In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ANGELO MICHAEL MELENDEZ,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S118384

San Joaquin County Superior Court Case No. SP081070B
The Honorable Terrence R. Van Oss, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an information filed on December 21, 2001, the San Joaquin County District Attorney charged appellant, Angelo Michael Melendez, and the co-defendant, Latroy Ashanti Taylor, with the following: in count 1, first degree murder of Koi Wilson (Pen. Code, § 187);[1] in count 2, attempted murder of Ricky Richardson (§§ 664/187); and, in count 3, first degree residential robbery (§ 211). (1 CT 183-190.)

As to count 1, the information contained a special circumstance allegation that Wilson was murdered during a felony robbery (§§ 190.2, subd. (a)(17), 211). (1 CT 183-190.) The information alleged, with respect to counts one and two, that appellant personally and intentionally discharged a firearm, a handgun, in the course of the murder and robbery causing great bodily injury to Wilson and Richardson (§§ 12022.53, subds. (b), (c), (d) &(e), 12022.7). The information also alleged that appellant personally used a firearm within the meaning of section 1203.06, subdivision (a)(1), a serious felony (§§ 12022.5, subd. (a)(1), 1192.7, subd. (c)(8)). With respect to count three, the information also alleged that appellant was armed with a firearm and intentionally and personally discharged the firearm during the course of the robbery causing great bodily injury to Wilson (§§ 12022, subd. (a)(1), 12022.53, subds. (b), (c), (d) & (e), 12022.7). The information further alleged with respect to the robbery that appellant personally used a firearm within the meaning of section 1203.06, subdivision (a)(1), a serious felony (§§ 12022.5, subd. (a)(1), 1192.7, subd. (c)(8)).

The information alleged that appellant had suffered three prior serious felony convictions (§§ 1170.12, subd. (b), 667, subd. (d)) for: shooting at

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[1] All subsequent statutory references are to the Penal Code unless otherwise indicated.

an inhabited dwelling (§ 246); assault with intent to commit murder (§ 217); and assault with a deadly weapon (§ 245, subd. (a)(1)). (1 CT 183-190.) The information also contained allegations that appellant had suffered three prior convictions resulting in prison terms (§ 667.5, subd. (b)). (1 CT 183-190.)

On December 27, 2001, appellant entered pleas of not guilty and denied all special allegations. (1 CT 192.)

On March 19, 2003, appellant's jury trial commenced. The jury found appellant guilty as charged and found the special allegations true. (2 CT 396, 487-488; 3 CT 686-698.) A penalty phase trial followed and, on June 20, 2003, the jury returned a death verdict. (3 CT 715, 743, 840.) On the People's motion, the prior conviction and prison term allegations were stricken. (4 CT 943.)

On August 18, 2003, the trial court denied an automatic motion to modify the penalty and sentenced appellant to death for murdering Wilson. The trial court imposed a consecutive indeterminate term of 25 years-to-life for the section 12022.53, subdivision (d) enhancement, and imposed, but stayed, sentence on the section 12022.5, subdivision (a)(1) enhancement. (4 CT 972.)

For the attempted murder of Richardson, the trial court imposed a consecutive term of life with the possibility of parole and a consecutive indeterminate term of 25 years-to-life for the section 12022.53, subdivision (d) enhancement. The trial court also imposed, but stayed sentence on the section 12022.5, subdivision (a)(1) enhancement.

For the first degree robbery conviction, the trial court sentenced appellant to a consecutive term of six years, stayed pending execution of the death sentence. As for the enhancements, the trial court imposed the indeterminate term of 25 years-to-life pursuant to section 12022.53,

subdivision (d), stayed. The court also imposed, but stayed sentence pursuant to section 12022.5, subdivision (a)(1).[2] (4 CT 942-943, 972-976.)

Appeal to this Court is automatic pursuant to section 1239, subdivision (b).

STATEMENT OF FACTS

THE PROSECUTION'S GUILT PHASE EVIDENCE

At about one in the morning on December 13, 2000, Ricky Richardson, age 24, and his fiancée, Koi Wilson, age 19, were at home playing video games in a bedroom they had turned into a den while their infant daughter slept in another bedroom. (5 RT 1041; 10 RT 2425, 2430, 2510, 2551; 11 RT 2666-2667, 2697, 2831-2833, 2840-2841, 2847-2848.) When the doorbell rang, Richardson went to the front door and saw his good friend Latroy Taylor standing outside. (11 RT 2695-2596, 2698; 12 RT 3105.) Taylor visited almost every day, but he had never come this late before. (11 RT 2699, 2729-2731; 12 RT 3105.) Richardson opened the door and invited Taylor inside. (11 RT 2698, 2700.) Just then, appellant, who had been hidden by the garage, stepped into view. (11 RT 2698-2699, 2820.) Richardson immediately recognized appellant, but was surprised to see him. (11 RT 2698-2699.) Richardson greeted appellant, calling him "Uncle Angelo," and the two embraced. (11 RT 2697, 2700.) Though appellant was not truly a blood relative, as a child Richardson knew appellant to be a close friend of his father, Ricky Tanner. (11 RT 2674, 2696.) There had been a falling out between appellant and Tanner ten years earlier. Since then, Richardson had only seen appellant in passing. (11 RT 2696, 2699-2700, 2730, 2847-2848.) Appellant went to use the bathroom

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[2] The trial court failed, however, to specify a term of years under the triad (3-4-10) for this enhancement.

while Richardson and Taylor joined Wilson on the couch in the den. (11 RT 2700-2702, 2759.)

Richardson worked part-time as a telemarketer and earned money producing and selling rap music; he also sold marijuana, and Taylor had come to the house that night to buy some. (10 RT 2655-2660, 2668, 2663-2665; 11 RT 2701, 2731.) Richardson noticed that Taylor was armed, but that was not unusual for Taylor. (11 RT 2765-2766, 2786-2787.) Richardson gave Taylor the marijuana and the two also smoked some. (11 RT 2702-2703.) When appellant exited the bathroom, he went over and stood in the doorway to the den; Richardson saw a gun handle sticking out of the front pocket of appellant's hooded sweatshirt and something about appellant's posture made Richardson uneasy. (11 RT 2705, 2761.) Appellant said to Taylor, "Did you get what you came for?" (11 RT 2703-2705.) As appellant was speaking, Richardson began to stand up. (11 RT 2704-2705.) As he did so, appellant shot him in the chest. (11 RT 2705.) Richardson fell backward and slumped over the couch. (11 RT 2705-2707, 2709, 2754.) He played dead, but he could see appellant through his hooded eyes. (11 RT 2706-2707, 2709, 2754, 2756-2757, 2763, 2815-2816.) Appellant stepped toward him and Richardson thought appellant was going to shoot him again, but Wilson was screaming and waving her arms in the air, so appellant shot her instead. (11 RT 2706-2707, 2709, 2754, 2757, 2763-2764, 2815-2816.) Appellant fired two shots into Wilson's torso. (11 RT 2707, 2709-2710.) The fatal shot entered Wilson's side, penetrating through both of her lungs and her heart; Wilson could have survived the other shot. (10 RT 2557-2558, 2560.)

After the shootings, Taylor hurriedly removed marijuana from the drawer under the television set while appellant stood in the hallway with his gun pointed toward Richardson and Wilson. (11 RT 2711-2712, 2739, 2767.) Taylor and a third person removed two safes from a padlocked

cabinet in the baby's bedroom. (10 RT 2417, 2425, 2643; 11 RT 2712-2715; 12 RT 3062.) In all, they removed four pounds of marijuana and $27,000 in cash from the house. (11 RT 2717-2718.)

At one point during the robbery, Taylor said to appellant, "Make sure they [*sic*] dead." (11 RT 2721, 2766-2767; 12 RT 3061.) Appellant replied, without checking, "Oh, they [*sic*] dead." (11 RT 2721; 12 RT 3061-3062.)

After appellant and Taylor left, Richardson removed a cell phone from his pants pocket and called 911. (11 RT 2722-2723.) Richardson told the 911 operator only that Taylor had shot him, but when he thought he might die, he added that appellant was also involved. (10 RT 2670; 11 RT 2688, 2725, 2727, 2795-2796, 2799-2800, 2829; 2 CT 496-498.) When the police arrived they found Richardson and Wilson on the couch; their baby was in the ransacked back bedroom, about to slide off the mattress. (10 RT 2416-2417.)

Six days later, on December 19, 2000, the police interviewed Richardson briefly in the hospital. He told them that appellant had shot him and that Taylor had shot Wilson. (12 RT 2980- 2981, 2986.) In a longer interview on February 8, 2001, while he was still in the hospital, Richardson told police that appellant had shot both him and Wilson. (11 RT 2804-2805, 2839; 12 RT 2986.) At trial, Richardson testified that appellant alone was the shooter. (11 RT 2705-2707, 2709-2712, 2715, 2765-2766, 2840.) He explained that he had initially said that Taylor had shot him because he felt so betrayed by Taylor. (11 RT 2725-2727.) Taylor was his close and trusted friend and, but for Taylor's presence that night, Richardson never would have allowed appellant inside. (11 RT 2725-2726.)

The police found two spent bullets on the couch underneath Wilson's body and three shell casings on the floor. (9 RT 2385; 10 RT 2420; 11 RT

2926-2927.) The third bullet remains lodged in Richardson's spine and, as a result, he is paralyzed from the waist down. (10 RT 2446-2448, 2484; 11 RT 2728.) James Hamiel, a Department of Justice criminalist, testified that all three shell casings were fired from the same weapon, a .45-caliber handgun. (11 RT 2871, 2884.) Hamiel was also able to determine that the two recovered .45-caliber bullets were fired from same handgun. (11 RT 2900-2901.)

After the robbery, Stacy Harris and DeJame Henderson helped Taylor flee the state by driving him to Reno, Nevada. (10 RT 2581-2582, 2589-2590, 2601-2602.) From there, Taylor travelled to St. Louis, Missouri, by bus. (10 RT 2529, 2595-2596, 2601-2602; 11 RT 2936.) Appellant fled to Seattle, Washington. (11 RT 2957.) Both appellant and Taylor were apprehended on warrants and returned to California to stand trial. (11 RT 2956-2957.)

THE DEFENSE'S GUILT PHASE EVIDENCE

Appellant testified at trial. (13 RT 3387-3469.) He admitted being in Richardson's home with Taylor, but claimed that Taylor had fired the shots. (13 RT 3392-3397.) Appellant testified that after entering the house he went to use the bathroom. While he was there, he heard four to five shots fired inside the house. (13 RT 3395-3396.) According to appellant, when he emerged from the bathroom, Taylor was standing in the den doorway with a pistol in his hand. (13 RT 3397.) Appellant claimed that he asked Taylor what was going on and Taylor responded, "it's going to be alright." Appellant responded, "bullshit," and ran out the front door. (13 RT 3397.) When Taylor emerged from the house, appellant claims he knocked Taylor to the ground. Appellant claimed he demanded to know why Taylor had shot "Ricky." (13 RT 3399.) According to appellant, Taylor responded, "They [*sic*] both dead." (13 RT 3399.) Appellant said who is "both?" (13

RT 3399.) Appellant claimed it was then he learned, for the first time, that Taylor had also shot "some girl." (13 RT 3399.)

Appellant claimed he punched Taylor in the face, ribs and chest for committing "such a crime." (13 RT 3399.) Without calling for help for the two gunshot victims, appellant told Taylor to drive him home. (13 RT 3399.) Because they were arguing, Taylor missed the exit to appellant's mother's house where appellant was living. Appellant told Taylor not to double back, but to instead just take him to his sister's house. (13 RT 3401.) According to appellant, Taylor offered several times to share the proceeds of the theft with him. Each time appellant declined, by slapping the money out of Taylor's hands and then beating him up. (13 RT 3400-3401, 3404-3406.) Appellant did pick up eight hundred dollars of the money he slapped out of Taylor's hands after Taylor left appellant's sister's house. (14 RT 3535.)

Taylor did not testify at trial.

The prosecutor offered no rebuttal evidence during the guilt phase of the trial. (14 RT 3725.)

THE PROSECUTION'S PENALTY PHASE EVIDENCE

Victim Impact in the Present Case

Wilson's mother, Frankie Todd, testified to the daily emotional impact caused by her daughter's death. (16 RT 4214.) Wilson's older sister, Dorshea Cleveland, also testified how her sister's death has affected her. She described Wilson as her best friend, a "nice" person who was well-liked by everyone who knew her. (16 RT 4215-4216, 4221.) Cleveland testified that, in high school, Wilson played varsity basketball all four years; she was a point guard who averaged 20-25 points per game. (16 RT 4215-4216.) According to Cleveland, colleges were recruiting Wilson and she was frequently in the local newspaper. (16 RT 4215-4216.)

Wilson was very close to her two-year-old nephew, who continually asks where she is, why she is in heaven, and why Richardson cannot walk. (16 RT 4221-4223.) Wilson's and Richardson's daughter was four months old when appellant murdered Wilson. (10 RT 2665-2667.)

Appellant's Previous Violent Criminal Activity

On a September evening in 1980, Christine Preciado and Yolanda Dawson went to their high school football game where they encountered Howard Gaines, their hall monitor,[3] and a stranger who turned out to be appellant. (17 RT 4326-4328, 4365.) Dawson asked Gaines to buy alcohol for her because she was underage. Dawson intended to spend the evening in her studio apartment with Preciado talking, drinking and doing "girl stuff." (17 RT 4366-4367.) Gaines agreed to buy the alcohol, and, after meeting the girls at McKinley Park, the four drove in Gaines's car to the liquor store. (17 RT 4329, 4366.) Preciado did not want to go in Gaines's car, but Dawson reassured her saying that even though they did not know appellant, they knew Gaines from school and they could trust him. (17 RT 4366-4367.)

After going to the liquor store, the men refused to return the girls to McKinley Park. (17 RT 4330, 4366-4367.) Instead, they took them to a remote field, pointed guns at them and threatened to kill them if they did not engage in sex with them. (17 RT 4330-4335, 4338, 4367-4371.) Appellant told Preciado he would "blow her away" if she did not give him what he wanted. (17 RT 4371.) The girls refused, begged to be released, cried, engaged in stalling tactics and eventually, the men took them from

[3] The high school employed hall monitors, who were four to five years older than the students, to maintain order during desegregation. (17 RT 4327.)

the field to Dawson's apartment. (17 RT 4330-4335, 4340-4341, 4346-4348, 4367-4372.)

Inside Dawson's apartment both men repeated their demands for sex and made threats to kill the girls and their families if they refused. (17 RT 4346-4348, 4373-4374.) Gaines raped Dawson, but after Preciado induced herself to vomit, appellant discontinued his sexual demands of her. (17 RT 4348-4349, 4373-4374.) Dawson drove appellant and Gaines back to McKinley Park, then she took Preciado home. (17 RT 4349-4350, 4373-4375.) Because of appellant's threats to kill them and their families if they told anyone, neither Preciado nor Dawson reported the incident to police. (17 RT 4346, 4350, 4375-4377.)

That same month, appellant and Gaines repeated the scenario, this time choosing Lynette Denny and Adela Jose as their victims. (16 RT 4113-4118, 4127, 4225-4229.) Jose and Denny went to their high school football game. (16 RT 4127.) Jose knew Gaines and appellant "somewhat," but Denny did not know either man. (16 RT 4128.) The four left the football game and went to a house in Sacramento. (16 RT 4129, 4225-4226.) Along the way, they stopped at a liquor store where Gaines and appellant bought alcohol. (16 RT 4225.) At the house in Sacramento, appellant took Jose into a bathroom and threatened to shoot her unless she convinced Denny to have sex with appellant. (16 RT 4130-4131, 4225-4226.) Jose talked to Denny, but Denny refused to have sex with appellant. Gaines punched Denny twice in the face causing her nose to bleed and her eyes to swell. (16 RT 4131, 4226.) Appellant and Gaines took the girls to a corn field where appellant again threatened Jose with a knife in an attempt to make her convince Denny to have sex with him. (16 RT 4131, 4227.) Gaines and appellant moved Denny some distance away from the car, leaving Jose inside, but Jose could hear them kicking Denny. (16 RT 4131,

4227.) Thirty minutes later, Gaines and appellant brought Denny back to the car bleeding, crying, and begging to go home. (16 RT 4131, 4227.)

From the corn field, they drove to appellant's aunt's house where, in a bathroom, appellant put a gun to Jose's head and threatened to kill her if she revealed anything. (16 RT 4132, 4228.) They left the aunt's house and went to south Stockton. Appellant told Jose they were going to kill Denny. (16 RT 4132, 4228.) They drove to a deserted area, stopped, and made Denny get out and stand behind the car. Denny begged for her life and promised not to tell anyone what they had done. Then Gaines shot her once in the stomach and twice in the head. Appellant and Gaines retuned to the car and left without Denny, but they took her purse and threw it into a creek along the way. (16 RT 4132-4135, 4228-4229.) Appellant threatened to kill Jose and her mother if she told anyone. (16 RT 4134-4135.) Denny survived the shooting, but was paralyzed from the neck down and remained in a coma for 23 years. (16 RT 4118-4122.) She required 24 hour a day nursing care, breathed through a trachea tube and was fed through a stomach tube. (16 RT 4122-4123.) She urinated through a Foley catheter and wore a diaper. (16 RT 4125-4126.)

Appellant was sentenced to an 11 year prison term for the crimes committed against Denny and Jose. (17 RT 4468, 4503-4504; 3 CT 747; 4 CT 861.) He had suffered a previous conviction in 1980 for shooting into an inhabited dwelling. (17 RT 4587; 3 CT 782.)

After being released from prison on the Denny matter, appellant abused his girlfriend Loretta Beck in 1988. (16 RT 4139.) He punched her in the face and choked her. (16 RT 4144-4145.)

In the same year, he attacked another girlfriend, Raven Lee. (16 RT 4146.) He demanded the money she needed to feed her children. (16 RT 4147-4148.) When Lee refused to give appellant the money and tried to call 911, appellant grabbed the telephone from her and heaved it through a

window. He punched a hole in the wall, saying "this could have been your face." (16 RT 4148-4149.) He threatened to kill her and her children who were also present and who witnessed appellant's conduct. (16 RT 4148.) Lee had marks on her neck from appellant grabbing her by the throat. (16 RT 4149-4150.)

In 1992, appellant was convicted of grand theft from a person. (17 RT 4504; 3 CT 788, 818.) In 1994, he was convicted of possession of cocaine for sale. (16 RT 4223; 17 RT 4504; 3 CT 800, 817.)

THE DEFENSE'S PENALTY PHASE EVIDENCE

Appellant's mother, Venesee Warmsley, two siblings, Christina Frazier and Julio Melendez, a half-sibling, Sabrina Perry, his daughter, Talytha Melendez, and a former girl friend, Gwen Taylor, spoke on his behalf. (17 RT 4385, 4410, 4415, 4425, 4431, 4437.)

Family members attested to the poor economic circumstances of the family and its dysfunction. (17 RT 4388-4391, 4393-4396, 4407-4409.) Appellant's biological father, Johnny Melendez, and his step-father, Lundy Perry, both abused his mother in front of him and the later taught appellant how to use guns and commit crimes. (17 RT 4390, 4396, 4405, 4439.) Appellant's family and friends still love him because he has been kind to them and he has given them good advice from time to time. (17 RT 4411-4412, 4414, 4417, 4419-4420, 4426, 4436, 4444.)

Gwen Taylor testified that she met appellant in 1977 when she was 14 years old. (17 RT 4425.) Appellant was older than she. (17 RT 4425.) She would "runaway" from her home and visit appellant at his mother's house often. (17 RT 4425-4426.) According to Gwen Taylor, appellant would encourage her to return home. (17 RT 4426.) Gwen Taylor gave birth to a child in 1978. Appellant was "like a Godfather" to the child. (17 RT 4426.) Appellant encouraged both Gwen Taylor and her child, as he

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED APPELLANT'S *WHEELER/BATSON* MOTION

Appellant contends that the prosecutor used his peremptory challenges to discriminate against African-American prospective jurors and, as a result, he was denied a jury drawn from a representative cross-section of the community, due process, equal protection and reliable guilt and penalty verdicts as guaranteed by the federal and state constitutions. (AOB at 24.) Respondent disagrees. The trial court's determination that the prosecutor exercised his peremptory challenges for race neutral reasons is amply supported by the record, and the trial court's denial of appellant's *Wheeler/Batson*[4] motion was proper.

A. Procedural and Factual Background

The jury venire in this case was comprised of 270 people. (4 RT 835, 852.) The trial court summoned the prospective jurors to the courtroom in groups of 90 people. Ninety people were excused for hardship; the remaining group of 180 people completed a twenty-two page questionnaire. (3 RT 481; 4 RT 835, 866-867, 870; 4 CT 1002-1020.) The prospective jurors were asked to identify their race on page 16 of the questionnaire. (4 CT 1014.) In a written motion, the prosecutor objected to the request for race information on relevance grounds. (2 CT 391-392; 8 RT 1832.) On a day when the proseeutor could not personally appear to argue his motion, the trial court denied it. (2 CT 391-392; 4 RT 843-844.)

An unknown number of African-Americans were excused for hardship. (7 RT 1825.) The record does not reflect how many. One African-American, L.E., was disqualified because he had a prior felony

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[4] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

conviction. (5 RT 1224; 6 RT 1297-1298; 7 RT 1829.) Even without this disqualification, L.E.'s jury service was placed in doubt after he was seen hugging the victim and the victim's father outside the courtroom. (5 RT 1151, 1219-1220, 1223, 1297-1299.) Appellant and Taylor both asked the trial court to excuse L.E. (6 RT 1298.)

The prosecutor used 23 peremptory challenges during jury selection. (6 RT 1402, 1487-1489; 7 RT 1555-1556, 1625-1627, 1712-1714, 1771-1773, 1822; 8 RT 1845, 1956, 1958.) Three of those were against African-American members of the venire. (7 RT 1824.) The prosecutor used his third peremptory challenge on D.W. (6 RT 1488), his sixteenth on S.C. (7 RT 1772), and his nineteenth on M.J. (7 RT 1822).

After the prosecutor struck M.J., appellant made a *Wheeler/Batson* motion. (7 RT 1823.) Appellant challenged the strike because M.J. was the third African-American the prosecutor had excused and, according to him, there were no more African-American prospective jurors in the remaining panel. (7 RT 1823, 1825.) The trial court found that appellant had established a prima facie case and required that the prosecutor explain why he had used a peremptory challenge against each of the three African-American prospective jurors. (7 RT 1824, 1830; 8 RT 1831.)

The prosecutor explained each strike. First, he explained that prior to ever seeing the prospective jurors, he had reviewed their completed questionnaires and had rated them numerically from one to ten. (8 RT 1832.) He also had a "special code" for any prospective juror that he would never consider leaving on the jury despite their numeric rating. (8 RT 1832.) He told the trial court that, even though the questionnaires included race information, he did not look at that information or consider race during his scoring of the jurors, or at any other time. (8 RT 1832.)

1. Prospective Juror D.W.

Before he ever saw D.W., the prosecutor determined that he would not keep him as a juror. (8 RT 1832.) D.W. had been the subject of a court-martial proceeding while serving in the United States Navy. (8 RT 1832.) His brother-in-law was serving a six-year state prison term that D.W. thought was unfair. (8 RT 1833.) D.W. believed that police officers "gather in the hallway to corroborate their false stories before they testify," believed that judges "presume guilt before anybody testifies," and had negative comments about district attorneys and public defenders. (8 RT 1833.) D.W. believed that "people who sold drugs got what they deserve." (8 RT 1833.) He believed that the district attorney had an increased burden of proof in the guilt phase. (8 RT 1833.)

The prosecutor then read directly from his notes some of D.W.'s comments that troubled him. In response to the question "What are your opinions about the effectiveness of the criminal justice system dealing with crime?" D.W. responded, "Make sure there is enough evidence to convict the crimes or else assumptions are long and boring." (8 RT 1833.) The prosecutor related this statement to D.W.'s comments about judges presuming guilt. (8 RT 1833.) D.W. stated that police officers "talk in groups before court to get each other on track." (8 RT 1833.) D.W.'s comment about prosecuting attorneys was that there was "no need to badger or confuse witnesses, just move on." (8 RT 1833.) He said that criminal defense attorneys are "just in it for the money." (8 RT 1833.) On the questionnaire, D.W. said that he would not be able to follow the law in the penalty phase. (8 RT 1833.) D.W. also said he was afraid of juror retaliation. (8 RT 1833.) The prosecutor also said that during voir dire D.W. gave "long-winded confusing stories" which helped confirm his decision not to keep him on the jury. (8 RT 1834.)

2. Prospective Juror S.C.

Next the prosecutor described his reasons for excusing prospective juror S.C. (8 RT 1834.) He rated S.C. a five-out-of-ten prior to voir dire. (8 RT 1834.) After voir dire, he decided not to keep her. (8 RT 1834.) He noted that she had been arrested for drugs, and that her case had been dismissed. (8 RT 1834.) S.C. had a brother and nephew in state prison for robbery. (8 RT 1834.) She did not read the newspaper or watch any news on television. (8 RT 1834.) In a death penalty case, the prosecutor felt it was important to have jurors who are "aware of their surroundings" and their "place in the community." (8 RT 1834.) He felt that a person who does not watch the news and does not read the newspaper has a limited view of their surrounding and has a limited connection with their community. (8 RT 1834.) He also rejected S.C. because she had "absolutely no feelings on the death penalty." (8 RT 1834.) He wanted his jurors to have feelings "one way or the other" about it. (8 RT 1834.) He felt that it was odd for a 43-year-old not to know where she stood on the death penalty and he did not want her to be making up her mind for the first time during an actual death penalty case, especially one in which two defendants were facing the death penalty rather than just one. (8 RT 1834-1835.)

The reason S.C. went from a five to a "never going to be sitting on my jury" rating was because of her answer during voir dire to one of the defense counsel's questions. (8 RT 1835.) S.C. reported that she had been a witness to an assault. (8 RT 1834.) She said "essentially that the police officers weren't telling the truth about what she said." (8 RT 1835.) The prosecutor was concerned about this because there was going to be "a lot" of police officer testimony. (8 RT 1835.)

In addition, the prosecutor felt S.C.'s demeanor during questioning was "cavalier" and showed she was "entirely bored with the system." (8

RT 1835.) The prosecutor stated that he needed people on the jury who cared, so that they would be engaged all the way through to the end of the proceedings. (8 RT 1835.)

3. Prospective Juror M.J.

The prosecutor scored prospective juror M.J. a four based solely on his questionnaire answers for two primary reasons. (8 RT 1835.) Like prospective juror S.C., prospective juror M.J. "had no opinions about anything." (8 RT 1835-1836.) The prosecutor was concerned that M.J., a 58-year-old, former Marine, could not tell when someone was lying. (8 RT 1836.) He had no opinion about district attorneys or public defenders. (8 RT 1836.) He had no opinion on the law or the criminal justice system. (8 RT 1836.) He had no opinion about drugs. (8 RT 1836.) He had no opinion on rap music or the death penalty. (8 RT 1836.) When asked about these topics during voir dire he had nothing to add. (8 RT 1836.) The prosecutor stated that he did not want a juror making up his mind on these subjects while sitting as a juror on his case. (8 RT 1836.)

The prosecutor also struck M.J. because he had killed during war. (8 RT 1836.) The prosecutor had a recent experience with such a juror. (8 RT 1836.) On his last death penalty case, the prosecutor left on the jury a tank commander who had killed during his military service. This juror had the most difficulty during the penalty phase and was the reason the jury was out as long as it was. (8 RT 1836-1837.) After the trial, the juror told the prosecutor that because he had taken a life before, the decision to take a life again caused him great distress. The tank commander had not realized that making that decision would be such a problem for him until he actually had to do it. (8 RT 1837.) The prosecutor was concerned that M.J. would react in the same way. (8 RT 1837.) And because M.J. had served in Vietnam from 1966 to 1968, the prosecutor suspected he may have killed more than

once. (8 RT 1837.) He thought M.J. "would have grave reservations" about imposing the death penalty in this case. (8 RT 1837.)

4. The Trial Court's Ruling

After the prosecutor justified the use of his peremptory challenges on D.W., S.C. and M.J., appellant countered that the prosecutor had not asked M.J. any questions about whether taking a life during war would impact his ability to render a death verdict in this case. (8 RT 1837-1838.) The trial court observed, however, that M.J. had been asked about this, even if it was not the prosecutor who had asked him. (8 RT 1837-1838.)

Appellant made no further argument and the trial court made its ruling. The trial court started by saying that when the prosecutor excused D.W. and S.C., it "had no trouble with it." (8 RT 1840-1841.) Initially, the trial court was curious about the excusal of M.J. since he was such a "neutral" juror. However, after hearing the prosecutor's explanation the trial court was "convinced." (8 RT 1841.) The court ruled as follows:

> So with regard to [D. W.], I think it's a perfectly good reason for using a challenge, and I don't think it's inconsistent with the other challenges here. It is true that he did go through a court-martial when he was in the military. He does have relatives in prison, and he did express in the questionnaire a very negative attitude towards courts and lawyers as far as that goes. And nobody has been able to show me where the DA has passed over people or at least has had plenty of opportunity and passed over people like that at this point.
>
> [S.C.] was an obvious exclusion situation because she -- I remember listening to her and seeing the way she said that the police tend to put words in your mouth or in her mouth anyway in regard to an incident that she observed. And it was obvious that she felt that the police are not to be trusted. She also has relatives in state prison for felonies. And it is true that her comment about never watching any news whether it be in the newspaper or on TV is probably a good reason for excluding anybody.
>
> [M.J.] was sort of a -- I mean, he was an absolutely neutral juror with regard to his questionnaire, and for that reason I really did have

some question about his exclusion. However, it is true that probably a person who expresses no opinion whatsoever -- and it is correct that his entire questionnaire he just kept writing over and over again no opinion. He just checked off boxes without ever writing anything down which probably other people have done as well. But he really did leave an absolute blank page with regard to opinions. However, that is not the most important thing. And I have to say this is the first time I've heard this one, and it does have a certain ring of logic to it with regard to the fact he has taken human life before in combat. And although -- and if somebody can show me the DA has passed over somebody else who has done that, I might be more convinced. But I do see the logic in why it may be a problem. Especially if that has been a problem before, I can kind of see why somebody that might have done that and then expresses no opinion -- I can see it if the person had been in combat before and then made some comment about how they've adjusted to it, it might be different. But it is true after doing that he indicates no opinions at all about the effect on him or his ability to make a decision with regard to death or life in this case. So I have to say that that does tend to convince me. I think that that shows it is a nonprejudicial and neutral basis for exercising a challenge. So the Court is going to find that all three challenges here were exercised on a nondiscriminatory basis, and for that reason is going to deny the motion.

(8 RT 1841-1843.)

5. Additional Information from Questionnaires and Voir Dire

D.W.'s questionnaire responses were consistent with the prosecutor's reasons for rejecting him. (11 CT 3128-3146.) He reported his court-martial (11 CT 3130), his brother-in-law's unfair sentence (11 CT 3133), his negative attitudes toward police officers, judges and attorneys (11 CT 3132, 3134), his feeling regarding drug dealers getting what they deserve (11 CT 3139), and the higher burden he would impose on the prosecutor (11 CT 3144). He indicated that he could not set aside his personal feelings about the law and follow the judge's instruction "because I may have saw or felt something something [*sic*] no one hasn't seen." (11 CT 3144.) He indicated he was concerned about retaliation against jurors. (11 CT 3146.)

During Taylor's voir dire, D.W. answered questions about his court martial. He explained that he was demoted from an "EM3" to a fireman after he switched duties with an "EM2," who did not have D.W.'s qualifications. (5 RT 1206.) He had attempted to do this once before, with permission, but his superiors had denied his request. On the second occasion, he left his post and went drinking. Because he had been drinking, when he returned to work, he could not resume his duties. (5 RT 1206-1207.) D.W. accepted partial responsibility for his conduct, but also attributed fault to the person who switched jobs with him. (5 RT 1206.)

D.W. confirmed that he thought police officers were less truthful than the average person. (5 RT 1206.) He described having seen a television program during which police officers had lied on the witness stand. (5 RT 1208.) He said that rap music portrayed "kids" and adults with no futures. (5 RT 1208; 11 CT 3139.)

During appellant's voir dire, he asked D.W. about his fear of retaliation against jurors. D.W. said he was somewhat scared because this was a serious case. (6 RT 1292.) He relayed that his neighbor had been a juror in a drive-by shooting case. (6 RT 1292.) Three months later he saw the neighbor's obituary in the newspaper. (6 RT 1292.) D.W. had no prior jury experience. (6 RT 1292.) He said he had a family and did not want to "judge whoever was on trial." (6 RT 1292.) He was mistakenly arrested as a suspect in a New Orleans murder case. (6 RT 1293-1294.) He was upset with the district attorney in that case because the "DA didn't even give him a chance." (6 RT 1294.)

The prosecutor questioned D.W. last. (6 RT 1320.) He asked D.W. whether he thought that someone who shoots a drug dealer should "get a free pass." (6 RT 1320-1321.) D.W. answered "no." (6 RT 1321.) The prosecutor asked what about the friends and family of that drug dealer. Again, Wilson indicated no. (6 RT 1321.) The prosecutor asked D.W.

about rap music and its image. (6 RT 1327.) D.W. said mental health professionals were "bull." (6 RT 1358-1359.) He said he did not see the need for psychiatric expert testimony in this case. (6 RT 1359.)

S.C.'s juror questionnaire answers support the prosecutor's reasons for excusing her. (5 CT 1293-1311.) She was arrested for drugs, but her case was dismissed, and her brother and nephew were in prison for robbery. (5 CT 1298.) She had no opinions about the effectiveness of the criminal justice system, judges, attorneys, or police officers. (5 CT 1299.) She did not read the newspaper or watch the news on television. (5 CT 1302.) She had no general feelings about the death penalty. (5 CT 1308.) She did not know what she would consider in deciding the penalty. (5 CT 1310.)

During Taylor's voir dire, S.C. confirmed her belief that police officers lie. (7 RT 1728.) She explained that she had witnessed someone being shot inside her house. (7 RT 1727-1728.) When the officer who took her statement testified at trial, his testimony was "totally different" from what she had said to him. (7 RT 1728.) She said overall the experience was "all right," she just did not like "the fact that the officers put words into your mouth, you know, that you didn't say." (7 RT 1728.) She denied that the experience left her dissatisfied or distrustful of the criminal justice system. (7 RT 1728.)

During the prosecutor's voir dire, S.C. confirmed her lack of feelings and opinions about the death penalty. (7 RT 1755.) She also confirmed that she did not follow the news; she said she did not "like it" and that there was no particular reason for her dislike. (7 RT 1756.) Ultimately, she said that she did not "have time" for the news. (7 RT 1756.) She did, however, watch all the law related entertainment television shows. (7 RT 1726, 1756; 5 CT 1295.)

M.J.'s written answers reflect his lack of opinion about most of the subjects covered on the questionnaire. (8 CT 2152-2170.) He did not

answer the question about whether he could judge credibility. (5 CT 2154.) He had no opinions on the criminal justice system, judges, attorneys or police offices. (8 CT 2158.) He had no opinion on the use of mental health experts at trial. (8 CT 2163.) He had no general feelings about the death penalty, he had no opinion about a life sentence without the possibility of parole, and he did not know what he would consider in determining the penalty. (8 CT 2167, 2169.) In response to the question: "If you were President and in charge of making all of the laws would there be a death penalty?" M.J. answered "no." (8 CT 2167.) During voir dire, however, he said he would keep the death penalty for murder. (7 RT 1785.) He wrote on the questionnaire that he had taken a life during wartime. (8 CT 2154.)

During Taylor's voir dire of M.J., he confirmed that he had killed during the Vietnam war. (7 RT 1784.) During the prosecutor's voir dire, he acknowledged not answering the question about being able to judge credibility, but he had no explanation for failing to answer the question. (7 RT 1811.) Despite the prosecutor's efforts to draw him out, M.J. confirmed he had no opinions or feelings about the criminal justice system or the death penalty. (7 RT 1812-1815.)

B. The Three Step *Wheeler/Batson* Analysis

Both the California and United States Constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on their membership in a cognizable group. (*People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1045 (*Mai*).) Nationality, race, and skin color are some of the characteristics which comprise such groups. (*Batson, supra* 476 U.S. at pp. 84-89; *Wheeler*, *supra*, 22 Cal.3d at pp. 266, 276-277.) When a claim is made that a peremptory challenge has been used to exclude members of a cognizable group, the trial court must evaluate the claim using a three step process. (*Mai*, at p. 1048.)

First, the party making the claim must make a prima facie showing of group bias. (*Mai*, supra, 57 Cal.4th at p. 1048; *Johnson v. California* (2005) 545 U.S. 162, 168 (*Johnson*).) To make a prima facie case the objecting party must produce enough evidence from which a trial judge could infer group bias. (*People v. Gray* (2005) 37 Cal.4th 168, 186; *Johnson, supra*, 545 U.S. at p. 170.) If a prima facie case is established the analysis moves to the second step. (*Gray*, at p. 186; *Johnson*, at p. 170.) In the second step, the burden shifts to the party exercising the peremptory challenge to justify its use. (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) In the third step, the trial court evaluates the justification given and determines whether purposeful discrimination has been proven. (*People v. Jones* (2013) 57 Cal.4th 899, 917 (*Jones*).)

The trial court must make "a sincere and reasoned attempt to evaluate" the justification taking into account the circumstances of the case, trial techniques and the manner in which the party has examined members of the venire and used its challenges. (*Mai, supra*, 57 Cal.4th at p. 1048.) The trial court, however, is not required to make specific or detailed comments for the record to justify every instance in which a race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine. (*Id.* at p. 1049.) During the third step, the trial court often bases its decision on whether it finds the race-neutral explanations for exercising a peremptory challenge credible. (*Jones, supra*, 57 Cal.4th at p. 917.) A prosecutor's credibility can be judged by his demeanor, by how reasonable or how improbable his explanations are, and by whether his explanation has some basis in accepted trial strategy, as well as other factors. (*Ibid.*)

A *Wheeler/Batson* inquiry does not focus on the objective reasonableness of the reason given for the exercise of the challenge, but rather the subjective genuineness of those reasons. (*People v. Reynoso*

(2003) 31 Cal.4th 903, 924.) A trivial reason will suffice so long as it is genuine and race neutral. (*Lenix*, *supra*, 44 Cal.4th at p. 613.) "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (*Ibid.*)

Appellate court review of a trial court's denial of a *Wheeler/Batson* motion is deferential, asking only whether substantial evidence supports the trial court's conclusions. (*Lenix*, *supra*, 44 Cal.4th at p. 613.) The trial court's factual finding of no discriminatory intent in the third step is a accorded great deference. (*Id.* at p. 614.) This is because the third step involves an assessment of the prosecutor's credibility, which is largely based on his demeanor, as well as an assessment of the juror's credibility which is likewise based on demeanor. (*Ibid.*) A prosecutor's race neutral explanation for exercising a peremptory challenge often involves an assessment of the juror's demeanor, such as nervousness, inattention, evasiveness. Thus, the trial court's first-hand observations of the juror's demeanor are of even greater importance. (*Ibid.*) The trial court assesses " 'whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.' " (*Ibid.*, quoting *Snyder v. Louisiana* (2008) 552 U.S. 472, 477.)

In this case, the trial court's conclusion that the prosecutor was credible in expressing race neutral reasons for the use of his peremptory strikes is supported by the record. D.W. had been the subject of a military court martial, he had relatives in prison, he had very negative attitudes towards judges and lawyers and negative personal experiences with law enforcement. There were no similarly situated jurors whom the prosecutor kept on the jury. Indeed, the excusal of D.W. was not even questioned until the third African-American juror was excused.

The trial court referred to S.C. as an "obvious exclusion situation." Implicitly, this statement shows the trial court found the prosecutor credible

when he expressed his reasons for excusing S.C. The record reflects that S.C.'s believes police officers are untruthful. The trial court assessed her demeanor in reaching this conclusion and discredited her attempt, or the defense's attempt, to reframe her response to suggest her experience was an isolated situation. The record clearly shows that S.C. was not interested in current events in her community or elsewhere. The trial court's observation that this was "probably a good reason to exclude anybody," establishes that the trial court found the prosecutor credible when he said this.

Finally, the record supports the trial court's determination that the prosecutor was credible when he said he was rejecting M.J. as a juror because he had killed during wartime. There was no question that M.J. had done so, and the trial court accepted the prosecutor's personal experience as true. Certainly, there was no evidence to the contrary.

C. The trial court's determination that the prosecutor excused three African-American jurors for valid non-racial reasons is supported by substantial evidence

Appellant contends that the prosecutor's justifications were not race-neutral, but rather a pretext for unlawful discrimination. (AOB at 24.) He also contends that the trial court's evaluation of the prosecutor's justifications was legally insufficient. (AOB at 24, 28, 48-50.)

Appellant's arguments are largely based on his disagreement with the prosecutor's interpretation of the three jurors' questionnaire responses or statements they made during voir dire. It does not matter that appellant does not interpret the information as the prosecutor did so long as the prosecutor's interpretation was genuine. (*Reynoso*, *supra*, 31 Cal.4th at p. 924.) The genuineness of an interpretation depends to some degree upon its reasonableness. It is not the objective reasonableness of the explanations that is at issue, however. It is the subjective reasonableness of the prosecutor's reasons and his sincerity that are judged. (*Ibid.*) The trial

court's determination that the prosecutor's reasons were genuine and race-neutral is amply supported by the record in this cases.

On appeal, appellant also makes comparisons between the three stricken jurors and the seated jurors in support of his pretext arguments. He did not make these comparisons in the trial court. While this Court has held that the failure to make comparative juror analyses in the trial court does not preclude it from considering comparative juror analysis for the first time on appeal, the reviewing court, however, must recognize the inherent limitations of doing so on a cold appellate record. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 106.) In *Lenix*, this Court held that comparative juror analysis may be considered for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons. (*Lenix*, *supra*, 44 Cal.4th at p. 622.) The problems with comparative juror analysis raised for the first time on appeal is that the prosecutor generally has not provided an explanation for his nonchallenges. (*People v. Jones* (2011) 51 Cal.4th 346, 365–366.) In such cases the reviewing court must not "turn a blind eye to reasons the record discloses for not challenging other jurors even if those other jurors are similar in some respects to excused jurors." (*Ibid.*)

1. The Prosecutor's Justifications for Excusing D.W. are Supported by the Record

Appellant contends that the prosecutor's reasons for striking D.W. were a pretext for discrimination. (AOB at 34.) In the trial court, appellant did not challenge any of the prosecutor's justifications for excusing D.W. For the first time on appeal, appellant asserts that comparative juror analysis proves the prosecutor's justifications were pretext. There is no merit to this contention.

Appellant contends that D.W.'s court-martial was not a valid reason for striking him because Juror Nos. 3, 4, and 6 had each suffered minor

criminal convictions. (AOB at 34.) This is not a proper comparative analysis because it compares dissimilar characteristics and because it focuses on one characteristic in isolation without taking into account all of the prosecutor's reasons for the excusal. Moreover, because appellant did not make this argument in the trial court, the record does not reflect why the prosecutor considered D.W.'s court-martial more significant than the minor criminal convictions of Juror Nos. 3, 4, and 6. Nevertheless, the record supports the trial court's finding that the prosecutor's explanation was not a pretext for discrimination.

A court-martial is a proper basis for excusing a juror because it indicates a possible bias in favor of the accused. (*People v. Salcido* (2008) 44 Cal.4th 93, 140 [prospective juror reasonably excused on the basis of his life experiences, including his court-martial].) D.W. was the subject of the court-martial, therefore, he was the accused. D.W. described being "surprised" by the proceeding with one day's notice, which no doubt added to the negativity of the experience. (5 RT 1206.) He was found guilty and demoted. (5 RT 1207.) Thus, it was reasonable for the prosecutor to conclude that D.W. might harbor a bias in favor of the accused in this case.

Not only did D.W.'s court-martial experience predisposed him to favor the accused, but D.W.'s underlying conduct provides significant insight into D.W. as a person. His own description of his actions showed he either exercised extremely poor judgment or deliberately disobeyed orders when he traded duties with a person who was not qualified to perform those duties, left his position, went drinking, and returned unable to resume his duties because of his drinking. (5 RT 1206-1207.) Because D.W. previously sought and was denied approval to trade duties with this person, he knew his actions were against the rules, but he chose to do it anyway. (5 RT 1206-1207.) While D.W. accepted partial responsibility for his actions, he was quick to point out that it was the other "guy's fault too."

(5 RT 1206.) D.W.'s court-martial and his response to it, justify the prosecutor's concern that he could be biased in favor of the accused. (*Salcido*, *supra*, 44 Cal.4th at p. 140.) D.W.'s conduct showed a lack of respect for authority and an inability to follow the rules. There is no evidence that the prosecutor's reliance on the court-martial was a pretext to cover up racial bias.

The record also reflects that appellant's comparison jurors were not similarly situated. Juror No. 3 was honorably discharged from the military without any courts-martial, and Juror Nos. 4 and 6 never served in the military. (12 CT 3320, 3377, 3339.) Consequently, Juror Nos. 3, 4, and 6 did not have the blemished military record that D.W. had.

Appellant's comparison of minor criminal convictions these jurors suffered to D.W.'s court-martial also does not establish that the prosecutor's justification was a pretext for unlawful discrimination. Juror Nos. 3 and 4 each had a conviction for driving under the influence,[5] and Juror No. 6 had unspecified misdemeanor convictions ten years earlier. (12 CT 3328, 3287, 3285; 6 RT 1517-1518.) Each prospective juror admitted responsibility for their conduct and said they were treated fairly by the criminal justice system. (12 CT 3328, 3287, 3285; 6 RT 1518.) D.W., on the other hand, blamed his colleague and believed the court-martial had been sprung on him. (5 RT 1206-1207.) Additionally, the comparison between a highly-structured, rules-oriented, chain-of-command driven employment relationship is not comparable to the relationship an ordinary civilian citizen has with society-at-large. There is more accountability for one's conduct in the military and the relationship is one that results from an individual's conscious choice to submit to those rules, unlike the general

[5] Juror No. 3's was a misdemeanor offense, and Juror No. 4 did not say. (12 CT 3328, 3287.)

societal relationship to which all are bound without having the option to chose.

Appellant next contends that the prosecutor's justification relating to the incarceration of D.W.'s brother-in-law was a pretext for discrimination. (AOB at 34.) Appellant attempts to support his argument with comparative juror analysis. However, the record reveals that appellant has misunderstood the nature of the prosecutor's justification. It was D.W.'s belief that his brother-in-law was *unfairly* imprisoned that concerned the prosecutor, not the fact of the incarceration itself. (11 CT 3133; 8 RT 1833.) A negative reaction to law enforcement is a proper race neutral reason for excusing a juror. (*People v. Montes* (2014) 58 Cal.4th 809, 855, citing *People v. Turner* (1994) 8 Cal.4th 137, 171.)

Appellant compares D.W. to Juror Nos. 5 and 7 and Alternate Juror Nos. 1 and 2 because these jurors had relatives who were either in jail or prison. (AOB at 34-35.) These individuals are not comparable. None of these individuals had suffered a court martial, had themselves been arrested for murder, and none of them had negative views of law enforcement or the professionals associated with law enforcement. And, while these jurors did have relatives in prison, none of them thought the criminal justice system had treated their relatives *unfairly* as D.W. clearly did. (11 CT 3266; 12 CT 3304, 3421, 3443.)

D.W. had two negative experiences with law enforcement. D.W. was arrested and accused falsely of murder in New Orleans. (6 RT 1293-1294.) Although D.W. was not charged, he was unhappy with the prosecutor who apparently did not believe him. He said of the experience that: "[I]t just really took me that the DA didn't even give me a chance or anything." (6 RT 1293-1294.)

D.W.'s failure to disclose on the juror questionnaire, his New Orleans arrest for murder, the very crime charged here, support's the prosecutor's

reasonable inference that D.W. was harboring negative feelings toward law enforcement and the judicial system. (11 CT 3133.) Appellant argues that D.W. "made clear" that he would not hold this experience against the current prosecutor. (AOB at 35.) No reasonable prosecutor, however, would have accepted D.W.'s assurances, especially when that juror had said he would hold the prosecutor to a higher standard of proof. (*Mai, supra*, 57 Cal.4th at p. 1051; *People v. Taylor* (2010) 48 Cal.4th 574, 643, fn. 19; *People v. Young* (2005) 34 Cal.4th 1149, 1174.)

D.W.'s second negative experience with law enforcement was his court martial. When D.W. was asked whether his court-martial would cause him to be biased against the prosecutor he answered equivocally, "No, not really." (5 RT 1207.)

Appellant contends that the criminal histories of prospective jurors and their relatives only mattered to the prosecutor when the potential juror was African-American. (AOB at 34, 37.) This is inaccurate. The prosecutor excused six white jurors and two Hispanic jurors with similar criminal histories. He excused: a Caucasian female whose husband had been convicted of robbery and had served three years in prison (6 RT 1489; 11 CT 3029, 3036); a Caucasian female whose son had been convicted of a sexual offense (7 RT 1625; 8 CT 2239, 2246); a Caucasian female whose husband had a DUI and whose nephew served time in jail for assault with a firearm on his wife (7 RT 1772; 6 CT 1693, 1700); a Caucasian male whose son was convicted of domestic violence (8 RT 1958; 5 CT 1260, 1267); a Caucasian female whose close friend served five years for rape (8 RT 1958; 8 CT 2340, 2347); an "Irish-American" male whose brother-in-law served time for drug possession with intent to distribute (8 RT 1956; 6 CT 1513, 1520); a Mexican-American male whose father had served six months in jail for domestic violence (6 RT 1487; 9 CT 2656, 2663); and a Hispanic male whose uncle was serving a life sentence for murder (8 RT

1845; 4 CT 1048, 1055). The prosecutor's rejection of these prospective jurors establishes that his concerns over a juror's prior negative experience with the criminal justice system was not isolated to African-American jurors as appellant claims.

Appellant asserts that the prosecutor distorted D.W.'s comments about the criminal justice system. (AOB at 35.) D.W.'s comments are memorialized in his questionnaire answers and reflect his views that prosecutors "badger witnesses," judges "presume guilt" and defense attorneys are "in it for the money." (11 CT 3134.) Appellant's assertion that D.W. had nothing against the prosecutor in this case is irrelevant. (AOB at 35.) The prosecutor in this case never said he struck D.W. because he felt D.W. had something against him personally.

Throughout his opening brief *Wheeler/Batson* argument, appellant suggests that the only relevant prosecutorial justifications are those which the trial court mentioned in its ruling. (AOB at 33-36.) In *Mai,* this Court held otherwise. (*Mai*, *supra*, 57 Cal.4th at p. 1054.) The trial court was not required to set forth each of its reasons or discuss each of the prosecutor's reasons. Undeterred by his own mistaken premise about the law, however, appellant argues that the reasons *not* discussed by the trial court also show pretext. (AOB at 35.) They are as follows.

Appellant contends that the prosecutor's rejection of D.W. based on his answer to question 14 on page 20 of the questionnaire was a pretext for unlawful discrimination. (AOB at 35.) Question 14 fell under the heading "Attitudes Regarding the Death Penalty" and asked: "Could you set aside your own personal feelings regarding what the law in this case ought to be and follow the law as the court explains it to you?" D.W. answered "no" and also wrote "Because I may have saw or felt something something [*sic*] no one hasn't seen." (11 CT 3144.) The comment suggested that D.W. believed his personal experience should trump the trial court's instructions

in the penalty phase. It is reasonable for a prosecutor to be concern about such a belief in a prospective juror. Especially when the belief is strongly held, which appears to be the case with D.W.'s since this was the very attitude that lead to his court-martial; that it is acceptable to ignore instructions from superiors, if there is a good reason to do so, or if one simply prefers to do so.

Appellant compares D.W.'s answer to question 14 to the answers of five Caucasian jurors to *different* questions, ones falling under the heading "Trial Rights." The comparison is unavailing. Juror Nos. 1, 5, 7, 11 and 12, all answered question 14 by stating that they *could* put aside their personal feelings and follow the judge's instructions in the penalty phase; the exact opposite of what appellant answered. (11 CT 3201; 12 CT 3277, 3215, 3391, 3410.) Their answers to different questions is not a proper comparison, particularly when the prosecutor did not rely on D.W.'s answer to those questions as a justification for excusing D.W.

Appellant asserts that the prosecutor should have questioned D.W. further about his inability to follow the court's instructions in the penalty phase and challenge him for cause. (AOB at 35.) There is no legal requirement for the prosecutor to do so. Moreover, the standard for excusing a juror for cause is much higher than that applicable to peremptory challenges. In addition, the trial court had instructed the attorneys not to cover subjects in voir dire that were already covered on the questionnaire. (5 RT 1221.) Even if the prosecutor had further questioned D.W. and D.W. had retreated from this position, the prosecutor would not have been required to accept D.W.'s revised answer. (*Mai, supra*, 57 Cal.4th at p. 1051.) Indeed another prospective juror answered that he too did not believe he could put aside his feelings and follow the trial court's instructions in the penalty phase. (10 CT 2723.) When the prosecutor questioned this prospective juror further during voir dire, the juror changed

his mind, but the prosecutor still struck him. (10 CT 2723, 2727; 4 RT 1604-1605, 7 RT 1626.) Significantly, the juror was Caucasian. (10 CT 2727.) This establishes two things, that the prosecutor *was* concerned about a negative answer to question 14 and that he would strike black and white jurors alike who answered no to question 14. The prosecutor also struck a white juror who answered "yes," but qualified her answer by writing "I think so." (8 CT 2126, 2130; 7 RT 1771.)

Appellant's scrutiny of each of the prosecutor's justifications in isolation, gives too much weight to each individual reason and ignores the sum total of the juror's answers and how they reflect on the juror as a whole. The prosecutor excused D.W. for the reasons he stated because of their aggregate effect, and there was no other comparable juror who was not struck, that is, one who was court martialed, arrested for murder, distrusted prosecutors and law enforcement officers.

Appellant contends that the prosecutor exaggerated D.W.'s comments about police officers, arguing that D.W. said only a few police officers might be untrustworthy. (AOB at 36.) D.W.'s two separate comments about his belief that police officers make assumptions and collaborate on their testimony before trial, are memorialized in his questionnaire and establish that he did have negative feelings about law enforcement professionals. (11 CT 3133-3134.) Whether D.W. believed all police officers lie or that only a few do, makes no difference to the reasonableness of the prosecutor's apprehension about such an attitude in a juror. The prosecutor's concern was justifiable given his reliance on police officer testimony in this case and in consideration of D.W.'s court martial and arrest history. Moreover, there were no other similarly situated jurors who were not struck. Appellant offers no evidence which undermines the trial court's crediting of the prosecutor's justification on this basis.

Appellant asserts that the prosecutor also exaggerated D.W.'s concerns about retaliation for serving as a juror. (AOB at 36.) D.W. stated his concern about juror retaliation in his questionnaire. (11 CT 3146.) Appellant questioned him about this topic during voir dire. (6 RT 1292-1293.) D.W. explained that his neighbor was a juror in a drive-by shooting case. Shortly afterward, D.W. saw the neighbor's obituary in the newspaper. (6 RT 1292-1293.) D.W.'s willingness to connect these two events shows he was indeed concerned about the potential for retaliation regarding jury service. It was reasonable for the prosecutor not to want a juror who might be distracted by concerns about his safety, particularly where that juror might hear penalty phase evidence that appellant had previously successfully threatened witnesses. The trial court would have been able to discern whether the prosecutor was exaggerating D.W. concerns about juror retaliation and presumptively found that the prosecutor was not exaggerating or using D.W.'s fear as a pretext to cover up unlawful discrimination. The combination of D.W.'s background and answers made him sufficiently different from the other jurors to justify the prosecutor's strike. (*People v. Harris* (2013) 57 Cal.4th 804, 837.) The trial court is presumed to have considered each of the prosecutor's reasons and made its decision based on all the evidence.

2. The Prosecutor's Justifications for Excusing S.C. are Supported by the Record

Appellant contends that the prosecutor's reasons for striking S.C. were a pretext for discrimination. (AOB at 36-40.) Appellant's contention is without merit.

Appellant challenges the prosecutor's justification regarding S.C.'s drug arrest, which he characterized as S.C.'s "legal problems," and suggests that this was a problem shared by Juror Nos. 3, 4 and 6. (AOB at 36.)

As stated previously, Juror Nos. 3 and 4 each had a conviction for driving under the influence, and Juror No. 6 had decade-old unspecified misdemeanor convictions. (12 CT 3328, 3287, 3285; 6 RT 1517-1518.) Each of these three jurors admitted responsibility for their conduct, and each said the criminal justice system had treated them fairly. (12 CT 3328, 3287, 3285; 6 RT 1518.) In contrast, S.C.'s drug case was dismissed. (5 CT 1298.) Her statement that she was treated fairly by the criminal justice system, therefore, is qualitatively different from the comparison jurors since she suffered no penal consequences from her arrest.

S.C. also had two relatives in prison for robbery. (5 CT 1298.) Comparison Jurors 3, 4 and 6 had no relatives in prison or even relatives with criminal histories. (12 CT 3328, 3287, 3285.) The fact that a relative has been convicted of a crime and is currently incarcerated creates the significant potential for bias against the prosecution. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 277, fn. 18; see also *Lenix*, *supra*, 44 Cal.4th at p. 628 [prospective juror's negative experience with law enforcement].) Appellant has not established that the prosecutor's reasons were pretextual based on a comparison of S.C. to Juror Nos. 3, 4 and 6.

Appellant next attacks the prosecutor's justification that S.C. had no interest in the news. (AOB at 37.) S. C. asserted that she did not "like" the news, but could not give a reason why. (7 RT 1756.) She only gave the explanation that she was too busy after the prosecutor pressed her several times. (7 RT 1756.) He suggested perhaps she found it too "ugly" or "overwhelming." Finally she said she was "too busy." (7 RT 1756.)

Appellant compares S.C. lack of interest in the news to Juror 3, who he asserts also said he was too busy to follow the news. (AOB at 38.) A careful review of Juror 3's statement reveals that what he actually said was "I don't have time to watch TV," not that he had no interest whatsoever in

following the news in any of its available forms, like S.C. had. (5 RT 1226.) Juror 3's answer, therefore, is not comparable to S.C.'s.

Appellant's next compares S.C. to Jurors Nos. 1 and 11, who each left blanks on their questionnaire. (AOB at 38.) The prosecutor did not base his excusal of S.C. on her failure to answer questions, thus the comparison is irrelevant. Furthermore, both jurors answered during voir dire the questions they left blank. (5 RT 1168, 8 RT 1913-1914; 11 CT 3190-3191, 12 CT 3381-3382, 3391.)

Appellant challenges the prosecutor's justification that S.C. had no opinion about the death penalty. (AOB at 38.) He claims that Juror No. 3 gave comparable responses. This is not true. Juror No. 3 wrote out several lines of opinions to nine different death penalty questions on pages 19 through 21 of the questionnaire, while S.C. responded to those same questions with either "none," or "I don't know." (11 CT 3238-3240; 5 CT 1308.) There is simply no support for appellant's comparison between S.C. and Juror No. 3 regarding either person's opinion of the death penalty.

Appellant argues that S.C. did not have a negative attitude about the police. (AOB 38-39.) The trial court found otherwise.

> THE COURT: [S.C.] was an obvious exclusion situation because she -- I remember listening to her and seeing the way she said that the police tend to put words in your mouth or in her mouth anyway in regard to an incident that she observed. And it was obvious that she felt that the police are not to be trusted.

(8 RT 1841.) The trial court's demeanor observations, particularly as they relate to the credibility of a prospective juror's answers is entitled to great deference on appeal. S.C.'s comments about the police could be construed as both negative and positive. Her demeanor, therefore, was important to an assessment of her credibility. Given S.C.'s experience it is reasonable that she would have a negative attitude toward police. She apparently genuinely felt that they had either intentionally or negligently failed to

testify in court consistent with what she told them. The trial court's finding that S.C. distrusted police officers is supported by the record and common sense. Naturally a prosecutor, whose case depends in part on the testimony of police officers, is justified in not wanting to keep a juror who distrusted police officer testimony.

Appellant contends that because the trial court did not make any observations or findings about S.C.'s demeanor as it relates to her boredom, the prosecutor's reliance on this factor should not be considered on appeal. He cites *Snyder v. Lousiana* (2008) 552 U.S. 472, 477 (*Snyder*). (AOB at 39.) The *Snyder* decision does not support the proposition for which appellant cites it. In *Snyder*, the United States Supreme Court said that in the absence of exceptional circumstances, the reviewing court should defer to the trial court on issues of credibility and demeanor of both the prosecutor and the prospective juror. (*Snyder,* at p. 477.) Not every credibility determination must be stated on the record. If the prosecutor's description had been distorted, surely the trial court would have stated that. Just because the trial court did not comment on the prosecutor's justification that S.C. seemed "entirely bored" (8 RT 1835) does not mean that this Court cannot consider it as part of the record.

3. The Prosecutor's Justifications for Excusing M.J. are Supported by the Record

Appellant contends that the prosecutor's reasons for excusing M.J. were a pretext for unlawful discrimination. (AOB at 41.) This claim has no merit.

The prosecutor rated M.J. a four based on his questionnaire responses, for two primarily reasons. One, because M.J., like S.C., "had no opinion about anything" and, two, because he had killed during war. (8 RT 1835-1836.) The record supports these justifications. The trial court based its finding of a prima facia case primarily on the fact that it found M.J. to be a

neutral juror. After hearing the prosecutor's justification however, the trial court stated that it "was convinced." (8 RT 1841.) The trial court found that it was logical for the prosecutor to be concerned about whether M.J.'s war time killing experience would affect his ability to vote for the death penalty. Particularly in light of the prosecutor's recent experience with just such a juror. That experience demonstrated that even a juror himself might not realize the difficultly of deciding a person's fate in a criminal context after making that decision during war. Consistent with the prosecutor's observation, the trial court also found that M.J. had left an "absolute blank page with regard to opinions." (8 RT 1842.) The record supports this finding as well.

Appellant also makes juror comparison arguments with respect to M.J. for the first time on appeal. (AOB at 41-42.) Appellant's comparisons are flawed. First, he compares M.J.'s answer to question 6 on page 10 of the questionnaire to the answers given by Juror Nos. 1, 7, and 11. Question 6 asked for the prospective juror's feelings regarding the professionals involved in the criminal justice system. M.J. answered "none" to each of the four professions listed. (8 CT 2158.) During the prosecutor's voir dire M.J. confirmed he had no opinions. (7 RT 1812-1813.) On the other hand, Juror No. 1, said during voir dire that he had inadvertently missed the question and had not intended to skip it, and stated that he had no negative feelings. (11 CT 3191; 5 RT 1168.) Juror No. 7 explained that she had no opinions because she had no experience with the criminal justice system. (7 RT 1737-1738.)

The prosecutor did not rely on M.J.'s lack of an answer to this question as a reason for excusing him. The prosecutor rejected M.J. for his complete lack of opinions, which was evident from his questionnaire and voir dire, and because he had killed during war. The comparison jurors, on the other hand, had opinions and expressed them.

Appellant compares Juror No. 3's answer on the frequency of the imposition of the death penalty to M.J.'s answer. (AOB at 41.) M.J. answered that he thought the death penalty was imposed "about the right amount" (8 CT 2169) and Juror 3 answered that because he did not know how often it was imposed, he could not say (11 CT 3240). Because the answers were different, they do not establish pretext. Again, the prosecutor did not rely on M.J.'s answer to this question as a reason for striking him, so the comparison is irrelevant.

M.J.'s complete failure to answer the question is different from the answers of the other jurors. M.J., unlike the other jurors who missed questions and acknowledged that they had done so, had no explanation for not answering questions. (7 RT 1811.) The prosecutor struck M.J. for his lack of opinions about anything, which the trial court confirmed in its ruling. Even if the other jurors' answers could be compared with M.J.'s non-answer, overall these jurors had many more opinions than M.J. and are distinguishable from him on that basis alone, and because none of them had killed during war

Appellant equates the prosecutor's decision not to question M.J. about taking a life during war with "desultory" voir dire. (AOB at 42.) There is a vast difference between not questioning a juror at all and not asking about a particular question, which is what happened in this case. Furthermore, the prosecutor may not have questioned M.J. on this because Taylor had already done so and M.J. had denied that his wartime killing experience would affect him in this case. The prosecutor also may not have followed up because he realized it would not resolve the concern he had. The prosecutor's experience with the prior juror taught him that the juror himself may not realize that taking a life in war could lead to difficulty in making that decision in a criminal context. Thus questioning M.J. about it would not necessarily have given the prosecutor the confidence he would

need to leave M.J. on the jury. Moreover, M.J. was not a juror who was very forth coming even when questioned. The prosecutor had tried to draw him out on other topics, but was unsuccessful, as were the two defense attorneys. (7 RT 1783-1785, 1807, 1811-1815.)

The record supports the trial court's finding that the prosecutor used his peremptory challenges against D.W., S.C. and M.J. for valid race neutral reasons.

4. Prison Statistics

Appellant argues, under a separate sub-hearing, that the prosecutor used the characteristic of "having relatives in prison" as a pretext for unlawful discrimination. He supports his argument with the statistic that there are more African-Americans in prison than Caucasians. (AOB at 43-48.) Appellant's reference to this statistic is outside the record for this case and he has not requested judicial notice of this fact. The prosecutor did not use the fact that a prospective juror had relatives in prison as a categorical reason to exclude them from the jury. Rather, the prosecutor consider this factor as a way to evaluate how the prospective juror felt toward the criminal justice system.

As stated previously, the prosecutor in this case felt that both D.W. and S.C. had negative feelings toward the criminal justice system because of their individual experiences. His concern was valid. (See *People v. Montes, supra,* 58 Cal.4th at p. 855 [peremptory challenge to excuse a prospective juror with negative experiences of the criminal justice system]; *People v. Roldan* (2005) 35 Cal.4th 646, 703;) D.W. thought his brother-in-law was "unfairly" imprisoned. D.W. was also wrongly thought to be responsible for in a murder in New Orleans. He thought the district attorney in that case had not "not even given him a chance." In S.C.'s case, she stated her belief that police officers lie. She had a personal experience which caused her to believe this. The trial court noted S.C.'s demeanor

when she was questioned about this and found that this was a belief that she actually held.

The prosecutor did not use the fact of having relatives in prison as a pretext to eliminate black jurors. He excused both African-Americans and Caucasian jurors who had relatives in prison. Appellant's statistical argument is outside the record and is unmeritorious.

5. The Trial Court's Evaluation of the Prosecutor's Justifications

Appellant contends that the trial court's ruling is reversible error because it's review of the prosecutor's justification was inadequate, calling it "cursory" and "perfunctory." (AOB at 24, 48-50.) No such objection was made in the trial court, thus it is forfeited. Had appellant made a timely objection, surely the trial court could have and would have remedied the matter. Nevertheless, all that is required, is that the trial court make a "sincere and reasonable" examination of the proffered explanation for the use of the challenged peremptory strike. (*Mai, supra*, 57 Cal.4th at p. 1049.) The trial court need not comment upon each proffered justification nor set forth on the record its assessment of each factor it considered. (*Ibid.*) This level of exactitude may not even be possible given that one of the factors the court must consider is the demeanor of the prosecutor and the jurors throughout the entire jury selection process.

In this case, appellant's characterization of the proceedings suggests that the only justifications that matter are the ones the trial court specifically addressed in its ruling. This Court presumes that every reason given by the prosecutor was considered by the trial court in determining whether the prosecutor used his peremptory challenges in a racially biased manner. (*Reynoso, supra*, 31 Cal.4th at p. 929.) The trial court is also presumed to have considered all of the information the jurors gave in the questionnaire and during voir dire. (*Ibid.*) In his motion for a new trial,

appellant asked the trial court to reconsider its ruling on the *Wheeler/Batson* motion. (3 CT 844.) In denying the new trial motion, the trial court stated that it had reviewed all the reasons given for striking M.J. and found them sufficient. (4 CT 938.)

D. Conclusion

The trial court's determination that the prosecutor exercised his peremptory challenges without consideration of race is amply supported by the record. The prosecutor's justifications were reasonable and genuine. There was nothing in the prosecutor's demeanor or his reasons that could be characterized as improbable or which should have caused the trial court to doubt the veracity of his justifications. Appellant's *Wheeler/Batson* motion was properly denied.

II. THE TRIAL COURT'S EXCLUSION OF UNAUTHENTICATED RAP LYRICS WAS PROPER

Appellant asserts that the trial court erred by excluding rap lyrics that he claims were written by co-defendant Taylor, and in which Taylor allegedly admits to shooting Wilson and Richardson. (AOB at 52.) The trial court properly excluded the document because appellant failed to lay a proper foundation for its authentication and admission.

A. Background

Appellant filed an in limine motion seeking an advanced ruling on the admissibility of the document. In his motion, appellant alleged that the document was written by Taylor, was found in his cell, and constituted a confession. (2 CT 412-413; 8 RT 1864-1865.) Taylor filed a written opposition challenging the authenticity of the document and its relevance.

(1 CAMT[6] 98-99.) Because the People did not intend to offer the document, the prosecutor filed no written response to either appellant's motion or Taylor's opposition, and took no position on the matter at the hearing. (8 RT 1858, 1864, 1873.)

Appellant attached a copy of the document to his motion, thus it is part of the record in this case. (8 RT 1864; 2 CT 416.) At the hearing, appellant said he received the document through the prosecutor's discovery, but offered no further evidence on the document's chain of custody or it's authentication. (8 RT 1865; 2 CT 416.) Appellant offered no handwriting or fingerprint analysis, and no expert testimony on rap music to interpret the document's content. (8 RT 1865, 1873.)

At first the trial court was uncertain as to how to even characterize the document, referring to it alternatively as a note, a poem and rap lyrics. (8 RT 1856, 1864.) For ease of reference, the trial court referred to the writing as rap lyrics, though as stated previously, no expert offered an opinion that it was.

In response to the trial court's question regarding the relevance of the document, appellant asserted that it established that Taylor was the shooter. (8 RT 1865-1867.) Appellant maintained that the initials L.T. at the top of the document stood for Latroy Taylor and that from the content, L.T. was clearly the author. (8 RT 1866.) Under appellant's interpretation of the lyrics, Taylor shot Richardson while acting as a hit man for the mob. (8 RT 1866-1867.) The trial court rejected appellant's relevance argument stating there was no evidence that this case involved a mob hit. Appellant responded that he had a witness who could make the connection. (8 RT 1869.)

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[6] CAMT refers to the "Clerk's Additional Material Transcript on Appeal-1."

Taylor objected based on a lack of authentication, arguing appellant's representations that Taylor had written the document were merely speculation. (8 RT 1871-1872.) Taylor noted the lack of any chain-of-custody, stating that the document could have been obtained from another inmate or that it could have been received by Taylor. (8 RT 1872.) Taylor also asserted that the document was highly prejudicial. (8 RT 1872.)

With appellant's assistance, the trial court attempted to read and interpret the document then ruled it was inadmissible, but did so without prejudice.[7] (8 RT 1868-1871, 1873-1874.) The trial court agreed with Taylor that appellant's characterization of the document was based on speculation. (8 RT 1870-1871.) The trial court stated, "there is—really no foundational evidence to show at this point either that Mr. Taylor wrote this, number one, or, number two, that it actually is related to the facts of this case." (8 RT 1873.) In response to the trial court's ruling, appellant merely asked whether he would have another opportunity to make an offer of proof. The trial court confirmed this was the case, but appellant never again sought to do so. (8 RT 1873-1874.)

During the trial, evidence was admitted that Richardson was a rap music artist who produced and sold his own rap music. (10 RT 2655-2660.) In addition Richardson testified that he collaborated musically with his brother, Tyron. (10 RT 2657, 2659.) Toward the end of the document is the phrase "just call me Tyron." (2 CT 416.) There was no evidence admitted that Taylor was a rap artist.

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[7] Perhaps in an effort to make the document more legible, appellant has attempted to transcribe it in the body of his opening brief. (AOB at 53.) This transcription is not evidence, however, and respondent does not agree that appellant's transcription is accurate. Appellant's transcription is also inconsistent with the interpretation reflected in the reporter's transcript.

B. Standard of Review

A trial court's ruling on the admission of evidence is reviewed for abuse of discretion. (*People v. Lucas* (1995) 12 Cal.4th 415, 466 (*Lucas*).) A trial court does not abuse its discretion by excluding evidence that produces only speculative inferences. (*People v. Babbitt* (1988) 45 Cal.3d 660, 684 (*Babbitt*).)

C. Only Authenticated Relevant Evidence Is Admissible

Generally, all relevant evidence is admissible. (Evid. Code, § 351.) The relevance of evidence sometimes depends, however, upon the existence of a preliminary fact. (Evid. Code, § 403; *Lucas*, *supra*, 12 Cal.4th at p. 466.) A trial judge who is evaluating proffered evidence under section 403 may exclude the evidence if it finds that the showing made on the preliminary fact is too weak. (*Ibid.* at p. 466.) For example, a defendant's identity as the person who committed an uncharged act is a preliminary fact necessary to establish the relevance of the uncharged act. (*People v. Cottone* (2013) 57 Cal.4th 269, 284.) If it cannot be shown that the defendant did the uncharged act, the uncharged act is irrelevant. (*Ibid.*) Under section 403, then, the trial court performs a threshold screening function to shield the jury from evidence that is so factually weak as to undermine its relevance. (*Lucas*, at p. 466.) Evidence that is only marginally relevant or evidence that poses an undue risk of prejudice or confusion of the issues may be excluded. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1259 [defense proffered character evidence properly excluded].) Subject to Evidence Code section 352, evidence offered by a criminal defendant to show someone else committed the crimes of which he is charged is admissible to establish reasonable doubt.

A writing must be authenticated before it may be received into evidence and before secondary evidence of its content may be introduced.

(Evid. Code, § 1401; *People v. Lindberg* (2008) 45 Cal.4th 1, 53.) "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400; see *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1434.) There are many ways in which a writing may be authenticated, including proving the genuineness of the handwriting, or by examination of the content of the writing. (Evid. Code, §§ 1410-1421; *Babbitt, supra*, 45 Cal.3d at p. 685.) Circumstantial evidence, such as the location of the document, as well as a defendant's name or moniker on it, may also be used to authenticate a document. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1103; see *People v. Gibson* (2001) 90 Cal.App.4th 371, 383.) The illegibility of a writing may affect its admissibility. (*People v. Phillips* (1985) 41 Cal.3d 29, 78.)

A proponent of physical evidence must establish its chain of custody. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1061.) He must establish by a reasonable certainty that there was no alteration of the evidence. (*Ibid.*) This reasonable certainty is not met when some vital link in the chain of possession is unaccounted for, because then it is just as likely as not that the evidence was not the evidence originally obtained. (*Ibid.*) If there is speculation concerning the chain of custody, the trial court must exclude the evidence. (*Ibid.*)

D. The Document Was Not Authenticated

Appellant failed to present any evidence authenticating the rap lyrics he sought to introduce as having been written by Taylor. Taylor's signature does not appear on the document. No exemplar of Taylor's handwriting was offered. No handwriting expert opined that Taylor wrote the document. No one testified that they saw Taylor write it and Taylor made no adoptive

admission. No finger print analysis was offered tying Taylor to the document.

Neither the location nor the contents of the document created a reasonable inference that Taylor was its author. The fact that a document was found in a cell Taylor occupied does not prove it was his or that he wrote it, and was insufficient to authenticate it.

The content of the writing does not authenticate it. The letters LT at the top of the document are too uncertain and speculative to establish that Taylor was the author of the document. There was no evidence at all that Taylor identified himself by his initials, and the letters are not so unique as to apply only to him. More significantly, the letters LT are followed by the phrase "aka Papa." There was no evidence that Taylor was known as "Papa." In fact, there was no evidence that he had any nickname at all. Nor did the content of the document relate to the circumstances of this case. There was no evidence or even an allegation, as the trial court noted, that the shooting of Richardson and Wilson was gang related or retaliatory. (8 RT 1868-1869, 1873.) During pretrial proceedings, the subject of Taylor's remote gang status was discussed, but no such evidence was introduced in the People's case in chief ,and, thereafter, only appellant testified concerning Taylor's alleged gang affiliations. (8 RT 1861-1863.) At no time was there any allegation or suggestion that the crimes in this case were gang related.

The words in the document, if they are rap lyrics, do not mean anything. As Richardson testified, words like murder, bitch, trick, and money, in the context of rap lyrics, "them words are not really nothing in particular. Them words is just impressions." (10 RT 2661-2662.) The killing of people in his neighborhood was one of the common themes of his music, as was the use of marijuana. (10 RT 2663.)

Appellant failed to establish the chain of custody of the document. The production of the document during discovery, and a report that it had been found during a routine search of Taylor's cell, were the only links in the chain. Appellant relies on *People v. Olguin* (1994) 31 Cal.App.4th 1355 (*Olguin*). In *Olguin*, a case involving gang related crimes, rap lyrics that were found in defendant Mora's house three weeks after the crimes were admitted against him at trial.[8] (*Id.* at p. 1372.) The writing referred to Mora as the author of the lyrics by his first name "Franky" and his gang moniker "Vamp," to his specific gang, "Southside," and to his part-time employment as a disc jockey. (*Ibid.*) A gang expert interpreted the lyrics. (*Id.* at pp. 1367, 1372.) The lyrics demonstrated Mora's membership in the Southside gang, his loyalty to it, his familiarity with gang culture, and, inferentially, his motive and intent on the day of the killing. (*Id.* at p. 1373.) The appellate court affirmed the trial court's determination that the writing had been sufficiently authenticated. (*Ibid.*) In the present case there was no expert testimony offered interpreting the lyrics, and this was not a gang related case. Consequently, *Olquin* is not persuasive.

Appellant also relies on *Gibson*, *supra*, 90 Cal.App.4th 371. In *Gibson*, the police seized two manuscripts, one typewritten from defendant's hotel room, and a handwritten document from her home. Each was written in the first person and each described operating a prostitution enterprise. The lead detective testified that the manuscripts were consistent with a pimping and pandering operation. (*Id.* at p. 382.) The court determined that the documents were properly authenticated because they were found in the defendant's home or hotel room, referred to her established alias and spoke extensively about her profession, that of being a

[8] Appellant contends the lyrics were admitted against both defendant's but this is incorrect. (31 Cal.App.4th at p. 1372.)

madam, for which she was being prosecuted. (*Id.* at p. at 383.) As in *Olguin*, expert testimony was offered to interpret the content or meaning of the writings. (*Id.* at pp. 379, 383.) In appellant's case, there was no evidence that Taylor went by the alias "Papa," and there was no connection between the gang activity described in the writing and the case being tried. There was no reference to Richardson or Wilson. Appellant's contention otherwise is speculation that the trial court rightly rejected.

Appellant argues that the writing was admissible under Evidence Code section 1220 as a statement of a party, Taylor, to prove consciousness of guilt that he, not appellant, shot Richardson and Wilson. (AOB at 57-58.) In so arguing appellant puts the cart before the horse. Appellant had to first authenticate the document before it could be admitted as a statement of a party. (Evid. Code, § 1401.) Appellant failed to establish that the writing constituted a statement by Taylor.

Appellant contends that the document was relevant. (AOB at p. 58.) In doing so, he compares the lyrics in this case to evidence of a bag used in a robbery (*People v. Freeman* (1994) 8 Cal.4th 450 (*Freeman*)), and to a weapon, an axe handle, that an expert testified could have been used to cause the injuries to the victim (*People v. De La Plane* (1979) 88 Cal.App.3d 223 (*De La Plane*)). An instrument of a crime is not the same as a statement, and in the two cases cited there was evidence connecting each item with the crimes. In *Freeman*, two eye witnesses saw a bag being used in the robbery and such a bag was found in the defendant's car. (*Id.* at p. 490.) In *De La Plane,* an expert testified that the axe handle that was found in the defendant's bathroom could have cause the injuries the victim sustained. The lyric stating that L.T. was a hit man for the mob who was just doing his job and that it was nothing personal is not physical evidence regarding how the crime was committed. There was no evidence offered in the present case establishing that the shooting was gang related.

Appellant states that neither the prosecutor nor Taylor disagreed with his interpretation of the lyrics. (AOB at 60.) This assertion is irrelevant since appellant was the proponent of the evidence and he failed to authenticate it. Moreover, the assertion misstates the record. The prosecutor took no position at all, therefore, he neither agreed nor disagreed with the appellant's purported interpretation of the lyrics. (8 RT 1873.) Taylor objected to the admission of the lyrics and questioned appellant's interpretation, pointing out that no expert in rap music had interpreted the document and that appellant's interpretation was pure speculation during which he freely "filled in the gaps." (8 RT 1870-1872.)

E. Prejudice Standard

The claim that evidence was wrongly excluded is reviewed under the prejudice standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Bacon, supra*, 50 Cal.4th at p. 1104, fn. 4; see Evid. Code, § 354.) That standard asks, is it reasonably probable that a result more favorable to the party challenging the ruling would have resulted from the admission of the evidence.

It is not reasonably probable that appellant would have obtained a more favorable result from the admission of the document in this case, and there was no miscarriage of justice because of the document's exclusion. The document was largely illegible and meaningless, its content did not identify any of the parties in the case, or any facts related to the case. It is not reasonably probable that the jury would have used the document in any way, certainly not as evidence creating a reasonable doubt as to appellant's guilt, especially in light of the fact that Richardson testified that it was appellant, and appellant alone, who shot him.

Appellant also contends that his state and federal constitutional rights to a fair trial were violated as a result of the exclusion of the proffered evidence. Generally violations of garden variety state evidentiary rules do

not rise to the level of federal constitutional error. (*People v. Benavides* (2005) 35 Cal.4th 69, 91.) The trial court's ruling did not implicate appellant's constitutional right to a fair trial and this claim should be denied.

III. THE TRIAL COURT PROPERLY ADMITTED TAYLOR'S LETTER AND EXCLUDED APPELLANT'S LETTER.

Appellant contends that during his case in chief, the trial court erroneously admitted Taylor's letter to Tino Yarborough implicating appellant in the shootings. (AOB at 76.) Appellant also contends that the trial court erroneously excluded appellant's letter to Larry Rhodes denying his involvement in the shootings. (AOB at 93.) Neither contention has merit. The trial court properly admitted Taylor's letter pursuant to Evidence Code section 356, the statutory codification of the common law "rule of completeness," after Yarborough testified that Taylor's had threatened him in the letter. Appellant's letter, on the other hand, was inadmissible self-serving hearsay to which no exception applied and the trial court properly excluded it.

A. Background

1. Yarborough's testimony

Appellant's teen-age nephew, Yarborough, was a defense witness.[9] (12 RT 3112.) Yarborough's testimony supported appellant's account of events at appellant's sister's house the night of the shootings. (12 RT 3112-3119, 3176-3177.) Appellant awakened Yarborough by tapping on his window at one in the morning,[10] and Taylor arrived at the house 45 minutes

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[9] Yarborough is also related to Taylor. (12 RT 3112.)

[10] During the prosecutor's cross-examination, after he suggested that Yarborough could have been an alibi witness for appellant based on Yarborough's testimony that appellant had arrived at 1:00 a.m.,

(continued...)

later. (12 RT 3112-3114, 3135.) Yarborough testified that Taylor had a brown plastic garbage bag. (12 RT 3115-3116.) Yarborough watched appellant and Taylor "tussle" on the front lawn, and he saw Taylor trying to give appellant cash that appellant slapped out of Taylor's hand. (12 RT 3115-3117.) According to Yarborough, appellant and Taylor picked up the money and Taylor put it in the plastic bag. (12 RT 3116.) The "tussling" ended after a few minutes and appellant went inside the house. (12 RT 3117, 3119.)

By this time Yarborough had come outside. (12 RT 3117-3118.) Yarborough had his Mossberg pistol grip shotgun and Taylor had his .45. (12 RT 3115-3116, 3118.) Yarborough and Taylor stood on the front porch talking. Before Taylor left, Yarborough loaned Taylor his car and his cell phone. (12 RT 3119-3120.) Yarborough went back to bed and appellant spent the night. (12 RT 3120-3121.) Yarborough's car was returned to him three days later. (12 RT 3120.)

2. Appellant's testimony

Appellant testified that Taylor drove him to his sister's house after the shootings.[11] (13 RT 3401.) When they exited the car, appellant struck Taylor in the face. (13 RT 3401.) Appellant told Taylor to leave and he did. (13 RT 3401.) Appellant tapped on Yarborough's window and Yarborough let appellant into the house. (13 RT 3402.) Taylor returned between 35 and 40 minutes later and tried to persuade appellant to accept some money from the robbery, but appellant refused. (13 RT 3403-3406.)

(...continued)
Yarborough, on redirect, changed his testimony and said that appellant could have arrived at half past one. (12 RT 3164, 3167.)

[11] Contrary to appellant's tried testimony, appellant's opening brief asserts that he and Taylor came to the house separately. (AOB at p. 78.)

According to appellant, Taylor was not armed. (13 RT 3405.) After Taylor left, appellant collected the money off the ground. (13 RT 3407.)

3. Taylor's letter to Yarborough

Yarborough testified on direct examination that he had been threatened by Taylor in a letter that had been slid under his cell door the night before he testified. (12 RT 3121.) Appellant's counsel asked:

> Q. Have you received any threats from Mr. Latroy Taylor about this case?
>
> A. Somewhat.
>
> Q. Can you explain?
>
> A. I have a letter right here.[12]
>
> Mr. Agbayani [Taylor's counsel]: I'm going to object.
>
> Mr. Panerio [appellant's counsel]: Did Mr. Taylor give you that letter?
>
> The Witness [Yarborough]: Yes. I'm in the hole right now, and a trustee slid it under my door.
>
> Mr. Agbayani: I'm going to object to that. It's nonresponsive also.
>
> The question is if Mr. Taylor gave him something.
>
> The Court: All right. Sustained. The jury is admonished to disregard that last answer.
>
> Mr. Panerio: Have you received any personal threats from Mr. Latroy Taylor?
>
> A. Personal? What do you mean by personal?
>
> Q. Has he said anything to you?
>
> A. Not to me personally.
>
> Q. Are you saying the only thing that's happened is somebody slid something under your cell door?
>
> A. That and at night he talked.
>
> Mr. Agbayani: I'm going to object. This is calling for hearsay.
>
> The Court: The question is whether Mr. Taylor said anything to you himself. And the answer I take it is no; is that correct?
>
> The Witness: Yes.
>
> The Court: All right. Next question.

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[12] At this point Yarborough took the letter out of his pocket (12 RT 3153.)

(12 RT 3121-3122.) The direct examination concluded with Yarborough saying that he had not been threatened or promised anything in exchange for his testimony. (12 RT 3123.)

The prosecutor cross-examined Yarborough next. He asked nothing about the letter or the threat. (12 RT 3123-3130.) Taylor's cross-examination followed, but a break was taken in the middle of it. (12 RT 3142-3143.) Taylor's counsel had not asked any questions about the letter or any threat at that point. (12 RT 3130-3142.)

When the jury left the courtroom, the prosecutor took the letter from Yarborough. (12 RT 3142-3143.) Only appellant's counsel had seen the letter at that point, (12 RT 3142-3143, 3148-3149.) Taylor objected because the letter did not contain a threat and Yarborough's testimony created the prejudicial impression that it did. (12 RT 3146-3148.) The prosecutor agreed and added that the letter showed that Yarborough is bias in appellant's favor. (12 RT 3150.) The trial court concurred with both representations and asked Taylor what he wanted to do. (12 RT 3149, 3151-3152.) Because he did not want the jury to think he was hiding something, Taylor's counsel opted to have the letter admitted instead of having the jury admonished. (12 RT 3149-3150.)

Appellant's counsel, however, refused to introduce the letter himself. (12 RT 3151.) He argued that the only relevant part of the letter was the last sentence, but the trial court ruled under Evidence Code section 356 that the entire letter was admissible. (12 RT 3151-3152.)

When Taylor's cross-examination of Yarborough resumed, Yarborough agreed that Taylor's letter denied responsibility for the shootings and blamed appellant. (12 RT 3154-3155.) Yarborough also agreed that in the letter, Taylor was urging Yarborough to testify truthfully. (12 RT 3155.) Yarborough's testimony about whether he considered the

letter to be a threat became more ambiguous upon further cross-examination as follows:

> Q. Okay.
> Did you -- so, going back to this note for a minute, the threat to you is if you don't tell the truth, something might happen to you?
>
> A. Nah. Threat to me is, I feel sorry for you. I mean, it wasn't not really necessary a threat, but, I mean, if you want to take it as a threat, then I guess -- you know, I mean.
>
> Q. Okay.
>
> A. I mean, you know. I mean, you take it how you wanna take it, "I'll feel sorry for you," you know. If I said that to you, how would you take it? "I'll feel sorry for you," how would you take it?
>
> Q. Well, if I was telling the truth -- is that how you took it, that if you didn't tell the truth –
>
> A. I'm telling the truth. So, his definition of the truth -- I don't know what his definition of the truth is, his side of story, you know.
>
> Q. Okay. Are you getting anything for testifying?
>
> A. Not getting nuthing. I didn't volunteer for this. Somebody came and -- you know, came and asked me would I come up here. I said yeah, I don't care. I'm just telling the truth, so ...
>
> Q. Okay.

(12 RT 3158.) The letter was admitted into evidence and Yarborough read it to the jury. (12 RT 3153; 2 CT 494.) The letter stated:

> Real Talk
>
> Boy they wasn't lying when they said family will be the first one to get ya. Little cuzzo. You know your uncle did that bullshit. He is trying to blame me for something I didn't do. Real talk on my kids when you got into it -- when you got into it out there, who was there for you? Me. I gave you heats and everything. I was supposed to be at home two and a half years ago.

> If Angelo was my real cousin -- if Angelo was my real cousin, Rick ain't saying I did it. So why is Angelo saying I did? Cold nigga -- cold nigga, don't hop on that stand lying cuzzo. I got that Mexican chunky coming to court saying what you told him -- what you told him. I know you're trying to help your uncle, but you're fucking your cousin at the same time.
>
> I love you little nigga, but don't go up there lying. If you do, I'll feel sorry for you little cousin. Real talk, love you little cuzzo.

(12 RT 3165.)

Over Taylor's objection, appellant requested and the trial court gave a limiting instruction. (14 RT 3734-3737.) Using a modified version of CALJIC No. 2.09, the trial court instructed the jury as follows:

> Certain additional evidence was admitted for a limited purpose. Evidence of the contents of the letter produced in court by the witness Tina [*sic*] Yarborough was not admitted for the truth of the matters stated in the letter, but only on the question of the truthfulness of Mr. Yarborough's testimony that the letter did or did not contain a threat. Do not consider this evidence for any purpose except the limited purpose for which it was admitted.

(15 RT 3950.)

4. Appellant's letter to Larry Rhodes

Appellant wrote and delivered a letter to Larry Rhodes while they were both incarcerated at Deuel Vocational Institution. Rhodes showed the letter to Detective Anderson, but would not let him copy it or take it with him. (14 RT 3700-3701.) At trial, Rhodes said he no longer had the letter, and claimed that appellant had not actually made the statement he attributed to him in the letter. (14 RT 3579-3580, 3585.) Rhodes also said that he lied to Detective Anderson because he was angry with appellant. (14 RT 3582, 3584-3486.) Appellant sought to introduce the content of the letter by asking Detective Anderson to recall what it had said. (14 RT 3705.) The trial court, ruled that Detective Anderson's testimony was inadmissible

because appellant was attempting to introduce his own self-serving exculpatory hearsay statement. (14 RT 3705-3706.) Appellant sought to characterize the letter as an admission, but the trial court disagreed. (14 RT 3705.) The trial court also disagreed with appellant's argument that the letter was admissible under Evidence Code section 356 based on the premise that it put into context appellant's statement to Rhodes that he had shot Richardson's "black ass." (14 RT 3700-3701.) The trial court sustained the prosecutor's hearsay objections as well as Taylor's objection that appellant had not produced the original letter. (14 RT 3706.)

B. Standard of Review

If part of a statement has been introduced into evidence, other portions of the same statement are admissible, even if they are self-serving, so long as they "have some bearing upon, or connection with," the statement admitted into evidence. (*People v. Arias* (1996) 13 Cal.4th 92, 156 (*Arias*).) Evidence Code section 356 provides:

> Where 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; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

The purpose of Evidence Code section 356 "is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed." (*People v. Pearson* (2013) 56 Cal.4th 393, 460, quoting *Arias*, at p. 156.) "In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. 'In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the

declarant in the course of such conversation or correspondence, provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence . . . .' " (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1174, quoting *Rosenberg v. Wittenborn* (1960) 178 Cal.App.2d 846, 852.)

A trial court's evidentiary rulings are reviewed for abuse of discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1244, 1273, fn. 21.)

C. The Trial Court's Evidentiary Rulings Were Correct

Taylor's letter to Yarborough was admissible to counter the erroneous impression created by Yarborough's trial testimony that he had received a written threat from Taylor, and the letter was admitted for this sole purpose. The letter allegedly written by appellant and sent to Rhodes was a self-serving hearsay statement the trial court properly excluded from the evidence at trial.

1. Taylor's Letter to Yarborough

Appellant introduced a portion of Taylor's letter through Yarborough in which Taylor had supposedly threatened Yarborough. Yarborough's testimony created the misleading impression that Taylor had indeed threatened Yarborough. But when the entire letter was considered, the characterization of it as a threat became more ambiguous and subject to interpretation. Consequently, the entire letter was admissible under Evidence Code section 356. Appellant sought to make use of the writing, thus Taylor was able to place the entire writing before the jury for the limited purpose of placing the alleged threat in context. Further, the trial court gave a limiting instruction informing the jury that the contents of the letter could be considered only for the purpose of assessing Yarborough's veracity.

Appellant also makes a belated *Aranda-Bruton*[13] error claim with respect to Taylor's letter. (AOB at 90-93.) *Aranda* and *Bruton* stand for the proposition that a "nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given." (*People v. Jennings* (2010) 50 Cal.4th 616, 652 quoting *People v. Anderson* (1987) 43 Cal.3d 1104, 1120–1121.) Assuming that appellant did not invite any such error by attempting to introduce the letter, appellant forfeited any such claim by failing to make it in the trial court. (*People v. Hill* (1992) 3 Cal.4th 959, 994-995, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046.) In any event, the letter was offered solely for the limited non-hearsay purpose of correcting Yarborough's misleading statement, and to impeach him, and as such its admission does not violate *Aranda* or *Bruton*. (*People v. Vines* (2011) 51 Cal.4th 830, 862.)

2. Appellant's Letter to Larry Rhodes

Appellant's second argument is that the trial court erred when it refused to allow him to introduce testimony concerning a note he gave to Larry Rhodes in prison. (AOB at 93-105.) Unable to produce the actual note, appellant sought to have Detective Anderson testify to its contents. (14 RT 3705.) Rhodes had shown a note to Detective Anderson, but had refused to give it to him or allow him to make a copy. (14 RT 3700-3701.) The trial court denied appellant's request to have Detective Anderson testify to his recollection of what the note said. (14 RT 3704-3706.) That ruling was proper. The note was hearsay and Detective Anderson's

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[13] *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*) and *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).

testimony about the content of the note would have been a second level of hearsay.

Appellant argues that testimony about the note was admissible under Evidence Code section 356. He claims that the note was part of the statement he made to Rhodes. However, the statement appellant made to Rhodes was, "Yeah, I shot his black ass," and appellant made that statement to Rhodes in person. (14 RT 3671.) Appellant's claim is not supported by the record. There is no evidence in the record regarding the contents of the note, only appellant's counsel's representation that the note contained appellant's denial of having shot Richardson. (14 RT 3705.) There is nothing in the record to support appellant's claim that his statement that he shot Richardson was part of a continuing conversation that was memorialized in the note. Thus, the trial court's ruling was proper.

D. Prejudice

Appellant claims his constitutional rights to due process, to present a defense, and to a reliable verdict were violated by the trial court's evidentiary rulings. (AOB at 104-105.) Appellant's attempt to inflate garden-variety evidentiary questions into constitutional ones is unpersuasive. The application of ordinary rules of evidence does not impermissibly infringe on a defendant's right to present a defense. (*People v. Boyette* (2002) 29 Cal.4th 381, 427.) If the trial court had completely excluded evidence of appellant's defense, theoretically this could rise to the level of constitutional harm, but excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. (*Ibid.*) If the trial court erred, it was an error of law merely; there was no refusal to allow appellant to present a defense, but only a rejection of some evidence concerning the defense. (*Ibid.*) Accordingly, the proper standard of review is that announced in *People v. Watson, supra, 46* Cal.2d at p. 836 and not the stricter beyond-a-reasonable-doubt standard reserved

for errors of constitutional dimension, *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*)).

Even assuming, arguendo, that the trial court erred by admitting the entire Yarborough letter under Evidence Code section 356, it is not reasonably probable that a result more favorable to appellant would have been reached in the absence of the error. The trial court instructed the jury that Taylor's letter to Yarborough was not admitted for the truth of the matters stated in the letter, but only for the limited purpose of assessing the truthfulness of Yarborough's testimony about the threat. (15 RT 3950.) Juries are presumed to follow the trial court's instructions. (*People v. Ervine* (2009) 47 Cal.4th 745, 776.)

Even if, arguendo, the admission of Taylor's statement in the Yarborough letter was constitutional error, any such error was harmless beyond a reasonable doubt. Errors in admitting out of court statements of a non-testifying codefendant are subject to the harmless error analysis under *Chapman*. (*People v. Jennings*, *supra*, 50 Cal.4th at p. 652 [*Aranda–Bruton* error is subject to harmless error analysis under *Chapman*].) In determining whether such error was harmless, the court looks to the entire record as a whole and must look to the remaining evidence to see whether there was "overwhelming" evidence of a defendant's guilt, despite the erroneous admission of a codefendant's confession. (*Id.* at p. 655.) "If the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless." (*People v. Anderson*, *supra*, 43 Cal.3d at p. 1129.)

Richardson testified that appellant was the shooter, not Taylor. Richardson's explanation about why he had originally identified Taylor was plausible. There was no evidence that this was a gang crime. The evidence at trial proved that the crimes were committed solely to

accomplish a robbery. Appellant was not a credible witness. He was cross-examined on many aspects of his inconsistent and implausible account of events that night that simply made no sense. Thus, even if the court erred by admitting the entire Yarborough letter under Evidence code section 356 for the limited purpose of allowing the jury to assess Yarborough's truthfulness, any such error was harmless beyond a reasonable doubt. Likewise, appellant's written statement to Rhodes allegedly denying his involvement in the shootings would not have substantially affected the jury's verdict. The jury already knew that appellant was denying he was involved in the crimes. The admission of a letter in which appellant denied his involvement in the shootings, simply would not have mattered.

IV. THE ADMISSION OF REBUTTAL GANG EVIDENCE DID NOT DENY APPELLANT A FAIR TRIAL

Appellant contends that Taylor's cross-examination of him about appellant's gang membership violated appellant's right to a fair trial. (AOB at 106.) Appellant opened the door on this subject, testifying on direct examination that he was afraid of Taylor because of Taylor's gang connections, and when he claimed that he had been threatened by Taylor's gang. Taylor's cross-examination was proper rebuttal because appellant's testimony created the prejudicial inference that Taylor was more likely to have been the shooter because of his gang connections.

A. Background

Appellant's defense was that Taylor acted alone and that appellant was completely surprised by Taylor's actions. (13 RT 3393-3397.) Appellant claimed he was angry with Taylor afterward, and demonstrated it by beating up Taylor several times, once on Richardson's front lawn and again when they arrived at appellant's sister's house. (13 RT 3398-3399, 3401.) As a result of these beatings, appellant said initially that Taylor was afraid of him. (13 RT 3399, 3401, 3405.)

At the end of his direct testimony, appellant testified that he never contacted the police to report the shootings and left California because he had been threatened by Taylor's fellow Sutter Street gang members. (13 RT 3410-3411.)

When the prosecutor cross-examined appellant, he testified that as he and Taylor drove away from Richardson's house, they argued and appellant became fearful of Taylor because of Taylor's gang connections. (13 RT 3458.) The following examination occurred:

> Q. When you were arguing with Latroy in the car, did you feel threatened by him?
>
> A. Somewhat and somewhat I didn't.
>
> Q. Well, what made you scared of him?
>
> A. Well, he threatened me with his Sutter Street gangster boys, whatever you call them.
>
> Q. I'm talking about in the car?
>
> A. In the car, yeah. In the car too.
>
> Q. In the car he said, I'll sick my boys on you?
>
> A. Yes. Well, he didn't say sick them on me. He said he was going to holler at them. He was saying just be cool.
>
> He wasn't saying direct shut up, be quiet or I'll have my boys get you. But in words he was saying I'm going to talk to my boys. Just be cool. Like that.
>
> Me and him know what time it was about, that he would tell my boys if I don't be cool.

(13 RT 3458.) Appellant then claimed that several days later he was actually threatened by Taylor's gang, and that was why he went to Seattle. (13 RT 3459, 3468.) He then denied feeling fear in the car on the way to his sister's house and said it was when Taylor came to his sister's house the second time that he became fearful of Taylor. (13 RT 3459-3460.) When he was interviewed in Seattle by Detective Anderson, appellant said that, at

some point during the evening of the crimes, Taylor had pulled out a gun and, had appellant not turned around, Taylor would have shot him.[14] (13 RT 3460-3461.) He also reiterated that he did not go to the police because Taylor would probably figure out it was him and he was afraid of Taylor's gang friends. (13 RT 3466.)

During Taylor's cross-examination of appellant, appellant confirmed that he "beat on" Taylor in the car when they were driving away from the shootings and again when they first arrived at his sister's house. (13 RT 3502-3504; 14 RT 3525.) He also confirmed that he was afraid of Taylor's Sutter Street gangsters. (14 RT 3538-3539.) In addition, he was asked about his own gang affiliations.

> Q. Now you were a member of the Black Guerilla Family right?
> A. About 20 some years ago, right.
> [Objection.]
> Q. You were a gang member at one point, but you weren't any longer, so that's why you were scared of these kids?
> A. That's not the reason why I was scared of them. I was scared of them because of what they told me.
> Q. They told you they wanted to talk to – they -- somebody told you the Sutter Street Boys wanted to talk to you.
> A. Right. Right.
> Q. Was it one of the Sutter Street Boys that even said that?
> A. I don't know if he was a Sutter Street guy.

(14 RT 3540-3542.)

In closing argument, Taylor pointed out that there was no evidence that the gang he was alleged to be a part of even existed. (15 RT 3853.) There was no mention of appellant's gang affiliations during closing arguments.

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[14] It is not clear from the record if this happened in the car or at appellant's sister's house.

B. Gang Evidence Is Admissible When Relevant

Gang evidence has long been admissible at trial when such evidence is relevant to the case. (*People v. Gonzales* (2006) 38 Cal.4th 932, 944.) It is otherwise inadmissible because of its highly inflammatory nature. (*People v. Cox* (1991) 53 Cal.3d 618, 660.) The prejudicial effect of inadmissible gang membership evidence lies in its tendency to suggest that a defendant is the type of person predisposed to commit violent acts of the type engaged in by the gang to which he belongs. (See *People v. Cardenas* (1982) 31 Cal.3d 897, 905 (plur. opn.).) When a defendant introduces evidence of gang involvement in the case, he opens the door to the admission of rebuttal evidence. (See *People v. Jordan* (2003) 108 Cal.App.4th 349, 365-366 (*Jordon*).)

In *Jordan*, the defendant was charged with possession of cocaine base for sale. The trial court initially ruled that the prosecutor would not be allowed to introduce evidence that the defendant was a gang member. (*Jordan, supra*, 108 Cal.App.4th at p. 365.) However, the defendant then presented evidence that others who were gang members had sold drugs in that location. (*Ibid.*) The trial court ruled that the defendant had opened the door for the prosecutor to present rebuttal evidence that the defendant was a gang member. (*Ibid.*) The appellate court affirmed the trial court's ruling noting that the defendant's defense had opened the door by seeking to show that other gang members were responsible. (*Id.* at pp. 365-366.)

The scope of rebuttal evidence must be specific and evidence presented or argued in rebuttal must relate directly to a particular incident or character trait defendant has offered. (*People v. Jones* (2003) 30 Cal.4th 1084, 1121-1122.) Trial court evidentiary rulings are reviewed for abuse of discretion. (*People v. Prince*, *supra*, 40 Cal.4th at pp. 1244, 1273, fn. 21.)

C. After Appellant Introduced Gang Evidence Against Taylor It Was Proper for Taylor to Question Appellant About His Own Gang Involvement

Appellant was the first witness to introduce any testimony about gangs. He testified that Taylor was a gangster, and that, because Taylor and Taylor's gang affiliates had threatened him, he had not called the police and had left town. Under these circumstances, the trial court concluded that appellant had opened the door. (See *Jordan, supra,* 108 Cal.App.4th at pp. 365-366.) Thus, it was proper for Taylor to offer, and for the trial court to allow, rebuttal evidence that appellant too had ties to gangs. The scope of the questioning was limited to this precise issue. No further background evidence on appellant's gang or its criminal activities was elicited. There is no evidence in the record from which the jury could infer that appellant's gang was any worse than Taylor's. Taylor's rebuttal evidence merely lessened the prejudicial impact of appellant's testimony. Appellant's right to a fair trial was not violated by the admission of the evidence of his own gang affiliations.

D. Prejudice Standard

Appellant opened the door to the admission of gang evidence when he testified about Taylor's gang status. In any event, the questioning of appellant regarding his own prior gang involvement was brief. On this record, it is not reasonably probable that the absence of the evidence would have garnered a more favorable result for appellant. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1093; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

V. THERE IS NO REQUIREMENT THAT THE INFORMATION ALLEGE THE THEORY ON WHICH THE MURDER CHARGE IS BASED

Appellant contends that the jury was improperly instructed on first degree murder because only second degree murder was charged in the information. (AOB at 114.) The information did not specify the degree of murder charged, and it was not required to do so in order for the trial court to instruct the jury on the two theories of first degree murder proven during the trial.

A. Background

The information charged appellant with murder in count one under section 187. It also alleged the special circumstance that the murder was committed during a robbery (§ 211), that is, felony murder. (1 CT 183-184.) The information did not specify the degree of murder charged. The only degree charged in the information was that relating to the first degree residential robbery charge. (1 CT 187.)

During review of the jury instructions, the prosecutor stated he was proceeding on both premeditation and felony murder theories as the basis for the first degree murder of Wilson. (14 RT 3633, 3658.) He argued both theories in closing argument. (14 RT 3762, 3767-3771, 3774-3776, 3787, 3790, 3794.) He told the jury to fill out the verdict form and to specify the degree under either a theory of premeditation or felony murder. (15 RT 3931.) The trial court instructed the jury on both theories of first degree murder as well as second degree murder resulting from the absence of premeditation. (15 RT 3956-3957, 3958-3959.)

B. Forfeiture of Issue

Appellant does not assert that he objected to any deficiency in the information, the jury instructions, or the verdict forms in the trial court and respondent has found no such objection. Because appellant failed to object

or raise this claim in the trial court, he has forfeited it on appeal. (*People v. Maury* (2003) 30 Cal.4th 342, 427.)

C. The Information Need Not Set Forth the Degree of Murder Charged

An accusatory pleading charging murder does not need to specify the degree or the manner in which the murder was committed. (*People v. Jones*, *supra*, 57 Cal.4th at p. 968 (*Jones*).) It is also unnecessary to plead that the charged murder was willful, deliberate, and premeditated. (*Ibid.*) When the accusatory pleading alleges murder, the evidence adduced at the preliminary hearing is sufficient to put the defendant on notice of the prosecution's theories regarding the manner and degree of the killing. (*Ibid.*) An accusatory pleading also does not need to specify the statutory section under which the accused is being charged. (*Ibid.*) The charging document is also sufficient if it states the offense in the language of the statute. (*Ibid.*) An accusatory pleading that charges murder does not need to specify the degree or recite the language of both sections 187 and 189. (*People v. Contreras* (2013) 58 Cal.4th 123, 147-148 (*Contreras*); *People v. Hawthorne* (2009) 46 Cal.4th 67, 89, overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643.)

D. Appellant Was Properly Charged

Appellant contends that his murder conviction must be reversed because the language in the information was inadequate to charge him with first degree murder under a theory of either premeditation and deliberation or felony murder. (AOB at 114.) Because the charging language was inadequate, he claims, the trial court should not have instructed the jury on first degree murder. He also argues his trial for first degree murder violated his constitutional right to due process and to a fair trial and reliable penalty determination under the state and federal Constitutions. Appellant is incorrect. 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. Witt* (1915) 170 Cal. 104, 107–108 (*Witt*).) Thus, appellant's underlying premise that the information charged him only with second degree murder is incorrect. (*People v. Zamudio* (2008) 43 Cal.4th 327, 362; *People v. Harris* (2008) 43 Cal.4th 1269, 1294–1295; *People v. Wilson* (2008) 43 Cal.4th 1, 21.)

Appellant first contends that the information's failure to include any mention of willfulness, premeditation or deliberation means he was charged with second degree murder only. He is mistaken. The information was adequate to charge appellant with murder in the first degree under both a theory of willful, premeditated and deliberate killing and felony murder because the degree and theory were not required to be alleged in the information. (*Contreras*, *supra*, 58 Cal.4th at pp. 147-148; *Jones*, *supra*, 57 Cal.4th at p. 968.)

Appellant argues the information, by referencing section 187 but not section 189, failed to adequately charge first degree murder on a felony murder theory. (AOB at 116-117.) Although he concedes that this Court rejected this contention in *Witt,* holding that "it is sufficient to charge the offense of murder in the language of the statute defining it," and that such charging language "includes both degrees of murder" (*id.*, at pp. 107–108), he argues *Witt*'s rationale has been "completely undermined" by this Court's reasoning in *People v. Dillon* (1983) 34 Cal.3d 441, 472.) As appellant concedes, this Court has rejected his argument and has reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, and has rejected the argument that felony murder and murder with malice are separate crimes that must be pleaded separately. (*People v. Hughes* (2002) 27 Cal.4th 287, 369.) Appellant presents no persuasive reason to deviate from this long established rule and his claim should be rejected.

Appellant also argues that the foregoing principles and authorities have been abrogated by *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). (AOB at 119.) The sole support for his claim is a statement in *Apprendi* that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Id.* at p. 476; AOB at 119.) The "fact" appellant claims was fatally omitted from murder as charged in the information here was his premeditation, deliberation and willfulness and the commission of the serious felony (robbery) on which the first degree felony-murder verdict was based. (AOB at 119-120.)

Contrary to what appellant implies, the *Apprendi* court expressly declined to address the constitutional implications, if any, of omitting sentencing factors from accusatory pleadings. (*Apprendi*, *supra*, 530 U.S. 466, 477, fn. 3 [noting that no "indictment question" was properly presented or actually addressed in the case].) Appellant's reliance on *Apprendi* therefore is misplaced. (*Contreras*, *supra*, 58 Cal.4th at pp.148-149.)

VI. THE TRIAL COURT WAS NOT REQUIRED TO GIVE A UNANIMITY INSTRUCTION ON THE THEORY OF FIRST DEGREE MURDER

Appellant contends that the trial court erred in failing to instruct the jury that it must agree unanimously on the theory of first degree murder, i.e. premeditation or felony murder. Appellant acknowledges that this Court has held otherwise. Nevertheless, he maintains that this Court should reconsider its long standing precedent. (AOB at 121.) Appellant provides no persuasive reason for this Court to do so.

A. Background

The trial court instructed the jury on the two theories of first degree murder that the evidence at trial supported-- willful, deliberate and

premeditated murder and felony murder. In doing so the court used CALJIC Nos. 8.20 and 8.21. (3 CT 627-629; 15 RT 3956-3957.)

B. Forfeiture of Issue

Appellant did not object to the trial court's use of these instructions nor did he claim in the trial court that a unanimity instruction should be given on the theory of first degree murder. Because appellant failed to object in the trial court, his claim is forfeited on appeal. (*People v. Clark* (2011) 52 Cal.4th 856, 957.)

C. Standard of Review

So long as each juror finds beyond a reasonable doubt that a defendant is guilty of murder as that offense is defined by statute, the jury need not decide unanimously under what theory he is guilty, that is whether by a theory of premediation and deliberation or felony murder. (*People v. Rogers* (2013) 57 Cal.4th 296, 339.) This is true because malice murder and felony murder are two forms of the single statutory offense of murder. (*Contreras*, *supra*, 58 Cal.4th at p. 147.) The felony-murder rule "simply describes a different form of malice under section 188. 'The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to human life.' " (*People v. Chun* (2009) 45 Cal.4th 1172, 1184, quoting *People v. Hansen* (1994) 9 Cal.4th 300, 308; *People v. Friend* (2009) 47 Cal.4th 1, 75–76.)

D. Unanimity on the Degree of Murder Is Not Required

Appellant acknowledges the many decisions of this Court that have rejected his contention. Nevertheless, he urges this Court to reconsider those decisions. He fails to provide a good reason for this Court to do so. Consequently, this Court should decline appellant's invitation. The trial

court was under no obligation to give a unanimity instruction on the theory of murder in this case, consequently there was no error.

VII. BOTH THE CIRCUMSTANCES AND IMPACT OF APPELLANT'S CRIMES AGAINST LYNETTE DENNEY WERE ADMISSIBLE AT THE PENALTY PHASE

Appellant contends that the trial court erred in admitting victim impact evidence concerning appellant's prior conviction for attempted murder of Lynette Denney[15] during the penalty phase. (AOB at 132.) Appellant is incorrect. The evidence was relevant and admissible under section 190.3 subpart (b), so called "factor (b)" evidence.

A. Background

During the penalty phase, the prosecutor intended to have Lynette, who was in a vegetative state, brought into the courtroom on a gurney. (16 RT 4094-4096.) The defense objected arguing that presenting Lynette to the jury in that way was overly inflammatory and inadmissible victim impact evidence not related to the present crime. (15 RT 4077; 16 RT 4097-4098.) The prosecutor responded that Lynette was the victim of appellant's prior criminal activity and that he was required to prove that crime beyond a reasonable doubt. (16 RT 4095-4096.) The trial court found that because Lynette could not testify herself, there was no point in bringing her into the courtroom. (16 RT 4096-4098.) Instead, the trial court permitted Lynette's mother, Mrs. Joyce Denney, to describe the physical effects of appellant's prior violent crime on Lynette. (16 RT 4098-4103.) Mrs. Denney described how she learned that Lynette had been shot and described Lynette's physical condition after the shooting. (16 RT

[15] To differentiate Lynette from her mother, her first name is used hereafter.

4115-4116, 4120-4126.) Mrs. Denney's testimony encompassed seven pages of the reporter's transcript. (16 RT 4094-4096.)

The trial court, relying upon this Court's holding in *People v. Edwards* (1991) 54 Cal.3d 787, 835, allowed evidence of the direct impact of appellant's crime on Lynette. (16 RT 4089-4099, 4101-4102.) Because Lynette herself could not testify, her mother did. In the course of that testimony some evidence of the impact of appellant's crimes on the family members was admitted.

B. The Circumstances and Impact of Appellant's Prior Violent Criminal Activity Were Admissible in the Penalty Phase

In a capital case, the jury is permitted to consider evidence of a defendant's prior violent criminal activity during the penalty phase. (§ 190.3.) Section 190.3 provides, inter alia, that:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
>
> (b) 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.
>
> (c) The presence or absence of any prior felony conviction.

The circumstances surrounding the prior violent criminal activity are admissible whether or not a conviction was obtained. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1241; *People v. Demetrulias* (2006) 39 Cal.4th 1, 39.) Factor (b) evidence includes not only the existence of the criminal activity, but the pertinent circumstances surrounding it as well, including the results of the conduct and the impact on the victims. (*People v. Thornton* (2007) 41 Cal.4th 391, 464; *People v. Price* (1991) 1 Cal.4th 324, 479.)

While victim-impact evidence is generally admissible under California law as a circumstance of the crime under factor (a), "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*People v. Harris* (2005) 37 Cal.4th 310, 351, internal citations & quotations omitted.) "The federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair." (*People v. Hamilton* (2009) 45 Cal.4th 863, 927, citing *Payne v. Tennessee* (1991) 501 U.S. 808, 825.)

When reasonable steps are taken to assure a fair and impartial penalty trial, i.e., notice of evidence to be introduced, opportunity to confront available witnesses, and requirement of proof beyond a reasonable doubt, then the remoteness of prior violent conduct affects its weight, not its admissibility, in the penalty phase of a capital trial. (*People v. Huggins* (2006) 38 Cal.4th 175, 246.)

A trial court's rulings on the admissibility of evidence is reviewed for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113; *People v. Valdez* (2012) 55 Cal.4th 82, 170.)

C. Lynette's Condition and the Impact on Her Family Were Admissible

The trial court properly admitted under factor (b) testimony concerning the effect and impact of appellant's prior violent criminal assault on Lynette, including evidence concerning her present physical condition and needs as a result of appellant's attack. Evidence of appellant's assault on Lynette and the damage he caused was admissible under factor (b) to show appellant's character for violence. (*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 39; see *People v. Collins* (2010) 49 Cal.4th 175, 219.) The evidence was relevant and not unduly prejudicial. (See *People v. Booker* (2011) 51 Cal.4th 141, 188.)

The trial court properly admitted evidence regarding appellant's assault on Lynette and her present condition as a result of that assault. Even if the court erred by allowing testimony concerning Lynette's present condition, there is no possibility that evidence affected the verdict. (*People v. Lancaster* (2007) 41 Cal.4th 50, 94; *Chapman, supra*, 386 U.S. at p. 24.)

Appellant offers no unique fact or legal argument sufficient for this Court to reconsider its prior precedent, and his claim should be denied.

VIII. THE TRIAL COURT'S ADMISSION OF PENALTY PHASE EVIDENCE REFLECTING APPELLANT'S RELEASE ON PAROLE WAS PROPER

Appellant contends that his constitutional rights to due process and a fair trial were violated when evidence showing his periods of incarceration and periods of parole was admitted during the penalty phase. (AOB at 142.) The evidence was relevant because it showed the date when appellant was free, making it possible for him to commit additional acts of violence. In addition, the evidence was relevant rebuttal evidence establishing Gwen Taylor's bias.

A. Background

In 1981, appellant began serving an eleven year sentence for his assault with intent to commit murder on Lynette Denny. (3 CT 746, 750.) After serving five and a half years, he was released on parole in January 1987. (3 CT 751.) Within a few months, he violated parole and was returned to prison. (3 CT 752.) He was released again at the end of 1987. (3 CT 752.) Appellant was in and out of prison several times thereafter, until he was discharged in 1991. (3 CT 752-753.)

The prosecutor initially sought to introduce People's Exhibit 57 to prove up the prior prison term in connection with the Denny matter. (16 RT 4201; 3 CT 746.) At the conclusion of the defense penalty phase evidence, however, the prosecutor also argued that People's Exhibit 57,

was admissible to rebut Gwen Taylor's testimony and prove her bias in favor of appellant. (17 RT 4465-4468.) Exhibit 57 included a certified copy of appellant's conviction for assault with intent to commit murder on Denney. (3 CT 746-754; 16 RT 4296; 17 RT 4465.) The certified conviction was part of appellant's section 969(b) prison package, which also contained an annotated chronology of appellant's incarceration. (3 CT 750-753.) Appellant objected to the exhibit on relevance grounds stating that "there were notes about his parole in there." (17 RT 4465-4466.) The chronology did not contain the circumstances surrounding appellant's violation of parole. (3 CT 750-753.) The trial court confirmed that the exhibit established the history of appellant's incarceration, but found nothing "particularly prejudicial" in the 969(b) package. (17 RT 4465-4466.)

The prosecutor argued that the incarceration chronology established when appellant was free, which in turn provided insight into his relationship with Gwen Taylor, who had testified on appellant's behalf during the penalty phase. (17 RT 4466-4467.) By showing when appellant was incarcerated, the jury could deduce that Gwen Taylor had a romantic relationship with appellant when appellant was an adult and she was between the ages of 14 and 18 years old. (17 RT 4467.) The prosecutor argued that Gwen Taylor's reluctance to reveal the true nature of her relationship with appellant went to her credibility. (17 RT 4467-4468.) The trial court agreed and admitted the exhibit over defense objection for this limited purpose. (17 RT 4468-4469.)

B. Appellant Forfeited All Objections Except Relevance

Appellant contends on appeal that the trial court should have excluded the exhibit on three grounds: (1) because it was irrelevant; (2) because its prejudicial effect outweighed its probative value (Evid. Code, § 352); and, (3) because it was not evidence in support of a statutorily authorized

aggravating factor. (AOB at 144.) However, appellant's only objection at trial was relevance. (17 RT 4465-4466.) Appellant never claimed that the exhibit "created substantial danger of undue prejudice." (Evid. Code, § 352.) In fact, the trial court found that the exhibit did not contain "anything particularly prejudicial." (17 RT 4465-4466.) By failing to object on Evidence Code section 352 grounds, appellant has forfeited his right to complain on appeal on that basis. (*People v. Edwards* (2013) 57 Cal.4th 658, 709.) In addition, appellant never objected to the admission of the exhibit because it contained information that was not statutorily authorized as an aggravating factor, thus his claim of error on this ground is likewise forfeited on appeal. (*People v. Pearson*, *supra*, 56 Cal.4th at p. 416; *People v. McDowell* (2012) 54 Cal.4th 395, 440; *People v. Myles* (2012) 53 Cal.4th 1181, 1222, fn. 15 [claim that age was not a statutory aggravating factor forfeited].)

In any event, the claims are without merit.

C. Admission of Evidence Is Reviewed for Abuse of Discretion

Generally appellate courts apply the abuse of discretion standard in reviewing evidentiary rulings on the admissibility of evidence by the trial court. (*People v. Waidla* (2000) 22 Cal.4th 690, 717–718.) This includes appellate consideration of the relevance of evidence admitted or excluded by the trial court. (*Ibid.*) Evidence is relevant if it has any tendency in reason to prove a disputed material fact. (Evid. Code, § 210.)

In *People v. Martinez* (2003) 31 Cal.4th 673, 665-666, this Court found that evidence that a defendant violated the terms and conditions of his parole was admissible to rebut the testimony of a defense penalty phase witness.

D. The Trial Court Did Not Abuse Its Discretion in Admitting Evidence Showing When Appellant Was Released on Parole and When He Was Incarcerated

The trial court properly exercised its discretion to admit exhibit 57, including the "parole notes." The periods when appellant was in or out of prison custody were relevant to establishing the bias of Gwen Taylor. (17 RT 4504, 4524.) The periods when appellant was free were also relevant to show he had the opportunity to inflict violence upon Raven Lee and Loretta Beck. (17 RT 4492, 4504, 4529.) The evidence also contradicted his own testimony that his mother's drug use had a negative influence on him because appellant was incarcerated when she began using cocaine. (17 RT 4522.) The evidence was also admissible to contradict appellant's claim that his stepfather Lundy Perry was a negative influence because Perry's actions also occurred during periods of appellant's incarceration. (17 RT 4418, 4432, 4438, 4485, 4468-4469.) The evidence also put into perspective appellant's claim of being a devoted father because he was incarcerated until his daughter was 14 years old. (17 RT 4524.) Finally, the evidence established that appellant was out on parole during the time he committed theft from a person, for which he was convicted in 1992. (17 RT 4529.) The trial court's admission of exhibit 57 was not an abuse of discretion because the evidence contained therein was relevant and created "some reasonable evidentiary inferences, and was not overly prejudicial." (17 RT 4469.)

E. Appellant Was Not Prejudiced by Evidence Showing His Release on Parole

Petitioner claims his state and federal constitutional rights were violated by the admission of evidence of his parole violations because this evidence is not one of the listed aggravating factors under section 190.3. (AOB at 147-148.) Even if appellant had preserved this issue for appeal,

which he has not, the contention is without merit. The prosecutor said nothing about appellant's parole violations in his closing argument. Appellant's supposition that the jury was "concerned" about appellant's parole violations is purely speculation.

Appellant murdered a young mother, devoted daughter, sister and aunt, for no other reason than to prevent her from being a witness to his robbery She was a person with a future who was offered scholarships to college. Appellant was a violent and predatory thief; he had a history of preying on young woman for sex and threatening them with violence if they spoke. He beat at least two girl friends and was convicted for shooting into an inhabited dwelling. He had paralyzed at least two people, Denny and Richardson, by shooting them while intending to kill them. In light of the facts of the crime and aggravating evidence, even if the trial court erred, there is no reasonable possibility that the evidence affected the verdict. (*People v. Lancaster, supra*, 41 Cal.4th at p. 94; *Chapman, supra*, 386 U.S. at p. 24.)

IX. THE TRIAL COURT PROPERLY ADDRESSED THE MOPPINS OTHER CRIMES EVIDENCE AND APPELLANT SUFFERED NO PREJUDICE

Appellant contends that the trial court erred in refusing to grant his request for a *Phillips* hearing[16] before allowing the prosecutor to introduce evidence of appellant's violent criminal conduct involving Rita Marie Moppins. (AOB at 149-150.) Appellant never requested a *Phillips* hearing, thus his claim is forfeited. Even if not forfeited, it is without merit. Even if appellant's general request for an "offer of proof" could constitute a request for a *Phillips* hearing, the trial court's decision not to conduct such a

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[16] *People v. Phillips* (1985) 41 Cal.3d 29 (trial court may, but is not required to, conduct a preliminary examination of the prosecutor's evidence of other criminal activity to assess its sufficiency).

hearing was not error since a *Phillips* hearing is not required nor is admission of prior criminal violence evidence predicated on the results of such a hearing. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 225.) Any prejudice caused by Ms. Moppins's testimony was cured by the trial court's instruction to the jury to completely disregard her testimony. Given the totality of aggravating factors in this case any prejudice flowing from Moppins's testimony was harmless beyond a reasonable doubt.

A. Background

Rita Marie Moppins, formerly Rita Marie Brown, testified very briefly. (16 RT 4137-4138.) She testified that when she was a young girl, she was at a party with her stepbrother Robert Brown and stepsister Debra Brown. (16 RT4137.) Upon leaving the party, she was shot in the leg, which had to be amputated. (16 RT 4137.) After the bullet hit Rita, it struck her brother Robert, who was standing close to her. (16 RT 4138.) Unexpectedly, Rita testified that she did not know appellant, and she could recall nothing else about the incident. (16 RT 4138.)

The prosecutor had expected Moppins to testify that appellant was the person who fired the gun that resulted in the amputation of her leg. (16 RT 4299.) After Moppins failed to identify appellant as the shooter, the prosecutor attempted to have Debra Brown, Moppins's stepsister, who had attended the party with Moppins, provide that testimony.[17] (16 RT 4299.) Debra Brown, however, unexpectedly refused both the prosecutor's and family members' attempts to persuade her to testify. (16 RT 4299.) It was not until the "eleventh hour" that she refused. (16 RT 4302, 4306.)

As a result of the Moppins shooting, appellant had been charged with assault with a deadly weapon (§ 245), but pled to a misdemeanor

[17] Moppins's stepbrother was deceased and so could not supply this testimony. (16 RT 4299.)

brandishing (§ 417) and carrying a loaded weapon in public (§ 12031). (16 RT 4300, 4302-4303.) The misdemeanor records of that conviction had been destroyed after ten years. (16 RT 4302.) The trial court asked the prosecutor to check for court records on microfilm since the case was filed as a felony. (16 RT 4305.) The trial court also found that the prosecutor had offered Ms. Moppins's testimony in good faith. (16 RT 4305.)

The prosecutor reported that after additional investigation he was unable to find any court records of the conviction, though the conviction was mentioned in the probation report in the Denny case. (17 RT 4446.) The trial court agreed to strike Moppins's testimony and admonish the jury not to consider it.[18] (17 RT 4446, 1463.)

B. Forfeiture

Appellant never asked the trial court to conduct a *Phillips* hearing, therefore his right to complain that the trial court should have granted him one is not well taken. Appellant cites to volume 15 of the reporter's transcript at page 4075 in support of his contention that he requested such a hearing. (AOB at 149, 151-152.) What that portion of the transcript shows, however, is that appellant asked for an "offer of proof" as to any factor (b) evidence if there were "only a couple of them." (15 RT 4075.)

An offer of proof is what appellant asked for and what was given, which explained how the prosecutor intended to proceed in proving criminal activity for which there was no conviction. After Moppins unexpectedly failed to identify appellant as the person who shot her, defense counsel asserted that he had previously requested a section 402 hearing on this incident, but the record does not support his contention. (16

[18] Appellant states that defense counsel moved to strike Moppins's testimony. (AOB at 150.) It was actually the trial court that first recognized the problem. (16 RT 4298-4300, 4305.)

RT 4301-4302.) Again appellant cites to and quotes from volume 15 of the reporter's transcript at page 4075 in support of his contention that appellant requested a section 402 hearing. (AOB at 151.) The quote itself shows that appellant asked for nothing more than an "offer of proof." (15 RT 4075.)

C. Standard of Review

Under some circumstances, it is advisable for the trial court to conduct a preliminary inquiry to determine whether there is sufficient evidence of each element of the proposed prior offense to allow its introduction into evidence. (*People v. Fauber* (1992) 2 Cal.4th 792, 849.) However, a preliminary inquiry is not a prerequisite to admission of unadjudicated-criminal-conduct evidence. (*People v. Young*, *supra*, 34 Cal.4th at p. 1209.)

Here the evidence was admitted and then stricken by the trial court after it was clear that the anticipated evidence linking appellant to the crime was unobtainable.

D. *Phillips* Hearings Are Not Mandatory

The purpose of a *Phillips* hearing is to determine whether the prosecution has substantial evidence to support each element of other-crimes evidence it intends to introduce in aggravation. (*People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 225.) The trial court is not required to conduct such hearings, however. (*Ibid.*) Nor is the admission of evidence of unadjudicated criminal conduct predicated upon the outcome of such an inquiry. (*People v. Young*, *supra*, 34 Cal.4th at pp. 1209-1210.)

E. Appellant Did Not Request a *Phillips* Hearing and None Was Necessary

Appellant never requested a *Phillips* hearing in connection with Moppins's testimony. Thus, the trial court did not erred in denying one. The trial court also did not err in failing to anticipate the need for a *Phillips*

hearing because Moppins's failure to identify appellant as the shooter was unexpected. The trial court acted within its discretion in admonishing the jury to disregard Moppins's testimony.

Appellant notes that the trial court was "aware of the proper procedure for determining the admissibility of factor (b) testimony "because it ordered a hearing on the proffered testimony of Christine Preciado and Yolanda Dawson." (AOB at 151-152.) The trial court conducted a section 402 hearing with respect to these witnesses because neither side had had an opportunity through discovery to interview them. (16 RT 4152-4156, 4186.)

F. Appellant Was Not Prejudiced

Appellant argues that both the *Chapman* standard of prejudice applies as well as the state law standard under *People v. Brown* (1988) 46 Cal. 3d 432, 447-448 [reversal of penalty required if "there is a reasonable possibility such an error affected the verdict."] (AOB at 152.)

Any prejudice arising from the introduction of Moppins's testimony was cured by the trial court's instruction to the jury to ignore it. Juries are presumed to follow the directions of the trial court. (*People v. Ervine*, *supra*, 47 Cal.4th at p. 776.)

Appellant argues this instruction was deficient because the trial court did not admonish the jurors not to speculate about the reasons why the testimony was stricken. (AOB at 153.) But appellant never requested such an instruction, so his ability to make this claim on appeal is forfeited, and he does not assert that the trial court had a sua sponte duty to so instruct.

Trials are dynamic processes and not every aspect is predictable or perfectly orchestrated. Here a witness withdrew her cooperation at the last minute and records dating back to 1978 were unobtainable. No one did anything wrong. Not the prosecutor and not the trial court. Moreover, given appellant's violent history and the testimony of Preciado and

Dawson, and the underlying crime, there is no reasonable probability that the testimony of a single witness who never identified appellant as the person who shot her, could have resulted in a penalty more favorable to appellant.

X. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

Appellant challenges California's death penalty statute on numerous constitutional grounds which have withstood review before this Court and the United States Supreme Court. Respondent will address each challenge in the order they appear in appellant's opening brief.

A. California's Death Penalty Statute Sufficiently Narrows the Class of Murders to Which It Applies and Is Thus Constitutional

Appellant contends that California's capital sentencing scheme is unconstitutional because it does not meaningfully narrow the class of murders eligible for the death penalty under *Furman v. Georgia* (1972) 408 U.S. 238, 313. (AOB at 155-156.) Specifically he contends that the number of special circumstance under which the death penalty can be applied makes it unconstitutional. Appellant is incorrect.

The California Supreme Court has consistently rejected appellant's contention. (See, e.g., *People v. Linton* (2013) 56 Cal.4th 1146, 1214 [§ 190.2 is not impermissibly overbroad in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution]; *People v. Nelson* (2011) 51 Cal.4th 198, 225 [California homicide law and special circumstances listed in § 190.2 adequately narrow class of murderers eligible for death penalty]; *People v. Williams* (2010) 49 Cal.4th 405, 469 [§ 190.2 is not impermissibly overbroad in violation of federal Constitution; number of special circumstances is not so high as to fail to perform constitutionally required narrowing function; special circumstances

are not over inclusive, either facially or as interpreted by California Supreme Court].)

Appellant offers no unique fact or legal argument supporting his request that this Court revisit the issue. This Court should, therefore, decline to do so.

B. The Jury's Consideration of the Circumstances of the Crime Did Not Result in an Arbitrary or Capricious Imposition of the Death Penalty

Appellant contends that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase resulted in an unconstitutionally arbitrary and capricious imposition of the death penalty because the criteria is overly broad. (AOB at 156-157.) He specifically observes, without additional argument, that the prosecutor argued to the jury that the manner, motive, and location of the murder, and the impact of the murder on Wilson's family, friends and community were aggravating "circumstances of the crime." (*Ibid.*) The jury's consideration of these circumstances of the crime was appropriate and constitutional.

The circumstances of the crime are a traditional subject for consideration during the penalty phase, thus section 190.3, factor (a), which allows the jury to consider the circumstances of the crime is neither vague nor otherwise improper under Eighth Amendment jurisprudence. (*People v. Linton, supra*, 56 Cal.4th at pp. 1214-1215; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 976.) In this case the victim was murdered in her own home during a robbery and was callously shot as she reacted to the shooting of her fiancée. These were appropriate manner, motive and location circumstances of the crime which the jury was entitle to and should have considered in deciding whether to impose the death penalty.

Moreover, the admission of evidence showing how a defendant's crimes directly impacted the victim's family, friends, and the community as a whole does not violate the Eighth Amendment unless such evidence is "so unduly prejudicial" that it results in a trial that is "fundamentally unfair." (*People v. Pearson*, *supra*, 56 Cal.4th at p. 466, quoting *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; see *People v. Marks* (2003) 31 Cal.4th 197, 235-236.) Victim impact evidence is likewise admissible as a circumstance of the crime under section 190.3, factor (a), so long as it "is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Taylor*, *supra*, 48 Cal.4th at pp. 645-646 quoting *People v. Pollock* (2004) 32 Cal.4th 1153, 1180; see *People v. Zamudio*, *supra*, 43 Cal.4th 327.) In the present case the victim impact evidence fell within permissible parameters. (*People v. Pollock*, *supra*, 32 Cal.4th at p. 1180.)

Appellant offers no unique fact or legal argument supporting his request that this Court revisit the issue. This Court should, therefore, decline to do so.

C. There Is no Burden of Proof Standard Applicable to the Jury's Decision Making Function During the Penalty Phase in a Death Penalty Case

Appellant contends that the jury's determination that the aggravating factors outweighed the mitigating factors and their determination that the aggravating factors were substantial enough to support a death judgment were all "facts" which should have been proven beyond a reasonable doubt under the federal constitution. (AOB at 158.) This Court has recently and specifically rejected this argument. (*People v. Harris*, *supra*, 57 Cal.4th at p. 858.) Furthermore, this Court has previously concluded that California's death penalty statute is not lacking in the procedural safeguards necessary to protect against arbitrary and capricious sentencing under the Eighth and

Fourteenth Amendments. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) In so holding this Court stated that "neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty." (*Ibid.*)

D. There Is No Burden of Proof Requirement in the Penalty Phase Because Such Determination Are Essentially Moral and Normative

Appellant contends that the jury should have been instructed that the prosecutor had the burden of persuasion during the penalty phase. (AOB at 160.) Pursuant to this argument, appellant invites this Court to reconsider its holdings in *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137 and *People v. Arias*, *supra*, 13 Cal.4th 92, 190. (AOB at 160.)

This Court recently affirmed its prior holdings that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1362.) Appellant's wish to have this Court reconsider its position is not well taken. This Court has also rejected appellant's argument that Evidence Code section 520 requires that the jury be instructed on the standard of proof. (See *People v. Whalen* (2013) 56 Cal.4th 1, 90.)

Appellant offers no unique fact or legal argument supporting his request that this Court revisit the issue. This Court should, therefore, decline to do so.

E. Unanimity in the Penalty Phase of a Death Penalty Case Is Not Constitutionally Required

Appellant contends that the jury should have unanimously agreed on its determinations in connection with the aggravating factors and with

respect to the presence or absence of criminal activity. (AOB at 161-162.) Appellant is incorrect.

1. Aggravating factors

Appellant urges this Court to reconsider its decisions in *People v. Taylor* (1990) 52 Cal.3d 719, 749 and *People v. Prieto* (2003) 30 Cal.4th 226, 275, which held that juror unanimity is not required in the assessment of aggravating factors during the penalty phase of a capital case. (AOB at 161-162.) Appellant contends that *Prieto* was incorrectly decided. (AOB at 161.) Respondent disagrees.

As this Court explained in *Prieto*,

> the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. [Citation.] Accordingly, *Ring* [*v. Arizona* (2002) 536 U.S. 584, 604] does not undermine our previous rulings upholding the constitutionality of California's death penalty law, and we reaffirm our rejection of defendant's contentions. [Citation.]

(*People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

2. Prior criminal activity

Appellant contends that the jury should have been required to unanimously agree that appellant was engaged in prior criminal activity, factors (b) and (c) under section 190.3. (AOB at 162-163.) This Court has repeatedly rejected this argument. (*People v. Bunyard* (2009) 45 Cal.4th 836, 860-861; *People v. Ward* (2005) 36 Cal.4th 186, 222; and *People v. Anderson* (2001) 25 Cal.4th 543, 590.)

Appellant offers no unique fact or legal argument supporting his request that this Court reverse or reconsider it prior precedents. This Court should, therefore, decline to do so.

F. The Term "Substantial" as Used in CALJIC No. 8.88 Is Not Unconstitutionally Vague

Appellant contends that the term "substantial" in the instruction to the jury on the standard to be used in comparing the aggravating factors to the mitigating factors created a vague and ambiguous standard. (AOB at 163.) Respondent disagrees, as has this Court most recently in *People v. Contreras*, *supra*, 58 Cal.4th at pp. 160-170.

1. CALJIC No. 8.88 does not misstate the law

Appellant contends that CALJIC No. 8.88 misstates the law by asking jurors to decide whether the circumstances of the case "warrant" death rather than whether death is the "appropriate" punishment. (AOB at 164.) This Court rejected this precise argument in *People v. Manibusan* (2013) 58 Cal.4th 40, 54.

2. CALJIC No. 8.88 need not instruct the jury that life without parole must be imposed if the jury finds the death penalty not warranted.

Appellant contends that CALJIC No. 8.88 is constitutional infirm because it does not instruct the jury that if it finds the death penalty unwarranted then it must impose life without the possibility of parole. (AOB at 165.) This Court has rejected such arguments in the past finding such an admonishment is unnecessary in light of the express instruction that a death verdict could be entered only if aggravating circumstances outweigh mitigation circumstances. (*People v. McKinzie*, *supra*, 54 Cal.4th at pp. 1361-1362.)

G. The Lack of a Jury Instruction on the Burdens of Proof in the Penalty Phase Did Not Violate the Constitution

Appellant contends that the jury instructions were deficient because they did not instruct the jury on a standard of proof or burden of proof. (AOB at 166.) As a consequence, he argues, the jury was left with the

impression that appellant bore some particular burden in proving facts in mitigation. (*Ibid.*) This Court recently rejected the premise that the statute is unconstitutional because it does not require such instructions. (*People v. Jackson* (2014) 58 Cal.4th 724, 773.) If the statute is not unconstitutional on this basis, the lack of an instruction regarding the same subject is likewise unassailable.

H. There Is No Constitutional Requirement to Instruct the Jury on the Presumption of Life

Appellant contends that the jury should have been instructed in the penalty phase on the "presumption of life" which he equates to the "presumption of innocence" during the guilt phase. (AOB at 166.) There is no legal support for appellant's position. (*People v. Rodriquez* (2014) 58 Cal.4th 587, 653.)

I. The Jury Was Not Required to Make Written Findings During the Penalty Phase.

Appellant contends that the jury was required to make written findings during the penalty phase. (AOB at 167.) Appellant acknowledges that this Court rejected such a requirement in *People v. Cook* (2006) 39 Cal.4th 566, 619. Appellant offers no unique fact or legal reason in support of his request that this Court revisit its previous holding. Recently this Court again held that there is no such constitutional requirement. (*People v. Contreras*, *supra*, 58 Cal.4th at p. 172.)

J. The Jury Instructions on Mitigating and Aggravating Factors Did Not Violate Appellant's Constitutional Rights

Appellant contends that the use of the adjectives "extreme" and "substantial" in CALJIC No. 8.85 acted as barriers to the jury's consideration of mitigating factors in violation of appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. This Court has

consistently and recently rejected such claims. (*People v. Rodgers*, *supra*, 57 Cal.4th at p. 350.)

K. Inapplicable Mitigating Factors Need Not Be Deleted from the Jury Instructions

Appellant contends that six sentencing factors were inapplicable to appellant's case and should have been deleted from CALJIC No. 8.85. (AOB at 168.) This Court has held otherwise. (*People v. Contreras*, *supra*, 58 Cal.4th at p. 173.)

L. There Is no Requirement for the Trial Court to State that Only Some Factors Are Only Relevant to Mitigation

Appellant contends that the trial court should have instructed the jury that certain sentencing factors were only relevant as mitigating factors. (AOB at 169.) In doing so, appellant urges this Court to overturn its ruling to the contrary in *People v. Hillhouse* (2002) 27 Cal.4th 469, 509. This Court has recently decline to do so in *People v. Jackson*, *supra*, 58 Cal.4th at p. 773, stating, "The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation."

M. Intercase Proportionality Review Is Not Required

Appellant urges this Court to overrule its prior precedents and find that the Constitution requires a comparison among death penalty cases to ensure that capital defendants receive proportionately consistent sentences. (AOB at 169.) This Court's precedent is to the contrary and appellant offers no unique fact or legal reason justifying this Court's reconsideration of that precedent. (*People v. Jackson*, *supra*, 58 Cal.4th at p. 774.)

N. California's Capital Sentencing Scheme Does Not Violate the Equal Protection Clause

Appellant contends that California's death penalty statute violates the equal protection clause of the constitution because it provides fewer procedural protections to capital defendants. (AOB at 170.) This Court has previously and recently rejected such contentions and appellant offers no unique fact or legal reason for this Court to do otherwise. (*People v. Jones*, *supra*, 57 Cal.4th 899, 979.)

O. The Use of the Death Penalty Does Not Violate International Law or the U.S. Constitution

Appellant urges this Court to overrule its prior decisions rejecting the contention that the use of the death penalty violates international law and the Eighth and Fourteenth Amendments. (AOB at 170.) The death penalty as applied in this state is not rendered unconstitutional through operation of international law and treaties. (*People v. Williams* (2013) 58 Cal.4th 197, 295-296.) Appellant offers no unique fact or legal reason for this Court to reconsider its own precedent on the issue.

XI. APPELLANT'S CLAIM OF CUMULATIVE ERROR IS WITHOUT MERIT

Appellant contends that the cumulative effect of the trial court's errors was so prejudicial that reversal is required. (AOB at 172.) Because the trial court did not commit any errors there can be no cumulative prejudice. (*People v. Jackson, supra*, 58 Cal.4th at p. 774.)

A. Additional Background

While claiming that all the asserted errors of the trial court combined cause appellant to suffer reversible cumulative prejudice, appellant specifically identifies: the exclusion of the rap lyrics allegedly written by Taylor (AOB Argument II.); the admission of Rhodes's statement that

appellant admitted shooting Richardson (AOB Argument III);[19] the admission of gang evidence (AOB Argument IV) and two penalty phase arguments: evidence of appellant's parole violations (AOB Argument VIII); and the admission of Rita Brown Moppins's testimony (AOB Argument IX), as being prejudicial.

B. There Are no Errors and Thus no Cumulative Impact

As the reasons provided regarding each claim of error demonstrate, the trial court committed no errors. Even should this Court disagree and find error, none of those errors caused prejudice sufficient to require reversal of the judgment or sentence. Where there are no errors there is "nothing to cumulate." (*People v. Duff* (2014) 58 Cal. 4th 527, 568.)

The exclusion of the rap lyrics was proper and, even if it was not, the likelihood that the jury would have understood the lyrics to be an admission of guilt by Taylor is highly speculative. It is not reasonably probable that the admission of the lyrics would have resulted in a more favorable result for appellant. Richardson identified appellant as the shooter, and established that appellant and Taylor acted together.

The admission of Taylor's letter to Yarborough resulted from appellant's own conduct. Nevertheless, the trial court's limiting instruction negated any prejudice that could have been caused by its admission. Juries are presumed to have followed the court's instructions. *People v. Ervine*, *supra*, 47 Cal.4th at p. 776; *People v. Mendoza* (2007) 42 Cal.4th 686, 699.)

Appellant makes the vague claim that the prosecutor and Richardson (actually Taylor) were permitted to introduce "distorted evidence" that

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[19] Appellant states that Richardson was allowed to present distorted evidence that suggested appellant had admitted that he was the shooter and that this is likely why the jury acquitted Richardson. Richardson was the victim, so presumably appellant is referring to Taylor.

suggested appellant was the shooter. (AOB at 173.) This appears to be a reference to Rhodes's testimony. Rhodes testified on appellant's behalf, but on cross-examination by Taylor, Rhodes denied that appellant ever said to him, "I shot his black ass." Taylor then recalled Detective Anderson to impeach Rhodes on this point. Appellant does not argue on appeal that the admission of Detective Anderson's testimony impeaching Rhodes was error. Thus, to the extent he now attempts to argue it was error that contributed to the cumulative effect of other errors, appellant fails to explain why such impeachment evidence was inadmissible in the first place.

The trial court's decision not to allow Detective Anderson to testify regarding his recollection of the content of appellant's letter to Rhodes, in which appellant presumably denied his involvement in the shooting, was proper. Even if there had been error, admission of that evidence would not have changed the result. The jury was already aware that appellant was denying his involvement.

The evidence that both appellant and Taylor had some connection to gangs could not reasonably have affected the verdict. This was not a gang case, and that evidence was admitted to impeach appellant's claim that he was afraid of Taylor because of Taylor's gang connections.

Appellant's parole violations were of no consequence because there was much more damaging evidence in the form of appellant's prior felony convictions and violent conduct. Moreover, this evidence was admitted for a limited purpose and nothing more—in any event, the jury already knew about appellant's prior convictions. This evidence merely showed a chronology of when appellant was in or out of prison and was admitted to rebut inferences arising from Gwen Taylor's testimony

Moppins's testimony was not considered by the jury and it did not implicate appellant anyway.

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests this Court affirm the judgment and sentence of the trial court.

Dated: July 1, 2014

Respectfully submitted,

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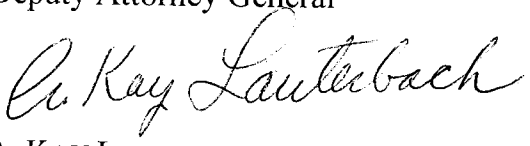

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 28, 436 words.

Dated: July 1, 2014

KAMALA D. HARRIS
Attorney General of California

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Angelo Michael Melendez**
No.: **S118384**

I declare:

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

On July 1, 2014, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, 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 July 1, 2014, at Sacramento, California.

Declarant