SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LUMORD JOHNSON, Defendant and Appellant.	CAPITAL CASE Case No. S105857

SUPREME COURT
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Gordon R. Burkhart, Judge Presiding

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DEATH PENALTY

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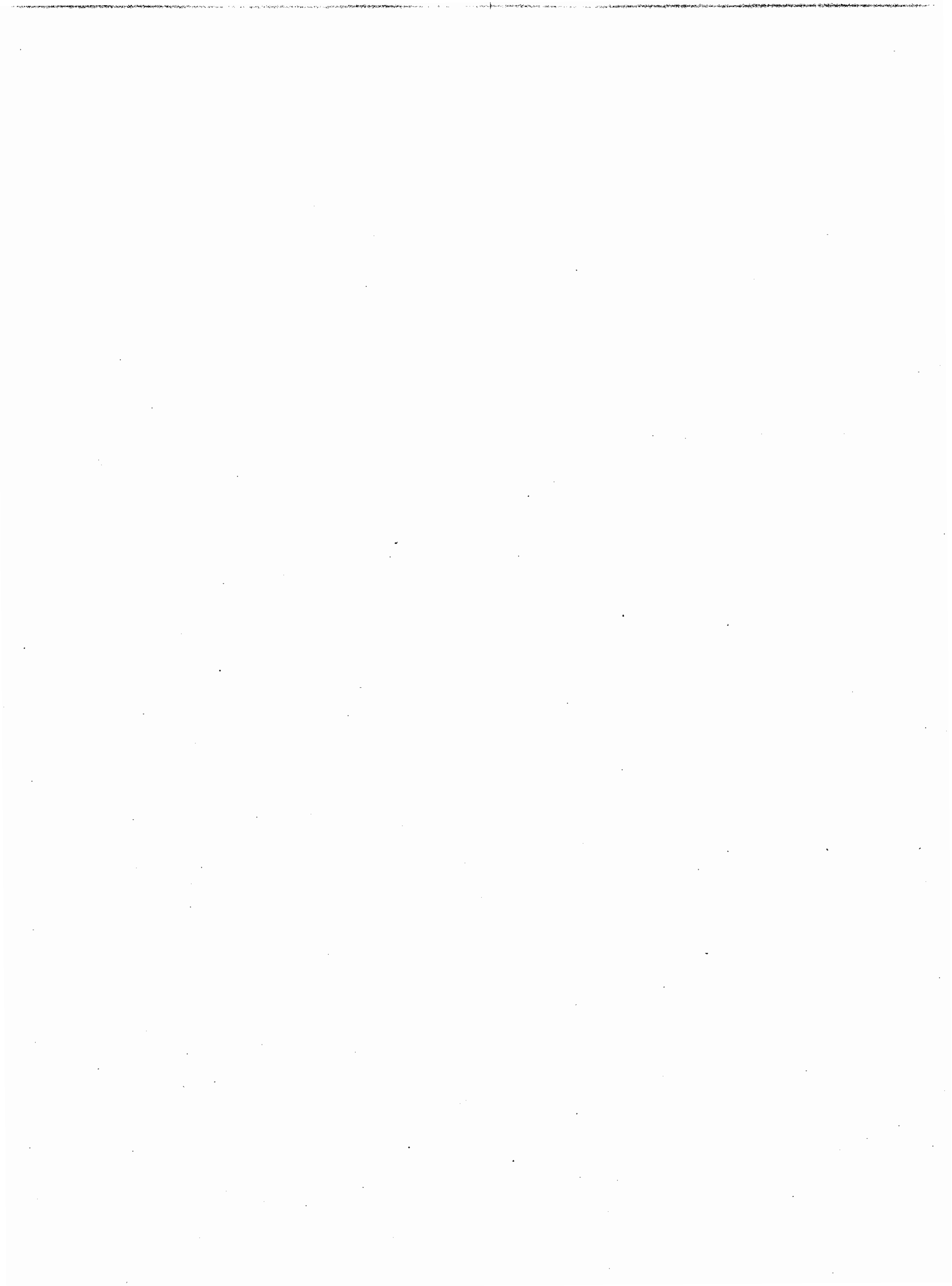

STATEMENT OF THE CASE

In a second amended information filed by the Riverside County District Attorney on November 20, 1998, Johnson was charged with two counts of murder in violation of Penal Code[1] section 187 (count 1 [victim Martin Campos]); count 2 [victim Candy Camarina Lopez]). The information alleged Johnson personally used a firearm in the commission of both murders within the meaning of sections 12022.5, subdivision (a), and 1192.7, subdivision (c)(8); and a principal was personally armed with a firearm in the commission of the Campos murder within the meaning of section 12022, subdivision (a)(1). (3 CT 787-789.)

The information alleged as special circumstances that the Campos murder was committed during the commission or attempted commission of a kidnapping and kidnap for robbery within the meaning of section 190.2, subdivision (a)(17)(ii), the Campos murder was committed during the commission or attempted commission of a robbery within the meaning of section 190.2, subdivision (a)(17)(i), and that Johnson was being charged with and committed more than one offense of murder within the meaning of section 190.2, subdivision (a)(3).[2] It was further alleged that Johnson was previously convicted of a serious or violent felony (manslaughter) within the meaning of sections 667, subdivisions (c) & (e), and 1170.12, subdivision (c), and a serious felony (manslaughter) within the meaning of section 667, subdivision (a).[3] (1 CT 789-791.)

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[1] All further statutory references are to the Penal Code unless otherwise noted.

[2] On August 7, 1996, subsequent to the filing of the original information, the People gave notice of their intention to seek capital punishment for Johnson. (1 CT 205-207.)

[3] Todd Dewayne Brightmon was charged with murder as a codefendant in count 1. (3 CT 787.) Johnson and Brightmon were tried together in a joint trial with separate juries. (2 RT 271-272.) Brightmon (continued...)

Johnson entered not guilty pleas to counts 1 and 2, and denied all special allegations. (4 CT 801.) On March 22, 2000, a jury was sworn to try the case.[4] (13 CT 3502.)

On May 10, 2000, the jury found Johnson guilty of both counts, finding the Campos murder to be in the first degree and the Lopez murder to be in the second degree.[5] The jury found all special circumstances and firearm enhancements true. (14 CT 3864-3871, 3884.)

On May 15, 2000, the penalty phase commenced. (14 CT 3898.) In a bifurcated hearing during the penalty phase in which Johnson waived his right to a jury trial, the court found both prior conviction allegations true. (14 CT 3924.) On June 15, 2000, the jury reported that it was unable to reach a verdict as to penalty, and the court declared a mistrial for the penalty phase. (15 CT 4012.)

On October 9, 2001, a new jury was sworn for the retrial of the penalty phase. (25 CT 7013.) On November 20, 2001, the jury returned a verdict finding death to be the appropriate penalty. (26 CT 7258-7259, 7261.)

(...continued)
was convicted of first degree murder with true findings on the kidnap and robbery special circumstances as well as a vicarious arming within the meaning of section 12022, subdivision (a)(1). (28 RT 4338-4343.) Brightmon was sentenced to life without possibility of parole and a determinate term of five years in state prison. (28 RT 4356.)

[4] The prior conviction allegations were bifurcated for trial purposes. (13 CT 3481; 4 RT 657.)

[5] The jury initially indicated that it was unable to reach a verdict on either count, and the prosecutor subsequently elected to reduce the charge in count 2 to second degree murder. (29 RT 4394-4402, 4405.) Accordingly, the court instructed the jurors that their verdict on count 2 could only be second degree murder, voluntary manslaughter, involuntary manslaughter or not guilty. (29 RT 4412-4413.)

On April 8, 2002, the trial court considered and denied a motion to modify the verdict pursuant to section 190.4, subdivision (e). (26 CT 7304-7306.) On the same date, the trial court sentenced Johnson to death.[6] (26 CT 7306, 7315-7316.)

This appeal is automatic. (§ 1239, subd. (b).)

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[6] The trial court sentenced Johnson to death on counts 1 and 2 concurrently, and then stayed execution of the prior conviction and firearm enhancements pursuant to the stipulation of the parties. (26 CT 7306, 7315-7316; 1 3rd Supp. CT 5-6, 8-9.) However, count 2 was a second degree murder conviction. (14 CT 3865, 3884.) Death is not an authorized sentence for second degree murder. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1174; see § 190, subd. (a).) Under such circumstances, this Court may use its statutory power to vacate the death sentence on count 2 and order the judgment modified to reflect the proper sentence of 15 years to life for that count. (*Ibid.*, citing § 1260 and *People v. Barnwell* (2007) 41 Cal.4th 1038, 1048 & fn. 7.) Respondent respectfully requests that this Court do so in Johnson's case.

Moreover, 12022.5, subdivision (a), enhancements cannot be stayed or stricken. (See § 12022.5, subd. (c); *People v. Thomas* (1992) 4 Cal.4th 206, 209-213; *People v. Ledesma* (1997) 16 Cal.4th 90, 96-97; *People v. Herrera* (1998) 67 Cal.App.4th 987, 993-994.) Likewise, a five-year section 667, subdivision (a), enhancement must be imposed. (See *People v. Dotson* (1997) 16 Cal.4th 547, 553.) However, given the parties' stipulation in the trial court to have those enhancements stayed, respondent is not requesting imposition of sentence for those enhancements.

Hereafter, respondent's references to affirming the judgment incorporate the necessary correction to the sentence on count 2.

STATEMENT OF FACTS[7]

A. Guilt Phase

1. Prosecution Evidence

On June 25, 1994, Johnson confronted Jose Alvarez because he was angry that Alvarez was driving in his neighborhood. During the ensuing altercation, Johnson retrieved a shotgun and tried to shoot Alvarez. However, Alvarez's girlfriend, Camerina "Candy" Lopez,[8] was shot and killed instead when she tried to intervene. Johnson fled immediately after the murder.

On November 11, 1995, Johnson and Todd Brightmon assisted Oscar Ross in a plan to rob Martin Campos of a kilo of cocaine. After Johnson and his cohorts forced Campos and his companion, Jose Garcia, into the back of a U-Haul truck, both men tried to escape. Johnson pursued the unarmed Campos and shot him in the chest. While Campos was still alive, Johnson and Brightmon locked him in the trunk of Garcia's car, where Campos eventually died. Johnson fled immediately after the murder.

The facts and circumstances surrounding these crimes are as follows:

a. The Camerina "Candy" Lopez Murder

Johnson's aunt, Deborah Galloway, lived at the corner of Lincoln and Beloit Avenues in the Casa Blanca area of Riverside where she served as

[7] Inasmuch as Johnson was tried jointly with codefendant Brightmon, evidence which was only presented to the Brightmon jury has been excluded from this Statement of Facts.

[8] The record contains different spellings of Camerina and includes references to Camerina as the victim's last name. However, based on the testimony of the victim's mother, it appears that the her first name was Camerina, her last name was Lopez, and "Candy" was a nickname for Camerina which her father started using when she was a baby. (43 RT 6563-6564.) Thus, respondent will refer to the victim of count 2 as Camerina "Candy" Lopez.

caretaker for Vallie Williams. (12 RT 1991, 2002-2005.) Camerina "Candy" Lopez lived with her family on Lincoln Avenue five houses away from Williams. (12 RT 1945-1947; 20 RT 3114, 3120-3121.) Lopez was dating Jose Alvarez.[9] (12 RT 1946; 20 RT 3113.)

On June 25, 1994, Alvarez drove past the intersection of Beloit and Lincoln while Johnson was standing outside in front of Williams's house. Johnson expressed displeasure at Alvarez driving in the area and told him to "keep on going straight." (20 RT 3114-3118.) Alvarez got angry and exchanged profanities with Johnson through the open driver's side window. (20 RT 3116.) Johnson told Alvarez to get out of the car; but Alvarez drove home. (20 RT 3119.)

About a half hour later, Alvarez called Lopez, told her what happened and described Johnson. (20 RT 3140.) Alvarez then picked up Lopez, and they went to the store and a park for a couple hours. (20 RT 3120-3121.)

As Alvarez drove back down Lincoln to take Lopez home, he saw Johnson again on the porch of Williams's house and pointed him out to Lopez. (20 RT 3121-3122.) Brightmon and other individuals were with Johnson. (12 RT 2009-2010; 14 RT 2288-2289, 2292; 21 3172.) Alvarez made a u-turn and stopped in front of the house. (20 RT 3122-3123.) Lopez opened her passenger door and tried to talk to Johnson. (20 RT 3123-3124.) Alvarez exited and walked around the car. With his hands raised, Alvarez asked Johnson, "What's going on?" (20 RT 3124-3126.)

Johnson grabbed a shotgun from the porch and ran toward Alvarez. (20 RT 3126.) As Alvarez stepped back, Johnson struck him in the head with the butt of the shotgun. (20 RT 3126-3127.) This caused a laceration

[9] Alvarez's prior testimony from the preliminary hearing was read to the jury. (20 RT 3111-3156.)

on the side of Alvarez's head which bled. (12 RT 1959, 2075-2076; 20 RT 3127.)

Alvarez grabbed the gun and began struggling with Johnson. (20 RT 3128-3129.) As they wrestled over the gun, Lopez exited the car. (20 RT 3127, 3129, 3148.) Despite Alvarez telling her to stay in the car, Lopez approached and stood next to Alvarez, who was facing Johnson. (20 RT 3130-3131.) Johnson had one hand on the handle of the shotgun and the other hand on the barrel of the gun. (20 RT 3132.)

Johnson then moved the gun very fast with the barrel slightly raised, eventually pointing it at Alvarez. (20 RT 3132-3133.) Alvarez pushed himself away from Johnson and the gun as Lopez stepped closer. (20 RT 3150, 3133.) Alvarez looked at Lopez and tried to push her away as Johnson fired the shotgun. (20 RT 3147, 3151-3154.) Lopez was stricken and fell to the street.[10] (20 RT 3133, 3155.) Johnson fled towards

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[10] Deborah Galloway testified that Alvarez had come by the house twice that day asking for Johnson, she later heard Johnson and Alvarez arguing outside, Johnson asked Alvarez to park and talk about their problem, Alvarez made a u-turn and parked in front of the house, Johnson left the porch with a gun, Alvarez approached Johnson and continued to argue, Alvarez threw up his hands as if challenging Johnson to fight, Johnson told Alvarez to "take it around the corner," Johnson and Alvarez began "tussling" over the gun, Lopez got between them, they pushed her out of the way, Johnson struck Alvarez in the head with the butt of the gun, Lopez moved back between Johnson and Alvarez, there was a gunshot, Johnson looked "mad, shocked and surprised," Lopez called Johnson's name, and Johnson yelled, "Todd." (12 RT 2005-2040, 2050, 2056, 2060-2061; 21 RT 3168, 3171, 3174-3177.)

In July of 1996, Galloway told Officer Brian De Coninck that Johnson pushed Lopez out of the way before striking Alvarez in the head with the stock of the gun, which caused the gun to fire, and did not mention any struggle over the gun. (21 RT 3171-3172, 3176.)

Williams's house.[11] (12 RT 1965-1968; 20 RT 3133-3135.) As she lay in the street bleeding, Lopez cried for help and said, "He shot me." (12 RT 1966-1967; 20 RT 3134.)

California Highway Patrol Officer Jon West was flagged down by a bystander and responded to the shooting scene. (12 RT 1975- 1978.) When he arrived, Lopez was rolled up in a fetal position on the street, looking pale and grunting in considerable pain with labored breathing. (12 RT 1978-1980.) Subsequently, paramedics and officers from the Riverside Police Department responded to the scene. (12 RT 1982, 1987, 1988, 1992, 1995-1999, 2073-2075.)

Members of Lopez's family were told of the shooting and ran to the corner where they saw her lying in the street. (12 RT 1947-1948, 1950-1951, 1954-1956.) Lopez's mother observed two young men -- one African-American and one Hispanic-- jump out a rear window of Williams's house, and run down Lincoln. (12 RT 1249-1250.)

As she lie on the ground, bleeding, in great pain, gasping for air and lapsing into unconsciousness, Lopez said "Lamar" or "Lamar Johnson" shot her, described Johnson, and indicated that Johnson lived in or frequented Williams's house. (12 RT 1957-1959, 1981-1982, 1989-1991, 2000.) Lopez was transported to Riverside Community Hospital. (12 RT 1951, 1996.)

At the hospital, Lopez told Officer Patrick Olson that she and Alvarez were standing next to the car when "Lamar" approached them with a rifle and started an argument with Alvarez, Lamar pointed the rifle at Alvarez, she stepped in between them to prevent Lamar from shooting Alvarez, and

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[11] Neither Alvarez nor Lopez threatened Johnson, and neither of them had any weapons at the time of the shooting. (12 RT 2017-2018; 20 RT 3136.)

Lamar shot her once. (12 RT 1999-2000.) Lopez subsequently died in surgery. (12 RT 1952.)

Officers searched Williams's house and backyard, but did not find Johnson. (12 RT 1992, 2076-2077, 2095.) Galloway told Officer Wayne Ramaekers that Johnson had run out the back door of the house.[12] (12 RT 2093-2095.)

Officers found a 12-gauge Winchester shotgun lying on the dirt in Williams's backyard. (12 RT 2077-2078, 2080-2082.) The ejection port of the shotgun was face up with one expended shell inside of it. (12 RT 2082-2083.) The magazine contained three additional live rounds. (12 RT 2084, 2087.)

On June 28, 1994. Dr. Joseph Choi, a forensic pathologist with the Riverside County Coroner's Office performed an autopsy on Lopez. (14 RT 2220-2223.) Lopez suffered a single gunshot wound to her chest. (14 RT 2223-2224.) The gun was fired at relatively close range, between six inches and two feet, as indicated by the presence of unburned gunpowder, the unscalloped appearance of the wound, the absence of individual pellet holes and the absence of soot. (14 RT 2224-2227.)

There were hundreds of shotgun pellets inside Lopez's chest and abdomen. (14 RT 2227, 2231.) Shotgun wad -- cardboard, plastic or felt material which divides gunpowder from pellets in the shell – was also found inside Lopez's body. (14 RT 2232-2233.) The presence of wadding

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[12] Subsequently, Galloway told officers that she did not see Johnson run through the back door or witness the shooting. (12 RT 2096, 2106-2107.) At trial, Galloway testified that she went into her bedroom after the shooting, closed the door, heard the front door open and heard footsteps across the house to the back door. (12 RT 2015-2016, 2032.) Galloway admitted that she lied to police officers and told them she did not see anything because she did not want Johnson to get in trouble. (12 RT 2063-2064.)

which penetrated the wound was consistent with the shotgun having been fired at a distance of less than two feet. (14 RT 2233.)

The trajectory of the pellets was in a sharply downward direction, right to left and front to back. (14 RT 2233-2234.) The pellets penetrated the diaphragm, damaging the liver and perforating the vena cava and right kidney. (14 RT 2234-2235.) Internal and external blood loss from these injuries was the primary cause of death. (14 RT 2235.)

Richard Takenaga, a firearms expert, examined and test-fired the 12-gauge pump-action Winchester shotgun found in Williams's backyard. (16 RT 2603-2604.) Takenaga determined that the trigger pull -- how hard the trigger would have to be pulled to fire the gun -- was approximately eight pounds[13] (16 RT 2601-2606), the expended 12-gauge shell in the ejection port had been fired by the shotgun (16 RT 2606-2611), and the shot pellets and wadding removed from Lopez's body were consistent with those inside the unexpended shells (16 RT 2611-2613).

b. The Martin Campos Murder

Oscar Ross was the uncle of Johnson's wife. (18 RT 2735; 19 RT 2856.) Ross was also co-defendant Brightmon's cousin. (18 RT 2733-2734; 19 RT 2855-2856.) Ross was wheelchair bound since a shooting incident in 1971. (19 RT 2855, 2930-2934.)

Ross owned a large parcel of property on Day Street in Mead Valley in Riverside. (15 RT 2369.) The property contained several mobile homes or trailers, junked and operable cars, animal pens and substantial trash and clutter. (15 RT 2331-2335.) The property was enclosed by a chain-link fence, a main gate and an interior gate which led to the primary residence in which Ross resided. (15 RT 2331-2334, 2385; 19 RT 2856-2858.)

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[13] Takenaga testified that the trigger pull was in "a normal range" and "not excessively heavy or light" for a shotgun. (16 RT 2624-2625.)

Ross's caretaker, Margie Escalera, lived in a smaller nearby trailer. (18 RT 2726-2728, 2730-2731; 19 RT 2858.) Ronnie Moore and Jim Aston lived in other trailers on the property. (15 RT 2368-2370, 2394-2396; 18 RT 2728-2730; 19 RT 2858-2859.)

Martin Campos and Ross became friends in June or July of 1995. (18 RT 2731-2733; 19 RT 2860.) Ross purchased cocaine and marijuana from Campos, and then sold the cocaine. (19 RT 2860.) During one of the drug buys, Ross informed Campos that he stored money in a PVC pipe which he kept hidden inside his Cadillac. (18 RT 2784-2786;19 RT 2860.) Only Ross and Campos knew about the PVC pipe. (19 RT 2863.)

In October of 1995, four or five Spanish-speaking men robbed Ross and Escalera at gunpoint. (18 RT 2760-2764; 19 RT 2862-2866.) One of the men demanded the keys to Ross's Cadillac and specifically mentioned the PVC pipe inside the car. (18 RT 2763-2766; 19 RT 2861-2863.) Ross said he had sent the PVC pipe to Los Angeles for some cocaine. (19 RT 2864.) The men took approximately $4,500 in cash, five or six pounds of marijuana and various household items. (18 RT 2763-2764, 2787; 19 RT 2863.)

Campos was not one of the men who robbed Ross and Escalera. (18 RT 2761, 2763.) However, Ross felt Campos set up the robbery because the gunmen knew about the PVC pipe and asked for the keys to his Cadillac. (18 RT 2766, 2787; 19 RT 2863.) Ross did not confront Campos with his suspicions. (19 RT 2864-2865.)

November 9, 1995, Johnson and Brightmon visited Ross.[14] (19 RT 2865-2868.) One of them told Ross, "I heard you've been having problems," and asked him "What [do] you want to do about it?" (19 RT

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[14] Johnson's wife drove them and picked them up. (15 RT 2396-2397; 18 RT 2737-2739; 19 RT 2866, 2868.)

2867.) Ross believed they were talking about getting his money and marijuana back. (19 RT 2867.)

Subsequently, Ross formulated a plan to steal a kilo of cocaine from Campos. (19 RT 2869.) Ross planned to offer Campos $22,500 for the cocaine, tell Campos when he delivered the cocaine that he suspected him of having set up the prior robbery, and take the cocaine without paying for it by using Johnson and Brightmon to intimidate Campos. (19 RT 2872-2875.) Ross did not intend to harm or kill Campos. (19 RT 2873-2874.)

On November 10, 1995, Johnson and Brightmon returned and asked Ross whether he had decided what he wanted to do. When Ross explained his plan, Johnson and Brightmon said, "Okay." (18 RT 2740-2741; 19 RT 2879-2871, 2876.) There was an understanding that everyone would receive a portion of the cocaine. (19 RT 3057.)

Ross called Campos and asked for the cocaine, and Campos agreed to bring it that day. (19 RT 2883-2884.) Later, Campos told Ross that he was having problems getting the cocaine and would bring it the next day. (19 RT 2884.) Campos purchased the kilo of cocaine from Jose Garcia. (15 RT 2431-2433.)

Johnson and Brightmon joined Ross and Escalera for dinner that night. (18 RT 1841-1842;19 RT 2876-2877.) That evening, Johnson said something to the effect of killing someone "comes easy."[15] (19 RT 2877, 2880.) Johnson and Brightmon apparently stayed overnight somewhere in the front of the property. (19 RT 2883.)

The following morning, November 11, 1995, Johnson asked Ross, "Is he coming with it?" (19 RT 2883.) After Ross assured them, Johnson and

[15] Ross previously told detectives that Johnson commented that it was easy to kill the "Mexican girl" who was shot in Casa Blanca. (21 RT 3193.)

Brightmon hung around the property. (19 RT 2883-2884.) Meanwhile, Garcia drove to Campos's home with the cocaine concealed inside the trunk of his white Nissan Sentra, and agreed to give Campos a ride to Ross's property. (15 RT 2432-2435.)

When Campos and Garcia arrived, Ross was outside with Johnson and Brightmon between the interior gate and Ross's trailer. (16 RT 2539; 19 RT 2886-2887.) They pretended to rake the yard so that Campos would not suspect anything. (19 RT 2887-2888.) Garcia parked near Ross's Cadillac, and Campos exited the Sentra and spoke to Ross near a U-Haul trailer. (19 RT 2889-2890.) Johnson and Brightmon stood nearby them. (19 RT 2890.) Garcia then exited his car and approached the others. (19 RT 2890.) Ross appeared to be in charge. (15 RT 2484.)

Ross asked Campos to let him see the cocaine, and Campos told Garcia to get it. (19 RT 2890.) As Garcia headed back toward the Sentra, Ross "was about to tell [Campos] what was getting ready to go down" when Johnson pulled out a gun and pointed it at Campos who was seated on the bumper of the U-Haul. (19 RT 2890-2893.)

Garcia saw what was happening and began running toward the gate.[16] (19 RT 2891, 2893.) Brightmon chased after Garcia, tackled him and dragged him approximately 19 feet back towards the U-Haul. (15 RT 2441-2442; 19 RT 2893-2895.) Ross, Johnson and Brightmon said, "Up, up," indicating that they wanted Campos and Garcia to get inside the U-

[16] Garcia testified that Campos exited the home with Ross, Johnson and Brightmon. (15 RT 2438-2339.) According to Garcia, he walked over to their location behind the U-Haul truck where he saw Campos crouched on the ground next to Ross's wheelchair with Johnson pointing a pistol at Campos's head. (15 RT 2440-2441.)

Haul.[17] (15 RT 2444-2445.) Campos said, "No," as Johnson continued pointing his handgun. (15 RT 2443-2444.) However, Campos was forced inside of the U-Haul. (15 RT 2446.)

Garcia offered his car keys, but refused to get in the U-Haul fearing that he would be killed once inside the truck. (15 RT 2445-2446.) Brightmon struck Garcia in the face, causing him to fall inside the open rear of the U-Haul. (15 RT 2445-2447.) Garcia testified that once inside the truck, he was out of sight of any others in the yard and hidden from view of the street by a large container filled with trash. (15 RT 2446.)

Campos jumped out of the U-Haul and went around the side of the truck. (15 RT 2447; 19 RT 2896.) Johnson and Brightmon chased after Campos. (15 RT 2447-2448; 19 RT 2897-2899.) Johnson caught up with Campos and began struggling with him. (18 RT 2745-2746.) Brightmon stood approximately seven feet away from them. (18 RT 2746-2747.) Campos broke loose or was thrown to the ground, and Johnson shot him with the handgun. (15 RT 2447-2448; 18 RT 2748-2749, 2801; 19 RT 2899.)

Garcia jumped out of the U-Haul into the trash container from which he saw Campos slouched with Johnson standing about ten feet in front of him. Campos said, "No, man. No, man," and fell to the ground. (15 RT 2448-2452; 18 RT 2749-2751; 19 RT 2899.) Garcia scaled the fence and fled. (15 RT 2452; 18 RT 2751; 19 RT 2899.)

Campos crawled on his stomach as Johnson continued holding the gun. (19 RT 2899-2901.) Ross, Johnson and Brightmon searched the Sentra for the cocaine, but did not find it. (19 RT 2902-2903.) Meanwhile,

[17] Ross testified that Campos and Garcia were not told to get inside the U-Haul. (19 RT 2896.)

Campos lay on the ground, still breathing and looking at Ross. (19 RT 2903.)

Johnson and Brightmon placed Campos in the trunk of the Sentra while he was still alive and closed the trunk.[18] (19 RT 2903-2905.) Johnson then ran toward the front gate, leaving Brightmon and Ross behind. (19 RT 2904-2905, 2909-2910.)

Moore heard the gunshot and was about to leave with his son when Johnson approached Moore's car with his gun pointed downward and said, "Don't go nowhere." (15 RT 2371-2375.) Johnson got in the passenger seat with the gun on his lap and told Moore to take him off the property. The barrel of the gun was pointed towards Moore, but Johnson's finger was not on the trigger. (15 RT 2374-2376; 16 RT 2586, 2590.)

Johnson directed Moore to drive to various unknown locations for 30 to 60 minutes. (15 RT 2376-2377.) When Johnson attempted to share his thoughts, Moore said he did not want to hear about anything. (15 RT 2377.) Eventually, Johnson told Moore to stop, apologized, gave him 30 dollars, and exited the car. (15 RT 2378.)

Meanwhile, Ross offered some unidentified men money to move the Sentra out off his property. (19 RT 2910-2911, 2972-2973.) Either Ross or Aston broke the steering wheel column and steered the Sentra while one of the unidentified men pushed the Sentra out to the street with his car. (19 RT 2911-2912.)

Subsequently, a white pickup truck with some Hispanic men in it pulled up to the front gate, Ross retrieved an assault rifle and fired a round

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[18] Escalera testified that Brightmon tried to pick up Campos, Brightmon put him down because Campos was too heavy, some unknown Black men in a blue car later placed Campos in the trunk of the Sentra, and the same men pushed the Sentra off Ross's property with another car. (18 RT 2752-2753, 2804-2807.)

into the dirt, and the men in the truck left.[19] (18 RT 2755-2756; 19 RT 2912-2913.) Ross then decided it was time for him to leave as well. (19 RT 2913.)

Ross drove Escalera and Brightmon out of the yard in a 1956 Chevy. (18 RT 2754-2757; 19 RT 2913-2914.) Ross dropped Brightmon off in Sunnymead or Moreno Valley and then drove to a cousin's house where he and Escalera spent the night. (18 RT 2757-2758; 19 RT 2913-2915.)

Garcia went to Campos's house and told his brother, Raul, what had happened.[20] (15 RT 2453-2456.) Garcia and Raul got some guns from Garcia's home and drove to Ross's property in Raul's red El Camino. (15 RT 2455, 2488.) However, they did not find the Sentra, Campos or any other people on the property. (15 RT 2456-2457.)

Garcia and Raul eventually found the Sentra about a mile away. (15 RT 2457-2458.) Garcia drove the Sentra home with Raul following him in the El Camino. (15 RT 2458.) Garcia left the Sentra at his house and returned to Campos's home where Raul called the police. (15 RT 2458-2459.) Raul did not tell the police anything about the cocaine. (15 RT 2459.)

Deputy Sheriff Michael Angeli escorted Garcia and Raul back to Ross's property. (15 RT 2328-2330, 2459.) Angeli found fresh tire tracks from a small car coming from the second locked gate, drag marks with coagulated blood and blood spatter in the dirt near Ross's Cadillac, chicken wire nearby with slightly fresh damp blood on it, a key chain with an "S" on it in the blood, some blood near an animal pen and junk car which

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[19] Ross believed Garcia was one of the men in the back of the truck. (19 RT 2912.)

[20] To avoid confusion, Raul Campos will referred by his first name.

appeared to have been washed down by water, and a set of partially wet leather gloves on top of a vehicle. (15 RT 2336-2341, 2344.)

Inside Ross's trailer home, Angeli found a rifle gun case behind the couch, a magazine containing 21 rounds of live .223-caliber assault rifle ammunition and an empty magazine. (15 RT 2344-2345.) No dead or injured people, witnesses or weapons were found on the property. (15 RT 2346.)

The next morning, Ross and Escalera drove back to the property. (18 RT 2758.) Along the way, Ross stopped at a feed store where he purchased some bags of white lime. (18 RT 2759; 19 RT 2915.) When they got home, Ross asked Aston to assist him in spreading the lime on the ground in the area where Campos was shot. (15 RT 2402-2403; 18 RT 2759-2760, 2915-2916.)

That same morning, Garcia found Campos's dead body in the trunk of the Sentra while he was either washing the car or looking for the cocaine. (15 RT 2460-2462, 2472.) Worried that he would be blamed for Campos's death, Garcia did not call the police or Raul.[21] (15 RT 2461-2462.) Rather, Garcia drove to a location on Cajalco Road where he removed Campos's body from the trunk and dumped it on an embankment on the side of the road. (14 RT 2300, 2302; 15 RT 2461.) A passerby discovered the body and contacted the Sheriff's Department. (14 RT 2300-2302.)

On November 15, 1995, Dr. Choi performed an autopsy on Campos. (14 RT 2236.) Campos suffered a single gunshot entry wound in the right upper chest near the armpit. (14 RT 2239-2240.) The bullet was fired from right to left at a slightly downward and forward angle. (14 RT 2242-2243.)

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[21] Garcia did not tell anyone about finding Campos's body until he talked to District Attorney Investigator Martin Silva in July of 1996. (15 RT 2463.)

The bullet struck and broke the fifth rib, fragmented, perforated the right lung and heart, and passed between the fifth and sixth left rib before lodging in the skin. (14 RT 2240-2241.)

Blood loss was the main cause of death with aspiration of blood as an additional factor. (14 RT 2243.) Choi opined that Campos would have been able to survive a minute or two after incurring the injuries -- long enough to continue breathing and aspirating his own blood. (14 RT 2243-2244, 2260.)

Campos had various dried abrasions, primarily on the right side of his face. (14 RT 2236-2237.) Choi opined that abrasions on the right cheek, right upper shoulder, right side of the torso and right wrist appeared to be inflicted prior to death due to signs of blood coagulation, while the timing of an abrasion on the left side of the face was uncertain. (14 RT 2237-2239.)

There was no visible gunpowder on Campos's skin. (14 RT 2267.) Campos's shirt was so blood-soaked that Choi could not determine whether there was gunshot residue on it, and microscopic imaging and testing by Takenaga were inconclusive. (14 RT 2261, 2268-2270; 16 RT 2618.) However, Choi opined that the gun was fired probably beyond a distance of two feet. (14 RT 2266.)

Choi recovered the brass jacket from the bullet and two fragments of the broken lead slug from Campos's chest. (14 RT 2241-2242, 2304-2308.) Takenaga subsequently determined that Campos was struck by a "nominal .38" caliber bullet, which could have been fired by various weapons all but one of which were revolvers. (16 RT 2614-2617.) Michele Merrit, a criminalist with expertise in serology, determined that the chicken wire and dirt samples obtained from the shooting scene contained human blood, but was unable to type the blood. (15 RT 2342-2344; 16 RT 2552-2554; 19 RT 2842-2846.)

Ross and Escalera initially lied to Investigator Arthur Horst, claiming they were away from the property on November 11 and knew nothing about the shooting. (19 RT 2916-2917; 20 RT 3091-3092, 3095.) Eventually, Ross told Horst that he was involved in a drug "rip-off" to avenge Campos for setting up the prior robbery,[22] explained Johnson's and Brightmon's involvement and described how Johnson shot Campos. (19 RT 2917; 20 RT 3092-3101; 21 RT 3207-3209.) Escalera likewise recanted her previous story and described how she observed Johnson shooting towards the ground, dragging Campos with Brightmon and placing Campos in the back of a vehicle. (20 RT 3092-3094; 21 RT 3202.) Ross reiterated his account of the shooting in a later interview.[23] (21 RT 3209-3217.)

2. Defense Evidence

Defense Investigator Brian De Coninck interviewed Escalera on April 4, 1996, at Ross's residence. (21 RT 3178.) Escalera was unable to identify a photograph of Johnson, but said "Lamar" or "Mars" was at the property the day of the shooting.[24] (21 RT 3180.) Escalera made statements about the shooting which she refused to repeat in court. (21 RT 3179-3183.) Ross told De Coninck that he would say he was not on the property that day. (21 RT 3183, 3186.)

Raul testified that he and Campos had previously visited Ross, he knew Campos was involved in drug transactions, and Ross purchased a kilo

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[22] At one point, Ross told Horst that he was the middleman for Johnson and Brightmon in a legitimate drug deal which "went bad." (20 RT 3092; 21 RT 3201-3203.)

[23] Ross also reported to Horst that Johnson told him 'in a way" that he accidentally shot somebody in Casa Blanca while shooting at some guy (21 RT 3203-3204.) Ross later denied hearing about Lopez from Johnson. (21 RT 3191-3195, 3199.)

[24] Johnson was also known as "Mars." (18 RT 2734-2735.)

of cocaine from Campos about a week prior to the shooting. (21 RT 3279-3282.) Raul testified to statements Garcia made to him about the shooting and described how he lied to deputies about the reason for Campos's absence and other details. (21 RT 3282-3289.) Investigator Silva testified as to prior statements Raul and Ross made during interviews in 1996. (23 RT 3542-3544, 3548-3559) The parties stipulated that Ross had various prior felony convictions in California and Arizona. (23 RT 3633-3634.)

Johnson's cousin, Francisco Trotter, and his girlfriend Roberta McConnell lived in Oklahoma. (22 RT 3322-3323, 3325, 3328, 3330-3332; 23 RT 3574-3576, 3579.) When Johnson and Trotter met in 1994, Johnson went by an alias of Tony Ruff because he was wanted for, as described by Trotter, an accidental shooting where Johnson was wrestling with someone over a gun. (23 RT 3576.) In January of 1995, Trotter and Johnson were arrested in New Mexico for possession of a pound of marijuana, and Johnson gave the police and the court a false name. (23 RT 3577-3578.)

Between January and November of 1995, Trotter often socialized with Johnson in Tulsa. (22 RT 3326-3327, 3336-3339; 23 RT 3578-3580.) Trotter and McConnell testified that Johnson was at Trotter's apartment on the morning of November 11, 1995, Johnson had breakfast with them, Johnson and Trotter worked out together, and then Trotter and McConnell bought a flag and went to a cemetery to place the flag on Trotter's father's grave because it was Veterans Day.[25] (22 RT 3325-3328; 23 RT 3580-3584.)

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[25] Trotter testified that Johnson did not go with them to the cemetery. (23 RT 3583.) However, McConnell testified that Johnson accompanied her and Trotter to the grave site. (22 RT 3326.) After being confronted by a prior statement made to defense investigator Robin Levinson, McConnell (continued...)

In November of 1996, Trotter told Levinson that he did not recall anything specific about November of 1995, but offered an alibi for Johnson for a couple days before Thanksgiving in 1995.[26] (23 RT 3585-3586, 3617-3619.) After speaking with his mother, Trotter recontacted Levinson to tell her that he specifically remembered seeing Johnson on Veterans Day in 1995. (23 RT 3586-3587, 3619-3623.) On November 5, 1996, Trotter told McConnell about the Campos shooting and prompted her to remember the prior year's Veterans Day to assist Johnson. (22 RT 3359.)

Brightmon was called as a witness by Johnson[27] and testified to the following regarding the Campos shooting: Ross asked him to assist with a drug transaction; Ross gave him a .357-caliber revolver as Campos and Garcia arrived; one of Escalera's male relatives who was part Black and part Hispanic assisted them; some Hispanic men in a truck drove past the property; Brightmon got nervous and grabbed Garcia; Ross yelled "jack" as some men ran towards them; Brightmon grabbed Campos and took out the gun; the gun went off while Brightmon struggled with Campos; Brightmon got scared and dropped the gun; Ross told Brightmon to pick up the gun and give it to him; Ross told Brightmon to "clean up this shit," and threatened to shoot him if he refused; Escalera's relative helped Brightmon

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(...continued)
testified that she might have been mistaken about Johnson joining her and Trotter at the cemetery. (22 RT 3342-3345.)

[26] On rebuttal, testimony was elicited showing that when Levinson first spoke to Trotter, she was under the impression that the Campos murder was on November 21 1995, and noted that Thanksgiving was on November 23, 1995. (23 RT 3638-3642.) After speaking to Trotter, she changed the date of the murder in her report to November 11, 1995. (23 RT 3644.)

[27] Brightmon testified against the advice of his trial counsel. (22 RT 3299-3301, 3358-3361, 3364.)

place Campos in the trunk of the Sentra and left; the truck with the Hispanic men returned; Ross fired a shot into the ground with an assault rifle; some men came by and pushed the Sentra off the property with their vehicle; Brightmon, Ross and Escalera drove away in the Chevy; Ross wiped his fingerprints off the assault rifle and gave it to Brightmon; and when Brightmon expressed concern about Campos, Ross said Campos's friends would help him. (22 RT 3363-3386.)

Brightmon further testified that Ross told him to just "[s]ay Lamar did it," and that he would take care of Brightmon if he lied about what happened.[28] (22 RT 3386, 3391.) Brightmon claimed he was scared of Ross because he had money to have people killed. (22 RT 3391.) Brightmon told detectives that "Timbuktu" or "Mr. X" shot Campos in order to protect himself from the death penalty. (22 RT 3390.)

Brightmon admitted that he indicated to Investigator Horst that he wrestled with Campos until Johnson approached and told Brightmon to get out of the way, Brightmon backed off, and Johnson shot Campos. However, Brightmon claimed his prior statement was false and that he implicated Johnson to protect himself and because Ross told him to do so. (22 RT 3424-3425, 3436.) In the interview, Brightmon tried not to name Johnson, but slipped a few times and named or acknowledged Johnson's presence due to "tricky" questioning. (22 RT 3447-3460, 3490.) Brightmon never mentioned Escalera's relative because he wanted to protect him. (22 RT 3490-3492.) On March 14, 1998, Brightmon sent a letter to Johnson's attorney in which he offered to testify that he shot Campos accidentally. (22 RT 3510-3515.)

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[28] Brightmon testified that Ross did not like Johnson ever since an argument in 1993 when Ross threatened Johnson with a gun and ordered him off his property. (22 RT 3386-3389.)

Brightmon testified to the following regarding the Lopez shooting: he rode up on a bike and greeted Johnson who was sitting on the porch; a white car "kind of burned a little rubber" and pulled up in front of the house; Alvarez jump out of the car with his arm raised in an angry manner; Lopez exited the car; Johnson grabbed a shotgun from the porch steps and ran up to the car; Johnson struck Alvarez with the butt of the gun; Lopez tried to intervene; the gun went off while Alvarez and Johnson were face to face struggling over the gun; Brightmon then rode his bike to his grandmother's house and did not see where Johnson went. (22 RT 3392-3419.)

Approximately a month later, Brightmon told an officer that he was not at the scene of the Lopez killing because he did not want to get involved. (22 RT 3419-3420.) Brightmon also told Horst that he knew nothing about the Lopez shooting. (22 RT 3421.)

3. Rebuttal Evidence

A videotape recording of Horst's November 13, 1995, interview with Brightmon was played for the jury. (23 RT 3659-3663; 24 RT 3675-3676.) Horst showed Brightmon Johnson's photograph as the person he was referring to as "Lamar" in his questioning. (23 RT 3660-3661; 24 RT 3680-3681; 13 CT 3639-3640.) Brightmon denied having or touching a gun, and originally refereed to the shooter as "Timbuktu." (13 CT 3589-3591, 3606, 3609.)

Subsequently, Brightmon described how he and Johnson went to Ross's property the afternoon prior to the shooting to "handle some business" regarding a kilo of cocaine and slept overnight on the property because Johnson said the seller was coming. Campos and Garcia arrived the next day in a white car. After bringing Garcia back to the U-Haul, Brightmon wrestled with Campos who tried to run. Thereafter, Johnson told Brightmon to stand back and Brightmon got out of the way as Johnson

shot Campos. Brightmon and Johnson then put Campos in the trunk of the white car. (13 CT 3611-3633.)

Brightmon marked and signed a diagram showing where "Lamar" was during various stages of the incident. (13 CT 3635-3638; 14 CT 3642-3644.) Brightmon explained that the drug transaction was intended to be "a jack mode" or "rip off," where Ross, Johnson and Brightmon planned to split the drugs among them. (14 CT 3659-3663.) Brightmon also described how other individuals pushed the Sentra off the property and Ross fired his assault rifle once into the air after some Hispanic men drove by in a white truck. (14 CT 3667-3670, 3673-3675.)

Johnson and Brightmon were housed on the same floor of the Robert Presley Detention Center for approximately 17 months, between August of 1996 and January of 1998. (24 RT 3691-3692.) During that time period, Johnson and Brightmon had access to the same dayroom, which was a common area where inmates could talk and socialize with each other for up to six hours a day. (24 RT 3691-3694.)

B. Penalty Phase

1. Prosecution Evidence

The prosecution presented evidence in aggravation in the penalty phase retrial that included evidence of the Lopez and Campos murders, the prior killing of Norberto Estrada for which Johnson was convicted of voluntary manslaughter, the prior drive-by shooting of Nigel Hider, a prior shooting incident at a motel which involved Johnson, Johnson's threat to blow up a high school where Johnson's wife worked, telephonic threats against Jarah Smith who was having an affair with Johnson's wife, numerous incidents of Johnson's violence against fellow inmates, and victim impact testimony from members of the Campos and Lopez families.

a. The Murders

Because a different jury determined Johnson's guilt for the Lopez and Campos murders, the prosecutor presented substantially the same evidence from the guilt phase proving the murders and special circumstances that is summarized hereinabove.[29]

b. Victim Impact Evidence

Camerina "Candy" Lopez was 34 years old when she was murdered. (43 RT 6563-6564, 6572.) Lopez's mother, Socorro Roman, and the younger of her two brothers, Mario Roman, testified about her personal and family background, which included the fact that Lopez had two children (Ana and Raymond) from a prior marriage at the time of her death. (43 RT 6564-6572, 6615-6618.)

Socorro, Mario and Ana described how they found Lopez lying in the street after the shooting, tried to comfort her, followed Lopez in the ambulance and were notified of her death at the hospital. (43 RT 6574-6578, 6608-6616; 44 RT 6633-6638.) Lopez's last words to her mother was a request to take care of her children. (43 RT 6578.)

Socorro, Mario and Ana described the loss, pain and grief the family suffered as a result of Lopez's untimely death. (43 RT 6565, 6568, 6570-

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[29] The facts and circumstances of the two murders was presented to the penalty phase retrial jury through the testimony of Officer Jon West (43 RT 6552-6563), Officer Darryl Hurt (43 RT 6595-6600), Officer Patrick Olson (43 RT 6601-6607), Mario Roman (43 RT 6609-6613, 6625-6628), Jose Alvarez (44 RT 6690-6725), Dr. Choi (48 RT 7218-7243), Brightmon's prior testimony (48 RT 7258-7387), Deputy Richard Joseph (48 RT 7388-7395; 49 RT 7428-7429), Horst's interview of Brightmon (48 RT 7395-7399, 49 RT 7428), Deputy Michael Angeli (49 RT 7430-7455), Ronnie Moore (49 RT 7456-7478), Jose Garcia (49 RT 7479-7528), James Aston (49 RT 7528-7544), Margie Escalera (50 RT 7558-7622), Oscar Ross (50 RT 7624-7693), and Correctional Deputy Thomas Tanner (51 RT 7722-7734).

6571, 6579-6593, 6618-6625; 44 RT 6638-6645.) They testified how difficult it was to have to pass every day by the location of Lopez's murder, which was just five houses away from where the family resided and a bloodstain could still be seen until the street was repaved about a year before trial. (43 RT 6573, 6620.) Socorro further testified that the first thing the family did on holidays was visit Lopez's grave to "put flowers and clean the stone, polish. And that's all we can do. Go, look at her name." (43 RT 6594.)

Martin Campos was 33 years old when he was killed. (51 RT 7764.) He had three children -- three-year-old Marty Junior, two-year-old Juan, and six-month-old Gerardo—at the time of his death. (48 RT 7199.) Gladys Felipe, the mother of Campos's children, testified about Campos's relationship with her and the children, family activities and their future plans. (48 RT 7197-7202, 7215.) Campos's older brother, Amador, described Campos's personal and family background, as well as Campos's generosity and good qualities as a father, son and friend. (51 RT 7753, 7764-7771.)

Felipe and Amador described the last time they saw Campos alive and how they learned of his death. (48 RT 7202-7207; 51 RT 7771-7773.) They further described the pain, loss and grief that they and the children suffered as a result of Campos's murder. (48 RT 7206-7216; 51 RT 7773-7779.) Felipe explained how the children wanted her to take Campos out of the grave to see him again, but she could only show them a picture. (48 RT 7208.) Campos' mother was "pretty devastated" and continued to wait for her son's return. (51 RT 7780-7781.)

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c. Prior Violent Conduct

i) The Norberto Estrada Killing

On March 26, 1983, 25-year-old Norbert Estrada went to the Ahumada Market in Riverside with his cousin, Victor Rodriguez.[30] (44 RT 6654-6658, 6662; 46 RT 7029.) There, they met Pedro Pantoja Golinas and Jose Ramirez. (45 RT 6743-6744, 6765-6767.) While Estrada and his companions sat in the parking lot drinking beer, Johnson approached and offered to sell Estrada marijuana. (45 RT 6744-6746, 6750-6752, 6767, 6773-6774; 46 RT 7030.) Estrada complained to Johnson that he had previously sold him bad marijuana and said he did not want any more. Johnson and Estrada began to argue. (45 RT 6745-6746, 6767-6768.) After Estrada stood as if he wanted to fight, Johnson left and everything calmed down. (45 RT 6745-6746, 6768-6770; 46 RT 7030.)

Johnson returned 15 to 60 minutes later. (45 RT 6769-6770; 46 RT 7030.) As Estrada began to stand, Johnson pulled a .22-caliber long barrel pistol from his waistband and fired three to five shots at Estrada without any further words exchanged. (45 RT 6746-6749, 6769-6772; 46 RT 7031, 7039.) Johnson then fled while brandishing his gun at the others. (45 RT 6748, 6770-6772; 46 RT 7031-7032.)

Two bullets struck Estrada in the upper chest near the sternum and one bullet struck his right forearm, each bullet exiting the body. (46 RT 6878-6880.) Ramirez and Pantoja covered Estrada with a jacket and went inside the store to call the police. (45 RT 6771.) Estrada was transported by paramedics to the hospital where he died in surgery. (44 RT 6660-6661; 45 RT 6734-6735, 6737-6738.)

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[30] Rodriguez's prior testimony was read into the record. (46 RT 7028.)

On April 5, 1983, Johnson told Detective Edgar McBride that he was the victim of an accident at the Ahumada market on March 26 and acted in self-defense. (46 RT 6880-6882.) McBride did not see any injuries on Johnson. (46 RT 6881.)

ii) The Nigel Hider shooting

On February 28, 1989, Nigel Hider was standing in front of a house near the Ahumada Market talking to some women when a blue truck pulled up and someone inside the truck started shooting at him. (46 RT 6986-6989, 6995) Hider was stricken in the right shoulder, the right leg and the ear. (46 RT 6986-6987.)

Three days later, Detective Guy Portillo spoke to Hider at the hospital. (47 RT 7101.) Hider was initially uncooperative and reluctant to identify the shooter, but eventually told Portillo that Johnson shot him and said he would not testify in court. (47 RT 7101-7102.) At the penalty phase retrial, Hider testified that he was friends with Johnson and that a white person shot him.[31] (46 RT 6988-6991, 6994-6995.)

At the time of the shooting, Hider was a member of the Gardena Payback Crips. (46 RT 6993.) In January of 1989, Johnson bragged to Officer Duane Beckman "that he single-handedly ran the Gardena Payback Crips out of the Casa Blanca area." (51 RT 7719-7721.)

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[31] Angela McCurdy testified that she was with Hider on the date of the incident but did not see who shot him. (46 RT 7010-7016.) However, on March 9, 2000, McCurdy told Silva that she saw a bald-headed Black male fire the gun from the passenger side of the truck. (46 RT 7025.) Johnson was bald at the time. (46 RT 7018, 7025-7026.) Although McCurdy knew Johnson, she was unable to identify him as the shooter. (46 RT 7024-7025.) Prior to the penalty phase, retrial, McCurdy told Silva that she was worried about testifying in front of Johnson's family, concerned for her safety and uncomfortable being in court. (46 RT 7024.)

iii) The American Motel Incident

On January 9, 1992, Anita Smith was staying at the American Motel in Riverside with her husband and four month old son. (46 RT 6963-6965.) On that date, Smith's husband was arguing with Reginald Robinson in the motel parking lot. (46 RT 6965-6967.) The argument attracted a crowd which included Eric Dawson.[32] (46 RT 6967.)

While Smith was in her bathroom, someone shot Dawson in the elbow with a shotgun. (46 RT 6959-6961, 6967-6970.) Smith went down to the parking lot where she saw Johnson's car starting to leave and yelled out that she had the car's license plate number. (46 RT 6971-6973, 6981; 49 RT 7420-7421.)

Smith testified that Robinson exited the driver's side of the car and pointed a shotgun at her, Johnson exited the passenger side of the car and told Robinson not to shoot her, Johnson slapped Smith hard across the face after Robinson put the gun down, and Robinson and Johnson then drove away.[33] (46 RT 6971, 6974-6975, 6981.) However, Smith told Officer Guy Toussaint shortly after the incident that Johnson was the driver[34] who exited the car, walked up to her and slapped her in the face before Robinson threatened her with the shotgun. (49 RT 7421-7422.)

iv) Custodial Offenses

On March 16, 1986, Johnson was housed in San Quentin State Prison. On that date, Correctional Officer David Smith found two shanks -- inmate-

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[32] Johnson may have been present during the argument. (46 RT 6967, 6972, 6976-6977.)

[33] Smith testified that Johnson saved her life. (46 RT 6974.)

[34] Smith admitted that the car, a Datson 280z, belonged to Johnson. (44 RT 6967, 6971-6973.)

manufactured stabbing instruments -- concealed behind the sink in Johnson's cell, which was a single-man cell to which no inmates other than Johnson would have access. (45 RT 6783-6786, 6788.) One weapon was fashioned from round metal stock, sharpened to a point, approximately five and 3/4 inches in length and about 3/16 inches in diameter with no discernible handle. The other weapon was fashioned from flat metal stock, sharpened to a point, approximately four and 1/4 inches in length, 6/8 of an inch wide and 1/16 of an inch thick with no discernible handle. (45 RT 6783-6785.)

Frank Stevens was incarcerated in San Quentin for robbery and first degree murder, and initially housed in a maximum security cell below Johnson. (45 RT 6835-6837, 6846.) Stevens would sometimes yell back and forth to a friend above Johnson's cell. (45 RT 6837.) Johnson complained to Stevens about him banging on the walls while he exercised in his cell. (45 RT 6837-6838.)

On May 3, 1986, after approximately five months in adjoining cells, Stevens and Johnson were in the same exercise yard. (45 RT 6838-6839.) Johnson was "mad dogging" Stevens with "a challenging look" as if he wanted to fight.[35] (45 RT 6839-6840.) Stevens approached Johnson, asked what was up and punched Johnson.[36] (45 RT 6840, 6841-6842, 6844.) Johnson punched back, and they grabbed each other and began fighting until a guard ordered them to get down and fired a warning shot. Johnson

[35] Stevens explained that when someone receives such a challenging look in prison there is no option of just walking away as this would portray weakness and subject one to predatory behavior. (45 RT 6840-6841.)

[36] Stevens assumed Johnson was mad about him yelling to his friend and banging on the walls. (45 RT 6842.)

and Stevens stopped fighting, and Johnson was removed from the yard without further incident. (44 RT 6683-6684; 45 RT 6842, 6847.)

On August 27, 1986, Correctional Officer Howard Johnson was monitoring an exercise yard at San Quentin when his attention was drawn to Johnson. Johnson had his hand in his pocket and was with another inmate, as he watched Officer Johnson. (44 RT 6666-6669, 6672-6673.) Johnson then began playing basketball. When Johnson jumped to block a shot, a shank fell from his right pocket. (44 RT 6667.) The shank was a round piece of plastic tapered to a point and capable of inflicting a stab wound. (44 RT 6667.) Officer Johnson ordered all the inmates in the yard to freeze and get down. Johnson was removed from the yard and the shank recovered. (44 RT 6668.)

Subsequently, Johnson was sent to Corcoran State Prison. Wilbert Townsend was also incarcerated there for rape and first degree burglary, and assigned to the secured housing unit for assaulting a correctional officer. (50 RT 7552; 51 RT 7735, 7740.) On June 17, 1989, Townsend and Johnson were placed in the same exercise yard together. Townsend testified that while he was doing pushups, Johnson struck or kicked him in the back of his head, smashing his head into the concrete. (51 RT 7735-7739.) Correctional Officer Thomas Benson testified that Johnson approached Townsend with a clenched fist, punched Townsend in the face, stepped back and then kicked Townsend in the face. (50 RT 7552.) Townsend got up and started to square off with Johnson. The guards ordered them to get down and both complied. (50 RT 7552, 51 RT 7739-7740.) Townsend suffered a skull fracture under his left brow. (51 RT 7737.) Townsend testified that he had no prior problems with Johnson, one of the correctional officers warned him prior to the incident that Johnson was "a tough guy," and that it appeared to him that the officers anticipated the altercation. (51 RT 7736, 7740, 7742, 7744.)

In 1989, Ruben Davis was incarcerated in Corcoran for first degree murder. (45 RT 6792-6794.) Davis was placed in a secured housing unit due to his affiliation with the Mexican Mafia and a retaliatory assault of a Black inmate.[37] (45 RT 6792-6796) On July 8, 1989, Davis was in one of the exercise yards with his cellmate "watching his back." Johnson was also in the yard, standing near them. (45 RT 6792, 6796-6798.) After Davis's cellmate was called out of the yard, Johnson asked one of the guards for some nail clippers. (45 RT 6797-6798.) As soon as the guard left and without warning, Johnson jumped on Davis's back while he was in a prone pushup position, and began punching Davis in the back of his head "pretty hard" repeatedly with his fists.[38] (45 RT 6797, 6799-6800.) Johnson then ran across the yard. (45 RT 6800.) The guard drew his gun and ordered Davis to stay down. (45 RT 6800.)

In order to live up to his reputation as a gang member and not be considered weak, Davis decided to retaliate. (45 RT 6801-6802, 6804.) About eight days later, Davis entered the exercise yard knowing he would fight Johnson. (45 RT 6801-6802.) Davis removed a small plastic shank which he had concealed in his mouth and screwed a handle on it. (45 RT 6802-6803.) Johnson, who did not see the weapon, indicated to Davis that they should fight. (45 RT 6803.) Davis approached Johnson and swung at

[37] By the time of the penalty phase retrial, Davis had dropped out of the Mexican Mafia and cooperated with the Department of Corrections and FBI who were investigating the gang's activities. (45 RT 6808.) Either the prosecutor's office or a detective had promised to write a letter on Davis's behalf regarding his cooperation with the prosecution. (45 RT 6808, 6832-6833.)

[38] No words were exchanged, and Davis had no prior contact with Johnson. (45 RT 6800-6801.)

him, Johnson blocked Davis's punch and broke the shank, and they started fighting until the guards fired three warning shots. (45 RT 6803.)

On January 15, 1990, Correctional Officer Eddie Espinoza observed Johnson and Marvin Jackson walking back and forth together in one of the Corcoran exercise yards. (45 RT 6849-6852.) They did not appear to be arguing or getting ready to fight. (45 RT 6853.) Suddenly and without provocation or warning, Johnson punched Jackson in the side of the head with a closed fist, knocking Jackson to the ground.[39] (45 RT 6852-6854.) Espinoza ordered everyone in the yard to the ground. (45 RT 6853-6854.)

On June 2, 1990, Correctional Officer Mary Barclay observed Johnson and Freddie Aguero confront each other in a Corcoran exercise yard and exchange blows.[40] (45 RT 6862-6866.) Barclay ordered all the inmates in the yard to get down. However, Johnson and Aguero continued

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[39] Jackson testified that he was playing handball with Johnson, they got in an argument, he swung at Johnson first, and then Johnson swung back. (46 RT 6889-6890, 6894-6895.) Jackson also testified that he observed and participated in fights which the correctional officers arranged between inmates, and that he believed his fight with Johnson was set up by one of the guards. (46 RT 6906-6909, 6914-6922.) However, on September 19, 2001, Jackson told Silva that Johnson came from behind and hit him on the back of the head during a handball game. (25 CT 7031-7032, 7034-7935.) Jackson said he did not want to make a statement against Johnson since he had 20 years left to serve in prison and did not need that on his "jacket." (25 CT 7032-7033.)

When Silva brought him to court, Jackson said he was placed in a holding cell next to Johnson who told him, "I hope you're not here to testify against me," and Jackson replied that he was there to help Johnson. Jackson told Silva that it was stupid to put him and Freddie Aguera near Johnson in the holding cells and that Johnson "had gotten to everybody" who was there. Jackson then said he was going to change his testimony and claim he attacked Johnson and started the fight. (47 RT 7106-7107.)

[40] Barclay was warned by another officer that there was going to be a fight as either Johnson or Aguero was released into the yard. (45 RT 6862.)

fighting until Barclay gave a second order. (45 RT 6863-6864.) There was no identifiable aggressor.[41] (45 RT 6869.)

In September of 2000, Johnson and John McHenry were cellmates in the Riverside County Jail. (47 RT 7176-7177.) Johnson argued with McHenry about some water which he left in the sink or toilet. The confrontation was so bad that McHenry asked the deputies to put him in different cell, explaining that Johnson was "crazy." However, McHenry was not moved. (47 RT 7177-7180; 51 RT 7748.) Later that month, McHenry left water in the sink again. (47 RT 7178-7179; 51 RT 7747.) Johnson grabbed McHenry from behind in a choke hold, rammed him up against the cell wall, and may also have tried to punch him. (47 RT 7180-7182; 51 RT 7747-7749.) McHenry suffered abrasions when his face hit the wall. (51 RT 7749.)

v) Phone Threats

Tina Johnson[42] married Johnson in 1992. (47 RT 7114.) She worked at Ramona High School. (47 RT 7116.) In 1999, Tina had an affair with Jarah Smith for about seven months. (47 RT 7114-7115, 7134-7136.)

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[41] Aguero testified that he attacked Johnson because he was the only Hispanic in the yard and wanted to be put in a different yard, and denied any prior verbal exchanges with Johnson. (46 RT 6936-6939, 6944-6945.) Aguero further testified that the correctional officers were staging fights. (46 RT 6939, 6942.) However, on September 29, 1998, Aguero told Silva that he had prior problems with Johnson, they exchanged words in the yard, and about a week before the June 2 incident they were going to fight but Johnson's friends told Aguero to back off. (51 RT 7749-7750.) Aguero also told Silva that, a couple days prior to the fight, Johnson yelled at him from his cell complaining that Aguero was talking about him. On the morning of the incident, Johnson yelled at Aguero again from his cell claiming he was talking about him and Aguero responded with profanities. (51 RT 7750-7751.)

[42] Members of the Johnson family are referred to herein by their first names to avoid confusion.

Sometime before October or November of 1999, Johnson found out about the affair while incarcerated in the county jail. (47 RT 7115.) Johnson reacted with anger and emotion. (47 RT 7115.) Johnson obtained the assistance of Leland McCord and Chaka Coleman to set up as many as 50 three-way phone calls, including four to seven calls to Smith. (47 RT 7136-7137; 7154-7157.) In the calls, Johnson said "he ain't the one to fuck with," and told Smith to stop messing with Tina, that "he could have something done," he knew where Smith lived and could send people to his house, and Smith knew what could happen. (47 RT 7138-7144; 7157-7158, 7171; 26 CT 7206-7209.) Smith was scared and promised to leave Tina alone.[43] (47 RT 7145-7146, 7160-7161; 26 CT 7203-7206.) In a three-way call to Tina, Johnson threatened to blow up Ramona High School and make her lose her job if she did not stop seeing Smith. (47 RT 7116-7118.) Tina did not report the call because she thought it was an empty threat. (47 RT 7118-7119.) Tina continued to see Smith until the end of 1999. (47 RT 7120.)

2. Defense Evidence

(a) Personal and Family Background

Johnson was born in 1965. (51 RT 7797-7798.) His father was Leroy Brown. (51 RT 7798.) Brown did not marry Johnson's mother, Joe Ann, and never became a part of Johnson's life. (51 RT 7797-7798.)

Johnson had three sisters, Patrina, Patricia and Sherlyn. (51 RT 7798-7799.) The father of Johnson's older twin sisters, Patrina and Patricia, was James Johnson. (51 RT 7799, 7858; 54 RT 8150-8151.) Sherlyn's father was Linton Williams, whom Joe Ann married after her relationship with

[43] At the penalty phase retrial, Smith denied that he was scared or felt threatened. (47 RT 7144-7146.)

Brown. (51 RT 7899-7800.) Johnson was very protective of his mother and sisters. (51 RT 7823; 53 RT 8100; 54 RT 8181.)

Jo Ann obtained an annulment from Williams because he was physically abusive to her and already married to another woman. (51 RT 7800.) Joe Ann then was in a five-year relationship with Alton Lee. (51 RT 7801-7802; 54 RT 8152.) Lee was an alcoholic, but he was not abusive. (54 RT 8152.) Lee treated Johnson and the family well. (51 RT 7890-7891; 53 RT 8087-8088; 54 RT 8176.)

When Johnson was six or seven years old, Joe Ann resumed her relationship with James and moved in with him. (51 RT 7802.) When Johnson was about ten years old, Jo Ann married James. (51 RT 7802.) James gave Johnson his last name even though he knew Johnson was not his child. (51 RT 7803.) James was a father figure for whom Johnson appeared to have affection. (51 RT 7814-7815.) According to Jo Ann's brother, Leonard Galloway, Johnson deeply loved James. (53 RT 8099.)

After Joe Ann's father died, James became very abusive and physically violent. (51 RT 7804-7806; 54 RT 8153.) James was an alcoholic and most abusive when he drank.[44] (51 RT 7862, 7866; 53 RT 8045, 8093; 54 RT 8154.) James sold drugs and ran around with a lot of women. (51 RT 7864; 53 RT 8107.) James gave drugs to Patrina, who became addicted to cocaine and alcohol. (51 RT 7866-7869.) Patricia also became addicted to drugs. (54 RT 8158-8159.)

James beat Jo Ann with "mops, brooms, skillets, knife, whatever he get his hands on...." (53 RT 8091-8092.) James hit Jo Ann with a bottle, cut her finger, beat her with belts, shot at her and caused her to lose her job

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[44] Contrary to the testimony of her daughters and brother, Jo Ann testified that the violence was not really worse when James drank. (51 RT 7805.) Leonard Galloway testified that James "was a pretty decent guy when he wasn't drinking." (53 RT 8093.)

when he found her in possession of men's uniforms she was cleaning. (51 RT 7806-7809.) On other occasions, James pulled a gun on Joe Ann and put a dead snake in her lap. (53 RT 8042-8044.) Jo Ann tried to shield her children from the violence. (51 RT 7808-7809.) However, the abuse usually occurred in front of the children, and Johnson at times tried to intervene.[45] (51 RT 7808, 7869; 53 RT 8044-8045, 8094; 54 RT 8154.)

James was also verbally abusive and physically violent with the children, especially Patrina and Patricia. (51 RT 7811-7812, 7868; 53 RT 8045-8046; 54 RT 8160.) The violence against the girls was often in Johnson's presence, and Johnson sometimes tried to intervene. (51 RT 7812, 7868; 54 RT 8160-8161.) The frequent altercations made the children nervous and scared of James. (51 RT 7862-7863.) On one occasion, James beat Patrina with an extension cord and was arrested for child abuse. (51 RT 7865.) On other occasions, James cut Patricia's wrist with a pocketknife and threw her into a window. (54 RT 8155-8156.) James beat the twins many other times. (51 RT 7866.) When James beat Johnson, he did not cry and appeared "like he was holding everything inside." (54 RT 8160-8161.)

When Johnson was approximately eight years old, James backhanded him and knocked him to the ground when he tried to intervene in a fight. (53 RT 8097.) Thereafter, Johnson was afraid to approach James and would just ask him to stop fighting and run to his room crying. (53 RT 8098.)

When Johnson was 13 years old, he intervened in a fight between his parents and knocked out one of James's teeth. (54 RT 8156, 8161.) The physical abuse lessened as the children got older. (51 RT 7869; 54 RT

[45] Jo Ann previously testified that Johnson did not try to intervene and protect her from James. (51 RT 7831-7832.)

8156-8157, 8161.) Jo Ann called the police a few times.[46] (51 RT 7808-7809.)

Jo Ann tried to leave James over a dozen times. However, James would always find her and the children and force them to come back. (51 RT 7809-7810; 53 RT 8094-8096, 8100-8101; 54 RT 8157-8158.) The abuse against Jo Ann and the girls continued until Jo Ann was finally able to end the marriage in the early 1980's, when Johnson was 15 or 16 years old.[47] (53 RT 8095-8097; 54 RT 8155.)

Johnson's mother, grandparents, aunts and uncles treated him and his sisters well, and taught them right from wrong. (51 RT 7837-7841, 7891-7893; 53 RT 8048; 54 RT 8178-8180.) Johnson was described as a quiet, respectful and mindful child, who loved dogs and fishing, was intelligent and did well in school. (51 RT 7816-7822, 7841, 7872, 7893-7894;53 RT 8038-8039, 8048, 8099; 54 RT 8159, 8162, 8166, 8179.) When Joe Ann hurt her back and could no longer work, Johnson dropped out of high school and got a job to support the family. (51 RT 7821; 54 RT 8181.)

Johnson had no law enforcement problems until the family moved into the Casa Blanca area of Riverside and the Estrada shooting. (51 RT 7822-7823.) After Johnson got out of prison, he began dating Tina and married her five or six years later in 1992. (51 RT 7825; 52 RT 7961-7965.)

Johnson and Tina moved to Perris and had a son, Jihad. Johnson also obtained custody of Lumorda, a daughter he previously had with another

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[46] Patricia testified that the violence got to the point where the police and ambulances were called all the time, but James would always be released from jail the next morning. (54 RT 8155.)

[47] Leonard Galloway testified Johnson was 18 or 19 years old when Jo Ann left James. (53 RT 8101.)

woman. (51 RT 7826-7827; 52 RT 7965-7968.) Johnson and Tina were model tenants. (52 RT 7949-7955.)

Johnson and Tina separated for approximately a month in April or July of 1994, but continued to see each other. (51 RT 7846; 52 RT 7970-7971.) Tina attributed their problems to her post-partum depression. (52 RT 7971; 54 RT 8227.)

Various relatives and friends testified that Johnson and Tina had a wonderful and happy marriage, Johnson was a loving husband and father, Johnson always provided for his family, Johnson had good relationships with other relatives, and Johnson was very good with other children. (51 RT 7826, 7828, 7871-7873, 7896-7897; 52 RT 7968, 7973-7976; 53 RT 8041, 8046; 54 RT 8129-8130, 8141-8143, 8154-8167, 8222-8228.) Johnson was never violent or abusive with his wife or children. (51 RT 7828; 54 RT 8128, 8141-8142.)

After the Lopez shooting, Johnson went to Oklahoma where he stayed with his mother. (51 RT 7843; 52 RT 7971-7972.) Tina visited him there. (52 RT 7972.) Johnson discussed the Lopez incident with Jo Ann and Tina and decided not to turn himself in because he felt no one would believe him. (51 RT 7843-7844; 52 RT 7997.)

In Oklahoma, Johnson used a false name and hung out with Trotter. (51 RT 7844-7845; 52 RT 7997-7998.) Johnson also had an affair with Simone Hunter in Tulsa. Johnson told Tina that he went out a couple times with Hunter but that it was not a sexual relationship. (51 RT 7847; 52 RT 7973, 7988.)

Johnson's prior convictions and bomb threat did not change Tina's feelings and positive image of him. (52 RT 7978, 8000.) Tina and the children visited Johnson two or three times a week in custody. (52 RT 7968-7969, 7978-7979.) Johnson continued to take an interest in and

advise his children, help them with schooling and be fatherly during the family visits. (52 RT 7979.)

Johnson's aunt, Janet McCord, his mother-in-law, Estella Coachman, and family friends, Stella and Bayyinah Nick, testified that Johnson was good, helpful, caring, always respectful, and never used profanity, lost his temper or was violent around them. (53 RT 8036, 8039-8040; 54 RT 8126, 8136-8149, 8219-8226, 8230.) Johnson and Stella Nick discussed religion together. (54 RT 8125.) Coachman felt Johnson could still play a positive role in his children's lives even while in custody. (54 RT 8231.)

Steven Pete, Dylan Dunn, Damien Moore, Kevin Jones and Reginald Brimmer were convicted felons incarcerated with Johnson at various times in the Riverside County jail between 1997 and the penalty phase retrial. (53 RT 8051-8052, 8060-8061, 8069-8071, 8314-8315; 54 RT 8009-8110.) They testified that Johnson was a good cell mate, humble, friendly, polite, "was a shoulder to lean on," mentored and counseled them, talked to them about poetry, religion, patience and other positive things, taught them how to play chess, was not violent, never threatened or fought with them, was "an easy person to deal with," and had good report with jail staff. (53 RT 8053-8055, 8062-8063, 8071-8076, 8316-8317; 54 RT 8113-8115.)

(b) **Testimony Regarding the Estrada Shooting**

On March 26, 1983, Jose Ramirez told Officer Steven Shumway through an interpreter that he was sitting in the Ahumada Market parking lot drinking beer when he observed a Hispanic and Black male arguing and exchanging racial slurs. (51 RT 7782-7785, 7789.) After the Hispanic male called him "a nigger," the Black male pulled a gun from his waistband and shoot the Hispanic male. (51 RT 7785-7786.) Ramirez was unable to hear the entire argument. (51 RT 7785.)

Patrina testified that she and a girlfriend went to the Ahumada Market prior to the shooting and three or four intoxicated Hispanic men offered them money as if they were prostitutes. Johnson showed up at the market and told the girls to go home. As they were walking home, Patrina heard gunshots, saw helicopters and knew there was trouble. (51 RT 7873-7877, 7880-7882.) Later that evening, Patrina took Johnson to Los Angeles so Johnson could think about what he had done. (51 RT 7878, 7884.)

Johnson told Patrina that he shot someone, made a mistake and was in trouble, and explained that the gun accidentally went off by itself four or five times. (51 RT 7882-7883.) Patrina talked to Johnson about turning himself in. (51 RT 7878.) Johnson told his mother that the shooting was an accident and the gun went off when the other man grabbed it. (51 RT 7843.)

Peter Scalisi prosecuted Johnson in 1983 for the Estrada shooting, and subsequently left the District Attorney's Office to practice criminal defense. (53 RT 8007-8010.) Johnson was convicted of voluntary manslaughter with use of a weapon and sentenced to six years in prison without an amenability study. (53 RT 8008-8010.)

Scalisi testified that it was not normal practice to send defendants under the age of 21 with non-life sentences straight to prison without first being housed in the Youth Authority or requesting an amenability study. (53 RT 8010.) Scalisi further testified that, although Johnson was 18 by the time of trial, he was very young looking and "could have passed for 15 years of age." (53 RT 8012.) Johnson did not receive the maximum sentence allowed under the law. (53 RT 8019-8020.)

(c) Testimony Regarding the Current Offenses

On June 25, 1994, Officer Roger Sutton interviewed Jose Alvarez at the scene of the shooting. (52 RT 7905-7906.) Alvarez was belligerent and

had to be handcuffed and placed in the patrol car. (52 RT 7906.) After he calmed down, Alvarez reported that he had an argument with a Black male with whom he had a fight earlier that day, he wrestled with the man over a shotgun, the man pointed the gun at him, he ducked as the man fired the gun, his girlfriend was hit, and the man ran into a house. (52 RT 7905-7911.)

Subsequently, Alvarez told Officer Curtis Seymore that the Black male struck him above the ear with the shotgun, he began struggling with the man over the gun, Lopez exited the car and intervened, the man fired the gun, Lopez was hit, and the man ran into the house after Lopez fell to the ground. (51 RT 7792-7796.) Alvarez had a cut and some dried blood above his ear. (51 RT 7794.)

Deborah Galloway testified that a Hispanic man with a large white car came by the house twice earlier in the day looking for Johnson, the man returned in the afternoon and started an argument with Johnson, the man may have been hit, Johnson and the man "tussled" over the gun, Lopez intervened, Johnson pushed Lopez away, the gun went off while both men had their hands on it and Lopez was between them, Lopez fell to the ground, Johnson looked shocked and surprised, someone said "Todd," and Galloway went into her room and closed the door. (52 RT 7912-7934.) Galloway had told the police at the time of the shooting that she had not seen anything because she did not want Johnson to get in trouble, but later talked to prosecution and defense investigators. (52 RT 7924-7925.) She gave Silva essentially the same account and said the shooting was an accident. (56 RT 8373-8374.)

In June of 1996, Alvarez told Silva that he grabbed the shotgun and was struggling over it with Johnson, he pushed Johnson and covered himself, and a shot was fired when Lopez got in the way. (56 RT 8373-

8376.) Alvarez said he was feeling a lot of pressure and feeling kind of guilty. (56 RT 8373.)

On July 3, 1996, Silva presented Jose Garcia with a photograph of a live lineup of Johnson and five other African-American males. Garcia picked out someone other than Johnson, stating that that person looked "closest to" the shooter but he was uncertain. (56 RT 8367-8370, 8374.) Garcia said he would probably be able to positively identify the shooter if he saw him in person. (56 RT 8370.) Tina testified that she had previously been out to Ross' property, but was not there in November of 1995. (52 RT 7976-7977.)

(d) **Expert Testimony**

Robert Richardson, a parole agent and former correctional officer, testified that the Youth Authority housed juvenile offenders between the ages of 14 years and 18 years old who could stay until they were 25 years of age. (54 RT 8184-8187.) Defendants between 18 and 21 years of age with prison sentences – even those convicted of murder -- could also be housed at the Youth Authority. (54 RT 8188, 8190.) Such wards would be assessed upon arrival and still be sent to prison if found not amenable for treatment and counseling despite a court having ordered Youth Authority housing. (54 RT 8189-8190.)

Richardson described Youth Authority programs which were individualized for each ward, including violent offenders. (54 RT 8190-8194, 8203-8205.) Successful completion of a violent offenders program would makes a ward eligible for monitored release into the general population, whereas failure to cooperate in the program can result in the ward being sent to adult prison. (54 RT 8200-8204.)

Richardson explained that the main focus and objective of the Youth Authority was rehabilitation rather than punishment. (54 RT 8205-8206, 8209.) Richardson knew of success stories in which youthful offenders of

horrible crimes turned their lives around. (54 RT 8206-8208.) Richardson opined that an 18-year-old convicted of voluntary manslaughter with no prior record, who was receptive toward treatment, would be accepted by the Youth Authority. (54 RT 8191.)

William Rigg, a correctional consultant and former correctional officer at Corcoran and San Quentin, explained inmate classifications and security levels in the state prison system. (55 RT 8251-8256.) Rigg described the restrictive conditions for secured housing units ("SHU") and "closed custody" designations, as well as the lack of rehabilitation and other programs in SHU.[48] (55 RT 8255-8264, 8280-8281.)

SHU was reserved for the "worst of the worst" who could not follow prison rules. (55 RT 8285-8286.) Thus, an inmate will be sent to SHU if determined to be a security risk to staff and other inmates or an escape risk. (55 RT 8283.) However, an inmate sentenced to life without possibility of parole would immediately be classified at the highest security level and be placed on closed custody status. (55 RT 8264-8265.) The inmate could be taken off closed custody and placed in "mainline" SHU within five years only if he was a model prisoner. (55 RT 8265.)

Rigg testified that it was impossible for prison inmates to avoid fights and survive, especially in SHU. (55 RT 8276-8277.) They would have to follow the orders of a "shot caller" or go into protective custody.[49] (55 RT

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[48] Closed custody and life inmates may still have a television or radio in their cells, send and receive mail, make daytime phone calls, visit with family, read books, subscribe to magazines, and have education and work opportunities. (55 RT 8229-8302.)

[49] Rigg opined from disciplinary reports that Johnson was not a shot caller. (55 RT 8282-8283.)

8277.) Rigg felt young-looking 18 or 19-year-old inmates were particularly vulnerable and impressionable.[50] (55 RT 8277-8279.)

Rigg testified that inmates feared the SHU at Corcoran. (55 RT 8267-8268.) According to Rigg, Corcoran was one of the worst prisons in the state and "extremely violent" because the staff housed rival or incompatible Black and Hispanic inmates together, placed known enemies together in the exercise yards, betted on inmates and watched them fight, and used firearms to break up fist fights. (55 RT 8270-8274.)

Rigg testified that more inmates were shot and killed in Corcoran than all other prisons in the United States combined between 1989 and 1999. (55 RT 8274-8275.) There were six to 18 fights a day, most with shots fired, at Corcoran between 1989 and 1990. (55 RT 8275.) He opined that Corcoran officials "were escalating their force too rapidly" and firing shots unnecessarily. (55 RT 8275.) Rigg said that a Corcoran inmate who got into four fights during a 13-month period in the late 1980's and early 1990's would be considered "relatively a well-behaved inmate." (55 RT 8274-8276.)

Gretchen White, a licensed psychologist who specialized in forensic psychology and capital cases, was hired in December of 2000 to investigate Johnson's background for any psychological dysfunction that may have affected him. (56 RT 8320-8325.) She interviewed Johnson's mother, sisters and aunt, reviewed testimony from the first penalty phase trial, and reviewed miscellaneous records. (56 RT 8325.) White discussed three aspects of Johnson's childhood which she believed had a very significant effect on him: family instability, the lack of a real father, and physical and emotional violence in the home. (56 RT 8325-8332.) She opined that Jo

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[50] The only difference Jo Ann saw in Johnson when he was released from prison was that he seemed bigger and huskier. (51 RT 7824-7825.)

Ann was a classic case of a battered wife, Johnson felt helplessness and guilt about not being able to help his mother, and Johnson had mixed feelings towards James. (56 RT 8334-8338.) White testified that James's emotional and physical abuse created an "atmosphere of vigilance and pending violence" which accumulated over the years and had lifetime effects on the children, including isolation, concentration difficulties, anxiety, fearfulness, hyperarousal, hypervigilance, misinterpretation of environmental cues, behavioral problems, developmental delays and school problems. (56 RT 8332-8334, 8338-8341.) White specifically believed Johnson's abusive childhood caused him to over-perceive threats and overreact. (56 RT 8340-8341.)

3. Rebuttal Evidence

Jo Ann previously told Levinson that Linton Williams abused her, James was abusive to her girls, she left James for good when Johnson was 16 years old, and Johnson stayed with James since he was not abusive to Johnson. (55 RT 8305-8310.)

Deborah Galloway previously told Silva that the shotgun fired when Johnson struck Alvarez in the head with it. (56 RT 8366-8367.) Galloway twice said she did not see Johnson and Alvarez struggle over the gun. (56 RT 8367.)

ARGUMENT

I. JOHNSON FAILS TO SHOW THE TRIAL COURT'S DENIAL OF HIS SEVERANCE MOTION WAS AN ABUSE OF DISCRETION

Johnson claims the trial court erred in denying his motion to sever the Lopez and Campos murder charges, prejudicing his state and federal constitutional rights to a fair trial and reliable verdicts. (AOB 47-67.) However, Johnson fails to meet his burden of clearly showing the trial

court's ruling constituted an abuse of discretion. Moreover, joinder did not result in any gross unfairness in violation of Johnson's right to due process. Accordingly, Johnson's claim should be rejected.

Consolidation or joinder of charged offenses has long been preferred under the law because it promotes efficiency and judicial economy. (*People v. Soper* (2009) 45 Cal.4th 759, 771-772 (*Soper*); *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 (*Alcala*); *People v. Manriquez* (2005) 37 Cal.4th 547, 574.) The state constitution specifically bars courts from construing any of its provisions "to prohibit the joining of criminal cases as prescribed by the Legislature…." (Cal. Const., art. I, § 30, subd. (a).)

Penal Code section 954 provides in relevant part:

> 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….

However, the trial court retains discretion to order offenses or counts to be tried separately in the interests of justice and for good cause shown. (§ 954.)

Prior to trial, Johnson filed a motion to sever the two murder charges. (3 CT 497-528.) The prosecutor filed an opposition and supplemental opposition in which he argued joinder was proper under section 954 as the two murders were the same class of crime, the evidence was cross-admissible, there was no prejudicial "spillover" effect as the evidence for each case was strong and neither murder charge was unduly inflammatory, joinder did not by itself render Johnson death-eligible, and severed trials

would be grossly inefficient as well as a hardship on the witnesses and Johnson. (3 CT 680-697, 761-763.)

Following a hearing, the trial court denied Johnson's motion.[51] (3 CT 780; 1 RT 131-141.) In so ruling, the court stated:

> It appears to me that I would – it would not be appropriate for me to exercise my discretion in favor of severing. I believe that there is – there's not a sufficient showing that the interest of justice would be served. I believe there is a preference for joint trials, although strong indication that separate trials are appropriate under many circumstances. But I think that, here, I don't see the interest of justice being served by a severance. [¶] So the motion to sever will be denied.

(1 RT 141.)

Where the statutory requirements for joinder under section 954 are met, the defendant "'"must make a *clear showing of prejudice* to establish that the trial court *abused its discretion*"'" in denying a motion to sever the charges. (*Soper, supra,* 45 Cal.4th at p. 774, quoting *Alcala, supra,* 43 Cal.4th at p. 1220, and cases cited [emphasis in original].) An abuse of discretion is only shown where denial of a severance motion "'"'"falls outside the bounds of reason."'"'" (*Ibid.*, quoting *Alcala, supra,* 43 Cal.4th at p. 1220.) The reviewing court looks to "'the record before the trial court when it made its ruling'" in making that determination. (*Ibid.*, quoting *Alcala, supra,* 43 Cal.4th at p. 1220; see also *People v. Lynch* (2010) 50 Cal.4th 693, 735.)

The reviewing court first considers whether evidence would have been cross-admissible in separate trials. (*Soper, supra,* 45 Cal.4th at 774, citing *Alcala, supra,* 43 Cal.4th at p. 1220.) Cross-admissibility of

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[51] Johnson also brought a motion to sever defendants, which was denied by the trial court in light of it order for separate juries. (2 RT 259-272) Johnson does not raise any claim of error on appeal regarding that ruling.

evidence "alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges."[52] (*Id.* at pp. 774-775, citing *Alcala, supra,* 43 Cal.4th at p. 1221.) However, a lack of cross-admissible evidence does not by itself suffice to establish prejudice or an abuse of discretion. (*Id.* at p. 775; *Alcala, supra,* 43 Cal.4th at p. 1221; see also *People v. Lynch, supra,* 50 Cal.4th at p. 736.) Indeed, section 954.1 states:

> 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.

Where there is no cross-admissible evidence, the reviewing court considers three additional factors in assessing whether the denial of the severance motion was a prejudicial abuse of discretion:

> (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case.

(*Soper, supra,* 45 Cal.4th at p. 775, citing *People v. Arias* (1996) 13 Cal.4th 92, 127.) "[P]otential for prejudice to the defendant from a joint trial" is then balanced "against the countervailing benefits to the state." (*Ibid.*)

In *Soper*, this Court cautioned against minimizing the benefits of joinder in this analysis. (*Soper, supra,* 45 Cal.4th at p. 781.) The benefits

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[52] Complete or "two-way" cross-admissibility between counts is not required. (*Alcala, supra,* 43 Cal.4th at p. 1221.)

include "case-specific efficiencies" as well as judicial and systemic economies. (*Soper, supra,* 45 Cal.4th at pp. 781-782.) Joinder prevents waste and duplication of limited resources in the court processing system, jury selection, trial court proceedings, and appeals. (*Id.* at p. 782.) "Manifestly, severance of properly joined charges denies the state the substantial benefits of efficiency and conservation of resources otherwise afforded by section 954." (*Ibid.*)

Where the reviewing court finds an abuse of discretion, "reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result at a separate trial." (*People v. Burney* (2009) 47 Cal.4th 203, 237.)

> "[E]ven if a trial court's ruling on a motion to sever is correct at the time it was made, a reviewing court still must determine whether, in the end, the joinder of counts or defendants for trial resulted in gross unfairness depriving the defendant of due process of law. [Citations.]"

(*Soper, supra,* 45 Cal.4th at p. 783, quoting *People v. Rogers* (2006) 39 Cal.4th 826, 851.)

A. The Trial Court Properly Exercised Its Discretion in Denying Severance of the Two Murder Charges

Counts 1 and 2 were each murder charges. Thus, as Johnson concedes, joinder was permissible in the first instance as both counts were of the same class of crime within the meaning of section 954. (AOB 52; See, e.g., *People v. Cook* (2006) 39 Cal.4th 566, 582; *People v. Manriquez, supra,* 37 Cal.4th at p. 574; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120.)

Given the statutory requirements for joinder were met, Johnson has the burden of making a clear showing of prejudice in order to show the trial court abused its discretion in denying his severance motion. (*Soper, supra,*

45 Cal.4th at p. 774; *Alcala, supra,* 43 Cal.4th at p. 1220.) Johnson fails make any such showing of prejudice here.

Foremost, there was cross-admissible evidence. As pointed out by the prosecutor in the trial court, certain evidence concerning Ross, Brightmon and Johnson's wife was admissible in both trials. (3 CT 687-690.) Most significant of this cross-admissible evidence was Johnson's admission to Ross prior to the Campos murder that it was easy to kill somebody in reference to the Lopez murder.[53] (See 19 RT 2877, 2880; 21 RT 3193.) This single statement strongly evidenced both an intent to kill in the prior Lopez murder as well as intent to kill and premeditation for the ensuing Campos murder.

For purposes of cross-admissibility,

> "'*The least degree of similarity... is required in order to prove intent....* In order to be admissible [for that purpose], the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbored[ed] the same intent in each instance.' [Citations.]" [Citation.]'"

(*Soper, supra,* 45 Cal.4th at p. 776, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 [emphasis in original].) In both murders, Johnson armed himself with a firearm for highly confrontational encounters where use of the gun was very likely and then fired the guns at his intended victims. Thus, both murders were sufficiently similar to support the inference that Johnson probably harbored the same intent to kill in each incident.

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[53] The statement was apparently made in reference to the Estrada killing in 1983 as Johnson spoke of killing someone "the second time" in discussing the Lopez murder. (4 RT 646; 9 RT 1557-1558.) In order to ameliorate the possibility of the jury inferring there was a prior homicide in the guilt phase, the parties agreed to redact the statement to omit the "second time" reference and so admonish the witnesses. (9 RT 1559.)

Johnson counters that the defense in the Lopez shooting was intent whereas the defense in the Campos shooting was identity, thereby rendering the statement inadmissible in the Campos case. (AOB 53.) A similar argument was rejected in *Soper,* where this Court found the defendant's reliance upon an identity defense "would not eliminate the prosecution's burden to establish both intent and identity beyond a reasonable doubt." (*Soper, supra,* 45 Cal.4th at p. 777.) Likewise, the prosecutor here still had the burden to prove intent as well as identity for the Campos murder.

Johnson also argues the "easy to kill" statement did not establish his intent in the Lopez killing as it could have been uttered even with the belief that the shooting was accidental. (AOB 54-55.) However, the mere fact that the evidence may have been susceptible to varying inferences or interpretations, did not render the statement inadmissible in the Lopez case. (See *People v. Mason* (1991) 52 Cal.3d 909, 957 [an "innocent explanation merely raises an ordinary evidentiary conflict for the trier of fact" rather than make the evidence inadmissible].) Nonetheless, it defies reason to characterize Johnson's bragging about how easy it was to kill Lopez as the lamenting of an accidental death.

Also, the fact that Johnson intended to suggest that the gun accidentally fired during his struggle with Alvarez made the admission that he killed Lopez even more relevant. At the time of the severance motion, the defense indicated that it would only concede that Johnson "was responsible for" and "in essence caused" the Lopez shooting. (1 RT 133.) Thus, the prosecutor would have to dispel any juror concerns that the shotgun fired by itself or perhaps was even accidentally fired by Alvarez during their struggle. Johnson's admission to Ross that he was in fact the person who killed Lopez was thus highly relevant in the Lopez case.

As previously noted, the statement was also extremely relevant to show Johnson's intent and premeditation for the Campos murder as it was uttered the night before as he, Brightmon and Ross prepared for their encounter with Campos. Johnson's "easy to kill" statement was cross-admissible.

The prosecutor also had a good faith expectation that Ross would testify to Johnson's personal hatred of Hispanics and it would be necessary to impeach Johnson's wife should she testify for the defense in the guilt phase. (3 CT 689-690.) Johnson correctly notes that neither ultimately occurred at trial. (AOB 54, n. 22, 56, fn. 25.) However, Johnson's observations are of no moment, as the denial of the severance motion must be assessed on the record before the trial court at the time of its ruling. (See *Soper, supra,* 45 Cal.4th at p. 774; *Alcala, supra,* 43 Cal.4th at p. 1220.)

In addition, the prosecutor indicated that he expected Brightmon to testify for Johnson based upon Brightmon's letter to Johnson's counsel offering to testify, and that evidence impeaching Brightmon's general credibility would be cross-admissible regardless if it emanated from the Lopez or Campos incidents. (3 CT 690; 1 RT 136-137.) Moreover, as argued by the prosecutor at the hearing, Johnson's request for assistance from Brightmon immediately following the Lopez shooting tended to show an important prior relationship between the two defendants which was admissible in the Campos case where Johnson was expected to claim he had no involvement. (1 RT 136-137; 12 RT 2010-2011 [Johnson yelled, "Todd," right after the shooting].) This evidence from the Lopez case was admissible in the Campos case to corroborate the prosecution witnesses who identified Johnson as the shooter.

The cross-admissible evidence discussed above in and of itself should be deemed "sufficient to dispel any suggestion of prejudice" and justify the

trial court's denial of Johnson's severance motion. (See *Soper, supra,* 43 Cal.4th at pp. 774-775; *Alcala, supra,* 43 Cal.4th at p. 1221.) Nonetheless, the remaining three severance factors also supported the trial court's ruling.

First, neither murder was unduly inflammatory vis-a-vis the other. Each involved a single victim killed by the same means (a gunshot) who was an adult unrelated to Johnson. In each case, Johnson fled after the killing. Since the two murders were "similar in nature and equally egregious" in comparison with each other, this factor weighed heavily in favor of joinder. (See *Soper, supra,* 45 Cal.4th at p. 780.)

Second, neither murder was a weak case bolstered through joinder. To, the contrary, both cases were very strong.

In the Lopez case, Johnson's identity was conclusively proved through the identifications of Alvarez and Deborah Galloway (12 RT 2013-2015, 2023-2030; 20 3115-3118, 3133, 3155), Lopez's dying declarations (12 RT 1959, 1981, 1990), and Johnson's admission to Ross (19 RT 2877, 2880; 21 RT 3193). Moreover, Johnson's intentional firing of the gun and missing his intended target was proven through Johnson's ongoing confrontation with and expressed animosity against Alvarez (12 RT 2018-2019; 20 RT 3114-3127), Johnson pointing the gun and firing a shot at Alvarez as Lopez intervened (12 RT 1999-2000; 20 RT 3132-3133, 3147, 3151-3154), Johnson's admission that it was easy to kill Lopez (19 RT 2877, 2880; 21 RT 3193), and the fact that it would have taken approximately eight pounds of trigger pull to fire the shotgun (16 RT 2601-2606). Johnson's accident defense was simply untenable.

In the Campos case, Johnson's identity as the shooter was proven through the observations of Garcia (15 RT 2441-2442), Escalera (18 RT 2745-2746) and Ross (19 RT 2892-2893) as well as the testimony of Aston (15 RT 2399-2400) and Moore (15 RT 2379-2380; 16 RT 2586, 2590) regarding Johnson's presence on the property prior to, during and following

the shooting. Johnson's alibi that he was in Oklahoma at the time of the murder was thoroughly discredited through Brightmon's prior statements to Investigator Horst (22 RT 3424-3425, 3436, 3447-3460, 3490; 23 RT 3660-3661; 13 CT 3611-3638, 3639-3644) and the testimony of Trotter and McConnell through their obvious bias and prior statements to Levinson (22 RT 3342-3345, 3359; 23 RT 3585-3586, 3617-3619, 3638-3644). Again, Johnson's defense was unconvincing.

Johnson cites various distinctions between the Lopez and Campos cases in arguing joinder permitted one case to bolster the other. (See AOB 60-61.) Johnson's argument is of no moment since

> between any two charges, 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.

(*Soper, supra,* 45 Cal.4th at p. 781.)

Third, joinder did not make Johnson death-eligible since the Campos murder carried its own kidnap and robbery special circumstances. (See *Alcala, supra,* 43 Cal.4th 1228-1229; *People v. Sandoval* (1992) 4 Cal.4th 155, 173; *People v. Marquez* (1992) 1 Cal.4th 553, 573; *People v. Walker* (1988) 47 Cal.3d 605, 623.) Also, the multiple murder special circumstance did not convert the matter into a capital case. If severance was granted, the prosecutor simply could have elected to try the Lopez case first and later amend the information to allege a special circumstance of a prior first or second degree conviction in the Campos case. (See *People v. Mason, supra,* 52 Cal.3d at p. 934; § 190.2, subd. (a)(2).)

Johnson summarily asserts that "he wanted to testify in regards to the Lopez shooting." (AOB 57, citing 1 RT 133 and 3 CT 516.) However, "severance is not mandatory every time a defendant wishes to testify to one

charge but not to another." (*People v. Sandoval, supra,* 4 Cal.4th at p. 174 [citing federal court rulings].) The defendant must convincingly demonstrate that he has important testimony to offer as to one charge while having a strong need to refrain from testifying on another, and present sufficient information for the trial court to be satisfied that his or her claim is genuine and weigh the countervailing interests in a joint trial. (*Ibid.*)

Johnson did not explain to the trial court the nature of the testimony he intended on offering in the Lopez case or his reasons for not wanting to testify in the Campos case. (See 1 RT 133; 3 CT 516.) As noted by the prosecutor, "there's nothing inconsistent, again, about having an accident at Candy's [shooting] and not being at the other one." (1 RT 138.) Having failed to demonstrate the genuineness of his claimed desire to testify or give the trial court the pertinent information it needed to weigh his concerns against the countervailing benefits of joinder, Johnson cannot now complain that the trial court abused its discretion on this basis. (See *People v. Sandoval, supra,* 4 Cal.4th at p. 174 [finding it unnecessary to address separate state standard since defendant failed to satisfy federal test].)

Considering all of the relevant factors, there was absolutely no potential prejudice which would have justified severance at the time of Johnson's motion. In stark contrast, the benefits of joinder were many. Joinder prevented the needless consumption of limited judicial resources in duplicating the litigation of Johnson's discovery matters and other numerous pretrial motions – most of which were applicable to both murder charges. (See 1 CT 219-296.) Joinder also preserved finite resources by obviating the need to summon and subject yet another sizable venire of potential jurors to the selection process. Also, consolidation of the two murder charges prevented the senseless waste in instructing and educating two juries on the same legal principles applicable to both murders. Finally,

joinder eliminated the costs and burdens of separate appellate proceedings. (See *Soper, supra,* 45 Cal.4th at p. 782.)

Moreover, there was substantial overlap of evidence and witnesses militating against severance. Dr. Choi, who conducted the autopsies on both Lopez and Campos, would have had to testify at both trials, repeating his testimony regarding his qualifications and expertise, forensic pathology, autopsy procedures and the science of gunshot wounds. (14 RT 2220-2278.) Richard Takenaga would have had to testify at both trials, repeating his testimony regarding his qualifications and expertise on firearms. (16 RT 2601-2629.) In addition, Ross, Detective George Callow (who took Ross's prior statement regarding Johnson's "easy to kill" comment), Brightmon and Investigator Horst (who took Brightmon's prior statement) would have had to testify at both trials.

Like the Court of Appeal in *Soper*, Johnson errs in minimizing the benefits of joinder in the weighing process, focusing almost entirely on his unsubstantiated claims of prejudice. (See AOB 58-64.) Also, Johnson erroneously relies on *People v. Smallwood* (1986) 42 Cal.3d 415 (*Smallwood*), and *Williams v. Superior Court* (1984) 36 Cal.3d 441 (*Williams*), "as a benchmark" in arguing the potential prejudicial effects of joinder outweighed the benefits. (AOB 62-64.)

This Court has specifically criticized *Smallwood* insofar as the burden of showing potential prejudice from denial of a severance motion. (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 636.)

> "Misleading language in [*Smallwood*]...implies that because prejudice is always presumed when offenses are joined and the evidence is not cross-admissible, the People must establish that the noncross-admissible evidence cannot reasonably affect the verdicts."

(*Ibid.*, quoting *People v. Bean* (1988) 46 Cal.3d 919, 939, fn. 8.)

Moreover, *Smallwood* concluded "there was no significant judicial economy to be gained from joinder" where the offenses are not cross-admissible. (*Smallwood, supra,* 42 Cal.3d at p. 430.) It is now clear from *Soper*, that *Smallwood* was incorrect on that point as well. (See *Soper, supra,* 45 Cal.4th at pp. 781-782.)

Finally, *Smallwood* is also readily distinguishable from Johnson's case. In *Smallwood*, "[a]ll parties agreed that the two offenses were not cross-admissible." (*Smallwood, supra,* 42 Cal.3d at p. 427.) As discussed above, there was substantial cross-admissible evidence between the Lopez and Campos counts.

The continued viability of *Williams* is also questionable. That case held severance where one of the charges is a capital offense must be analyzed "with a higher degree of scrutiny and care than is normally applied in a noncapital case." (*Williams, supra,* 36 Cal.3d at p. 454.) However, this Court has since held "such a heightened analysis is no longer called for." (*Alcala, supra,* 43 Cal.4th at p. 1229, fn. 19, citing § 790, subd. (b).)

In addition, *Williams* held "even greater scrutiny is required" in cases where joinder gives rise to a multiple murder special circumstance under section 190.2 subdivision (a)(3), dismissing the significance of the prosecutor proceeding under the prior murder conviction special circumstance of section 190.2, subdivision (a)(2), in severed trials. (*Williams, supra,* 36 Cal.3d at p. 454.) As previously shown, that reasoning has since been rejected by this Court in *People v. Mason, supra,* 52 Cal.3d at p. 934.

Additionally, *Williams* is distinguishable from Johnson's case in several important respects. Like *Smallwood,* the *Williams* Court found the evidence was not cross-admissible. (*Williams, supra,* 36 Cal.3d at pp. 450-451.) As discussed above, such is not the case here.

Moreover, *Williams* involved gang evidence which this Court found "might indeed have a very prejudicial, if not inflammatory effect on the jury in a joint trial." (*Williams, supra,* 36 Cal.3d at p. 453.) No gang evidence whatsoever was admitted in the guilt phase of Johnson's trial.

Finally, joinder in *Williams* gave rise to the only special circumstance of multiple murder. (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 454.) In contrast, the Campos charge carried its own kidnap and robbery special circumstances that made Johnson death-eligible independent of the multiple murder special circumstance. For all these reasons, Johnson's invitation to use *Smallwood* and *Williams* as "benchmarks" for assessing his severance claim should be rejected.

Johnson's argument essentially is that joinder made it easier to reject his defenses and convict him of both murders. (See AOB 60-61.) However,

> 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.

(*Soper, supra,* 45 Cal.4th at p. 781, citing *Zafiro v. United States* (1993) 506 U.S. 534, 540 [113 S.Ct. 933, 122 L.Ed.2d 317].) Moreover, Johnson's argument is premised on speculation as to how "joinder *was likely to have* created a spillover from one case to another." (AOB 61 [emphasis added].) Such "speculative and unconvincing contentions" are insufficient to make the clear showing of prejudice necessary to establish an abuse of discretion. (See *People v. Manriquez, supra,* 37 Cal.4th at p. 575 [defendant argued he "probably" would have been acquitted or convicted of lesser offenses in separate trials].)

In *Manriquez*, this Court found no abuse of discretion where the trial court denied severance of four unrelated murder charges with no cross-

admissible evidence. (See *People v. Manriquez, supra,* 37 Cal.4th at pp. 571-576.) In light of *Manriquez*, denial of Johnson's severance motion for two murder charges similar in nature with significant cross-admissible evidence surely did not constitute an abuse of discretion.

Considering all relevant factors for the properly joined murder charges in this case, Johnson did not meet his burden of making a clear showing of potential prejudice or an abuse of discretion. For the same reasons, it is not reasonably probable that Johnson would have obtained more favorable verdicts in separate trials. (See *People v. Burney, supra,* 47 Cal.4th at p. 237.) Accordingly, the trial court's denial of Johnson's pretrial severance motion should be affirmed.

B. Joinder Did Not Result in Any Gross Unfairness

Notwithstanding the propriety of the trial court's ruling on the severance motion, the resulting trial on the joined counts did not result in any gross unfairness in violation of Johnson's due process rights. Factors to be considered in this analysis are whether the evidence underlying each joined offense is "relatively straightforward and distinct" and independently sufficient to support the convictions, there is no great disparity in the nature of the two offenses which would unduly inflame the jury, and the evidence of one count is not significantly weaker than the other. (*Soper, supra,* 45 Cal.4th at p. 784.)

The evidence underlying the Lopez and Campos murders was straightforward and distinct. For the Lopez charge, the jury simply had to determine whether or not the shooting was accidental; whereas for the Campos charge, Johnson's identity as the shooter was the primary issue. As discussed above, the remaining factors mitigated against a finding that gross unfairness was present in Johnson's case.

It is also important to consider whether the jury was instructed on the need to consider each count separately. (See *Soper, supra,* 45 Cal.4th at p. 784.) Johnson's jury was so instructed as follows in the guilt phase:

SEVERAL COUNTS – DIFFERENT OCCURRENCES – JURY MUST FIND ON EACH

> Each Count charge[s] a distinct crime. You must decide each Count separately. The defendant may be found guilt or not guilty of [either or both] of the crimes charged. Your finding as to each Count must be stated in a separate verdict.

(14 CT 3808 [CALJIC No. 17.02.)

It is presumed that the jurors understood and followed the court's instructions. (See *Penry v. Johnson* (2001) 532 U.S. 782, 799 [121 S.Ct. 1910, 150 L.Ed.2d 9]; *Greer v. Miller* (1987) 483 U.S. 756, 766 fn. 8 [107 S.Ct. 3102, 97 L.Ed.2d 618]; *Richardson v. Marsh* (1987) 481 U.S. 200, 211 [107 S.Ct. 1702, 95 L.Ed.2d 176]; *People v. Sanchez* (2001) 26 Cal.4th 834, 852; *People v. Osband* (1996) 13 Cal.4th 622, 714; *People v. Pinholster* (1992) 1 Cal.4th 865, 919, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Johnson offers nothing to rebut this presumption and instead ignores the instruction and its import. (See AOB 64-66.)

In sum, Johnson fails to show the trial court's denial of his pretrial severance motion exceeded the bounds of reason such that it constituted an abuse of discretion. Moreover, joinder of the two murder counts did not result in any gross unfairness amounting to a denial of due process. Accordingly, his claim of error should be rejected.

II. THE TRIAL COURT PROPERLY DENIED JOHNSON'S *BATSON/WHEELER*[54] MOTION

Johnson claims the prosecutor improperly exercised three peremptory challenges against African-Americans in jury selection for the guilt phase and the trial court failed to conduct a sincere "third step" evaluation of the prosecutor's reasons for excusing those potential jurors, thus requiring reversal of the judgment. (AOB 68-83.) However, the prosecutor's race-neutral reasons for excusing each potential juror were compelling and supported by the record. Moreover, the record belies Johnson's claim that the trial court did not make a sincere evaluation of the prosecutor's reasons. Thus, Johnson's *Batson/Wheeler* claim should be rejected.

A. Relevant Proceedings

During selection of the alternates for the guilt phase, Johnson raised a *Batson/Wheeler* objection, claiming the prosecutor was improperly using his peremptory challenges to excuse African-Americans. (8 RT 1384-1385.) Johnson's objection was based on the prosecutor's peremptory challenges to a potential juror, Keith B., and two potential alternate jurors, Vanessa H. and Myra P. (8 RT 1385.)

1. Potential Juror Keith B.

Keith B. was a 68-year-old married man with three adult children. (6 CT 1389 [juror questionnaire].) He was a retired ordained minister, church pastor and trust officer with the Seventh Day Adventist Church. (6 CT 1391.) Keith B. had previously visited correctional facilities as a "prison ministry pastor" in Washington state. (6 CT 1393-1394.) In his questionnaire, Keith B. noted that he was impressed with the "order + discipline" and "response to religious/gospel appeals." (6 CT 1394.)

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[54] *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]; *People v. Wheeler* (1978) 22 Cal.3d 258.

Keith B. was previously the victim of a theft where the perpetrator was not apprehended. (6 CT 1394.) Although Keith B. felt the justice system worked properly, he was angry that the police department made him pay for a copy of his report. (6 CT 1394 ["made me angry!"].)

In response to a question whether he would follow an instruction on the law if it differed from his beliefs or opinions, Keith B. answered in the negative, explaining, "I am not comfortable violating my conscience or convictions." (6 CT 11.) He also was unsure whether he would be able to follow the principle that the testimony of a single witness may be sufficient to prove a fact. (6 CT 12.)

Keith B. indicated that he would believe or disbelieve the testimony of a law enforcement officer or District Attorney simply because of who they were. (6 CT 12.) He also stated that Johnson's appearance and demeanor, attitude and conduct in court might bias him for or against one of the parties. (6 CT 1399.) He further expressed a belief that law enforcement sometimes treats African-Americans differently than other racial groups. (6 CT 1402.) Keith B. was unsure whether he could objectively view autopsy or crime scene photographs. (6 CT 1400.)

Keith B. wrote that the death penalty had "a legitimate place" in the law, but that he "lean[ed] on the side of mercy." (6 CT 1403.) He rated himself a "7" on a ten-point scale of how much he favored the death penalty and believed people had choices which made them responsible for their actions, but noted that his "orientation is Christian" and reiterated that his views on the death penalty have evolved "more toward mercy." (6 CT 1404.)

Keith B. noted that he would consider all the evidence and instructions, and impose whichever penalty he felt appropriate. (6 CT 1405.) However, he expressed a concern about "errors & malpractice" as to the death penalty. (6 CT 1405.)

During voir dire, Keith B. confirmed that he had performed ministry work with prison inmates. (4 RT 731.) Insofar as his comment that he would lean on the side of mercy, Keith B. explained:

> I view the whole situation as to persons, background, the circumstances under which the crime was committed, the attitude of the individual. and with that in mind, I would tend to consider a lesser penalty. That's not an absolute, but it depends on a number of circumstances, as I see it, at the time when they are presented.

(4 RT 731.) He indicated that he was capable of returning a death verdict under the right circumstances. (4 RT 731-733.)

2. Potential Alternate Juror Vanessa H.

Vanessa H. was a 35-year-old married woman with three children. (8 CT 2206 [juror questionnaire].) She was employed as a housing management assistant at Camp Pendleton and previously worked in sales, housing and maintenance. (8 CT 2208.)

Vanessa H. was a juror in a civil trial where the jury was unable to reach a verdict. (8 CT 2209.)

Vanessa H. had friends or relatives in law or law enforcement, but did not know anything about their employment. (8 CT 2210.) When she was a child, she visited her mother's boyfriend, whom she considered her step-father, in a correctional facility. (8 CT 220-2211.) She had a friend or relative who had previously been arrested or charged with a crime, but had no specific knowledge beyond that. (8 CT 2211.) Her step-son was previously killed in a shooting. (8 CT 2211-2212.)

Vanessa H. rated herself a "5" on a ten-point scale of how much she favored the death penalty. (8 CT 2220-2221.) However, she wrote, "and I think my feelings don't count." (8 CT 2220.) Vanessa H. indicated that she would consider all the evidence and jury instructions and impose whichever penalty she personally felt was appropriate. (8 CT 2222.)

During voir dire, Vanessa H. explained her feelings about the shooting of her step-son as follows:

> I think I could set it aside. Because we never went to the trial or anything. Because, based on the police decision, it was – everything in Michigan is drug-related. So, according to them, it was drug-related. Our family never went to a trial or trying to convict anybody of murder because they never found the suspect. I feel like I can make a decision, both based on the evidence – I really don't really have an opinion on the death – on the death penalty because I never came to that situation.

(6 RT 1198.)

Vanessa H. continued:

> Based on my religion – I believe in Jesus Christ. And according to him, you shouldn't kill. "Thou shall not kill." But if it was to be based on the evidence and special circumstances, I can look at it both ways. I really don't have any problem with it.

(6 RT 1198-1199.)

During voir dire by the prosecutor, Vanessa H. declined to answer his question as to whether she would able to return a death verdict for someone found guilty beyond a reasonable doubt with aggravating circumstances substantially outweighing those in mitigation, explaining that she could not "think about 2 months down the road because I think about everyday life," "can't even imagine," and "couldn't even answer that until it comes to that time." (6 RT 1226-1227.)

Vanessa H. further explained her comments about the death penalty in her questionnaire as follows:

> The reason why I said my feelings don't count is because the way the world is now and the way people make decisions on a lot of things, they [are] not basing – basing the decision on what's in the world today. They [are] basing it on how they feel.
>
> So sometime a lot of people opinion, especially – I mean, I'm not being prejudice[d]. Especially African-American opinions – it really don't count on how I feel about the death penalty.

> Okay. Because it's a lot of things that goes around that – I guess you could say certain things you, like, "Oh really? Why you say that?" You know. But that will be my opinion. But I really don't have an opinion on either one."

(6 RT 1228.)

Vanessa H. confirmed that her step-son was murdered in Michigan, but she was not living with him at the time. (6 RT 1228-1229.) When the prosecutor asked her whether the police treated the murder as if it did not matter, Vanessa H. answered, "Yes," and that she knew "different" from what the police thought. (6 RT 1229.) When asked if the police had a "so what" attitude about the murder since it was drug-related, Vanessa H. responded:

> No. It wasn't a "So what that he was killed? He was involved in drugs." Because he probably was. And I don't know that unless I knew what he was doing. But based on what I knew that he wasn't doing, I didn't feel like it should have came out that way. I felt like it should have been based on evidence and stuff that was supposed to be put in front of people before you even make a decision like that.

(6 RT 1229-1230.) She further stated, "I think they could have did more to find out who did it." (6 RT 1230.)

Vanessa H. characterized her prior service on a hung jury as a bad experience, explaining that "[i]t was like everybody just already had the answer" upon going into deliberations and the jurors were not listening to each other and basing their decision on emotions rather than the evidence. (6 RT 1231.) She stated, "I can't base things on my emotional feelings, because I just think when you put feelings in the way, you can't really come up with a decision." (6 RT 1231.)

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3. Potential Alternate Juror Myra P.

Myra P. was a 49-year-old married woman with three adult children. (11 CT 2794 [juror questionnaire].) She was previously employed as a teacher. (11 CT 2796.)

Myra P. had an uncle who was killed by a gunshot more than 30 years prior. (11 CT 2799-2800.) She felt "[a]ssuring that a person is guilty" and lawyers and judges being friends were the most important problems in the current criminal justice system. (11 CT 2800.)

Myra P. stated that it would be difficult or impossible for her to sit in judgment because she did not believe in the death penalty. (11 CT 2803.) However, she indicated that she could follow instructions on the law that differed from her beliefs. (11 CT 2803.)

Myra P. represented that she had a significant negative experience in job discrimination with a person of another race, but that she could evaluate the defendant and all witnesses fairly regardless or race, national origin or religion. (11 CT 2806.) Myra P. felt African-Americans are sometimes treated unfairly by the criminal justice system, but more likely to commit crimes than other racial groups. (11 CT 2806-2807.)

Myra P. reiterated that she did not believe in the death penalty, rating herself a "1," the most "strongly against" rating on a ten-point scale. (11 CT 2808-2809.) She wrote, "There are many innocent people who may die," and explained that a life without possibility of parole sentence would give a person the opportunity to prove he or she is not guilty. (11 CT 2809.)

Myra P. felt the death penalty served no purpose. (11 CT 2809.) However, she indicated that she would consider all the evidence and instructions and impose whichever penalty she personally felt appropriate. (11 CT 2810.) Based on Myra P.'s anti-death penalty comments on her

questionnaire, Johnson's trial counsel stated, "So I'm going to try to save her, if I can." (6 RT 1053.)

During voir dire, Myra P. told the court that she "really would always go for the life without parole," did not believe in the death penalty," could not see herself voting for death under any circumstance, and could not consider the death penalty as a viable option. (6 RT 1090-1092.) Later, she stated that it would be difficult. (6 RT 1098-1099.) Upon further questioning as to whether she would be "completely closed" to it, Myra P. stated that she would be open for consideration of the death penalty although it would be hard to vote for it. (6 RT 1099-1100.)

During questioning by the prosecutor, Myra P. reiterated that it would be very difficult but not impossible to vote to have someone executed, explaining that the case "would have to be really aggravating." (6 RT 1126.) The following colloquy between the prosecutor and Myra P. then occurred:

> Q You know, it's like my son asked me – 16-year-old son asked me if I would go out and buy him a motorcycle. I would tell him I'd consider it, but there ain't no way. You could you [*sic.*] you say, "Well, I'll consider it." But do you think that's a realistic possibility that you could return a death sentence?
>
> A I don't know, realistically.
>
> Q Not realistically?
>
> A Yeah.
>
> Q So it's jut kind of a – theory, you might be able to, but you don't think—
>
> A Yeah
>
> Q --you don't think it's realistic that you could return a death verdict?
>
> A Yes.

(6 RT 1127-1128.) However, Myra P. stated that she did not consider her feelings about the death penalty to be so strong that it would substantially impair her ability to return a death verdict. (6 RT 1128.)

4. The *Batson/Wheeler* Objection

The prosecutor exercised eight peremptory challenges to potential jurors. Keith B. was the fourth of those challenges. (8 RT 1373-1379.) He subsequently exercised three peremptory challenges to potential alternate jurors. Vanessa H. was the second of those challenges, and Myra P. was the third.[55] (8 RT 1382-1384, 1393-1395.)

Following the prosecutor's challenge to Myra P., Johnson made his *Batson/Wheeler* objection, arguing the prosecutor was improperly excluding African-American jurors. (8 RT 1384-1385.) Based on the fact that the prosecutor had exercised peremptory challenges against three of the four African-Americans involved in jury selection, the trial court found a prima facie showing sufficient to request the prosecutor's reasons for excusing Keith B., Vanessa H. and Myra P.. (8 RT 1386.)

The prosecutor explained that he excused Keith B. because he spent considerable time ministering to prison inmates and stated that he would lean on the side of mercy. (8 RT 1386-1387.) The prosecutor recognized that Keith B. agreed at one point during voir dire that he would consider the death penalty, but then reiterated that he "leaned on the side of mercy." (8

[55] Johnson erroneously states nearly 38% of the prosecutor's challenges were directed against African-Americans since he "used eight challenges in all." (AOB 72, fn. 30.) Johnson overlooks the fact that Vanessa H. and Myra P. were excused during selection of the alternates during which the prosecutor exercised three peremptory challenges in addition to the eight he had exercised during selection of the initial 12 jurors. Thus, the prosecutor only exercised three out of eleven or 27.27 % total peremptory challenges to African-Americans, further weakening Johnson's argument that it was "likely that racial considerations affected his use of challenges." (See AOB 72, fn. 30.).

RT 1387.) Accordingly, the prosecutor felt Keith B.'s sympathies did not favor the People and it would be very unlikely that he would render a death verdict. (8 RT 1387.)

As to Vanessa H., the prosecutor noted her "'Thou shalt not kill,'" "'2 months down the road,'" and "I can't even imagine" comments which caused him concern that she would have a hard time voting for death. (8 RT 1387.) The prosecutor further explained that Vanessa H.'s feelings on the death penalty remained unclear in light of her cryptic comments about her feelings not counting. (8 RT 1388.)

The prosecutor further cited the fact that Vanessa H. previously served on a hung jury wherein she expressed frustration with the other jurors whom she characterized as unfair. (8 RT 1387-1388.) Finally, the prosecutor explained that when he attempted to see if she was sympathetic to a drug-related victim, Vanessa H. gave difficult to understand responses which concerned him. (8 RT 1388.)

As to Myra P., the prosecutor noted her views against the death penalty. (8 RT 1389.) In light of those statements, the prosecutor believed Myra P. would not be able to render a death verdict and would be a bad juror for the People. (8 RT 1389.)

Subsequently, defense counsel argued various favorable aspects of Keith B., Vanessa H. and Myra P. (8 RT 1389-1392.) The prosecutor adamantly denied that any of his peremptory challenges were racially-motivated. (8 RT 1392.)

Thereafter, the trial court denied the *Batson/Wheeler* challenge as follows:

> Well, I said at the outset I did find there was sufficient prima facie concern here that I think Mr. West should comment on it. And at this point he has commented and he has given a number of reasons.

> I guess my duty now is to determine whether or not those reasons are based on reality or race. It does appear to me that he has overcome the prima facie showing that these might have been excused for a racial – or based upon some racial motivation. It does appear that he has a legitimate peremptory challenge for each of these, for good reasons, and reason that he stated for the record.

(8 RT 1392.)

B. Standard of Review

"Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on group bias." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1100, citing *Batson* and *Wheeler*.) Thus, prosecutors may rely on any legitimate basis to excuse a juror as long as it does not deny equal protection. (*People v. Lenix* (2008) 44 Cal.4th 602, 613, citing *Purkett v. Elem* (1995) 514 U.S. 765, 769 [115 S. Ct. 1769, 131 L.Ed.2d 834].)

A prosecutor's peremptory challenges are presumed to have been based upon constitutionally permissible grounds. (*People v. Lenix, supra,* 44 Cal.4th at pp. 613-614; *People v. Alvarez* (1996) 14 Cal.4th 155, 193.) Moreover,

> [T]he law recognizes that a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality. The evidence may range from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative.

(*People v. Wheeler, supra,* 22 Cal.3d at p. 275.)

Peremptory challenges "based on 'hunches' and even 'arbitrary' exclusion are permissible" provided they are not based on impermissible group bias. (*People v. Turner* (1994) 8 Cal.4th 137, 164-165, overruled on other grounds in *People v. Griffin* (2004) 33 Cal.4th. 536, 555, fn. 5.) "In addition, peremptory challenges are properly made in response to '"bare

looks and gestures' " by a prospective juror that may alienate one side." (*Id.* at p. 171, quoting *People v. Wheeler, supra,* 22 Cal.3d at p. 276.) "[E]ven a "'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias, supra,* 13 Cal.4th at p. 136.)

The party alleging *Batson*/*Wheeler* error carries the burden of establishing a prima facie case of discrimination. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1203.) The complaining party must "first. . . make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule." (*Id.* at pp. 1199-1200, quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154.)

The complaining party must then "make out a prima facie case by 'showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" (*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129] quoting *Batson v. Kentucky, supra,* 476 U.S. at pp. 93-94.) "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Id.* at p. 170.)

Where a prima facie case of discrimination is found, the burden shifts to the party exercising the peremptory challenge to show the absence of discrimination by offering permissible race-neutral reasons for the challenge. (*Johnson v. California, supra,* 545 U.S. at p. 168; *People v. Alvarez, supra,* 14 Cal.4th at p. 193.) The prosecutor's explanation need not rise to the level that would justify a challenge for cause. (*Batson v. Kentucky, supra,* 476 U.S. at p. 97; *People v. Arias, supra,* 13 Cal.4th at p. 136.)

The trial court must then decide whether the objecting party has proved purposeful racial discrimination. (*Johnson v. California, supra,* 545 U.S. at p. 168.) The trial court must make a "sincere and reasoned"

evaluation of the proffered explanations for the peremptory challenges. (*People v. Snow* (1987) 44 Cal.3d 216, 222.) If the trial court determines the peremptory challenges were exercised for race-neutral reasons, the *Batson/Wheeler* motion must be denied. (*People v. Wheeler, supra,* 22 Cal.3d at pp. 281-282.)

At this "third stage,"

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

(*People v. Lenix, supra,* 44 Cal.4th at p. 613, quoting *Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 [123 S.Ct. 1029, 154 L.Ed.2d 931] (*Miller-El I*) [footnote omitted].)

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions." (*People v. Lenix, supra,* 44 Cal.4th at p. 613 [trial court's ruling to be viewed with """great restraint"""].) This Court has observed that trial judges are in the best position to assess the credibility of prosecutors and evaluate their reasons for exercising peremptory challenges. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1197; *People v. Turner, supra,* 8 Cal.4th at p. 168.) "So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]" (*People v. Lenix, supra,* 44 Cal.4th at p. 614, citing *People v. Burgener* (2003) 29 Cal.4th 833, 824; see also *People v. Jackson, supra,* 13 Cal.4th at

p. 1197; *People v. Montiel* (1993) 5 Cal.4th 877, 909; *People v. Fuentes* (1991) 54 Cal.3d 707, 720-721 ["great deference" afforded to trial court].)

C. The Prosecutor's Race-Neutral Reasons Were Proper and Supported by the Record

Here, the trial court found a prima facie case and requested that the prosecutor explain his peremptory challenges against Keith B., Vanessa H. and Myra P.. The prosecutor's reasons were race-neutral, compelling and completely supported in the record.

The prosecutor explained that one of the reasons for excusing Keith B. was his prior work as a prison ministry pastor. (8 RT 1386-1387.) That explanation was amply supported in the record (6 CT 1393-1394) and a permissible reason for exercising the peremptory challenge.

Juror "professions [which] the prosecutor reasonably could believe would tend to make them overly sympathetic to the defense" are legitimate reasons for excusal. (*People v. Taylor* (2010) 48 Cal.4th 574, 644; see also *People v. Reynoso* (2003) 31 Cal.4th 903, 925; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260 [excluding juror based on his or her profession is "wholly within the prosecutor's prerogative"].) Keith B.'s prison ministry was such a profession. As aptly noted in *People v. Semien* (2008) 162 Cal.App.4th 701, 708, a "pastor is in the business of forgiveness, and the prosecutor was not required to accept the pastor's assurance that he could find someone guilty."

The prosecutor also excused Keith B. because of his professed bias against the death penalty in leaning on the side of mercy. (8 RT 1386-1387.) That explanation was supported by substantial evidence in the record (6 CT 1403-1404; 4 RT 731) and a permissible reason for excusal. It is proper for a prosecutor to dismiss a juror who expresses reservations about the death penalty. (*People v. Turner, supra,* 8 Cal.4th at p. 171 [juror said he "'would most likely vote'" for life rather than death penalty].)

In addition, Keith B. expressed concern about "errors & malpractice" in enforcement of the death penalty. (6 CT 1405.) It is permissible to excuse jurors for having doubts about the death penalty in general. (See *People v. Smith* (2005) 35 Cal.4th 334, 347-348.)

Moreover, Keith B. indicated on his questionnaire that he would not follow an instruction on the law which violated his "conscience or convictions." (6 CT 11.) Accordingly, the prosecutor's reasons for exercising a peremptory challenge against Keith B. were proper and fully supported by the record.

The prosecutor also had concern that Vanessa H. would be a bad prosecution juror based on her inconsistent and cryptic statements about the death penalty such as "Thou shalt not kill," that she could not imagine whether she would ever vote for a death verdict and that her feelings on the death penalty did not count. (8 RT 1387-1388.) Those concerns were fully justified in light of Vanessa H.'s questionnaire and voir dire. (8 CT 2220-2221; 6 RT 1198-1199, 1226-1228.) As previously discussed, a juror's reservations or doubts about the death penalty are legitimate, race-neutral reasons for exercising a peremptory challenge. (*People v. Smith, supra,* 35 Cal.4th at pp. 347-348; *People v. Turner, supra,* 8 Cal.4th at p. 171.)

The best that could be said of Vanessa H. was that she was undecided on how she felt about the death penalty. Indecision about the death penalty is likewise a permissible reason for excusing a juror. (See *People v. Mills* (2010) 48 Cal.4th 158, 177; see also *People v. Thompson* (2010) 49 Cal.4th 79, 109 [juror's failure to reveal his attitudes toward a particular matter].)

The prosecutor also cited Vanessa H.'s prior service on a hung jury as a reason for excusal. (8 RT 1387-1388.) Again, this reason was supported by the record. (8 CT 2209; 6 RT 1230-1231.) "[P]rior service on a deadlocked jury is an acceptable race-neutral ground for" exercising a

peremptory challenge. (*People v. Taylor, supra,* 48 Cal.4th at p. 644; see also *People v. Turner, supra,* 8 Cal.4th at p. 170.)

The prosecutor further expressed a concern about Vanessa H.'s ability to understand questions and give comprehensible answers in regards to his important inquiry into the shooting of her step-son. (8 RT 1388.) Vanessa H.'s rambling responses wherein she alternatively criticized but then excused the conduct of the Michigan police officers adequately supported the prosecutor's concern.[56] (6 RT 1228-1230.) "Of course, where a prosecutor's concern for a juror's ability to understand is supported by the record, it is a proper basis for challenge." (*People v. Turner, supra,* 8 Cal.4th at p. 169.)

The prosecutor explained that he excused Myra P. due to her ambivalence and negative comments about the death penalty, which included statements that she would have difficulty and might not "realistically" be able to return a death verdict. (8 RT 1389.) Once again, the prosecutor's explanation was fully supported by the record. (11 CT 2803, 2808-2809.) Indeed, Myra P. indicated in her questionnaire that she did not believe in the death penalty (11 CT 2803), the death penalty served no purpose (11 CT 2809), and a life sentence would give defendants the opportunity to prove their innocence (11 CT 2809). Myra P. even rated herself as most strongly against the death penalty on the questionnaire's ten-point scale. (11 CT 2808-2809.)

Myra P.'s anti-death penalty views were so extreme so as to prompt defense counsel to comment that he would "try to save her, if [he] can." (See 6 RT 1053.) Myra P.'s voir dire just confirmed her inability to

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[56] "[A] prospective juror's negative experience with law enforcement" is a proper basis for a peremptory challenge. (*People v. Turner, supra,* 8 Cal.4th at p. 171.)

seriously consider rendering a death verdict. (See 6 RT 1090-1092, 1098-1100, 1126-1128.) Myra P.'s reservations and doubts about the death penalty were legitimate, race-neutral reasons for excusing her. (See *People v. Smith, supra,* 35 Cal.4th at pp. 347-348; *People v. Turner, supra,* 8 Cal.4th at p. 171.)

It also should be noted that the prosecutor accepted an African-American on the sworn jury. (8 RT 1385-1386.)

> "'While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection.'"

(*People v. Thompson, supra,* 49 Cal.4th at p. 110, quoting *People v. Stanley* (2006) 39 Cal.4th 913, 938, fn. 7; see also *People v. Lewis* (2008) 43 Cal.4th 415, 480; *People v. Huggins* (2006) 38 Cal.4th 175, 236; *People v. Turner, supra,* 8 Cal.4th at p. 168.) The record supports the trial court's finding that each of the prosecutor's peremptory challenges was properly exercised.

D. The Trial Court's Denial of the *Batson/Wheeler* Motion is Entitled to Deference

The trial court engaged in the requisite sincere and reasoned evaluation of the prosecutor's reasons for exercising the peremptory challenges. After having listened to the prosecutor's explanations as well as the arguments of defense counsel, the court found the prosecutor's reasons for challenging Keith B., Vanessa H. and Myra P. were legitimate and race-neutral. (8 RT 1392.) As discussed above, substantial evidence in the record supported the trial court's conclusions. Accordingly, the trial court's ruling is entitled to deference. (See *People v. Lenix, supra,* 44 Cal.4th at pp. 613-614.)

Johnson counters that the trial court failed to engage in a sincere and reasoned evaluation because it did not address inconsistencies between the prosecutor's "unsupported or implausible explanations" and the facts. (See AOB 76.) The premise of Johnson's argument is unfounded. As shown above, the prosecutor's explanations were eminently reasonable and fully supported by the record consisting of the juror questionnaires as well as voir dire.

Johnson also complains that the trial court made no factual findings. (See AOB 76.) However, the court's reasoning need not be express. (See *People v. Mills, supra,* 48 Cal.4th at p. 176.)

Johnson further attempts to build an argument around the trial court's use of the word "appears" in its ruling. (See AOB 73.) Such argument, based on meaningless semantics taken out of context, should be rejected.

Johnson cites various positive aspects about Vanessa H. and her responses to support his argument that the prosecutor's peremptory challenge against her was racially motivated.[57] (See AOB 77-81.) "But the mere possibility that one could draw plausible inferences about [a potential juror] other than those the prosecutor did does not mean the prosecutor's stated reason was pretextual." (*People v. Thompson, supra,* 49 Cal.4th at p. 108.) "The proper focus of a *Batson/Wheeler* inquiry, of course, is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons." (*People v. Reynoso, supra,* 31 Cal.4th at p. 924, citing *Purkett v. Elem* [emphasis in original].)

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[57] Conspicuously, Johnson presents no similar argument attacking the prosecutor's reasons for excusing Keith B. and Myra P., perhaps conceding this argument as to those two individuals. (See AOB 76-82.)

For example, Johnson argues Vanessa H.'s criticisms of the other jurors in her prior civil trial would have "made her a 'great juror.'" (AOB 81, citing 6 RT 1231.) However, Johnson misses the point. The problem with Vanessa H.'s prior jury service was that it evidenced potential problems with her working productively in a group regardless of differences in opinion as well as an inability to effectively communicate her concerns to fellow jurors.

Finally, Johnson implicitly invites this Court to engage in comparative juror analysis in regards to Vanessa H.. (AOB 77.) Comparative analysis does not assist Johnson's *Batson*/*Wheeler* claim.

"[E]vidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*People v. Lenix, supra,* 44 Cal.4th at p. 622; see also *People v. Cruz* (2008) 44 Cal.4th 636, 658.) Although comparative analysis is one form of relevant circumstantial evidence, it is "'not necessarily dispositive [] on the issue of intentional discrimination.'" (*People v. Cruz, supra*, 44 Cal.4th at p. 658 quoting *People v. Lenix, supra,* 44 Cal.4th at p. 622.) The reviewing court must still be mindful of the inherent limitations of conducting comparative juror analysis "on a cold appellate record." (*People v. Lenix, supra,* 44 Cal.4th at p. 622, citing *Snyder v. Louisiana* (2008) 552 U.S. 472, 483 [128 S.Ct. 1203, 1211, 170 L.Ed.2d 175].)

As this Court has observed:

> There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact.

(*People v. Lenix, supra*, 44 Cal.4th at p. 622.)

As further recognized by this Court:

> [A]lthough a written transcript may reflect that two or more prospective jurors gave the same answers to a question on voir dire, "it cannot convey the different ways in which those answers were given. Yet those differences may legitimately impact the prosecutor's decision to strike or retain the prospective juror. When a comparative juror analysis is undertaken for the first time on appeal, the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers." [Citation.] Observing that "[v]oir dire is a process of risk assessment" [citation], we further explained that, "[t]wo panelists [i.e., prospective jurors] might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding."

(*People v. Cruz, supra,* 44 Cal.4th at pp. 658-659, quoting *People v. Lenix, supra,* 44 Cal.4th at p. 623.) Accordingly, comparative juror analysis is most effectively considered in trial courts where an "inclusive record" of the comparisons can be made by the defendant, the prosecutor has an opportunity to respond to the alleged similarities and the court can evaluate counsels' arguments based on what it saw and heard during jury selection. (*People v. Lenix, supra*, 44 Cal.4th at p. 624.)

Preliminary, it should be noted that, in the trial court, Johnson suggested comparative analysis with three seated jurors -- Juror Nos. 4, 5 and 6. (8 RT 1390.) On appeal, Johnson summarily cites to the questionnaires of six other jurors as his entire comparative analysis argument. (AOB 79, & fn. 32 [referring to Juror No's 2, 5, 8, 10, 11 & 12].) "The reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment." (*People v. Lenix, supra,* 44 Cal.4th at p.

624.) Accordingly, this Court need not engage in comparative analysis as to Juror Nos. 4 and 6.

Moreover, as conceded by Johnson, Juror No. 8 was African-American. (See AOB 71 fn. 29, citing 8 RT 1385.) Therefore, his claim of disparate treatment based on race can be rejected at the outset insofar as his comparative analysis with Juror No. 8. Nonetheless, a true comparison of all the jurors cited in the Opening Brief readily defeats Johnson's comparative analysis argument.

Juror No. 2 indicated that a person who commits severe crimes with no remorse should be considered for the death penalty (4 CT 985) and that failing to vote for death where just and necessary "would be the easy way out." (4 RT 818.)

Juror No. 5 commented that the death penalty can benefit the victim's relatives and noted the expense to the taxpayers from a life without possibility of parole sentence. (4 CT 1043, 1044.)

Juror No. 8 felt there should be a death penalty so that people would think before committing crimes and cited harm to his or her 12-year-old daughter as a purpose for the death penalty. (5 CT 1099, 1100.)

Juror No. 10 stated that he or she "probably would initiate the death penalty" for defendants who murdered more than once in a violent way, that the death penalty "is the only option left" for repeat murderers, and that the death penalty is "[t]he only way some people will learn." (5 CT 1137, 1138, 1139.) In voir dire, Juror No. 10 reiterated his belief that repeat killers deserved the penalty and did not need to be in society. (6 RT 1133.)

Juror No. 11 believed "there are circumstances where the death penalty is warranted" after "diligent study of the facts, etc.," and indicated in voir dire that she could "deliver... the death penalty" because she believed "laws should be enforced if societies are going to endure." (5 CT 1156; 4 RT 840.)

Juror No. 12 felt "some factors" warrant the death penalty, stated that over time his or her views have changed due to individuals who deserved the death penalty, and felt the death penalty served the purpose of "scaring straight" children and reducing crime. (5 CT 1175, 1176.) In voir dire, Juror No. 12 indicated he or she could impose the death penalty if the aggravating circumstances outweighed those in mitigation and that the special circumstances made "all the difference." (6 RT 1232.)

Unlike Vanessa H.'s confusing and evasive statements about the death penalty and her feelings which "did not count," the questionnaires and voir dire demonstrably show Juror Nos. 2, 5, 8, 10, 11 and 12 had rather strong views in favor of the death penalty. Furthermore, none of the six jurors cited by Johnson previously served on a hung jury. (4 CT 974, 1031; 5 CT 1088, 1126, 1145, 1164.)

In addition, Juror No. 5 commented that she thought O.J. Simpson was guilty (4 CT 1034) and Juror No. 11 stated that justice was not served in the Simpson trial, citing the devastation to one of the victim's family (5 CT 1148.) In contrast, Vanessa H. cited no high publicity cases that she had followed. (8 CT 2212.)

In short, all six jurors Johnson suggests for comparative analysis were excellent for the prosecution in stark comparison to Vanessa H. with her very troubling responses (and lack thereof) on the death penalty and her prior upsetting experience on a hung jury. A comparison with seated jurors does not show a discriminatory exercise of peremptory challenges.

In Johnson's case, the prosecutor had compelling non-racial reasons for excusing Keith B., Vanessa H. and Myra P., the trial court made a sincere and reasoned evaluation of those explanations which were well-supported by substantial evidence in the record, and the trial court's ruling is entitled to deference. Even without deference, the record convincingly shows the prosecutor's reasons for exercising the peremptory challenges

were genuine and not racially motivated. Accordingly, Johnson's *Batson/Wheeler* claim should be rejected.

III. JOHNSON FORFEITED HIS DYING DECLARATION CLAIM BY FAILING TO PRESS FOR A FORMAL RULING IN THE TRIAL COURT; THE ADMISSION OF LOPEZ'S DYING DECLARATIONS DID NOT VIOLATE JOHNSON'S CONSTITUTIONAL RIGHTS TO CONFRONTATION, DUE PROCESS OR A RELIABLE VERDICT; AND JOHNSON FAILS TO SHOW ADMISSION OF THE STATEMENTS WAS AN ABUSE OF DISCRETION OR PREJUDICIAL

Johnson claims the admission of Lopez's dying declarations violated his constitutional rights to confrontation, due process and a reliable verdict, the dying declarations were not sufficiently reliable to be admitted, and admission of the dying declarations caused reversible error in the guilt and penalty phases. (AOB 84-95.) None of Johnson's contentions has merit.

Prior to the presentation of the prosecutor's case-in-chief, Johnson objected to the admission of Lopez's statements to Officer Hurt and Officer Olson as dying declarations under the Sixth, Eight and Fourteenth Amendments as well as general hearsay grounds. (12 RT 1911-1912, 1914.) Johnson specifically argued one of the officers at the scene (Officer Garzoni) reported Lopez's condition as critical, but stable and not life-threatening. (12 RT 1912.)

The prosecutor responded that there were a number of statements made by Lopez each of which qualified as a dying declaration with the requisite foundation. (12 RT 1912.) The prosecutor made an offer of proof of Dr. Choi's testimony which would establish the severity of Lopez's injuries as well as the extreme pain she was experiencing despite one officer's opinion. (12 RT 1912-1913.) The prosecutor indicated that Lopez was informed of the seriousness of her condition and died within several hours of the shooting, and cited Lopez's request of her mother to take care

of her children prior to going into surgery as evidence of Lopez's sense of impending death. (12 RT 193-1914.) Thereafter, Johnson made an additional objection to the "take care of my children" statement being admitted at the guilt phase. (12 RT 1915-1917.)

The trial court gave a "preliminary indication that I would probably be allowing" Lopez's statements to be admitted as dying declarations under Evidence Code section 1242.[58] (12 RT 1917-1918.) However, the court indicated that it would exclude the "take care of my children" statement from the guilt phase. (12 RT 1921.) The court granted Johnson's request to deem his objections to the dying declarations to be a continuing objection throughout the trial testimony establishing the foundation for the statements' admissibility. (12 RT 1918.)

At the guilt phase, Lopez's brother, Mario Roman testified that he ran to the corner where he saw Lopez lying in the street near the driver's door of Alvarez's car. (12 RT 1955-1956.) Lopez was bleeding from her side, conscious but barely talking, cringing in pain, breathing slowly and looking pale. (12 RT 1957-1958.) Roman asked Lopez who shot her. Lopez replied, "Lamar Johnson," as she lie in pain, gasping for air and appearing weaker. (12 RT 1959.)

Following the prosecutor's laying of the foundation for the admission of Lopez's statement to her brother, Johnson did not request a final ruling on his dying declaration objection. (See 12 RT 1969-1960.)

Wilson Cooper, one of Lopez's neighbors, testified that he heard the gunshot and ran into the street where he saw Lopez lying on the ground,

[58] Evidence Code section 1242 provides: "Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death."

bleeding and yelling for help. Cooper told her not to move and asked someone to call for help. (12 RT 1963-1967.) Lopez told Cooper, "He shot me." (12 RT 1967.)

Johnson did not request a final ruling on his dying declaration objection during Cooper's testimony. (See 12 RT 1966-1967.)

California Highway Patrol Officer Jon West testified that he observed Lopez lying in the street, rolled up in a fetal position, looking pale and grunting with labored breathing. She appeared to be in great pain. (12 RT 1978-1980.) West asked her what happened, and Lopez responded that she had been shot. When West asked who did it, Lopez said, "Lamar did it." (12 RT 1981.) When asked for a description of the shooter, Lopez described Johnson as a short, stocky Black man who was wearing Levi shorts and no shirt. (12 RT 1981-1982.) Within a couple of minutes, paramedics arrived. (12 RT 1982.)

Following the prosecutor's laying of the foundation for the admission of Lopez's statement to Officer West, Johnson did not request a final ruling on his dying declaration objection. (See 12 RT 1981-1982.)

Riverside Police Officer Darryl Hurt responded to the scene while a paramedic was attending to Lopez in the street. (12 RT 1987-1988, 1992.) Hurt testified that Lopez was lapsing into unconsciousness and appeared to be in great pain with a bleeding chest injury. (12 RT 1989-1990.) Realizing she was in grave condition, Hurt asked Lopez who shot her. Lopez replied, "Lamar shot me," and indicated that he lived in Williams's house with a movement of her head. (12 RT 1990.) Before losing consciousness, Lopez described Johnson as a Black male, who was approximately 28 years old, balding, big and wearing no shirt. (12 RT 1991.)

Following the prosecutor's laying of the foundation for the admission of Lopez's statement to her Officer Hurt, Johnson did not request a final ruling on his dying declaration objection. (See 12 RT 1989-1991.)

Riverside Police Officer Patrick Olson testified that he interviewed Lopez at Riverside Community Hospital. (12 1995-1996.) Lopez told Olson that she and Alvarez were standing next to the car when "Lamar" approached them with a rifle and started an argument with Alvarez, Johnson pointed the rifle at Alvarez, she stepped in between Johnson and Alvarez because she thought he was going to shoot Alvarez and thought he would not shoot her, and then Johnson shot her once. (12 RT 1999-2000.) Lopez also indicated that Johnson was known to visit the house at the corner of Beloit and Lincoln. (12 RT 2000.)

During Officer Olson's testimony, Johnson did not request a final ruling on his dying declaration objection. (See 12 RT 1999-2000.)

Dr. Choi testified that Lopez suffered a gunshot wound to her right breast, which was almost one inch in diameter, (14 RT 2223-2224), the gun was fired at relatively close range (14 RT 2224-2227, 2233), there were hundreds of shotgun pellets as well as shotgun wad inside of Lopez's chest (14 RT 2227, 2231-2233), the pellets penetrated Lopez's diaphragm, damaging the liver, perforating the vena cava and right kidney and resulting in substantial blood loss (14 RT 2234-2235). Choi further testified that Lopez would have experienced painful incapacitation and fainting due to the blood loss. (14 RT 2235-2236.)

Following the prosecutor's laying of additional foundation for Lopez's statements through Dr. Choi's testimony, Johnson did not request a final ruling on his dying declaration objection. (See 14 RT 2223-2236.) Indeed, during Johnson's cross –examination of Dr. Choi the prosecutor withdrew an objection to Lopez's blood toxicology results "since she did

make a dying declaration." (14 RT 2255.) Yet, Johnson still made no request for a final ruling on his objection. (See 14 RT 2255-2256.)

During the penalty phase, Lopez's mother described how she and her family found Lopez lying on the street following the shooting and followed the ambulance to the hospital. (43 RT 6574-6578.) She testified that Lopez's last words to her was a request to take care of her children prior to going into surgery. (43 RT 6578.)

During the testimony of Lopez's mother, Johnson did not request a final ruling on his dying declaration objection. (See 43 RT 6578.)

A. Johnson's Claim Was Forfeited

Evidence Code section 353 states:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
>
> (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

In order to preserve a challenge to the admission of trial evidence for appeal purposes, a party must comply with Evidence Code section 353. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171.) These requirements may be satisfied by a "properly directed motion *in limine*" in which the party obtains an "express ruling" from the trial court. (*Ibid.*) However, "[f]ailure to press for a ruling on a motion to exclude evidence forfeits appellate review of the claim because such failure deprives the trial court of the opportunity to correct potential error in the first instance." (*People v.*

Lewis, supra, 43 Cal.4th at p. 481 [*Batson/Wheeler* motion]; see also *People v. Ramirez* (2006) 39 Cal.4th 398, 449-450, 472 [shackling and instructional objections]; *People v. Cunningham* (2001) 25 Cal.4th 926, 984 [severance motion].)

In Johnson's case, the trial court only gave a "preliminary indication" of how it would rule on the dying declarations pending the prosecutor laying the appropriate foundation at trial. (12 RT 1917-1918.) Thus, it was incumbent on Johnson to press for a formal ruling on his objection and raise pertinent arguments at the time that evidence was presented.

> A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself. [Citations.]

(*People v. Holloway* (2004) 33 Cal.4th 96, 133.)

> [T]he distinction between a tentative ruling and a final one does not turn on whether the court has given significant consideration to the issue; it turns on whether the court has finished its consideration of the issue.

(*People v. Ennis* (2010) 190 Cal.App.4th 721, 736.)

Here, the trial court clearly only made a tentative ruling on Johnson's objection to the dying declarations, implicitly inviting him to press for a contrary ruling based on any lack of foundation at trial. Presumably, Johnson elected not to do so given the fully adequate foundation for the statements established by several witnesses. Regardless of his reason, Johnson forfeited his claim for purposes of appeal by failing to press for a final ruling from the trial court. (See *People v. Lewis, supra,* 43 Cal.4th at p. 481; *People v. Ramirez, supra,* 39 Cal.4th at pp. 449-450, 472; *People v. Cunningham, supra,* 25 Cal.4th at p. 984.)

Moreover, Johnson presents on appeal various arguments regarding the reliability of Lopez's statements to Officer Olson which were not raised in the trial court. (Compare AOB 91-92 with 12 RT 1911-1921.) This further forfeited Johnson's claim on appeal. (See *People v. Holloway, supra,* 33 Cal.4th at p. 133 ["could and should have presented those theories to the trial court"].) Accordingly, Johnson has forfeited his dying declarations claim.

B. The Dying Declarations Did Not Violate Johnson's Constitutional Rights

In *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*), the United States Supreme Court held the admission of out-of-court "testimonial" statements violates the Sixth Amendment unless the witness is unavailable to testify and the defendant was afforded a prior opportunity to cross-examine the witness. (*Crawford, supra,* 541 U.S. at pp. 59, 68.) In so ruling, the Court abandoned its long-standing holding in *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [100 S.Ct. 2531, 65 L.Ed.2d 597], which had allowed the admission of such statements if they qualify under a "firmly-rooted hearsay exception" or bear "particularized guarantees of trustworthiness." (*Crawford, supra*, 541 U.S. at pp. 68-69.) The Court left the *Roberts* rule in place for "non-testimonial" statements. (*Id.* at pp. 68-69.)

The *Crawford* Court identified the "core class of "testimonial" statements as

> ex parte in court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, [citation]; extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, [citation]; [and] statements that were made under circumstances which would lead an objective witness

> reasonably to believe that the statement would be available for use at a later trial, [citation].

(*Crawford*, 541 U.S. at pp. 51-52 [internal quotes omitted].) The Court also concluded that the term "testimonial" "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Crawford*, *supra,* 541 U.S. a at p. 68.)

Johnson contends dying declarations should be subject to the rule in *Crawford.* (AOB 85-88.) He is mistaken.

The holding in *Crawford* was based on "the right of confrontation at common law, admitting only those exceptions established at the time of the founding." (*Id.* at p. 54.) The Supreme Court specifically found dying declarations constituted such a historical exception to the right of confrontation. (*Id.* at p. 56, fn. 6.) The Court explained:

> The one deviation we have found involves dying declarations. *The existence of that exception as a general rule of criminal hearsay law cannot be disputed.* [Citations.] Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. [Citations.] We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.

(*Ibid.* [emphasis added].)

Undaunted by this clear language defeating his constitutional claim, Johnson attempts to denigrate the Supreme Court's pronouncement on dying declarations as dicta and quarrel with the high Court's finding of an indisputable historical exception to the Confrontation Clause. (See AOB 86-88.) Similar arguments were rejected by this Court in *People v. Monterroso* (2004) 34 Cal.4th 743, 764-765, and *People v. D'Arcy* (2010) 48 Cal.4th 257, 291-292. As this Court held, "the common law pedigree of

the exception for dying declarations poses no conflict with the Sixth Amendment." (*People v. Monterroso, supra,* 34 Cal.4th at p. 765.)

Johnson asks this Court to reconsider its holding in *Monterroso*. (AOB 88.) However, like the defendant in *D'Arcy*, Johnson fails to "provide persuasive reason for [this Court] to revisit that decision," merely reasserting previously dismissed arguments. (See *People v. D'Arcy, supra,* 48 Cal.4th at p. 292.) Thus, Johnson's claim that Lopez's dying declarations were admitted in violation of his Sixth Amendment right to confrontation should be rejected.

In the alternative, Johnson argues admission of dying declarations are violative of due process and a reliable verdict because they are in his view inherently unreliable. (See AOB 88-91.) Contrary to Johnson's contentions, "from time immemorial [dying declarations] have been treated as competent testimony" and necessary "to prevent a manifest failure of justice." (*Mattox v. United States* (1895) 156 U.S. 237, 243-244 [15 S.Ct. 337, 39 L.Ed. 409].)

Moreover, specific indicia of reliability are built into California's statutory provision for admitting dying declarations. Evidence Code section 1242 states:

> Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death.

As the Supreme Court recognized in *Mattox*, "the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath." (*Mattox v. United States, supra,* 156 U.S. at p. 244.)

Furthermore, as discussed below, the dying declarations were properly admitted pursuant to Evidence Code section 1242. Where evidence is properly admitted, there is no violation of due process. (*People*

v. Burgener, supra, 29 Cal.4th at p. 872; *People v. Farnam* (2002) 28 Cal.4th 107, 184.) Accordingly, Johnson's constitutional challenge to the dying declarations under the Eighth and Fourteenth Amendments should be rejected in addition to his Sixth Amendment claim.

C. Johnson Fails to Show the Admission of the Dying Declarations Constituted an Abuse of Discretion in His Case

Johnson further claims the reliability of the dying declarations in his case was insufficient for them to be admitted. (AOB 91-93.) A trial court's ruling on the admissibility of a dying declaration is reviewed for abuse of discretion. (See *People v. Monterroso, supra,* 34 Cal.4th at p. 763; see also *People v. Guerra, supra,* 37 Cal.4th at p. 1113 ["abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence"].)

> Under the abuse of discretion standard, "a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice."

(*People v. Guerra, supra,* 37 Cal.4th at p. 1113, citing *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) Johnson cannot show any such abuse of discretion here.

For a statement to qualify as a dying declaration, it must concern "the cause and circumstances" of the declarant's death, be based on the declarant's "personal knowledge" and be made "under a sense of immediately impending death." (Evid. Code, § 1242.)

> "'this sense of impending death may be shown in any satisfactory mode, by the express language of the declarant, or be inspired from his evident danger, or the opinions of medical or other attendants stated to him, or from his conduct, or other circumstances in the case, all of which are resorted to in order to ascertain the state of the declarant's mind.'"

(*People v. Monterroso, supra,* 34 Cal.4th at p. 763, quoting *People v. Tahl* (1967) 65 Cal.2d 719, 725.) The prosecution must establish the "objective severity" of the fatal wounds as well as the declarant's "subjective awareness of those wounds." (*Ibid.*)

Each of these elements were satisfied in Johnson's case. It was uncontroverted that Lopez's statements about the shooting were from personal knowledge and concerned the circumstances of her death. The evidence also established that Lopez made her statements under the sense of immediately impending death.

In *Monterroso*, the declarant suffered a gunshot wound which pierced his respiratory system, gastrointestinal system and liver. (*People v. Monterroso, supra,* 34 Cal.4th at p. 763.) There was testimony to the effect that the declarant knew he had been shot, was in great pain, lying on the ground in a fetal position and fearful of dying. (*Ibid.*) Based on these facts, this Court found no abuse of discretion in admitting the declarant's statements as dying declarations. (*Ibid.*) Similarly, Lopez's statements were admissible.

The objective severity of Lopez's fatal wounds was shown through Dr. Choi's testimony. Lopez suffered significant damage to her diaphragm, critical internal organs (the liver and kidney) and a primary vein, resulting in significant blood loss. (14 RT 2234-2235.) Her chest was filled with hundreds of shotgun pellets. (14 RT 2227, 2231-2233.) Choi further testified to the pain and incapacitation that Lopez would have been experiencing. (14 RT 2235-2236.)

Lopez's subjective awareness of those wounds was most obviously established by the fact that she knew that she had been shot in the chest at close range, rather than some other non-vital area of the body. Moreover, the testimony of several witnesses at the shooting scene established that Lopez was curled up in a fetal position, experiencing great pain, bleeding

with labored breathing, gasping for air, and lapsing in and out of consciousness when she made the various dying declarations. (12 RT 1959, 1978-1980, 1989-1990.)

At the hospital, Lopez asked her mother to take care of her children prior to going into surgery. (43 RT 6578.) As the family followed Lopez's ambulance to the hospital, it can fairly be inferred that Lopez's statement to her mother was made close to the time that Officer Olson interviewed her. (See 43 RT 6574-6578.) Considering all the circumstances, the trial court did not abuse its discretion in finding Lopez believed she was going to die from her wounds at the time she made her statements to the various police officers and her family.

The fact that Lopez did not die until several hours after the shooting did not undermine the admissibility of her dying declarations. The declarant in *Monterroso* died 11 days after he made his statements at the shooting scene. (*People v. Monterroso, supra,* 34 Cal.4th at p. 763.) This Court found "the trial court did not abuse its discretion in admitting the statements under the exception for dying declarations, even though [the declarant] lingered on for several more days before dying." (*Ibid.*)

Given the ample evidence supporting the trial court's exercise of discretion in admitting Lopez's statements, Johnson's arguments regarding reliability and credibility essentially goes to the weight rather than admissibility of the evidence. "Once the court makes a preliminary determination to admit a statement as a dying declaration [citations], only the jury can assay the weight of that evidence. [Citations.]" (*People v. Smith* (1989) 214 Cal.App.3d 904, 913 [footnote omitted].) Likewise, Johnson's arguments on appeal would have been more properly directed to the jury.

The dying declarations were properly admitted. As Johnson fails to show the trial court's exercise of discretion in admitting the evidence was

arbitrary, capricious or patently absurd, the court's ruling must be upheld. (See *People v. Guerra, supra,* 37 Cal.4th at p. 1113; *People v. Rodriguez, supra,* 20 Cal.4th at pp. 9-10.)

D. Even Assuming Error, Johnson Was Not Prejudiced

Even assuming the inadmissibility of the dying declarations, any alleged error was harmless. As discussed above, the admission of dying declarations does not implicate federal constitutional rights. Therefore, any alleged error in the guilt phase would be one of state law to be reviewed under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818. (See *People v. Epps* (2001) 25 Cal.4th 19, 29.) Under *Watson*, reversal of the judgment is unwarranted unless, "'after an examination of the entire cause, including the evidence" [citation], it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred." (*People v. Breverman* (1998) 19 Cal.4th 142, 178, quoting Cal. Const., art. VI, § 13, and *People v. Watson, supra*, 46 Cal.2d at p. 836.)

Independent of the dying declarations, there was substantial evidence supporting Johnson's *second degree* murder conviction for the Lopez killing through the testimony of Alvarez, Brightmon and Galloway. A second degree murder conviction can be based on one of three theories: "unpremeditated murder with express malice, implied malice murder, and second degree felony murder." (See *People v. Beames* (2007) 40 Cal.4th 907, 926.)

Johnson's jury was instructed on the first and second theories of second degree murder as follows:

> Murder of the second degree is [also] the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation.

(14 CT 3770 [CALJIC No. 8.30].)

> Murder of the second degree is [also] the unlawful killing of a human being when:
>
> 1. The killing resulted from an intentional act,
>
> 2. The natural consequences of the act are dangerous to human life, and
>
> 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.
>
> When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being.

(14 CT 3771 [CALJIC No. 8.31].)

Alvarez's testimony showed Johnson had the gun pointed at Alvarez and Lopez, he moved the gun around toward Alvarez, and Johnson fired the gun as Lopez intervened. (20 RT 3132-3133, 3147, 3150, 3154-3155.) Although Alvarez did not specifically see him pull the trigger, Johnson was in full control of the gun when it was fired. (20 RT 3153-3154.) It would have taken approximately eight pounds of force to pull the shotgun's trigger. (16 RT 2605-2606.) Thus, any claim of an accidental firing was effectively precluded. Moreover, Johnson's animosity toward Alvarez was clear. (20 RT 3115-3116.) Alvarez's testimony in itself proved a second degree intentional murder without deliberation and premeditation.

There was also substantial evidence for second degree murder on the theory of an unlawful act dangerous to human life independent of the dying declarations. It was proved through Alvarez, Brightmon and Galloway that Johnson intentionally introduced a loaded shotgun into a highly volatile,

physical confrontation.[59] (12 RT 2013-2015, 2020-2023, 2060-2061; 20 RT 3126-3129; 22 RT 3398-3400, 3415-3416.) Like the classic example of throwing a heavy object out of a window onto a crowded sidewalk, Johnson's arming and use of a loaded firearm in the altercation -- with Alvarez, Lopez and the other men on the porch all well within the danger zone – constituted a deliberate act "performed with knowledge of the danger to, and with conscious disregard for, human life" whether or not Johnson intended to kill anyone.[60] Any alleged error in the guilt phase was harmless.

For the same reasons, any alleged error in admitting the dying declarations was harmless in the penalty phase. Moreover, the overwhelming aggravating evidence which included three unlawful killings, a drive-by shooting, an assault following a shooting by a companion, numerous incidents of violence and weapon possession in custody and criminal threats including a threat to blow up a school, rendered the particulars of the Lopez murder less significant in the penalty phase. Accordingly, there is no reasonable or realistic possibility that any alleged error regarding the dying declarations affected the penalty phase verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 448, and Argument XVI B, *infra.*)

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[59] Johnson mistakenly assumes the "act" in conscious disregard of human life must have been the intentional firing of the gun. (See AOB 93-94.)

[60] Accordingly, Galloway's testimony that Johnson looked "shocked and surprised" when the gun went off is not inconsistent with his being guilty of second degree murder. (12 RT 2024.)

IV. THE TRIAL COURT'S DENIAL OF A MISTRIAL MOTION BASED ON A WITNESS'S VOLUNTEERED "HENCHMAN" COMMENT DID NOT VIOLATE JOHNSON'S RIGHT TO DUE PROCESS OR A RELIABLE VERDICT

Johnson claims his rights to due process and a reliable verdict were violated because the trial court denied his motion for a mistrial after a witness commented that Brightmon was Johnson's "henchman." (AOB 96-98.) However, the trial court did not abuse its discretion in denying the motion for the fleeting comment which was effectively cured by the trial court's striking the testimony and instructions to the jury.

During the guilt phase presentation of evidence regarding the Lopez murder, Alan Ford testified for the prosecution. (14 RT 2286.) During direct, the prosecutor asked Ford if he knew the relationship between Brightmon and Johnson. Ford answered, "He's Lamar's henchmen [sic.]." (14 RT 2291.)

Johnson and Brightmon objected, and Brightmon moved to strike the answer. The trial court granted the motion to strike. (14 RT 2291.) Thereafter, the prosecutor asked whether Johnson and Brightmon were friends and frequently associated with each other, and Ford answered yes to both questions. (14 RT 2291-2293.)

Prior to the conclusion of the day's proceedings, Johnson and Brightmon moved for a mistrial based on Ford's "henchman" comment. (14 RT 2312-2313.) The trial court observed that the comment "was pretty much blurted" out and that it was somewhat surprised by the answer. (14 RT 2313.) The prosecutor likewise stated that he was surprised by the comment which was not anticipated. (14 RT 2313.) Nonetheless, Johnson argued Ford's comment created the impression that Johnson was a "kingpin." (14 RT 2315.) The trial court denied the mistrial motion, suggesting that the prosecutor "talk to his witnesses better" but noting that "everybody was caught off guard." (14 RT 2315, 2316.)

This Court has recognized that a volunteered statement by a witness can result in incurable prejudice. (*People v. Williams* (1997) 16 Cal.4th 153, 211, citing *People v. Wharton* (1991) 53 Cal.3d 522, 565.) However, "'[A] motion for mistrial should be granted only when "'a party's chances of receiving a fair trial have been irreparably damaged.'"'" (*People v. Ayala* (2000) 24 Cal.4th 243, 284, quoting *People v. Ayala* (2000) 23 Cal.4th 225, 282.)

The trial court's ruling on a mistrial motion is reviewed for abuse of discretion. (*People v. Ayala, supra,* 24 Cal.4th at pp. 283-284, citing *People v. Welch* (1999) 20 Cal.4th 701, 749; see also *People v. Bolden* (2002) 29 Cal.4th 515, 555.) "'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.'" (*People v. Williams, supra,* 16 Cal.4th at p. 211-212, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854.)

In *Bolden*, a police officer volunteered testimony which showed Bolden was on parole at the time of his arrest. (*People v. Bolden, supra,* 29 Cal.4th at p. 554.) Bolden subsequently moved for a mistrial, arguing the testimony implied he had at least one prior felony conviction for which he was sentenced to prison. (*Id.* at pp. 554-555.) The prosecutor stated that he was surprised by the answer, and the trial court thereafter denied the motion noting that the brief parole reference was not likely to leave a lasting impression on the jurors. (*Id.* at p. 555.)

On appeal, Bolden claimed denial of his motion for a mistrial violated his constitutional right to due process. (*People v. Bolden, supra,* 29 Cal.4th at p. 555.) After noting the witness's comment was nonresponsive and interrupted by the prosecutor, this Court rejected the due process claim finding the witness's "fleeting reference to a parole office" was not likely to have led to any impermissible inferences by the jury, the volunteered

statement was insignificant in the context of the entire guilt phase and Bolden's chances of receiving a fair trial were not irreparably damaged. (*People v. Bolden, supra,* 29 Cal.4th at p. 555.)

In *People v. Hayes* (1999) 21 Cal.4th 1211, a witness volunteered that Hayes had put out a $25,000 contract on her life. (*Id.* at p. 1264.) This Court found the "likely impact of this testimony was not incurable prejudice" in light of the trial court's admonition to the jury to disregard the statement. (*Ibid.*) This Court further found the statement was insignificant in light of other evidence of Hayes's threats against witnesses. (*Ibid.*) Accordingly, the trial court's denial of Hayes's motion for new trial was affirmed. (*Ibid.*)

In *Ayala*, a witness volunteered that he previously testified in Ayala's brother's case after having been instructed not to refer to the brother's trial. (*People v. Ayala, supra,* 24 Cal.4th at p. 283.) This Court found the trial court did not err in denying Ayala's mistrial motion since the comment was innocuous, the jury had already been exposed to other evidence concerning the brother's complicity in the crimes with Ayala, and the jurors were instructed "not to discuss or consider the legal fate of any perpetrator other than defendant." (*Id.* at p. 284.)

In light of these authorities, Johnson's claim should be rejected. The "henchman" reference was a brief, fleeting comment which was immediately stricken by the trial court.

Prior to the presentation of evidence as well as before deliberations, the trial court instructed the jurors: "Do not consider for any purpose any offer of evidence that is rejected, or any evidence that is stricken by the court; treat it as though you had never heard of it." (14 CT 3703 [CALJIC No. 0.50]; 11 RT 1828; 28 RT 4264.) Indeed, at the beginning of the guilt phase, the court emphasized this instruction as follows:

> For example, there might come an occasion where a witness is asked a question. There is an objection, but the answer is given before the objection can be ruled upon. I will under some circumstances, order or direct you to disregard the answer. Okay? And "strike that," basically. And you will treat it as though you had not heard it.
>
> Okay. I know that is difficult, but that's something I have to do. I think one of the attorneys earlier said you sort of have to rise above being basic humans. You have to be better than you are sometimes even capable of being. So you have to do your best to disregard certain things.

(11 RT 1829.)

It is presumed that the jurors understood and followed these instructions. (See *Penry v. Johnson, supra,* 532 U.S. at p. 799; *Greer v. Miller, supra,* 483 U.S. at p. 766 fn. 8; *Richardson v. Marsh, supra,* 481 U.S. at p. 211; *People v. Sanchez, supra,* 26 Cal.4th at p. 852; *People v. Osband, supra,* 13 Cal.4th at p. 714; *People v. Pinholster, supra,* 1 Cal.4th at p. 919.) Johnson cites to nothing in the record rebutting this presumption, instead choosing to rely on generalities about "unringing the bell" and rank speculation. (See AOB 97-98.)

Johnson also argues that the "henchman" comment could have led a juror to believe Johnson ordered Brightmon to confess to the Campos murder and testify falsely about the Lopez murder. (AOB 98.) However, as in *Ayala* and *Hayes*, the jury could well have reached that conclusion from the timeline of other evidence properly presented at the guilt phase.

Brightmon initially told a police officer in 1994 that he knew nothing about the Lopez shooting. (22 RT 3421) In 1995, Brightmon denied shooting Campos and denied having or touching the gun, referring to the shooter as "Timbuktu." (13 CT 3572-3573, 3589-3591, 3606, 3609.) Between August 20, 1996, and January 20, 1998, Johnson and Brightmon were housed on the same floor of the Presley Detention Center, where they

were able to meet and talk with each other in a common day room for up to six hours a day. (24 RT 3687-3694.) Subsequently, on March 14, 1998, Brightmon sent a letter to Johnson's attorney offering to testify on Johnson's behalf that he shot Campos. (22 RT 3510-3515.) The inference that Johnson convinced Brightmon to admit to being the shooter in the Campos case and testify falsely in the Lopez case was inescapable irrespective of Mr. Ford's testimony.

Accordingly, the fleeting "henchman" comment did not irreparably damage Johnson's chances of receiving a fair trial, Johnson's rights to due process and a reliable verdict were not affected, and the trial court properly exercised its discretion in denying the motion for a mistrial.

V. JOHNSON'S RIGHTS TO DUE PROCESS, A FAIR TRIAL AND RELIABLE VERDICTS WERE NOT VIOLATED BY THE ADMISSION OF PHOTOGRAPHIC EVIDENCE

Johnson claims the trial court erroneously admitted photographs of the Lopez and Campos autopsies, Campos's body on the side of the road and a lineup which depicted Johnson in jail clothing and handcuffs because they were probative of uncontested issues, cumulative to other evidence and inflammatory. Johnson contends this error deprived him of due process, a fair trial and reliable verdicts in the guilt and penalty phases. (AOB 99-110.) Johnson fails to show the trial court's rulings were an abuse of discretion as the photographs were relevant and not unduly inflammatory. Accordingly, there was no error and Johnson's rights to due process, a fair trial and reliable verdicts were not violated. Moreover, any alleged error was harmless.

As this Court stated in *People v. Scheid* (1997) 16 Cal.4th 1,

> The rules pertaining to the admissibility of photographic evidence are well-settled. Only relevant evidence is admissible [citations], and all relevant evidence is admissible unless

> excluded under the federal or California Constitution or by statute. [Citations.] Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence. [Citations]

(*People v. Scheid, supra,* 16 Cal.4th at p. 13; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1168; *People v. Heard* (2003) 31 Cal.4th 946, 972-973.)

Even where relevant, photographic evidence may still be excluded under Evidence Code section 352[61] if the trial court finds its probative value is "substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice." (*Id.,* at p. 13.) Undue prejudice is that """which uniquely tends to evoke an emotion bias against the defendant as an individual and which has very little effect on the issues.""" (*People v. Alexander* (2010) 49 Cal.4th 846, 905, quoting *People v. Karis* (1988) 46 Cal.3d 612, 638; see also *People v. Carter, supra,* 36 Cal.4th at p. 1168; *People v. Scheid, supra,* 16 Cal.4th at p. 19.)

However, """[i]n applying section 352, 'prejudicial' is not synonymous with 'damaging.'""" (*People v. Alexander, supra,* 49 Cal.4th at p. 905, quoting *People v. Karis, supra,* 46 Cal.3d at p. 638.)

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[61] Evidence Code section 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

> "'Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice."

(*People v. Doolin* (2009) 45 Cal.4th 390, 438-439, quoting *People v. Cudjo* (1993) 6 Cal.4th 585, 609 [emphasis in original].)

The trial court's weighing of evidence under Evidence Code section 352 is reviewed for abuse of discretion. (*People v. Scheid, supra,* 16 Cal.4th at p. 13.) The trial "'court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352'" (*People v. Doolin, supra,* 45 Cal.4th at p. 438, quoting *People v. Taylor* (2001) 26 Cal.4th 1155, 1169) "and there is an adequate basis for appellate review" (*People v. Arias, supra,* 13 Cal.4th at p. 155).

Prior to Dr. Choi's guilt phase testimony, Johnson objected to the admission of all autopsy photographs, except one x-ray of Lopez, pursuant to Evidence Code section 352 as well as the Sixth, Eighth and Fourteenth Amendments. (14 RT 2160.) As to Lopez, Johnson argued the other autopsy photographs were not relevant because her cause of death was not at issue. (14 RT 2160-2161.)

Exhibit No. 48 was a photograph depicting Lopez on a gurney or autopsy table with some type of breathing apparatus in her mouth and some tubes in her arms. (14 RT 2161.) The photograph was used for Alvarez's identification of Lopez at the preliminary hearing and referenced in the preliminary hearing transcript which was subsequently admitted at trial. (14 RT 2161, 2163; 20 RT 3134.) The prosecutor noted that there was nothing particularly gruesome about the photograph as it was primarily an

external view of Lopez showing her face with much of the rest of her body covered. (14 RT 2161.) No wounds were depicted on the photograph. (14 RT 2162.)

Johnson offered to stipulate to Alvarez's identification of the photograph. (14 RT 2162.) However, the prosecutor declined to enter into any stipulations, explaining that he was only seeking to admit the mildest photographs of Lopez's external wounds rather than autopsy photographs showing her cut open. He explained that such photographs were admissible to show the cause of the death, trajectory of the wounds, the proximity of the gunshot and to lay the foundation for the dying declarations. (14 RT 2162-2163.)

Brightmon's counsel further argued Exhibit No. 48 was irrelevant and inflammatory. (14 RT 2163-2165.) Johnson joined in Brightmon's remarks. (14 RT 2166.) Johnson reiterated that the photograph was irrelevant because he was not contesting Lopez's identity as the decedent. (14 RT 2166-2167.) The trial court admitted the photograph, finding it was relevant and not prejudicial.[62] (14 RT 2167.)

Next, Johnson objected to Exhibit No. 51, a side-view photograph of Lopez's body which showed some bruising. (14 RT 2168, 2169.) Johnson argued the photograph was unnecessary in light of Dr. Choi's anticipated testimony and sketch of the wounds which could be admitted in lieu of the photograph. (14 RT 2168, 2169.) The prosecutor explained that the bruising most likely occurred in surgery and the purpose of the photograph was to show the downward trajectory of the gunshot which was depicted

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[62] The Reporter's Transcript refers to Exhibit No. 40 being admitted. (14 RT 2167.) However, given the context of the discussion, it is apparent that the court was admitting Exhibit No. 48.

through a probe inserted into the wound. (14 RT 2168-2169.) The trial court admitted the photograph. (14 RT 2169.)

Exhibit No. 52 was a head-to-foot view of the probe which depicted the lateral, left-to-right angle of the probe and Lopez's gunshot wound. (14 RT 2170.) Johnson raised the same objection. (14 RT 2170.) The trial court admitted the photograph. (14 RT 2170.)

Exhibit No. 53 depicted the margin of Lopez's wound as well as a piece of gunpowder which showed the range of the shotgun blast. (14 RT 2171.) Johnson objected to this photograph as cumulative. (14 RT 2171.) The court admitted Exhibit No. 53 since it portrayed additional information which was not in the other photographs. (14 RT 2171.)

Exhibit No. 54 was another photograph of Lopez's wound with Dr. Choi highlighting a piece of gunpowder. (14 RT 2171-2172.) Johnson objected to the photograph as cumulative. (14 RT 2172.) The court observed, and the prosecutor agreed, that the gunpowder depicted in Exhibit No. 54 may not have been the same as that depicted in Exhibit No. 53. Accordingly, the court admitted Exhibit No. 54. (14 RT 2172.)

Johnson reiterated his objection to the admission of all of the Campos autopsy photographs, except one photograph showing the location of the bullet and several fragments, under the Sixth, Eighth and Fourteenth Amendments. (14 RT 2172-2173.)

Exhibit Nos. 13 and 14 depicted pre-mortem bruising on Campos's face. (14 RT 2174.) Johnson objected to the photograph as irrelevant since Campos was not shot in the face and claimed it was unduly gruesome. (14 RT 2174.) The prosecutor explained that the photographs showed how Campos was kicked, beaten and manhandled, which was probative of the kidnap and robbery special circumstance allegations. (14 RT 2174-2175.) Johnson argued the injuries were probably more consistent with Campos being dragged to the car and joined in Brightmon's objection that the two

photographs were duplicative. (14 RT 2175.) The court admitted Exhibit Nos. 13 and 14. (14 RT 2175.)

Johnson next objected to Exhibit No. 15, a photograph of probes inserted into Campos's upper torso, arguing that the photograph "can be simply testified to" and was unduly inflammatory due to the presence of blood. (14 RT 2160-2161.) Exhibit No. 16 depicted the gunshot wound without the probe. (14 RT 2177.) The court admitted Exhibit No. 15, but excluded Exhibit No. 16 as duplicative. (14 RT 2176-2177.)

Exhibit No. 17 was a full-length photograph of Campos on the autopsy table. (14 RT 2177.) Johnson objected to the photograph as duplicative. (14 RT 2177.) The prosecutor explained that, unlike Exhibit No. 15 which was a close-up of the armpit area, this photograph gave "a better view of the location of the entry wound in relationship to the rest of the body." (14 RT 2177.) The court admitted Exhibit No. 17 provided that the prosecutor cover up the bottom half of Campos's body from the waist down. (14 RT 2178.)

Exhibit No. 18 depicted pre and post-mortem drag marks on Campos's back. (14 RT 2178.) Johnson objected, submitting on his previous arguments. (14 RT 2178.) The prosecutor explained that this was relevant to show how Campos was dragged to the Sentra. (14 RT 2178-2179.) The trial court admitted Exhibit No. 18, again instructing the prosecutor to cover the bottom half of the body from the waist down. (14 RT 2179.)

Johnson next objected to Exhibit No. 47, a photograph of Campos's body as it was found on the side of Cajalco Road, arguing it was overly gruesome, cumulative and irrelevant because Campos's cause of death was not at issue. (14 RT 2179.) The prosecutor explained that there were two photographs which depicted Campos's attire and injuries at the time his body was recovered. Exhibit No. 46 showed the body face-down through

some weeds, whereas Exhibit No. 47 showed the body turned over. (14 RT 2180-2181.) The prosecutor asked that either one of the photographs be admitted to corroborate Garcia's testimony. (14 RT 2181.) Finding Exhibit No. 47 "has a tendency to be a little bit on the gruesome side," the trial court only admitted Exhibit No. 46. (14 RT 2181-2182.)

Finally, Johnson objected to Exhibit No. 19, which showed a laceration on Campos's wrist. (14 RT 2183.) The prosecutor explained that the photograph was probative of a struggle as a wristwatch in clean condition was found at the murder scene and Campos was not wearing a watch at the time is body was found. (14 RT 2182.) The trial court admitted Exhibit No. 19. (14 RT 2182.)

Johnson renewed his objections to the autopsy photographs prior to the prosecutor resting his case-in-chief in the guilt phase. The objections were overruled. (21 RT 3256)

Insofar as Exhibit No. 86, Johnson cross-examined Ronald Moore about his identification of Johnson from a lineup photograph presented to him by Investigator Silva. (15 RT 2387.) Prior to the prosecutor's redirect, Johnson asked that the jail garb and handcuffs of the individuals in the photograph be covered prior to the prosecutor showing the photograph to Moore. (15 RT 2390.) The prosecutor objected to any concealing or alteration of the photograph, arguing that it was important for the jury to see that all six individuals in the lineup were of similar build, height and weight, and noting that it would not come as a shock to any juror that a capital defendant such as Johnson was in custody at some point in time. (15 RT 2391.)

The court allowed the photograph, Exhibit No. 86, to be admitted in its original form. (15 RT 2391.) Subsequently, the prosecutor questioned Moore about the photograph. (15 RT 2392-2393.) Johnson also questioned Garcia about Exhibit No. 86 in the guilt phase (16 RT 2539-2541) and

questioned Silva about the photograph in the penalty phase retrial (56 RT 8368-8370).

All of the above-cited exhibits, except Exhibit Nos. 16 and 47, were admitted into evidence at the guilt phase. (21 RT 3256-3257.)

Prior to the penalty phase retrial, Johnson moved to relitigate all motions heard in the first trial, submitting on all previous arguments raised. (15 CT 4193-4194; 38 RT 5602.) The objections were overruled. (38 RT 5603.)

All of the above-cited exhibits, except Exhibits 16, 19, 47 and 86, were admitted into evidence at the penalty phase retrial. (51 RT 7759-7761.) The photographs were relevant and not unduly prejudicial. Thus, they were properly admitted.

A. The Photographs Were Relevant

Exhibits 13, 14, 15, 17, 18, 19, 51, 52, 53 and 54 were relevant to establish the injuries suffered by Campos and Lopez, the manner of the shootings (including the trajectory and proximity of the gun shots) and the nature of the struggles (including the drag marks on Campos's back and the laceration on Campos's wrist.) (See *People v. Heard, supra,* 31 Cal.4th at p. 973.) Exhibit Nos. 13, 14 and 18 were also relevant to prove the kidnap special circumstance.

The photographs were particularly necessary for the jury to assess conflicting prosecution and defense testimony as to the manner in which Lopez and Campos were shot. The photographs were also very useful in understanding and evaluating Dr. Choi's medical testimony. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 354 [photographs used by pathologist to assist jury in understanding testimony].) Since "[t]hese images illustrated the testimony of various prosecution witnesses who encountered the victim[s] and viewed the crime scene," they were relevant. (*People v. Heard, supra,* 31 Cal.4th at p. 973.)

Johnson argues the photographs were unnecessary and cumulative because the nature of Lopez's and Campos's injuries and their manners of death were adequately proved through Dr. Choi's testimony. (AOB 102-103, 104-105.) Johnson's argument is unavailing. "'[I]t is immaterial for purposes of determining the relevance of evidence that other evidence may establish the same point.'" (*People v. Heard, supra,* 31 Cal.4th at p. 975, quoting *People v. Scheid, supra,* 16 Cal.4th at p. 16; see also *People v. Wilson* (1992) 3 Cal.4th 926, 938.) "[P]hotos are not cumulative simply because they illustrate evidence presented by other means." (*People v. Anderson* (2001) 25 Cal.4th 543, 592, citing *People v. Box* (2000) 23 Cal.4th 1153, 1199, and *People v. Crittenden* (1994) 9 Cal.4th 83, 134-135.)

Exhibits 46 and 48 which respectively showed Lopez's body prior to the autopsy as identified by Alvarez at the preliminary hearing and Campos's body as found by law enforcement authorities were "relevant in establishing the fact that a murder had occurred." (*People v. Scheid, supra,* 16 Cal.4th at p. 15.) Furthermore, the photographs corroborated testimony concerning the circumstances of the two shootings and the disposal of Campos's body. Evidence which bolsters a witness's credibility by corroborating his or her testimony is relevant. (*Ibid.*; *People v. Allen* (1986) 42 Cal.3d 1222, 1256.)

On appeal, Johnson counters that Alvarez's and Garcia's testimony was not in dispute in these regards. (AOB 101-102, 105-106.) In the trial court, Johnson argued the causes of Lopez's and Campos's deaths were not at issue. (14 RT 2160-2161, 2179.) However, photographs are not rendered irrelevant simply because the defendant does not dispute some fact or theory shown by them. (See *People v. Heard, supra,* 31 Cal.4th at p. 974, 975; *People v. Lewis* (2001) 25 Cal.4th 610, 641.)

Johnson further cites his offer in the trial court to stipulate to Alvarez's identification of Lopez. (AOB 102.)

> The circumstance that the defense might have preferred that the prosecution establish a particular fact by stipulation, rather than by live testimony, does not alter the probative value of such testimony or render it unduly prejudicial. The prosecution was not required to accept such a stipulation or other "sanitized" method of presenting its case.

(*People v. Carter, supra,* 36 Cal.4th at pp. 1169-1170; see also *People v. Scheid, supra,* 16 Cal.4th at p. 16 [defense offer to stipulate did not negate relevance of photograph].) The jury was entitled to see the relevant details of the murders. (*People v. Weaver* (2001) 26 Cal.4th 876, 933.)

Exhibit No. 86, the photographic lineup, was relevant as well in allowing the jury to evaluate Moore's identification of Johnson in the guilt phase. Moore tentatively identified Johnson in the photographic lineup (15 RT 2392) and again tentatively identified Johnson at the guilt phase trial (15 RT 2379-2380). Moore also told his friend Joseph Marshall that he had given "Lamar" a ride off the property. (16 RT 2586, 2590.)

Notably, it was Johnson who initially confronted Moore with the photographic lineup. (See 15 RT 2386-2387.) The prosecutor was entitled to subsequently question Moore with that photograph in its original form as viewed by Moore to rehabilitate the prior tentative identification.

Johnson argues there was nothing about the jail clothing or handcuffs that affected Moore's identification in any way. (AOB 107.) Johnson is mistaken. As explained by the prosecutor in the trial court, it was important for the jury to see that all of the participants in the lineup were dressed in jail garb, handcuffed and of similar build, height and weight. This showed the lineup was not suggestive and bolstered Moore's prior identification.

Moreover, "[w]here part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party...." (Evid. Code, § 356.) Johnson's proposal to cover everything but the faces of the lineup participants would have misled the jury to speculate about the fairness and reliability of the photographic lineup.[63] Furthermore, the similarities between the lineup participants was probative of Garcia's failure to identify Johnson in the photograph. Garcia explained, "They all look alike... More or less." (See 16 RT 2540.)

Each of the photographs "logically, naturally, and by reasonable inference" established material facts. Accordingly, the photographs were relevant within the meaning of Evidence Code section 210.

B. The Photographs Were Not Excludable Under Evidence Code Section 352

The trial court weighed the prosecutor's relevancy arguments against Johnson's prejudice claims, excluded two photographs which were otherwise relevant and ordered two photographs to be partially covered. (14 RT 2167, 2169, 2170, 2171, 2172, 2175, 2176-2177, 2178, 2179, 2181-2182; 15 RT 2391.) Thus, the record shows the trial court was aware of and performed its weighing responsibilities under Evidence Code section 352. (See *People v. Taylor, supra,* 26 Cal.4th at p. 1169 [court excluded several photographs and suggested editing changes to videotape].) In so doing, the trial court also provided an adequate record for appellate review.

"[A] trial court has *broad discretion* in determining the admissibility of murder victim photographs in the face of a claim that they are unduly gruesome or inflammatory." (*People v. Wilson, supra,* 3 Cal.4th at p. 938

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[63] Johnson also cites Garcia's prior misidentification in the penalty phase. (AOB 107, citing 55 RT 8369.) However, as noted above, Exhibit 86 was not admitted at the penalty phase retrial. (51 RT 7759-7761.)

[emphasis added].) "'The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. [Citations.]'" (*People v. Heard, supra,* 31 Cal.4th at pp. 975-976, quoting *People v. Crittenden, supra,* 9 Cal.4th at pp. 133-134.) Johnson fails to show any such abuse of discretion here.

All of the photographs challenged by Johnson were relevant to prove the circumstances of the murders and corroborate the prosecution witnesses. As previously noted, Johnson's primary complaint about the autopsy photographs is that they were cumulative of Dr. Choi's testimony.

> "[I]nsofar as defendant is contending that the trial court was required to exclude the photograph[s] under Evidence Code section 352 because th[e] physical evidence was cumulative of the testimonial evidence presented, the trial court correctly rejected defendant's argument."

(*People v. Heard, supra,* 31 Cal.4th at p. 976, quoting *People v. Scheid, supra,* 16 Cal.4th at p. 19; see also *People v. Mills, supra,* 48 Cal.4th at p. 191 ["That the challenged photographs may not have been strictly necessary to prove the People's case does not require that we find the trial court abused its discretion in admitting them."].)

Moreover, the photographs were not unduly prejudicial. As this Court has "'observed, victim photographs and other graphic items of evidence in murder cases always are disturbing.'" (*People v. Carter, supra,* 36 Cal.4th at p. 1168, quoting *People v. Heard, supra,* 31 Cal.4th at p. 976.) Where "photographs portray the results of defendant's violent conduct; that they are graphic and unpleasant to consider does not render the introduction of those images unduly prejudicial." (*People v. Heard, supra,* 31 Cal.4th at p. 976; see also *People v. Carter, supra,* 36 Cal.4th at p. 1168.)

Additionally, the admitted photographs were "not unduly gory or inflammatory." (See *People v. Heard, supra,* 31 Cal.4th at pp. 976-977.)

In *Heard*, this Court found 14 photographs of the crime scene and the child victim who had been subjected to a violent sexual assault, 11 photographs of the child's wounded face wrapped in a bloody garment as well as unwrapped, and 11 photographs of the victim's head and chest injuries were not unduly prejudicial. (*People v. Heard, supra,* 31 Cal.4th at pp. 965, 972, 976-978 [victim found with an empty bottle of rubbing alcohol in her mouth, bite marks on her chest, a shoeprint on her chest, a baseball bat protruding from her vagina and another bat stained with blood and feces on the floor between her legs].)

In *Scheid*, a photograph of the victims handcuffed to each other with their heads facedown on a blood-soaked box spring was found to not be unduly prejudicial. (*People v. Scheid, supra,* 16 Cal.4th at pp. 8-9, 20.) In light of the graphic photographs in *Heard* and *Scheid* which this Court found properly admitted, the comparatively mundane autopsy and crime scene photographs in Johnson's case were clearly not unduly prejudicial.

Furthermore, "'"the trial court clearly and properly could find that the photographs[s were] not so gruesome as to have impermissibly swayed the jury "*in light of the testimony detailing each and every fact relating to the crime scene and victims.*""" (*People v. Heard, supra,* 31 Cal.4th at p. 977, quoting *People v. Scheid, supra,* 16 Cal.4th at p. 20 [emphasis in original]; see also *People v. Carter, supra,* 36 Cal.4th at p. 1169 [photographs of victims at coroner's facility unlikely to have elicited improper response after jurors already heard testimony describing the murders].) In Johnson's case, Alvarez, Lopez's family members, Garcia, Ross, Escalera, the responding and investigating officers, and Dr. Choi all detailed the nature of the murders in far more graphic terms than that depicted in any photographs.

Similarly, Johnson's argument that the photographic lineup would have led the jurors to believe Johnson "may have been regarded as being a

particular danger" is unpersuasive.[64] (See AOB 107.) It was apparent to the jury that Johnson had been arrested for the murders. Moreover, Johnson's dangerousness was amply shown through the testimony of the prosecution witnesses who described two violent, unjustified killings. No undue prejudice arose from the rather innocuous photograph of the lineup.

Johnson's argument on appeal essentially is that the photographs made "it more likely that the jury would find that Johnson had the intent to kill Lopez or participated in the Campos homicide." (See AOB 109.) As such, Johnson errs by equating "damaging" with "prejudicial" and by arguing the photographs were prejudicial simply because they undermined his defense or supported the prosecutor's case. (See *People v. Alexander, supra,* 49 Cal.4th at p. 905; *People v. Doolin, supra,* 45 Cal.4th at pp. 438-439; *People v. Cudjo, supra,* 6 Cal.4th at p. 609; *People v. Karis, supra,* 46 Cal.3d at p. 638.) Since the probative value of the photographs was not clearly outweighed by any risk of undue prejudice, the trial court's admission of the photographs should not be disturbed on appeal. (See *People v. Carter, supra,* 36 Cal.4th at p. 1167; *People v. Heard, supra,* 31 Cal.4th at pp. 976-977; *People v. Crittenden, supra,* 9 Cal.4th at pp. 133-134.)

Likewise, since the photographs were properly admitted, there was no due process violation. (See *People v. Burgener, supra,* 29 Cal.4th at p. 872; *People v. Farnam, supra,* 28 Cal.4th at p. 184.) Moreover, the

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[64] Johnson only cites to *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 748, a case addressing *in-court shackling* at a jury sentencing hearing, in support of this contention. (AOB 107-108.) Contrary to Johnson's argument, the prejudicial nature of shackling the defendant in the presence of the jury cannot be compared to a photograph of a defendant with five other individuals similarly dressed and handcuffed at a lineup where any jury would expect the authorities to have all participants handcuffed and in jail garb.

protections of Evidence Code section 352 satisfied any due process concerns. (*See People v. Falsetta* (1999) 21 Cal.4th 903, 917 [application of section 352 precludes constitutional challenge to prior act evidence].) Accordingly, Johnson's rights to due process, a fair trial and reliable verdicts were not violated.

C. Johnson Fails to Show Admission of the Photographs in the Penalty Phase Retrial Was an Abuse of Discretion

Johnson sought to argue lingering doubt before a second jury at the penalty phase retrial. (57 RT 8455-8460.) Thus, the photographs remained relevant and admissible at that hearing for all of the reasons discussed above.

Moreover,

> the discretion to exclude photographs under Evidence Code section 352 is much narrower at the penalty phase than at the guilt phase. This is so because the prosecution has the right to establish the circumstances of the crime, including its gruesome consequences (§ 190.3, factor (a)), and because the risk of an improper guilt finding based on visceral reactions is no longer present. [Citations.]

(*People v. Bonilla, supra,* 41 Cal.4th at pp. 353-354, citing *People v. Moon* (2005) 37 Cal.4th 1, 35, and, *People v. Anderson, supra*, 25 Cal.4th at pp. 591-592.)

In the penalty phase retrial, the photographs of the victims were highly probative of the circumstances of the murders which was a valid aggravating factor to be considered by the jury. Photographic evidence which depicts "the deliberate and brutal nature of the crime" are admissible under section 190.3, factor (a). (*People v. Staten* (2000) 24 Cal.4th 434, 463.) As this Court observed in *Bonilla*,

> " ' " '[M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant.' " ' " [Citation.] Likewise here. But as unpleasant as these photographs are, they demonstrate the real-life consequences of

> [the defendant's] actions. The prosecution was entitled to have the jury consider those consequences.

(*People v. Bonilla, supra,* 41 Cal.4th at p. 354, quoting *People v. Moon, supra,* 37 Cal.4th at p. 35.)

Accordingly, the admission of the photographs at the penalty phase retrial "was neither statutory nor constitutional error." (See *People v. Bonilla, supra,* 41 Cal.4th at p. 354.) As in the guilt phase, Johnson's rights to due process, a fair trial and reliable verdict were not violated at the penalty phase retrial.

D. Even Assuming Error, Johnson Was Not Prejudiced

Notwithstanding the propriety of the trial court's rulings, any alleged error in admitting the photographs was harmless in both the guilt and penalty phases. The erroneous admission of photographic evidence in the guilt phase is reviewed for harmless error under the *Watson* standard. (*People v. Carter, supra,* 36 Cal.4th at pp. 1170-1171; *People v Heard, supra,* 31 Cal.4th at p. 978; *People v. Scheid, supra,* 16 Cal.4th at p. 21.) Accordingly, Johnson is only entitled to reversal of his convictions if it is reasonably probable the jury would have reached more favorable verdicts in the absence of the photographs. (See *People v. Watson, supra,* 46 Cal.2d at p. 836.)

Like in *Heard,*

> The photographs at issue did not disclose to the jury any information that was not presented in detail through the testimony of witnesses. Although the photographs were unpleasant, they were not unusually disturbing or unduly gruesome, and were no more inflammatory than the graphic testimony provide by a number of the prosecution's witnesses.

(*People v. Heard, supra,* 31 Cal.4th at p. 978.)

Furthermore, as discussed in Argument III(D), *ante*, Johnson's guilt was proved by overwhelming independent evidence. Any alleged error in the guilt phase was harmless.

For the same reasons, as well as the overwhelming independent aggravating evidence presented, there is no reasonable or realistic possibility that any alleged error regarding the photographs affected the penalty verdict. (See *People v. Brown*, *supra,* 46 Cal.3d at p. 448.)

VI. JOHNSON FAILS TO SHOW THE TRIAL COURT ABUSED ITS DISCRETION BY DECLINING HIS REQUEST TO REDACT DETECTIVE HORST'S REMARK ABOUT GETTING JOHNSON OFF THE STREETS DURING THE BRIGHTMON INTERVIEW

Johnson claims the trial court erred by failing to redact Brightmon's interview with Detective Horst pursuant to Evidence Code section 352 to delete Horst's remark about getting Johnson off the streets, and contends this error violated his right to a fair and reliable trial in the guilt and penalty phases. (AOB 111-114.) However, Johnson fails to show the trial court's ruling was an abuse of discretion. Moreover, Johnson's rights to a fair trial and reliable verdicts were not violated, and any alleged error was harmless.

Like photographic evidence, the following general principles apply to the admission of any evidence:

> Only relevant evidence is admissible [citations], and all relevant evidence is admissible unless excluded under the federal or state Constitution or by statute. [Citations.] The test of relevance is whether the evidence "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." [Citations.] [Citation.] The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. [Citation.] We review for abuse of discretion a trial court's rulings on the admissibility of evidence.

(*People v. Benavides* (2005) 35 Cal.4th 69, 90; see also *People v. Waidla* (2000) 22 Cal.4th 690, 717-718.)

During his direct testimony on Johnson's behalf, Brightmon testified that he dropped the gun after he shot Campos and "told Ross he was going to run," Ross ordered Brightmon to "pick up the gun and give it to him," and Brightmon gave Ross the gun. (22 RT 3380-3381.) Brightmon explained that Ross told him that he was not going anywhere and said, "'You going to help me clean up this shit'" while "Ross was already ... right by the trunk." (22 RT 3381.)

Brightmon then testified that Ross told him, "'You going to touch him or you going to get shot too,'" after Brightmon said he did not want to touch Campos. (22 RT 3381.) Thereafter, according to Brightmon, he and Escalera's relative placed Campos in the trunk at Ross's direction. (22 RT 3381-3383.) Brightmon told the jury that he was afraid of Ross because Ross could have people killed. (22 RT 3391.)

Subsequently, the prosecutor called Detective Horst as a rebuttal witness in the guilt phase to testify about his November 13, 1995, interview with Brightmon. (23 RT 3659.) A redacted copy of an audiotape of the interview was played for the jurors who were also given corresponding redacted transcripts. (23 RT 3661-3665.)

In the interview, Brightmon refused to identify the man who shot Campos, stating "As far as I know, that man's name was uh, Timbukto, I don't know." (13 CT 3589.) Subsequently, Horst accused Brightmon of trying to protect Johnson and asked Brightmon where Johnson might be located. (13 CT 3603-3604.) Horst then questioned Brightmon about why he was covering up for Johnson and why Brightmon did not back out when he found out Campos was going to be murdered. (13 CT 3606.) The following discussion ensued:

HORST: Right! Or you have the opportunity to go.

BRIGHTMON: I didn't have a gun.

HORST: That's what I'm sayin', no, but you have the opportunity to sit there and go "No man, I don't want any of this, I don't want any of this."

BRIGHTMON: Then, I would have been a dead man inside of the trunk.

HORST: Think so.

BRIGHTMON: I know so.

HORST: I gotta get him off streets man, gotta get him off streets! You know who else I'm worried for too, right, is all _______ , and everything like that, I gotta get em', I gotta get em."

BRIGHTMON: Who, who else you gotta get?

HORST: The loner, I've gotta bring him in. You just said yourself Man, you'd be the one in the trunk, if you didn't _______. So, obviously to me that says, you gettin' some kind of direction, or you have some fear, right! What I'm telling you man is quite swimming for the both of you. Quit swimming for the both of you! You did something there, and what you did was wrong.

BRIGHTMON: I know that.

HORST: Okay, that's the bottom line. I mean there ain't no two ways about that.

BRIGHTMON: Ain't nothing I can do about that.

HORST: But, you ain't got to swim for both of you. Let me ask you this, let me ask you this, Would you expect Oscar, gnaw, nah, Ross, to do joint time for you.

BRIGHTMON: No.

(13 CT 3606-3607.)

During a break in the playing of the tape, Johnson's counsel notified the court of "one little thing we need to take up after it's done, anyway." (23 RT 3665.) After the jury was excused, defense counsel objected to Horst's comment about getting Johnson off the streets under Evidence Code section 352 and the Sixth, Eighth and Fourteenth Amendments. (23 RT 3666, 3668.)

Defense counsel argued Horst's desire to get Johnson off the streets was irrelevant and that the comment emphasized the fact that Johnson was a very dangerous man. (23 RT 3666-3668.) The prosecutor responded that the challenged remark provided context for an important portion of the interview as it clarified that Brightmon's fear of being the "dead man inside of the truck" referred to Johnson rather than Ross and did not convey anything improper to the jury. (23 RT 3667-3668.)

The trial court overruled Johnson's objection as follows:

> Under 352, in that evaluation, it appears to me there is certainly probative value which, I think outweighs the prejudice. And I think what we are dealing with here – at least my perception is, we are dealing with Horst's state of mind, which isn't really problematic, I don't think your particular client, as far as prejudice is concerned. Because his state of mind is, "Here's a man that's already, in my opinion, killed two people. I got to get him off the street. So again, I don't think it's particularly prejudicial to your position. And I could see the probative value. [¶] Okay. So under 352, that's part of my analysis as well.

(23 RT 3668-3669.)

The trial court reaffirmed its ruling for the penalty phase retrial. (38 RT 5603.) Brightmon's guilt phase testimony was read to the penalty phase jury. (48 RT 7258-7387.) Subsequently, the tape of Brightmon's interview was played for the penalty phase jurors who received corresponding transcripts. (48 RT 7395-7398; 49 RT 7426-7429.)

A. The Trial Court's Ruling Was Proper

Brightmon's comment about being the dead man inside the trunk if he backed out of the Campos murder was highly relevant to explain his considerable fear of Johnson, and consequently, Brightmon's hesitancy to identify Johnson as the shooter during his interview and Brightmon's reasons for testifying on Johnson's behalf, recanting his prior statement and claiming he was the shooter at trial. Horst's remark about getting the shooter off the streets was thus of great importance since it clarified whether Brightmon was referring to Ross or "Timbuktu" in his trunk comment. Accordingly, the trial court properly declined to redact that portion of the interview from the tape and transcript.

Here, the challenged evidence was clearly relevant to clarify Brightmon's comment about being the dead man in the trunk. Brightmon had previously testified for the defense that Ross threatened to shoot him if he refused to put Campos in the Sentra's trunk (22 RT 3381) and that he was scared of Ross because he could have people killed (22 RT 3391). Thus, it was unclear whether Brightmon was referring to Ross or the shooter as the person by whom he felt threatened if had backed out during the Campos incident.

Johnson argues that it was clear Brightmon was referring to Johnson based on other statements in the interview. (AOB 111-112.) However, Johnson fails to consider Brightmon's preceding trial testimony which caused the confusion.

Horst's remark about getting that person off the streets and Brightmon's subsequent, "I know that," statement confirmed that Brightmon was referring to Johnson because Horst had just discussed Johnson's whereabouts with Brightmon and asked if Brightmon would tell him where Johnson was "this very minute." (13 CT 3603-3604.) Had the challenged remark by Horst been excised, it would have remained unclear

whether Brightmon was expressing fear of Ross or Johnson. Since Horst's comment had "a tendency in reason to prove or disprove a disputed fact that [was] of consequence," it was relevant and admissible. (See Evid. Code, § 210.)

Brightmon's fear of Johnson was clearly relevant. Relevant evidence includes "evidence relevant to the credibility of a witness or hearsay declarant...." (Evid. Code, § 210; *People v. Mills, supra,* 48 Cal.4th at p. 193; see also *People v. Alexander, supra,* 49 Cal.4th at p. 913 [trial court reasonably found evidence significantly probative of witness's overall credibility].) Thus, evidence which assists the trier of fact in evaluating a witness's credibility is admissible. (See *People v. Hawthorne* (2009) 46 Cal.4th 67, 99; *People v. Brown* (2004) 33 Cal.4th 892, 895-896 [expert testimony on domestic violence victims].)

For example,

> Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis of the witness's fear is likewise relevant to [his] credibility and is well within the discretion of the trial court. [Citations.]"

(*People v. Burgener, supra,* 29 Cal.4th at p. 869.) Similarly, Brightmon's fear of Johnson explained his motivation for testifying on Johnson's behalf *against the advice of his attorney* and claiming at trial that he shot Campos. Brightmon's fear further explained his reason for referring to the shooter as "Timbukto" during his interview with Horst and resisting any identification of Johnson.

The trial court fulfilled its responsibilities in weighing the relevance of the contested evidence against the potential of undue prejudice. (23 RT 3668-3669.) In so doing, the court properly exercised its discretion under Evidence Code section 352. As discussed above, the relevance of the "get him off the streets" comment was substantial as it clarified Brightmon's

fear of Johnson. On the other hand, the remark presented no risk of undue prejudice.

Johnson argues Horst's comment "emphasized Johnson's dangerousness as reflected by the opinion of a police officer." (AOB 112.) However, the jurors were well aware that Horst believed Johnson had killed two people and it would have been obvious and quite unremarkable to any juror that a law enforcement officer with such a belief would consider Johnson a danger and want him in custody.

Johnson further argues there was a risk that the jurors "would identify with [Horst's] goal and adopt his mission as their own in getting Johnson off the streets." (AOB 112.) Johnson's argument is unavailing as Johnson had not been arrested at the time of Brightmon's interview; yet, the guilt and penalty phase juries knew Johnson was in custody by the time of trial. (See 22 RT 3509-3510; 23 RT 3530-3531, 3533; 48 RT 7367, 7377-7378, 7380-7381 [Brightmon's testimony that he and Johnson were housed in the same county jail facility]; 3584-3585 [Trotter testimony concerning Johnson's arrest]; 24 RT 3689-3691[Deputy Brian Daugherty's testimony that Johnson was booked in the county jail facility on March 2, 1996]; 51 RT 7725-7729 [Deputy Thomas Tanner's testimony regarding Johnson's detention in the county jail].)

In addition, any reasonable juror would have recognized Horst's comment simply as a tactic to get Brightmon to affirmatively identify Johnson as the shooter. Accordingly, the probability of undue prejudice was not substantially outweighed by the evidence's relevance, and the trial court properly denied Johnson's redaction request. (See Evid. Code, § 352; *People v. Scheid, supra,* 16 Cal.4th at p. 13.) There was no evidentiary error in either the guilt or penalty phase.

Johnson's claims of constitutional error should be rejected as well. Since the trial court's ruling was correct and Johnson was afforded the

protections of Evidence Code section 352, there was no due process violation. (See *People v. Burgener, supra,* 29 Cal.4th at p. 872; *People v. Farnam, supra,* 28 Cal.4th at p. 184; *People v. Falsetta, supra,* 21 Cal.4th at p. 917.) This Court has "held the application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution...." (*People v. Marks* (2003) 31 Cal.4th 197, 226-227, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125, and *People v. Fudge* (1994) 7 Cal.4th 1075, 1103; see also *People v. Mills, supra,* 48 Cal.4th at p. 194; *People v. Harris* (2005) 37 Cal.4th 310, 336.)

B. Even Assuming Error, Johnson Was Not Prejudiced

Notwithstanding the propriety of the trial court's rulings, any alleged error in failing to redact Horst's comment about getting Johnson off the streets was harmless. Since there was no error of constitutional magnitude, the harmless error standard for state error would apply. (See *People v. Alexander, supra,* 49 Cal.4th at p. 910.) Error in state evidentiary rulings, including the admission of evidence pursuant to Evidence Code section 352, is reviewed for harmless error under the *Watson* test for the guilt phase. (*People v. Marks, supra,* 31 Cal.4th at p. 227.)

As discussed above, it would have been utterly obvious and unremarkable to any juror that a law enforcement officer who believed the defendant had killed two people would consider that defendant to be a danger and want him in custody. Thus, Horst's comment did not impart to the jurors any information of which they would not already be capable of discerning.

Moreover, the fact that Johnson was at large at the time of Brightmon's interview but had been arrested by the time of trial rendered Horst's remark even less prejudicial. Furthermore, any reasonable juror would have recognized Horst's comment as a common police interviewing

tactic to overcome Brightmon's evasiveness and convince him to identify "Timbuktu."

Finally, Horst's "get him off the streets" comment was largely redundant to his "I've gotta bring him in" statement (13 CT 3607) which Johnson did not seek to redact in the trial court and does not challenge on appeal. (See 23 RT 3666-3669; AOB 111-114.) Where the challenged evidence is cumulative of other evidence properly admitted at trial, this weighs against a finding of prejudice. (See, e.g., *People v. Cowan* (2010) 50 Cal.4th 401, 503; *People v. Jackson, supra,* 13 Cal.4th at p. 1234; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589; *People v. Frank* (1990) 51 Cal.3d 718, 728.)

Accordingly, Horst's remark about getting Johnson off the street could not have resulted in any significant prejudice. As defense counsel characterized the issue, it was just "one little thing" for the trial court to address. (23 RT 3665.) Thus, any alleged error in the guilt phase was harmless. For the same reasons, as well as the independent overwhelming aggravating evidence presented, there is no reasonable or realistic possibility that any alleged error regarding the redaction affected the penalty phase verdict. (See *People v. Brown, supra*, 46 Cal.3d at p. 448.)

VII. THE STANDARD FLIGHT INSTRUCTION WAS PROPERLY GIVEN

Johnson claims his second degree murder conviction and the multiple murder special circumstance finding must be reversed because the trial court allegedly improperly instructed the guilt phase jury on flight with CALJIC No. 2.52, which he contends was unnecessary, argumentative and permitted the jurors to draw irrational inferences against him in violation of his constitutional rights to due process, a fair jury trial, equal protection and a reliable verdict. (AOB 115-124.) Johnson forfeited his claim insofar as the Lopez homicide under the doctrine of invited error. Nonetheless,

CALJIC No. 2.52 has repeatedly been approved by this Court, and the time-worn arguments raised by Johnson should be rejected once again. In addition, any alleged instructional error was harmless.

A. Johnson Has Forfeited His Claim

Johnson forfeited his instructional error claim insofar as CALJIC No. 2.52 was given in regards to the Lopez homicide. While Johnson objected to CALJIC No. 2.52 since his identity was at issue in the Campos homicide (25 RT 3735-3739), defense counsel told the court, "I don't have a problem with it in the Camerina Lopez shooting, Your Honor.... [¶] In fact, I think that's where *you would have to give it sua sponte*. Because I think what the first use note – that's what they are talking about." (25 RT 3738 [emphasis added].) Accordingly, the doctrine of invited error applies here because Johnson should not be able to obtain relief based on an error in instructing the jury on flight as to the Lopez shooting when any such error was at the behest of the accused. Since the trial court did not have a sua sponte duty *not to* instruct on flight, then it is not necessary to show that counsel acted for tactical reasons. (*People v. Gallego* (1990) 52 Cal.3d 115, 183, citing *People v. Marshall* (1990) 50 Cal.3d 907, 932 [requirement of a tactical reason "applies only when the court is under a sua sponte duty to instruct in a manner other than it did"].)

Here, defense counsel correctly informed the trial court of his belief that CALJIC No. 2.52 had to be given sua sponte for the Lopez shooting. (25 RT 3738; see *People v. Henderson* (2003) 110 Cal.App.4th 737, 742 [instruction must be given where prosecution relies on evidence of flight to show guilt].) This is distinguishable from *People v. Moon, supra,* 37 Cal.4th at p. 28, wherein this Court declined to apply the invited error doctrine to instruction on flight with CALJIC No. 2.52 because the record did not show affirmative action opposed to mere acquiescence to the giving of the instruction. Thus, the doctrine of invited error applies regardless of

whether defense counsel had a tactical purpose for suggesting the instruction, and Johnson's challenge to CALJIC No. 2.52 for the first time on appeal insofar as the Lopez homicide has been forfeited.[65] (See *People v. Gallego, supra,* 52 Cal.3d at p. 183; *People v. Marshall, supra,* 50 Cal.3d at p. 932.)

B. CALJIC No. 2.52 Was Properly Given as to Both Homicides

"A flight instruction is proper where the evidence shows a defendant departed the crime scene under circumstances suggesting his movement was motivated by a consciousness of guilt." (*People v. McWhorter* (2009) 47 Cal.4th 318, 376, citing *People v. Smithey* (1999) 20 Cal.4th 936, 982, and *People v. Visciotti* (1992) 2 Cal.4th 1, 60; see also *People v. Avila* (2009) 46 Cal.4th 680, 710; *People v. Ray* (1996) 13 Cal.4th 313, 345.) This is because "[f]light requires "" a purpose to avoid being observed or arrested.""" (*People v. Avila, supra,* 46 Cal.4th at p. 710, quoting *People v. Visciotti, supra,* 2 Cal.4th at p. 60.) Also, a flight instruction is properly given where identity is contested as long as there is some evidence identifying the defendant as the person who fled and the prosecution relies on flight as tending to show guilt. (*People v. Mason, supra*, 52 Cal.3d at pp. 942-943.)

The prosecution evidence showed Johnson fled immediately after shooting Lopez. (12 RT 1249-1250, 1965-1968, 2015-2016, 2032, 2063-2064; 20 RT 3133-3135.) The evidence also showed Johnson fled

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[65] Johnson mistakenly characterizes defense counsel's comments as a failure to object. (See AOB 115, fn. 47.) Respondent recognizes that a mere failure to object would not have forfeited the claim. (See *People v. Taylor, supra,* 48 Cal.4th at p. 630, fn. 13.) However, as shown above, this is not an instance of failure to object. Rather, defense counsel affirmatively indicated to the court that it had a sua sponte duty to give the instruction for the Lopez shooting.

immediately after the Campos shooting (15 RT 2371-2378; 19 RT 2904-2905, 2909-2910) and left the state (22 RT 3325-3328; 23 RT 3580-3584.) In the guilt phase, the trial court instructed the jury with CALJIC No. 2.52 as follows:

> The flight of a person immediately after the commission of a crime, or after [he] is accused of a crime, is not sufficient in itself to establish [his] guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(14 CT 3728.) Since there was substantial evidence of flight, CALJIC No. 2.52 was properly given as to both murders.

Instead of contesting the sufficiency of evidence supporting the flight instruction in his case, Johnson asserts various general challenges to CALJIC No. 2.52. However, each of the arguments raised by Johnson has repeatedly been rejected by this Court. As Johnson offers no new arguments, Johnson's invitation to reconsider the instruction should be declined.

Johnson first complains that CALJIC No. 2.52 is impermissibly argumentative because it was slanted toward the prosecution. (AOB 116-20.) Similar challenges to the instruction were rejected in *People v. Taylor, supra,* 48 Cal.4th at p. 630, *People v. McWhorter, supra,* 47 Cal.4th at p. 377, *People v. Friend* (2009) 47 Cal.4th 1, 52-53, *People v. Loker* (2008) 44 Cal.4th 691, 706, *People v. Rundle* (2008) 43 Cal.4th 76, 152, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22, *People v. Mendoza* (2000) 24 Cal.4th 130, 180-181, and *People v. Bacigalupo* (1991) 1 Cal.4th 103, 128.

An argumentative instruction is one which is """of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.""" (*People v. Panah* (2005) 35 Cal.4th 395,

486, quoting *People v. Mincey* (1992) 2 Cal.4th 408, 437; see also *People v. Earp* (1999) 20 Cal.4th 826, 886.) CALJIC No. 2.52 is not argumentative because "it does not impermissibly direct the jury to make only one inference." (*People v. Mendoza, supra,* 24 Cal.4th at pp. 180-181.) Rather, where flight is found under CALJIC No. 2.52, the instruction permits the jury "'to consider alternative explanations for that flight other than defendant's consciousness of guilt.'" (*People v. Avila, supra,* 46 Cal.4th at p. 710, quoting *People v. Bradford* (1997) 14 Cal.4th 1005, 1055.)

As a corollary to his first argument, Johnson contends the flight instruction lessened the prosecutor's burden of proof. (AOB 117.) This contention has also been rejected by this Court. (*People v. Avila, supra,* 46 Cal.4th at p. 710; *People v. Mendoza, supra,* 24 Cal.4th at p. 181; see also *People v. Smithey, supra,* 20 Cal.4th at p. 982 ["instruction did not create an unconstitutional presumption of guilt"].)

Johnson next argues CALJIC No. 2.52 permitted the jurors to draw irrational permissive inferences about his guilt because there was no rational connection between flight and consciousness of guilt and because flight was not probative of his mental states at the times of the murders. (AOB 120-123.) Similar challenges to the instruction were rejected in *People v. Taylor, supra,* 48 Cal.4th at p. 630, *People v. McWhorter, supra,* 47 Cal.4th at p. 377, *People v. Burney, supra,* 47 Cal.4th at pp. 244-245, *People v. Friend, supra,* 47 Cal.4th at pp. 52-53, *People v. Avila, supra,* 46 Cal.4th at p. 710, *People v. Loker, supra,* 44 Cal.4th at p. 706, *People v. Rundle, supra,* 43 Cal.4th at pp. 153-154, *People v. Zambrano* (2007) 41 Cal.4th 1082, 1160 (disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 2), *People v. Mendoza, supra,* 24 Cal.4th at pp. 179-180, *People v. Smithey, supra,* 20 Cal.4th at p. 982, *People v. Welch, supra,* 20 Cal.4th at p. 757, and *People v. Ray, supra,* 13 Cal.4th at pp. 345-346.

Johnson specifically claims his flight following the Lopez shooting "shed no light" on his intent or mental state during the crime, arguing he might have fled because he did not want to go to prison for some unspecified crime that might have not risen to the level of murder. (AOB 121-122.) Johnson overlooks the fact that his defense at trial was accident. Like in *Zambrano*, CALJIC No. 2.52 "was manifestly relevant to the issue whether defendant held an honest belief that [Lopez's] death was an accident for which he bore no criminal responsibility." (See *People v. Zambrano, supra,* 41 Cal.4th at p. 1160.)

Johnson also argues CALJIC No. 2.52 was irrelevant because he did not dispute his identity in the Lopez shooting. (AOB 122.) This Court has

> repeatedly rejected the argument that instructions on consciousness of guilt, including instructions regarding the defendant's flight following the crime, permit the jury to draw impermissible inferences about the defendant's mental state, or are otherwise inappropriate where mental state, not identity, is the principal disputed issue. [Citations.] As we have said, even where the defendant concedes some aspect of a criminal charge, the prosecution is entitled to bolster its case, which requires proof of the defendant's guilt beyond a reasonable doubt, by presenting evidence of the defendant's consciousness of guilt.

(*People v. Zambrano, supra,* 41 Cal.4th at p. 1160; see also *People v. Burney, supra,* 47 Cal.4th at p. 245; *People v. Loker, supra,* 44 Cal.4th at p. 707; *People v. Smithey, supra,* 20 Cal.4th at p. 982; *People v. Ray, supra,* 13 Cal.4th at pp. 345-346 [rejecting argument that flight instruction was irrelevant].)

Finally, Johnson contends CALJIC No. 2.52 was unnecessary because it duplicated principles which were adequately covered in the circumstantial evidence instructions. (AOB 123.) This argument has also already been rejected by this Court. (See *People v. Friend, supra,* 47 Cal.4th at pp. 52-53.)

Johnson argues CALJIC Nos. 2.00, 2.01 and 2.02 "informed the jury that it may draw inferences from the circumstantial evidence, i.e. that it could infer facts tending to show Johnson's guilt – including his state of mind – from the circumstances of the alleged crimes." (AOB 123.) However,

> "the flight instruction, as the jury would understand it, does not address the defendant's specific mental state at the time of the offenses, or his guilt of a particular crime, but advises of circumstances suggesting his consciousness that he has committed some wrongdoing."

(*People v. Loker, supra,* 44 Cal.4th at p. 706-707, quoting *People v. Zambrano, supra,* 41 Cal.4th at p. 1160; see also *People v. Welch, supra,* 20 Cal.4th at p. 757; *People v. Ray, supra,* 13 Cal.4th at p. 346.) Accordingly, Johnson's argument that CALJIC No. 2.52 was simply duplicative of the circumstantial instructions is unpersuasive.

Since CALJIC No. 2.52 was properly given in his case, there was no violation of Johnson's state or federal constitutional rights. (See *People v. Rundle, supra,* 43 Cal.4th at pp. 154; *People v. Mendoza, supra,* 24 Cal.4th at p. 180 [no due process violation].) The judgment should be affirmed.

C. Even Assuming Error, Johnson Was Not Prejudiced

Notwithstanding the propriety of CALJIC No. 2.52, any alleged instructional error was harmless in Johnson's case. The erroneous giving of a flight instruction is reviewed for harmless error under the *Watson* test for state law error. (See *People v. Crandell* (1988) 46 Cal.3d 833, 870, disapproved on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) Thus, reversal is not warranted unless it is "reasonably probable a verdict more favorable to defendant would have resulted had the instruction not been given." (*Ibid.*)

As previously noted, CALJIC No 2.52 did not direct the jury only to an inference in support of the prosecutor's theory of the case. (*People v.*

Mendoza, supra, 24 Cal.4th at pp. 180-181.) Rather, the instruction permitted the jurors to accept alternative explanations for Johnson's flight including those favorable to the defense. (See *People v. Avila, supra,* 46 Cal.4th at p. 710; *People v. Bradford, supra,* 14 Cal.4th at p. 1055.)

Moreover, if as argued by Johnson on appeal, there was no logical connection between the flight and Johnson's mental state, no reasonable jury would have drawn any adverse inference from the instruction. (See *People v. Rundle, supra,* 43 Cal.4th at pp. 153-154 [if the jurors "found the logical connection between the two was lacking"].) Also, the flight instruction "did not suggest that the jury should consider such evidence as dispositive." (*People v. Carter, supra,* 36 Cal.4th at p. 1182.)

Johnson overemphasizes the significance of CALJIC No. 2.52. Indeed, his argument that the flight instruction merely duplicated other properly given instructions on circumstantial evidence undermines his claim of prejudice. (See AOB 123.)

Finally, Johnson's second degree murder conviction was supported by substantial evidence independent of his flight after the Lopez shooting.[66] Johnson's flight was inconsistent with his claim that the shooting was an accident. Moreover, Johnson's accident defense was sufficiently discredited by other evidence showing Johnson intended to shoot Alvarez or at least committed an act inherently dangerous to and in conscious disregard of human life when he introduced a loaded shotgun into a highly volatile confrontation in close proximity to Lopez. (12 RT 199-2000, 2013-2015, 2020-2023, 2060-2061; 20 RT 3126-3129, 3132-3133, 3147,

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[66] As previously noted, Johnson only requests reversal of his second degree murder conviction for the Lopez shooting and, consequently, the multiple murder special circumstance. (See AOB 124.)

3151-3154; 22 RT 3398-3400, 3415-3416; 14 CT 3771 [CALJIC No. 8.31; second degree murder instruction].)

Accordingly, it is not reasonably probable that Johnson would have received a more favorable verdict on count 2 in the absence of the flight instruction, and reversal of the judgment and multiple murder special circumstance is not warranted. (See *People v. Crandell, supra,* 46 Cal.3d at p. 870; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

VIII. THERE WAS NO VARIANCE BETWEEN THE INFORMATION AND JURY INSTRUCTIONS ON FIRST DEGREE MURDER

Johnson contends the second amended information only charged him with second degree murder for the Campos homicide because Count 1 was charged as malice murder under section 187 rather than deliberate and premeditated or felony murder under section 189. Accordingly, Johnson claims the trial court erred in instructing the jury on first degree murder, lacked jurisdiction to try him for first degree felony murder and violated his constitutional rights to due process, a fair trial, trial by jury and a reliable verdict. (AOB 125-132.) Johnson again presents a claim which has been repeatedly rejected by this Court and presents no new arguments or persuasive reason to revisit the issue.

This Court has "held for nearly a century that if the charging document charges the offense in the language of the statute defining murder (§ 187), the offense charged includes murder in the first degree and murder in the second degree." (*People v. Hawthorne, supra,* 46 Cal.4th at p. 89, citing *People v. Witt* (1915) 170 Cal. 104, 107-108; see also *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 141; *People v. Friend, supra,* 47 Cal.4th at p. 54; *People v. Bramit* (2009) 46 Cal.4th 1221, 1236-1238; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 222; *People v. Harris* (2008) 43 Cal.4th 1269, 1294; *People v. Zamudio* (2008) 43 Cal.4th 327, 362;

People v. Brasure (2008) 42 Cal.4th 1037, 1057; *People v. Morgan* (2007) 42 Cal.4th 593, 616; *People v. Geier* (2007) 41 Cal.4th 555, 570; *People v. Carey* (2007) 41 Cal.4th 109, 131-132; *People v. Hughes* (2002) 27 Cal.4th 287, 369; *People v. Silva* (2001) 25 Cal.4th 345, 367.)

This is because first degree murder and malice murder are not separate offenses. (*People v. Brasure, supra,* 42 Cal.4th at p. 1057; *People v. Geier, supra,* 41 Cal.4th at p. 570; *People v. Hughes, supra,* 27 Cal.4th at p. 369; *People v. Silva, supra,* 25 Cal.4th at p. 367.) Also, "felony murder and premeditated murder are not separate crimes, but rather different varieties of the same crime." (*People v. Carey, supra,* 41 Cal.4th at p. 132.)

Johnson raises the often repeated argument that *People v. Dillon* (1983) 34 Cal.3d 441, overruled the long-standing precedent of *People v. Witt, supra,* 170 Cal. 104, insofar as the charging of first degree murder. (AOB 128-129.) Like the defendants in *Bramit*, *Harris* and *Cary*, Johnson

> "misreads both *Dillon* and the statutes. *Dillon* made it clear that section 189 serves *both* a degree-fixing function and the function of establishing the offense of first degree felony murder. [Citation.] It defines second degree murder as well as first degree murder. Section 187 also includes both degrees of murder in a more general formulation [Citations.] Thus, an information charging murder in the terms of section 187 is 'sufficient to charge murder in any degree.' [Citation.]"

(*People v. Bramit, supra,* 46 Cal.4th at pp. 1237-1238, quoting *People v. Harris, supra,* 43 Cal.4th at pp. 1294-1295, quoting *People v. Carey, supra,* 41 Cal.4th at p. 132; see also *People v. Hawthorne, supra,* 46 Cal.4th at p. 89; *People v. Brasure, supra,* 42 Cal.4th at p. 1057; *People v. Morgan, supra,* 42 Cal.4th at p. 616; *People v. Geier, supra,* 41 Cal.4th at p. 591; *People v. Hughes, supra,* 27 Cal.4th at p. 369.)

Finally, Johnson argues his constitutional rights to notice of the charges, due process and trial by jury were violated under *Apprendi v. New*

Jersey (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], because he was not charged with facts which increased the maximum penalty for the murder and he was convicted of an uncharged crime. (AOB 130-132.) This argument has also been consistently rejected by this Court. (See *People v. Friend, supra,* 47 Cal.4th at p. 54; *People v. Bramit, supra,* 46 Cal.4th at p. 1238; *People v. Harris, supra,* 43 Cal.4th at p. 1295.)

Apprendi is inapposite because, as discussed above, Johnson "was not convicted of an 'uncharged crime.'" (See *People v. Friend, supra,* 47 Cal.4th at p. 54, citing *People v. Whisenhunt, supra,* 44 Cal.4th at p. 222.) Moreover, Johnson's "'*Apprendi* claim is illusory" since "the information included special circumstance allegations that fully supported the penalty verdict.'" (*People v. Bramit, supra,* 46 Cal.4th at p. 1238, quoting *People v. Harris, supra,* 43 Cal.4th at p. 1295.)

Johnson was not convicted of an uncharged first degree murder, the jury was properly instructed, and none of Johnson's constitutional rights were violated. Accordingly, the judgment should be affirmed.

IX. There Is No Requirement for Jury Unanimity as to the Theory for a First Degree Murder Conviction

Johnson claims his rights to have all elements of the first degree murder proved beyond a reasonable doubt by a unanimous jury and his right to a fair and reliable verdict were violated because the trial court failed to instruct the guilt phase jurors that they had to unanimously agree on the type of first degree murder he committed. (AOB 133-141.) Once again, Johnson offers no new argument or persuasive reason for this Court to reconsider the issue.

This Court "repeatedly [has] held that jurors need not unanimously agree on a theory of first degree murder as either felony murder or murder with premeditation." (*People v. Carey, supra,* 41 Cal.4th at pp. 132-133,

citing *People v. Nakahara* (2003) 30 Cal.4th 705, 712, and *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; see also *People v. Friend, supra,* 47 Cal.4th at p. 54; *People v. Bramit, supra,* 46 Cal.4th at p. 1238; *People v. Hawthorne, supra,* 46 Cal.4th at p. 89; *People v. Harris, supra,* 43 Cal.4th at p. 1295; *People v. Zamudio, supra,* 43 Cal.4th at pp. 362-363; *People v. Morgan, supra,* 42 Cal.4th at p. 617; *People v. Geier, supra,* 41 Cal.4th at p. 592; *People v. Benavides, supra,* 35 Cal.4th at pp. 100-101; *People v. Cole* (2004) 33 Cal.4th 1158, 1221; *People v. Box, supra,* 23 Cal.4th at p. 1212.)

This is because "'[f]elony murder and premeditated murder are not distinct crimes.'" (*People v. Benavides, supra,* 35 Cal.4th at p. 101, quoting *People v. Davis* (1995) 10 Cal.4th 463, 514.) "When, as here, the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed, the jury need not unanimously agree on the theory under which the defendant it guilty." (*Ibid.*)

Johnson argues his claim should be reconsidered in light of "recent" United States Supreme Court decisions such as *Apprendi v. New Jersey, supra,* 530 U.S. 466, *Schad v. Arizona* (1991) 501 U.S. 624 [111 S.Ct. 2491, 115 L.Ed.2d 555], and *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]. (See AOB 133, 138-140.) This Court has already done so and concluded that neither *Apprendi*, *Schad* nor *Ring* leads to a different result. (See *People v. Harris, supra,* 43 Cal.4th at pp. 1295-1296 [*Schad*]; *People v. Morgan, supra,* 42 Cal.4th at p. 617 [*Apprendi*]; *People v. Geier, supra,* 41 Cal.4th at p. 592 [*Apprendi* and *Ring*]; *People v. Carey, supra,* 41 Cal.4th at p. 133 [*Apprendi* and *Ring*]; *People v. Benavides, supra,* 35 Cal.4th at p. 101 [*Schad*].)

Contrary to Johnson's argument, "[t]he United States Supreme Court has held that a jury need not unanimously agree on whether the defendant committed premeditated or felony murder, and this rule has been widely

adopted by state courts." (*People v. Harris, supra,* 43 Cal.4th at p. 1295, citing *Schad v. Arizona, supra,* 501 U.S. at pp. 640-642 (plur. opn. of Souter, J.), and pp. 649-651 (conc. opn. of Scalia, J.).) Johnson attempts to distinguish *Schad* by citing this Court's prior references to premeditation and the facts underling felony murder as "elements" of first degree murder. (AOB 138-140.) As stated in *Harris*,

> [t]he distinction is merely semantic. The Arizona murder statute at issue in *Schad* was substantially similar to section 189, and to the common law definition of murder in existence since "at least the early 16th century." [Citation and reference to footnote.] Whether the mental states required for a conviction of first degree murder are described as "elements" [citation], 'theories" [citation], or "alternative means of satisfying the element of *mens rea*" [citation], the rule remains the same: the jury need only unanimously agree that the defendant committed first degree murder."

(*People v. Harris, supra,* 43 Cal.4th at p. 1296.)

Nonetheless, the jury's true findings on the robbery and kidnapping special circumstances demonstrates the jurors unanimously agreed on a felony-murder theory of first degree murder. (See *People v. Bramit, supra,* 46 Cal.4th at p. 1238; *People v. Hawthorne, supra,* 46 Cal.4th at p. 89-90; *People v. Harris, supra,* 43 Cal.4th at p. 1296.) Accordingly, Johnson's claim of instructional error can readily be dismissed and the judgment affirmed.

X. THE "ACQUITTAL-FIRST" RULE IS CONSTITUTIONAL

Johnson claims the trial court's instructions to the guilt phase jurors that they had to acquit on first degree murder before returning a conviction for second degree murder "skewed" the deliberations in favor of a first degree murder for the Campos homicide in violation of Johnson's rights to due process, trial by jury and a reliable verdict. (AOB 142-151.) Johnson

offers yet another well-worn argument which this Court has previously rejected and need not revisit.

The trial court instructed the guilt phase jury with the following instructions:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

(14 CT 3785 [CALJIC No. 8.71].)

> If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder.

(14 CT 3786 [CALJIC No. 8.72].)

> Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you should find him guilty of an unlawful killing, you must agree unanimously as to whether he is guilty of murder of the first degree or murder of the second degree or voluntary or involuntary manslaughter.

(14 CT 3788 [CALJIC No. 8.74] [brackets omitted].)

> If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime.
>
> The crime of voluntary manslaughter is lesser to that of murder charged in Counts 1 & 2.
>
> The crime of involuntary manslaughter is lesser to that of murder charged in Counts 1 & 2.
>
> Thus, you have to determine whether the defendant is guilty or not guilty of the crimes charged in Counts 1 & 2 or of any lesser

> crimes. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdicts. However, the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the charged crimes.

(14 CT 3809 [CALJIC No. 17.10] [brackets omitted].)

Subsequently, after the jury indicated it was unable to reach a verdict on count 2 and the prosecutor elected to reduce that charge to second degree murder, the trial court gave the jury the following special instruction:

> Previously I instructed you under 8.71 and other instructions, that you could not return a verdict on second degree murder or any lesser charge, unless you <u>unanimously</u> agreed that the defendant was <u>not guilty</u> of first degree murder.
>
> This instruction will continue to apply to Count 1 (Martin Campos). I am now changing this instruction as to Count 2 (Camerina Lopez). As to Count 2 (Camerina Lopez) <u>only</u> you are no longer to consider first degree murder. You are now to consider only second degree murder, voluntary manslaughter, involuntary manslaughter and not guilty (and the firearm allegation). First degree murder on Count 2 (Camerina Lopez) is no longer before you.

(14 CT 3832 [emphasis in original]; 29 RT 4412-4413.)

This Court has "upheld the 'acquittal first' rule, namely, that a jury must unanimously agree to acquit a defendant of a greater charge before returning a verdict on a lesser charge. [citation.]" (*People v. Whisenhunt, supra,* 44 Cal.4th at p. 222, citing *People v. Fields* (1996) 13 Cal.4th 289, 309-311.)

> The acquittal-first rule protects a defendant from retrial when the jury agrees that the greater offense was not proven but cannot agree on a lesser included offense. Without the rule, a general declaration of mistrial would disguise the fact that the jury

> agreed the defendant was not guilty of the greater offense, making the defendant subject to retrial on both the greater and lesser offenses.

(*People v. Anderson* (2009) 47 Cal.4th 92, 114.)

The acquittal first rule still permits the jurors to consider or discuss the charges in any order they prefer. (*People v. Anderson, supra,* 47 Cal.4th at p. 114, citing *People v. Kurtzman* (1988) 46 Cal.3d 322, 330.) Thus, "[s]ince *Fields*, [this court has] repeatedly rejected arguments similar to those raised by defendant that the 'acquittal first' rule 'precludes full jury consideration of lesser included offenses' and encourages 'false unanimity' and 'coerced verdicts.' " (*Ibid.*, citing *People v. Nakahara, supra,* 30 Cal.4th at p. 715, and *People v. Riel* (2000) 22 Cal.4th 1153, 1200-1201; see also *People v. Jurado* (2006) 38 Cal.4th 72, 125; *People v. Mickey* (1991) 54 Cal.3d 612, 672-673.)

Johnson's contention that the "acquittal first" instructions "skewed" the jurors' deliberations is unconvincing. As in *Mickey,*

> A reasonable juror would have understood the challenged instructions to govern *how the panel was to return its verdicts on homicide, and not to affect how it was to deliberate on the matter*. Certainly, such a juror could not have construed the charge so as to interfere in any significant way with his consideration of the evidence.

(*People v. Mickey, supra,* 54 Cal.3d at p. 673 [emphasis added].)

Also, Johnson's claim that the special instruction constituted a "change" which confused the jurors is unfounded. The special instruction reiterated the same principles articulated in CALJIC Nos. 8.71, 8.72, 8.74 and 17.01, simply removing first degree murder from the jury's consideration for count 2.

There was no instructional error or violation of Johnson's constitutional rights to due process, trial by jury or a reliable verdict. The judgment should be affirmed.

XI. THE TRIAL COURT'S DISMISSAL OF THE FIRST DEGREE MURDER CHARGE ON COUNT 2 WAS PROPER AND HAD NO EFFECT ON THE JURY'S VERDICT FOR COUNT 1

Johnson claims the trial court improperly removed the first degree murder charge from the jury's consideration for the Lopez homicide and that the dismissal of that charge skewed the jury's verdict in the Campos homicide to first degree murder. (AOB 152-157.) Each of Johnson's contentions lacks merit.

On the sixth day of the guilt phase deliberations, the jury submitted a written request for an explanation of CALJIC No. 8.71, informed the court that it was unable to reach a unanimous verdict on either count, and requested guidance. (14 CT 3695A.) The trial court discussed the note with counsel, and thereafter spoke with the jurors. (29 RT 4377-4383.) The jurors clarified that they were unable to unanimously agree on the degree of murder for either count. (29 RT 4383-4387.)

During the ensuing discussions between the court and counsel, the prosecutor indicated his desire to withdraw first degree murder from the jurors' consideration in the Lopez homicide since that count did not carry its own special circumstance and would still satisfy the multiple murder special circumstance as a second degree murder. (29 RT 4390-4391.) Subsequently, the foreperson stated that the jury was unable to unanimously agree on anything as to count 1 but was able to agree on some matter as to count 2. The foreperson and two other jurors indicated that further deliberations might be productive, but nine jurors disagreed. (29 RT 4395-4399.) The court asked the jurors to continue their deliberations. (29 RT 4402-4404.)

The following day, the jury requested further instruction on transferred intent as it related to first or second degree murder. (14 CT 3696A.) Based on this request, the prosecutor surmised that the jury was

having problems reaching a verdict as to the degree of the Lopez murder and asked the court to withdraw first degree murder from the jury's consideration as to that count. (29 RT 4405.)

The court considered the prosecutor's request to be essentially a motion to dismiss first degree murder as to count 2. (29 RT 4407.) Defense counsel objected under the Sixth, Eight and Fourteenth Amendments, arguing the dismissal would have a coercive effect "on this count, maybe on the other counts as well."[67] (AOB 4407.) The prosecutor responded:

> Well, clearly, they have been able to separate in their minds the two different crimes, and they are analyzing them completely separately. I think there is no real reason to think that there is going to be any kind of spillover relationship of one to the other.

(29 RT 4407.) After defense counsel expressed his disagreement, the court stated:

> Well, I think the instruction that Mr. West was proposing clearly distinguishes, clearly separates them out; makes it clear that what we're referring to here is only as to Count II. In fact, it says that in at least two – three different places. So – I don't think that that would send any message that – Count I is clearly something else. I mean, clearly, they should – I don't think it sends a message that I am instructing them that they should lean toward a particular verdict as to Count I. I don't think there is any – I don't see the coercion here at all. But you're right. The BORDEAUX[68] case does not hit on all fours because it doesn't have multiple counts, as we have here. But I do think it's pretty persuasive.

(29 RT 4407-4408.) Thereafter, the court read the special instruction to the jury. (29 RT 4412-4413.)

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[67] On appeal, Johnson no longer contends the dismissal had any improper effect on count 2. (See AOB 152-157.)

[68] *People v. Bordeaux* (1990) 224 Cal.App.3d 573.

A. The Dismissal of the First Degree Murder Charge for Count 2 Was Proper

Here, the jurors' responses to the court's inquiry as well as their request for further explanation of the transferred intent doctrine showed they were deadlocked as to the degree for the Lopez murder despite the hopes of a small minority of jurors that further deliberations might help in regards to some unspecified issue as to either count.

> [W]hen faced with a deadlock on the greater offense and a verdict of guilt on the lesser included offense, the People may prefer to forgo the opportunity to convict the accused of the greater offense on retrial in favor of obtaining a present conviction on the lesser included offense. [Citation.] In that case, the People should move the trial court to exercise its discretion to dismiss the charge on the greater offense in furtherance of justice under section 1385. [Citation.]

(*People v. Fields, supra,* 13 Cal.4th at p. 311, citing *People v. Zapata* (1992) 9 Cal.App.4th 527, 534, and *People v. Bordeaux, supra,* 224 Cal.App.3d at pp. 581-582.)

Johnson argues the dismissal was invalid because the trial court did not comply with the statutory requirement of section 1385 that it state its reasons for the dismissal in the minutes. As support for his position, Johnson cites *People v. Orin* (1975) 13 Cal.3d 937, and Justice Weiner's concurring opinion in *People v. Bordeaux, supra,* 224 Cal.App.3d at p. 584, which in turn relies on *Orin.* (AOB 153-154.) However, *Orin* has no application here since that case addressed a disposition and dismissal over the People's objections.

In *Orin,* the defendant was charged with three counts. (*People v. Orin, supra,* 13 Cal.3d at p. 940.) When the case was called for trial, the prosecutor informed the court that he was "ready to proceed to trial on all counts and that any plea to count III was unacceptable." (*Id.* at p. 940.) Yet, the trial court over the prosecutor's repeated objections accepted the

defendant's plea to count III and subsequently dismissed the remaining counts at the sentencing hearing. (*People v. Orin, supra,* 13 Cal.3d at pp. 940-941.) The People appealed from the dismissal order. (*Id.* at p. 940.)

In reversing the trial court's order and reinstating the dismissed counts, this Court explained that a trial "court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of 'plea bargaining' to 'agree' to a disposition of the case *over prosecutorial objection.*" (*People v. Orin, supra,* 13 Cal.3d at p. 943 [emphasis added].)

As a secondary reason for its reversal of the trial court's order, this Court found the dismissal was "manifestly invalid" because the trial court failed to set forth its reasons in the minutes as required under section 1385. (*Id.* at pp. 943-944.) However, the underlying purpose of this statutory requirement is "'*to protect the public interest against improper or corrupt* (fn. omitted) *dismissals*' and to impose a purposeful restraint upon the exercise of judicial power 'lest magistral discretion sweep away the government of laws.'" (*Id.* at p. 944, quoting *People v. Superior Court* (*Schomer*) (1970) 13 Cal.App.3d 672, 678 [emphasis added].) As the *Schomer* court explained, "'A judge dismissing criminal charges without trial, *upon his motion*, must record his reasons so that all may know why this great power was exercised....'" (*Schomer, supra,* 13 Cal.App.3d at p. 678, quoting *People v. Winters* (1959) 171 Cal.App.2d Supp. 876, 882 [emphasis added].)

In Johnson's case, the dismissal of the first degree murder charge for count 2 was made at the behest of the People, not over their objection or upon the court's own motion. Thus, the underlying purpose and rationale for the strict rule in *Orin* does not apply here and the dismissal should be deemed valid.

B. The Dismissal As to Count 2 Did Not Affect the Jury's Deliberations on Count 1

As the trial court noted, nothing about the dismissal of the first degree murder charge for the Lopez homicide had any bearing on the Campos matter and the special instruction clearly separated the two counts. (See 29 RT 4407-4408; 14 CT 3832.) Moreover, the jury was instructed:

> Each Count charges a distinct crime. You must decide each Count separately. The defendant may be found guilty or not guilty of either or both of the crimes charged. Your finding as to each Count must be stated in a separate verdict.

(14 CT 3808 [CALJIC No. 17.02].) It is presumed that the jurors understood and followed this instruction. (See *Penry v. Johnson, supra,* 532 U.S. at p. 799; *Greer v. Miller, supra,* 483 U.S. at p. 766 fn. 8; *Richardson v. Marsh, supra,* 481 U.S. at p. 211; *People v. Sanchez, supra,* 26 Cal.4th at p. 852; *People v. Osband, supra,* 13 Cal.4th at p. 714; *People v. Pinholster, supra,* 1 Cal.4th at p. 919.) Johnson's bare speculation, unsupported by any citation to the record, of some coercive cross-count effect fails to rebut this presumption. (See AOB 155-156.)

Indeed, contrary to Johnson's argument, "the dismissal would only operate to the benefit of appellant in thrusting into the jurors' minds doubt as to the strength of the remainder of the prosecution's case." (See *People v. Harris* (1977) 71 Cal.App.3d 959, 967.) Accordingly, Johnson's claims of statutory and constitutional error should be rejected and the judgment affirmed.

XII. The Trial Court's Incorrect Instruction on Simple Kidnapping Does Not Require that the Kidnap-Murder Special Circumstance Be Set Aside

Johnson claims the kidnap-murder special circumstance must be set aside because the trial court incorrectly instructed the jury with a definition

of simple kidnap that was not in effect at the time of the charged offense. (AOB 158-161.) Respondent agrees that the simple kidnap instruction was erroneous. However, the kidnap-murder special circumstance should stand since the jury's robbery finding shows the jurors relied on a theory of aggravated kidnapping for which they were correctly instructed.

In *People v. Caudillo* (1978) 21 Cal.3d 562, this Court held the asportation requirement for simple kidnap was entirely dependant on the distance the victim was moved. (*People v. Martinez* (1999) 20 Cal.4th 225, 233, citing *People v. Caudillo, supra,* 21 Cal.3d at p. 572.) The *Caudillo* Court "expressly declined the People's invitation 'to introduce considerations – other than actual distance – as determinative of what constitutes 'sufficient movement' of the victim" such as "the incidental nature of the movement, the defendant's motivation to escape detection" or "the possible enhancement of danger to the victim resulting from the movement." (*Id.* at p. 244, citing *People v. Caudillo, supra,* 21 Cal.3d at p. 574; see also *People v. Morgan, supra,* 42 Cal.4th at pp. 609-610.)

The law for simple kidnap remained the same until 1999 when this Court abandoned the *Caudillo* standard and held jurors should consider the totality of the circumstances (including increased risk of harm, decreased likelihood of detection, inherent danger in foreseeable attempts by the victim to escape and enhanced opportunity to commit additional crimes) in determining whether the movement was substantial in character. (*People v. Morgan, supra,* 42 Cal.4th at p. 610, citing *People v. Martinez, supra,* 20 Cal.4th at p. 237.) Based on its determination that this change in the law "'constitute[d] "judicial enlargement of a criminal act,"'" this Court held the new rule for simple kidnapping announced in *Martinez* was only to be applied prospectively. (*Ibid.*, citing *People v. Martinez, supra,* 20 Cal.4th at pp. 237, 239.) Thus, the *Caudillo* standard continues to govern crimes committed prior to 1999, and the *Martinez* "totality of the circumstances"

test constitutes "a legally inadequate theory" for simple kidnap in such cases. (*People v. Morgan, supra,* 42 Cal.4th at p. 611.)

Unlike simple kidnap, the law of aggravated kidnapping remained consistent since articulated by this Court in *People v. Daniels* (1969) 71 Cal.2d 1119, and reaffirmed in *People v. Rayford* (1994) 9 Cal.4th 1, until 1997.[69] (See *People v. Martinez, supra,* 20 Cal.4th at pp. 232-233 [noting "asportation requirement for simple kidnapping has historically been less clear"].) *Daniels* and *Rayford* both defined substantial movement for purposes of aggravated kidnapping in terms of the "'scope and nature' of the movement," including whether the movement was merely incidental to the underlying crime, whether the movement increased the risk of harm beyond that necessarily present in the underlying crime, the decreased likelihood of detection, the inherent danger in foreseeable victim escape attempts and the enhanced opportunity to commit additional crimes. (*Id.* at pp. 232-233, citing *People v. Rayford, supra,* 9 Cal.4th at pp. 12, 13-14, 22, and *People v. Daniels, supra,* 71 Cal.2d at pp. 1128, 1139.)

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[69] In 1997, the Legislature added section 209, subdivision (b)(2), codifying *Rayford* "and a modified version" of the *Daniels* asportation standard. (*People v. Martinez, supra*, 20 Cal.4th 225, 232, fn. 4, citing Stats. 1997, ch. 817, § 17; Sen. Rules Com., Analysis of Assem. Bill No. 59 (1997-1998 Reg. Sess.) as amended Sept. 4, 1997, p. 3.) In so doing, the Legislature omitted the word "substantial" in defining the required increase in the risk of harm. The newly enacted subdivision (b)(2) of section 209 read: "This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." (Stats. 1997, ch. 817, § 2.) Thus, for aggravated kidnaps committed after the 1997 amendment, section 209 no longer requires that the increased risk of harm to the victim be substantial. (*Ibid.*) Johnson's jury was correctly instructed on the substantial increase of risk of harm standard for his 1995 offense. (14 CT 3799-3801.)

Johnson was charged with two special circumstances specifically pertaining to the November 11, 1995, Campos killing. The first special circumstance alleged the murder was committed during "the commission of, attempted commission of, and the immediate flight after committing and attempting to commit the crime of KIDNAPPING AND KIDNAPPING FOR ROBBERY, in violation of sections 207 and 209 of the Penal Code, within the meaning of Penal Code section 190.2(a)(17)(ii)." (3 CT 788.)

The second special circumstance alleged the Campos murder was committed during "the commission of , attempted commission of, and the immediate flight after committing and attempting to commit the crime of ROBBERY in violation of Section 211 of the Penal Code, within the meaning of Penal Code Section 190.2(a)(17)[](i)." (3 CT 788.)

The trial court instructed the jury on simple kidnap as follows:

> Every person who unlawfully and with physical force or by any other means of instilling fear, steals or takes, or holds, detains, or arrests another person and carries that person without his consent [or] compels any other person without his consent and because of a reasonable apprehension of harm, to move for a distance that is substantial in character, is guilty of the crime of kidnapping in violation of Penal Code section 207, subdivision (a).
>
> A movement that is only for a slight or trivial distance is not substantial in character. In determining whether a distance that is more than slight or trivial is substantial in character, you should consider the totality of the circumstances attending the movement, including, but not limited to, the actual distance moved, or whether the movement increased the risk of harm above that which existed prior to the movement, or decreased the likelihood of detection, or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's enhanced opportunity to commit additional crimes. If an associated crime is involved, the movement also must be more than that which is incidental to the commission of the other crime.

In order to prove this crime, each of the following elements must be proved:

> 1. A person was unlawfully moved by the use of physical force, or by any other means of instilling fear; or
>
> A person was unlawfully compelled by another person to move because of a reasonable apprehension of harm;
>
> 2. The movement of the other person was without his consent; and
>
> 3. The movement of the other person in distance was substantial in character.

(14 CT 3796-3797 [CALJIC No. 9.50 (1999 Revision)] [original brackets and redundant commas omitted].)

The trial court instructed the court on aggravated kidnap as follows:

> Every person who, with the specific intent to commit robbery, kidnaps any individual, is guilty of the crime of kidnapping to commit robbery in violation of Penal Code section 209, subdivision (b)(1).
>
> The specific intent to commit robbery must be present when the kidnapping commences.
>
> Robbery is the taking of personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specific intent permanently to deprive the person of his or her property.
>
> Kidnapping is the unlawful movement by physical force of a person without that person's consent for a substantial distance where the movement is not merely incidental to the commission of the robbery and where the movement substantially increases the risk of harm to the person moved, over and above that necessarily present in the crime of robbery itself.
>
> Kidnapping is also the unlawful compulsion of another person without that person's consent and because of a reasonable apprehension of harm, to move for a substantial distance where such movement is not merely incidental to the commission of

the robbery and where the movement substantially increases the risk of harm to the person moved, over and above that necessarily present in the crime of robbery itself.

Brief movements to facilitate the crimes [*sic.*] of robbery are incidental to the commission of the robbery. On the other hand, movements to facilitate the robbery that are for a substantial distance rather than brief are not incidental to the commission of the robbery.

In order to prove this crime, each of the following elements must be proved:

1. A person was unlawfully moved by the use of physical force; or

A person was unlawfully compelled to move because of a reasonable apprehension of harm;

2. The movement of that person was caused with the specific intent to commit robbery, and the person causing the movement had the required specific intent when the movement commenced;

3. The movement of the person was without that person's consent;

4. The movement of the person was for a substantial distance, that is, a distance more than slight, brief or trivial; and

5. The movement substantially increased the risk of harm to the person moved, over and above that necessarily present in the crime of robbery itself.

(14 CT 3799-3801 [CALJIC No. 9.54 (1998 Revision)] [original brackets and redundant commas omitted].)

In his closing argument, the prosecutor referred to both of the above instructions in discussing the kidnap-murder special circumstance. (See 27 RT 4134, 4137.)

The guilt phase jury returned a true finding on the kidnap-murder special circumstance without specifying whether it was basing its finding

on simple kidnapping, aggravated kidnapping, attempts or both. (14 CT 3868 ["engaged in the commission or attempted commission of the crime of KIDNAPPING or KIDNAPPING FOR ROBBERY"].) The jury also returned a true finding on the robbery-murder special circumstance. (14 CT 3867.)

Johnson's jury was provided with a legally correct theory for the kidnap special circumstance based on kidnap for robbery and a legally inadequate theory for the special circumstance based on simple kidnap.

> "[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand."

(*People v. Guiton* (1993) 4 Cal.4th 1116, 1122, quoting *People v. Green* (1980) 27 Cal.3d 1, 69, overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 234, fn. 3, and *People v. Martinez, supra,* 20 Cal.4th at p. 239.) Here, this Court can determine that Johnson's jury relied on the legally correct theory.

Unlike *Morgan*, the kidnap-murder special circumstance in Johnson's case alleged aggravated (and attempted) kidnap in addition to simple (and attempted) kidnap. (Compare *People v. Morgan, supra,* 42 Cal.4th at pp. 605, 611 [setting aside kidnap special circumstance].) As previously noted, the verdict form did not specify whether the jury was resting its true finding on a theory of simple kidnap, kidnap for robbery or both. (14 CT 3868.)

However, the true finding on the robbery-murder special circumstance (14 CT 3867) demonstrates that the jurors based their true finding for the kidnap-murder special circumstance at least on a kidnap for robbery theory. (Compare *People v. Morgan, supra,* 42 Cal.4th at p. 613 [true finding on unlawful-penetration special circumstance showed jury necessarily found murder was committed in the course of an unlawful penetration with a

foreign object]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 499, [other verdict and findings showed jury necessarily found murder was committed in the course of a robbery and by lying in wait]; *People v. Sakarias* (2000) 22 Cal.4th 596, 625 [true finding on robbery-murder special circumstance showed jury necessarily found murder was committed in the commission of a robbery]; *People v. Payton* (1992) 3 Cal.4th 1050, 1061-1062 [true finding on rape-murder special circumstance necessarily showed jury found murder was committed in the course of a rape or attempted rape]; *People v. Kelly* (1992) 1 Cal.4th 495, 531 [same]; *People v. Garrison* (1989) 47 Cal.3d 746, 779 [true finding on robbery-murder special circumstance showed jury necessarily found murder was committed in the course of a robbery].)

This conclusion is reinforced by the fact that the prosecutor's theory of the case was that the attempted and completed kidnaps of Campos and Garcia occurred contemporaneously with the robbery attempt. (See 27 RT 4132-4138.) No rational juror having found the murder was carried out in the commission of an attempted robbery could have found the murder was also carried out in the commission of an attempted or completed simple kidnap but not an attempted or completed kidnap for robbery. (Compare *People v. Riel, supra,* 22 Cal.4th at pp. 1199 [jury could not have found defendant guilty of one of two robberies]; *People v. Carrera* (1989) 49 Cal.3d 291, 311-312 [jury could not have found defendant guilty of robbing on victim but not the other].)

Since this Court can be satisfied that the jury's "verdict rested on at least one correct theory" for the kidnap-murder special circumstance, reversal is not warranted. (See *People v. Hillhouse, supra,* 27 Cal.4th at p. 499, citing in part *People v. Guiton, supra,* 4 Cal.4th at p. 1130 [affirming first degree murder conviction]; see also *People v. Morgan, supra,* 42 Cal.4th at p. 613 [same]; *People v. Sakarias, supra,* 22 Cal.4th at p. 625

[same]; *People v. Payton, supra,* 3 Cal.4th at pp. 1061-1062 [same]; *People v. Kelly, supra,* 1 Cal.4th at p. 531 [same]; *People v. Garrison, supra,* 47 Cal.3d at pp. 778-779 [same].) Accordingly, the erroneous instruction on simple kidnap "was of no consequence to" the kidnap-murder special circumstance and the true finding on that special circumstance should stand. (See *People v. Kelly, supra,* 1 Cal.4th at p. 531, citing *People v. Garrison, supra,* 47 Cal.3d at p. 779.)

XIII. NO UNANIMITY INSTRUCTION WAS REQUIRED FOR THE KIDNAP-MURDER SPECIAL CIRCUMSTANCE

Johnson claims the kidnap-murder special circumstance must also be set aside because there were different movements of Garcia and Campos which could have constituted a kidnap and the trial court failed to instruct the jurors that they had to unanimously agree on one those acts in order to return a true finding. Johnson contends this instructional error violated his state and federal constitutional rights to a unanimous verdict. (AOB 162-166.) However, no unanimity instruction was required for the special circumstance and any alleged error was harmless. Accordingly, the true finding should be affirmed.

During the defense motion to dismiss the kidnap-murder special circumstance pursuant to section 1118.1, the prosecutor argued both Campos and Garcia were kidnapped during the November 11, 1995, incident on the Day Street property. (21 RT 3257-3262.) Defense counsel responded that what happened to Garcia did not matter since he was not the murder victim. (21 RT 3262-3263.) Thereafter, Brightmon's counsel asked the trial court to strike the special circumstance since the prosecutor had not made an election as to which person was kidnapped, and Johnson's counsel joined in the request. (21 RT 3264-3265.)

The prosecutor responded that no election was necessary since he only needed to show the murder was committed "in the course of a kidnap." (21 RT 3266-3267.) The trial court agreed and denied the defense motion to dismiss the kidnap-murder special circumstance. (21 RT 3267.)

In his closing argument, the prosecutor argued both Garcia and Campos were kidnapped insofar as Garcia was dragged back after attempting to flee and both men were forced into the rear of the U-Haul trailer. (27 RT 4132-4138.) Defense counsel argued there was no robbery (28 RT 4179-4188), there was insufficient asportation of either Campos or Garcia for anyone to be guilty of kidnapping (28 RT 4189) and that Johnson was misidentified and not involved in the incident (28 RT 4189-4201).

The jury was instructed: "In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously." (14 CT 3790 [CALJIC No. 8.80.1 (1997 Rev.)].) The instructions did not require the jurors to unanimously agree on a specific act or theory of kidnapping before returning a true-finding on the kidnap-murder special circumstance. (See 14 CT 3789-3790; 3795 [CALJIC No. 8.81.17].)

A. No Unanimity Instruction Was Required

To date, this Court has "assumed, without deciding, that the unanimity requirement applies to special circumstance findings." (*People v. Jennings* (2010) 50 Cal.4th 616, 680 fn. 30, citing *People v. Davis* (2005) 36 Cal.4th 510, 563 [robbery-murder special circumstance], *People v. Sapp* (2003) 31 Cal.4th 240, 283-285 [financial gain special circumstance], and *People v. Mickle* (1991) 54 Cal.3d 140, 178 [lewd and lascivious act special circumstance]. As in the above-cited cases, this Court need not decide the issue here.

In *Jennings*, this Court stated the applicable legal principles as follows:

> As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty. [Citation.] There are, however, several exceptions to this rule. For example, no unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises "when the acts are so closely connected in time as to form part of one transaction" [citation], or "when the statute contemplates a continuous course of conduct or a series of acts over a period of time." [Citation.] There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime. [Citation.]

(*People v. Jennings, supra,* 50 Cal.4th at p. 679.) Both exceptions to the unanimity rule apply in Johnson's case.

The prosecutor clearly proceeded on a "course-of-conduct" theory for the kidnap-murder special circumstance based on a series of continuous acts which were all part of the drug "rip-off," commencing with Johnson's production of the gun and culminating in the shooting after Campos and Garcia escaped from the U-Haul. (See 27 RT 4132-4133.) As in *Sapp,* "the prosecutor's argument wove" the claimed separate acts together. (See *People v. Sapp, supra,* 31 Cal.4th at p. 284.)

It is indisputable that each of the acts Johnson cites as the basis of his unanimity argument – Brightmon dragging Garcia back to the truck and the forcing of Campos and Garcia into the rear of the truck (AOB 162) – were "so closely connected in time as to form part of one transaction." Indeed, each of these movements occurring minutes if not seconds apart were effectuated solely for the purpose of stealing the cocaine from Campos. Thus, the first exception to the general unanimity rule applies. (See *People v. Jennings, supra,* 50 Cal.4th at pp. 679-680, citing *People v. Crandell,*

supra, 46 Cal.3d at p. 875, disapproved on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

Also, Johnson presented precisely the same defenses as to all movements – that he was neither present nor involved in the Campos incident in any way, there was no robbery and none of the movements were sufficient enough to constitute asportation. (28 RT 4179-4201.) Thus, the second exception to the general unanimity rule applies. (See *People v. Jennings, supra,* 50 Cal.4th at p. 679, citing *People v. Carrera, supra,* 48 Cal.3d at pp. 311-312.) Since both exceptions to the general rule apply here, no unanimity instruction was required.

Citing *Apprendi v. New Jersey, supra,* 530 U.S. 466, and *Ring v. Arizona, supra,* 536 U.S. 584, Johnson nonetheless contends the Sixth Amendment requires unanimity instructions for special circumstances. (AOB 164.) This argument has already been rejected by this Court. As stated in *Davis,*

> *Apprendi* and its progeny govern only the question of who, as between judge and jury, must decide the existence of the facts that increase the maximum punishment. Here, *Apprendi's* requirement is satisfied by our state law requiring the jury unanimously to agree that the murder occurred during the commission of a robbery. We see nothing in *Apprendi* or *Ring* that requires the jury to agree unanimously as to which robbery the murder facilitated.

(*People v. Davis, supra,* 36 Cal.4th at p. 564.) Likewise, *Apprendi* and *Ring* did not require Johnson's jury to unanimously agree on which particular movement of Campos or Garcia supported the kidnap-murder special circumstance.

B. Even Assuming Error, Johnson Was Not Prejudiced

Notwithstanding the absence of any need for a unanimity instruction for the kidnap-murder special circumstance, any alleged instructional error was harmless. There is currently a split of authority as to whether error in

failing to give a unanimity instruction should be reviewed for prejudice under the standard for state court error set forth in *People v. Watson, supra,* 46 Cal.2d 818, or that articulated in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705], for federal constitutional error.[70] (*People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 647 [adopting *Chapman* test].) However, the question need not be decided here since the error alleged by Johnson can be deemed harmless under the more stringent *Chapman* standard.

Under *Chapman*, reversal is required unless the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California, supra*, 386 U.S. at p. 24.) For two reasons, any failure to give a unanimity instruction for the kidnap-murder special circumstance in Johnson's case was harmless beyond a reasonable doubt.

First, as discussed in Argument XV, *infra*, each of the three acts or movements argued by the prosecutor was sufficient to support the kidnap-murder special circumstance. The fact that two of those movements pertained to Garcia is of no consequence.

> For the felony-murder rule to apply, the murder victim need not be the target of the underlying felony [citations], and we see no reason why a different rule should apply with regard to felony murder special circumstances.

(*People v. Davis, supra,* 36 Cal.4th at p. 563.) Thus, it was unnecessary for the jurors to distinguish between Garcia and Campos for purposes of the kidnap-murder special circumstance.

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[70] Johnson argues the lack of a unanimity instruction resulted in structural error requiring per se reversal. (AOB 165.) However, even federal constitutional error under *Apprendi*, remains subject to harmless error analysis under *Chapman*. (See *People v. Davis, supra,* 36 Cal.4th at p. 564, citing *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326-328; see also *Neder v. United States* (1999) 527 U.S. 1, 19 [119 S.Ct. 1827, 144 L.Ed.2d 35].)

Second, as discussed in Argument XII, *ante*, the true finding on the robbery-murder special circumstance demonstrates that at a minimum the jurors unanimously agreed on a kidnap for robbery theory for the kidnap-murder special circumstance in light of the fact that the attempted robbery and attempted and completed kidnaps occurred simultaneously. No rational juror having found the murder was carried out in the commission of the attempted robbery could have found the murder was also carried out in the commission of an attempted or completed simple kidnap but not an attempted or completed kidnap for robbery.

For example, in *People v. Seaton* (2001) 26 Cal.4th 598, this Court found the jury's true findings on robbery-murder and burglary-murder special circumstances rendered any error in failing to give a unanimity instruction harmless because the jurors necessarily agreed on a felony-murder theory of first degree murder. (*Id.* at p. 671.) Similarly, the jury's true finding on the robbery-murder special circumstance in Johnson's case rendered any error in failing to give a unanimity instruction as to the kidnap-special circumstance harmless because the jurors necessarily agreed on at least a kidnap for robbery theory of kidnap-murder. Thus, the error claimed by Johnson can be deemed harmless beyond a reasonable doubt, and the jury's true finding on the kidnap-murder special circumstance should be affirmed.

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XIV. SINCE THE JURY WAS NOT INSTRUCTED ON THE PRE-*MARTINEZ* DEFINITION OF SIMPLE KIDNAP, JOHNSON'S VOID FOR VAGUENESS CHALLENGE TO THAT DEFINITION NEED NOT BE ADDRESSED

Johnson claims the definition of simple kidnap (§ 207, subd. (a)) in effect at the time of the Campos incident[71] was unconstitutionally vague, specifically challenging the asportation element requiring movement over a "substantial distance." Thus, Johnson concludes the kidnap-murder special circumstance must be set aside. (AOB 167-179.)

The precise void for vagueness challenge raised by Johnson was previously rejected by this Court in *People v. Morgan, supra,* 42 Cal.4th at pp. 604-607. Nonetheless, this Court need not address Johnson's constitutional attack on the pre-*Martinez* definition of simple kidnap since, as explained in Argument XII, *ante*, Johnson's jury was instructed on and the prosecutor argued the post-*Martinez* definition for simple kidnap. (14 CT 3796-3797; 27 RT 4134; see, e.g., *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 674 & fn. 4 [unnecessary to decide legal question for which jury not instructed].)

Moreover, as discussed in Argument XII, *ante*, any infirmity with the simple kidnap instruction in Johnson's case does not require reversal since the true finding on the robbery-murder special circumstance demonstrates that the jurors based their finding for the kidnap-murder special circumstance at least on a kidnap for robbery theory. Thus, since this Court can be satisfied that the jury's true finding on the kidnap-murder special

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[71] Johnson mistakenly states the kidnapping alleged in his case occurred in 1994, which is coincidentally the year of the kidnapping in the *Morgan* case where the same void for vagueness argument was raised. (See AOB 167, 179; *People v. Morgan, supra,* 42 Cal.4th at p. 604.) The Campos incident occurred in 1995. (3 CT 787.) However, since both 1994 and 1995 predate the 1999 *Martinez* decision, Johnson's error is of no significance.

circumstance rested on at least one correct theory of kidnapping, reversal is not warranted. (See *People v. Morgan, supra,* 42 Cal.4th at p. 613; *People v. Hillhouse, supra,* 27 Cal.4th at p. 499; *People v. Sakarias, supra,* 22 Cal.4th at p. 625; *People v. Payton, supra,* 3 Cal.4th at pp. 1061-1062; *People v. Kelly, supra,* 1 Cal.4th at p. 531; *People v. Garrison, supra,* 47 Cal.3d at pp. 778-779.)

XV. SUFFICIENT EVIDENCE OF AN ATTEMPTED OR COMPLETED KIDNAP FOR ROBBERY SUPPORTED THE KIDNAP-MURDER SPECIAL CIRCUMSTANCE

Johnson claims the kidnap-murder special circumstance must be set aside because there was insufficient evidence of asportation for a simple kidnap or a kidnap for robbery. (AOB 180-189.) Johnson is mistaken. Moreover, Johnson overlooks the fact that the kidnap-murder special circumstance could also be supported by an attempted kidnapping.

As previously discussed in Argument XII, *ante*, Johnson's jury was instructed on a legally inadequate theory of simple kidnap. Thus, the kidnap-murder special circumstance cannot rest on a theory of simple or attempted simple kidnap. (See *People v. Morgan, supra,* 42 Cal.4th at p. 613.) However, as previously discussed, the true finding on the robbery-murder special circumstance demonstrates that the jurors based their finding for the kidnap-murder special circumstance at least on a kidnap for robbery theory. Thus, this Court need only address the sufficiency of evidence for aggravated kidnapping.[72] There was substantial evidence of

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[72] In *Morgan*, this Court reversed a simple kidnap conviction and kidnap-murder special circumstance, but still assessed the sufficiency of the evidence proving simple kidnap under the pre-*Martinez* standard for purposes of determining whether the defendant could be re-tried for the kidnapping offense. (*People v. Morgan, supra,* 42 Cal.4th at p. 613.) Here, no freestanding kidnapping offense was charged and the kidnap-murder (continued...)

asportation for purposes of a completed kidnap for robbery and substantial evidence of an attempted kidnap for robbery to support the jury's true finding on the kidnap-murder special circumstance.

The standard for reviewing the sufficiency of the evidence in criminal cases is well-established. (*People v. Jennings, supra,* 50 Cal.4th at p. 638.)

> "When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence -- i.e., evidence that is credible and of solid value -- from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt."

(*People v. Hill* (1998) 17 Cal.4th 800, 848-849, quoting *People v. Jennings* (1991) 53 Cal.3d 334, 363; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

This applies to convictions which rest primarily on circumstantial evidence as well as direct evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124; *People v. Bean, supra,* 46 Cal.3d at p. 932.)

> Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt.

(*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

Thus, the reviewing court "must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Jones* (1990) 51 Cal.3d 294, 314, citing *People v.*

(...continued)
special circumstance can be affirmed on an aggravated kidnapping theory. Thus, unlike in *Morgan*, there is nothing to retry in Johnson's case and it is unnecessary for this Court to decide the sufficiency of the evidence of asportation under the pre-*Martinez* definition for simple kidnap.

Johnson, supra, 26 Cal.3d at pp. 576-577; see also *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) A conviction may not be reversed merely because circumstances might support or be reconciled with a contrary finding. (*People v. Kraft, supra*, 23 Cal.4th at p. 1054; *People v. Hill, supra*, 17 Cal.4th at p. 849; *People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139.)

When assessing the sufficiency of evidence, the reviewing court has a limited role. (*People v. Ochoa, supra*, 6 Cal.4th at p. 1206.)

> [I]t is the jury, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] Therefore, an appellate court may not substitute its judgment for that of the jury.

(*People v. Ceja, supra*, 4 Cal.4th at p. 1139 [emphasis in original].) The reviewing court should "accord due deference" to the jury's factual determinations. (*People v. Ochoa, supra*, 6 Cal.4th at p. 1206.) It "neither reweigh[s] the evidence nor reevaluate[s] the credibility of witnesses." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

The same standard of review applies to special circumstance findings. (*People v. Jennings, supra,* 50 Cal.4th at p. 638.)

> When reviewing the sufficiency of evidence to support a special circumstance, the relevant inquiry is "'whether, after viewing the evidence in the light most favorable to the People, *any* rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.'"

(*People v. Lindberg, supra,* 45 Cal.4th at p. 27, quoting *People v. Alvarez, supra,* 14 Cal.4th at p. 225 [emphasis in original].) Reversal is only warranted where it clearly appears that "upon no hypothesis whatever is there sufficient substantial evidence to support" the verdict. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

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A. There Was Substantial Evidence of a Completed Kidnap for Robbery to Support the Kidnap-Murder Special Circumstance

Aggravated kidnapping, as defined under Penal Code section 209, is where the kidnapping is for the purpose of robbery or certain sex offenses. (*People v. Martinez, supra,* 20 Cal.4th at p. 232.) The asportation element for aggravated kidnapping requires that the movement not be merely incidental to the underlying crime and that the movement substantially increase the risk of harm to the victim above and beyond that inherent in the underlying crime. (*People v. Rayford, supra,* 9 Cal.4th at p. 12, citing *In re Earley* (1975) 14 Cal.3d 122, 127-128, and *People v. Daniels, supra,* 71 Cal.2d at p. 1139.) "These two aspects are not mutually exclusive, but interrelated." (*Ibid.*; see also *People v. Martinez, supra*, 20 Cal.4th at pp. 233.)

For the first prong of the *Rayford/Daniels* test, the jury must consider "the 'scope and nature' of the movement," including the actual distance the victim is moved. (*People v. Rayford, supra,* 9 Cal.4th at p. 12, quoting *People v. Daniels, supra,* 71 Cal.2d at p. 1131, fn. 5.) However, no minimum number of feet is required. (*Ibid.*) Rather, the "context of the environment in which the movement occurred" is determinative. (*Ibid.*; see also *People v. Dominguez* (2006) 39 Cal.4th 1141, 1152.)

In deciding the second prong of the *Rayford/Daniels* test as to whether there was a substantial increase in the risk of harm, the jury must consider "such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes." (*People v. Rayford, supra,* 9 Cal.4th at p. 13.) It is not required that these dangers actually materialize in order to satisfy the second prong. (*Id.* at p. 14; see also *People v. Martinez, supra,* 20 Cal.4th at p. 233.)

1. The Movements of Garcia and Campos Were Not Merely Incidental to the Attempted Burglary

Viewing the facts in the light most favorable to the prosecution and drawing all reasonable inferences in favor of the judgment, the evidence showed the movements of Campos and Garcia were not merely incidental to the underlying attempted robbery. Notably, none of the movements were necessary to complete the robbery.

The robbery did not require Brightmon to chase after Garcia and drag him back to the U-Haul truck. Garcia was attempting to flee on foot, leaving the cocaine behind in the trunk of the Sentra. (15 RT 2441-2442.) Thus, this totally unnecessary forced movement of Garcia was not incidental to the attempted robbery. The fact that the movement was only approximately 19 feet (15 RT 2441-2442) does not undermine the first prong being satisfied here. (See *People v. Martinez, supra,* 20 Cal.4th at p. 233; *People v. Rayford, supra,* 9 Cal.4th at p. 12.)

Likewise, the forced movements of Garcia and Campos into the rear of the U-Haul truck (15 RT 2445-2446) were not necessary in order to accomplish the robbery. Johnson and his cohorts could have easily completed the robbery outside the truck. Indeed, Garcia had already shown compliance by handing over his keys. (15 RT 2445.) Yet, the two men were still forced into the rear of the U-Haul. (15 RT 2445-2446.) Thus, these movements were not merely incidental to the attempted robbery.

For example, in *People v. Salazar* (1995) 33 Cal.App.4th 341, the movement of the victim from a walkway outside a motel room into the room was found not to be merely incidental to a rape because the defendant could have simply raped the victim on the walkway without moving her at all. (*Id.* at p. 345.) Although the movement may have been an essential part of the defendant's plan to avoid detection and made commission of the rape easier, it was neither "natural to the crime" nor "incidental to the

actual commission of the crime itself." (*People v. Salazar, supra*, 33 Cal.App.4th at p. 347.)

Similarly, Johnson's jury could reasonably infer that the movements of Garcia and Campos were not incidental to the attempted robbery since the robbery could have easily been accomplished outside the truck. Where the movement of the victim is not necessary for commission of the underlying crime itself, it satisfies the first prong of the *Rayford/Daniels* test regardless if that movement made the crime easier to commit or less detectable. (*People v. Salazar, supra*, 33 Cal.App.4th at p. 347.)

The "scope and nature" and "context of the environment" in which Campos and Garcia were moved also showed the movements were not merely incidental to the attempted robbery. In *Daniels*, this Court found movement of a victim within a residence, business or other enclosure will generally not be sufficient asportation for purposes of section 209. (*People v. Daniels, supra,* 71 Cal.2d at p. 1126.) Likewise, in *In re Crumpton* (1973) 9 Cal.3d 463, this Court found the forcible movement of the victim 20 to 30 feet behind a truck within a service station's premises was incidental to a robbery, reasoning that " a service station, including the adjacent outdoor areas, to be analogous to a place of business or enclosure within our meaning in *Daniels*." (*Id.* at p. 466, citing *People v. Williams* (1970) 2 Cal.3d 894.)

In contrast to *Daniels* and *Crumpton*, Garcia and Campos were not simply moved within a building or anything analogous to an enclosure. Garcia was moved from one exterior location to another, and Garcia and Campos were then moved from an exterior location into an enclosure –the rear of the U-Haul truck. Thus, the first prong of the *Rayford/Daniels* test was satisfied.

2. The Movements Substantially Increased the Risk of Harm

Viewing the evidence in the light most favorable to the prosecution and drawing all reasonable inferences in support of the judgment, the movements of Garcia and Campos clearly subjected them to a substantial increase in the risk of harm over and above that necessarily present in the crime of the underlying attempted robbery. "Any determination of the increase in the risk of harm involves a comparison of the victim's physical location before and after the asportation." (*People v. Salazar, supra*, 33 Cal.App.4th at p. 348.)

Brightmon first forcibly moved Garcia from a location of temporary safety where he was potentially out of range of Johnson's gun. By dragging Garcia a distance of approximately 19 feet, Brightmon placed him squarely in the zone of danger.

Then, the forced movements of Garcia and Campos into the rear of the U-Haul unquestionably subjected them to a substantial increase in the risk of harm. Outside the truck, they were open to view by others who might have been on Day Street or on the property. The evidence showed a number of other people lived or worked on Ross's property. (18 RT 2728-2730; 19 RT 2858-2859.) However, inside the rear of the U-Haul, Garcia and Campos were out of the line of sight of anyone else on the property and hidden from view from the street by the trash trailer. (15 RT 2446.)

Any substantial change in the context of the victim's environment can satisfy the second prong of the *Rayford/Daniels* test. (*People v. Shadden,* (2001) 93 Cal.App.4th 164, 169; *People v. Diaz* (2000) 78 Cal.App.4th 243, 247.) Specifically, movement of the victim "from a relatively open area" to "a place significantly more secluded" "substantially decreases[es] the possibility of detection, escape or rescue." (*People v. Dominguez,*

supra, 39 Cal.4th at p. 1153.) Johnson and his cohorts effected such a change in Campos's and Garcia's environment.

Moving the victim out of view of potential passersby substantially increases the risk of danger. (*People v. Jones* (1999) 75 Cal.App.4th 616, 629; *People v. Hill* (1971) 20 Cal.App.3d 1049, 1053.) "[W]here a defendant moves a victim from a public area to a place out of public view, the risk of harm is increased even if the distance is short." (*People v. Shadden, supra,* 93 Cal.App.4th at p. 169.)

For example, in *Rayford*, where this Court found the movement substantially increased the risk of danger, the victim was placed against a wall which "blocked the view of any passersby from the parking lot side, and the tree and the bushes at the end of the wall limited detection of [her] from the street," despite the lack of evidence as to whether the victim and defendant "were detectable from the street." (*People v. Rayford, supra,* 9 Cal.4th at p. 23.) Similarly, the forced movements of Garcia and Campos inside the U-Haul truck blocked them from view of any potential passersby on the property or Day Street, and the trash container further limited their detection. The fact that no additional crimes were committed inside of the U-Haul did not mean the *risk* of harm was not increased. (*Id.* at p. 14.)

In addition to decreased likelihood of detection and the enhanced opportunity to commit additional crimes, the movements of Campos and Garcia increased the dangers inherent in their foreseeable attempts to escape. Indeed, both men did escape from the interior of the truck, culminating in Johnson's execution of Campos.

Again, *Daniels* and *Crumpton* are readily distinguishable. In *Daniels,* the victims were merely moved from room to room with no evidence of any increased risk of danger inside any particular room. (See *People v. Daniels, supra,* 71 Cal.2d at pp. 1123-1125.) In *Crumpton,* the victim was moved to another outside location on the premises behind a truck, and there was no

evidence that the truck blocked the victim from the view of any potential passersby. (See *In re Crumpton, supra,* 9 Cal.3d at p. 466.)

Moreover, unlike Brightmon's initial movement of Garcia, the victim in *Crumpton* was not moved from a place of temporary safety back into the zone of danger. That victim was placed at gunpoint prior to, during and following the movement. (See *In re Crumpton, supra,* 9 Cal.3d at p. 466.) Accordingly, each of the movements in Johnson's case satisfied the second prong of the *Rayford/Daniels* test.

In arguing to the contrary, Johnson ostensibly ignores the fact that Campos and Garcia were out of the line of sight of potential passersby on Day Street or other persons on the property when they were inside the truck, and further hidden from view by the trash trailer. (See AOB 188-189.[73]) By citing allegedly conflicting testimony from Escalera and Ross as to whether Campos was inside the truck (AOB 188 fn. 68[74]), Johnson

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[73] Johnson represents that Escalera could see Garcia in the back of the U-Haul truck. (AOB 188, citing 18 RT 2750.) However, Escalera was referring to the trash trailer into which Garcia jumped in effectuating his escape, not the U-Haul trailer. (See 18 RT 2750.)

[74] Johnson represents that "[b]oth Escalera and Ross stated that Campos was not in the truck." (AOB 188 fn. 68, citing 18 RT 2802, and 19 RT 2896.) This does not accurately reflect the record. On the pages cited by Johnson, Escalera testified that *she did not see* Campos inside the truck or trash trailer (18 RT 2802) and Ross merely testified that Campos and Garcia *were not told* to get in the back of the truck (19 RT 2896).

Campos was placed inside the truck before Garcia (15 RT 2446), which would explain why Escalera would have been able to see Garcia -- who would have been closer to the rear opening -- but not Campos who would have been deeper inside the truck. Also, Garcia testified that Johnson and his cohorts were saying, "Up, up," which he did not understand and interpreted as a directive to get inside the back of the U-Haul. (15 RT 2444-2445.) Thus, Ross's testimony that Campos and Garcia were not explicitly told to get in the back of the truck is not

(continued...)

violates the fundamental principles of appellate review of a sufficiency claim by refusing to view the evidence in the light most favorable to the prosecution or resolve conflicts in the evidence in support of the judgment. (See *People v. Hill, supra,* 17 Cal.4th at pp. 848-849; *People v. Ochoa, supra,* 6 Cal.4th at p. 1206; *People v. Jennings, supra*, 53 Cal.3d at p. 363; *People v. Jones, supra,* 51 Cal.3d at p. 314; *People v. Johnson, supra,* 26 Cal.3d at pp. 576-577.)

In addition to *Daniels* and *Crumpton*, Johnson attempts to rely on *People v. John* (1983) 149 Cal.App.3d 798, as support for his claim. (AOB 187-188.) However, the victim in *John* "was never forced to move outside of the interconnected living quarters shared by him and his parents." (*Id.* at p. 805) As shown above, this clearly was not the case here. The *John* court also noted that the victim was not subjected to violence or injury subsequent to his movement. (*People v. John, supra,* 149 Cal.App.3d at p. 806.) In sharp contrast, Garcia was punched in the face after his initial movement back to the robbery scene (15 RT 2445-2446) and Campos was shot subsequent to his forced movement into the U-Haul (15 RT 2477-2448; 18 RT 2748-2749 19 RT 2899). Accordingly, *John* is inapposite.

Applying the appropriate standard of review and drawing all reasonable inferences in support of the judgment, there was substantial evidence proving an aggravated kidnap based on either of the three movements argued by the prosecutor. Since Johnson cannot show "upon no hypothesis whatever is there sufficient substantial evidence" proving a kidnap for robbery, his challenge to the sufficiency of the evidence

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(...continued)
inconsistent, and Johnson's claimed conflicts in the testimony are questionable.

supporting the kidnap-murder special circumstance true finding must be rejected.[75] (See *People v. Redmond, supra,* 71 Cal.2d at p. 755.)

B. There Was Substantial Evidence of an Attempted Kidnap for Robbery to Support the Kidnap-Murder Special Circumstance

The information also alleged, and the jury was instructed on, attempted kidnapping and attempted aggravated kidnapping for the kidnap-murder special circumstance. (3 CT 788; 14 CT 3760 [CALJIC No. 6.00 "ATTEMPT-DEFINED]; 3795 [CALJIC No. 8.81.17].) Furthermore, the verdict form reflected that the true finding on the kidnap-murder special circumstance was based on "the commission or attempted commission of KIDNAPPING or KIDNAPPING FOR ROBBERY...." (14 CT 3868.) Here, there was ample evidence of at least an attempted kidnap for robbery based on any of the movements of Garcia or Campos.

Where a person commits a direct but ineffectual act toward the commission of crime and possesses the requisite criminal intent to commit the crime, he or she is guilty of attempt to commit the particular crime. (*People v. Kipp* (1998) 18 Cal.4th 349, 376.) "The act must go beyond mere preparation, and it must show that the perpetrator is putting his or her plan into action, but the act need not be the last proximate or ultimate step toward commission of the substantive crime." (*Ibid.*; see also *People v.*

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[75] Even assuming one of the three movements cited by the prosecutor was factually insufficient to constitute asportation for purposes of aggravated kidnapping, the true finding on the kidnap-special circumstance should still be affirmed. "If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*People v. Guiton, supra,* 4 Cal.4th at p. 1129.) There is no affirmative indication in the record that the kidnap-murder special circumstance finding rested on a factually inadequate ground.

Memro (1985) 38 Cal.3d 658, 698, overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2; *People v. Dillon* (1983) 34 Cal.3d 441, 452-453.) "No bright line distinguishes mere preparatory acts from commencement of the criminal design." (*Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 187.)

All that is required for an attempt is the accomplishment of "some appreciable fragment" of the crime. (*People v. Memro, supra*, 38 Cal.3d at p. 698.) Thus,

> "[w]henever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt, and the courts should not destroy the practical and common-sense administration of the law with subtleties as to what constitutes preparation and what constitutes an act done toward the commission of a crime."

(*Ibid.*, quoting *People v. Fiegelman* (1939) 33 Cal.App.2d 100, 105, and *People v. Von Hecht* (1955) 133 Cal.App.2d 25, 38-39.) "When [the defendant's] acts are such that any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is underway...." (*People v. Dillion, supra*, 34 Cal.3d at p. 455.)

Johnson's attack on the kidnapping evidence is entirely based on alleged insufficiencies in proof pertaining to the asportation element. (See AOB 183-189.) However, for an "*attempted* kidnapping, the distance [the victim] was moved is immaterial – asportation simply is not an element of the offense." (*People v. Cole* (1985) 165 Cal.App.3d 41, 50 [emphasis in original].) All that is required for an attempted kidnapping is a direct but ineffectual act in furtherance of a kidnap with the specific intent to move the victim against his or her will regardless of any actual movement. (See *People v. Medina* (2007) 41 Cal.4th 685, 699 [sustaining convictions for attempted kidnapping during the commission of a carjacking where

defendant unsuccessfully attempted to move van in which victims were seated].)

It is indisputable that the acts of dragging Garcia back to the robbery scene and forcing Campos and Garcia into the rear of the U-Haul were appreciable acts beyond mere preparation pursuant to the plan to rob Campos which were committed with the requisite specific intent. Accordingly, the kidnap-murder special circumstance can also be affirmed under a theory of attempted aggravated kidnapping.

XVI. THE TRIAL COURT PROPERLY ADMITTED JOHNSON'S BOMB THREAT TO HIS WIFE AND TELEPHONIC THREATS TO JARAH SMITH AS EVIDENCE IN AGGRAVATION PURSUANT TO SECTION 190.3, FACTOR (B)

Johnson claims his bomb threat conveyed to his wife and his other telephonic threats to Jarah Smith did not violate any criminal statute and were therefore inadmissible as aggravating evidence under section 190.3, factor (b), at the penalty phase retrial. Johnson's contends this error violated his rights to due process and a reliable verdict, and requires reversal of the penalty judgment.[76] (AOB 190-201.) Johnson's claims lack merit. All of the threats admitted at the penalty phase retrial, qualified as criminal threats within the meaning of section 422 as well as threatening phone calls within the meaning of section 653m. If as claimed by Johnson, the bomb threat was not serious, it still constituted a crime under section 148.1. Moreover, all of the threats at least met the requirements of attempted violations of sections 422, 653m and 148.1, even if, as claimed by Johnson, the victims did not taken them seriously. Furthermore, any

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[76] Johnson mistakenly refers to "Penal Code section 190.2, factor (b)." (AOB 190.) However, factors in aggravation and mitigation are listed under section 190.3.

alleged error was harmless in light of the other aggravating evidence which clearly outweighed the evidence offered in mitigation.

Section 190.3 provides a list of aggravating and mitigating circumstances to be considered by the trier of fact in determining the appropriate penalty in capital cases. Pertinent to the issue here, section 190.3, factor (b) (hereafter "factor (b)"), permits evidence of "the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." In order to be admissible under factor (b), a threat of violence must constitute a violation of a criminal statute. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1259, citing *People v. Boyd* (1985) 38 Cal.3d 762, 776 [violence/threat of violence to property not admissible].)

On March 14, 2000, following jury selection, the prosecutor notified the trial court that Investigator Silva had recently learned of Johnson's telephonic threats to his wife and Jarah Smith. (8 RT 1403-1404.) The prosecutor also informed the court that a real bomb was found at Ramona High School on February 14, 2000, which had to be disarmed or detonated by law enforcement authorities. (8 RT 1404-1405, 1408-1209.) Based on the threats, the trial court granted the prosecutor's request to tentatively terminate Johnson's telephone privileges. (8 RT 1415.)

Prior the penalty phase retrial, Johnson objected to the admission of evidence of "threats allegedly made by Mr. Johnson against his wife," arguing the threats did not meet the elements of section 422 and citing the marital privilege.[77] (30 RT 4464-4466.) The prosecutor indicated that he did not at that point intend to admit evidence of the actual bomb found at the high school, but argued the bomb threat and threats against Smith

[77] Johnson subsequently waived the marital privilege for tactical reasons. (47 RT 7130-7131.)

constituted violations of sections 422 and 653m, and the bomb threat further constituted a violation of section 148.1.[78] (20 RT 4465-4469.) The court overruled Johnson's objection, and permitted the prosecutor to admit the evidence. (20 RT 4469.)

During his recross-examination of Tina, defense counsel asked, "Mrs. Johnson, if you thought he really was going to put a bomb there; would you have reported it?" Tina answered in the affirmative. (47 RT 7126.) Subsequently, the prosecutor asked permission from the court to question Tina about the fact that an actual bomb was found at the school after the telephone threat, and that she still said nothing about the threat. (47 RT 7126-7127.) Defense counsel responded that the bomb found was "just pure happenstance" and had no connection to Johnson. (47 RT 7127.)

Thereafter, the prosecutor and defense counsel informed the court that it was indeed a real bomb which had to be disarmed by removing powder from it, but that the device was found outside a building at the school which was not near Tina's office. (47 RT 7127-7128.) The prosecutor argued Tina's failure to report the telephonic threat after the bomb was found showed her bias and willingness to cover up for Johnson. (47 RT 7128.) Defense counsel countered that the threat was apparently made three

[78] Since Johnson's argument in the trial court also, albeit perfunctorily, addressed the threats against Smith (30 RT 4465), respondent does not contend Johnson's claim of statutory error was forfeited insofar as the Smith threats. In light of Johnson citing the state and federal constitutions as grounds for seeking to exclude aggravating evidence presented in the first penalty phase trial (15 CT 4193-4194), it would appear that the trial court would understand any subsequent objection to the admission of aggravating evidence to be based on constitutional grounds as well, even though Johnson did not specifically cite those grounds in objecting to the phone threat evidence. Thus, respondent does not argue forfeiture in that regard either.

months before the bomb was found at the high school, and argued Tina did not take the threat seriously. (47 RT 7129.)

Subsequently, the prosecutor withdrew his request to admit evidence of the bomb being found at Ramona High School, indicating that he might reconsider his position if Tina were to offer opinion or reputation testimony as to Johnson's good character. (47 RT 7129-7130.) However, the prosecutor did not revisit the issue during Tina's testimony as a defense witness.[79] (See 52 RT 7961-8002.)

A. The Bomb Threat and Threats Against Smith Were Properly Admitted

In Johnson's case, the bomb threat and telephonic threats against Smith constituted violations of sections 422 and 653m. The bomb threat could have further constituted a violation of section 148.1. In addition, attempted violations of these statutes constitute criminal violations as well. Accordingly, all of the evidence was properly admitted under factor (b).

1. Criminal Threats

A criminal threat in violation of section 422 qualifies as a threat of force or violence under factor (b). (See, e.g., *People v. Taylor, supra,* 48 Cal.4th at p. 657; *People v. Bolin* (1998) 18 Cal.4th 297, 336-340.)

> In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement ... is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat-which may be "made verbally, in writing, or by means of an electronic communication device"-was "on its face and under the circumstances in which it

[79] The prosecutor referred only to the threat itself when cross-examining Tina about her opinion that Johnson was a good father. (52 RT 7999-8001.)

> [was] made, ... so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.

(*People v. Toledo* (2001) 26 Cal.4th 221, 227-228, quoting § 422, and citing *People v. Bolin, supra,* 18 Cal.4th at pp. 337-340 & fn. 13.) All five elements were satisfied here.

Johnson's bomb threat was undoubtedly a threat to commit a crime which would result in death or great bodily injury to another. Johnson threatened to blow up Ramona High School if she did not stop seeing Smith. (47 RT 7116-7118.) Clearly exploding a bomb at a school would result in death or great bodily injury to Tina, who worked at the school, as well as other employees and students.

Johnson's statements to Smith were clearly implied threats of death or great bodily injury. Johnson told Smith that he did not want him messing around with Tina anymore, that "he ain't the one to fuck with," that he knew where Smith lived, that he could send people to Smith's home (47 RT 7140-7144; 26 CT 7206-7209), that "he could have something done," and that Smith knew what could happen (47 RT 7157-7158, 7171). Although Chaka Coleman interpreted this as a threat to have Smith beat up rather than killed (47 RT 7159), she told Investigator Silva that Johnson was "very lethal" and "one person you don't want to mess with" (47 RT 7170).

> A communication that is ambiguous on its face may nonetheless be found to be a criminal threat if the surrounding circumstances clarify the communication's meaning. [Citation.]

(*In re George T.* (2004) 33 Cal.4th 620, 635.) Here, the communication and surrounding circumstances sufficiently established implied threats of at

least great bodily injury, if not death, to Smith. The first element of section 422 was satisfied.

The evidence also showed Johnson had the specific intent that his calls to Tina and Smith be taken as threats regardless of his intent of actually carrying them out. Felonious "intent usually must be inferred from all the facts and circumstances revealed by the evidence, because only rarely can it be proved directly." (*People v. Proctor* (1992) 4 Cal.4th 499, 533.)

Johnson was enraged about the fact that his wife was having an affair with another man while he was in custody and intent on doing everything in his power to put an end to it. "It is clear by case law that threats are judged in their context." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137.) Accordingly, the evidence showed Johnson expected that his threats to blow up the school and have Smith beaten or killed be taken very seriously. The second element of section 422 was satisfied.

The threats were so unequivocal, unconditional, immediate and specific as to convey a gravity of purpose and immediate prospect of execution. Here, Johnson's threats were conditioned on Tina and Smith ending their relationship. However, "prosecution under section 422 does not require an unconditional threat of death or great bodily injury." (*People v. Bolin, supra,* 18 Cal.4th at p. 338, disapproving *People v. Brown* (1993) 20 Cal.App.4th 1251.) Conditional threats are admissible under factor (b). (*Id.* at p. 340.)

As this Court reasoned in *Bolin*: "'Most threats are conditional; they are designed to accomplish something; the threatener hopes that they *will* accomplish it, so that he won't have to carry out the threats.'" (*People v. Bolin, supra,* 18 Cal.4th at p. 339, quoting *United States v. Schneider* (7th Cir. 1990) 910 F.2d 1569, 1570 [emphasis in original].) Moreover, the use of the word "so" to modify the third element of section 422 demonstrates

that the unequivocal, unconditional, immediate and specificity of the threat need not be absolute. (*People v. Bolin, supra,* 18 Cal.4th at pp. 339-340.)

Accordingly, the following conditional threats have been found to violate section 422: "If you ever [] touch my daughter again, I'll have you *permanently* removed from the face of this Earth," and, "[I]f it's 1[cent] over 1000 you can kiss your ass good by[e]" (*People v. Bolin, supra,* 18 Cal.4th at p. 336, 340 [emphasis in original]); "[I]f you're lying to me, I'm going to kill you" (*People v. Dias* (1997) 52 Cal.App.4th 46, 49, 53-54); "[I]f her former attorney did not join her in bringing her 'Universe Reform Party' into power, she would hire gang members to kill him" (*People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1154, 1158-1159); "'If I was to go anywhere near the courthouse or anywhere downtown, I would be killed....'" (*People v. Brooks* (1994) 26 Cal.App.4th 142, 145, 149). Similarly, Johnson's conditional threats against Tina and Smith violated section 422.

Johnson's threats were also sufficiently specific and immediate.

> "A threat is sufficiently specific where it threatens death or great bodily injury. A threat is not insufficient simply because it does 'not communicate a time or precise manner of execution, section 422 does not require those details to be expressed.' [Citation.]'"

(*People v. Butler* (2000) 85 Cal.App.4th 745, 752, quoting *In re David L.* (1991) 234 Cal.App.3d 1655, 1660.)

As used in Penal Code section 422, immediacy means "that degree of seriousness and imminence which is understood by the victim to be attached to the *future prospect* of the threat being carried out, should the conditions not be met." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1538 [emphasis in original].) "'[A]n immediate ability to carry out the threat'" is not required. (*People v. Wilson* (2010) 186 Cal.App.4th 789, 807, quoting *People v. Smith* (2009) 178 Cal.App.4th 475, 480, and *People v. Lopez* (1999) 74 Cal.App.4th 675, 679.)

For example, in *People v. Franz* (2001) 88 Cal.App.4th 1426, the defendant made a shush-type noise to the victim while making a slashing gesture with his hand across his throat. (*Id.* at p. 1437.) The court of appeal found the communication satisfied the immediacy requirement of section 422 because the victims "did not know when they would next see defendant." (*Id.*, at p. 1449.) In addition, "[t]he immediacy factor was present in the surrounding circumstances that defendant was in a rage." (*Ibid.*) Similarly, Johnson's rage in response to learning Tina was having an affair with another man supplied the requisite immediacy.

There was a serious and imminent future prospect of Johnson's threats being executed. Beyond that, section 422 did not place any time limit on the immediacy of the threats. (See *People v. Melhado, supra*, 60 Cal.App.4th at p. 1538.) Johnson demanded that Smith's affair with his wife end immediately. Without question, Johnson's comments conveyed the requisite "gravity of purpose." The third element of section 422 was satisfied.

There was also sufficient evidence from which a trier of fact could find Johnson placed both of his victims in sustained fear. Within the meaning of section 422,

> "sustained" has been defined to mean "a period of time that extends beyond what is momentary, fleeting, or transitory... [and] [t]he victim's knowledge of defendant's prior conduct is relevant in establishing that the victim was in a state of sustained fear. [Citation.]"

(*People v. Wilson, supra,* 186 Cal.App.4th at p. 808, quoting *People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.)

Despite Smith's denials in his interview with Silva and at the penalty phase retrial that he considered Johnson's comments a threat or was scared (47 RT 7144-7146; 26 CT 7206-7209), Coleman told Investigator Silva that Smith sounded scared as she listened in on the three-way call she

facilitated. When Silva asked if "Jarah sounded scared on the other line?" Coleman replied, "Oh yeah! He was like, 'man I, I ain't 'gon mess with <> and,' th..the..the.. or you know ---" (26 CT 7205 [special symbols in original].) When asked again, Coleman responded, "Yea. It was like <> he was trembling, that boy... I heard him. I heard him, he was trembling, he was scared."[80] (26 CT 7205-7206 [special symbols in original].)

From this evidence, the jury could reasonably conclude Smith was placed in sustained fear within the meaning of section 422 despite his attempts at bravado and efforts to portray otherwise. As recognized in *Ricky T, supra,* 87 Cal.App.4th 1132, "A victim too courageous to be frightened or intimidated may, in spite of contrary testimony, be held to be in 'fear' because the victim did what the robber demanded." (*Id.* at p. 1140, fn. 9.) Smith ended his relationship with Tina within a few weeks of the November 1999 phone threats. (See 47 RT 7120, 7134-7136 [relationship terminated at the end of 1999].)

Similarly, the jury could reasonably infer from the circumstances that Tina was placed in sustained fear. Johnson of course seizes on Tina's penalty phase retrial testimony that the bomb threat was simply "a disagreement between a husband and wife rather than a true threat."[81] (AOB 197; see 47 RT 7118-7119, 7123-7124.) However, as conceded by defense counsel in attacking the probative value of the actual bomb placed at the school, stated, "She's biased for her husband. Naturally, she's biased for her husband." (47 RT 7129.)

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[80] During her penalty phase retrial testimony, Coleman gave conflicting and confusing responses to questions concerning Smith's fear. (See 47 RT 7160-7162.)

[81] Tina testified that she considered Johnson's comments an empty threat since he was in custody. (47 RT 7118-7119.)

Given Johnson's unquestionable rage and gravity of purpose in ending the affair combined with Tina's knowledge of Johnson's prior violence against Estrada, Lopez and Campos, a reasonable trier of fact could infer that Johnson's bomb threat placed Tina in sustained fear despite her obvious efforts to help her husband through consistently favorable testimony at the penalty phase retrial. Moreover, the fact that Tina did not immediately stop seeing Smith does not undermine this conclusion. (See AOB 197.) The calls to Smith provided further evidence of Johnson's gravity of purpose which would have removed any doubts about the genuineness of the November 1999 bomb threat which led Tina to end the relationship the following month. (See 47 RT 7120, 7134-7136.) There was sufficient evidence of the fourth element of section 422 to admit the threats against Tina and Smith.

Finally, Tina's and Smith's fears were reasonable under the circumstances. As stated previously, Johnson acted with rage and conviction of purpose. He had no hesitancy to unleash his violence in the past. The fact that Johnson was in custody was of no consequence. Johnson had already shown his savvy in executing his plans from custody through his finessing of Coleman and Leland McCord into arranging as many as 50 three-way calls. (See 47 RT 7156.)

In *People v. Gaut* (2002) 95 Cal.App.4th 1425, the defendant argued he was unable to carry out threats made while he was incarcerated. (*Id.* at p. 1431.) Yet, the Court of Appeal concluded that "[i]t was reasonable for [the victim] to fear that defendant would also follow through on the threats he made from jail based on the totality of the circumstances." (*Ibid.*) The final element required for a section 422 violation was satisfied.

Johnson primarily relies on *Ricky T., supra,* 87 Cal.App.4th 1132, in arguing to the contrary. (See AOB 197.) In *Ricky T.*, the minor was locked out of a classroom when he left to use the restroom. (*Id.* at p. 1135.) After

pounding on the door, the teacher opened the door outwardly, which caused the door to strike the minor. (*Ibid.*) This angered the minor, who cursed at the teacher and said, "I'm going to get you." (*Ibid.*) The following day, the minor told a police officer that he felt disrespected because the door hit him in the head and admitted speaking angrily toward the teacher. (*Ibid.*) However, the minor said he did not mean to sound threatening, admitted his actions were not appropriate, and apologized for the incident. (*Ibid.*) One week later, the minor admitted to the officer that he told the teacher, "I'm going to kick your ass," but never did anything in furtherance of the threat. (*Id.* at p. 1136.)

The Court of Appeal found the minor's "intemperate, rude, and insolent remarks hardly suggest any gravity of purpose" in light of the surrounding circumstances. (*In re Ricky T., supra,* 87 Cal.App.4th at pp. 1138-1139.) Moreover, the Court of Appeal cited the Juvenile Court's dismissal of a Penal Code section 71 charge based on an insufficiency of proof of the minor's specific intent to interfere with the teacher's duties or that the threat would have created a reasonable belief that it could be carried out. (*Id.* at p. 1139.) The Court of Appeal thereafter found the evidence insufficient to sustain the Juvenile Court's true finding on a section 422 allegation as follows:

> It is this court's opinion that section 422 was not enacted to punish an angry adolescent's utterances, unless they otherwise qualify as terrorist threats under that statute. Appellant's statement was an emotional response to an accident rather than a death threat that induced sustained fear. Although what appellant did was wrong, we are hesitant to change this school confrontation between a student and a teacher to a terrorist threat. Students who misbehave should be taught a lesson, but not, as in this case, a penal one.

(*Id.* at p. 1141.)

Johnson's bomb threat and threats to unleash serious bodily harm or death on Smith can hardly be compared to a brief emotional outburst from a child in reaction to being struck by a door. Johnson's actions were well thought out and orchestrated through three-way calls with clear gravity of purpose in modifying the behavior of Tina and Smith. Unlike the child in *Ricky T.*, Johnson did not follow-up his threats with an apology. Rather, a real bomb was found at Ramona High School several months later. This and other surrounding circumstances showed the threats to Tina and Smith were real and genuine. Accordingly, Johnson's reliance on *Ricky T.* is misplaced.

The bomb threat and threats against Smith constituted violations of section 422. Accordingly, they were properly admitted as aggravating evidence under factor (b).

2. Threatening Phone Calls

A threatening phone call in violation of section 653m qualifies as a threat of force or violence under factor (b). (See, e.g., *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1014, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22; *People v. Stanley* (1995) 10 Cal.4th 764, 824.) Section 653m provides in relevant part:

> Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith.

(§ 653m, subd. (a).[82])

[82] Subdivision (b) of section 653m proscribes repeated calls made with the intent to annoy or harass.

> The purpose of section 653m is to deter people from making harassing telephone calls with the intent to annoy and thus, to secure an individual's right to privacy against unwanted intrusion.

(*People v. Hernandez* (1991) 231 Cal.App.3d 1376, 1384.)

It appears no published case has defined "annoy" for purposes of section 653m. Within the context of section 646.9, "annoy" was "defined as 'to irritate with a nettling or exasperating effect.'" (*People v. Ewing* (1999) 76 Cal.App.4th 199, 207, quoting Webster's New Internat. Dict. (3d ed. 1993) p. 87.) However, as the *Ewing* court cautioned, "terms as they appear in the statute cannot be read in a vacuum." (*Ibid.*)

Calls which threaten lethal harm to the recipient constitute annoying calls within the meaning of section 653m. (See *People v. Lewis* (2006) 39 Cal.4th 970, 1053.) "That the offenses do not necessarily require acts or threats of violence is immaterial" since crimes which in fact involve an express or implied threat of force or violence are admissible under factor (b). (*People v. Stanley, supra,* 10 Cal.4th at p. 824.)

As discussed above, Johnson's bomb threat and threats against Lewis consisted of express and implied threats of great bodily injury or death with the intent to place his victims in fear and modify their behavior. The lesser intent to annoy is fairly subsumed within Johnson's telephonic threats.

In arguing that had no intent to annoy, Johnson cites *People v. Cooper* (Ill. App. 1975) 32 Ill.App.3d 516 [336 N.E.2d 247]. (AOB 193-194.) However, the Illinois disorderly conduct statute at issue in *Cooper* is materially distinguishable from section 653m, subdivision (a), in that it makes no reference to obscene language *or threats* in defining annoying calls. (See *id.* at p. 517, quoting Ill.Rev.Stat.1973, ch. 38, par. 26-1(a)(2)).) As previously stated, terms within a statute cannot be read in a vacuum. (*People v. Ewing, supra,* 76 Cal.App.4th at p. 207.)

Moreover, the defendant in *Cooper* merely used "abusive and vulgar profanity" rather than make threats of bodily harm. (See *People v. Cooper, supra,* 32 Ill.App.3d at p. 517.) Accordingly, *Cooper* is inapposite.

Johnson further argues "[h]is words were nothing more than an emotional outburst" with no intent to annoy. (AOB 194, 198.) Johnson is mistaken. Johnson's bomb threat and multiple calls to Smith which were carefully orchestrated over a period of time through three-way calls evidenced a deliberative and calculated plan with gravity of purpose in effectuating changes in Tina's and Smith's behavior rather than some instantaneous, impulsive outburst.

Finally, Johnson claims admitting the evidence under section 653m violated his First Amendment right to free speech. (AOB 195, 198-199, citing *In re M.S.* (1995) 10 Cal.4th 698, 714.) Johnson's reliance on *In re M.S.* is misplaced.

In *In re M.S.*, this Court held:

> Violence and threats of violence, by contrast, fall outside the protection of the First Amendment because they coerce by unlawful *conduct*, rather than persuade by expression, and thus play no part in the "marketplace of ideas." As such, they are punishable because of the state's interest in protecting individuals from the fear of violence, the disruption fear engenders and the possibility the threatened violence will occur. [Citation.] As long as the threat reasonably appears to be a serious expression of intention to inflict bodily harm [citation], and its circumstances are such that there is a reasonable tendency to produce in the victim a fear the threat will be carried out [citation], the fact the threat may be contingent on some future event [citation] does not cloak it in constitutional protection.

(*In re M.S., supra,* 10 Cal.4th at p. 714 [upholding constitutionality of section 422.6] [emphasis in original].)

As discussed in the preceding section, Johnson's threats against Tina and Smith reasonably appeared to be serious expressions of intention to

inflict great bodily harm or death from the nature of Johnson's comments and the circumstances under which they were uttered. Thus, Johnson's outlandish contention that a bomb threat and threats to inflict death or great bodily injury on another person were constitutionally protected speech is untenable.

The bomb threat as well as the threats against Smith constituted violations of section 653m. Accordingly, they were properly admitted as aggravating evidence under factor (b).

3. Section 148.1

If, as argued by defense counsel in the trial court, the actual bomb subsequently found at Ramona High School was "just pure happenstance" with no connection to Johnson (47 RT 7127) and, as argued by Johnson on appeal, the bomb threat was not "a true threat" (AOB 197), the threat against Tina would have constituted a violation of section 148.1. That section provides in relevant part:

> Any person who maliciously informs any other person that a bomb or other explosive has been or will be placed or secreted in any public or private place, knowing that the information is false, is guilty of a crime....

(§ 148.1, subd. (c).)

Johnson's malicious intent in making the bomb threat was evident from his rage over his wife's relationship with Smith. Accordingly, the bomb threat was in the alternative admissible under factor (b) as a violation of section 148.1.

4. Attempted Crimes

The threats against Smith and the bomb threat were also admissible as attempted violations of sections 422, 653m and 148.1. "In general, under California law, '[a]n attempt to commit a crime *is itself a crime* and [is] subject to punishment that bears some relation to the completed offense.'"

(*People v. Toledo, supra,* 26 Cal.4th at p. 229, quoting 1 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) elements, § 53, p. 262 [emphasis added].)

In *Toledo*, this Court specifically held an attempted criminal threat constituted a crime in this state. (*People v. Toledo, supra,* 26 Cal.4th at p 235.) This Court gave the following example of such an offense:

> [I]f a defendant, again acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat.

(*People v. Toledo, supra,* 26 Cal.4th at p. 231 [emphasis in original].) Accordingly, this Court found the victim's trial testimony that she was not frightened by the defendant's statements and her willingness to return home in defiance of the threat might have raised a reasonable doubt as to a completed criminal threat but supported an attempted criminal threat conviction. (*Id.* at p. 235.)

Similarly, if a factfinder were to believe Smith's and Tina's claims that they were not afraid of Johnson and did not take the threats seriously, the crimes of attempted criminal threat still would have been committed given the evidence of Johnson's requisite intent and gravity of purpose. Likewise, if they were not annoyed by Johnson's threats or did not believe them, the crimes of attempted threatening phone calls and attempted false report of a bomb were still committed given the evidence of Johnson's malicious intent.

> That the offenses do not necessarily require acts or threats of violence is immaterial. Section 190.3, factor (b) permits evidence of any offense that in fact "*involved* the use or attempted use of force or violence or the express or implied threat to use force or violence."

(*People v. Stanley, supra,* 10 Cal.4th at p. 824 [emphasis in original], quoting § 190.3, factor (b).) Accordingly, the threats against Smith and Tina were also admissible as attempted criminal offenses under factor (b).

B. Even Assuming Error, Johnson Was Not Prejudiced

Notwithstanding the correctness of the trial court's ruling, any error in admitting evidence of Johnson's telephonic threats against Tina and Smith can be deemed harmless.

> The state standard of review for error at the penalty phase, which is a more "exacting standard" than that employed for state-law errors at the guilt phase, is set forth in *People v. Brown* (1988) 46 Cal.3d 432, 447-448, 250 Cal.Rptr. 604, 758 P.2d 1135: "[W]hen faced with penalty phase error not amounting to a federal constitutional violation, we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*Id.*, at p. 448, 250 Cal.Rptr. 604, 758 P.2d 1135.) "When evidence has been erroneously received at the penalty phase, this court should reverse the death sentence if it is 'the sort of evidence that is likely to have a significant impact on the jury's evaluation of whether defendant should live or die.' [Citation.]" (*People v. Danielson* (1992) 3 Cal.4th 691, 738, 13 Cal.Rptr.2d 1, 838 P.2d 729.) The federal standard of review for constitutional error is set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." We recently reiterated that "*Brown's* 'reasonable possibility' standard and *Chapman's* 'reasonable doubt' test ... are the same in substance and effect." (*People v. Prince* (2007) 40 Cal.4th 1179, 1299, 57 Cal.Rptr.3d 543, 156 P.3d 1015.)

(*People v. Hamilton* (2009) 45 Cal.4th 863, 917.)

Error in admitting factor (b) evidence should be assessed for prejudice in light of other aggravating evidence which was properly admitted, including the circumstances of the current offenses(s). (See, e.g., *People v. Stanley, supra,* 10 Cal.4th at p. 825; *People v. Brown, supra,* 46 Cal.3d at p.

449.) In light of the overwhelming aggravating evidence independent of the telephonic threats, any factor (b) error was harmless in Johnson's case.

Johnson was convicted of two murders in the current case, in which his lethal acts were completely unnecessary and senseless. In particular, his execution of Campos showed Johnson to be a cold-blooded killer. The jury also had before it the equally senseless killing of Estrada, the Hider shooting and the American Motel incident. In addition, the jurors were presented with evidence of Johnson's numerous acts of violence and weapon possession in various custodial facilities, including his unprovoked attack on Wilbert Townsend which left Townsend with a skull fracture (51 RT 7737).

> From this evidence the jury would have had to infer that defendant had engaged in a pattern of exceptionally violent behavior over an extended period of time and that he had failed to respond to the rehabilitative efforts of the criminal justice system ... [a]nd admission of the additional evidence could not have made a difference.

(See *People v. Stanley, supra,* 10 Cal.4th at p. 825.) Accordingly, there is no reasonable or realistic possibility that the jury would have reached a different verdict in the penalty phase retrial had the evidence of the telephonic threats been excluded. (See *People v. Brown, supra,* 46 Cal.3d at p. 448.)

XVII. THERE IS NO REQUIREMENT THAT THE SPECIFIC CRIMINAL OFFENSES ALLEGED UNDER FACTOR (B) BE IDENTIFIED FOR THE JURY

Within its factor (b) instructions for the penalty phase retrial, the trial court listed 13 criminal acts or activity for the jury to consider. One of those read: "The incident occurring at the American Motel on January 9,

1992, involving the shooting of Eric Dawson and the striking of Anita Smith." (267226 [CALJIC No. 8.87].)

Johnson claims his rights to due process and a reliable penalty verdict were violated because the trial court failed to inform the jurors which specific crime Johnson was alleged to have committed in regards to the Dawson shooting.[83] (AOB 202-205, citing *People v. Phillips* (1985) 41 Cal.3d 29, 72, fn. 25, and *People v. Robertson* (1982) 33 Cal.3d 21, 55, fn. 19.) Johnson contends this instructional error "nullified the reasonable doubt standard" and provided the jury with an arbitrary standard for making its penalty determination. (AOB 205-206.) Several months prior to the filing of Johnson's Opening Brief, this precise claim was rejected by this Court.

In *People v. Taylor, supra,* 48 Cal.4th 574, wherein the defendant also cited *Phillips* and *Robertson*, this Court held:

> [D]efendant points to no case imposing a duty on the prosecutor or the trial court to identify for the jury the actual offense defined by the criminal activity admitted as factor (b) evidence. Indeed, to the contrary, we have held that absent a request, the trial court has no duty to specify the names or elements of the unadjudicated crimes when instructing the jury on factor (b) evidence. [Citations.] The premise of this rule is that, for tactical reasons, most defendants prefer not to risk having the jury place undue emphasis on the prior violent crimes. [Citation.]

(*Id.* at p. 656, citing *People v. Tuilaepa, supra,* 4 Cal.4th at pp. 591-592, and *People v. Hardy* (1992) 2 Cal.4th 86, 205-206.)[84]

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[83] Johnson does not challenge the instruction insofar as the alleged acts of violence against Anita Smith. (See AOB 202-206.)

[84] The record does not reflect and Johnson does not contend on appeal that he requested enumeration of the specific crimes or elements for purposes of the factor (b) instruction. (See 56 RT 8382-8396; 57 RT 8402-
(continued...)

Moreover, "the failure to identify or define the specific crime constituting the criminal activity did not render meaningless the reasonable doubt requirement or otherwise skew the jury's normative determination of the appropriate penalty." (*People v. Taylor, supra,* 48 Cal.4th at p. 656, citing *People v. Anderson, supra,* 25 Cal.4th at p. 589.) Accordingly, Johnson's instructional error claim must be rejected.

XVIII. CALJIC NO. 8.87 DOES NOT CREATE AN IMPROPER "MANDATORY PRESUMPTION" BY IDENTIFYING ALLEGED ACTS OR ACTIVITIES AS CRIMINAL

Johnson next challenges CALJIC No. 8.87 by arguing that it "created a mandatory presumption and was improperly argumentative in violation of" his rights to a jury trial, due process and a reliable verdict because the instruction directed the penalty phase jury to find his prior acts were criminal, removing a critical determination from the jury. (AOB 207- 219.) Similar claims have been repeatedly rejected by this Court. (See *People v. Butler* (2009) 46 Cal.4th 847, 872; *People v. Gray* (2005) 37 Cal.4th 168, 234-235; *People v. Monterroso, supra,* 34 Cal.4th at p. 793; *People v. Nakahara, supra,* 30 Cal.4th at p. 720.)

As this Court explained in *Nakahara*,

> CALJIC No. 8.87 is not invalid for failing to submit to the jury the issue whether the defendant's acts involved the use, attempted use, or threat of force or violence. [Citation.] The

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(...continued)
8412 [discussions regarding penalty phase instructions]; AOB 202-206.) To the contrary, Johnson requested that the trial court withdraw instructions on principals and aiding and abetting (CALJIC Nos. 3.00 and 3.01) for tactical reasons. (See 57 RT 8408-8409.) To the extent Johnson now argues such instructions were important for the jury's penalty phase determination (AOB 205), his claim is forfeited. (See *People v. Wickersham* (1982) 32 Cal.3d 307, 330; *People v. Gallego, supra,* 52 Cal.3d at p. 183; *People v. Marshall, supra,* 50 Cal.3d at p. 932.)

> question whether the acts occurred is certainly a factual matter for the jury, but the *characterization* of those acts as involving an express or implied use of force of violence, or the threat thereof, would be a legal matter properly decided by the court.

(*People v. Nakahara, supra,* 30 Cal.4th at p. 720 [emphasis in original].) Johnson offers no new arguments or persuasive reasons for revisiting the issue.

Within his claim, Johnson also argues the jurors might have concluded that the shank possession incidents "did not rise to the level of force or violence required under the statute." (AOB 211.) However, this Court has consistently held possession of a weapon in a custodial facility constitutes an express or implied threat of violence under factor (b). (See *People v. Butler, supra,* 46 Cal.4th at p. 872; *People v. Nakahara, supra,* 30 Cal.4th at pp. 719-720, citing *People v. Smithey, supra,* 20 Cal.4th at p. 1002, *People v. Tuilaepa, supra,* 4 Cal.4th at p. 589; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187.) The penalty judgment should be affirmed.

XIX. Chaka's Coleman's "Very Lethal" Comment Was Relevant and Admissible to Impeach Her Trial Testimony Minimizing the Nature of Johnson's Threats Against Smith

Johnson claims the trial court violated his constitutional rights to due process and a reliable verdict by permitting the prosecutor to admit Chaka Coleman's prior statement to Investigator Silva wherein she said the she had heard Johnson was "very lethal" and not someone to "mess with." Johnson contends the statement was irrelevant hearsay and should have been excluded under Evidence Code section 352 since Coleman never testified that she was afraid of Johnson. (AOB 220-228.) However, the statement was admitted to impeach Coleman's testimony in which she

attempted to minimize the nature of Johnson's threats against Smith. As such, the statement was highly probative and relevant with no undue prejudice. Accordingly, Johnson fails to show the trial court abused its discretion in admitting the evidence or constitutional error. Moreover, any alleged error from this brief statement was clearly harmless in light of the mountain of other evidence showing Johnson's lethalness.

At the penalty phase retrial, Coleman testified that she cooperated with Johnson in setting up several three-way calls to Smith and that she listened in on those calls. (47 RT 7156-7157.) Coleman testified that Johnson called Smith "just to ask him to quit messing with his wife" and that Johnson's tone was not harsh. (47 RT 7157.) When asked if Johnson was angry when he told Smith that he could have something done and when he told Smith that he knew what could happen, Coleman answered, "Still in the same, the same tone pretty much," and, "Basically the same, you know, the same." (47 RT 7158.) Coleman testified that she just interpreted Johnson's comments as an indication that he was going to have Smith beat up but not killed. (47 RT 7158-7159.) When asked if Smith sounded scared, Coleman first answered, "kind of – kind of to me, yes." (47 RT 7160.) However, she denied or could not recall telling Silva that Smith sounded terrified. (47 RT 7160.) When asked about her prior "trembling" comment, Coleman testified that Smith sounded scared and "a little, kind of like, you know, you know, I'm going to listen to, you know, what you're saying basically." (47 RT 7161.)

However, Coleman subsequently testified that Smith was "[n]ot so much scared, but like he's basically taking heed to what he was saying. He was going to carry out what he was saying. I'm going to – listening to what you basically had to say to me." (47 RT 7162.) When asked how seriously Smith took Johnson's comments, Coleman replied: "No, not so much as that. I'm – like I'm going to listen, you know what I'm saying, not so

much as he's a serious man, but, okay, you know what I'm saying, you ask me this, and I'm going to do – you ask me, you know, that's not so much as a serious man, but he's just doing what he asked him to do." (47 RT 7162.)

Coleman did not recall telling Silva that Johnson's words were "pretty harsh, that Smith was scared, or that the threats did not do any good since Smith was still sleeping with Tina. (47 RT 7163.) Coleman denied that she was afraid of Johnson. (47 RT 7163.)

Defense counsel objected and requested a sidebar conference. (47 RT 7163.) Outside of the jury's presence, the prosecutor indicated that he wanted to ask Coleman about her comments that Johnson was "very lethal" and "one person you don't want to mess with." (47 RT 7164.) Defense counsel countered that Coleman did not testify that she was afraid of Johnson and that the prejudicial effect outweighed any relevance of the prior statements. (47 RT 7165.) The prosecutor responded that Coleman was "still trying to shade things for him. She's saying well, it wasn't really that harsh. She said it was harsh a number of times. She said well, he was just listening." (47 RT 7165.)

The prosecutor further argued the statement would impeach Coleman's testimony that she was not afraid of Johnson. (47 RT 7167.) Defense counsel reiterated his objection that the prejudicial effect outweighed any minimal probative value, arguing Johnson was no longer out on the streets or threatening anyone. (47 RT 7167-7169.)

Citing Evidence Code section 352, the trial court overruled the defense objection and permitted the prosecutor to question Coleman about the prior statement. (47 RT 7169.) Defense counsel added that he was objecting under "Fourth, Eighth, and Fourteenth Amendment grounds." (47 RT 7169.)

Thereafter, in the presence of the jury, the prosecutor asked Coleman, "Do you remember telling Detective Silva when you spoke with him about

the defendant, 'I know his past, and I've heard he's very lethal around here. He's one person you don't want to mess with.'?" (47 RT 7170.) Coleman answered, "Yes, I did." (47 RT 7170.) Subsequently, Coleman testified that she was not concerned about coming to court and saying things that would hurt Johnson, and continued to deny that Johnson's words to Smith were harsh.[85] (47 RT 7170-7171.)

A. Johnson Fails to Show the Admission of Coleman's Prior Statement Was an Abuse of Discretion

As previously stated, trial court rulings on the admissibility of evidence are reviewed for abuse of discretion. (See *People v. Benavides, supra,* 35 Cal.4th at p. 90; *People v. Waidla, supra,* 22 Cal.4th at pp. 717-718.) Johnson fails to show any abuse of discretion here.

"Unless precluded by statute, any evidence is admissible to attack the credibility of a witness if it has a tendency in reason to disprove the truthfulness of the witness's testimony." (*People v. Hawthorne, supra,* 46 Cal.4th at p. 99, citing Evid. Code, § 780, and *People v. Humiston* (1993) 20 Cal.App.4th 460, 479; see also Evid. Code, § 210.) In the penalty phase retrial, Coleman went to great lengths in attempting to minimize the nature of Johnson's comments to Smith, essentially portraying them as mere requests rather than threats. Smith's prior statement to Silva that Johnson was "very lethal" and not someone to "mess with," which was offered to provide context to Johnson's comments to Smith, clearly had a tendency to disprove the truthfulness of Coleman's penalty phase retrial testimony.[86]

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[85] During cross-examination, Coleman was again confronted with her prior statement about Johnson's "harsh words," and testified, "I don't remember, but if that's what I said, I could have said it." (47 RT 7172.)

[86] Johnson concedes Coleman's prior statement was made in reference to her understanding of Johnson's comments to Smith at a threat.
(continued...)

The prior statement further showed why Coleman was trying to minimize Johnson's comments to Smith, thus permitting the jury to better assess the credibility of her testimony.

> Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis of the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court. [Citations.]

(*People v. Burgener, supra,* 29 Cal.4th at p. 869.) Thus, evidence explaining why a witness's prior testimony (or statement) differs from her current testimony is admissible. (*Ibid.*) Accordingly, Coleman's prior statement to Silva was relevant and admissible.

Johnson's arguments to the contrary are unavailing. First, Johnson is mistaken in labeling the prior statement as hearsay. (See AOB 220.) "[A]n out-of-court statement is hearsay only when it is 'offered to prove the truth of the matter stated.'" (*People v. Jurado, supra,* 38 Cal.4th at p. 117, quoting Evid. Code, § 1200.) The prosecutor offered the statement to impeach Coleman's testimony that Johnson's words were not harsh and that Smith was merely listening. (47 RT 7165.) The prosecutor further offered the statement to impeach Coleman's testimony that she was not motivated by any fears of Johnson. (47 RT 7166-7167.) Since the prior statement was admitted to explain Coleman's penalty phase retrial testimony and her reasons for trying to minimize Johnson's comments rather than to prove in fact that Johnson was "lethal" or someone "not to mess with," it was not hearsay.

Johnson also argues the prior statement was inadmissible because Coleman did not testify that she was afraid of him and did not tell Silva that

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(...continued)
(See AOB 220-221 [citing additional portions of prior statement for context].)

she was afraid to testify. (AOB 223.) Johnson misses the point. Coleman's denials that she was afraid of Johnson were precisely the reason why the prior statement was admissible. The statement to Silva attacked Coleman's credibility and tended to disprove the truthfulness of her rather benign characterization of Johnson's comments to Smith during her penalty phase retrial testimony, and thus was admissible. (See *People v. Hawthorne, supra,* 46 Cal.4th at p. 99; *People v. Burgener, supra,* 29 Cal.4th at p. 869.)

Johnson further contends the prior statement should have been excluded under Evidence Code section 352 since it had "minimal" relevance and was potentially prejudicial and inflammatory. (AOB 224-226.) Johnson is mistaken.

First, as discussed above, the prior statement bore great relevance in explaining Coleman's minimization of Johnson's comments to Smith during her testimony and in assisting the jurors in assessing the true nature of Johnson's threats to Smith. Second, there was no undue prejudice.

Johnson argues the prior statement was prejudicial because the jurors could have used it to find his comments to Smith to be threatening. (AOB 225.) However, as previously stated, evidence is not "prejudicial" within the meaning of section 352 simply because it is "damaging." (*People v. Alexander, supra,* 49 Cal.4th at p. 905 [internal quotes omitted].)

> "'Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice."

(*People v. Doolin, supra,* 45 Cal.4th at pp. 438-439, quoting *People v. Cudjo, supra,* 6 Cal.4th at p. 609 [emphasis in original].) The mere fact

that the prior statement supported the prosecutor's theory that Johnson threatened Smith did not render the evidence unduly prejudicial.

Moreover, Johnson's rank speculation without any support in the record that the jurors might have misused Coleman's prior statement to bolster the prosecutor's evidence regarding the Hider and Dawson shootings and erase lingering doubts about the Lopez and Campos murders does not demonstrate undue prejudice. (See AOB 225.) The prejudice contemplated under section 352 "cannot be based on mere speculation and conjecture." (*People v. Wright* (1985) 39 Cal.3d 576, 585 [assessing prejudice of defense evidence to prosecution]; see also *People v. Adams* (2004) 115 Cal.App.4th 243, 255 ["burden of showing a constitutional violation as a demonstrable reality, not mere speculation" for excluding third-party culpability evidence under § 352].)

Finally, the penalty phase jury was presented with overwhelming evidence of Johnson's lethalness independent of Coleman's brief prior statement. The jurors knew Johnson had previously been convicted of killing three people (Campos, Lopez and Estrada), with the Campos killing being particularly cold-blooded. The jurors knew of Johnson's violence during the Hider shooting and the American Motel incident. The jurors were presented with evidence of Johnson's numerous acts of violence and weapon possession in various custodial facilities, including his unprovoked attack on Wilbert Townsend which left Townsend with a skull fracture.

Thus, Coleman's "lethal" comment did not impart to the jurors anything that they did not already know. Indeed, the rather mundane prior statement paled in significance to the other evidence of Johnson's lethal violence. Accordingly, there was no risk of undue prejudice.

Given the great probative value of Coleman's prior statement to Silva which was not substantially outweighed by the risk of undue prejudice, the trial court's ruling was not "arbitrary, capricious or patently absurd" and

Johnson fails to show an abuse of discretion. (See *People v. Guerra, supra,* 37 Cal.4th at p. 1113; *People v. Rodriguez, supra,* 20 Cal.4th at pp. 9-10.) Accordingly, the trial court's ruling should not be disturbed on appeal. (See *People v. Benavides, supra,* 35 Cal.4th at p. 90; *People v. Waidla, supra,* 22 Cal.4th at pp. 717-718.) Since the evidence was properly admitted, there was no violation of due process either. (*People v. Burgener, supra,* 29 Cal.4th at p. 872; *People v. Farnam, supra,* 28 Cal.4th at p. 184.)

B. Even Assuming Error, Johnson Was Not Prejudiced

Notwithstanding the propriety of the trial court's ruling, any error in admitting Coleman's prior statement to Silva was harmless. As discussed above, the brief reference to Johnson being lethal within the context of Coleman's testimony paled in significance to the mountain of evidence showing Johnson's lethalness in the prior manslaughter, two prior murders, two shootings and custodial violence.

Where the challenged evidence is cumulative of other evidence properly admitted at trial, this weighs against a finding of prejudice. (See, e.g., *People v. Cowan, supra,* 50 Cal.4th at p. 503; *People v. Jackson, supra,* 13 Cal.4th at p. 1234; *People v. Stanley, supra,* 10 Cal.4th at p. 825; *People v. Tuilaepa, supra,* 4 Cal.4th at p. 589; *People v. Frank, supra,* 51 Cal.3d at p. 728.) Accordingly, there is no reasonable or realistic possibility that the jury would have reached a different verdict in the penalty phase retrial had Coleman's prior statement been excluded, and the penalty judgment should be affirmed. (See *People v. Brown, supra,* 46 Cal.3d at p. 448.)

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XX. JOHNSON'S STATEMENT ABOUT RUNNING THE CRIPS OUT OF HIS NEIGHBORHOOD WAS RELEVANT AND ADMISSIBLE TO PROVE MOTIVE AND IDENTITY IN THE HIDER SHOOTING

Johnson claims the trial court violated his statutory rights under Evidence Code section 352 and his constitutional rights to due process and a reliable verdict by admitting evidence of his prior bragging about running a gang out of the Casa Blanca area. (AOB 229-232.) However, the evidence was relevant and admissible in the Hider shooting where the identity of the shooter was highly disputed. Thus, Johnson fails to show an abuse of discretion or constitutional error. Moreover, any alleged error in admitting the evidence was harmless.

On February 28, 1989, Nigel Hider was shot during a drive-by shooting near the Ahumada Market in Riverside. (46 RT 6986-6987, 6995.) Several days later in the hospital, Hider told Detective Guy Portillo that Johnson was the shooter, but said he would not testify in court. (47 RT 7101-7102.) Hider was a member of the Gardena Payback Crips at the time of the shooting. (46 RT 6993.)

At the penalty phase retrial, Hider testified that the shooter was a White male. (46 RT 6988, 6991, 6994.) Hider denied that he previously identified Johnson at the hospital. (46 RT 6991.)

On March 9, 2000, Angela McCurdy told Investigator Silva that she saw the Hider shooting and described the shooter as a bald-headed Black male who was seated in the passenger side of the vehicle. (46 RT 7025.) Beyond that, McCurdy could not say whether or not Johnson was the shooter even though she knew him. (46 RT 7024- 7027.) At the penalty phase retrial, McCurdy testified that she did not see the vehicle or Hider being shot (46 RT 7010-7016) and denied or could not recall any prior statements to the contrary (46 RT 7015-7016).

Subsequently, the prosecutor informed the trial court that he intended to present evidence of Johnson's prior statement to Officer Duane Beckman that he personally ran the Gardena Payback Crips out of the Casa Blanca area. (49 RT 7405-7407.) The prosecutor argued the statement went to "two important things," identity and motive. (49 RT 7407.) Defense counsel claimed surprise[87] and objected under Evidence Code section 352, arguing that the statement was prejudicial, speculative and related to a collateral matter.[88] (49 RT 7408-7409.)

Citing Evidence Code section 352, the court permitted the prosecutor to admit Johnson's statement to Officer Beckman, finding the probative value outweighed any prejudicial effect. (49 RT 7412.) Subsequently, Officer Beckman testified that Johnson told him in January 1989 that "he single-handedly ran the Gardena Payback Crips out of the Casa Blanca area." (51 RT 7720-7721.)

A. Johnson Fails to Show Admission of the Prior Statement Was an Abuse of Discretion

"[E]vidence related to gang membership is not insulated from the general rule that all relevant evidence is admissible if it is relevant to a material issue in the case other than character, is not more prejudicial than

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[87] At the October 25, 2001, bench conference, the prosecutor told the court that he gave the defense notice of Johnson's statement on March 20, 2000, as soon as he was informed of it. (49 RT 7409-7410.) On appeal, Johnson no longer premises his claim on surprise or lack of notice. (See AOB 229-232.)

[88] Although Johnson did not object on constitutional grounds, he may still raise "a very narrow due process argument on appeal...that the asserted error in admitting the evidence over his Evidence Code section 352 objection had the additional legal consequence of violating due process." (*People v. Partida* (2005) 37 Cal.4th 428, 435; see also *People v. Bonilla, supra,* 41 Cal.4th at p. 353, fn. 18; *People v. Huggins, supra,* 38 Cal.4th at pp. 199-200; *People v. Cole, supra,* 33 Cal.4th at p. 1195, fn. 6.)

probative, and is not cumulative." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167, citing Evid. Code, §§ 210, 352, *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049, and *People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) Thus, "in a gang-related case, gang evidence is admissible if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect." (*People v. Williams* (1997) 16 Cal.4th 153, 193.) "'[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.' [Citations.]" (*People v. Samaniego, supra,* 172 Cal.App.4th at pp. 1167-1168, quoting *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.)

Due to the potential inflammatory impact of gang-related evidence, it should be carefully scrutinized prior to its admission. (*People v. Williams, supra,* 16 Cal.4th at p. 193, citing *People v. Champion* (1995) 9 Cal.4th 879, 922.) A trial court's admission of gang-related evidence is reviewed under the abuse of discretion standard. (*People v. Avitia, supra,* 127 Cal.App.4th at p. 193, citing *People v. Brown* (2003) 31 Cal.4th 518, 547, *People v. Carter* (2003) 30 Cal.4th 1166, 1194, and *People v. Waidla, supra,* 22 Cal.4th at p. 723.) Accordingly, "[t]he trial court's ruling will not be disturbed in the absence of a showing it exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice." (*Ibid.*, citing *People v. Rodriguez, supra,* 20 Cal.4th at p. 9.)

In Johnson's case, the identity of Hider's armed assailant was very much in dispute. Hider testified that the shooter was a White male and denied his prior identification of Johnson. (46 RT 6988, 6991, 6994.) Although McCurdy told Silva the shooter was a bald-headed Black male, she could not identify the shooter as Johnson even though she knew him. (46 RT 7024-7025.) Then, at the penalty phase retrial, McCurdy told the

jurors that she did not see the vehicle or shooting and denied or did not recall any prior statements to the contrary. (46 RT 7010-7016.) Moreover, Hider's and McCurdy's testimony provided no reason or motive for the shooting.

Johnson's statement about running the Gardena Payback Crips out of the Casa Blanca area filled in the necessary missing pieces to the puzzle. It provided a motive for the shooting and resolved the conflicting testimony and prior statements about the identity of the shooter in conjunction with the facts that Hider was a Gardena Payback Crip and the shooting occurred in the Casa Blanca area. As such, the statement carried significant probative value.

Yet, the risk of prejudice from the evidence was non-existent. Notably, Johnson's statement to Officer Beckman did *not* indicate Johnson was a gang member. To the contrary, the statement showed Johnson was ridding the neighborhood of gang members. There was no evidence that Johnson was in a rival gang or acting out of any motive other than a dislike of gangs and protecting his neighborhood from them. Indeed, as conceded by Johnson, the prosecutor argued Johnson was not dominated by gangs. (See AOB 230, citing 57 RT 8431.)

Johnson speculates to the contrary without any support in the record that the jurors might have thought he was a rival gang member or involved in the drug trade. (See AOB 230-231.) However, such speculation does not demonstrate prejudice under section 352. (See *People v. Wright, supra,* 39 Cal.3d at p. 585; *People v. Adams, supra,* 115 Cal.App.4th at p. 255.) There was no risk of undue prejudice.

Given the significant relevance of Johnson's statement to Officer Beckman in proving motive and identity in the Hider shooting which was not outweighed by any risk of undue prejudice, the trial court's ruling was not "arbitrary, capricious or patently absurd" and Johnson fails to show an

abuse of discretion. Accordingly, the trial court's ruling should not be disturbed on appeal. (See *People v. Rodriguez, supra,* 20 Cal.4th at p. 9; *People v. Avitia, supra,* 127 Cal.App.4th at p. 193.) It follows that there was no violation of due process since the evidence was properly admitted. (See *People v. Burgener, supra,* 29 Cal.4th at p. 872; *People v. Farnam, supra,* 28 Cal.4th at p. 184.)

B. Even Assuming Error, Johnson Was Not Prejudiced

Notwithstanding the propriety of the trial court's ruling, any error in admitting the evidence was harmless. As discussed above, Johnson's statement to Officer Beckman showed Johnson was opposed to gangs, not a gang member or involved in any speculative drug-war. Thus, there is no reasonable or realistic possibility of undue prejudice arising from the statement.

Moreover, in light of the other aggravating evidence presented, including the fact that Johnson killed three defenseless individuals, any alleged evidentiary error regarding the Hider incident can be deemed harmless. Accordingly, the penalty judgment should be affirmed. (See *People v. Brown, supra,* 46 Cal.3d at p. 448.)

XXI. THE TRIAL COURT HAD NO DUTY TO GIVE A LIMITING INSTRUCTION REGARDING THE APPROPRIATE USE OF VICTIM IMPACT TESTIMONY

Johnson claims the trial court had a *sua sponte* duty to instruct the penalty phase retrial jury on the appropriate use of victim impact evidence, specifically proposing a cautionary instruction suggested by the Pennsylvania Supreme Court in *Commonwealth v. Means* (Pa. 2001) 565 Pa. 309, 773 A.2d 143, 159, and the New Jersey Supreme Court in *State v. Koskovich* (N.J. 2001) 168 N.J. 448, 776 A.2d 144, 177. (AOB 233-235.) The cautionary instruction urged by Johnson would read as follows:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Finally, a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

(AOB 235.) Johnson argues these principles were not covered by CALJIC No. 8.84.1,[89] and failure to give the cautionary instruction violated his rights to due process, a fair trial and a reliable verdict. (AOB 235-237.)

Johnson fails to acknowledge that an identical claim based on the precise instruction proposed by him was previously rejected in *People v. Zamudio, supra,* 43 Cal.4th at pp. 369-370. (See AOB 233-237.) This Court explained that the proposed cautionary instruction "would not have provided the jurors with any information they did not otherwise learn from CALJIC No. 8.84.1," the first two sentences of the proposed instruction

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[89] The trial court instructed the jury with CALJIC No. 8.84.1 as follows:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial. [¶] You must determine what the facts are from the evidence received during this trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. [¶] You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

(26 CT 7221.)

were also adequately covered by CALJIC No. 8.85,[90] and "the proposed instruction is incorrect in suggesting that a juror's 'emotional response' to the evidence may play no part in the decision to vote for the death penalty" since jurors may exercise sympathy for the victims and their families in considering the impact of the defendant's crimes. (*Id.* at p. 369, citing *People v. Pollock* (2004) 32 Cal.4th 1153, 1195, and *People v. Brown, supra,* 31 Cal.4th at p. 573.) Also, there is no *sua sponte* duty to give the remaining portions of the instruction concerning the life of one victim not being more valuable than another and cautioning the jurors against drawing an adverse inference from the witnesses' silence regarding capital punishment since they are not necessary for the jury's understanding of the case. (*People v. Zamudio, supra,* 43 Cal.4th at p. 370.)

Other claims of a *sua sponte* duty to give limiting or cautionary instructions on victim impact evidence were rejected in *People v. Russell* (2010) 50 Cal.4th 1228, 1265-1266, and *People v. Carrington* (2009) 47 Cal.4th 145, 198. Johnson offers no new arguments or persuasive reasons for this Court to reconsider its holdings in *Zamudio, Russell* and *Carrington*. The penalty judgment should be affirmed.

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[90] The trial court instructed the jury with CALJIC No. 8.85, in relevant part, as follows:

> In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of this trial. You shall consider, take into account and be guided by the following factors, if applicable: (a) the circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstances fount to be true....

(26 CT 7223.)

XXII. THERE WAS NO PROSECUTORIAL MISCONDUCT

Johnson claims the prosecutor committed three instances of misconduct during closing argument at the penalty phase retrial by improperly telling the jurors they should fear Johnson, by arguing lack of remorse as a factor in aggravation, and by attacking Johnson's defense as having an "unspoken theme" of denigrating the victims. Johnson contends his state and federal constitutional rights to due process, a fair trial and a reliable penalty verdict were violated by the alleged misconduct, individually and cumulatively. (AOB 238-254.) Two of Johnson's misconduct claims were forfeited due to Johnson's failure to request an admonition to cure any alleged harm. Moreover, none of the comments cited by Johnson constituted misconduct under the applicable state or federal standards. Finally, any alleged misconduct was harmless.

A. Alleged Appeal to the Jurors' Personal Fears

Johnson's first allegation of misconduct is based on the following statement by the prosecutor in closing argument: "'The people who know the defendant know enough about him to fear him, and so should you.'" (AOB 239-243, quoting 57 RT 8418.) Johnson objected "on 352 grounds" and stated that the prosecutor's comment was improper. The objection was overruled, and the prosecutor continued his argument. (57 RT 8418.)

Notably, Johnson did not request any curative admonition. (57 RT 8418.)

> At the penalty phase, as at the guilt phase, on appeal a defendant may not complain of prosecutorial misconduct if the defendant does not timely object *and* request an admonition, unless an admonition would not have cured the harm.

(*People v. Cunningham, supra,* 25 Cal.4th at p. 1019 [emphasis added]; see also *People v. Dykes* (2009) 46 Cal.4th 731, 786; *People v. Earp* (1999) 20 Cal.4th 826, 858.)

Here, an admonition to the jurors that they must not let their personal feelings or fears influence their decision would have been particularly effective to cure the harm Johnson alleges on appeal. However, Johnson did not request a curative admonition. Accordingly, this misconduct claim was forfeited for purposes of appeal.[91]

Notwithstanding forfeiture, the prosecutor's comment did not constitute misconduct under the federal Constitution or state law.

> "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process."

(*People v. Doolin, supra,* 45 Cal.4th at p. 444, quoting *People v. Morales* (2001) 25 Cal.4th 34, 44, and citing *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144], and *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed.2d 431].) "Under California law, a prosecutor who uses deceptive or reprehensible methods of persuasion commits misconduct even if such actions do not render the trial fundamentally unfair." (*Ibid.*, citing *People v. Cook, supra,* 39 Cal.4th at p. 606.) These standards apply to the penalty phase of a capital case as well as the guilt phase. (*People v. Dykes, supra,* 46 Cal.4th at p. 786.)

"A prosecutor may vigorously argue his case, marshalling the facts and arguing inferences to be drawn therefrom." (*People v. Thompson* (1988) 45 Cal.3d 86, 112; see also *People v. Rundle, supra,* 43 Cal.4th at p. 161; *People v. Ledesma* (2006) 39 Cal.4th 641, 720 [prosecutor given

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[91] Respondent also notes that Johnson's objection was not made on federal constitutional grounds. Indeed, Johnson referred to section 352 of the state's Evidence Code in making his objection. (See 57 RT 8414.) However, Johnson's claim was not forfeited insofar as it is based on federal constitutional grounds since it involves the same facts and similar analysis as his state grounds. (See *People v. Friend, supra,* 47 Cal.4th at p. 29, fn. 13 [misconduct claim].)

"wide latitude" in closing argument.) In the penalty phase of a capital trial, a prosecutor may target the jurors' emotions, and "'considerable leeway is given for emotional appeal so long as it relates to relevant considerations.'" (*People v. Sanders* (1995) 11 Cal.4th 475, 551, quoting *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35; cf. *People v. Thomas* (1992) 2 Cal.4th 489, 537 [comment on defendant's potential for future violence based on the evidence is not misconduct].) That is what the prosecutor did in Johnson's case.

Prior to the challenged comment, the prosecutor discussed the fear and threats to which Johnson subjected the victims' families, Jose Alvarez, Nigel Hider, Anita Smith, Jarah Smith and various fellow inmates. (57 RT 8416-8417.) These were relevant considerations based on the evidence presented at the penalty phase retrial. To the extent the prosecutor at the same time appealed to generalized fears, there was no misconduct.

For example, in *People v. Riggs* (2008) 44 Cal.4th 248, the prosecutor told the jurors:

> "Could be any of us, could be any of our children, it could be anybody that we know that doesn't deserve it. [¶] Scary. [¶] It's really scary what happens out there on our highways. And it's even more scary because we know we got a predator sitting right here in the courtroom with us. It is time that we take control of the situation and do what is right."

(*People v. Riggs, supra,* 44 Cal.4th at p. 323.) Characterizing the comments as references to "generalized fears aroused by random violence" and rejecting the defendant's contention that the prosecutor was urging the jurors to personalize the murder, this Court found the prosecutor's argument was not unduly inflammatory. (*Ibid.*)

In *Sanders*, the prosecutor argued in part,

> "This man subjugated a city.... A man like him makes us all prisoners in our own cities.... You're afraid to walk the streets at

> night, you're afraid to leave your house at certain hours, you lock your doors."

(*People v. Sanders, supra,* 11 Cal.4th at p. 551.) This Court found no misconduct, explaining that the prosecutor's general allusions to urban violence fears were not unduly inflammatory. (*Ibid.*) Like *Riggs* and *Sanders*, the comment here was merely a reference to generalized fears aroused by Johnson's violence and threats of violence despite the prosecutor's use of the word "you." Certainly, if the prosecution remarks in *Riggs* and *Sanders* were not misconduct, the prosecutor's rather benign comment in Johnson's case does not constitute misconduct either.

In arguing to the contrary, Johnson cites *People v. Criscione* (1981) 125 Cal.App.3d 275, 292. (AOB 239.) However, *Criscione* addressed misconduct in the guilt phase of a non-capital trial. (*Id.*) As such, *Criscione* stands for the unremarkable principle that emotional appeals to jurors are improper to influence their guilt determination. In contrast, as stated, emotional appeals to the jury based on the evidence are permissible in the penalty phase of a capital trial. (*People v. Bittaker, supra,* 48 Cal.3d at p. 1110, fn. 35.) *Criscione* is simply inapplicable here.

Johnson also attempts to rely on *Tucker v. Zant* (11th Cir. 1984) 724 F.2d 882, for his misconduct claim. (See AOB 239-240.) However, in *Tucker*, the prosecutor improperly personalized his argument, telling the jurors how infrequently the death penalty was sought by his office based on his personal experience. (See *Tucker v. Zant, supra,* 724 F.2d at p. 889.) The Court of Appeals found:

> Such arguments are objectionable because their effect is to assure the jurors that someone with greater experience has already made the decision that the law imposes on them. The statement invites the jury to rely on the prosecutor's office's conclusion that the defendant is deserving of death rather than to make its own evaluation of the enormity of the defendant's crime.

(*Tucker v. Zant, supra,* 724 F.2d at p. 889.)

The *Tucker* prosecutor also told the jurors that he would sleep good or better knowing the defendant had been executed and would not be on the streets. (*Id.,* at p. 889.) The Court of Appeals found the prosecutor's comments were "not germane, and making such an argument serves only to arouse the generalized fears of the jurors and divert the focus of their attention from the character of this crime and this criminal." (*Ibid.*) Unlike *Tucker*, the prosecutor in Johnson's case did not personally vouch for the death penalty by touting his experience or infuse non-germane considerations such as his personal comfort regarding a death verdict. Accordingly, *Tucker* is readily distinguishable and does not assist Johnson in his claim.

Finally, Johnson takes issue with the prosecutor's statement that the people who knew Johnson best and other inmates feared him, citing favorable testimony from several defense witnesses. (AOB 241-242.) Such argument is more appropriately presented to the jurors at trial than in a misconduct claim on appeal. The prosecutor was entitled to draw these fair inferences from the evidence. (See *People v. Thompson, supra,* 45 Cal.3d at p. 112; *People v. Rundle, supra,* 43 Cal.4th at p. 161.) The mere fact that Johnson disagrees with the prosecutor's assessment of the evidence does not mean the prosecutor's comment was improper.

The prosecutor's comment about threats and generalized fear was not a deceptive or reprehensible method of persuasion and did not render the trial fundamentally unfair. Accordingly, no misconduct should be found under state or federal law.

B. The Prosecutor's Argument Regarding Lack of Remorse Was Proper

Johnson next claims the prosecutor engaged in misconduct by improperly arguing that Johnson did not show remorse, specifically

contending the prosecutor "set up 'a straw man'" since the defense did not attempt to show Johnson was remorseful. (AOB 243-246.) Johnson is mistaken.

Prior to starting his argument, defense counsel objected to the prosecutor arguing lack of remorse since it was not an aggravating factor. (57 RT 8412 [objecting on Eighth and Fourteenth Amendment grounds as well].) The prosecutor responded,

> I cannot argue lack of remorse as an aggravating factor, but I can point out its absence as a mitigating factor. And the law is quite clear on this, and I'll make it clear in my argument that I'm not saying it's aggravating. I'll point out it's not existent as a mitigating factor. There's considerable case authority in support of that.

(57 RT 8412.) After further argument, the trial court overruled the defense objection but asked the prosecutor to exercise care in how he presented his argument regarding lack of remorse.[92] (57 RT 8415-8516.)

Subsequently, the prosecutor made the following remarks in closing argument:

> The presence of remorse by the defendant can be a mitigating factor. The absence of remorse cannot be considered an aggravating factor. But as I said, if he has remorse, it can be considered as mitigating. Is there any sign of remorse here? I'd submit there's none, that there is no mitigation in remorse to be placed on this side of the scale.

(57 RT 8426.)

The prosecutor's argument was entirely proper. This Court has consistently and repeatedly held, "[a] prosecutor may properly comment on a defendant's lack of remorse, as relevant to the question of whether

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[92] Since the objection was made and overruled *in limine* prior to the prosecutor's closing argument, respondent does not contend this misconduct claim was forfeited for failure to request an admonition.

remorse is present as a mitigating circumstance, so long as the prosecutor does not suggest that lack of remorse is an aggravating factor." (*People v. Mendoza, supra,* 24 Cal.4th at p. 187; see also *People v. Collins* (2010) 49 Cal.4th 175, 228; *People v. Burney, supra,* 47 Cal.4th at p. 266; *People v. Davis* (2009) 46 Cal.4th 539, 620; *People v. Thornton* (2007) 41 Cal.4th 391, 460; *People v. Bonilla, supra,* 41 Cal.4th at p. 356; *People v. Cook, supra,* 39 Cal.4th at p. 611; *People v. Jurado, supra,* 38 Cal.4th at p. 141; *People v. Vieira* (2005) 35 Cal.4th 264, 295-296; *People v. Combs* (2004) 34 Cal.4th 821, 866; *People v. Pollock, supra,* 32 Cal.4th at p. 1185; *People v. Crew* (2003) 31 Cal.4th 822, 857; *People v. Farnam, supra,* 28 Cal.4th at pp. 198-199; *People v. Jones* (2003) 29 Cal.4th 1229, 1265; *People v. Ochoa* (1998) 19 Cal.4th 353, 468; *People v. Dyer* (1988) 45 Cal.3d 26, 82.)

The prosecutor's argument concerning Johnson's lack of remorse was not a deceptive or reprehensible method of persuasion and did not render the trial fundamentally unfair. Accordingly, there was no misconduct.

C. The Prosecutor's Argument Regarding the Defense's Attacks on the Victims Was Proper

Lastly, Johnson claims the prosecutor committed misconduct by arguing the defense had an unspoken theme denigrating the worth of the victims. (AOB 246-253.) There was no misconduct in this regard.

Johnson bases this claim on the following statement by the prosecutor in closing argument: "One of the unspoken themes of the defense throughout this trial is that these victims Martin and Candy aren't worthy enough." (57 RT 8443.) At trial, defense counsel objected to the comment as improper because "[n]o one has ever argued that." (57 RT 8443.) After the objection was overruled, the prosecutor continued:

> One of the unspoken themes is that they're not worthy enough for their murders to be punished by death. They won't come out and say that, but why did we spend – why did the defense spend

> so much time when Oscar Ross was on the stand, when he was up there accusing him of murder of saying yeah, he was there and he gunned down a man. What was the bulk, of the cross-examination about? Well, you and Martin – you and Martin Campos made 20 drug deals together; didn't you? And you and Martin Campos ran through hundreds of thousands of dollars of drugs. And you and Martin Campos traveled to L.A. to sell guns. And Martin Campos had a big drug connection in L.A. And Martin Campos, you think he set up the robbery, and Martin Campos and Martin Campos, and Martin Campos is a drug dealer.
>
> And what did you hear about Candy's boyfriend? He was convicted – after these events, he was convicted of a shooting incident in Iowa. And what did the defense ask Dr. Choi, the coroner? They specifically asked him about Camerina Lopez having amphetamines in her system at the autopsy. Why? What was the point of that? What was the point of all of that evidence?
>
> Norberto Estada was drunk, sitting on a curb outside of a convenience store, and he had marijuana in his pocket. I would submit it was to make you like them less, to get you looking away from the defendant and away from the acts that he committed, and that's not right. You don't measure the gravity of the defendant's crimes by who he killed. In our society everyone's life has equal value. You don't have to pass a test or reach some kind of threshold of worthiness in order for your special circumstance murder to warrant the most severe sentence.

(57 RT 8443-8444.)

Johnson did not request any curative admonition. (57 RT 8443-8444.) Yet, an admonition would have effectively cured the harm Johnson claims on appeal by emphasizing to the jurors that they were the ultimate arbiters of whether Johnson truly attempted the undermine the victims' worth. Accordingly, this misconduct claim was forfeited for purposes of appeal. (See *People v. Dykes, supra,* 46 Cal.4th at p. 786; *People v. Cunningham, supra,* 25 Cal.4th at p. 1019; *People v. Earp, supra,* 20 Cal.4th at p. 858.)

Notwithstanding forfeiture, the prosecutor's argument was not misconduct. The prosecutor was exercising his wide latitude to argue eminently reasonable inferences from the evidence. (See *People v. Thompson, supra,* 45 Cal.3d 86, 112; *People v. Rundle, supra,* 43 Cal.4th at p. 161; *People v. Ledesma, supra,* 39 Cal.4th at p. 720.) Johnson goes to great lengths to counter the prosecutor's argument with more favorable inferences from various evidence elicited at trial. (See AOB 247-251.) Again, such argument is more appropriately directed to the jurors than a reviewing court assessing a misconduct claim.

Moreover, the prosecutor did not disparage defense counsel in any manner. Contrary to Johnson's contention that the prosecutor was suggesting defense counsel used the presentation of evidence and his cross-examination of witnesses for an improper purpose (AOB 252), the prosecutor was legitimately attempting to counter the temptations any juror might naturally entertain to feel less sympathetic towards drug dealers, drug users and convicted criminals as victims.

In arguing otherwise, Johnson cites *People v. Hill, supra,* 17 Cal.4th 800, *People v. Sandoval, supra,* 4 Cal.4th 155, and *United States v. Young* (1985) 470 U.S. 1 [105 S.Ct. 1038, 84 L.Ed.2d 1]. (See AOB 252.) Johnson's reliance on these cases is misplaced.

In *Hill*, defense counsel "was subjected to a constant barrage of [the prosecutor's] unethical conduct, including misstating the evidence, sarcastic and critical comments demeaning defense counsel, and propounding outright falsehoods." (*People v. Hill, supra,* 17 Cal.4th at p. 821.) The prosecutor's "continual misconduct, coupled with the trial court's failure to rein in her excesses, created a trial atmosphere so poisonous that [defense counsel] was thrust upon the horns of a dilemma" as whether to continually object. (*Ibid.*) No such egregious conduct occurred here. Indeed, this Court has characterized *Hill* as an "extreme"

case. (See *People v. Dykes, supra,* 46 Cal.4th at p. 774-775; *People v. Hillhouse, supra,* 27 Cal.4th at p. 502; *People v. Riel, supra,* 22 Cal.4th at p. 1212.)

In *Sandoval*, this Court "held it improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case." (*People v. Sandoval, supra,* 4 Cal.4th at p. 184.) In *Young*, the United States Supreme Court held neither a prosecutor nor defense counsel "must be permitted to make unfounded and inflammatory attacks on the opposing advocate." (*United States v. Young, supra,* 470 U.S. at p. 9.) As discussed above, the prosecutor did not engage in any such misconduct in Johnson's case.

In reviewing a claim of prosecutorial misconduct, "'[a]court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.'" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21, superseded by statute on another ground as stated by *In re Steele* (2004) 32 Cal.4th 682, 691, and quoting *Donnelly v. DeChristoforo, supra,* 416 U.S. at p. 647.) Yet, this is precisely what Johnson attempts to due in constructing the instant claim.

Finally, Johnson argues the prosecutor's comments penalized him for exercising his constitutional rights to rebut the prosecution case. (AOB 252-253.) However, there is no evidence in the record – and Johnson cites to none—showing the exercise of his rights at trial were impaired or prejudiced in any way.

The prosecutor's argument concerning the defense strategy of attacking the victims was not a deceptive or reprehensible method of persuasion and did not render the trial fundamentally unfair. Accordingly, no misconduct should be found under state or federal law.

D. Even Assuming Error, Johnson Was Not Prejudiced

Notwithstanding, the propriety of the prosecutor's argument, any alleged misconduct would not warrant reversal of the penalty judgment.

> When misconduct has occurred, the defendant must demonstrate that it was prejudicial. [Citations.] To be prejudicial, prosecutorial misconduct must bear a reasonable possibility of influencing the penalty verdict. [Citations.] In evaluating a claim of prejudicial misconduct based upon a prosecutor's comments to the jury, we decide whether there is a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner. [Citations.]

(*People v. Cunningham, supra,* 25 Cal.4th at p. 1019; see also *People v. Dykes, supra,* 46 Cal.4th at p. 786 [employing the *Brown* reasonable possibility test for penalty phase misconduct].) As discussed above, there was no reasonable possibility that the jurors construed the prosecutor's comments as an invitation to base their verdict on personal considerations, a suggestion that they view lack of remorse as a factor in aggravation or an attack on defense counsel's integrity. Moreover, when viewed in the context of the prosecutor's entire argument focusing on Johnson's personal culpability, the three remarks challenged by Johnson could not have influenced the penalty verdict. (See *People v. Doolin, supra,* 43 Cal.4th at p. 162.)

Furthermore, jurors are aware that comments by the prosecutor are merely argument and the statements of an advocate.[93] (See *People v. Gonzalez, supra,* 51 Cal.3d at p. 1224, fn. 21, citing *Boyde v. California* (1990) 494 U.S. 370 [110 S.Ct. 1190, 108 L.Ed.2d 316].) Indeed, the penalty phase retrial jury was instructed that "[s]tatements made by the

[93] In arguing otherwise, Johnson is forced to reach back to 59-year-old lower court decision. (See AOB 253, cting *People v. Talle* (1952) 111 Cal.App.2d 650, 677.)

attorneys during the trial are not evidence." (26 CT 7222 [CALJIC No. 1.02].) It is presumed that the jurors followed the trial court's instructions. (*Penry v. Johnson, supra,* 532 U.S. at p. 799; *Greer v. Miller, supra,* 483 U.S. at p. 766 fn. 8; *Richardson v. Marsh, supra,* 481 U.S. at p. 211; *People v. Sanchez, supra,* 26 Cal.4th at p. 852; *People v. Osband, supra,* 13 Cal.4th at p. 714; *People v. Pinholster, supra,* 1 Cal.4th at p. 919.) Johnson cites nothing in the record showing otherwise, choosing instead to speculate about potential harms from the prosecutor's argument. (See AOB 253-254.)

Neither singularly nor cumulatively was their any reasonable possibility that Johnson's assignments of misconduct affected the penalty phase verdict.

XXIII. THE PENALTY VERDICT FOR THE FIRST DEGREE MURDER NEED NOT BE REVERSED BECAUSE THE JURY ALSO RETURNED A DEATH VERDICT FOR THE SECOND DEGREE MURDER

Johnson claims the entire penalty judgment must be reversed because the trial court instructed the jury in the penalty phase retrial that death and life without possibility of parole were the punishment choices for both the Lopez second degree murder and the Campos first degree murder, the jury returned a death verdict for both counts and the trial court sentenced Johnson to death for both counts. Johnson contends these errors violated his constitutional rights to a proper verdict and a reliable and fair judgment. (AOB 255-262.)

As discussed in footnote 7, *ante*, respondent agrees that the judgment must be modified and the abstract of judgment corrected to reflect a lawful sentence of 15 years to life on count 2. However, the errors cited by

Johnson do not warrant the penalty judgment being disturbed in any other respect.

At the beginning of the penalty phase retrial, the trial court instructed the jury that Johnson had been previously found guilty of first degree murder with various special circumstances and second degree murder with a multiple murder special circumstance. (43 RT 6524.) Thereafter, the court stated, "The law of this state is that the penalty for a defendant found guilty of these crimes that I have just outlined shall be death or confinement in state prison for life without the possibility of parole." (43 RT 6524.)

During closing argument, the prosecutor argued the various aggravating and mitigating circumstances in relation to both murders. (See 57 RT 8419, 8436, 8437.) In its closing instructions to the jury, the court stated:

> The defendant in this case has been found guilty of one count of murder in the first degree and one count of murder in the second degree. The allegations that one of the murders was committed under special circumstances and the special circumstances of robbery, kidnapping, and multiple murder have specifically been found to be true.
>
> It is the law of this state that the penalty for the defendant – or for a defendant found guilty of murder in the first degree shall be death or imprisonment in the State prison for life without the possibility of parole in any case in which the special circumstances alleged in this case have been found to be true.
>
> Under the law of this state, you must now determine which of these two penalties shall be imposed upon the defendant.

(57 RT 8493; 26 CT 7221.) However, the court subsequently instructed the jurors to fix a penalty for the Lopez murder as well as the Campos murder. (57 RT 8512; 26 RT 7236-7237.)

The jury's verdict read: "We, the jury in the above-entitled action, as to the defendant, Lumord Johnson, fix the penalty for the murder of Martin

Campos and Candy Camerina Lopez as death." (57 RT 8530; 26 CT 7258.) Subsequently, the trial court imposed a death sentence for both murders. (58 RT 8616; 26 CT 7306, 7316.)

E. Since the Jury Returned a Proper Verdict on the First Degree Murder and a Superfluous, Incorrect Verdict on the Second Degree Murder, the First Degree Murder Verdict and Judgment Should Stand

In *People v. Coddington* (2000) 23 Cal.4th 529, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13, the jury returned a single death verdict for two first degree murders. (*Id.* at p. 566, fn. 7.) This Court found the verdict was not erroneous or defective, but explained:

> [I]n practice this rule could be troublesome in a case in which conviction on one of several murder counts is reversed as judgment is not pronounced on each count of which defendant is convicted. For this reason, the better practice is to provide the jury with verdict forms for each count on which the penalty must be imposed and to impose a penalty on each count.

(*Ibid.*)

In *People v. Rogers, supra,* 46 Cal.4th 1136, a somewhat different problem occurred. There, the jury convicted the defendant of two first degree murders and one second degree murder, but was only given verdict forms imposing a single sentence of death or life without possibility of parole. (*Id.* at p. 1173 & fn. 22.) Thus, the jury's subsequent death verdict did not specify whether it was for the two first degree murders or the second degree murder. (*Ibid.*) Based on the trial court's instructions and the prosecutor's closing argument, which clarified that death or life without possibility of parole only pertained to the first degree murders with the second degree murder to be considered as an additional circumstance, this Court found no state or constitutional error occurred. (*People v. Rogers, supra,* 46 Cal.4th at pp. 1173-1174.)

Johnson's case is distinguishable from *Coddington* and *Rogers* in one very important aspect. Johnson's penalty verdict set the punishment as death for *both* the first degree murder and the second degree murder, in contrast to the verdicts in *Coddington* and *Rogers* which failed to identify which murder or murders for which the jury was sentencing the defendant to death. In essence, Johnson's jury returned two verdicts on one form. Thus, the danger of not knowing which count the penalty applied does not arise in Johnson's case—the jury found each count deserved the death penalty.

For the same reasons, Johnson's reliance on *People v. Green, supra,* 27 Cal.3d 1, and his argument that the verdict forms and instructions deny him meaningful appellate review are unpersuasive. (See AOB 259-260.) The rule in *Green* is that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*Id.* at p. 69.)

Here, the jury rested its death verdict on both a legally correct theory (first degree murder) and a legally incorrect theory (second degree murder). Since this Court can be satisfied that the jury's penalty verdict rested on at least one correct theory, reversal of the death judgment is not warranted. (See *People v. Morgan, supra,* 42 Cal.4th at p. 613; *People v. Hillhouse, supra,* 27 Cal.4th at p. 499; *People v. Sakarias, supra,* 22 Cal.4th at p. 625; *People v. Payton, supra,* 3 Cal.4th at pp. 1061-1062; *People v. Kelly, supra,* 1 Cal.4th at p. 531; *People v. Garrison, supra,* 47 Cal.3d at pp. 778-779.)

Moreover, contrary to Johnson's argument, the instructional and verdict errors could only have inured to his benefit by requiring the jury to decide both the Lopez killing, which was only a second degree murder, and the Campos killing deserved the death penalty before returning a death

verdict. In essence, the trial court placed an additional, significant hurdle for the prosecutor to overcome in order to obtain a death judgment. Only deciding the Campos murder warranted the death penalty was not enough.

Moreover, the jurors would have been able to consider the Lopez murder as an aggravating circumstance in fixing the penalty even if correctly instructed. (See § 190.3, factor (a).) Accordingly, there is no realistic or reasonable possibility of a different outcome had the jury's penalty verdict been limited to count 1, and the death judgment for the Campos first degree murder should be affirmed.[94] (See *People v. Brown, supra*, 46 Cal.3d at pp. 447-448.)

XXIII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Johnson challenges the constitutionality of California's death penalty statute in general and as applied in his case, acknowledging that each of his claims has been consistently been rejected by this Court.[95] (AOB 263-277.)

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[94] Johnson claims these penalty phase error are structural defects which defy harmless error review. (AOB 260.) He is mistaken. The errors alleged here were those of state law in misinstructing the jury under section 190.3 insofar as considering the second degree murder as a sentencing count rather than an aggravating circumstance. "[W]hen faced with penalty phase error not amounting to a federal constitutional violation, we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*People v. Brown, supra*, 46 Cal.3d at p. 448.)

[95] Citing *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, Johnson summarily presents these claims to preserve them for federal review. (AOB 263.) Likewise, rather than burden this Court with arguments that have repeatedly been presented in past cases, respondent will simply cite to more recent cases which have rejected the claims and arguments raised by Johnson.

As Johnson presents no new arguments or persuasive reasons to revisit these issues, respondent urges this Court to reaffirm its prior holdings finding California's death penalty statute and relevant instructions constitutional.

Johnson claims section 190.2 is impermissibly broad because it fails to meaningfully narrow the types of first degree murders eligible for the death penalty. (AOB 263-264.) This claim has been repeatedly rejected. (*People v. Cowan* (2010) 50 Cal.4th 401, 508; *People v. Verdugo* (2010) 50 Cal.4th 263, 304; and *People v. Williams* (2010) 49 Cal.4th 405, 469.)

Johnson claims factor (a) of section 190.3 is impermissibly overbroad by permitting the jurors to consider "the circumstance of the crime" without limitation. (AOB 264-266.) This argument has been repeatedly rejected. (*People v. Foster* (2010) 50 Cal.4th 1301, 1362-1364; *People v. Russell, supra,* 50 Cal.4th at p. 1274; *People v. Jennings, supra,* 50 Cal.4th at pp. 688-689; and *People v. Lomax* (2010) 49 Cal.4th 530, 593.)

Johnson claims California's death penalty statute is unconstitutional because it does not require the jury to find beyond a reasonable doubt that the factors in aggravation outweigh those in mitigation in order to impose a death sentence. (AOB 266-268.) This argument has been repeatedly rejected. (*People v. Howard* (2010) 51 Cal.4th 15, 39; *People v. Lynch* (2010) 50 Cal.4th 693, 766; and *People v. Williams, supra,* 49 Cal.4th at p. 470.)

Johnson asks this Court to reconsider these prior holdings in light of *Apprendi v. New Jersey, supra,* 530 U.S. 466, and its progeny. (AOB 267.) This was already done in numerous recent cases, and the outcome remains unchanged. (*People v. Russell, supra,* 50 Cal.4th at pp. 1271-1272; *People v. Jennings, supra,* 50 Cal.4th at p. 689; *People v. Verdugo, supra,* 50 Cal.4th at pp. 304-305; *People v. Lomax, supra,* 49 Cal.4th at p. 594; and *People v. Hartsch* (2010) 49 Cal.4th 472, 515-516.)

Johnson claims CALJIC Nos. 8.85 and 8.88 are unconstitutional because they fail to provide the jury with guidance on a burden of proof or state there was no burden of proof. (AOB 268-269.) This argument has been repeatedly rejected. (*People v. Howard, supra,* 51 Cal.4th at p. 39; *People v. Foster, supra,* 50 Cal.4th at pp. 1367; *People v. Russell, supra,* 50 Cal.4th at p. 1272; and *People v. Jennings, supra,* 50 Cal.4th at p. 689.)

Johnson claims his death verdict is unconstitutional because it was not premised on unanimous jury findings on the truth of the aggravating circumstances and as to which aggravating circumstances warranted the death penalty. (AOB 269-271.) Similar arguments have been repeatedly rejected. (*People v. Foster, supra,* 50 Cal.4th at p. 1367; *People v. Russell, supra,* 50 Cal.4th at p. 1272; *People v. Lynch, supra,* 50 Cal.4th at p. 766; and *People v. Verdugo, supra,* 50 Cal.4th at p. 304.)

Johnson claims the use of the phrase "so substantial" within CALJIC No. 8.88 in regards to weighing the factors in aggravation against those in mitigation is unconstitutionally vague and ambiguous. (AOB 271.) This argument has been repeatedly rejected. (*People v. Foster, supra,* 50 Cal.4th at pp. 1366-1367; *People v. Russell, supra,* 50 Cal.4th at p. 1273; and *People v. Lomax, supra,* 49 Cal.4th at p. 595.)

Johnson claims CALJIC No. 8.88 is unconstitutional because its use of the term "warrants" fails to inform the jurors that their central determination is whether death is an appropriate penalty. (AOB 272.) This argument has been repeatedly rejected. (*People v. Foster, supra,* 50 Cal.4th at p. 1367; *People v. Russell, supra,* 50 Cal.4th at p. 1273; *People v. Lomax, supra,* 49 Cal.4th at p. 595; and *People v. Friend, supra,* 47 Cal.4th at p. 90.)

Johnson claims the instructions were unconstitutional because they failed to provide for a presumption of life without possibility of parole as the appropriate sentence. (AOB 268-269, 272-273.) This claim has been

repeatedly rejected. (*People v. Howard, supra,* 51 Cal.4th at p. 39; *People v. Foster, supra,* 50 Cal.4th at p. 1368; *People v. Russell, supra,* 50 Cal.4th at p. 1272; and *People v. Lomax, supra,* 49 Cal.4th at pp. 594-595.)

Johnson claims California's death penalty statute is unconstitutional because it does not require written findings from the jury which are necessary for meaningful appellate review of the penalty verdict. (AOB 274.) This argument has been repeatedly rejected. (*People v. Howard, supra,* 51 Cal.4th at p. 39; *People v. Foster, supra,* 50 Cal.4th at pp. 1365-1366; *People v. Russell, supra,* 50 Cal.4th at p. 1274; and *People v. Lynch, supra,* 50 Cal.4th at p. 766.)

Johnson claims CALJIC No. 8.85 as given in his case violated his right to a reliable penalty verdict because the trial court failed to delete inapplicable aggravating and mitigating factors from the instruction. (AOB 274-275.) Such arguments have been repeatedly rejected. (*People v. Russell, supra,* 50 Cal.4th at p. 1274; *People v. Lynch, supra,* 50 Cal.4th at p. 764; *People v. Lomax, supra,* 49 Cal.4th at p. 593; and *People v. Hartsch, supra,* 49 Cal.4th at p. 516.)

Johnson claims California's capital sentencing scheme is unconstitutional because it does not allow for intercase proportionality review to guarantee against arbitrary and disproportionate application. (AOB 275.) This argument has been repeatedly rejected. (*People v. Howard, supra,* 51 Cal.4th at p. 39; *People v. Foster, supra,* 50 Cal.4th at p. 1368; *People v. Russell, supra,* 50 Cal.4th at p. 1274; and *People v. Lynch, supra,* 50 Cal.4th at p. 767.)

Johnson claims California's capital sentencing scheme violates equal protection because it affords non-capital defendants more procedural protections than capital defendants. (AOB 275-276.) This claim has been repeatedly rejected. (*People v. Russell, supra,* 50 Cal.4th at p. 1274;

People v. Jennings, supra, 50 Cal.4th at p. 690; *People v. Verdugo, supra,* 50 Cal.4th at p. 305; and *People v. Lomax, supra,* 49 Cal.4th at p. 594.)

Johnson claims California's "regular use of the death penalty" is unconstitutional because it violates or falls short of international norms and "evolving standards of decency." (AOB 276-277.) This argument has been repeatedly rejected. (*People v. Howard, supra,* 51 Cal.4th at pp. 39-40; *People v. Foster, supra,* 50 Cal.4th at p. 1368; *People v. Lynch, supra,* 50 Cal.4th at p. 766; and *People v. Jennings, supra,* 50 Cal.4th at p. 689.)

All of Johnson's constitutional challenges to the death penalty should again be rejected as Johnson has not provided any basis for doing otherwise.

XXIV. THERE WAS NO CUMULATIVE EFFECT OF GUILT OR PENALTY PHASE ERRORS WARRANTING REVERSAL IN JOHNSON'S CASE

Johnson argues the cumulative effect of the various guilt and penalty phase errors claimed on appeal requires reversal of the judgment. (AOB 278-280.) Johnson's cumulative error claim is meritless.

This Court has recognized that multiple trial errors may have a cumulative effect. (*People v. Hill, supra,* 17 Cal.4th at pp. 844-848; *People v. Holt* (1984) 37 Cal.3d 436, 458-459.) In a "closely balanced" case, this cumulative effect may warrant reversal of the judgment "where it is reasonably probable" that it affected the verdict. (*People v. Wagner* (1975) 13 Cal.3d 612, 621.)

However, if the reviewing court rejects all of a defendant's claims of error, it should reject the contention of cumulative error as well. (*People v. Anderson, supra,* 25 Cal.4th at p. 606; *People v. Bolin* (1998) 18 Cal.4th 297, 335.) Even where "nearly all of [a] defendant's assignments of error"

are rejected, reversal is not warranted based on cumulative error.[96] (*People v. Bradford, supra,* 14 Cal.4th at p. 1057; see also *People v. Hughes, supra,* 27 Cal.4th at p. 407 [where "one possible significant error" at penalty phase].)

As previously discussed throughout this brief, there were no evidentiary errors, one inconsequential instructional error in the guilt phase, one inconsequential instructional error in the penalty phase retrial and one inconsequential sentencing error pertaining to the second degree murder conviction. Accordingly, there should be no finding of cumulative error. (See, e.g., *People v. Koontz* (2002) 27 Cal.4th 1041, 1094 [no cumulative error where single non-prejudicial instructional error in guilt phase]; *People v. Jones* (1998) 17 Cal.4th 279, 315 [no cumulative error where single "ministerial error in imposing an incorrect sentence" on non-capital count].)

Furthermore, since separate juries rendered the guilt and penalty verdicts, any attempt by Johnson to accumulate alleged errors between the guilt and penalty phases must fail. The judgment should be affirmed.

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[96] "'[A] defendant is entitled to a fair trial, but not a perfect one,' for there are no perfect trials. [Citations.]" (*Brown v. United States* (1973) 411 U.S. 223, 231-232 [93 S.Ct. 1565, 36 L.Ed.2d 208]; see also *People v. Bradford* (1997) 14 Cal.4th 1005, 1057; *People v. Cooper* (1991) 53 Cal.3d 771, 839.)

CONCLUSION

Accordingly, for the reasons stated, respondent respectfully requests that sentence on count 2 be modified to an indeterminate term of 15 years to life, and that the judgment be affirmed in all other respects.

Dated: May 5, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 64,538 words.

Dated: May 5, 2011

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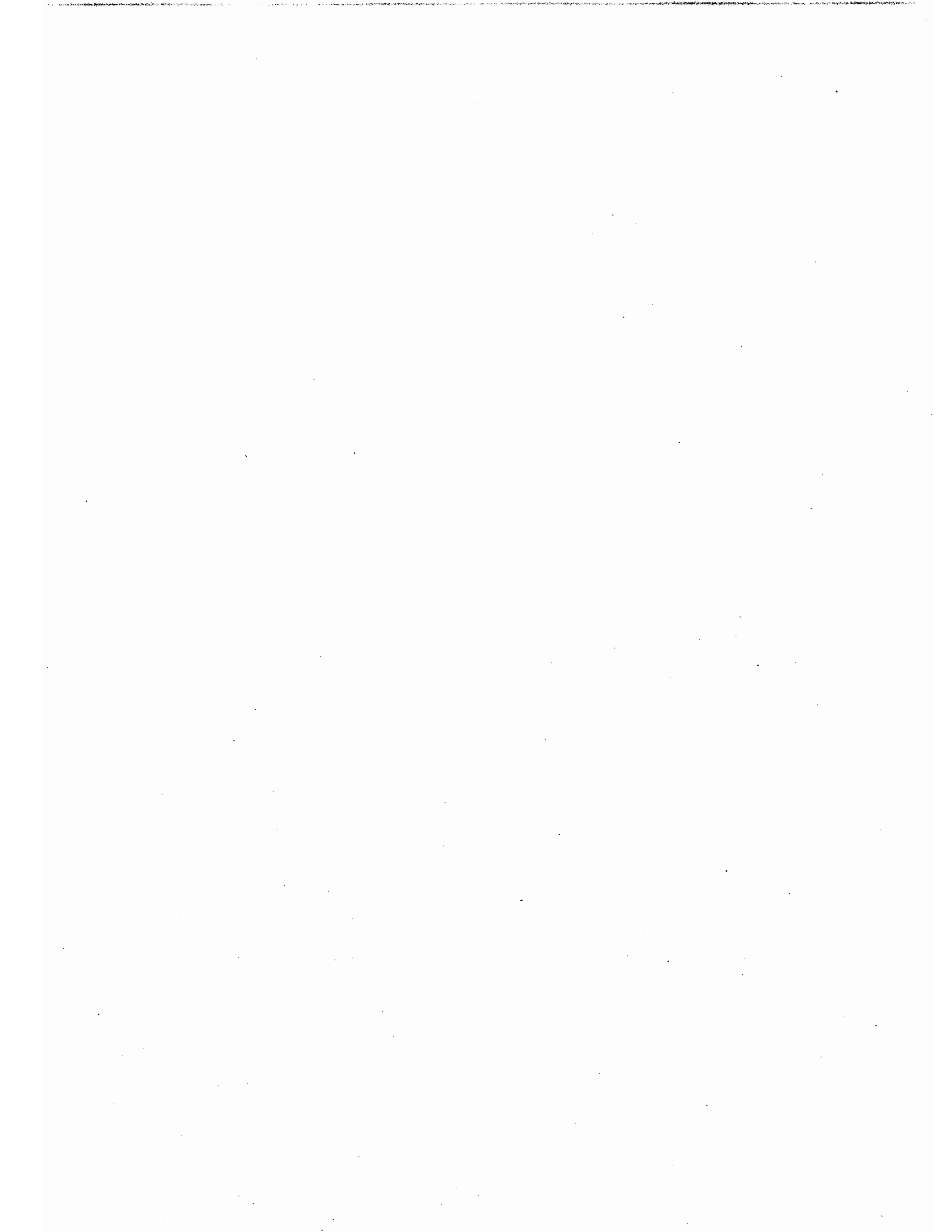

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Lumord Johnson**
No.: **S105857**

I declare:

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

On May 5, 2011, I served the attached **Respondent's Brief,** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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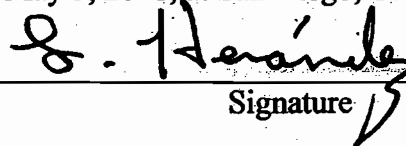
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 5, 2011, at San Diego, California.

L. Hernández
Declarant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