admit 18 acts of criminal activity which were beyond the statute of limitations. (III AOB 381-388.) In argument 19 Landry complains the trial court committed error by failing to instruct on defenses to his October 1994 battery of correctional officers as well as to consider Landry's mental illness regarding all the factor (b) offenses. (III AOB 389-414.) In argument 20, Landry asserts CALJIC No. 8.87 was unconstitutional because it directed a verdict in favor of the prosecution and failed to require jury unanimity. (III AOB 415-427.)

Landry acknowledges this Court's authority rejecting his challenges based on the statute of limitations and the instruction on Penal Code section 190.3, factor (b), evidence (CALJIC No. 8.87) but claims it is wrong. Landry also acknowledges authority by this Court rejecting his argument contesting the admission of evidence he possessed the razor blade but attempts to distinguish it. Landry also acknowledges he failed to make

objections based upon the federal Constitution. (III AOB 378, 416.) Landry's arguments lack merit, his attempts to distinguish this Court's settled authority should be rejected, and his failures to assert constitutional error below result in forfeiture of the issues on that basis. (*People v. Carpenter* (1997) 15 Cal.4th at p. 385 [objection based only on statutory grounds result in forfeiture of constitutional arguments on appeal].)

Under Penal Code section 190.3, factor (b), a jury may hear facts surrounding prior criminal activity involving force or violence. (*People v. Jurado* (2006) 38 Cal.4th 72, 135; *People v. Zapien* (1993) 4 Cal.4th 929, 987; *People v. Mickle* (1991) 54 Cal.3d 140, 187; *People v. Melton* (1988) 44 Cal.3d 713, 754.) Such evidence must demonstrate the commission of a violation of the Penal Code. (*People v. Jurado*, *supra*, 38 Cal.4th at p. 136.) Evidence of violent crimes is admissible regardless of when it was committed or whether it led to criminal charges or a conviction. (*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1052 (*Lewis*).) This Court in *Jurado* held as follows:

> [Penal Code] [s]ection 190.3, . . . factor (b), imposes no time limitation on the introduction of unadjudicated violent crimes; rather, it permsits the jury to consider a capital defendant's criminally violent conduct occurring at any time during the defendant's life. [Citation omitted.] Thus, ***evidence of violent criminal activity is admissible even though prosecution of the crime would be time-barred*** [citation omitted], the right to a speedy trial is not implicated [citation omitted], and the defense of laches is not available [citation omitted]. As we have explained, the remoteness in time of a prior incident 'goes to its weight, not to its admissibility.' [Citation omitted.]

(*People v. Jurado*, *supra*, 38 Cal.4th at p. 135.)

Additionally, an objection must be interposed to the admission of the evidence to preserve the issue for appeal on either statutory or constitutional grounds. (*People v. Lewis*, *supra*, 39 Cal.4th at p. 1052.)

Also, there is no sua sponte duty to instruct the jury with the elements of the criminal offenses, although such instruction may be requested. (*People v. Anderson* (2001) 25 Cal.4th 543, 587-588; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 591-592.) However, the proffered evidence must constitute an actual crime, and the jury must be instructed they can only consider such evidence in aggravation if they are satisfied beyond a reasonable doubt the defendant committed it. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 584.)

A. The Razor Blade Found in Landry's Jail Cell During Trial Was Properly Admitted Pursuant to Penal Code Section 190.3, Factor (b)

On May 10, 2001, while the court was holding an Evidence Code section 402 hearing on an unrelated matter (XII RT 2822-2840), the prosecutor brought to the trial court's attention that after the proceedings the previous day Sergeant Roelle informed her a razor blade had been found in Landry's cell on April 18, 2001. (XII RT 2840.) While a report had not been made at that time, the prosecutor had Sergeant Roelle prepare a report which was e-mailed to defense counsel as soon as the prosecutor received it. The prosecutor sought the admission of this evidence pursuant to Penal Code section 190.3, factor (b). (XII RT 2840.)

As an offer of proof, Sergeant Roelle testified that on April 18 a phone call was received at the jail about threats made against an officer at the Department of Corrections and that Landry might have had weapons in his cell. (XII RT 2843.) A search was conducted of Landry's single-man cell, and a razor blade was found on the painted metal desk attached to the wall in the cell. (XII RT 2844, 2848-2849.) Landry was not permitted to have razor blades at any time for any purpose and was given an electric razor with which to shave. (XII RT 2845-2846.) It was apparent the razor blade had been removed from a disposable razor which other inmates were allowed to possess but not Landry. (XII RT 2845-2846, 2848.)

Additionally, the outline of a stabbing weapon was carved on the side of the metal desk on which the razor blade was found. (II RT 2844-2845, 2848-2849.) Inmates were known to use razor blades or sharp instruments to cut through the metal desks and create stabbing weapons, and it was apparent the etching in the desk had been started for this purpose. (XII RT 2849.) However, when Landry was asked about the razor blade he stated he used it for sharpening pencils and that the etching in the side of the desk was there before his placement in the cell. (XII RT 2846-2847, 2850.) No report was generated at that time, Landry was not disciplined, and the razor blade was destroyed. (XII RT 2847-2848.)

Defense counsel argued the evidence a razor blade was found in Landry's jail cell should not be admitted because even though it was sharp, it was not attached to a handle as were Landry's other slashing weapons and was "not an offer of violence or threats of violence by itself, particularly in view of its size. . ." (XII RT 2854.) The prosecutor countered Landry's possession of the razor blade was unlawful, it was a weapon even though it had no handle, and it could be used as a stabbing instrument. (XII RT 2854-2855.) The prosecutor also offered that the defense investigator informed her the threats were against Officer Lacey. (XII RT 2855-2856.) The court ruled evidence of the razor blade was admissible but not the stabbing weapon etched in the metal desk, and the prosecutor volunteered not to ask about the threats against Officer Lacey. (XII RT 2857.)

Sergeant Roelle testified Landry's single-man cell was searched on April 18, 2001, in the Administrative Segregation Unit, and on the desk in his cell they found a razor blade. (XII RT 2879-2880.) Landry was not allowed to possess a razor blade for any reason and was given a battery-operated electric razor to shave; the razor blade had to have been smuggled into Landry's cell. (XII RT 2880-2881.) When Landry was asked about

the razor blade, he stated it was his and he used it to sharpen pencils. (XII RT 2882.) However, guards sharpened pencils for inmates, and they could be sharpened by scraping them up against the cement walls or floor. (XII RT 2883.) The court did not commit error by allowing the admission of this evidence pursuant to Penal Code section 190.3, factor (b) (hereinafter, "factor (b)").

As Landry acknowledges (III AOB 369-376), this Court in numerous cases has found admissible the possession of a razor blade or sharpened instrument by a defendant in custody in a capital case pursuant to factor (b). (*People v. Butler* (2009) 46 Cal.4th 847, 871-872; *People v. Wallace* (2008) 44 Cal.4th 1032, 1081-1082; *People v. Pollack* (2004) 32 Cal.4th 1153, 1166, 1177-1178; *People v. Michaels* (2002) 28 Cal.4th 486, 535; *People v. Harris* (1981) 28 Cal.3d 935, 962-963.) In *Butler* on three separate occasions deputies found in Butler's cell razor blades which had been broken out of plastic razors, and this Court rejected the same arguments made by Landry in the instant case, holding "possessing contraband razor blades in custody constitutes an 'express or implied threat to use force or violence' under section 190.3, factor (b)." (*People v. Butler*, *supra*, 46 Cal.4th at pp. 871-872.)

In *Wallace*, officers found a razor blade and an altered plastic razor with a half exposed blade when Wallace's cell was searched. (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1081.) Wallace stated he possessed the razor blades to cut hair but a correctional officer testified he did not believe this explanation. (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1081.) Wallace objected to the admission of the razor blades, arguing there had been no threat accompanying the possession of the razor blades. (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1082.) But this Court upheld the trial court's decision to allow their admission pursuant to factor (b), explaining "'mere possession of a potentially dangerous weapon in custody involves

an implied threat of violence' [citation omitted]"; this was especially true when viewed with Wallace's overall conduct because he, like Landry, had several violent outbursts while in custody. (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1082.)

Similarly, in *Pollack* a razor blade was found in the defendant's jail cell during his trial (after the guilt phase but before the penalty phase had begun). (*People v. Pollack*, *supra*, 32 Cal.4th at p. 1177.) Like Landry, Pollack was not permitted to possess a razor blade and there was testimony such blades could be used as weapons if attached to a handle. (*People v. Pollack*, *supra*, 32 Cal.4th at pp. 1177-1178.) This Court upheld the admission of the evidence Pollack was found in possession of razor blades in jail on four occasions pursuant to factor (b) and rejected Pollack's argument that to be admissible as a weapon the blade had to be fastened to a handle of some sort. (*People v. Pollack*, *supra*, 32 Cal.4th at p. 1178.) In doing so, this Court specifically held, "Even without a handle, a razor blade could be used to slice a victim's throat, wrist, or other vital spot, and thus a detached razor blade has a reasonable potential of causing great bodily injury or death. Accordingly, a county jail inmate's possession of detached razor blades violates [Penal Code] section 4574, and evidence of such violations is admissible under section 190.3, factor (b)." (*People v. Pollack*, *supra*, 32 Cal.4th at p. 1178.)

Accordingly, based upon this Court's authority in *Butler*, *Wallace*, and *Pollack* (as well as the authority cited in those cases) the trial court properly allowed the prosecution to admit the evidence Landry possessed a razor blade, which had been removed from a disposable razor, while housed in jail during trial. Landry addresses several decisions by this Court and attempts to distinguish them from the instant case by arguing the prosecution was required to establish more than possession of the razor blade, i.e., attachment of the blade to a handle, concealment, a show of

anger or assaultive conduct, possession of multiple weapons, or possession of them on multiple occasions. (III AOB 369-377.) Landry is wrong because this Court has repeatedly held mere possession of a razor blade is admissible pursuant to Penal Code section 190.3. (See *People v. Wallace*, *supra*, 44 Cal.4th at p. 1082; *People v. Pollack*, *supra*, 32 Cal.4th at p. 1178.) While each case is different, and some cases may involve additional facts besides the possession of a weapon, Landry erroneously attempts to graft additional elements to the admissibility of possession of a weapon while in jail for purposes of admissibility pursuant to Penal Code section 190.3. (*People v. Butler*, *supra*, 46 Cal.4th at p. 872.) Landry's arguments that the trial court committed error should be rejected.

Furthermore, any error by the admission of this evidence was harmless under any standard. The evidence Landry possessed a razor blade while in jail during trial was neither shocking nor any more inflammatory than the evidence of the other nine times he was caught in prison with weapons in his cell or five times he was caught with weapons in his rectum. For that matter, to the extent Landry argues a requisite element for admission of the razor blade evidence included being found with them on multiple occasions (III AOB 376.), this element certainly existed in the instant case. Landry claims constitutional error resulted based on the admission of this evidence (III AOB 377-379), but because Landry did not assert any constitutional claims below, his arguments should be deemed forfeited for purposes of appeal. (*People v. Lewis*, *supra*, 39 Cal.4th at p. 1052.)

The trial court did not commit error by allowing the prosecution to admit evidence during the penalty phase that he possessed a razor blade while in jail during trial. Established law by this Court acknowledges the

admissibility of this evidence pursuant to Penal Code section 190.3. Landry's arguments to the contrary should be rejected and his judgment upheld on appeal.

B. None of the Offenses Admitted Pursuant to Penal Code Section 190.3, Subdivision (b), Were Subject to the Statute of Limitations and All Were Properly Admitted

Equally meritless is Landry's argument that eighteen of the criminal acts which the prosecution admitted during the penalty phase of his trial should have been excluded because they exceeded the statute of limitations. (III AOB 381-388.) Landry's argument lacks merit for four reasons.

First, as Landry acknowledges (III AOB 381-382), there was no objection based upon the statute of limitations, so this argument is forfeited for purposes of appeal. (*People v. Lewis*, *supra*, 39 Cal.4th at p. 1052.) Second, Landry acknowledges this Court's established authority rejecting his argument (III AOB 384) and offers no reason why it should be revisited. (*People v. Harris* (2008) 43 Cal.4th at pp. 1269, 1316; *People v. Jurado*, *supra*, 38 Cal.4th at pp. 72, 135.) Third, all the incidents about which Landry complains occurred while he was in prison or jail and evinced criminal activity involving force or violence, the attempted use of force or violence, or the implied threat to use force or violence squarely within the meaning of factor (b). Fourth, assuming arguendo the statute of limitations did apply to the admission of offenses for consideration pursuant to factor (b), within the statute of limitations Landry stabbed three inmates (Miller,[66] Labatt,[67] and Sanson[68]) and was caught with weapons in his cell on four

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[66] (XI RT 2670-2675.)

[67] (XII RT 2793-2798, 2800-2804.)

[68] (XII RT 2007-2817.)

occasions (April 16, 1997,[69] April 19, 1997,[70] May 6, 1997,[71] April 18, 2001[72]). Therefore, it is not reasonably probable he would have received a more favorable outcome had the offenses about which he complains not been admitted.

In any event, this Court should not revisit the statute of limitations issue for purposes of admitting evidence within the meaning of factor (b). All the criminal activity for which Landry complains the statute of limitations had expired was properly admitted, and he forfeited the issue for failing to raise it in the trial court below, so his judgment should be affirmed.

C. The Jury Was Properly Instructed Concerning the Penal Code Section 190.3, Factor (b), Evidence

Landry argues the trial court should have instructed the jury with the defense of reasonable use of force, in conjunction with the factor (b) evidence of battery against correctional officers in October 1994 because the jury could have found the officers used unreasonable or excessive force[73] and believed Landry "simply was unwilling to give up his food tray or to be removed from his locked cell."[74] (III AOB 393-402.) Additionally, Landry claims the jury should have been instructed to consider evidence of his mental health problems as mitigating the evidence

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[69] (XI RT 2592-2597, 2600-2605; XII RT 2772.)

[70] (XII RT 2772-2773.)

[71] (XI RT 2597-2600.)

[72] (XI RT 2879-2881.)

[73] (III AOB 398.)

[74] (III AOB 398-399.)

proffered by the prosecution in the context of factor (b). (III AOB 402-404.)

Landry's arguments lack merit for three reasons. First, Landry erroneously equates factor (b) evidence with charging a criminal offense. Second, the record definitively establishes defense counsel's tactical reasons for minimizing the instructions on factor (b) evidence, so the trial court had no sua sponte duty to instruct the jury with any defenses. Third, the instructions specifically informed the jury they could consider the factors which Landry claims the trial court erroneously omitted from the instructions.

This Court has held, "[t]he proper focus for consideration of prior violent crimes in the penalty phase is on the facts of the defendant's past actions as they reflect on his character, rather than on the labels to be assigned the past crimes [Citation omitted] ***or the existence of technical defenses to prior bad acts*** [Citation omitted]." (*People v. Cain* (1995) 10 Cal.4th 1, 73; emphasis added.) While the jury must be instructed not to consider any factor (b) evidence as an aggravating factor unless satisfied beyond a reasonable doubt the defendant committed a criminal act, there is no analogy between the burden of proof for charged offenses and factor (b) evidence because the issue at sentencing is the appropriate penalty for the capital crime and not whether the defendant committed the additional criminal offenses. (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 584, 588.) Therefore, this Court recognizes no sua sponte duty exists to instruct the jury with the elements of the factor (b) criminal offenses, although such instruction may be requested. (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 587-588; *People v. Tuilaepa*, *supra*, 4 Cal.4th at pp. 591-592, *People v. Phillips* (1985) 41 Cal.3d 29, 68, 72-73, fn 25.)

The rule for not requiring sua sponte instruction of the jury on the elements of factor (b) offenses, "recognizes that, for tactical reasons, defendants in the vast majority of cases do not want to risk highlighting prior violent crimes or ***alienating the jury with hypertechnical defenses to bad acts which otherwise seem clearly aggravating.***" (*People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 592; emphasis added.) "However, if a defendant-***or the prosecution***-requests such an instruction, they are entitled to have the jury informed of the elements of the alleged other crimes." (*People v. Phillips*, *supra*, 41 Cal.3d at pp. 72-73 fn 25; emphasis added.) In *Phillips*, this Court additionally indicated, "the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty." (*People v. Phillips*, *supra*, 41 Cal.3d at 72 fn 25.)

Here, while the prosecutor requested the jury to be instructed with the elements of the offenses, the record shows defense counsel not only wanted to minimize this evidence for strategic reasons and wanted the instructions on the factor (b) evidence kept to a minimum but, also, was not contesting the validity of any of the factor (b) evidence. Therefore, the trial court had no sua sponte duty to instruct on the factual defense which Landry asserts on appeal; to have done so would have been contrary to Landry's tactics at trial. Furthermore, the jury received adequate instructions to consider any mitigating factors, so Landry's argument that the jury should have received an instruction to consider his mental health in the context of the factor (b) evidence is without merit.

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1. Because Defense Counsel Expressly Stated It Was Trial Tactics to Concede the Factor (b) Offenses and Not Focus on This Evidence, the Argument Should Be Deemed Forfeited and the Trial Court Had No Sua Sponte Duty to Instruct the Jury with Any Defense concerning Appellant's October 1994 Battery of the Correctional Officers

While discussing jury instructions, the prosecutor requested the court to instruct the jury with the elements of the offenses admitted pursuant to factor (b). (XII RT 2861.) Defense counsel specifically objected to the court giving these instructions, stating "Basically the reason I am objecting, to go through all of that, where the circumstances -- ***where it's pretty obvious we are not contesting the existence of these various offenses***. It really doesn't seem necessary." (XII RT 2861-2862; emphasis added.) The prosecutor persisted that either side could request instructions on the elements of factor (b) evidence and referenced *Phillips*, *supra*, 41 Cal.4th at pp. 72-73, supporting her position. (XII RT 2861-2862.) Defense counsel countered:

> My suggestion as to 8.87, your Honor, is that rather than enumerating each of the events that have been proved in the case, that it simply be worded more generically to say something like evidence has been introduced for the purpose of showing the defendant committed a criminal activity which involved the express or implied use of force or violence or the threat of force or violence. And go from there. But to put into the instruction a list of every date and every little incident, I think, is not even necessary or appropriate.

(XII RT 2862-2863.)

When the prosecutor asked for additional time to submit authority to support her position, the court granted the request. However, defense counsel specifically stated his tactical reason for not wanting the jury instructed regarding the factor (b), evidence:

> we have a case here that involves any number of incidents and ***it strikes me that the most prudent way to approach this without overburdening everybody, overburdening the jury and unnecessarily emphasizing the impact of the evidence*** is to simply make a statement that there have been various offers of criminal acts which involve express or implied use of force or violence, that's why they are admitted, and the jury must decide beyond a reasonable doubt whether or not they have committed each of those acts. As the instruction indicates.

(XII RT 2864; emphasis added.)

The following court day, the prosecutor informed the court she had put together the elements of all the factor (b) offenses. (XII RT 2874.) The court found authority supported the prosecutor's request to instruct on the elements of the offenses and agreed to instruct on the elements of the offenses as per the prosecutor's request. (XII RT 2875.) Based on these facts, the record definitively establishes defense counsel did not want the jury to focus upon the factor (b) offenses and was not defending Landry's criminal conduct. Contrary to Landry's arguments on appeal, antithetical to this strategy would have been instruction on a possible defense to the October 1994 battery of the guards. Therefore, not only did the court have no duty to sua sponte instruct the jury, Landry's argument should be deemed forfeited on the basis of invited error since defense counsel had a tactical reason for not wanting such instructions. (*People v. Caitlin*, *supra*, 26 Cal.4th at p. 149.)

As already established, the focus of the penalty phase was on the facts of Landry's past actions as they reflected on his character. (*People v. Cain*, *supra*, 10 Cal.4th at p. 73.) While the trial court had a duty to properly instruct the jury, defense counsel specifically informed the court that for tactical reasons he was not contesting the existence of the offenses and did not want to emphasize the factor (b) evidence. (XII RT 2862, 2864.) That is, defense counsel did not want to alienate the jury with hypertechnical

defenses. The jury was not deciding Landry's guilt or innocence of battery involving the guards in October 1994, so not only would instructions on self-defense have been confusing but, also, contrary to defense counsel's stated tactics; trial tactics this Court has long recognized. (*People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 592.) Therefore, because defense counsel did not contest Landry committed the various offenses, which included the battery against the guards when they entered his cell after he refused to come out of it and give up his food tray,[75] the trial court had no sua sponte duty to instruct on self-defense. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 588.)

Concerning the October 1994 battery of the correctional officers, Landry argues the jury should have been instructed "that a defendant has a right to use self-defense to resist a battery." (III AOB 393-396.) The basis of Landry's argument is his fanciful interpretation of the facts that he was "unarmed" and not threatening "harm against the correctional officers" simply because he was unwilling to give up his food tray or be removed from his locked cell (III AOB 398). This assertion ignores the totality of the evidence. It ignores Landry's concession inmates were known to make weapons from food trays (III AOB 393; X RT 2448-2449; XI RT 2635-2636), the fact he had no right in prison to withhold his food tray or ignore the orders of the guards, he was given several opportunities to come out peaceably but instead took a defensive stance (X RT 2446-2447), as well as ignores his violent history known to the guards by that time. By October of 1994 Landry had been twice caught with a weapon in his cell (X RT 2476-2483; XI RT 2731-2733), stabbed inmate Cross (XI RT 2543-2549), teamed up with another inmate in the attempted stabbing of inmate Hemphill (XI RT 2556-2562, 2564, 2575, 2615-2619, 2714-2719), been

[75] (XII RT 2862)

caught with a weapon in his rectum (X RT 2496-2510; XI RT 2533-2541, 2620-2623), and attempted an assault against the associate warden (X RT 2469-2475).

Simply put, Landry's assertion that the guards used excessive force when entering his cell with a shield and a stun gun in light of Landry's history of possessing weapons and attacking people ignores the totality of the facts. It also ignores the fact defense counsel informed both the court and prosecutor "it's pretty obvious we are not contesting the existence of these various offenses." (XII RT 2862.) Contrary to Landry's arguments on appeal (III AOB 393-402), he was not entitled to a sua sponte instruction on self-defense regarding the October 1994 battery of the prison guards. Landry's arguments to the contrary should be rejected.

2. Because the jury was instructed to consider all the evidence, the trial court had no duty to sua sponte create a mental health instruction addressing only the factor (b) evidence

Landry argues the trial court committed error because it should have instructed the jury to consider evidence of Landry's mental health problems to determine the appropriate penalty. (III AOB 402-414.) In fact, the trial court did so instruct the jury. Because the jury received the instructions about which Landry complains on appeal, no error was committed.

Landry ignores the fact the jury was instructed to consider all the evidence – which included the evidence of his mental health – when determining the appropriate punishment. (XIV RT 3429.) Specifically, the jury was instructed:

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

(d) ***Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;***

[¶] . . . [¶]

(h) ***Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect*** or the effect of intoxication;

[¶] . . . [¶]

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime ***and any sympathetic or any aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.***

(XIV RT 3428-3429; emphasis added.)

Despite these instructions, Landry asserts "the trial court should have instructed the jury that it must consider the evidence of Landry's mental health problems in evaluating whether the factor (b) evidence justified a sentence of death rather than life without the possibility of parole." (III AOB 404.) Landry also asserts, "reversal is required because there was substantial evidence from which a properly instructed jury would have found that the factor (b) evidence did not justify a death sentence." (III AOB 405.) Landry's contention the trial court should have sua sponte crafted additional instructions to specifically address only the factor (b) evidence is unsupported by the totality of the instructions, logic or authority.

Landry's argument presupposes the jury imposed the death sentence based only on factor (b) evidence and ignored the remainder of the instructions; particularly the factor (k) instruction quoted above. The factor

(k) instruction necessarily allowed the jury to consider the totality of the evidence Landry presented, including the evidence of his mental health in all contexts. Respondent does not dispute the fact the jury could consider Landry's mental health history during the penalty phase, but this is precisely what factor (k) permitted.

In fact, Landry's closing statement heavily relied upon the jury considering his troubled upbringing, its resultant psychological problems, and the lack of proper mental health care while he was in prison, resulting in his three-year reign of terror (1994 through 1997); committing assaults, stabbing and slashing people, and concealing weapons in his cell and rectum. (XIV RT 3520-3534.) Specifically, after detailing Landry's troubled past, his mental health problems, the failings of the various institutions which treated him, and the failure of the prison system to provide adequate mental health care, defense counsel argued:

> Now, I guess that's my answer to factor (b). Factor (b) is prior incidents of violence, criminal violence, in the defendant's background. And my answer to factor (b) is, this is not a lifelong violent prisoner. This is a person who for a three-year window in his life became violent and we have to ask ourselves why did that happen? A man who was never violent on the street, who was not violent in prison for 11 of the 14 years he's been in prison, but for that three years, starting in famous Calipatria, this happened. ***And I think when you analyze it that way and you analyze it in the light of lack of mental health treatment and the defendant's own requests to please get help, to transfer to him out of there, that that remarkably diminishes the weight of that material.***

(XIV RT 3534; emphasis added.)

Therefore, it is readily apparent defense counsel understood the jury instructions to allow the jury to consider his mental health issues in the context of the factor (b) evidence. To the extent Landry argues an

additional instruction should have been given, he not only fails to offer a hint of what it should have been, it is apparent it would have been redundant to the instructions already given.

Landry does not provide any guidance as to what instruction should have been given, so the trial court did not commit error by failing to craft one from whole cloth without a request. The instructions clearly allowed the jury to consider his history of mental health in the context of the factor (b) evidence as evinced by defense counsel's closing arguments. Therefore, Landry cannot establish error or prejudice under any standard because it is apparent all parties, including defense counsel, understood the instructions to permit consideration of his mental health in the context of the factor (b) evidence. Landry's arguments to the contrary lack merit and should be rejected. Therefore, Landry's punishment should remain intact.

D. CALJIC No. 8.87 did not direct a verdict against Landry or need a unanimity requirement

Landry complains the instruction addressing factor (b) evidence (CALJIC No. 8.87) directed a verdict in favor of the prosecution and should have required jury unanimity. (III AOB 415-427.) Despite participating in the discussion on this jury instruction, Landry asserts his claim is not forfeited. (III AOB 416-417.) Landry also acknowledges authority by this Court directly addressing and rejecting his claim but argues the instruction is wrong. (III AOB 419-425.) Landry's arguments are forfeited, lack merit and should be rejected.

The doctrine of invited error bars Landry from obtaining relief based on his complaint the trial court improperly instructed the jury about considering other criminal activity if they found proof beyond reasonable doubt of it (CALJIC No. 8.87). (*People v. Harris* (2008) 43 Cal.4th 1269, 1293.) "The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a

'conscious and deliberate tactical choice' to 'request' the instruction. [Citation omitted]." (*People v. Harris*, *supra*, 43 Cal.4th at p. 1293.) When discussing how the court should instruct concerning the factor (b) evidence, defense counsel brought up CALJIC No. 8.87, and requested that it be worded "generically." (XII RT 2862-2863.) Specifically, defense counsel requested:

> My suggestion as to 8.87, your Honor, is that rather than enumerating each of the events that have been proved in the case, that it simply be ***worded more generically to say something like evidence has been introduced for the purpose of showing the defendant committed a criminal activity which involved the express or implied use of force or violence or the threat of force or violence.*** And go from there.

(XII RT 2862-2863; emphasis added.)

The record clearly establishes defense counsel made a conscious and clear choice for the jury to receive instruction on on factor (b) evidence as set forth in CALJIC No. 8.87. Landry erroneously asserts defense counsel simply told the court to assume "as soon as you recite [the instructions] that unless I say something, I'm agreeing" (XIV RT 3411) because the statement referenced by Landry was made well after the in-depth discussion specifically addressing instruction on factor (b) evidence and CALJIC No. 8.87. (III AOB 416.) Therefore, any error based upon the wording of the instruction should be deemed invited by Landry.

Assuming arguendo the issue is not forfeited as a result of invited error, it lacks merit. This Court has consistently and repeatedly held CALJIC No. 8.87 does not suffer the infirmities about which Landry complains. (*People v. Butler*, *supra*, 46 Cal.4th at p. 872; *People v. Jackson* (2009) 45 Cal.4th 662, 700.) In fact, Landry acknowledges some of this Court's authority rejecting his arguments but asserts the argument, nonetheless. (III AOB 417-418.)

In *People v. Butler, supra*, 46 Cal.4th at p. 872, this Court recently rejected Landry's argument that CALJIC No. 8.87 created an unconstitutional mandatory presumption and a directed verdict. (III AOB 417-424.) Specifically, this Court in *Butler* held "[w]e have also consistently ruled that whether criminal acts pose a threat of violence is a legal question for the trial court, and that CALJIC No. 8.87 does not create an unconstitutional mandatory presumption." (*People v. Butler, supra*, 46 Cal.4th at p. 872.)

Likewise, Landry's argument complaining the jury should have been required to unanimously agree on the factor (b) evidence lacks merit. (III AOB 424-425.) This Court recently reiterated the Constitution did not require unanimous agreement on evidence admitted pursuant to factor (b). (*People v. Taylor, supra,* 47 Cal.4th at p. 898.) Specifically, this Court held "[w]here each juror may rely on such criminal activity as an aggravating factor only if the juror finds defendant's commission of the crime has been proven beyond a reasonable doubt, and the jury must unanimously agree that death is the appropriate penalty, neither the Sixth nor the Eighth Amendment to the United States Constitution requires that the jury also unanimously agree on the application of factor (b) or any other factor in aggravation." (*People v. Taylor, supra*, 47 Cal.4th at p. 898.) Therefore, Landry's argument to the contrary can be summarily rejected.

The trial court's use of CALJIC No. 8.87 did not result in any error, and if there was error, it was invited by Landry. All of the factor (b) evidence was properly admitted, and the jury was properly instructed regarding the consideration of factor (b) evidence. Landry's arguments to the contrary lack merit. Therefore, Landry's arguments should be rejected and Landry's judgment should be affirmed.

XVII. THE JURY WAS PROPERLY INSTRUCTED DURING THE PENALTY PHASE

In three separate arguments Landry challenges the instruction of the jury during the penalty phase. In particular, Landry argues the trial court committed error by failing to sua sponte instruct the jury to consider inmate Green's disposition (argument 21). (III AOB 427-445.) Landry complains the language of the instruction addressing the factors to consider for purposes of sentencing (CALJIC No. 8.85) was deficient (argument 22). (III AOB 446-465.) Also, Landry challenges CALJIC No. 8.88, claiming the language is improperly restrictive in various ways (argument 23). (III AOB 466-485.) This Court in other cases has repeatedly addressed the arguments Landry makes and rejected them; it should continue to do so.

A. There Was No Duty to Sua Sponte Instruct the Jury to Consider the Disposition of Inmate Green

In argument 21, Landry asserts the jury should have been sua sponte instructed they could consider inmate Green's disposition for purposes of imposing punishment and the fact that Green was released from custody 10 months after the incident while Landry was facing a death sentence. (III AOB 427-445.) Established law recognizes the disposition of an accomplice lacks relevance in the penalty phase because it does not shed any light on the circumstances of the offense, or the defendant's character, background, history, or mental condition. (*People v. Brown* (2003) 31 Cal.4th 518, 562; *People v. McDermott* (2002) 28 Cal.4th 946, 1004-1005; *People v. Bemore* (2000) 22 Cal.4th 809, 857.) The decision in *Bemore* is particularly on point.

Bemore argued, just as Landry in the instant case, the trial court had a sua sponte duty to instruct the jury during the penalty phase of a capital case to take into consideration the sentence a codefendant received. (*People v. Bemore*, *supra*, 22 Cal.4th at p. 856.) This Court flatly rejected

Bemore's argument because the sentence received by an accomplice is not constitutionally or statutorily relevant as a mitigating factor. (*People v. Bemore*, *supra*, 22 Cal.4th at p. 857.) The disposition of an accomplice does not bear on the circumstances of a capital crime or on the defendant's own character and record. The disposition of an accomplice "provides nothing more than incomplete, extraneous, and confusing information to a jury, which is then left to speculate on the matter." (*People v. Bemore*, *supra*, 22 Cal.4th at p. 857.)

Landry acknowledges this Court's holdings rejecting consideration of an accomplice or codefendant's disposition as a mitigating factor for purposes of determining a defendant's penalty but claims they do not apply to the instant case. (III AOB 434-436.) Landry claims there would have been no undue consumption of time or confusion of the issues because inmate Green's disposition and evidence of his role in the murder was presented to the jury. (III AOB 435.) Landry is wrong.

Landry asserts the jury received evidence about inmate Green's involvement in the offense from numerous witnesses. (III AOB 435.) However, all the jury learned through these witnesses was: inmate Green made a ruckus about Addis being brought out onto the exercise yard on the day of his murder and inmate Green received disciplinary action at Calipatria pursuant to the CDC 115 procedures which found he was involved in a conspiracy to murder Addis, partially based upon the fact he was an NLR "shot caller." (VI RT 1328-1331, 1442-1445.) While there was all sorts of testimony and speculation about what inmate Green would have known as a NLR gang shot caller and the motive for Addis' murder, Landry fails to establish what these facts had to do with determining Landry's punishment. Assuming arguendo, without conceding in any way,

that inmate Green planned Addis' murder, Landry single-handedly carried out the murder in a bold, violent manner, regardless of inmate Green's disposition.

Concerning inmate Green's disposition, the jury only received information from the CDC 115 administrative disciplinary report at Calipatria. (See VI RT 1442-1445; VIII RT 1922-1925.) But for obvious reasons there was no evidence presented addressing why inmate Green was not charged by the prosecution. The jury learned inmate Green could not be held longer than the sentence for which he had been incarcerated, regardless of any findings from the CDC 115 hearing, and had to be released once he served that sentence. (VI RT 1442-1443.) However, this did not reflect Landry's culpability for murdering Addis, given the limited nature of the CDC 115 administrative process.

During the guilt phase the jury was properly instructed not to consider the fact inmate Green was not charged or prosecuted, and Landry made no objection to the jury being so instructed. (IX RT 2221-2222.) As the instruction acknowledged, "There may be many reasons why [inmate Green] is not here on trial. Therefore, do not discuss or give any consideration as to why [inmate Green] is not being prosecuted in this trial or whether he has been or will be prosecuted." (IX RT 2222.) The prosecutor's office and not the prison possessed the discretion to charge inmate Green, and a myriad of factors – all of which were irrelevant to Landry's case – went into that determination. For the jury to take this into consideration for purposes of sentencing Landry would not only have been confusing but mandated the jury to speculate about the charging process. This had absolutely nothing to do with the circumstances of the crime, Landry's character, or Landry's record – the appropriate factors for the jury to consider for purposes of sentencing. (*People v. Bemore*, *supra*, 22 Cal.4th at p. 857.)

Landry argues inmate Green's CDC 115 disposition showed Addis' murder "was not the type of 'extreme' offense for which Landry should" have been sentenced to death. (III AOB 436.) However, as this Court has acknowledged in its previous holdings, the treatment of a codefendant or co-conspirator does not reflect on the circumstances of the offense. (*People v. Brown*, *supra*, 31 Cal.4th at p. 562; *People v. McDermott*, *supra*, 28 Cal.4th at pp. 1004-1005; *People v. Bemore*, *supra*, 22 Cal.4th at p. 857.) Landry's unprovoked, out-of-the-blue, violent stabbing of Addis' in his neck in front of the inmates and guards on the exercise yard of the Administrative Segregation Unit at Calipatria was an "extreme" offense and this, considered with Landry's violent and dangerous prison history, warranted the death penalty by any definition, regardless of inmate Green's disposition. Nowhere in Landry's argument does he explain how inmate Green's CDC 115 disposition reflected upon Landry's character, background, history, or mental condition. For the jury to have speculated that inmate Green's CDC 115 disposition somehow reflected on the circumstances of the crime would have been confusing and contrary to their instruction at the guilt phase not to consider why inmate Green was not on trial or whether he was or would be prosecuted. Landry's arguments to the contrary lack merit.

Likewise, referencing *Parker v. Dugger* (1991) 498 U.S. 308 [111 S.Ct. 731; 112 L.Ed.2d 812], Landry asks this Court to revisit its prior decisions rejecting his argument. (III AOB 436-442.) However, this Court has considered *Parker* on numerous occasions and found *Parker* does not change how California implements the penalty phase of a capital prosecution. (*People v. Brown*, *supra*, 31 Cal.4th at pp. 562-563; *People v. McDermott*, *supra*, 28 Cal.4th at pp. 1004-1005; *People v. Bemore*, *supra*,

22 Cal.4th at pp. 857-858; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1188-1189; *People v. Mincey* (1992) 2 Cal.4th 408, 479-480.) Landry's argument should likewise be rejected.

Landry's complaint that the jury should have been sua sponte instructed to consider inmate Green's disposition lacks merit and is contrary to this Court's established authority. Therefore, it should be rejected and Landry's judgment remains intact.

B. The Trial Court Properly Instructed the Jury on Consideration of Mitigating Factors (CALJIC No. 8.85)

In argument 22 Landry claims the language of CALJIC No. 8.85 describing the factors to consider for determining Landry's penalty was too restrictive – particularly paragraphs (d), (g), and (h) – because they created a "nexus" between the capital offense and factors relating to Landry's mental state. (III AOB 446-465.) As part of his argument, Landry also complains the use of the terms "extreme" and "substantial" presented an unconstitutionally high barrier to the application of these factors. (III AOB 453-454.) Landry also claims factor (k) did not make up for the problems in the language of the other factors. (III AOB 454-459.) Not so; this Court has previously addressed and rejected Landry's arguments.

This Court rejected Landry's argument that the language in factors (d) and (h) created a restrictive nexus between the offense and the defendant's mental state. (*People v. Combs* (2004) 34 Cal.4th 821, 826; *People v. Hughes* (2002) 27 Cal.4th 287, 405 fn 33.) In *Combs* this Court reiterated the "temporal language in section 190.3, factors (d) and (h) (consideration of any extreme mental or emotional disturbance or impairment from mental disease or defect or the effects of intoxication *at the time of the offense*), [does] not preclude the jury from considering any such evidence merely because it did not relate specifically to defendant's culpability for the crimes committed." (*People v. Combs*, *supra*, 34 Cal.4th at p. 868 quoting

People v. Hughes, *supra*, 27 Cal.4th at p. 405 fn 33; emphasis in original.) The same analysis would apply to factor (g), whether Landry acted under extreme duress or under the substantial domination of another person. Therefore, Landry's argument complaining factors (d), (g) and (h) were unduly restrictive lacks merit.

Additionally, in numerous cases this Court has rejected arguments attacking the use of adjectives such as "extreme" and "substantial" as barring consideration of mitigating evidence. (*People v. Martinez* (2010) 47 Cal.4th 911 [2010 WL 114933, *39]; *People v. McWhorter* (2009) 47 Cal.4th 318, 379; *People v. Bramit*, *supra*, 46 Cal.4th at p. 1249.) This Court again should reject Landry's argument complaining about the adjectives used in CALJIC No. 8.85. (III AOB 453-465.)

Also lacking merit is Landry's argument that factor (k) failed to address any evidence the jury might not have found within the parameters of factors (d), (g) and (h). (III AOB 454-459.) This Court has addressed and rejected this argument, too. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1331; *People v. Rogers* (2006) 39 Cal.4th 827; *People v. Hughes*, *supra*, 27 Cal.4th at p. 405 fn 33.) Specifically, this Court has long recognized "factor (k), the so-called catchall provision, is the statutory factor under which'"consideration of nonextreme mental or emotional conditions'" is clearly permitted." (*People v. Stanley*, *supra*, 39 Cal.4th at p. 963; see also *People v. Hughes, supra*, 27 Cal.4th at p. 405 fn 33.) In *Hughes*, this Court held factor (k) allowed consideration of "'any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.'" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 405 fn 33.)

This Court held a jury's rejection of a defense based on mental and emotional problems at the guilt phase did not require the trial court to instruct the jury to consider the defendant's mental and emotional problems

during the penalty phase, pursuant to factors (d) and (h). (*People v. Stanley* (2006) 39 Cal.4th 826, 898-899.) In *Stanley*, this Court held the trial court did not need to expand on factors (d) and (h) because the jury "still could consider evidence of defendant's mental illness under the expansive language of section 190.3, factor (k), which allowed it to consider any aspect of defendant's character or record or background offered by the defense as a reason to impose a sentence of life imprisonment without possibility of parole. Under these circumstances, neither error nor prejudice appears." (*People v. Stanley*, *supra*, 39 Cal.4th at p. 899.) Likewise, the trial court was not required to define the terms "mental or emotional disturbance" in the context of factor (d). (*People v. Stanley*, *supra*, 39 Cal.4th at p. 899.) Therefore, Landry's argument that factor (k) would have led the jury to conclude it only concerned "different types of evidence than specifically addressed in factors (d), (g), and (h)" should be rejected. (III AOB 455.)

Landry references the prosecutor's closing argument, the denial of his automatic motion to modify the death penalty verdict, and the evidence he presented at trial to claim no one understood factor (k) applied to his defense evidence. (III AOB 456-465.) The fact the prosecutor argued there was no evidence Landry was under extreme mental or emotional duress or influence at the time of the murder and the fact the court did not overturn the jury's verdict fails to support Landry's argument attacking the language of factors (d), (g), (h), and (k). Landry's arguments attacking CALJIC No. 8.85 should be rejected and his judgment sustained.

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C. The Instruction Addressing the Scope of the Jury's Sentencing Discretion (CALJIC No. 8.88) Did Not Violate Appellant's Constitutional Rights

In Argument 23, Landry challenges CALJIC No. 8.88, claiming the language is improperly restrictive in various ways. (III AOB 466-485.) Landry acknowledges no objections were made to this instruction and that this Court has rejected attacks to this instruction in numerous other cases. (III AOB 468, 479-480, 482-483.) All of the aspects of Landry's complaints about this instruction have been rejected by this Court, and Landry presents no reason why they should not be rejected again.

Landry complains CALJIC No. 8.88 failed to allocate the burden of proof for purposes of determining the appropriate judgment and failed to inform the jury Landry did not bear the burden of showing the mitigating factors outweighed the aggravating factors. (III AOB 469-471.) However, this Court has rejected this argument holding "the pattern instructions are not constitutionally defective for failing to assign the state the burden of proving beyond a reasonable doubt that an aggravating factor exists, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty." (*People v. Bramit* (2009) 46 Cal.4th 1221, 1250; see also *People v. Taylor, supra,* 47 Cal.4th at pp. 899-900.)

Landry complains the language in CALJIC No. 8.88 that for the jury "to return a judgment of death, each of you must be persuaded that the aggravating circumstances are **so substantial** in comparison with the mitigating circumstances that it warrants death instead of life without parole" was unconstitutionally vague and violated his Eighth Amendment rights. (III AOB 471-473; emphasis added.) This Court has consistently rejected this argument over the years (*People v. Bramit, supra*, 46 Cal.4th at p. 1249) and specifically held the use of the phrase "so substantial" plainly conveys the importance of the jury's decision and emphasizes the

high degree of certainty required for a death verdict and "far from undermining defendant's cause at the penalty phase, [it] [assists] defense counsel in emphasizing the gravity of the jury's task, which include[s] the choice of death as a penalty." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1243.) Also, contrary to Landry's claims otherwise (III AOB 472-473) this Court rejected the notion that CALJIC No. 8.88 was vague, misleading and was biased in favor of a death sentence. (*People v. Dykes* (2009) 46 Cal.4th 731, 816.) Landry's arguments to the contrary should be rejected.

Landry also complains the use of the word "warranted" in the instruction rather than the word "appropriate" in determining whether to impose the death sentence instead of life without the possibility of parole was too low of a standard. (III AOB 474-476.) However, this Court has repeatedly rejected this argument, finding CALJIC No. 8.88 "is also not unconstitutional for failing to inform the jury that. . . death must be the appropriate penalty, not just a warranted penalty." (*People v. Bramit*, *supra*, 46 Cal.4th at p. 1249.)

Landry claims CALJIC No. 8.88 was misleading because it used the term "totality of the mitigating circumstances" which created the inference that more than one circumstance in mitigation was required to impose a life term rather than a death sentence. (III AOB 476-478.) This Court has rejected the argument that the pattern instruction exult a quantitative, mechanical weighing process rather than a qualitative evaluation of the applicable factors and it did not preclude the jury from finding a single mitigating circumstance could not outweigh multiple aggravating circumstances. (*People v. Dykes* (2009) 46 Cal.4th 731, 816.)

Landry also complains the instruction was defective because it did not convey that a life sentence was mandatory if the aggravating factors did not outweigh the mitigating circumstances, the aggravating factors were in equipoise with the mitigating circumstances, or the evidence in mitigation

outweighed the evidence in aggravation. (III AOB 478-482.) However, this Court in *Bramit* rejected this argument, holding the instruction was not unconstitutional for failing to instruct the jury that a sentence of life without the possibility of parole was required if the jury found the mitigating circumstances outweighed those in aggravation or even if the aggravating circumstances did not outweigh those in mitigation. (*People v. Bramit*, *supra*, 46 Cal.4th at p. 1249.) This Court found the trial court is not required to instruct the jury that if the aggravating circumstances did not outweigh those in mitigation, a sentence of life without the possibility of parole was mandatory. (*People v. Friend* (2009) 47 Cal.4th 1, 89-90.)

Landry complains CALJIC No. 8.88 was defective because it did not require jury unanimity regarding which aggravating factors applied. (III AOB 482-485.) Landry claims this Court's decisions preceding *Ring v. Arizona* (2002) 536 U.S. 584, 589 [122 S.Ct. 2428, 153 L.Ed.2d 556] and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490-495, require this Court to reconsider its decisions rejecting his argument. (III AOB 483.) However, this Court has considered Landry's argument that the jury must unanimously agree on the applicable aggravating circumstances and found *Ring* and *Apprendi* do not necessitate a different outcome. (*People v. Gutiérrez* (2009) 45 Cal.4th 789, 830-831.) Specifically, this Court held "The high court's decisions in *Apprendi* and *Ring* do not compel us to conclude that the death penalty sentencing scheme violates due process because capital juries need not find aggravating factors beyond a reasonable doubt." (*People v. Gutiérrez*, *supra*, 45 Cal.4th at p. 831.)

Landry's attacks on CALJIC No. 8.88 have all been previously addressed by this Court and rejected. Landry's pleas to this Court to reconsider its previous decisions should be rejected and his judgment remained intact.

This Court's authority has repeatedly addressed and rejected Landry's multifaceted attack on the jury instructions given in the instant case. Landry presents no reason to reconsider these issues so his judgment should be upheld.

XVIII. APPELLANT'S VARIOUS ATTACKS ON THE DEATH PENALTY AND CLAIMS IT VIOLATES INTERNATION LAW LACK MERIT

In Argument 24, Landry makes various challenges to the constitutionality of the death penalty which this Court has already rejected in other cases. (III AOB 485-496.) In Argument 26, Landry asserts the death penalty violates international law. (III AOB 503-508.) Specifically, in Argument 24 Landry complains about the lack of a requirement of unanimous jury findings on aggravating factors (III AOB 486-488), the lack of a jury requirement to make written findings (III AOB 489-491), the lack of inter-case proportionality review (III AOB 491-492), the instruction on possible mitigating factors (III AOB 492-495), and lack of procedural safeguards for imposing the death penalty (III AOB 495-497). Landry's claims – including his international law arguments – have been rejected by this Court on numerous occasions and lack merit.

Landry challenges this Court's rejection of the argument that the jury must unanimously agree that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt. (III AOB 486-488.) Landry references a string of United States Supreme Court cases – *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Ring v. Arizon, supra,* 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Blakely v Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] – and argues these cases contradict this Court's rejection of his argument. However, this Court has specifically considered these

decisions and rejected Landry's analysis. (*People v. Jurado* (2006) 38 Cal.4th 72, 143.) Landry's complaint, therefore, lacks merit.

Landry challenges this Court's rejection of his argument that the lack of a requirement for written findings on aggravating factors violated his Fifth, Eighth and Fourteenth Amendment rights to due process of law by depriving him of meaningful appellate review since written findings are required in other criminal proceedings. (III AOB 489-491.) This Court has consistently rejected the claim the lack of written findings deprive a capital Landry of meaningful appellate review. (*People v. Farley* (2009) 46 Cal.4th 1053, 1134.) In fact, this Court has reiterated, "the death penalty statute does not lack safeguards to avoid arbitrary and capricious sentencing or deprive defendant of the right to a jury trial, because it does not require written findings. . . ." (*People v. Avila* (2009) 46 Cal.4th 680, 724.)

Landry also complains the lack of intercase proportionality review violated the Eighth Amendment because the death penalty lacks sufficient checks on arbitrariness. (III AOB 491-492.) However, this Court in *Avila* held "The failure to require intercase proportionality does not violate the Fifth, Sixth, Eighth, or Fourteenth Amendments. [Citations omitted.] Nor does the circumstance that intercase proportionality review is conducted in noncapital cases cause the death penalty statute to violate defendant's right to equal protection and due process. [Citations omitted.]" (*People v. Avila*, *supra*, 46 Cal.4th at p. 724.) Contrary to Landry's argument otherwise (III AOB 492), the fact the instant case involved the imposition of the death penalty based upon Landry's status as an inmate serving a life sentence who committed a murder does not change the validity of this Court's decisions already rejecting Landry's argument.

While Landry acknowledges this Court has rejected the argument that the jury should be instructed that mitigating factors can only be considered to mitigate his sentence, he argues that because some case authority has

found trial court judges and prosecutors found the complained about instructions confusing, it is likely the jury in the instant case did as well. (AOB 493-495.) Landry's argument should be rejected. This Court in *Avila* specifically held a jury need not "be instructed which factors are aggravating and which are mitigating." (*People v. Avila*, *supra*, 46 Cal.4th at p. 724.) Landry specifically focuses upon the use of the words "whether or not" in the instructions on possible mitigating factors as causing the purported confusion, but as this Court held, "The use of the phrase 'whether or not' in certain statutory factors (e.g., § 190.3, factor (d), '[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance') does not unconstitutionally suggest 'that the absence of such factors amount[s] to aggravation.' [Citations omitted.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 456.) Landry's arguments are unavailing.

Landry argues the death penalty violates equal protection because it lacks protections and safeguards for a person facing a death sentence that persons not facing a death sentence enjoy, specifically complaining there is no burden of proof, there is no requirement that the jurors agree what facts are true or important, or what aggravating circumstances apply. (III AOB 495-497.) These arguments in general and specific have been routinely rejected, and Landry fails to show why this Court should depart from this established authority in the instant case. (*People v. Avila* (2009) 46 Cal.4th at pp. 723-724; *People v. Doolin*, *supra*, 45 Cal.4th at pp. 455-456.) This Court in *Avila* held, "Contrary to defendant's assertion, the death penalty statute does not lack safeguards to avoid arbitrary and capricious sentencing or deprive defendant of the right to a jury trial, because it does not require written findings, unanimity as to the truth of aggravating circumstances, or findings beyond a reasonable doubt that an aggravating circumstance (other than factor (b) evidence) has been proved,

that the aggravating factors outweighed the mitigating factors, or that death is the appropriate sentence." (*People v. Avila*, *supra*, 46 Cal.4th at p. 724.)

In argument 26 Landry argues the death penalty as applied in this case violates international norms of law, humanity, and decency in contradiction to the Eighth and Fourteenth Amendments of the United States Constitution. (III AOB 503- 508.) Landry acknowledges the case authority rejecting many of his arguments, including his claim that the death penalty violates the International Covenant on Civil and Political Rights (hereinafter, ICCPR) prohibiting the arbitrary deprivation of life as well as cruel, inhumane or degrading treatment or punishment, the consensus of the nations of Western Europe against the death penalty, and the argument that a near-consensus amongst nations not to impose the death penalty should be deemed to bar use of execution as a regular form of punishment in this country. (III AOB 503.) Nonetheless, he asserts the same claims. This Court has consistently rejected claims based upon the ICCPR. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1181; *People v. Butler* (2009) 46 Cal.4th 847, 885.) Likewise, this Court has consistently rejected arguments that "the death penalty statute is contrary to international norms of humanity and decency, and therefore violates the Eighth and Fourteenth Amendments." (*People v. Avila*, *supra* 46 Cal.4th at p. 724,.) The fact the instant case involves a murder by an inmate sentenced to life rather than a special circumstances murder does not change the analysis of any of this Court's authority rejecting arguments based on international law.

Landrys various and sundry attacks on the death penalty should be rejected. The penalty imposed in the instant case did not violate the Constitution of the United States, and Landry's arguments based upon international law have no merit. Therefore, Landry's judgment should be upheld.

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XIX. APPELLANT FAILS TO ESTABLISH ERROR BASED UPON THE TRIAL COURT'S DENIAL OF HIS AUTOMATIC MOTION TO MODIFY THE JUDGMENT

In argument 25 Landry claims the trial court committed error when denying his motion to modify the death verdict in accordance with Penal Code section 190.4, subdivision (e). (III AOB 497-502.) Landry complains that even though he did not object to any part of the trial court's decision not to modify the sentence, his sentence should be reversed and remanded because the court gave no weight to his evidence of duress and domination by others or his mental health problems.[76] (III AOB 498.) Not only is Landry's argument waived for purposes of appeal, it lacks merit.

As Landry acknowledges (III AOB 498), the failure to object to rulings made by the trial court on an automatic motion to modify a capital verdict results in waiver for purposes of appeal. (*People v. Tafoya* (2007) 42 Cal.4th 147, 196.) In the instant case, defense counsel did not file a motion to modify the death sentence for the stated reason that such a motion was automatic, pursuant to Penal Code section 190.4, and submitted the issue to the trial court. (XIV RT 3583.) Likewise, the prosecutor submitted the issue prior to the court rendering its ruling. (XIV RT 3584.) The court set forth in detail its reasons for not modifying the verdict, which were memorialized in an order. (XIV RT 3584-3592; IV CT 1056-1062.)

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[76] For the sake of brevity, Landry references his analysis in argument 22 of his opening brief in which he claimed the trial court failed to take into consideration his mitigating evidence entered pursuant to factors (d), (g), (h) and (k) (III AOB 456-459). (III AOB 498.) Landry also references argument 20, subdivision E. (III AOB 500), but argument 20 neither has a subdivision E nor addresses the trial court's denial of the automatic motion to modify the sentence.

To the extent Landry argues the trial court failed to state sufficient reasons for denying the modification motion, the claim is forfeited for purposes of appeal. (*People v. Jackson, supra,* 45 Cal.4th 662, 697.)

At no time did Landry object to any of the court's reasons in its ruling but, instead, simply informed the court Landry's mother wished to make a statement (which she was allowed to do) and waived arraignment. (XIV RT 3592.) When given the opportunity by the court to address any issues, defense counsel declined. (XIV RT 3593.) Therefore, because no objection was made to the trial court's reasons for denying the automatic motion to modify the judgment, Landry's arguments are waived for purposes of appeal. (*People v. Tafoya, supra*, 42 Cal.4th at p. 196; *People v. Hill* (1992) 3 Cal.4th at pp. 959, 1013.)

Assuming arguendo Landry's arguments are not waived, they lack merit. On appeal, this Court does not review the trial court's decision de novo but subjects the record to independent review. (*People v. Memro* (1995) 11 Cal.4th 786, 884.) Similarly, the trial court does not conduct de novo review of the evidence to make an independent determination but, rather, independently reweighs the evidence and determines whether, in the court's independent judgment, the weight of the evidence supports the jury's decision to impose death. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1334; *People v. Cunningham* (2001) 25 Cal.4th 926, 1039.)

In accordance with Penal Code section 190.4, subdivision (e), the trial court does not resentence the defendant but considers whether to modify the verdict; in making this determination it cannot consider any evidence unless it was presented to the jury that returned the death verdict. (*People v. Lewis* (2004) 33 Cal.4th 214, 231.) Additionally, "The trial court is not required to find that evidence offered in mitigation does in fact mitigate." (*People v. Alfaro, supra*, 41 Cal.4th at p. 1334.) Here, the trial court

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acknowledged Landry's mitigating evidence but simply found it did not mitigate imposition of the death penalty in context with the factors in aggravation.

In the instant case, the trial court began the pronouncement of its decision on the automatic motion to modify the verdict by stating it had "independently considered all of the evidence presented at trial and all of the arguments of counsel. It ***is not the Court's intention to list every item of evidence and all the arguments presented***, but rather to recite the principle factors which most powerfully inform and influence the decision at hand." (XIV RT 3584; emphasis added.) Clearly, the trial court understood its role to conduct an independent review of the evidence presented to the jury. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1039.) The trial court then went on at some length to set forth the factors it considered in its independent review that supported the jury's verdict. (XIV RT 3584-3592; IV CT 156-162.)

In accordance with factor (a), the court considered the circumstances of the offense. (XIV RT 3584; IV CT 1056.) Landry, who was undergoing a life sentence, personally and intentionally killed Addis with a prison made weapon – a knife. The killing was willful, deliberate, and premeditated with malice of aforethought and perpetrated while in the exercise yard by watching and waiting for an opportunity to strike. (XIV RT 3484; IV CT 1056-1057.) Landry committed the "gang motivated" murder by striking Addis with "lightning speed," stabbing him in the neck and laughing as Addis lay dying. (IV RT 3484; IV CT 1057.)

In accordance with factor (b), the court considered Landry's numerous criminal acts involving the use of violence, the attempted use of violence, or the implied threat to use force or violence. (IV RT 1385-3590; IV CT 1057-1060.) The court summarized each of the 29 criminal acts (more fully set forth in the Statement of Facts, *supra*), spanning from 1994

through 2001, that Landry committed which involved attacks on other inmates and prison personnel, the possession of weapons in his cell, and the secreting of weapons in his rectum.

The trial court did not find any mitigating evidence showing Landry was under the influence of extreme mental or emotional disturbance (factor (d)); any participation or consent by the victim (factor (e)); a reasonable belief by Landry in moral justification or extenuation (factor (f)); no evidence Landry was under extreme duress or substantial domination of another (factor (g)); no evidence Landry lacked the capacity to appreciate the criminality of his conduct (factor (h)), and he was 29 years old at the time of the offense. (XIV RT 3590; IV CT 1061.) Pursuant to factor (j), the court found Landry's participation was not relatively minor. Rather, Landry personally and intentionally killed Addis with a prison made weapon, willfully, deliberately, and with premeditation, with malice aforethought by waiting and watching in the exercise yard for an opportunity to strike. (XIV RT 3591; IV CT 1061.)

However, the court did address much of Landry's mitigating evidence under factor (k). (XIV RT 3591-3592; IV CT 1061-1062.) Specifically, the court acknowledged Landry was the victim of a traumatic childhood; born to youthful parents who were incapable of providing an appropriate home environment for him and who separated while he was still an infant. The trial court also acknowledged Landry was physically, mentally and sexually abused at his parents' homes and ultimately was raised by his grandparents who became his guardians and proceeded to get him psychological help. Despite Landry's grandparents' best efforts, the psychological damage to Landry had been done, and the testimony of Landry's childhood evoked "great sympathy" for him. (XIV RT 3591; IV CT 1062.) The court also acknowledged Landry's bipolar disorder diagnosis, which was a serious medical disorder involving substantial mood

swings. The court further acknowledged that while at times during his incarceration Landry received appropriate medical attention for his bipolar disorder, at other times he "quite clearly" did not. (XIV RT 3591; IV CT 1062.)

The court summed up its independent review by stating "[w]hile it's easy to feel great sympathy for the defendant as a child, and it appears that the defendant should have received better mental supervision in the prison, it also appears clear to this Court that this had little to do with his decision to kill." (XIV RT 3591-3592.) The court then pronounced its ruling: "Based on careful, independent re-weighing of the evidence, the Court finds that the weight of the evidence supports the jury's verdict. Consequently, the motion for modification is denied." (XIV RT 3592.) Landry fails to establish the trial court committed error in making its ruling.

Landry finds fault with the trial court not finding Landry was under the influence of extreme emotional disturbance (factor (d)), not under extreme duress or substantial domination of another (factor (g)), and not impaired as a result of mental disease or defect (factor (h)). (III AOB 500-501.) Landry also takes umbrage with the trial court not giving credit to "any of the evidence of duress or domination by another person at the time of the crime or at any other time" and the finding Landry's bipolar disorder had "little to do with his decision to kill"; especially, in the context of factor (k). (III AOB 501.) However, the trial court is not required to find any of the evidence offered in mitigation actually mitigated. (*People v. Alfaro, supra*, 41 Cal.4th at p. 1334; *People v. Turner* (1990) 50 Cal.3d 668, 717; *People v. Welch* (1999) 20 Cal.4th 701, 775; *People v. Rich* (1988) 45 Cal.3d 1036, 1123-1124.)

This Court rejected arguments in *Taylor*, *Welch*, and *Rich* similar to Landry's argument. In *Taylor*, this Court rejected the complaint the trial court ignored constitutionally relevant mitigating evidence because the trial

court failed to mention the evidence in detail on the record. (*People v. Taylor* (1999) 50 Cal.3d 668, 717.) This Court held the trial court's instruction to the jury on weighing the evidence and the trial court's statements at the beginning of its ruling that it had expressly acknowledged its obligation to consider the mitigating evidence was sufficient to uphold the court's denial of the motion to modify the judgment and find no impropriety. (*Ibid.*) So too in the instant case because the trial court definitively stated it "independently considered all of the evidence presented at trial and the arguments of counsel." (XIV RT 3584.)

In *Welch* this Court rejected the argument the trial court committed error when considering the aggravating and mitigating evidence during the automatic motion to modify the judgment. (*People v. Welch*, *supra*, 20 Cal.4th at p. 775.) Welch complained the trial court mistakenly considered the absence of extreme mental or emotional disturbance to be an aggravating circumstance and improperly discounted evidence of intoxication at the time of the crimes. However, this Court found it was within the trial court's discretion to conclude the evidence did not support Welch's claim his actions were greatly influenced by drug or alcohol intoxication. (*People v. Welch*, *supra*, 20 Cal.4th at p. 775.) So too this Court should reject Landry's complaints that the trial court did not adequately consider his mitigating evidence of duress, emotional disturbance, and mental impairment.

In *Rich*, this Court rejected a complaint the trial court erroneously failed to consider "'non-extreme' mental and emotional disturbance as mitigating evidence." (*People v. Rich*, *supra*, 45 Cal.3d at pp. 1123-1124.) This Court held, "[t]he fact that the court failed to find sufficient mitigation to outweigh the aggravating factors does not mean that the court failed to consider all of defendant's mitigating evidence." (*People v. Rich*, *supra*, 45 Cal.3d at pp. 1123-1124.) Similarly, in the instant case the trial court

briefly mentioned much of Landry's evidence offered in mitigation but plainly found it did not outweigh the aggravating factors.

Simply put, the record in the instant case establishes the trial court considered Landry's evidence in mitigation but found the evidence supported the jury's verdict of death, nonetheless. While Landry refers to much of his mitigating evidence as "uncontroverted," the opinions of experts can be accepted or rejected. The fact both the jury and the trial court found Landry deserved the death penalty for the heinous murder of Addis, despite Landry's expert testimony addressing gang pressure and his psychological problems as a result of his difficult upbringing, establishes the jury and court found Landry's expert and opinion testimony lacked credibility even though it was uncontested. That is, both the jury and trial court could have credited Landry's experts' opinions but, instead, rejected them. The jurors, and court for purposes of the automatic motion, were the arbiters of the facts and were not obligated to impose a sentence of life without the possibility of parole merely because Landry put on mitigating evidence. Landry's arguments should be rejected and his judgment remains intact.

XX. THE DEATH PENALTY IS NOT DISPROPORTIONATE AS APPLIED TO APPELLANT

In argument 27 Landry asserts consideration of the facts in the instant case establishes execution constitutes cruel and unusual punishment. (III AOB 509-514.) Landry argues he presented evidence showing he had a toxic upbringing which landed him in prison, and while in prison he attempted unsuccessfully to obtain psychological treatment for his mental health problems before being manipulated into murdering Addis, so the death penalty is disproportionate to the offense. (III AOB 511-513.) As part of his analysis, Landry claims "un-rebutted" evidence established the Department of Corrections violated his Eighth Amendment rights by

"knowingly depriving"[77] him of mental health treatment until after he murdered Addis and claims the guards put Addis on the exercise yard knowing Addis would be assaulted. (III AOB 512.) Landry's assertions do not withstand scrutiny, and an examination of the facts establishes the imposition of the death penalty in the instant case does not constitute cruel and unusual punishment.

This Court conducts intracase proportionality review to determine, based upon the facts of the instant case, whether the death sentence is so disproportionate to Landry's personal culpability as to violate California's constitutional prohibition against cruel and unusual punishment. (*People v. Wallace, supra,* 44 Cal.4th at pp. 1098-1099.) In making such a determination, this Court considers Landry's involvement in the crime, the nature in which it was committed, Landry's personal characteristics (including his mental capabilities), and the consequences of Landry's acts. (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1099.) Unquestionably, Landry fatally stabbed Addis in the neck, without provocation or forewarning, and then laughed about it as Addis bled to death, eventually bragging about the murder in a letter to fellow gang members. Landry's arguments attempting to shift blame to the Department of Corrections and their failure in preventing him from murdering Addis should be rejected.

Landry asserts that his repeated pleas for psychological help fell on deaf ears, and blames his homicidal behavior on the failures of the prison system. (III AOB 512, 514.) This claim is disingenuous for two reasons in consideration of the entire record.

First, on multiple occasions, starting in 1987 when Landry was admitted into the California Youth Authority, both Landry and his grandmother, who had guardianship of Landry, failed to acknowledge or

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[77] (III AOB 514)

disclose Landry had any history of "mental illness or nervous breakdowns," "any other illness, injury or physical condition not named above [in the questionnaire]," or that he was presently "under Dr.'s care for any condition." (VIII RT 3269-3270; XIV RT 3383-3385; V CT 1274-1275.) This, despite the fact Landry had been in and out of hospitals and treated for psychological and mental illness for several years. Landry's grandmother explained they did not believe Landry had mental illness but, rather, a behavioral problem. (XIV RT 3385.) She also explained she only wrote letters to her congressman seeking help for Landry in prison after Landry asked her to do this for him. (XIV RT 3385-3386.) Nonetheless, even as a juvenile Landry was placed in environments providing the opportunity for Landry to receive treatment but Landry defiantly refused to participate and, at best, only pretended to cooperate in order to obtain release.

Second, the record established on several occasions after Landry was incarcerated he refused to take medication after it was prescribed to him. (XIII RT 3164, 3169-3170, 3267.) Landry could not be forced to take his medication. (XIII RT 3163-3164.) Furthermore, a few months after Landry refused to take his medication in 1997, his medical records indicated a psychiatric evaluation showed Landry was not showing signs of problems. (XIII RT 3170-3172.) Additionally, following Addis' murder, Landry wrote a letter to a fellow gang member where he stated his intent to blame the murder on the fact he was not on medication – evincing the fact he fully understood the nature and gravity of his acts and his intent to play the system. (VII RT 1734-1736; III CT 767.) Therefore, Landry's argument and the opinions of his experts that the prison was to blame for his violent, murderous behavior not only fail to find support in the totality of the record but also do not support his claim that the death penalty constitutes cruel and unusual punishment in his case.

Furthermore, Landry misrepresents the totality of the evidence when asserting the guards brought Addis out onto the exercise yard with knowledge Addis would be assaulted based on inmate Green's demands. (III AOB 512.) In fact, Sergeant Sams and the officers who spoke with Addis about whether he wanted to go on the exercise yard did not know inmate Green had made a ruckus on the yard about Addis being brought outside. (VI RT 1341-1342; VIII RT 1780-1781.) Rather, Sergeant Sams, the officer in authority on the day of the murder, received informal information Addis might not want to go on the exercise yard, so he sent two officers to ask Addis if he wanted to exercise his yard privilege. (VI RT 1323-1324, 1333-1335, 1337-1338; VIII RT 1778, 1786, 1788-1779.) The uncontradicted testimony of the officers established Addis unequivocally wanted to exercise this privilege. (VI RT 1323-1324, 1341-1342; VIII RT 1778-1781, 1786, 1788.)

Not even Officer Maldonado thought Addis was in danger before he went on to the exercise yard. Officer Maldonado, who testified for the defense, interacted with inmate Green when he made his ruckus about Addis being allowed out because she was the officer in charge of releasing inmates out onto the exercise yard. (VIII RT 1803, 1806-1807, 1832-1833.) After putting all of the inmates into exercise yard two, with the exception of Addis, inmate Green began yelling at Officer Maldonado to let Addis out onto the yard. (VIII RT 1806-1809.) Addis was the last inmate brought out to exercise yard two, and rather than thinking Addis was in danger, Officer Maldonado thought he was "packing" – concealing drugs or contraband for the gang – and made a joke about this to Addis. (VIII RT 1812-1813.) Addis responded to the comment with a smile and gave Officer Maldonado no reason for concern. (VIII RT 1843-1844.)

It was only after Addis was released on the yard that Officer Maldonado purportedly told Sergeant Sams about inmate Green making the ruckus. (VI RT 1341-1342; VIII RT 1816-1818.) Landry's statement in his brief that "[w]ith knowledge that Addis would be assaulted, the guards put him on the prison yard after demands by the shot caller" purports to offer specific references to the record in support of this statement. (III AOB 512-513.) Scrutiny of these references do not support Landry's assertion.

The first reference quotes from the testimony of the tower gunner, Officer Esqueda, who made a report after the murder that he overheard inmate Green yelling at Officer Maldonado. (III AOB 512; V RT 1148.) At no time did Officer Esqueda claim he knew Addis would be assaulted if put on the yard but, rather, simply stated in the CDC 115 report what he overheard inmate Green say to Officer Maldonado. Second, Landry quotes Officer Maldonado who testified that after she released Addis onto the yard, she told Sergeant Sams she had a "gut feeling" they were going to take out Addis. (III AOB 512; VIII RT 1815-1817.) However, Officer Maldonado's testimony established she was not concerned until after Addis' release into the yard and not before, plus she conceded her gut feelings were usually wrong. (VIII RT 1812-1813, 1828, 1840, 1843-1844.) The third quote Landry references to support the officers knew "an inmate was to be killed" is also from the testimony of Officer Maldonado. (III AOB 512-513; VIII RT 1856.) However, Landry references a portion of Officer Maldonado's testimony in which she ***denied*** having made the very quote referenced by Landry. (VIII RT 1856-1857.)

Therefore, Landry's statements that the guards knew Addis was in danger before they placed him on the yard or were involved in a conspiracy involving Addis' demise are unsupported by the record. The record does

not support Landry's claim that "[w]ith knowledge that Addis would be assaulted, the guards placed him on the prison yard. . . ." (III AOB 512.)

Furthermore, Landry completely ignores significant evidence contradicting any notion Addis was placed on the yard because of demands by inmate Green or despite knowledge Addis was in danger. Officers Esqueda, Valencia, Maldonado, and Sergeant Sams testified inmates had no control over the officers or over who was released into the exercise yard. (V RT 1072, 1190; VI RT 1309-1310; VIII RT 1782, 1840.) Officer Maldonado unequivocally testified she was unaware of any conspiracy amongst the officers to harm or kill inmates. (VIII RT 1831-1832, 1151-1152.) While an inmate could voluntarily relinquish exercise yard privileges and request an alternative, yard privileges could not be taken away without "concrete information" establishing a danger to the inmate; with Addis, all Sergeant Sams heard was a rumor Addis might not want to go onto the yard. (VI RT 1338-1340, 1447, 1451-1453; VII RT 1673-1674.) Uncontroverted evidence established Addis had a status review on July 30, a few days before his murder, during which they discussed any concerns he had with his yard status, and Addis expressed no safety or other concerns. (VII RT 1664-1670.)

Contrary to Landry's arguments otherwise, the death penalty in the instant case does not constitute cruel and unusual punishment based upon the circumstances of the offense, the extent of Landry's involvement in the murder, the manner in which it is committed, and Landry's personal characteristics. Landry committed a violent, horrific murder on behalf of the gang he chose to become involved with in order to gain status and recognition, boasting about it after the fact in letters to fellow gang members. While Landry had a difficult upbringing and spent years in institutions before ending up in prison, Landry's argument blaming the

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system for his murder lacks credibility in light of the total record. Therefore, the judgment should be affirmed and his claim that execution constitutes cruel and unusual punishment in his case lacks merit.

XXI. THE TRIAL COURT DID NOT COMMIT ERROR BY IMPOSING THE ONE-YEAR ENHANCEMENT ON COUNT 3

In argument 28, Landry asserts the court committed error by imposing the weapons use enhancement on count three because use of a weapon is an element of Penal Code section 4500 under the accusatory pleading test. (III AOB 515-517.) Landry acknowledges this claim was not raised below but claims it was an unlawful sentence. (III AOB 515-516.) Landry is wrong because the trial court did not commit error by imposing the enhancement.

Landry was charged in count three with the assault of Joseph Matthews by a life prisoner with malice aforethought, pursuant to Penal Code section 4500, with an enhancement for use of a weapon, within the meaning of Penal Code section 12022, subdivision (b). (I CT 42-43, 45.) The jury convicted Landry of count three and made a true finding regarding the weapons use enhancement. (IV CT 920-921.) When sentencing Landry on count three, the trial court imposed a one-year consecutive prison term for the personal use of a weapon enhancement. (XIV RT 3596-3597; IV CT 1064, 1071.) The court then stayed the sentences on counts one, three and four. (XIV RT 3597; IV CT 1064.)

For purposes of determining whether a weapons use enhancement can be imposed requires considering the elements of the offense of Penal Code section 4500. This Court held "[t]he phrase 'element of the offense' signifies an essential component of the legal definition of the crime,

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considered in the abstract. [Emphasis in the original.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 317 (overruled on other grounds in *People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1199); see also *People v. Smith* (2007) 150 Cal.App.4th 89, 94-95.) Penal Code section 4500 provides, in pertinent part:

> Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole.

Considered in the abstract, the elements of Penal Code section 4500 are (1) an aggravated assault, (2) by a state prisoner, (3) serving a life term, (4) with malice aforethought. (*People v. Staples* (1988) 204 Cal.App.3d 272, 276; *People v. Superior Court* (*Gaulden*) *supra,* 66 Cal.App.3d at p. 778.) The elements of the offense in the abstract do not include personal use of a weapon because the offense can be committed without a weapon.

Penal Code section 12022, subdivision (b) (1) provides

> Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense.

The elements of Penal Code section 4500 do not include personal use of a weapon. (*People v. Staples*, *supra*, 204 Cal.App.3d at p. 276.) Therefore, the trial court properly imposed the additional one year enhancement to count three.

Landry argues this Court should employ the accusatory pleading rule to consider the elements of the offense as pled in the information to find use of a weapon was an element of the offense and relies, in part, upon *People v. McGee* (1993) 15 Cal.App.4th 107. (III AOB 315-316.) However,

McGee does not apply and contradicts the public policy goal of punishing more severely those who have a greater degree of culpability. (*People v. Murray* (1994) 23 Cal.App.4th 1783, 1788 [noting public policy demand of imposing greater punishment on those with greater culpability].)

McGee was charged with assault with a deadly weapon (Pen. Code, § 245, subd. (a)) and a weapons use enhancement (Pen. Code, § 12022), and at trial the prosecutor amended the information to charge assault with great bodily injury when McGee claimed use of the weapon was an element of assault with a deadly weapon. (*People v. McGee*, *supra*, 15 Cal.App.4th at pp. 112-113.) Rather than looking at the elements of the offense in the abstract, the court in *McGee* considered the conduct of McGee, finding that because McGee used a knife to commit the assault, the use of the weapon was an element of the offense. (*People v. McGee*, *supra*, 15 Cal.App.4th at p. 115.) The court in *McGee* reasoned that because the offense as defined by the statute could be committed either with a weapon or without, it was necessary to consider the facts of the case. (*People v. McGee*, *supra*, 15 Cal.App.4th at p. 115.) The holding in *McGee* has been held to the specific facts of the case. (See *People v. Ross* (1994) 28 Cal.App.4th 1151, 1156 fn 7.) Also, assault with a deadly weapon is not a lesser included offense of assault by state prisoner, pursuant to Penal Code section 4500. (*People v. Milward* (2010) 182 Cal.App.4th 1477 [2010 WL 1010114, 3.]

When considered in the abstract, use of the weapon is not one of the elements of the offense of assault by prisoner, pursuant to Penal Code section 4500, so the trial court properly imposed the one-year weapons use enhancement. Landry's arguments to the contrary should be rejected and the one-year weapons use enhancement should remain intact.

XXII. THERE WAS NO CUMULATIVE ERROR

In argument 29 Landry asserts cumulative error requires reversal of the judgment. (III AOB 517-520.) Because no error was committed, and any error committed was harmless, Landry's judgment should remain intact.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: May 12, 2010

Respectfully submitted,

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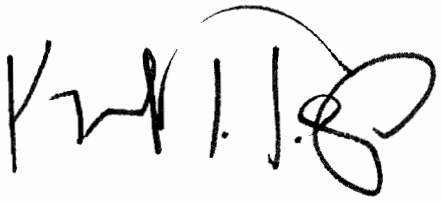

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 74187 words.

Dated: May 12, 2010

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Daniel Gary Landry** No.: **S100735**

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; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On May 13, 2010, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, 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 May 13, 2010, at San Diego, California.

Olivia de la Cruz
Declarant

Olivia de la Cruz
Signature

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