IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

LESTER WAYNE VIRGIL,

Defendant and Appellant.

S047867

CAPITAL CASE

Automatic Appeal From The Judgment Of The
Los Angeles County Superior Court No. YA016781
The Honorable Steven C. Suzukawa, Judge

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

STATEMENT OF THE CASE

Appellant was charged by the Los Angeles County District Attorney with three counts of second degree robbery in violation of Penal Code,[1/] section 211 (counts 1, 3 & 4), murder in violation of section 187, subdivision (a) (count 2), and assault by means of force likely to produce great bodily injury in violation of section 245, subdivision (a)(1) (count 5). As to count 2, it was alleged as a special circumstance that appellant committed murder while engaged in the commission of the crime of robbery, within the meaning of section 190.2, subdivision (a)(17). As to counts 1 through 4, it was alleged that appellant personally used a dangerous or deadly weapon, to wit: a knife, in the commission of the offenses. It was further alleged that appellant had served a prior prison term within the meaning of section 667.5, subdivision (b). (1CT 207-211.) Appellant was arraigned, pleaded not guilty, and denied the special-circumstance allegations. (1CT 213.)

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1. All further statutory references will be to the Penal Code, unless otherwise specified.

Trial was by jury. The jury found appellant guilty on all counts and found the robbery murder special-circumstance allegation true as to the murder count. The jury further found the weapon use enhancements true as to counts 1 through 4. (2CT 385-387.) The trial court found the prior prison term allegation true. At the conclusion of the penalty phase, the jury fixed the penalty at death on count 2. (2CT 413-414, 442.)

The trial court denied appellant's motions for a new trial and for reduction of sentence, pursuant to section 190.4, subdivision (e). In accordance with the jury's verdict, the trial court sentenced appellant to death on count 2, plus a concurrent year for the weapon use enhancement. The court also sentenced appellant as follows: count 1 -- the upper term of five years, plus one year for the weapon use enhancement, to be served consecutively; count 3 -- upper term of five years, plus one year for the weapon use enhancement, stayed pursuant to section 654; count 4 -- upper term of five years, plus one year for the weapon use enhancement, to be served concurrently; and count 5 -- the upper term of four years, stayed pursuant to section 654. The court also imposed a one-year prior prison term enhancement under section 667.5, subdivision (b), to be served consecutively. The service of the aggregate determinate sentence of seven years was stayed pending the completion of the death sentence. (2CT 441-444, 458-465.)

This appeal is automatic. (§ 1239, subd. (b); 2CT 444.)

STATEMENT OF FACTS

On Saturday October 24, 1992, appellant stabbed Soy Sung Lao 30 times in the bathroom of the Donut King in Los Angeles and then stole money from the cash register. Lao staggered from the bathroom and fell to the floor of the store, slowly bleeding to death. Appellant also committed armed robberies of Beatriz Addo on October 22, 1992, and Samuel Joseph Draper on

October 26, 1992.

A. PROSECUTION'S GUILT PHASE EVIDENCE

1. Murder And Robbery - Counts 2 And 3

On the afternoon of October 24, 1992, at approximately 3:30 p.m., Park Police Sergeant Donald Tiller went to the Donut King, located at 2214 West El Segundo in a strip mall, with his partner Officer Sorrell. (7RT 924-931.) Soy Sung Lao was working behind the counter. Appellant was seated at a booth in the seating area. On the table in front of him was a white styrofoam cup and an orange travel bag. Appellant wore a dark Malcolm X cap, a black T-shirt, dark jeans and white tennis shoes. Appellant appeared to weigh between 165-170 pounds, was between five feet, six inches and six feet, and had a goatee and scraggly beard. Sgt. Tiller thought it was "odd" that appellant would not look at him while he was in the restaurant because in his experience, most people did so. (7RT 939-944.)

Lavette Gilmore ("Peaches"), owner of Girls Will Be Girls Hair Salon in the same strip mall, was also at the donut shop at around 3:30 p.m. Appellant was wearing the same clothing described by Sergeant Tiller, seated at a table while facing the window. (18RT 2859-2866.) Gilmore spoke with Lao for about 20 to 25 minutes as other customers came and left. She also spoke with Sergeant Tiller and expressed her concern about Lao being in the shop alone with appellant. (18RT 2877-2881.)

At approximately 3:40 p.m., Debra Tomiyasu went to the Donut King. The orange duffle bag was still on a table in the sitting area along with a "Malcolm X" cap but there did not appear to be anyone in the store. Tomiyasu shouted, "Hello" two or three times but there was no response. (8RT 1027-1037, 1204-1205.) After a few minutes, Deandre Harrison entered the shop. (9RT 1258-1259.) When no one appeared, Harrison went to the door

and walked back and forth five or six times to trigger the buzzer so anyone in the back employee area of the store would know of their presence. (8RT 1037-1038, 9RT 1260-1264.)

Tomiyasu and Harrison heard muffled, high pitched screaming and a long wail that got louder. Appellant then came from the back employee area of the store and walked to the cash register as the screams became louder. Appellant opened the register and grabbed money as Tomiyasu and Harrison saw Lao, who was covered in blood, walking from the same direction from which appellant had come. As Tomiyasu looked at appellant, he took the money and passed her and Harrison to quickly leave the store. Lao continued to stagger forward, screaming and bleeding, and then collapsed to the floor behind a counter. There was an apron and a bloody cloth around Lao as she lay bleeding. (8RT 1038-1054, 1191-1194, 1204-1205, 9RT 1266-1276, 1340-1344.)

Tomiyasu followed appellant and saw him run across the parking lot of the strip mall. She called out that there had been a stabbing and for people to help. Tomiyasu also went to the Girls Will Be Girls Hair Salon to get help. Harrison went next door to Conway Cleaners to call "911" after he saw appellant run across the parking lot. No one other than Harrison and Tomiyasu had been in the store and noone else had left the store immediately after appellant fled. (8RT 1054-1059, 1200-1201, 9RT 1275-1276, 1280-1286, 1363-1364, 1368-1369, 1439-1440, 1446-1447.)

Ella Ford, who was next door to the Donut King at Conway Cleaners picking up her dry cleaning, heard a female scream from the other side of the wall. As she left the shop, she saw appellant running from the donut shop and he almost ran her over. He had an object in his left hand that he kept close to his body. Ford heard someone yell, "He stabbed her. He stabbed her." She lost sight of appellant as he ran through the strip mall. (9RT 1350-1364,

1431-1436.)

Felipe Santoyo, who worked at Bates Fish Market in the same strip mall, heard the commotion. Several other people from the surrounding stores, including Lavette Gilmore and Trina Simmons – a customer from the hair salon – also gathered at the donut shop. He, Santoyo, and Gilmore went into the donut shop and saw Lao bleeding on the floor. All three tried to help Lao. Lao asked for help several times and after several attempts, managed to state the telephone number of her relatives. Santoyo went next door and called Lao's family. Simmons retrieved some vaseline from the hair salon and applied it to Lao's numerous stab wounds to try to stop the bleeding. (8RT 1211-1226, 9RT 1287-1288, 1364-1369, 1446-1447, 1454-1457, 1483-1484, 11RT 1751-1752, 18RT 2859-2860, 2882-2887.)

Gardena Police Officers Blane Schmidt and Joey Schnabl arrived within minutes of the stabbing. (9RT 1477-1481, 11RT 1691-1695.) The paramedics arrived immediately thereafter and rendered aid to Lao. Officer Schmidt attempted to get a statement from Lao, but she was unconscious. (9RT 1484-1486, 1492.) Paramedic Jeff Audet could not start an IV or obtain a blood pressure on Lao because of the severity of her wounds and blood loss. She was transferred to a gurney and the ambulance and then taken to Harbor General Hospital. Officer Schnabl rode in the ambulance with her. Lao never gained consciousness. Paramedic Doug Roberts opined that Lao had lost a total of 2000 cubic centimeters of blood. (8RT 1055-1059, 9RT 1287-1288, 1456-1457, 10RT 1611-1623, 1632-1644, 11RT 1695-1696.)

Officer Schmidt broadcast the description of appellant given to him by the witnesses and that he had been seen running through the parking lot. (10RT 1495-1497, 1499, 1520-1528.) Tomiyasu described appellant as a Black male, in his late 20's to early 30's, wearing a black T-shirt with the continent of Africa outlined in white, dark blue jeans and dark shoes. (8RT 1051-1054,

1063-1065.) Harrison described appellant as a Black male, medium complexion, thin, five feet, nine inches or five feet, ten inches, with a beard and wearing a black T-shirt with the continent of Africa, red, yellow and green colors, and dark black jeans. (9RT 1277-1280.)

Officer Nick Pepper arrived shortly after hearing the broadcast description of appellant. Upon his arrival, he secured the donut shop door. He also interviewed Ford about what she had seen. Ford described appellant as Black male, five feet six inches, to six feet, 155-160 pounds, thin to medium build, with a full beard, wearing dark jeans, white tennis shoes, and a black T-shirt with African colors – red, green and yellow. (9RT 1372-1374, 11RT 1826-1832.)

Sometime after Lao was taken away, Officers Schmidt and David Mathieson, and Sergeant Michael Bartlebaugh examined the scene and saw that the cash register was open with no money inside. (9RT 1487-1489, 11RT 1839-1842, 1848-1861, 12RT 1894-1898, 1902-1904.) Lao's bra and shirt were near where she had lain as well as two bloody aprons. There was also a blood trail that went from pools of blood where Lao had fallen to and down a hallway to the closed door of the back employee bathroom. Inside the bathroom, there was another pool of blood and blood spatter on the inside of the door and the doorjamb. There were also a pair shoes and a knotted bloody towel. A partial apron string was also found outside the bathroom. (10RT 1489-1492, 1495-1506, 11RT 1848-1861, 12RT 1898-1902, 1904-1909, 14RT 2116-2118.)

On a table in the customer area, there was an open brown gym bag, a white styrofoam cup and a shoe lace. Inside the bag were gym shorts, a black sweater jacket, a flat nose screwdriver, soap in a dish, an empty black film canister and raffle tickets. (10RT 1506-1519, 11RT 1848-1861, 12RT 1898-1902.) No knives or other weapons connected to the stabbing were found in

the search of the shop. (10RT 1532-1533, 11RT 1842-1847, 1872-1875, 12RT 1910-1911.)

Identification Technician Kim Swobodzinski photographed the crime scene, including the employee bathroom, the blood trail, all blood spatter evidence, and the items found on the dining area table. (10RT 1520, 1599-1607, 12RT 1911-1912, 1995, 2009-2022, 13RT 2060-2088, 14RT 2102-2108, 2118-2121, 17RT 2814-2818.) Afterward, all the physical items were booked into evidence. (10RT 1517-1519, 11RT 1848-1861, 14RT 2108-2116, 17RT 2803-2806.)

Swobodzinski also dusted for fingerprints. A latent palm print from the dining area table matched appellant's palm print. Several other latent prints obtained from the styrofoam cup, interior bathroom door, bathroom sink area were either unidentifiable or did not match appellant's prints. (12RT 2021-2060, 14RT 2095-2102, 2200-2207, 2227-2230, 2233-2234, 15RT 2337-2240, 2245-2247, 17RT 2800-2803, 2810-2811.)

Senior Criminalist Elizabeth Devine examined photographs of the blood trails and spatter from the crime scene, and photographs of the autopsy of Lao and spoke with Sergeant Hernandes Lobo and Identification Technician Swobodzinski. In her expert opinion, Devine concluded that Lao was stabbed only in the employee bathroom. Her bleeding began in the bathroom and she traveled to the area of the panic button near the register while actively bleeding from both sides of her body. The blood smears on the bathroom door were consistent with the door having been closed during the stabbing and Lao attempting to get out afterward. In addition, based on the undisturbed blood droplets in the hallway, appellant left the bathroom prior to Lao. (15RT 2336-2357, 2361-2362.)

Soy Lao died as a result of 30 stab wounds caused by a single weapon with a five-eighth-inch width blade, five to six inches long and blunt

on one side. (14RT 2263-2264, 15RT 2293-2302.) Specifically, two fatal stab wounds that sliced completely through her liver caused massive internal bleeding in her abdomen, which led to her bleeding to death. Lao also suffered a fatal stab wound to her right chest that caused her lung to collapse and interfered with her ability to breathe. (15RT 2266-2269, 2284-2293.) Many of the stab wounds to Lao's hands and arms were defensive wounds. (15RT 2289-2291.) None of the many injuries was severe enough to lead to Lao's immediate unconsciousness. (15RT 2302-2306.)

On October 24, 2002, a composite of appellant was prepared with Tomiyasu, however, according to Tomiyasu, it was not a good likeness of appellant. (8RT 1067-1068, 12RT 1928-1929.) An artist sketch was prepared on November 11, 1992, which Tomiyasu testified was a better likeness of appellant. (8RT 1068-1069, 12RT 1929-1931.)

Sometime in early 1993, Sergeant Hernandes Lobo made a connection between the raffle tickets found in appellant's bag and a robbery at Southwest Bowl located at 11633 Western that had occurred in early October 1992. (15RT 2399-2416, 2424-2438.) On June 25, 1993, Sergeant Lobo and Gardena Police Officer Allen Otake met with Los Angeles County Sheriff's Detectives Richard Cohen and Jacques LaBerge, who were investigating other crimes committed by appellant. Detective Cohen had seen a copy of the composite drawing of the suspect in the Lao's murder and though he might know the suspect. From this meeting, Sergeant Lobo learned appellant's name. Officer Otake also had handled the investigation of a November 3, 1992, car burglary involving appellant and told Sergeant Lobo about it. Sergeant Lobo prepared a six-pack photo folder using appellant's booking photo. (17RT 2709-2711, 2715-2716, 2742-2745, 2789-2791, 18RT 2926-2947.)

On June 28, 1993, after being admonished, Tomiyasu identified appellant from the six-pack photo folder. Harrison also identified appellant

from the six-pack photo folder after being admonished. (8RT 1076-1078, 9RT 1288-1293, 12RT 1920-1925, 18RT 2940-2947.) On October 19, 1993, after being admonished, Harrison identified appellant at a live lineup. Tomiyasu narrowed down the suspects to #1 and #4 (appellant). (8RT 1082-1088, 9RT 1293-1297.) Subsequently, Tomiyasu viewed an additional six-pack photo and after being admonished, identified appellant again. (18RT 2979-2981.) Both Harrison and Tomiyasu also identified appellant at the preliminary hearing and at trial. (8RT 1094-1098, 9RT 1297-1298, 1349, 19RT 3070.)

On June 29, 1993, after being admonished, Sergeant Tiller identified appellant from a side profile six-pack photo folder. He also identified him at the live lineup on October 19, 1993, after being admonished. (18RT 2949-2961, 2975-2978.)

On August 18, 1993, after being admonished, Gilmore narrowed down the suspects to #1 or #2 (appellant) in a front view six-pack photo folder. However, she identified appellant from the side profile six-pack photo folder. (18RT 2866-2872, 2877, 2963-2968.) At the live lineup on October 19, 1993, after being admonished, Gilmore intentionally mis-identified suspect #1 because she was scared and had been warned by her husband that she should not get involved. (18RT 2872-2877, 2970-2972.) On January 20, 1995, after being admonished, Gilmore identified appellant from a six-pack photo folder. (18RT 2888-2890, 2968-2970.)

On January 6, 1995, Ford was admonished and identified appellant from the six-pack photo folder. (9RT 1376-1380.) Ford was reluctant to testify and had previously refused to talk to Sergeant Lobo or go to the live lineup because of gang concerns. (9RT 1384-1385, 19RT 3039-3045.)

2. Robbery - Count 1

On October 13, 1992, between 10:00 and 11:00 a.m., Beatriz Addo was working in LA Bargain Groceries, owned by her and her husband, Baffour Addo. The store was located at 12818 Van Ness Avenue in Gardena. (6RT 659-673, 760-761.) Beatriz was talking with a neighbor when appellant arrived on bicycle from the alley. Appellant asked if Beatriz wanted to buy the bike. (6RT 659-673.) After she declined, appellant asked for shaving cream the store did not carry. Appellant checked the shelves himself and then asked about a job. Beatriz said they were not hiring but she would tell her husband. Appellant wrote down his name and address – "1202 Denker, Apt. 10" – and then left. (6RT 673-679.)

Five to six minutes later, after Beatriz's friend left, appellant returned, said he was going to take any shaving cream and went towards the shelves. (6RT 679-683.) After Beatriz turned her back, she felt something pricking her from behind. Appellant put his arm around her neck and pushed her toward the bathroom. Appellant told Beatriz not to move when she tried to get away. (6RT 683-687.)

In the bathroom, Beatriz told appellant her husband would return in five minutes and then knelt to pray. Appellant left and closed the bathroom door. Shortly thereafter, Beatriz heard the cash register open. After ten minutes of silence, Beatriz left the bathroom. Appellant was gone and she went to close the front door. The phone lines had been cut and all the money, except for pennies – approximately $60 – had been taken from the cash register. Appellant had also taken an envelope containing $600 from underneath the cash register. (6RT 688-692, 762-767.)

A passerby stated he would call the police. Beatriz's husband arrived and she described appellant and told him what happened. Some time later, the police arrived and Beatriz also told them what had happened. Beatriz

had knife scratches on her back. (6RT 692-696, 768-775, 7RT 850-859.)

Henry Cavanaugh, a Questioned Documents expert examiner, determined that it was very unlikely that the person who wrote the statement in the church robbery (see Statement of Facts (4), *ante*) had not also written the note with the Denker address. (7RT 800, 904-906, 913-919, 921.) Sometime later, Sergeant Lobo attempted to locate 1202 Denker Street and found it did not exist. (19RT 3045-3048.)

On October 24, 1992, Baffour heard "panicked people" and went outside his store. (6RT 775-782.) He saw appellant running in his direction and thought he fit the description of the robber of his store. Appellant was wearing a T-shirt with a picture on the front. Baffour later told the police in the area what he had seen. (6RT 782, 7RT 806-811.)

On June 29, 1993, after being admonished, Beatriz identified appellant from a six-pack photo folder. (6RT 699-709, 18RT 2957-2961.) On October 19, 1993, after being admonished, Beatriz identified appellant at a live lineup. (6RT 709-712.) Beatriz also identified appellant at the preliminary hearing and at trial. (6RT 712-714, 19RT 3070.)

3. Robbery And Assault - Counts 4 And 5

On October 31, 1992, Samuel Draper was working as a mechanic at Southwest Bowl. (15RT 2444-2447.) While inside the mechanic's shop, appellant, whom Draper recognized from the bowling alley, came to the door and asked to borrow a dollar for the bus. Draper gave him a dollar. Appellant left and returned a short time later and asked for another dollar for the return bus trip. Draper went to the back of the shop for his wallet, returned and gave appellant another dollar. (15RT 2447-2453.)

Appellant left again and then returned to ask whether he could leave his shopping bag in the shop. Draper agreed, took the bag and turned around to go inside the shop. Appellant grabbed Draper from behind and put

a knife to his throat. Appellant forced Draper to bend backwards while Draper tried to grab the blade and move it. Two of Draper's fingers were cut on the blade. Appellant told Draper, "Get down and I won't hurt you." Draper got down and appellant tied his hands and feet with an extension cord and belt and gagged him with a dirty old rag. (15RT 2454-2461, 16RT 2473-2482.) Appellant then took Draper's wallet, which contained between $40 and $50. (16RT 2482-2483.)

After getting free, Draper reported the robbery and assault inside the bowling alley. Based on Draper's account, a couple of people inside the bowling alley believed appellant, who was living in a van behind the bowling alley, had committed the attack. After the police arrived, Draper described what had happened and appellant's appearance. (16RT 2482-2491, 2556-2563, 2572-2587, 2611-2622, 17RT 2665-2671.)

On October 9, 1993, after being admonished, Draper identified appellant from a live lineup. (16RT 2496-2501.) On November 13, 1993, Draper also identified appellant from a six-pack photo folder. (16RT 2492-2496, 2567-2570, 17RT 2727-2737.)

4. Other Evidence Introduced By The Prosecutor

Late one evening early to mid October 1992, while Joe Vaouli was visiting Samuel Draper at Southwest Bowl, his car was broken into. Four church raffle tickets and tickets to a luau fundraiser were stolen from the car. Vaouli did not report the break-in to the police. (15RT 2424-2438.)

In October 1992, about three weeks prior to the assault and robbery of Draper, Los Angeles County Deputy Sheriff Edward Gregory Everett had contacted appellant and "Irwin" approximately six times. On one occasion, at the Hilltop Motel at 10601 Western Avenue, Deputy Everett found rock cocaine and a smoking pipes on appellant. On another occasion, appellant appeared to be under the influence of cocaine. (17RT 2675-2679.)

On October 18, 1992, appellant stole a pie from a church bake sale at St. Francis Cabrini Church a 1440 West Imperial Highway in Los Angeles. On October 26, 1992, appellant returned to the church. Father David O'Connell spoke to appellant for six to seven minutes while the police were called. When the police arrived, appellant was taken into custody. (6RT 784-789.)

On October 27, 1992, Los Angeles County Sheriff's Detective Richard Cohen spoke to appellant at the Lennox Sheriff's Station. (7RT 882-885.) He read appellant his *Miranda*[2] rights and after appellant waived his rights, asked about the incident at the church. Appellant admitted stealing the pie and said he went to the church because he was hungry. He also stated that on October 18, a lady and Mexican boy searched him and found nothing on him. He remained in their sight until the woman began screaming. Appellant said he left and went back to the bowling alley. Appellant then wrote a statement and signed it. (7RT 886-891, 897-898, 901-903.)

Late in the evening on November 3, 1992, David Akinsaya and Alvin Duncan found that appellant had broken into the former's locked 1980 Oldsmobile Cutlass Supreme and was sleeping on the front seat of the car. There was a long screwdriver on the floor and the steering column was broken. They told appellant to get out of the car. (17RT 2767-2770.)

Appellant got out and said he was homeless and just wanted a place to sleep. Appellant then ran off yelling that they were trying to kill him. They chased appellant to a grocery store where the police were called. After the police arrived and Akinsaya and Duncan stated what had happened, appellant

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2. *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

was arrested. (17RT 2774-2781.) Officer Otake subsequently handled the investigation of the car burglary. (17RT 2784-2789.)

B. DEFENSE GUILT PHASE

Appellant presented no testimony in his defense. (19RT 3154.)

C. PROSECUTION PENALTY PHASE

1. Victim Impact Evidence

Soy Sung Lao was born in Cambodia in 1970. Lao had three older brothers and two older sisters. She and several of her brothers and sisters immigrated to the United States in November 1980 to escape communism. Lao's parents died in 1975 and 1976 and the siblings took care of one another. Lao was very close to her immediate older sister, Lynn Ngov, and was closer to Lynn's two children than Lynn. Lao taught the children songs and how to write and even gave Lynn's daughter, Ariel, her name. (24RT 3693-3696.)

Lao lived with Lynn in San Diego until Lynn married her husband, Ty, in 1987 and moved to the Los Angeles area. After Lao finished high school, she decided to attend USC and moved closer to Lynn. Lao lived with friends and planned to graduate in May 1993. (24RT 3696-3698.)

On the day of Lao's murder, Lynn got a call that she had been stabbed. She and Ty rushed to the donut shop and arrived as the ambulance was leaving. Lynn saw the blood on the floor and immediately called her brother and sister. Lynn had last seen Lao earlier in the day when she was working at the donut shop. (24RT 3698-3699.)

Lynn found out Lao had died later that night at the hospital. Lynn was numb and in shock. She also felt somewhat responsible because Lao would not have been killed if she had not worked at the donut shop. (24RT 3699-3700, 3703.) Soy Sung Lao was 22 years old at the time she was murdered. (24RT 3693.)

2. Appellant's Prior Criminal Acts

In October 1983, appellant was convicted of burglary in California. In January 1989, appellant was convicted of burglary in Louisiana. (23RT 3538-3542.)

On different occasions during the month of October 1992, appellant rented an apartment at the Hilltop Motel located at 10601 South Western. Julio Montulfar and Benita Rodriguez, common-law spouses, worked at the motel and met appellant when he stayed there. (23RT 3543-3545, 24RT 3635-3641.) Appellant had a substantial amount of money the first time he checked in, but not on later occasions. Montulfar became friendly with appellant, loaned him money on one occasion (with appellant's license for collateral) and ordered a pizza to be delivered to appellant, at his request. (23RT 3545-3552.) However, Rodriguez did not like Montulfar's friendship with appellant. (23RT 3552-3553.)

At approximately 9:00 p.m., on October 29, 1992, five days after Lao's murder, Rodriguez was cleaning one of the motel rooms when appellant came in and helped her make the bed. Appellant asked about Montulfar and Rodriguez said he was at the store. Rodriguez then went to the office where she saw Montulfar in the bathroom. She then went to Room #2 to clean. When Rodriguez exited the bathroom, appellant was standing in the room holding a knife with the door closed. Appellant motioned for Rodriguez to be silent and pointed the knife at her. (24RT 3641.)

Rodriguez got on her knees in front of appellant. Appellant gestured that he wanted her jewelry and Rodriguez gave her rings and watches to him. Appellant then motioned for Rodriguez to take off her pants and got on all fours on the bed, indicating she should imitate him. Rodriguez refused. Appellant tied her left arm or wrist with a shoelace and then wanted her to put her arms behind her back. Rodriguez refused. (23RT 3559, 24RT 3646-3648.)

Appellant then began stabbing Rodriguez in her chest, arm, stomach, legs and face a total of 20 times, while kicking her and trying to smother her by covering her mouth. Appellant appeared to enjoy stabbing her. Rodriguez screamed and tried grabbing the knife. Eventually, Rodriguez grabbed the blade and broke it off in appellant's hand. Appellant ran and slammed the door. (24RT 3648-3649, 3652-3656, 3688-3691.)

Rodriguez managed to get to the office and told Montulfar that appellant had stabbed her. Rodriguez could not see, had trouble breathing and was dizzy from the loss of blood. Montulfar called the paramedics and Rodriguez was taken to Martin Luther King Hospital. (23RT 3553-3557, 24RT 3656-3657.)

Rodriguez had three surgeries to repair the damage from the stabbing. As a result of the severe injuries to Rodriguez's face and abdomen, Rodriguez has trouble seeing out of her left eye and it droops down, and she drinks mostly juices because she has trouble digesting solid food. Rodriguez also has trouble sleeping, cannot be alone, cannot exert a lot of strength and has scarring on her body, specifically her legs and fingers. (24RT 3657-3664.)

Sometime after the attack, Rodriguez identified appellant from a six-pack photo folder and also identified him[3/] at the preliminary hearing. Montulfar also gave appellant's driver's license to the police. (23RT 3556-3557, 24RT 3663-3665.)

D. DEFENSE PENALTY PHASE

Appellant has an older sister and a much younger brother. Appellant was raised in California by his single parent mother. Appellant was close to his sister. The family moved around a lot as he was growing up. His mother also "partied" and drank. She supported the family by working and

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3. A local detention facility.

through "AFDC." When appellant did something wrong, his mother disciplined him with an extensions cord, a belt and her hand. Appellant's discipline became more severe as he got older. There were occasions when appellant had cuts and welts as a result of getting a "whooping." Appellant became angry and resentful. At times, appellant's mother's drinking caused anger, violence and fights in the home. However, there were no food, clothing or shelter problems. (24RT 3704-3719, 3767.)

At some point, appellant's mother was convicted of manslaughter and sent to Sybil Brand for approximately a year. During that time, appellant and his sister lived with his aunt and uncle and their two children. (24RT 3712-3715.)

Appellant's grades began to drop in junior high school. In 1979, he ran away from home and stayed with a friend after his mother beat him with a belt buckle. Appellant's mother did not show love in the home. His mother often told him he was a "little jughead bastard" and would be just as worthless as his father. Appellant's high school grades continued to drop. He dropped out of school at age 16 or 17 after he started working and had trouble getting up for school. (24RT 3724-3733, 3766-3767.)

After a conviction for stealing tools in 1982, appellant moved to Louisiana with his sister. Appellant worked several jobs and eventually began a job corps program in 1986 where he met Annie Antoine. (24RT 3733-3735, 25RT 3779-3785.) Appellant and Antoine began a romantic relationship and eventually lived together in Shreveport. Appellant began "hanging out" with his cousin Chester. Antoine noticed differences in appellant's attitude and behavior and believed Chester was not a good influence on him. Despite Antoine's concern, appellant continued to associate with his cousin. (25RT 3785-3790.)

Sometime after Antoine went home to care for her father in

March 1987, appellant was convicted of commercial burglary and sentenced to prison. They kept in contact by letter throughout appellant's prison sentence. (24RT 3737-3740, 25RT 3791-3794.) When appellant was released in the summer of 1991, he went back to California and moved in with his sister and Antoine, who were then living together. (24RT 3740-3741, 25RT 3794-3797.)

For a period of time, appellant worked two jobs. In October, Antoine began to notice personality changes in appellant. On one occasion, after he failed to pick her up from the hospital as planned, Antoine became angry and stabbed appellant in the shoulder after he failed to give an explanation. (25RT 3797-3801.) The following month, appellant was transferred to Las Vegas. Antoine followed two weeks later. (24RT 3744-3747.)

In Las Vegas, Antoine noticed more changes in appellant's behavior and attitude and he lost a lot of weight. When confronted about whether he was having an affair with another woman, appellant said he was and her name was cocaine. (25RT 3801-3804.)

One day in February 2002, Antoine arrived home and found all the furniture but the kitchen table gone. Appellant refused to talk about what had happened to the furniture. Sometime later, Antoine moved to Salt Lake City and subsequently learned she was pregnant. Antoine did not learn of appellant's arrest until sometime in 1993 and began exchanging letters with him. (25RT 3805-3809.)

ARGUMENT

I.

APPELLANT WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT CRITICAL STAGES OF HIS TRIAL

Appellant contends that his right to be present at critical stages of his trial, which is protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution, was violated when he was not present during parts of the jury voir dire or sidebars held by the trial court in the presence of the prosecutor and his trial counsel. (AOB 94-115.)[4/]

Appellant cites 32 instances where he was not present: (1) during voir dire, eight challenges for cause against prospective jurors Charles P. (4RT 372-373), Angel R. (4RT 383-386), Sandra M. (4RT 473-485), Margarita B. (5RT 527-530), Albert C. (5RT 542-547), Janice S. (5RT 566-571), John B. (4RT 507-514) and Tracey S. (5RT 582-585) and the questioning of eight other prospective jurors: Feliberta J. (3RT 273-277), Nina M. (4RT 369-370), William M. (4RT 425-426), Richard S. (5RT 522-526), Roberto S. (5RT 530-534), Gladys F. (5RT 535-538), Duvall G. (5RT 551-553), and Marguerite W. (5RT 589-594) (AOB 95-102); (2) during the guilt phase of trial, 10

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4. Appellant also claims that his absence violated "the relevant California statutory provisions," (AOB 94), but he fails to identify, let alone discuss, a single provision. Accordingly, respondent limits its discussion to the alleged constitutional violations.

Respondent notes that to the extent there was any statutory violation, appellant's conviction must stand since he had not constitutional right to be personally present, and his presence was non-prejudicial as to each alleged violation because his presence did not bear a reasonably substantial relationship to the fullness of his opportunity to defend against the charges. (*People v. Ochoa* (2001) 26 Cal.4th 398, 434-437.)

sidebar/bench conferences regarding: Juror Olivia D.'s ability to continue to serve after her car was stolen from the court parking lot (9RT 1251-1256), Identification Technician Kim Swobodzinski's testimony as to who requested fingerprint testing (14RT 2155-2156), Identification Technician Linda Schuetze's testimony relating to the fingerprint comparisons she had performed (14RT 2245-2248), Detective Richard Cohen's testimony regarding whether appellant resembled the composite of the murder suspect (17RT 2711-2714), Detective Otake's testimony regarding appellant's parole status (17RT 2794-2795), Dr. John Stroh's testimony regarding Lao's level of consciousness after being stabbed repeatedly (18RT 2833-2834), eyewitness Lavette Gilmore's testimony identifying appellant (18RT 2873-2874), the prosecutor's request that defense counsel limit the time to cross-examine Gilmore (18RT 2915-2916), the prosecutor's request that the trial court admonish the jurors not to speak with the parties and witnesses (19RT 3151-3156), and the court's removal of appellant so it could address penalty phase witnesses out of appellant's presence (23RT 3505-3506) (AOB 102-107); (3) during the penalty phase of trial, six sidebar/bench conferences regarding: victim-witness Benita Rodriguez's testimony that she was in therapy (23RT 3521-3526), the prosecutor's interview notes relating to witness Julio Montulfar that had not been turned over (23RT 3569-3595), defense counsel's improper cross-examination of Montulfar (24RT 3626-3627), defense counsel's objection to the prosecutor's cross-examination of Ms. Antoine – appellant's former girlfriend (25RT 3816-3817), defense counsel's notification of the court that his mother-in-law had just died and his desire to expedite the proceedings (25RT 3828-3829), and the court's identification of several jurors who spoke at a hearing (31RT 3981-3982) (AOB 107-110). Respondent submits that appellant did not have a constitutional right to be personally present during these discussions between the court and counsel.

A. Applicable Law

> A criminal defendant's right to be personally present at trial is guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution .... (*People v. Jones* ([1991] 53 Cal.3d [1115], 1141; *People v. Douglas* (1990) 50 Cal.3d 468, 517.) A defendant, however, "does not have a right to be present at every hearing held in the course of a trial." (*People v. Price* (1991) 1 Cal.4th 324, 407.) A defendant's presence is required if it "bears a reasonable and substantial relation to his full opportunity to defend against the charges." (*People v. Freeman* (1994) 8 Cal.4th 450, 511.) The defendant must show that any violation of his right resulted in prejudice or violated the defendant's right to a fair and impartial trial. (*People v. Jackson* (1980) 28 Cal.3d 264, 310.)

(*People v. Hines* (1997) 15 Cal.4th 997, 1038-1039; see also *People v. Ochoa*, *supra*, 26 Cal.4th at p. 433; *People v. Waidla* (2000) 22 Cal.4th 690, 741-742.)

A defendant is "not entitled to be personally present either in chambers or at bench discussions which occur outside of the jury's presence on questions of law or other matters . . . ." (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1080, citing, inter alia, *People v. Jackson*, *supra*, 28 Cal.3d at pp. 309-310.) Furthermore, there must be a "reasonably substantial relation" to a defendant's ability to defend himself, not a mere "shadow" benefit. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 433.)

"Appellant has the burden of demonstrating that his absence prejudiced his case or denied him a fair trial." (*People v. Bradford* (1997)15 Cal.4th 1229, 1357.)

B. Appellant Was Not Denied His Right To Personal Presence At The Various Court Proceedings

Here, appellant had no right to be personally present at the enumerated proceedings because they involved the discussion of legal issues between the court, the prosecutor and appellant's trial counsel. (*People v. Cole* (2004) 33 Cal.4th 1158, 1230-1232 [defendant had no right to be personally

present at various proceedings, including pretrial hearings on motions, and bench conferences during voir dire related to confidential interviews of various prospective jurors and alternate jurors and to challenges for cause, and in-court conferences regarding jury instructions].) There is no indication that appellant's presence at these routine proceedings and sidebar conferences, many of which were actually requested by defense counsel (5RT 582, 9RT 1253, 14RT 2155, 19RT 3151, 23RT 3521, 25RT 3816), would have had any impact or would have served any purpose. (*People v. Benavides* (2005) 35 Cal.4th 69, 89; *People v. Ervin* (2000) 22 Cal.4th 48, 74.) Appellant's "arguments to the contrary are unduly speculative" (AOB 112-114). (*People v. Cole, supra*, 33 Cal.4th at p. 1232.)

In fact, although appellant contends his presence was vital in 32 separate instances, he only bothers to discuss why this is supposedly true regarding 3 of the sidebars/conferences: voir dire discussion of prospective jurors Duvall G. and Marquerite W., and discussion of replacing Juror Roberto S. (AOB 113-114.) However, in none of those 3 specific instances, nor the remaining 29, has appellant shown that any of these sidebars, conferences or hearings were critical to the outcome of the trial, such that his exclusion impacted the fairness of the proceedings. (*People v. Roldan* (2005) 35 Cal.4th 646, 717-718.) Moreover, appellant failed to fully sustain his burden of demonstrating he was prejudiced. (*People v. Bradford, supra*, 15 Cal.4th at p. 1357.) Thus, there is "no arguable basis for claiming that [appellant's] absence 'prejudiced his case or denied him a fair and impartial trial.' [Citation.]" (*People v. Bittaker, supra*, 48 Cal.3d at pp. 1080-1081 [absence from various hearings and conferences nonprejudicial]; see *People v. Hardy* (1992) 2 Cal.4th 86, 178 [defendant had not right to be present during conference involving legal issues].) Accordingly, his claims are meritless.

II.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S CHALLENGES FOR CAUSE AGAINST PROSPECTIVE ALTERNATE JURORS JOHN B. AND TRACEY S. BECAUSE THEY COULD BE IMPARTIAL JURORS, AND PROPERLY EXCUSED PROSPECTIVE ALTERNATE JUROR JANICE S. IN LIGHT OF HER VIEWS ON THE DEATH PENALTY; FINALLY, THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW DEFENSE COUNSEL TO QUESTION PROSPECTIVE ALTERNATE JUROR DUVALL G.

Appellant contends the trial court erred in denying his challenges for cause against prospective alternate jurors John B. and Tracey S.. Appellant further contends the trial court erred in excusing prospective alternate juror Janice S. for cause. Finally, appellant contends the trial court erred in refusing to allow defense counsel to question prospective alternate juror Duvall G.. (AOB 116-149.) Respondent submits that based on substantial evidence in the record, the trial court's rulings regarding these prospective jurors were proper.

A. Relevant Facts And Trial Proceedings

1. Prospective Alternate Juror John B.

John B. stated on his juror questionnaire that he "strongly agreed" that the circumstances of the crime are factors to consider when deciding between life without possibility of parole and the death penalty. He also stated that he "strongly agreed" that anyone who intentionally kills should always get the death penalty because "intentional" meant that "the murderer has forfeited any leniency (unless in self defense in some manner)." (Supp. CT I 1865 [emphasis in original].)

During voir dire at sidebar, defense counsel asked John B.

whether he believed that a person who committed a cold-blooded, premeditated murder during a robbery has forfeited his right to live and should automatically receive the death penalty regardless of the circumstances. John B. disagreed that the death penalty should automatically be imposed but a "certain amount" had been forfeited. John B. further clarified that the circumstances of the crime would determine whether the death penalty was warranted. (4RT 510-511.)

The prosecutor then asked whether in a felony murder case where a victim is intentionally killed during the felony the death penalty should automatically be imposed or whether John B. would be able to weigh aggravating and mitigating factors and possibly vote for life without the possibility of parole. John B. responded that he would weigh the circumstances even though based on certain factual scenarios such as where a victim had been murdered despite cooperating with the murderer he would have a stronger leaning towards imposing the death penalty. (4RT 511-512.)

When questioned again by defense counsel, John B. stated he would not automatically vote in favor of the death penalty without regard to any extenuating circumstances relating to the defendant, such as his childhood, but would consider those circumstances in possibly deciding in favor of life without the possibility of parole. (4RT 512-513.) John B. also acknowledged his statement on the juror questionnaire that "the person has forfeited the right" regarding a intentional, premeditated, and deliberated murder. However, he objected to defense counsel's representation that he would automatically vote the death penalty in that case. Even though he would lean more heavily in that direction, John B. clarified that "there are circumstances that would have to be weighed all the way around." (4RT 513-514.)

Defense counsel later moved to dismiss John B. for cause. (5RT 567.) Defense counsel asserted that John B. had made it clear that he would impose the death penalty for premeditated deliberated murder during the

robbery where the victim had not initiated any violence or resistance, and thus, there was no reasonable possibility that he would return a verdict of life without the possibility of parole based on the facts of the instant case. (5RT 567-569.) The prosecutor responded that defense counsel's questioning of John B. had improperly been couched in a way to get a prejudgment based on the facts of the instant case. This not withstanding, the prosecutor argued that although John B. responses were pro-death, they were not automatic death, which was apparent from his statements that even with a scenario of a vicious cold-blooded killing, he would not automatically vote for death. (5RT 569-570.) The prosecutor further noted that John B. had stated in his questionnaire that he was neither "auto-life" or "auto-death" and had stated that he would consider the defendant's background and the circumstances of the situation before making a decision on penalty. (5RT 570-571; Supp. I CT 1863-1865.)

The trial court found that John B. could be fair, stating:

> I had an opportunity to judge Mr. [John B.'s] demeanor as he stood at side bar with counsel. I found him to be very thoughtful in his answers, and I found him to be very credible.
>
> And I believe, on three or four occasions, he kept saying – he used the word "automatically." And I am not comfortable with that. [¶] "I'm not saying that I would automatically put someone to death under these circumstances. However, I would strongly lean in that direction." [¶] And in my view, that is insufficient to find that his ability to be a fair juror would be substantially impaired.
>
> Yes, he's a strong pro-deather. But he made it very, very clear that he would be willing to look at the circumstances, although his feelings on the subject matter are very strong.

(5RT 571.) The trial court denied defense counsel's motion to dismiss John B. for cause. Subsequently, defense counsel exercised his first peremptory challenge against prospective alternative juror John B.. (5RT 571-572.)

2. Prospective Alternate Juror Tracey S.

Tracey S. stated in her jury questionnaire that she was a registered

nurse and worked for the Los Angeles County Sheriff's Department. (Supp. I CT 2234.) During voir dire, Tracey S. stated she worked at the Men's Central Jail treating individuals who passed through the jail system. She stated she had no close friends from work. Tracey S. also stated that she had contact with deputy sheriffs at her job but was not friends with any of them. (5RT 578-579.)

At sidebar, defense counsel informed the court that appellant recognized Tracey S. as one of the nurses who treated appellant after an attack although it was probable that she would not recall appellant. Appellant also had seen Tracey S. talking with deputies and believed Tracey S. dated deputies. Defense counsel further stated it would be "uncomfortable" for appellant and defense counsel if Tracey S. remained as an alternate juror. Thus, out of an abundance of caution and a concern that she would come in contact with him during trial through her job, defense counsel challenged her for cause. (5RT 582-583.)

The prosecutor responded that the court could inquire as to whether Tracey S. recognized appellant, but that she may have had contact with him in the past was insufficient to support a challenge. The trial court agreed to ask whether Tracey S. recognized anyone at the counsel table but also noted that Tracey S. would not be working at the jail if she was to be impaneled as an alternate juror. When asked, Tracey S. stated she did not recognize anyone. (5RT 583-584.)

The trial court denied defense counsel's challenge for cause stating, "Under the circumstances, I think it's awfully difficult for me to say that she couldn't be an objective juror based on the concerns you have." (5RT 584-585.) Subsequently, defense counsel expressly accepted Tracey S. as an alternate juror, declining to exercise a peremptory challenge against her, and she was subsequently sworn in as an alternate juror. (5RT 585-594.) Tracey S. eventually sat as a regular juror when Juror Olivia D. was discharged. (12RT

1892-1893.)

3. Prospective Alternate Juror Janice S.

Janice S. stated on her questionnaire that she did not believe in the death penalty for personal and religious reasons, but that she could put her beliefs aside to impose it if she thought it was appropriate. Janice S. also stated that her feelings about the death penalty would not interfere with her ability to be objective during the guilt phase and that she could personally participate in a decision that would result in the execution of an individual. Janice S. further stated that the death penalty should only be imposed when more than one person is killed . (Supp. I CT 2114, 2116, 2118.)

During voir dire at sidebar, the court questioned Janice S. about the shooting death of her cousin that occurred 20 years prior. Janice S. stated that at the time of that trial, she believed the case was handled unfairly because the shooter was 17 years old and only served approximately 6 months at a juvenile camp before he was released. (5RT 554-556.) When asked whether her feelings would have an impact on her judgment if she had to decide the appropriate penalty in the instant case, Janice S. said that it might. Janice S. stated at the time, she wanted the killer to die but she no longer felt that way. Janice S. further stated that she did not feel she had the right to say that someone should die and that she could not make that decision. (5RT 556-557.)

The court further inquired whether Janice S. could think of a situation where a person was convicted of first degree murder that occurred during a robbery where she could impose the death penalty. Janice S. responded:

> No. [¶] I said "yes" on that paper, but now I'm thinking. I had time to think. And no, I couldn't say – even if they did all that – that I still couldn't say that I could sentence this person to death.

Upon further questioning from the court, Janice S. concluded that the death penalty was a bad idea and under no set of circumstances could she personally vote to put someone to death. (5RT 557.)

The prosecutor later challenged Janice S. for cause because she had stated that no matter how heinous the murder, she could not impose the death penalty. Defense counsel objected because he was not permitted to rehabilitate Janice S. and asked leave to do so, but alternatively, objected to her dismissal based on her responses. (5RT 567.)

The trial court stated that its questioning of Janice S. was "fairly pointed and fairly clear," such that Janice S. acknowledged that she had written in her questionnaire that she could impose the death penalty, but after further thought, realized that she could not do so. (5RT 567.) Subsequently, the trial court excused prospective alternative juror Janice S. for cause. (5RT 571.)

4. Prospective Alternate Juror Duvall G.

In his questionnaire, Duvall G. stated that he had been subjected to physical and mental abuse from his father. (Supp. I CT 2022.) Duvall G. was arrested when he was "underage" for joyriding and "DUI." He received a fine and "rehab" and believed the outcome was fair. (Supp. I CT 2033-2034.) Duvall G. also stated that one must always follow the judge's instructions and that he would not find appellant guilty if it was not proven beyond a reasonable doubt under the applicable law that he was the person who committed the crime. (Supp. I CT 2035, 2040-2041.) Duvall G. stated he believed the death penalty was needed to deter people from killing each other and that he would vote for guilt and penalty based only on the evidence and not his personal feelings. (Supp. I CT 2042-2045.) Duvall G. further stated that the cost of prison was not a factor in punishment, but rather the circumstances of the crime.

Duvall G. agreed "somewhat" that one who intentionally kills should always get the death penalty but noted it could be self-defense. (Supp.

I CT 2045.) Duvall G. questioned whether a convicted murderer with a prior violent felony conviction should always receive the death penalty, but believed the penalty should only be imposed on the "worst of the worst," and not only when more than one person has been killed. (Supp. I CT 2046.) Duvall G. stated he would not base his decisions on race, and not on sympathy alone. (Supp. I CT 2047-2049.) Duvall G. further indicated that he would consider whatever evidence, factors, and circumstances the jury was instructed to consider in deciding the penalty. (Supp. I CT 2046-2051.)

During voir dire at sidebar, Duvall G. made statements similar to those in his questionnaire and expanded upon his answers. Duvall G. noted that even with his personal experience with physical abuse from his alcoholic father and the lack of any psychological counseling, he was "a regular kind of guy." However, Duvall G. also stated that his past would not prevent him from objectively considering such evidence and the impact it could have on one's choices in life. (5RT 551-552.)

Duvall G. also stated that the joyriding and DUI incidents had occurred when he was between 12 and 14 and reiterated that he had been treated fairly by all involved, specifically the police and courts. Duvall G. also stated he had felt bad about the DUI incident because he could have hurt someone. (5RT 552-553.)

Defense counsel asked the court if he could ask Duvall G. a couple of questions. The court stated that both counsel were out of time and it was going to end questioning. (5RT 553.) Defense counsel expressly accepted Duvall G. as an alternate juror twice, declining to exercise a peremptory challenge against him and he was subsequently sworn in as an alternate juror. (5RT 554-594.)

B. The Trial Court Properly Exercised Its Discretion In Denying And Granting The Challenges For Cause Against the Prospective Alternate Jurors At Issue And In Ending Questioning Of Prospective Alternate Juror Duvall G.

1. Prospective Alternate Juror John B.

Initially, respondent notes this claim is waived because although defense counsel made a timely challenge for cause of John B., exercised a peremptory challenge to excuse him, and then exhausted his peremptory challenges, he did not express any dissatisfaction with the alternate jurors eventually selected. (*People v. Crittenden* (1994) 9 Cal.4th 83, 121; accord *People v. Millwee* (1998) 18 Cal.4th 96, 146 [to preserve a claim of error in the denial of a challenge for cause, the defense must exhaust its peremptory challenges and object to the jury as finally constituted].) Thus, because defense counsel never indicated any dissatisfaction with the alternate jurors selected (see 5RT 593-594), this claim is not preserved for appeal.

A prospective juror may be excluded if his views would prevent or substantially impair the performance of his duties as a juror (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140) in the case before the juror. (*People v. Earp* (1999) 20 Cal.4th 826, 853; *People v. Bradford, supra*, 15 Cal.4th at p. 1318; *People v. Wader* (1993) 5 Cal.4th 610, 652-653.) If a juror gives conflicting or ambiguous answers to questions about his views on the death penalty, the trial court is in the best position to evaluate the juror's responses, so its determination as to the juror's true state of mind is binding on the appellate court. (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 428-429; *People v. Phillips* (2000) 22 Cal.4th 226, 234; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1147.) Any ambiguities in the record are resolved in favor of the trial court's assessment, and the reviewing court determines whether the trial court's findings are fairly supported by the record. (*People v. Crittenden*, *supra*, 9

Cal.4th at p. 122; *People v. Howard* (1988) 44 Cal.3d 375, 417-428.)

Here, the trial court determined that despite John B.'s strong pro-death penalty view, he could be a fair and impartial juror based on its evaluation of his responses and demeanor during voir dire. John B. had expressly and explicitly stated, both on his questionnaire and during voir dire, that he would not automatically vote for the death penalty *or* life without the possibility of parole. Instead, John B. stated despite his personal support of the death penalty he would consider the evidence and circumstances before determining guilt and punishment. (Supp. I CT 1863-1864; 4RT 509-514.) Indeed, John B. frequently qualified his answers on his questionnaire by stating that the "circumstances" should factor into any decision. (Supp. I CT 1862-1866.) Moreover, despite defense counsel's repeated questions, John B. refused and objected to any characterization of his views as such that he would "automatically" vote in favor of the death penalty based solely on the factors of the crime itself. (4RT 514.) Therefore, the trial court's conclusion that there was insufficient evidence to show that John B.'s ability to be a fair juror would be substantially impaired is amply supported by the record. (See *People v. Navarette* (2003) 30 Cal.4th 458, 490 ["When a prospective juror has made conflicting statements regarding his or her ability to remain impartial and apply the law despite strong personal beliefs, we accept as binding the trial court's assessment."].) The court therefore acted well within its broad discretion in denying appellant's challenge against John B. for cause.

Even assuming the trial court erred in denying appellant's challenge for cause of John B., he has failed to show that he was denied his right to a trial before a qualified jury. (*People v. Maury* (2004) 30 Cal.4th 342, 379 [if a defendant claims that the trial court wrongly denied challenge for cause, he must demonstrate that the right to fair and impartial jury was affected].) This is so because appellant exercised a peremptory challenge

against John B. and thus he was never seated on appellant's jury panel. Thus, appellant is limited to arguing that the trial court's error reduced the number of available peremptory challenges he had to use against subsequent alternate prospective jurors (AOB 128-129). (*People v. Boyette* (2002) 29 Cal.4th 381, 418-419.) This claim is insufficient to show error. First, the loss of a peremptory challenge does not constitute a violation of the constitutional right to an impartial jury. Second, as noted above, appellant never expressed any dissatisfaction with the alternate jurors that were eventually sworn in and appellant's current suggestions that three of the four alternate jurors were dissatisfactory are purely speculative. Thus, appellant has failed to show he was prejudiced. (*Ibid.*) Accordingly, he was not denied his constitutional rights to an impartial jury as to prospective alternative juror John B..

2. Prospective Alternate Juror Tracey S.

> Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation.] [Citation.] On appeal, we will uphold the trial court's decision if it is fairly supported by the record, and accept as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has given conflicting or ambiguous statements. [Citations.]

(*People v. Farnam* (2002) 28 Cal.4th 107, 132, quotation marks and fn. omitted.) Section 1089 authorizes the trial court to discharge a juror upon a finding that the juror is unable to perform his or her duty: "If at any time . . . upon . . . good cause shown to the court [a juror] is found to be unable to perform his or her duty . . . the court may order the juror to be discharged. . . ." In deciding whether to discharge a juror, the court must make a reasonable inquiry to determine whether the juror is able to perform the duties of a juror. (*People v. Bell* (1998) 61 Cal.App.4th 282, 287.) The juror's inability to perform must appear as a demonstrable reality and will not be presumed. (*People v. Holloway* (2004) 33 Cal.4th 96, 124-125; *People v. Williams* (2001)

25 Cal.4th 441, 447-448.)

"In reviewing a trial court's decision either to retain or discharge a juror, we use the deferential 'abuse of discretion' standard. [Citations.] And we will uphold the decision unless it "'falls outside the bounds of reason."' [Citations.]" (*People v. Earp*, *supra*, 20 Cal.4th at p. 892.) The reviewing court must "'accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.'" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1049, quoting from *People v. Nesler* (1997) 16 Cal.4th 561, 582.) Accordingly, "'[i]f there is any substantial evidence supporting the trial court's ruling, we will uphold it.'" (*People v. Williams*, *supra*, 25 Cal.4th at p. 448, citation omitted.)

Initially, respondent submits appellant has forfeited any claim that the trial court erred in denying his challenge for cause against prospective alternate juror Tracey S. Although appellant eventually exhausted all four of his peremptory challenges, it is important to note that after his challenge for cause against Tracey S. was denied, he did not exercise a peremptory challenge against her even though he still had one remaining. (5RT 572-573.) In fact, immediately after the challenge against Tracey S. was denied, appellant accepted the prospective alternate jurors, which of course included Tracey S. (5RT 585), who was subsequently seated as an alternate and eventually as a regular juror (5RT 594, 12RT 1892-1893). (See *People v. Ramos* (1997) 15 Cal.4th 1133, 1160 [defendant failed to preserve issue regarding trial court's failure to allow an additional peremptory to excuse alternate juror in part because although he eventually exercised all four peremptory challenges, counsel had previously accepted the prospective alternate juror with two peremptory challenges remaining].) Therefore, because appellant expressly accepted Tracey S. as an alternate juror when he could have excused her, he is precluded from complaining about her now. Even if this issue is properly

before the Court, it also fails on the merits.

Here, there was absolutely no evidence to justify granting appellant's challenge for cause against Tracey S. As the transcript of the voir dire shows, Tracey S. did not even recognize appellant and therefore had no idea that she had provided nursing assistance to him previously at the Men's Central Jail. (5RT 584.) Moreover, prior to the court asking whether Tracey S. recognized anyone at counsel table, defense counsel made no effort to even show that Tracey S. would be unable to perform her duties as a jury under the law. Instead, defense counsel, and appellant, speculated that Tracey S. might learn appellant was in custody through possible future contact with him in her capacity as a nurse at the jail and that she dated and/or talked to deputies at the jail. In fact, defense counsel justified the challenge on the ground that it would be "uncomfortable" for him and appellant if Tracey S. was seated as a juror and then admitted that the challenge was not based on "anything specific, but it would be out of an abundance of caution." (5RT 583.) This highly speculative reasoning is inadequate to establish that prospective alternate juror Tracey S. was unable to perform her functions as a fair and impartial juror as a demonstrable reality. Therefore, the trial court's denial of the challenge for cause was supported by substantial evidence. (*People v. Holloway*, *supra*, 33 Cal.4th at pp. 124-125.)

Furthermore, appellant's attempt to bootstrap Tracey S.'s brief sighting of appellant at the jail, during trial after she was a regular juror, onto his claim that his challenge for cause should have been granted during voir dire, is meritless. (AOB 133-135.) When questioned about seeing appellant, juror Tracey S. stated that while at work on the prior Friday morning (a non-court day), she had made eye-contact with him while he was in line with other inmates outside a clinic. She did not speak to him, walked past him, and made no effort to find out anything about him. Tracey S. initially thought appellant

was in line with others because he was in an "escort module" but later believed he was part of a group preparing to go to court. (21RT 3205-3207.) The only new thing Tracey S. learned about appellant was that he was in custody and she stated that that knowledge would not influence her in the case. The court then excused her and told her not to discuss the incident with the other jurors. There was no further discussion of the matter or objection to juror Tracey S. continued presence on the jury panel. (21RT 3207-3208.)

First, appellant's attempt to establish that juror Tracey S. was automatically disqualified as a juror based on her having gone to work and viewing him in jail is not properly before this Court because he did not even ask that she be dismissed, much less attempt to establish that she was disqualified as a juror based on the incident (21RT 3207-3208). (See *People v. Brown* (2003) 31 Cal.4th 518, 546 [constitutional objections not made in the trial court are waived on appeal].) Instead, for the first time on appeal, appellant wildly speculates that juror Tracey S. gained a fountain of knowledge about him that is not supported by the record. Instead of citing any evidence, appellant states that juror Tracey S. somehow knew that he required "special handling," the reasons why such handling would be required, and "inferentially that he was potentially dangerous." (AOB 134-135, fn. 108.) There is absolutely nothing in the record to support these conclusions and therefore they require no consideration by this Court.

Second, as the record shows, nothing about the incident at the jail established that juror Tracey S. was incapable of performing her function as a fair and impartial juror from the time she was examined during voir dire through the incident at the jail. In fact, the record demonstrates the opposite based on her testimony that her having seen appellant in jail would have no effect on her continuing to function as a juror. Furthermore, *any* juror would have assumed that appellant was in custody since he was charged with a capital

crime. Accordingly, the trial court's denial of appellant's challenge for cause of prospective alternate juror Tracey S. was supported by substantial evidence. (*People v. Williams*, *supra*, 25 Cal.4th at pp. 447-448.)

3. Prospective Alternate Juror Janice S.

> The United States Supreme Court has held that a prospective juror may be excluded for cause without compromising a defendant's rights under the Sixth and Fourteenth Amendments to trial by an impartial jury if the juror's views on capital punishment "'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" [Citations.] We apply the same standard to claims under our state Constitution. [Citations.] A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. [Citations.] [¶] Generally, the qualifications of jurors challenged for cause are matters within the wide discretion of the trial court, seldom disturbed on appeal. [Citations.] There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror. [Citations.] "On review, if the juror's statements are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding. If there is no inconsistency, we will uphold the court's ruling if it is supported by substantial evidence. [Citations.]" [Citation.]

(*People v. Jones* (2003) 29 Cal.4th 1229, 1246-1247.)

Here, the trial court's dismissal of prospective alternate juror Janice S. for cause was warranted. During voir dire, Janice S. expressly stated that upon further reflection and contrary to what she had initially stated in her jury questionnaire, she could not make the decision to sentence someone to death and there was no set of circumstances under which she could impose the death penalty. (5RT 556-557.) The prosecutor challenged Janice S. under *Wainwright v. Witt*, *supra*, based on these responses. (5RT 566-567.) Given

Janice S.'s absolute statements that she could not and would not impose the death penalty, the trial court's dismissal for cause must be upheld. (*People v. Haley* (2004) 34 Cal.4th 283, 306 [if there is no inconsistency in the juror's statements, this Court must uphold the trial court's ruling if it is supported by substantial evidence]; *People v. Jones*, *supra*, 29 Cal.4th at p. 1246.)

Contrary to appellant's claim (AOB 139-141), the trial court's questioning of Janice S. was more than sufficient. As the court itself noted, its questions were "pointed and fairly clear," such that Janice S. expanded upon her answers by referring back to contrary statements she had made in her questionnaire. (5RT 567.) There was nothing equivocal or conflicting in Janice S.'s response that she could not impose the death penalty regardless of the circumstances of the crime (5RT 557). (*People v. Harrison* (2005) 35 Cal.4th 208, 227-228 [juror was properly excused from capital jury where several times during voir dire, she said she could not vote for the death penalty, although she hedged her answer by stating that "maybe" she could not do so].) Under these circumstances and based on the clarity of Janice S.'s responses, the trial court was not required to permit further questioning. (*People v. Samayoa* (1997) 15 Cal.4th 795, 823 ["A trial court has discretion to deny all questioning by counsel when a prospective juror gives 'unequivocally disqualifying answer[s],' [citation] and may subject to reasonable limitation further voir dire of a juror who has expressed disqualifying answers [citation]."]; *People v. Carpenter* (1997) 15 Cal.4th 312, 355 [trial court has discretion to refuse to allow defense counsel to question jurors for purpose of rehabilitation if their answers make their disqualification unmistakably clear].) Accordingly, the trial court acted well within its proper discretion in excusing prospective alternate juror Janice S. for cause.

4. Prospective Alternate Juror Duvall G.

At the time of appellant's trial, Code of Civil Procedure section

223 stated:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.

The trial court has the duty to know and follow proper procedure and to devote sufficient time and effort to death-qualifying voir dire, such that the court and counsel have sufficient information regarding the prospective juror's state of mind to permit a reliable determination of whether the juror's views would prevent or substantially impair the performance of his or her duties. (*People v. Stewart* (2004) 33 Cal.4th 425, 445; accord *People v. Stitely* (2005) 35 Cal.4th 514, 539-540.) Limitations on jury voir dire are subject to review for abuse of discretion. (*People v. Benavides*, *supra*, 35 Cal.4th at pp. 88-89; *People v. Navarette*, *supra*, 30 Cal.4th at p. 486.)

Initially, respondent submits appellant has forfeited any challenge to the time limits on questioning. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 538.) Here, the trial court initially set forth the process to be used during voir dire of prospective jurors. The court indicated it would question the jurors and would then allow counsel one hour to question the jurors. Appellant made no objection to the time frame allotted for attorney questioning. (1RT 19-23.) Appellant also failed to object at the time the court ended questioning of Duvall G. and/or inform the court of any other questions that he had. (5RT 553.) Accordingly, he has forfeited his claim regarding the trial court's limitation of questioning of prospective alternate juror Duvall G..

Furthermore, appellant is precluded from raising this claim because he failed to challenge Duvall G. for cause and expressly accepted him

as an alternate juror. As the record shows, appellant did not challenge Duvall G. for cause despite his current contention that his responses "reasonably suggested" he "could not serve as a fair and impartial juror" (AOB 148). (5RT 566-571.) Second, appellant did not exercise a peremptory challenge against him when he still had one remaining. (5RT 572-573.) In fact, appellant accepted the prospective alternate jurors, which included Duvall G. (5RT 572) on three occasions (5RT 572-573, 577, 585), before the alternates, including Duvall G., were sworn (5RT 594, 22RT 3390-3391). (See *People v. Ramos*, *supra*, 15 Cal.4th at p. 1160.) Accordingly, appellant has forfeited any issues regarding Duvall G.'s suitability as a juror.

In any event, as appellant concedes, Duvall G. disclosed a significant amount of information in his questionnaire and during voir dire. (AOB 147-148.) In the context of this information, Duvall G. stated that he could consider the evidence and all relevant circumstances as instructed by the court in determining guilt and penalty. He also stated he could personally impose either the death penalty or life without the possibility of parole. (Supp. I CT 2045-2052; 5RT 550-551.) Despite these responses, appellant contends he was denied the opportunity to establish Duvall G. could not serve as a fair and impartial juror as a result to the time frame the court enforced. (AOB 148-149.) However, nowhere does appellant states what questions he was unable to ask Duvall G. that would presumably have uncovered his inability to be fair and impartial as a result of the trial court's time restrictions. Instead, appellant simply states his inability was "reasonably suggested by his responses during voir dire and in his questionnaire." (AOB 148.) However, this argument is too vague and speculative to support a claim of error. (*People v. Roldan*, *supra*, 35 Cal.4th at pp. 693-694 [trial court did not abuse its discretion in denying defendant's requests for additional voir dire questioning of jurors, where defendant did not explain what additional information he sought to have elicited

or how the existing information about the jurors was inadequate, and it appeared defendant had sufficient information to intelligently exercise his challenges].)

Accordingly, the trial court did not abuse its discretion by imposing time limitations on questioning of the jurors, and in ending questioning of prospective alternate juror Duvall G..

III.

THE TRIAL COURT PROPERLY ADMITTED THE PHOTOS OF VICTIM SOY SUNG LAO IN LIFE AND IN DEATH

In Ground Three, appellant contends the admission of four photographs of the murder victim, Soy Sung Lao, in life and death, violated his constitutional rights to due process, an impartial jury, and a reliable penalty determination, and thus, his entire judgement as to Lao must be reversed. (AOB 149-160.) Respondent submits this claim is waived for failure to object to the photographs when first introduced and for failure to object on constitutional grounds when they were admitted. In any event, the trial court properly exercised its discretion in admitting the photos and thus reversal is not required.

A. Because Appellant Failed To Object To The Photos When They Were Presented During The Testimony Of Several Witnesses, His Claims Are Waived

In the guilt phase, the prosecutor introduced an exhibit containing four photographs of Soy (Peo. Exh. 14): two photos on the left were of Soy wearing a USC shirt and two photos on the right were from the autopsy. The photos were first introduced during the testimony of Park Police Sergeant Donald Tiller wherein one entire coroner's photo and one-half of the other were covered on the board. Sergeant Tiller, Debra Tomiyasu, and Gardena Police

Officer Blane Schmidt identified Lao in one or all of the four photos. (7RT 927-928, 8RT 1038-1042, 10RT 1500.) The defense did not object at the time these photographs were used for this proper purpose. Thus, any claimed error is waived. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 423 ["Because defendant did not object at the time the photographs were used in questioning the witnesses, he failed to preserve the issue for appeal."]; *People v. Lucas* (1995) 12 Cal.4th 415 490.)

Prior to the identification testimony of Ty Ngov, Lao's brother-in-law, defense counsel objected only to the presentation of one of the four photos of Lao with the tube in her throat, and offered to stipulate that Lao was the person depicted in that photo. The prosecutor agreed, covered up the two coroner photos completely, and the parties stipulated that Lao was the person depicted in the newly-covered coroner photo. (11RT 1706-1708.) Ngov subsequently identified Lao from one of the photos showing Lao in a USC sweatshirt. (11RT 1708-1709.) As appellant failed to object to the photo that was shown to Ty Ngov, his claim of error is again waived. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 423; *People v. Lucas*, *supra*, 12 Cal.4th at p. 490.)

Lastly, Lynn Ngov also identified her sister Lao in one of the photos without objection. (11RT 1863-1864.) Identification Technician Kim Swobodzinski later identified the color of the hair found in a bloody apron knot as similar in color to Soy's hair color in one of the two visible photos. (13RT 2074-2076.) Because there was no objection to the photos during either witness's testimony, any error is waived. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 423; *People v. Lucas*, *supra*, 12 Cal.4th at p. 490.)

During the testimony of Forensic Pathologist Ogbonna Chinwah, the two coroner photos were uncovered without objection, and after identifying Lao, Dr. Chinwah testified extensively about the location, depth, and injuries caused to her by the 30 stab wounds to her body. Dr. Chinwah also testified

about the incision to Lao's chest that was performed during an emergency room procedure. (14RT 2263-2270, 15RT 2272-2307, 2327-2332.) As noted above, the lack of objection to the photos waives any claim of error. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 423; *People v. Lucas*, *supra*, 12 Cal.4th at p. 490.)

Finally, after the coroner photos had been covered again, Lavette Gilmore also identified Lao from one of the photos of Lao wearing a USC sweatshirt without objection. (18RT 2877.) Thus, any alleged error is waived. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 423; *People v. Lucas*, *supra*, 12 Cal.4th at p. 490.)

B. The Photos Of Lao Were Properly Admitted For Identification And Alternatively, Assuming Error, Their Admission Was Harmless

Near the end of the guilt phase during discussion of admission of the exhibit, defense counsel objected to the depiction of photos of Lao in life opposite to photos of her death on the ground that it was irrelevant in the guilt phase and cumulative because there was extensive testimony and a diagram showing the severity of Lao's wounds. Defense counsel argued the photos were therefore unduly prejudicial and were being submitted to "play to the sympathy of the jury," and should be excluded under Evidence Code section 352. (19RT 3133-3134, 3136-3137.) The prosecutor argued that the photos of Lao in life were relevant and admissible to show the brutality of the crime, the locations of defensive wounds are Lao's arms, the blunt and sharp edges of the knife's penetration, location and direction of the stab wounds, and how the wounds bled. (19RT 3135-3136.)

The trial court admitted the photos finding them to be substantially more probative than prejudicial. Specifically, the trial court stated the photos were relevant because they showed the nature of the wounds and

there was a dispute regarding the blood trail and how the homicide actually occurred. The court also noted that the coroner photos were "quite antiseptic" given the nature of the murder. (19RT 3137-3138.)

> The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect.

(*People v. Heard* (2003) 31 Cal.4th 946, 975-876, internal citations omitted.)

> Photographic evidence of murder victims while they were alive is not necessarily inadmissible. (*People v. Smithey* (1999) 20 Cal.4th 936, 975.) Even were we to reach a different conclusion, any error was manifestly harmless in light of the strong evidence of guilt, including defendant's confession. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

(*People v. Boyette*, *supra*, 29 Cal.4th at p. 424; *People v. Mendoza* (2002) 24 Cal.4th 130, 170-171.)

Here, the prosecutor used Lao's photographs in life for identification and did not dwell on the photograph or cause the witnesses to comment on the photographs for any other purpose. Moreover, in addition to using the coroner photographs for identification, the photos were also relevant to show the location, depth, and injuries to Lao as testified to by the pathologist. This was especially relevant as there was much dispute over whether Lao was able to walk and the extent of her consciousness after she was stabbed repeatedly and was bleeding to death. Thus, admission of the all the photos was proper. (*People v. Martinez* (2003) 31 Cal.4th 673, 692 [photographs showing the victim when he had been alive were admissible, at guilt phase of capital murder trial, for identification purposes while examining witnesses and to identify victim as the subject of autopsy photographs.]; *People v. Samayoa*, *supra*, 15 Cal.4th at p. 833 [autopsy photographs are probative evidence of the

circumstances of the victim's death].) Accordingly, the trial court properly exercised its discretion in admitting the four photos of Lao.

Furthermore, even assuming error, reversal is not required because it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) The photographs were "not particularly calculated to elicit sympathy." They simply showed Lao while she was alive and corroborated the extensive testimony of the coroner regarding Lao's 30 stab wounds. (See *People v. Smithey* (1999) 20 Cal.4th 936, 975; *People v. Thomas* (1992) 2 Cal.4th 489, 523.) Therefore, appellant was not prejudiced.

IV.

THE TRIAL COURT'S RULINGS REGARDING THE DIRECT AND CROSS-EXAMINATION OF LAVETTE GILMORE WERE PROPER

Appellant contends the trial court made several errors during the testimony of witness Lavette Gilmore. (AOB 160-187.) Specifically, appellant contends the trial court erred (1) in failing to strike Gilmore's testimony regarding money she had in her pocket when she observed appellant (AOB 168-173, 183-185), (2) in permitting her testimony about her deliberate failure to identify appellant at the live lineup despite her recognition of him at the time and her subsequent identification of appellant at trial from the photos from the live lineup (AOB 173-176, 183-185), (3) and in sustaining the prosecutor's objections to defense counsel's questioning of her during crosss-examination (AOB 176-182, 186-187). Respondent submits appellant's claims are waived for failure to object and/or move to strike the alleged erroneous testimony, and alternatively, the trial court properly permitted the testimony because it was relevant and did not err in restricting defense counsel from asking improper questions. In any event, assuming any error, appellant was not prejudiced.

A. Relevant Testimony And Proceedings

Lavette Gilmore ("Peaches"), owner of Girls Will Be Girls Hair Salon in the same strip mall, went to the Donut King donut shop where Lao was working behind the counter at around 3:30 or 4:00 p.m. Appellant was wearing a black shirt with "red on it" and a hat, and was seated at a table while facing the window. There was a small foam cup on the table and bag next to appellant. Appellant appeared "rugged," looked unkempt, and slouched as if he did not want to look at anyone. Appellant was thin, dark, and had not had a haircut. (18RT 2859-2866.) Gilmore spoke with Lao for about 20 to 25 minutes as other customers came and left. When Gilmore left, she also spoke with Sergeant Tiller and expressed her concern about Lao being in the shop alone with appellant. (18RT 2877-2881.) Gilmore was unable to identify appellant at trial as the person she had seen at the donut shop. (18RT 2865-2866.)

On August 18, 1993, after being admonished, Gilmore narrowed down the suspects to #1 or #2 (appellant) in a front view six-pack photo folder (Peo. Exh. 6) However, she identified appellant from a side profile six-pack photo folder (Peo. Exh. 22). (18RT 2866-2872, 2877, 2963-2968.) At trial, Gilmore testified that she remembered appellant's eyes, nose, and the hair on his face because she made sure to take the time look at him since she had a lot of money in her pocket. Defense counsel objected to the testimony and Gilmore's "inchoate fears." The trial court responded, "All right. Ask your next question, please." (18RT 2871.)

At a live lineup on October 19, 1993, after being admonished, Gilmore intentionally mis-identified suspect #1 and did not identify appellant because she was scared and had been warned by her husband that she should not get involved. (18RT 2872-2877, 2970-2972.) On January 20, 1995, after

being admonished, Gilmore identified appellant from the front-view six-pack photo folder (Peo. Exh. 6). (18RT 2888-2890, 2968-2970.)

At trial, defense counsel objected to Gilmore then identifying appellant from a photograph of the lineup (Peo. Exh. 8) on the ground of lack of foundation. The trial court overruled the objection. (18RT 2873-2874.) Gilmore then identified appellant as the person she had previously recognized at the lineup but had intentionally failed to identify. (18RT 2875-2877.)

During cross-examination, defense counsel questioned Gilmore about the circumstances and consequences of her identifying the wrong person during the live lineup. The prosecutor's objections to defense questions regarding Gilmore's knowledge at the time of the live lineup that the instant case involved the death penalty, and her feelings if she had been the person mis-identified in the live lineup, as assuming facts not in evidence and as argumentative, respectively, were sustained. (18RT 2891-2892, 2894.)

Defense counsel then continued to question Gilmore extensively as to why she decided to mis-identify suspect #1, when she eventually told the police that she had purposely mis-identified someone, the circumstances surrounding her mis-identification, and challenged her credibility based on her having lied in the past. (18RT 2892-2894.) Defense counsel also challenged Gilmore regarding her previous description of appellant to the police, and her testimony that she did not recall making certain statements describing appellant. The prosecutor's objection that the questions were argumentative was sustained. Despite the sustained objection, defense counsel resumed questioning Gilmore about what she recalled of her description of appellant to the police. (18RT 2905-2906.)

B. Because The Trial Court Did Not Rule On Defense Counsel's Objection To Gilmore's Testimony Regarding The Money In Her Pocket And Because Appellant Failed To Move For The Testimony To Be Stricken, His Claim Fails; Alternatively, The Claim Fails On The Merits

Initially, contrary to appellant's claim (AOB 169), as shown above the trial court did not rule on his objection to Gilmore's testimony and defense counsel failed to press for a ruling. For this reason, he is precluded from raising the claim on appeal. (See *People v. Roberts* (1992) 2 Cal.4th 1148, 1179 ["The absence of an adverse ruling precludes any appellate challenge."]; *People v. Pinholster* (1992) 1 Cal.4th 865, 931 ["(T)he above record discloses a failure formally to move for severance of the count and to press for a ruling on the issue, a failure that constitutes a waiver of the issue on appeal."].) Moreover, defense counsel did not object at trial on the ground that the testimony was non-responsive or for any constitutional reasons. Thus, his claims are forfeited for this reason also. (*People v. Kennedy* (2005) 36 Cal.4th 595, 612 [rule requiring objection to error at trial as prerequisite to appeal applies to claims based on statutory violations as well as claims based on violations of fundamental constitutional rights, other than any stated ground for the objection at trial]; *People v. Wilson* (2005) 36 Cal.4th 309, 358.)

In any event, contrary to appellant's claims, the point of Gilmore's testimony was not to establish whether or not appellant had planned to commit a robbery or in fact, that he had planned to rob her. Rather, it was to explain her conduct in paying specific detail to appellant. However, assuming the testimony was inadmissible, defense counsel failed to request that it be stricken. This too precludes any claim of error on appeal. (*People v. Lang* (1989) 49 Cal.3d 991, 1020 [failure to move to strike evidence precludes an appellate claim its admission was error]; Evid. Code, § 353 [a judgment will not be reversed for the erroneous admission of evidence unless a motion to strike

the evidence that clearly stated the specific ground for the motion was made at trial].)

Furthermore, even if the testimony should have been stricken, appellant was not prejudiced because Gilmore later testified similarly, without objection, regarding making sure appellant saw that she put her money back in her pocket (18RT 2879-2880) and that she was concerned about appellant remaining in the donut shop alone with Lao (18RT 2880-2881). Furthermore, Debra Tomiyasu, DeAndre Harrison, Ella Ford and Sergeant Tiller, all identified appellant as the person they had seen at or leaving the donut shop when Lao was murdered. (8RT 1076-1078, 1094-1098, 9RT 1288-1293, 1297-1298, 1349, 1374-1380, 12RT 1920-1925, 18RT 2940-2947, 2949-2961, 2975-2978, 19RT 3070.) Accordingly, assuming error, it is not reasonably probable that the jury would have reached a different result had the testimony at issue been stricken. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

C. The Trial Court Properly Allowed Gilmore To Testify At Trial That She Had Recognized Appellant At The Live Lineup When She Had Intentionally Mis-Identified Someone Else

As shown above, Gilmore testified that she had intentionally mis-identified a suspect at the live lineup, even though she had recognized appellant, because she was scared and had been told by her husband that she should not get involved. (18RT 2872-2875.) Defense counsel objected to the testimony on the ground of lack of foundation of what Gilmore had seen at the lineup and that her memory was no longer "fresh." (18RT 2873-2874.) In overruling the objection, the trial court stated defense counsel could question Gilmore about her testimony during cross-examination. (18RT 2874.) Appellant now contends the testimony violated his right to counsel, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments, and their analogous California

counterparts. (AOB 173-176.)

As above, appellant is precluded from raising this claim on appeal because he did not object to the testimony on the same grounds that he has raised on appeal. (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 612; *People v. Wilson*, *supra*, 36 Cal.4th at p. 358.) In any event, contrary to appellant's contention, the testimony was properly admissible as it was relevant to Gilmore's credibility and the believability of her subsequent identifications of appellant considering she did not identify appellant at the live lineup on October 19, 2003, when he was present and she recognized him as the person she had seen at the donut shop. (Evid. Code., § 210 [relevant evidence is "evidence, *including evidence relevant to the credibility of a witness* . . ., having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."] italics added.)

Furthermore, there was no Sixth Amendment violation because even though appellant is not entitled to counsel during a photographic lineup, he was represented by counsel at the time Gilmore made the identification at trial. (*United States v. Ash* (1973) 413 U.S. 300, 321 [93 S.Ct. 2568, 37 L.Ed.2d 619] ["the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender"]; *United States v. Barker* (9th Cir. 1993) 988 F.2d 77, 78 [defendant had no right to have counsel present when witness was shown photograph of live lineup].) And in any event, appellant was represented by counsel at the time of the live lineup, who had actually requested that the live lineup take place (Supp. I RT 2-5; see 1CT 189-190, 207-211), and he does not and cannot contend the lineup violated his Sixth Amendment right to counsel for this reason (see AOB 173-176). (See *United States v. Wade* (1967) 388 U.S. 218, 239-240 [87 S.Ct 1926, 18 L.Ed.2d 1149] [absence of counsel at post-indictment pretrial lineup renders courtroom identification inadmissible unless courtroom identification is based

upon observations of suspect other than lineup identification].) This notwithstanding, contrary to the cases cited by appellant, as Gilmore did not actually identify appellant at the live lineup, the prosecutor could not possibly have been seeking to admit an identification obtained in violation of appellant's rights. (See AOB 175-176.)

Finally, assuming arguendo the trial court erred, it was harmless. As discussed above, there was testimony from several witnesses identifying appellant, including additional testimony from Gilmore. (See Argument IV-B & Statement of Facts A-I, *ante*.) Accordingly, Gilmore's testimony explaining why she mis-identified a suspect at the live lineup, even though she recognized appellant, could not have prejudiced him. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

D. The Trial Court Did Not Improperly Limit Defense Counsel's Cross-Examination Of Gilmore

The Confrontation Clause guarantees criminal defendants the right to cross-examine adverse witnesses on matters reflecting on their credibility. (*Davis v. Alaska* (1974) 415 U.S. 308, 315-316 [94 S.Ct. 1105, 39 L.Ed.2d 347].)

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

(*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [106 S.Ct. 1431, 89 L.Ed.2d 674]; *People v. Frye* (1998) 18 Cal.4th 894, 946.)

Furthermore, "not every restriction on a defendant's desired method of cross-examination is a constitutional violation." (*People v. Frye*,

supra, 18 Cal.4th at p. 946; *People v. Jones* (1998) 17 Cal.4th 279, 305.) The California Supreme Court has further held: "[U]nless the defendant can show that the prohibited cross-examination would have produced 'a significantly different impression of the witnesses' credibility' (*Van Arsdall*, *supra*, 475 U.S. at p. 680 [ ], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment. [Citation.]" (*People v. Frye*, *supra*, 18 Cal.4th at p. 946.)

Initially, respondent submits that appellant's contentions that any limitation of his cross-examination violated his constitutional rights (AOB 182) are forfeited for failing to raise them first in the trial court. (See *People v. Williams* (1997) 16 Cal.4th 153, 250.) In any event, as shown above, the trial court properly sustained objections to defense counsel's questioning of Gilmore.

In the first instance, defense counsel asked Gilmore questions that assumed she knew the instant case involved the death penalty on October 19, 2003, when she attended the live lineup. (18RT 2891-2892.) However, appellant was not even arraigned until November 19, 2003. (1CT 213.) Moreover, there is no evidence in the record that Gilmore had, or would have had, access to any information regarding the penalty sought in this case prior to appellant even being charged with the instant crimes. And appellant provides no support for his claim that it is common knowledge that the death penalty could be an option in a murder case, especially when that is not even the law in California, much less in every state. (AOB 177.) Accordingly, the trial court properly determined the questions assumed facts that were not in evidence.

Likewise, appellant's claim that the trial court improperly limited his cross-examination of Gilmore when it sustained the prosecutor's objections to two of defense counsel's questions as argumentative is also without merit. (18RT 2894, 2906.) This is so because appellant's argument relies on the unsupported assumption that his cross-examination of Gilmore was restricted

on the subjects of her bias and credibility. (AOB 178-182, 186-187 & fns. 130-131.) As the record shows, the trial court did not restrict those subjects as defense counsel questioned Gilmore extensively about her identifications and descriptions of appellant, how they varied at different times, and her relationship with Lao. (18RT 2890-2919). Instead, the trial court merely sustained two specific objections to the form of the questions, i.e., argumentative, that related to the areas about which defense counsel questioned Gilmore. And as noted above, defense counsel reformulated his questions to elicit the desired testimony by other questioning. (See 18RT 2891-2894, 2905-2907.)

As a result, appellant has failed to establish that his right to cross-examine was restricted. And for the same reason, appellant cannot show that any prohibited cross-examination would have produced "a significantly different impression of the witness's credibility" as he was not prevented from conducting the cross-examination he sought. Thus, appellant suffered no prejudice. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 679; *People v. Frye*, *supra*, 18 Cal.4th at p. 946.)

V.

THE TRIAL COURT PROPERLY PERMITTED DETECTIVE RICHARD COHEN'S TESTIMONY REGARDING APPELLANT'S BEING A SUSPECT IN LAO'S MURDER

Appellant contends the trial court violated his rights to a fair trial, impartial jury, and a reliable penalty determination by permitting Detective Richard Cohen's testimony regarding why appellant was a suspect in Lao's murder. (AOB 187-197.) Respondent submits appellant's claims are waived for failure to object to the testimony and, and alternatively, the trial court properly permitted the testimony because it was relevant. In any event, assuming any error, appellant was not prejudiced.

A. Relevant Testimony And Proceedings

Los Angeles County Sheriff's Detective Cohen testified that on October 27, 1992, he had interviewed appellant in jail regarding his theft of a pie from St. Frances Cabrini Church. (7RT 886-891, 897-898, 901-903.) On June 25, 1993, Sergeant Lobo and Gardena Police Officer Allen Otake met with Detectives Cohen and Jacques LaBerge, who were investigating a robbery and car burglary committed by appellant.

During Detective Cohen's testimony regarding his meeting with the other officers, the prosecutor began to ask the detective how and why the investigation into Lao's murder focused on appellant. (17RT 2709-2711; see 17RT 2742-2745, 2789-2791, 18RT 2926-2947.)

Defense counsel objected to any testimony regarding Detective Cohen expressing a belief that appellant looked like a composite drawing and/or that appellant "is as he looked at Cabrini," and any testimony regarding a similar "MO." No other reason or specific ground for objections was given, such as relevancy. Defense counsel had no objection to Detective Cohen's testifying that the meeting resulted in the preparation of a six-pack containing appellant's photo. (17RT 2711-2713.) The prosecutor stated that the purpose of the testimony was to establish the progression of the investigation, which was likely to be a source of attack by the defense. (17RT 2712.) The trial court agreed that Detective Cohen's opinion regarding appellant's appearance was irrelevant, but decided that the testimony that the "MO" in the theft case triggered his memory regarding the murder case was not unduly prejudicial since the jury had already heard that testimony. (17RT 2713-2714.)

Subsequently, without objection, Detective Cohen testified that he suspected that appellant might be involved in Lao's murder based on having viewed the composite and appellant's resemblance to it at the time Detective Cohen had spoken with him, and that appellant had been hanging around the Southwest Bowl, possibly committing crimes. (17RT 2715.)

B. The Trial Court Properly Admitted Detective Cohen's Testimony To Provide A Clear Understanding Of His Testimony Regarding The Various Officers' Actions In The Investigation

In *People v. Farnam, supra*, 28 Cal.4th at p.153, the California Supreme Court held: "A lay witness may testify to an opinion if it is rationally based on the witness's perception and if it is helpful to a clear understanding of his testimony. [Citation.]" (*Ibid.*; Evid. Code, § 800.) However, the trial court has the discretion under Evidence Code section 352 to decide whether the probative value of the evidence is substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice. (*People v. Heard, supra*, 31 Cal.4th at p. 972; *People v. Scheid* (1997) 16 Cal.4th 1, 13.) And as the Supreme Court has further held, "Rulings under Evidence Code section 352 come within the trial court's discretion and will not be overturned absent an abuse of that discretion." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070; *People v. Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125.)

Initially, appellant's claim is waived for failure to object to the admission of the evidence on the same ground as raised below, i.e. relevancy. (*People v. Farnam, supra*, 28 Cal.4th at p. 153.) In any event, the claim fails on the merits because Detective Cohen's testimony was based on his perceptions after viewing the composite and appellant, and was necessary for a clearer understanding as to why appellant suddenly became a suspect in a murder that had occurred eight months prior, especially when he had been arrested on more than one occasion and had been in jail for approximately seven of those eight months (see 6RT 784-789, 17RT 2774-2781). (*People v. Farnam, supra*, 28 Cal.4th at p. 153.) Moreover, the cases cited by appellant are not to the contrary. (AOB 193-196.) Accordingly, the trial court properly exercised its discretion in admitting Detective Cohen's testimony.

And assuming arguendo the evidence was erroneously admitted,

appellant was not prejudiced because appellant's similarity in appearance to the composite drawing had already been presented through Debra Tomiyasu's testimony. (8RT 1068-1069, 1134-1138, 1186-1188, 1197-1199.) Accordingly, because it is not reasonably probable that appellant would have obtained a more favorable verdict had the testimony been excluded, any error was harmless. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 946; see *People v. Marks* (2003) 31 Cal.4th 197, 226-227 [a claim of error involving "the application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of *Watson*].)[5]

VI.

THE TRIAL COURT PROPERLY ADMITTED ELLA FORD'S IN-AND OUT-OF-COURT IDENTIFICATIONS OF APPELLANT BECAUSE THEY WERE NOT THE RESULT OF UNDULY SUGGESTIVE IDENTIFICATION PROCEDURES

Appellant contends the trial court violated his rights to due process, counsel, and a reliable penalty determination by failing to suppress Ella Ford's in- and out-of-court identifications of him and thus, the error requires reversal of the judgment for the crimes against Lao and the penalty of death. (AOB 197-222.) Initially, appellant's contention is waived for failure to request suppression of the identifications on the same ground raised on appeal, and alternatively, the trial court properly denied appellant's motion to suppress Ford's identifications because they were not the product of unduly suggestive procedures. Finally, assuming error, it was harmless beyond a reasonable

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5. To the extent appellant is alleging federal constitutional error in this ruling, he failed to object on these grounds below. Thus, he has waived the claims, and they must be rejected on their merits since there was no error by the trial court. (*People v. Osband* (1996) 13 Cal.4th 622, 675.)

doubt.

A. Relevant Proceedings And Testimony

On February 8, 1995, appellant filed a motion to exclude any reference to Ford's six-pack photo lineup identification that had taken place in January 1995 and any potential in-court identification, or alternately, to impose sanctions on the prosecutor on the grounds that: (1) the prosecutor had failed to notify the defense that the photo identification would take place, and (2) because Ford did not testify at the preliminary hearing, a new live lineup should have been conducted for Ford or defense counsel should have been notified and present when the photo lineup was conducted. Defense counsel also requested that if the court denied the motion to exclude the identification, the jury be instructed regarding the prosecutor's actions and that it could consider that in determining the reliability of the photo and/or in-court identification. (1CT 232-233.)

At the hearing on the motion, defense counsel made similar arguments as above. However, he clarified that his only concern was that because a pre-trial order to conduct a live lineup for any witnesses had been granted in September 1993, the defense should have been notified when Ford eventually indicated to the police in January 1995 that she could make an identification so that a live lineup could have been conducted for her, or alternatively, so that defense counsel could have requested to be present when the six-pack photo lineup with her was conducted. (5RT 603-609, 613-614.) The prosecutor noted that at the time of the live lineup Ford had not been identified as a witness who could make an identification of appellant, and there had been several unsuccessful attempts to discuss what she had seen prior to January 1995. (5RT 609-611.) Defense counsel expressly stated that he did not dispute that the prosecutor's version of events was true. (5RT 613.)

The trial court denied the motion to exclude or suppress Ford's

identifications, concluding that even if she could arguably have been covered by the order requiring a live lineup ("as a potential witness"), suppression was an inappropriate remedy under *People v. Fernandez* (1990) 219 Cal.App.3d 1379. However, the trial court noted it would consider modifying the standard eyewitness testimony instruction, CALJIC No. 2.92, regarding the circumstances of Ford's identification(s). (5RT 614-615.)

At trial, Ella Ford testified that she had been next door to the Donut King at Conway Cleaners picking up her dry cleaning when she heard a female scream from the other side of the wall. As she left the shop, she saw appellant running from the donut shop and he almost ran her over. He had an object in his left hand that he kept close to his body. Ford heard someone yell, "He stabbed her. He stabbed her." She lost sight of appellant as he ran through the strip mall. (9RT 1350-1364, 1431-1436.)

Officer Nick Pepper arrived shortly after hearing the broadcast description of appellant. Upon his arrival, he secured the donut shop door. He also interviewed Ford about what she had seen. Ford described appellant as Black male, five feet six inches to six feet, 155-160 pounds, thin to medium build, with a full beard, wearing dark jeans, white tennis shoes, a black T-shirt with African colors – red, green and yellow. (9RT 1372-1374, 11RT 1826-1832.)

On January 6, 1995, Ford was admonished and identified appellant from the six-pack photo folder. (9RT 1376-1380.) Ford was reluctant to testify and had previously refused to talk to Sergeant Lobo or go to the live lineup because of gang concerns. (9RT 1384-1385, 19RT 3039-3045.)

During discussion of jury instructions, defense counsel proposed to modify CALJIC No. 2.92 to instruct the jury that it could consider

> [w]hether or not the People notified the defense attorney that a prior – that a photo line-up would be shown to a witness when here had been a prior court order for a physical line-up for all witnesses. This applies to witness Ella Ford.

(20RT 3184.) The trial denied the request but instead modified CALJIC No. 2.92 to state that the jury could consider "[t]he failure of a witness to attend a live lineup" as a factor in determining the weight to be given eye witness testimony. (20RT 3184-3188; 2CT 312-313.) The trial court also ruled that counsel could properly argue to the jury whether Ford's failure to attend the live lineup should cause the jury to distrust her identification testimony. (20RT 3188; see 21RT 3301-3302, 3306-3307.)

B. Appellant Has Failed To Show That Either Ford's In Or Out-Of-Court Identifications Were Unreliable

> In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. [Citations.] The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. [Citations.]

(*People v. Cunningham* (2001) 25 Cal.4th 926, 989-990; *People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

> "If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable." [Citation.] In other words, "[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends." [Citation.]

(*People v. Ochoa, supra,* 19 Cal.4th at p. 412; accord, *People v. Yeoman* (2003) 31 Cal.4th 93, 125 ["Only if the challenged identification procedure is unnecessarily suggestive is it necessary to determine the reliability of the resulting identification."].) This Court has declined to specify a standard of

review for determining undue suggestiveness, but has stated that an identification procedure violates due process if it "'suggests in advance of identification by the witness the identity of the person suspected by the police.' [Citation.]" (*People v. Ochoa, supra*, 19 Cal.4th at p. 413.)

Initially, as the record shows, appellant did not move to exclude/suppress Ford's in and out-of-court identifications on the specific ground that they were unreliable. (1CT 232-233; 5RT 603-609, 613-614.) Accordingly, he has forfeited his right to raise this argument on appeal. (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) This notwithstanding, the claim lacks merit.

Here, appellant barely argues that the identification procedures surrounding Ford's identifications of him were unreliable. Instead, appellant appears to argue that alleged discrepancies and inconsistencies between Ford's initial descriptions of appellant and her activities on the day of Lao's murder and her testimony at trial *by themselves* show that her identification of appellant as the murderer in and out of court were unreliable. (AOB 214-216.) As shown above, this is not the standard to determine the unreliability of a witness identification. (*People v. Cunningham, supra*, 25 Cal.4th at p. 989.) At most, these alleged discrepancies affect the weight to be given Ford's identifications, but are irrelevant to their admissibility. (*People v. Williams* (1973) 9 Cal.3d 24, 37 ["Any lack of convincing quality or positive identification of [a] defendant by the witnesses . . . merely [goes] to the weight of their testimony and not to its admissibility. [Citation.]"], disapproved on another point in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3; *People v. Prado* (1982) 130 Cal.App.3d 669, 674.)

Moreover, to the extent appellant does argue that the photographic lineup itself was suggestive, this argument fails. (AOB 216-217.) Contrary to his claim, there was nothing unduly suggestive about appellant's photo as it appeared in the six-pack photo display as shown to Ford. (Supp. II CT 385.)

Moreover, there is no evidence in the record, nor does appellant argue (see AOB 214-218), that the police made any suggestion in advance of Ford's out-of-court identification of the person suspected by them. (*People v. Ochoa, supra,* 19 Cal.4th at p. 413.) Furthermore, Ford's identification of appellant from the six-pack was tentative at best, as she wrote, "[b]ased on my memory, No. 3 [appellant] looks like the person I saw the day of the incident more so than anyone else in the six-pack file." (9RT 1379-1380; Supp. II CT 429.) However if the identification procedure actually had been unduly suggestive, Ford would have positively identified appellant. (See, e.g., *People v. Nguyen* (1994) 23 Cal.App.4th 32, 39 ["If the procedure had been truly suggestive, then [the witness] would have positively identified Petitioner at the preliminary examination."]; *People v. Hernandez* (1988) 204 Cal.App.3d 639, 652 [that the pretrial identification procedure was not unduly suggestive demonstrated by fact that witness could only tentatively identify the defendant from a photographic lineup, even after being shown a single picture of the defendant].)

Moreover, Petitioner does not allege any specific facts regarding Ford's subsequent in-court identification of him to explain how that identification was the product of a prior alleged unduly suggestive procedure or that the in-court identification itself was unduly suggestive (AOB 217). (*People v. Cunningham, supra,* 25 Cal.4th at pp. 989-990 ["The defendant bears the burden of demonstrating the existence of an unreliable identification procedure."]) Instead, Petitioner simply concludes that Ford's identifications were unreliable and should have been excluded based on her statements to the police, the nature of the six-pack photo line-up, and her initial brief mis-identification in court of the six-pack she had been shown in January 2003. (AOB 217-218.) As noted above, this is insufficient to demonstrate the identification *procedure* was unduly suggestive and thus Ford's *identification* should have been excluded. Accordingly, this claim fails. (*People v. Ochoa, supra,* 19 Cal.4th at p. 412; accord, *People v. Yeoman, supra,* 31 Cal.4th at p.

125 ["Only if the challenged identification procedure is unnecessarily suggestive is it necessary to determine the reliability of the resulting identification."].)

C. Even If Ford Was Required To Attend The Pre-Trial Live Lineup, The Trial Court Was Not Required To Suppress Her Testimony And Identifications Of Appellant

Under *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625, this Court held that "due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate." In *People v. Fernandez*, *supra*, 219 Cal.App.3d at pp. 1384-1386, the Court of Appeal held that the determination of an appropriate sanction for the failure of a witness to appear at a court-ordered lineup was within the trial court's discretion. The court further found that the requested exclusion was too harsh a sanction in light of the circumstances, and it upheld the trial court's decision to allow the defendant to propose an instruction as a sanction. (*Id.* at p. 1385.)

Applying the above here, the trial court fashioned an appropriate remedy for Ford's failure to attend the live lineup, assuming arguendo she was required to attend. (Compare 5RT 614-615 [trial court stated Ford was arguably subject to the order for a lineup as a "potential witness"] with 20RT 3187-3188 [no evidence that court order for lineup listed specific witnesses who were required to attend].) As the record shows, the trial court properly exercised its discretion and instructed the jury that it could consider Ford's failure to attend the live lineup in weighing her identification testimony. (2CT 312-313; 20RT 3188.) Furthermore, the trial court informed counsel that they were free to argue to the jury the weight that should be given Ford's testimony based on her failure to attend the live lineup. (See *People v. Rodriguez* (2004) 8 Cal.4th 1060, 1155 [in the case of in-court identifications not preceded by a lineup, the weaknesses, if any, are directly apparent at the trial itself and can be argued to the court and jury without the necessity of depending on an attempt to picture

a past lineup by words alone]; see *People v. Breckenridge* (1975) 52 Cal.App.3d 913, 935- 936 [noting continuing validity of principle after *Evans v. Superior Court*, *supra*, 11 Cal.3d at p. 625.) This is all that was required.

Furthermore, appellant's argument that *People v. Fernandez*, *supra*, 219 Cal.App.3d 1379, does not apply to the instant case because the prosecutor acted in bath faith by "secretly interviewing Ford at the last minute" is meritless since it is not supported the record. (AOB 220-221.) In fact, the record is to the contrary. At the hearing on the motion to suppress Ford's identifications, the prosecutor outlined, without contradiction, all the unsuccessful attempts to contact Ford to just interview her, much less conduct any kind of identification procedure. (5RT 609-613.) Defense counsel acknowledged that there was "some confusion . . . about the witnesses" and that he did not dispute the prosecutor's inability to contact Ford before January 1993. Moreover, defense counsel never claimed the prosecutor had acted in bad faith. Accordingly, appellant's attempt to avoid *Fernandez*'s application here fails.

D. Any Alleged Error Was Harmless Beyond A Reasonable Doubt

Assuming arguendo it was error to admit Ford's identification testimony and identifications, the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) This is so because as noted previously, Ford's out-of-court identification was tentative, and her in-court side profile identification of appellant was not much stronger. (9RT 1374-1376.) The jury was fully informed of all the circumstances necessary to weigh the strength of her identifications, and appellant was allowed to cross-examine Ford about any weaknesses and argue them to the jury. Furthermore, several other

witnesses made positive identifications of appellant. (8RT 1076-1078, 1094-1098, 9RT 1288-1293, 1297-1298, 1349, 18RT 2940-2947, 2949-2961, 2975-2978, 19RT 3070.) Accordingly, the trial court's admission of Ford's identifications of appellant was harmless beyond a reasonable doubt.

VII.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S PRIOR UNCHARGED CRIMES AND INSTRUCTED THE JURY WITH CALJIC NOS. 2.50, 2.50.1, AND 2.50.2

Appellant contends the trial court erred in admitting evidence of his prior uncharged crimes and instructing the jury with CALJIC Nos. 2.50,[6] 2.50.1,[7] and 2.50.2,[8] thereby violating his rights to due process, trial by jury,

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6. CALJIC No. 2.50 (as given at the time of appellant's trial) states in relevant part:

> Evidence has been introduced for the purpose of showing that the defendant committed [crimes] other than that for which [he] is on trial.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:
>
> [The identity of the person who committed the crime, if any, of which the defendant is accused;]
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose.

(2CT 296-297; 21RT 3346.)

7. CALJIC No. 2.50.1 (as given at the time of appellant's trial) states in relevant part:

> Within the meaning of the preceding instruction, such other crime or crimes purportedly committed by a defendant must be proved by a preponderance of the evidence. You must not consider such evidence for any purpose unless you are satisfied

and a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the state constitution, and thus reversal of the judgment is required. (AOB 222-235.) Respondent submits appellant has forfeited any claim of error regarding the instructions on the evidence of uncharged crimes because he expressly consented to admissibility and relevancy of this evidence. Moreover, appellant expressed no objection to CALJIC Nos. 2.50.1 and 2.50.2 and thus his claim of error in issuing these instructions is also precluded. And finally, the trial court properly instructed the jury with the relevant instructions. Therefore, these claims fail.Appellant contends the trial court erred in admitting evidence of his prior uncharged crimes and instructing the jury with CALJIC Nos. 2.50,[9/] 2.50.1,[10/] and 2.50.2,[11/] thereby violating his

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> that [the] [particular] defendant committed such other crime or crimes.
>
> The prosecution has the burden of proving these facts by a preponderance of the evidence.

(2CT 298; 21RT 3346-3347.)

8. CALJIC No. 2.50.2 (as given at the time of appellant's trial) states in relevant part:

> "Preponderance of the evidence" means evidence that has more convincing force and the greater probability of truth than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.
>
> You should consider all of the evidence bearing upon every issue regardless of who produced it.

(2CT 299; 21RT 3347.)

9. CALJIC No. 2.50 (as given at the time of appellant's trial) states in relevant part:

> Evidence has been introduced for the purpose of showing that the defendant committed [crimes] other than that for which [he] is on trial.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to

rights to due process, trial by jury, and a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the state constitution, and thus reversal of the judgment is required. (AOB 222-235.) Respondent submits appellant has forfeited any claim of error regarding the instructions on the evidence of uncharged crimes because he expressly consented to admissibility and relevancy of this evidence. Moreover, appellant expressed no objection to

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show:

> [The identity of the person who committed the crime, if any, of which the defendant is accused;]
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose.

(2CT 296-297; 21RT 3346.)

10. CALJIC No. 2.50.1 (as given at the time of appellant's trial) states in relevant part:

> Within the meaning of the preceding instruction, such other crime or crimes purportedly committed by a defendant must be proved by a preponderance of the evidence. You must not consider such evidence for any purpose unless you are satisfied that [the] [particular] defendant committed such other crime or crimes.
>
> The prosecution has the burden of proving these facts by a preponderance of the evidence.

(2CT 298; 21RT 3346-3347.)

11. CALJIC No. 2.50.2 (as given at the time of appellant's trial) states in relevant part:

> "Preponderance of the evidence" means evidence that has more convincing force and the greater probability of truth than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.
>
> You should consider all of the evidence bearing upon every issue regardless of who produced it.

(2CT 299; 21RT 3347.)

CALJIC Nos. 2.50.1 and 2.50.2 and thus his claim of error in issuing these instructions is also precluded. And finally, the trial court properly instructed the jury with the relevant instructions. Therefore, these claims fail.

A. Relevant Proceedings

Prior to trial, the prosecutor informed the court and counsel that he would be eliciting testimony regarding appellant's uncharged and unrelated crimes in the context of explaining certain relevant events, e.g., the source of appellant's booking photo and statement, certain relevant aspects of appellant's prior custody status, etc. The prosecutor explained that he did not plan to solicit certain information or the circumstances relating to an assault, burglary and trespass, and that to the extent any of the evidence was admitted, the trial court could instruct the jury on the specific relevancy of its admission. (6RT 617-618.)

When asked whether he had any objection to the admission of the evidence, defense counsel stated, "no," because it was all relevant. Defense counsel further stated that if there was a penalty phase, he would bring out more details about some of the incidents. Lastly, defense counsel stated he was not opposing admission of the evidence for tactical reasons. (6RT 618-619.) After clarification with counsel and the court regarding the characterization of statements made by appellant and that there should be no mention of appellant being in a state facility, defense counsel concluded, "With those kind of rulings, I have no opposition to [the prosecutor] bringing out the various arrests for the offenses [the prosecutor]'s talking about, even though they are uncharged offenses." (6RT 619-621.)

During trial, without objection, the prosecutor presented the following evidence: (1) in October 1992, while the car was parked at Southwest Bowl, Joe Vaouli's car was broken into and raffle tickets were stolen from inside (15RT 2424-2438); (2) in October 1992, Deputy Sheriff Everett had contacted appellant and "Irwin" approximately six times; on one of those

occasions, at the Hilltop Motel at 10601 Western Avenue, Deputy Everett found rock cocaine and a smoking pipes on appellant; on another occasion, appellant appeared to be under the influence of cocaine (17RT 2675-2679); (3) on October 18, 1992, appellant stole a pie from a church bake sale at St. Francis Cabrini Church at 1440 West Imperial Highway in Los Angeles; appellant was taken into custody on October 26, 1992, when he returned to the church (6RT 784-789); and (4) on October 27, 1992, Los Angeles County Sheriff's Detective Richard Cohen spoke to appellant at the Lennox Sheriff's Station, and after appellant waived his *Miranda* rights, he admitted stealing the pie and said he went to the church because he was hungry (7RT 882-891, 897-898, 901-903); the evening of November 3, 1992, David Akinsaya and Alvin Duncan found that appellant had broken into the former's locked 1980 Oldsmobile Cutlass Supreme and was sleeping on the front seat of the car; appellant was arrested and Officer Otake handled the investigation (17RT 2767-2770, 2774-2781, 2784-2789).

During discussion of jury instructions, defense counsel objected to the issuance of CALJIC No. 2.50 as misleading, prejudicial, and inapplicable. Specifically, defense counsel argued that no Evidence Code section 1101, subdivision (b), evidence had been admitted and the evidence of the Draper robbery was insufficiently similar to show a common modus operandi with the robbery of the Donut King. (20RT 3171-3173.) The prosecutor responded that evidence was cross-admissible because of similar modus operandi, and the instruction was necessary to explain to the jury that the uncharged crimes were not admitted and could not be considered to find that appellant was "a criminal generally." (20RT 3173-3174.)

After further discussion, counsel agreed that the instruction was relevant only to the misdemeanor uncharged crimes, and not any crimes for which appellant was on trial, e.g., the Draper robbery. (20RT 3174-3175.) The trial court also determined that there had to be guidance to the jury regarding the

uncharged crimes and that CALJIC No. 2.50 should be issued with modification. As a result, portions of the instruction were stricken such that the jury was informed that the evidence at issue had only been admitted for the limited purpose of determining the identity of the person who committed the charged crimes. (20RT 3175-3176.) Defense counsel made no objection to CALJIC Nos. 2.50.1 and 2.50.2. (20RT 3177.)

B. The Trial Court Properly Instructed The Jury With CALJIC No. 2.50 To Inform The Jury Of The Permissible Use Of The Uncharged Crimes Evidence

> Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. [Citation.] Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. (*People v. Kipp* (1998) 18 Cal.4th 349, 369, 75 Cal.Rptr.2d 716, 956 P.2d 1169.)

(*People v. Catlin* (2001) 26 Cal4th 81, 111.)

Initially, appellant is precluded from arguing that the uncharged evidence was improperly admitted because not only did he not object to the evidence, he expressly consented to its admission for tactical reasons. (6RT 618-621.) Accordingly, any alleged error in admitting the evidence was invited or waived. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685-1686 ["'Under the doctrine of invited error, where a party, by his conduct, induces the commission of an error, he is estopped from asserting it as grounds for reversal. [Citations.] Similarly an appellant may waive his right to attack error by expressly or impliedly agreeing at trial to the ruling or procedure objected to on appeal.' [Citations.]"].)

Likewise, appellant's claims that the trial court erred in instructing the jury with the modified version of CALJIC No. 2.50, and CALJIC Nos. 2.50.1 and 2.50.2, cannot be raised on appeal because he agreed to issuance of the instructions below. Indeed, as discussed above, defense counsel directed the trial court to the portions of CALJIC No. 2.50 that should be stricken before it was read to the jury and then made no further objection to the modified instruction. And when the trial court specifically asked whether there was any objection to CALJIC Nos. 2.50.1 and 2.50.2, he stated "no." (20RT 3171-3176.) In addition, to the extent this Court finds appellant raised any objection to the instruction(s), he failed to object on the same grounds that he has raised on appeal. (*People v. Kipp*, *supra*, 26 Cal.4th at p. 1122 ["Although defendant contends that the ruling denied him various rights under the state and federal Constitutions, he did not object on these grounds in the trial court, and thus he has not preserved these constitutional claims for appellate review]; *Mesecher v. County of San Diego*, *supra*, 9 Cal.App.4th at pp. 1685-1686.) Accordingly, appellant is precluded from raising these claims of instructional error on appeal. The above notwithstanding, his claim fails on the merits.

Despite failing to object to the alleged conflict between CALJIC No. 2.01's instruction on the proof-beyond-a-reasonable doubt standard and the preponderance standard of CALJIC Nos. 2.50, 2.50.1 (as argued above), appellant argues that the latter instructions failed to inform the jury that it must find appellant's guilt of the uncharged crimes beyond a reasonable doubt before they could be used to establish his identity. (AOB 232-234.) In addition to the fact that this claim is waived for failing to raise it below, respondent submits the claim fails on the merits for the same reasons this Court gave in *People v. Medina* (1995) 11 Cal.4th 694, 763-764 (preponderance of the evidence standard proper for proving prior crimes during guilt phase), and *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 380-383 (jury could consider uncharged crimes in a capital murder trial only if it found defendant committed them by a

preponderance of the evidence; jury was not required to find that defendant committed the crimes by clear and convincing proof), as cited by appellant (AOB 232-233). (Cf. *People v. Reilford* (2003) 29 Cal.4th 1007, 1014 ["This is not the first time jurors have been asked to apply a different standard of proof to a predicate fact or finding in a criminal trial. . . . As we do in each of those circumstances, we will presume here that jurors can grasp their duty–as stated in the instructions–to apply the preponderance-of-the-evidence standard to the preliminary fact identified in the instruction and to apply the reasonable doubt standard for all other determinations."].) Accordingly, appellant's claims are meritless.

Assuming arguendo error, it was harmless under any standard. When all the instructions are considered as a whole, the jury was not misled because it was told each element of the charged crimes had to be proved beyond a reasonable doubt and that this standard applied to appellant's identity as the perpetrator (2CT 310-311, 319-349). (*People v. Lewis* (2001) 25 Cal.4th 610, 649 [in evaluating a claim of instructional error, the reviewing court must evaluate the entire charge to the jury]; *People v. Smithey*, *supra*, 20 Cal.4th at p. 963.) Further, there was overwhelming evidence of appellant's guilt as set forth in the Statement of Facts, *ante*, including the identification evidence. Any errors in the other crimes instructions were harmless under state and federal standards. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

VIII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.51

Appellant contends the trial court erred in instructing the jury with CALJIC No. 2.51, which explained that motive was not an element of the crimes charged. Appellant does not argue the instruction is incorrect. Instead,

he argues that issuance of the instruction in conjunction with the prosecutor's argument that his motive for the murder was akin to his mental state to commit robbery was error, and therefore, his federal rights to due process, trial by jury, and a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated. (AOB 236-246.) Respondent submits this claim fails for failure to object to or request clarification of the instruction at trial and to object to the prosecutor's argument, and alternatively, the instruction was properly given. Finally, assuming error, appellant suffered no prejudice.

During discussion of jury instructions, defense counsel raised no objection to the issuance of CALJIC No. 2.51. (20RT 3177.) The jury was subsequently instructed with the standard instruction:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(2CT 300; 21RT 3347.)

During closing argument, the prosecutor argued to the jury that each of the elements of robbery had been proved based on the evidence presented. (21RT 3219-3222.) Specifically, regarding the robbery of Lao, the prosecutor argued that there was evidence from which the jury could infer that appellant had the specific intent required to prove robbery, i.e., the intent to permanently deprive Soy of the $12, as he did not ask for a loan and had no intention of bringing the money back. (21RT 3222.)

In the context of the murder, the prosecutor argued that concerning the special circumstance allegation of a murder committed during the course of a robbery, there was ample evidence that appellant's motive, i.e., his reason, for committing the murder was robbery. Particularly, the prosecutor argued that the evidence did not show another motive, such as evidence of a

sexual assault. (21RT 3223-3226.)

The prosecutor also made the distinction that although the People's theory was not that the murder was first degree – premeditated – the evidence also supported that crime, such that appellant should not be found guilty of the lesser included offense of second degree murder. The prosecutor then argued that evidence that the murder was committed during the course of the robbery – felony murder – had separately been proved beyond a reasonable doubt based on appellant's having taken Lao into the back room, causing her death by stabbing her 30 times, and then leaving to take $12 from the cash register. (21RT 3224.) And to show that the intent to steal had arisen before the murder, a required element of the crime (see 2CT 324; 21RT 3359 [Defense Special Instruction 1]), and that the murder was committed to carry out the robbery (2CT 331; 21RT 3361 [CALJIC No. 8.81.7: Special Circumstances – Murder In Commission Of]), the prosecutor urged the jury to consider the similarities between the robbery of Beatriz Addo where she too had been taken to a back room, but did not struggle, before appellant left her to rob the cash register and left the store. (21RT 3226.)

Initially, respondent submits that CALJIC No. 2.51 is a legally correct standard jury instruction and because appellant failed to request modification or clarification, he has forfeited his appellate claim that issuance of the instruction was error. (*People v. Valdez* (2004) 32 Cal.4th 73, 113; *People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) In addition, appellant's contention is forfeited as to any alleged error in or confusion caused by the prosecutor's argument because he never objected to the prosecutor's argument (21RT 3219-3226). (*People v. Prieto* (2003) 30 Cal.4th 226, 259-260 [a defendant may not complain of prosecutorial misconduct unless he made a timely and *specific* objection at trial on the same ground *and* requested the court to admonish the jury regarding the impropriety].) This notwithstanding, appellant's claim also fails on the merits.

Here, appellant's argument fails at the onset because it is based on a mis-characterization of the prosecutor's argument. (AOB 239-241, 245.) As the record shows (and as outlined above), at no time did the prosecutor suggest or argue that appellant's intent to commit the robbery was similar to, related to, much less synonymous with his motive for committing the murder (AOB 245). (*People v. Cash* (2002) 28 Cal.4th 703, 738 ["[M]otive is the 'reason a person chooses to commit a crime,' but it is not equivalent to the 'mental state such as intent' required to commit the crime. [Citation.]"].) In fact, the prosecutor clearly distinguished the requisite elements for the robbery charges, particularly the evidence showing that appellant had the requisite intent to permanently deprive the victims of their property, from his discussion of appellant's motive (the robbery) for committing the murder, which as CALJIC No. 2.51 accurately instructs, *is not* an element of any of the crimes charged. (21RT 3219-3226.) Therefore, appellant's claim that the prosecutor's argument withdrew "the crucial mens rea elements of robbery and special circumstances from the jury's considerations" (AOB 245) is completely without merit. Accordingly, taking these arguments together with the absence of incorrect or conflicting instructions, there is no reasonable likelihood that the jury could have been confused or misled as to motive and intent, and thus, there is no basis for reversal on this issue. (*People v. Cash*, *supra*, 28 Cal.4th at p. 739 ["In sum, the instructions as a whole did not use the terms 'motive' and 'intent' interchangeably, and therefore there is no reasonable likelihood the jury understood those terms to be synonymous."].)

IX.

THE TRIAL COURT'S OMISSION OF CALJIC NO. 2.22 WAS HARMLESS BASED ON THE OTHER PROPERLY ISSUED INSTRUCTIONS

Appellant contends the trial court's failure to issue CALJIC No.

2.22 regarding conflicting testimony was prejudicial error and therefore, his federal rights to due process, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their analogous California counterparts were violated. (AOB 247-259.) Respondent submits that the omission of the instruction was harmless in light of the other properly issued instructions.

CALJIC No. 2.22 [12] must be given sua sponte where conflicting evidence is presented (*People v. Cleveland* (2004) 32 Cal.4th 704, 751; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885.) Here, there was evidence of conflicting testimony presented regarding the crimes against Lao, e.g., witness identification testimony.[13] Therefore, CALJIC No. 2.22 should have been issued sua sponte. However, appellant was not prejudiced.

In *People v. Snead* (1993) 20 Cal.App.4th 1088, 1097-1098, the defendant made the identical argument made here, i.e., the court's failure to instruct the jury with CALJIC No. 2.22 was prejudicial error. The *Snead* court agreed it was error not to instruct the jury with CALJIC No. 2.22, however, it

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12. CAJIC No. 2.22 states:

> You are not required to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which you find more convincing. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses [who have testified on the opposing sides]. The final test is not in the [relative] number of witnesses, but in the convincing force of the evidence.

13. Contrary to appellant's claims (AOB 251, 257), respondent submits there was no conflicting evidence on any material issue regarding the crimes against Beatriz Addo and Samuel Draper such that CALJIC No. 2.22 was required. However, because there was arguably conflicting evidence/testimony regarding the crimes against Lao, the instruction should have been issued.

found the error harmless because the trial court had instructed the jury with other standard instructions which provided guidance for the jury in its consideration and evaluation of the evidence. The same is true in the instant case.

Here, the jury was instructed with even more instructions than the jury received in *Snead* regarding the evaluation of the evidence: CALJIC No. 2.13 (evaluating prior consistent or inconsistent statements); CALJIC No. 2.20 (evaluating the credibility of witnesses); CALJIC No. 2.21.1 (evaluating discrepancies in a witness's testimony or between a witness's testimony and that of other witnesses); CALJIC No. 2.21.2 (when a witness is willfully false); CALJIC No. 2.27 (testimony of a single witness, when believed, is sufficient for proof of that fact); CALJIC No. 2.80 (weighing expert opinion); CALJIC No. 2.81 (weighing lay opinion); CALJIC No. 2.82 (hypothetical questions); and CALJIC No. 2.83 (resolving conflicts in expert testimony). (2CT 291-295, 306-309; 21RT 3343-3346, 3349-3351). In addition, the prosecutor did not argue that the jury should decide appellant's guilt based on the number of witnesses presented by each side. (21RT 3215-3264, 3320-3338.) Finally, there is no evidence the court's failure to instruct with CALJIC No. 2.22 hindered the jury in its ability to properly evaluate the evidence.

Accordingly, under the state standard of review, appellant has failed to show that there was a reasonable likelihood of a more favorable result had the instruction been given. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Snead*, *supra*, 20 Cal.App.4th at p. 1097.) Appellant also fails to establish any federal constitutional error occurred, but on this record, it is clear that omitting CALJIC No. 2.22 was harmless beyond a reasonable doubt. (See *People v. Carter* (2003) 30 Cal.4th 1666, 1220-1222 [error in omitting evidentiary instructions at penalty phase harmless under state and federal standards].)

X.

THERE WAS MORE THAN SUBSTANTIAL EVIDENCE TO SUPPORT APPELLANT'S CONVICTIONS FOR ROBBERY AND MURDER OF SOY LAO

Appellant contends there was not substantial evidence to support his convictions for robbery and murder of Soy Lao and therefore those judgments must be reversed. (AOB 260-268.) Respondent disagrees and submits appellant's arguments urging this Court to re-weigh the evidence on appeal notwithstanding, there was more than substantial evidence from which the jury could have reasonably concluded that appellant robbed and murdered Lao.

> A reviewing court faced with . . . a [sufficiency] claim determines "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

(*People v. Catlin*, *supra*, 26 Cal.4th at p. 139, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

> We examine the record to determine "whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." Further, "the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." This standard applies whether direct or circumstantial evidence is involved. "Although it is the [trier of fact's] duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the [trier of fact], not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'"'

(*People v. Catlin*, *supra*, 26 Cal.4th at p. 139, citations omitted; *People v. Carter*

(2005) 36 Cal.4th 1215, 1258 [in determining the sufficiency of the evidence to support a special circumstance finding, reviewing court applies the same test used to determine the sufficiency of the evidence to support a conviction of a criminal offense].)

Although the court must ensure the evidence is reasonable, credible, and of solid value, the credibility of witnesses and the weight accorded the evidence are matters within the province of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Stewart* (2000) 77 Cal.App.4th 785, 790; accord, *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319.) Thus, the reviewing court resolves all conflicts in the evidence and questions of credibility in favor of the verdict, and indulges every reasonable inference the factfinder could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) "An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise." (*People v. Combs* (2004) 34 Cal.4th 821, 849.) Therefore, if the verdict is supported by substantial evidence, the reviewing court must defer to the trier of fact and not substitute its evaluation of a witness's credibility for that of the fact finder. (*Ibid.*)

To prove a felony-murder special-circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder. (*People v. Mendoza* (2000) 24 Cal.4th 130, 182.) The robbery-murder special circumstance applies to a murder in the commission of a robbery, not to a robbery committed in the course of a murder. (*People v. Marshall* (1997) 15 Cal.4th 1, 41 .) For purposes of the robbery special circumstance, a murder

> is not committed *during* a robbery within the meaning of the statute unless the accused has killed . . . *in order to advance an independent felonious purpose,* . . . [Citation.] A special circumstance allegation of murder committed during a robbery

> has not been established where the accused's primary criminal goal is not to steal but to kill and the robbery is merely incidental to the murder. . . . [Citations.]

(*People v. Morris* (1988) 46 Cal.3d 1, 21, internal quotation marks omitted.) "Concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance." (*People v. Raley* (1992) 2 Cal.4th 870, 903.) It is only when the underlying felony is merely incidental to the murder that the felony-murder special circumstance does not apply. (*Ibid.*; *People v. Bolden* (2002) 29 Cal.4th 515, 554.)

The evidence in this case, taken as a whole and viewed in the light most favorable to the judgment, was of reasonable, credible and solid value from which a rational jury could have reasonably determined that appellant intended to commit a robbery and murdered Lao in the commission of the robbery. Appellant was observed by Sergeant Tiller and Lavette Gilmore seated inside at a table in the donut shop while Lao was working behind the counter. Appellant was wearing a Malcolm X cap and had an orange travel bag. Appellant remained in the donut shop after both left. (7RT 939-944, 18RT 2859-2866, 2877-2881.)

A short time later, Debra Tomiyasu entered the shop, saw the orange duffle back at a table along with a Malcolm X cap, but no one was visibly present in the shop. (8RT 1027-1037, 1204-1205.) Deandre Harrison also entered the shop and triggered the door buzzer several times so anyone in the back employee area would know of their presence. (8RT 1037-1038, 9RT 1258-1264.)

Tomiyasu and Harrison heard muffled, high pitched screaming and then saw appellant come from the back employee area of the store and walk to the cash register as the screams became louder. Appellant opened the register wider and grabbed money as Tomiyasu and Harrison saw Lao, who was covered in blood, walking from the same direction from which appellant had come.

Appellant took the money and quickly left the store. Lao continued to stagger forward, screaming and bleeding, and then collapsed to the floor behind a counter. (8RT 1038-1054, 1191-1194, 1204-1205, 9RT 1266-1276, 1340-1344.)

Tomiyasu followed behind appellant and saw him run across the parking lot of the strip mall. She called out that there had been a stabbing and for people to help. Tomiyasu also went to the Girls Will Be Girls Hair Salon to get help. Harrison went next door to Conway Cleaners to call "911" after he saw appellant run across the parking lot. No one other than them was in the store or left immediately after appellant fled. (8RT 1054-1059, 1200-1201, 9RT 1275-1276, 1280-1286, 1363-1364, 1368-1369, 1439-1440, 1446-1447.)

Ella Ford, who was next door to the Donut King at Conway Cleaners picking up her dry cleaning, heard a scream from the other side of the wall. When she left the shop, she saw appellant running from the donut shop and he almost ran her over. He had an object in his left hand that he kept close to his body. Ford heard someone yell, "He stabbed her. He stabbed her." She lost sight of appellant as he ran through the strip mall. (9RT 1350-1364, 1431-1436.)

Appellant was subsequently identified by Sergeant Tiller, Harrison, Tomiyasu, Ford, and Gilmore as the person who had been in the donut shop immediately prior to the robbery and murder, and as the person who took the money from the cash register and left the store as Lao stumbled from the back employee area, bleeding from 30 stab wounds. (8RT 1076-1078, 1094-1098, 9RT 1288-1293, 1297-1298, 1349, 1376-1380, 12RT 1920-1925, 18RT 2866-2872, 2877, 2888-2890, 2940-2947, 2949-2961, 2963-2970, 2975-2981, 19RT 3070.)

From this circumstantial evidence, the jury could have reasonably concluded that appellant stabbed Soy 30 times for the purpose of robbing her and in fact did rob her when he took the money from the cash register after the

stabbing. This is especially true considering appellant had committed two additional robberies by restraining the victims (Addo and Draper) while threatening them with injury from a knife or other sharp object if they were to resist. (6RT 679-692, 15RT 2454-2461, 16RT 2473-2483 Therefore, it was reasonable for the jury to infer that Lao, who had evidence of defensive wounds (15RT 2289-2291), had resisted appellant's attempts to restrain and rob her, and appellant stabbed and killed her as a result. Accordingly, there was more than substantial evidence to support the verdicts.

Appellant's argument to the contrary is meritless. (AOB 261-268.) Here, instead of applying the proper standard of review, which requires an appellate court to "view[] the evidence in the light most favorable to the prosecution" (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; *People v. Catlin*, *supra*, 26 Cal.4th at p. 139), appellant argues, in part, that the various prosecution witnesses were not credible because they had given somewhat different versions of the events on different occasions, that except for a partial palmprint, appellant's fingerprints were not matched to the fingerprints found at the scene, and the alleged illogic of appellant stabbing Lao when he didn't stab any other robbery victims and then letting two eyewitnesses live when leaving the donut shop. (AOB 261-268.) Whether these arguments and suppositions had any merit, the jury heard all the testimony of the witnesses and the alleged contradictions that appellant asserts, as well as defense counsel's closing argument reiterating these arguments and suppositions. (21RT 3269-3273, 3277, 3282-3291, 3294-3298, 3301-3319.) The jury clearly determined the witnesses to be credible, as was its right, and that their testimony was sufficient to find beyond a reasonable doubt that appellant robbed Lao and murdered her to facilitate the commission of the robbery.

In sum, there was no evidence

> suggesting, or requiring the jury to conclude, that defendant took [the money] merely to obtain a reminder or token of the incident

> [citation], to give a false impression about his actual motive for the murder, or in some other way to facilitate or conceal the killing [citation]. Nor was there substantial evidence of any motive for the murder apart from accomplishing the robbery.

(*People v. Bolden*, *supra*, 29 Cal.4th at p. 554.) Therefore, the evidence points to an intent to rob that degenerated into a killing, and the robbery-murder special circumstance is supported by substantial evidence. (See, e.g., *People v. Williams* (1994) 30 Cal.App.4th 1758, 1763.) Accordingly, appellant's claims fail.

XI.

THE TRIAL COURT PROPERLY CERTIFIED THE RECORD ON APPEAL; ACCORDINGLY, APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED

As he argued in his petition for writ of mandate/prohibition to decertify the record filed in this Court on March 7, 2003, and denied on June 15, 2003 (Supreme Court case no. S114106), appellant contends the trial court erred in denying his request to settle the record as to the chalkboard diagram of blood spatter that Senior Criminalist Elizabeth Devine created during her testimony at trial, and also erred in including its statement regarding the circumstances of the excusal of the 60 jurors for hardship in the record. As a result, appellant argues his rights to due process, a fair and impartial jury, counsel, confrontation, and a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their analogous California counterparts were violated. (AOB 260-286.) Respondent submits the trial court's rulings were correct and certification was proper because appellant was not entitled to settle the record concerning the chalkboard diagram as it was not admitted into evidence at trial, and appellant should not be allowed to settle a matter he should have pursued at trial. In addition, because there is no

indication that the trial court's recollection of the proceedings concerning the excusal of the 60 prospective jurors for hardship, after carefully examining appellant's request, was incorrect, the inclusion of the trial court's statement regarding their excusal was proper. Accordingly, none of appellant's constitutional rights were violated, nor has he shown that he was prejudiced by any alleged error.

A. Relevant Trial Proceedings

On October 5, 2000, appellant filed a request to correct the transcripts, augment the record, examine sealed transcripts, and settle the record in superior court. (Supp. IV CT 1-21.) On January 5, 2001, the trial court ordered the reporter's transcripts of several proceedings be prepared, but did not expressly rule on the remainder of appellant's requests, or his supplemental motion, because the trial record was unavailable. (1/5/01 RT; Supp. IV CT 33-40.) The next hearing was postponed due to delays in receiving the ordered transcripts. (Supp. IV CT 22-32; 1/21/01 RT, 9/18/01 RT, 11/19/01 RT.)

At the January 22, 2002, hearing, appellant informed the trial court that he was having difficulty gaining the assistance of Deputy Public Defender ("DPD") Michael Clark, appellant's trial attorney, in the record settlement process. At appellant's request, the trial court ordered DPD Clark, via a minute order, to assist appellant's counsel in the record settlement process. (Supp. IV CT 41; 1/22/02 RT 2-3.) The next hearing was postponed until April 2, 2002, due to further delays in receiving the previously ordered transcripts. (Supp. IV CT 42-47; 3/4/02 RT, 4/2/02 RT.) In subsequent letters to the trial court and respondent, appellant stated DPD Clark was on administrative leave and he had been unsuccessful in gaining DPD Clark's input in record settlement. (Supp. IV CT 48-49, 51-52, 54, 57-62.) As a result, the next hearing was delayed until August 5, 2002. (Supp. IV CT 50, 56.) On that date, appellant again informed the trial court that DPD Clark was still unavailable and he had

no information regarding his return to the Public Defender's Office. Respondent objected to any further delays in the settlement process. The trial court continued the matter until October 15, 2002, and stated record settlement would take place on that date. To that end, the trial court ordered respondent to forward a copy of appellant's record settlement requests to Deputy District Attorney (hereinafter "DDA") Marc Chomel, the trial prosecutor, to obtain his input in the settlement process. (Supp. IV CT 63; 8/5/02 RT.)

On October 15, 2002, appellant's counsel, DDA Chomel and counsel for respondent met and discussed all of appellant's record settlement requests. (Supp. IV CT 64; 10/15/02 RT.) Regarding appellant's request to settle the record relating to the chalkboard diagram Los Angeles County Sheriff's Department Senior Criminalist Elizabeth Devine created in the trial court, DDA Chomel stated she had drawn lines on the chalkboard to show blood spatter. However, DDA Chomel had no specific recollection of how the diagram appeared and stated it would need to be re-created entirely. Likewise, DDA Chomel had no recollection of the discussion regarding the excusal of prospective jurors for hardship and suggested appellant's counsel ask for the trial court's input. (10/15/02 RT 5-6; Supp. IV CT 66-67, 69, 71, 73.) After this discussion, the trial court ordered appellant's counsel to prepare a Proposed Settled Statement to be submitted to all parties and also gave appellant's counsel the opportunity to meet with DPD Clark for his input before the next hearing on November 18, 2002. (10/15/02 RT 8-9.)

On November 2, 2002, appellant's counsel served the Proposed Settled Statement in which he indicated he wanted to examine Senior Criminalist Devine's case files to examine "out-of-court" materials in an attempt to determine whether the chalkboard diagram was spontaneously created at trial. Appellant's counsel also requested the trial court's input in determining the procedures used and reasons for the trial court's excusal of the prospective jurors for hardship. (Supp. IV CT 65-75.) On November 8, 2002, respondent

objected to and opposed any further settlement proceedings of several items, including the matter of the chalkboard diagram and the excusal of the hardship jurors. (Supp. IV CT 78-79.) Appellant's response was served on November 15, 2002. (Petitioner's Response to Respondent's Opposition to Record Settlement.)[14/] Appellant's counsel's Revised Proposed Settled Statement was also served on November 15, 2002, after he consulted with DDA Chomel and DPD Clark. (Petitioner's Revised Proposed Settled Statement.) Concerning the chalkboard diagram, DPD Clark believed it was a re-creation of a diagram in Senior Criminalist Devine's files, (Petitioner's Revised Proposed Settled Statement, 7); and, concerning the excusal of the hardship jurors, DPD Clark recalled the trial court had been "pretty liberal" in excusing jurors and believed that a hearing had been conducted at which a court reporter was present (Petitioner's Revised Proposed Settled Statement, 8).

At the November 18, 2002, hearing, the trial court considered appellant's request and respondent's objection to settlement regarding the chalkboard diagram. After noting it had no recollection of the diagram on the chalkboard and that it would be impossible to reach an agreement on the diagram's appearance at this date, the trial court denied appellant's request for settlement regarding the chalkboard diagram. However, although the trial court was reluctant to allow settlement on a matter to which all parties were not likely to agree and to which no party had objected at trial, the trial court allowed appellant to attempt settlement concerning the excusal of the prospective jurors for hardship. To that end, the trial court recalled that both counsel had stipulated to jurors being excused based on their paid jury leave and that hearings were conducted concerning jurors whose "problems" were not "work-related." The trial court ordered appellant's counsel to prepare a revised Proposed Settled

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14. Appellant has requested this Court take judicial notice of its record in Supreme Court case No. S114106, which includes all subsequent documents without specific "CT" and "RT" citations. (AOB 268, fn. 173.)

Statement consistent with the rulings in the hearing. At appellant's counsel's request, the trial court also ordered him to copy the juror hardship questionnaires and forward them to the parties for review. (Supp. IV CT 80; 11/18/02 RT 1-11.)

On December 12, 2002, appellant served the Second Revised Proposed Settled Statement and the hardship questionnaires on the parties. (Supp. IV CT 81-93.) At the hearing on December 16, 2002, at which appellant's counsel appeared telephonically, the trial court stated that all the hearings concerning the excusal of the hardship jurors that it recalled took place on January 30, 1995. Andrea Gartner was the designated Court Reporter and had transcribed the proceedings so they were already part of the record. The trial court further noted that it recalled both counsel had seen the hardship questionnaires at the time of jury selection and both parties had either "stipulated or agreed" that the 60 prospective jurors could be excused because of financial hardship. Respondent informed the trial court that it had spoken to DDA Chomel and he had nothing further to add concerning the excusal of the jurors. (Supp. IV CT 94-95; 12/16/02 RT 1-7.)

Appellant's counsel agreed to prepare the Engrossed Settled Statement to be reviewed by respondent by December 18, 2002, and for the trial court's signature by December 20, 2002. (Supp. IV CT 95; 12/16/02 RT 8-10.) On December 19, 2002, appellant served the Engrossed Settled Statement, which included his objections to the trial court's denial of his request for settlement concerning the chalkboard diagram, and the settlement process and the settled statement concerning the excusal of the 60 prospective jurors for hardship. (Supp. IV CT 96-107, 110.) On December 20, 2002, the trial court certified the record as accurate and complete. (Supp. IV CT 109-110.) On December 27, 2002, respondent served a response to appellant's Engrossed Settled Statement stating respondent had no objection to the record being certified as accurate and complete. (Supp. IV CT 111.)

B. Petitioner Was Not Entitled To Settle The Record Concerning The Chalkboard Diagram Because It Was Not Admitted Into Evidence

Record settlement is governed by California Rules of Court, rules 7 and 36(b). (*Marks v. Superior Court* (2002) 27 Cal.4th 176, 192.) Under Rule 36(b), an appellant may apply to the trial court for settlement of a statement of any part of the "oral proceedings" of which a transcript "cannot be obtained for any reason." "An application for 'permission to prepare a settled statement' must show that the subject matter is in fact part of the oral proceedings." (*People v. Gzikowski* (1982) 32 Cal.3d 580, 584, fn. 2.) A court may decline to settle a statement if after resorting to all available aids, including the memory of the judge's and the participants, it is affirmatively convinced of its inability to do so. (*Marks v. Superior Court*, *supra*, 27 Cal.4th at p. 196.) The court's discretion in ruling on request for settled statements is fairly broad. (See *id.* at p. 195 [as long as trial court does not act "arbitrarily," court has "full power" over the record].)

This Court has said in regards to a settled statement, "Defendant is entitled to an appellate record that accurately reflects what was done and said in the trial court--not what he wishes had been done or said." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 585.) The rules authorizing settlement, augmentation, and correction of the record on appeal concern documents "file[d] or lodged" in the superior court and transcripts of "oral proceedings" that occurred therein. (Cal. Rules of Court, rules 7(b), 12.)

> These provisions-much like the entire network of rules governing matter properly included in the appellate record-are intended to ensure that the record transmitted to the reviewing court preserves and conforms to the proceedings actually undertaken in the trial court.

(*People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 585.) This Court explained, "The settlement, augmentation, and correction process does not allow parties to create

proceedings, make records, or litigate issues which they neglected to pursue earlier." (*Ibid.*)

Here, that is precisely what appellant was attempting to do: re-create proceedings and make a record of items he neglected to pursue earlier. First, as respondent argued in the superior court (Supp. IV CT 78-79; 11/18/02 RT 2), the diagram contained on the chalkboard was not itself an "oral proceeding" and it was neither a document that was filed nor lodged in the trial court, again making settlement improper.

Finally, as noted above, appellant could have, and should have, pursued any matters relating to the chalkboard diagram at trial, and not try to re-create proceedings during record correction in order to make a record he neglected to pursue at trial. (See 15RT 2342-2345.) As shown above, neither DDA Chomel nor the trial court had any recollection of how the diagram appeared (10/15/02 RT 5; 11/18/02 RT 3-4). DPD Clark also had no recollection of the diagram's appearance although he believed that it was not a spontaneous creation by Senior Criminalist Devine at the time of trial. (11/18/02 RT 4.) Indisputably, no one could recall what the diagram actually looked like. Thus, any attempt to settle the record on this matter would necessarily have required the re-creation of a proceeding to make a record of a diagram no party actually remembered. This is precisely what the rules of settlement are designed to prevent. (*People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 585.)

Accordingly, the trial court properly rejected appellant's request to settle the record as to the chalkboard diagram. Therefore, appellant was not denied his federal constitutional right to a record on appeal that permits meaningful review, the assistance of counsel, confrontation, and a reliable penalty determination under the Fifth, Sixth, and Fourteenth Amendments, and their analogous California counterparts.

Furthermore, because appellant has made no attempt to show he

suffered any prejudice, especially given that all of direct and cross-examination of Senior Criminalist Devine is contained in the Reporter's Transcript on appeal, his claim also fails. (*People v. Heard, supra*, 31 Cal.4th at p. 970 [complaining party bears the burden of demonstrating that the appellate record is not adequate to permit meaningful review]; see also *People v. Young* (2005) 34 Cal.4th 1149, 1170) [an appellate record is inadequate only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal; merely showing that missing material may have contained matter that demonstrated error or reflected a constitutional violation amounts to nothing more than speculation and is insufficient to demonstrate prejudice].)

C. The Trial Court Used The Proper Procedures In Allowing Settlement Of The Record As To The 60 Prospective Jurors Excused For Hardship

Appellant next contends the trial court erred in settling the matter of the excusal of 60 prospective jurors for hardship because it eliminated the role of the parties. (AOB 281-281.) Respondent submits the trial court properly performed its duty and settled the record as to the prospective jurors. In any event, assuming there are additional un-reported proceedings, appellant has failed exercise his remedy to augment the record under Rule 12.

In his initial Proposed Settled Statement, served November 2, 2002 (Supp. IV CT 65-75), appellant sought to settle the record regarding the procedures and considerations used to excuse the 60 prospective jurors for hardship. DDA Chomel had no recollection of the process, and thus, sought input from the trial court to settle this matter. (Supp. IV CT 73.) On November 15, 2002, appellant served his Revised Proposed Settled Statement, wherein he noted that DPD Clark recalled that the trial court was "pretty liberal" in excusing jurors for hardship and that a hearing had been conducted, at which a court reporter was present. (Petitioner's Revised Proposed Settled Statement, 8.) At the November 18, 2002, hearing, the trial court allowed settlement of this

matter and, as appellant requested, provided its input stating that it recalled both counsel had stipulated that certain jurors could be excused based on the amount of their paid jury leave. The trial court also stated that hearings were held for those jurors who had non-work related problems. (11/18/02 RT 6-7.) Appellant then requested that he be allowed to send the jury hardship questionnaires (which were already contained in the record [Supp. II CT Vol. I 47-239; Supp. II CT Vol. II 240-247]) to see if counsel could reach an agreement on what occurred when the jurors at issue were excused. (11/18/02 RT 7-8.) The trial court granted the request and set the next hearing for December 16, 2002. (11/18/02 RT 9-10.)

On December 13, 2002, appellant served his Second Revised Proposed Statement (Supp. IV CT 83-93). Appellant also filed a letter requesting that Court Reporter Andrea Gartner, who reported the proceedings concerning the prospective jurors who were excused for hardship on January 30, 1995, be directed to check her notes to see whether there were any un-reported proceedings from that date. At the December 16, 2002, hearing, the trial court stated all the proceedings that it recalled had occurred on January 30, 1995, concerning the prospective jurors, and had been transcribed and were already part of the record (see 1CT 257). (12/16/02 RT 4, 7-8.) The trial court also stated, as it had at the November 18, 2002, hearing, that both counsel had "stipulated" to the excusal of the 60 prospective jurors based on financial hardship. Respondent's counsel also stated that she had spoken to DDA Chomel regarding appellant's settlement request and he had nothing to add regarding the prospective jurors excused for hardship. (12/16/02 RT 6-7.) The trial court's recollection of the proceedings was incorporated into the Engrossed Settled Statement. (Supp. IV CT 103-104.)

Cases have held that the appellate record needs to be complete for a fair and meaningful appellate review, which is particularly important in death penalty cases. (*Dobbs v. Zant* (1993) 506 U.S. 357, 358 [113 S.Ct. 835, 122

L.Ed.2d 103] [noting the "critical role of a complete record in facilitating meaningful appellate review"]; *Parker v. Dugger* (1991) 498 U.S. 308, 321 [111 S.Ct. 731, 112 L.Ed.2d 812] [noting the important role of meaningful appellate review in ensuring the death penalty is not imposed arbitrarily]; *People v. Hawthorne* (1992) 4 Cal.4th. 43, 63 [noting "critical role of a proper and complete record" in facilitating appeal]; see *People v. Pinholster*, *supra*, 1 Cal.4th at p. 921 [court looked to see whether missing portion of record was "substantial," meaning it affected the ability of reviewing court to conduct "meaningful review"].) However, appellant is entitled to a fair appeal, not a perfect one. (See *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 681 ["the Constitution entitles a criminal defendant to a fair trial, not a perfect one"]; *People v. Mincey* (1992) 2 Cal.4th 408, 454.) An appellant is simply entitled to a record that is "'adequate to permit meaningful appellate review.'" (*People v. Osband*, *supra*, 13 Cal.4th at p. 663 (quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1165).)

Based on the above, respondent submits the trial court used the proper procedures in allowing settlement as to the 60 prospective jurors excused for hardship. Appellant initially submitted his settlement request and the trial court allowed settlement of the matter (Cal. Rules of Court, rules 7, 36(b)). Appellant then received input from DDA Chomel, DPD Clark and the trial court, as appellant requested, concerning their recollection of what transpired in order to reach a settled statement. The Engrossed Settled Statement accurately reflected all parties' recollections of the proceedings concerning the 60 prospective jurors who were excused for hardship. Accordingly, contrary to appellant's claim, the trial court properly included all parties in the settlement process. (AOB 280-281.) Thus, the trial court properly certified the record as complete and appellant was not denied his federal constitutional rights to a record on appeal that permits meaningful review, the assistance of counsel, confrontation, and a reliable penalty determination under the Fifth, Sixth, and

Fourteenth Amendments, and their analogous California counterparts.

D. The Trial Court Did Not Act Arbitrarily In Determining That All The Proceedings Regarding The 60 Prospective Jurors At Issue Had Been Reported

Finally, concerning appellant's claim that the trial court arbitrarily decided all proceedings concerning the prospective jurors at issue had been reported (AOB 282-283), there is nothing in the record that demonstrates the trial court's recollection is incorrect. The record shows that the trial court carefully considered appellant's settlement request on at least two occasions, and its recollection of the hearings that took place was the same on both occasions. The most appellant can provide to support his claim is that DPD Clark recalled there was a hearing regarding the hardship requests, at which a court reporter was present. (AOB 282.) This does not contradict the trial court's recollection, and in fact, actually supports it. The trial court recalled there were hearings held concerning jurors whose problems were not work-related. Such hearings did in fact occur and are already a part of the record on appeal. (See 1RT 58-2RT 101.) Accordingly, appellant's claim of various errors also fails for this reason.

And finally, because as shown above, there was no error in the procedures used by the trial court to certify the record, there can be no cumulative error (AOB 285-286).[15] (*People v. Harris* (2005) 37 Cal.4th 310, 366.) Therefore, appellant's claim should be rejected.

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15. As appellant has previously conceded, he did not object to the procedures used to excuse the 60 prospective jurors, and thus, appellant cannot challenge the process. (Petitioner's Response to Respondent's Opposition to Record Settlement, 6.)

XII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AT THE PENALTY PHASE

Appellant contends the trial court erred by instructing the jury with CALJIC No. 8.84.1, which instructed it to disregard all jury instructions from the guilt phase, but failing to instruct the jury with CALJIC Nos. 1.01, 1.02, 1.03, 1.05, 2.00, 2.01, 2.20, 2.21.1, 2.21.2, 2.22, 2.60, 2.61, 2.71, 2.72, 2.80, and 2.90. (AOB 287-309.) Respondent submits that any error in failing to properly instruct the jury at the penalty phase was harmless beyond a reasonable doubt and there is no reasonable possibility the error contributed to the penalty verdict.[16/]

A. Relevant Trial Proceedings

After discussing the penalty instructions with counsel (25RT 3773-3778, 3833-3837, 26RT 3851) and at the conclusion of the penalty phase, the trial court instructed the jury with CALJIC No. 8.84.1, in pertinent part as follows:

> You will now be instructed as to all of the law that applies to the penalty phase of the trial. [¶] You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.

(2CT 362; 26RT 3905.) The court also instructed the jury with CALJIC Nos. 8.85, listing the factors for the jury to consider in determining appellant's penalty, 8.86, requiring proof beyond a reasonable doubt of a prior conviction

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16. In *People v. Jones*, *supra*, 29 Cal.4th at p. 1264, fn. 11, this Court noted that the state law "reasonable possibility" standard for assessing error at the penalty phase "is the same, in substance and effect," as the harmless-beyond-a-reasonable doubt standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

offered in aggravation, 8.87, requiring such proof of other criminal activity offered in aggravation, and 8.88, setting forth the concluding instructions for the penalty phase. The trial court also gave six instructions proposed by the defense regarding the limited factors to be considered in determining penalty and how to determine and weigh aggravating and mitigating factors in making the sentencing determination. The trial court did not instruct the jury with various evidentiary instructions. (2CT 363-375; 26RT 3905-3913.)

B. *Blakely*, *Ring*, And *Apprendi* Do Not Apply To California's Death Penalty Scheme

Appellant contends that under recent Supreme Court precedent, the jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, and therefore the trial court's instructing the jury with CALJIC No. 8.84.1 and failure to issue several evidentiary instructions violated his federal constitutional rights. (AOB 291-301.) This Court has repeatedly rejected arguments that are virtually identical to appellant's. (See, e.g., *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Vieira* (2005) 35 Cal.4th 264, 300.) The Supreme Court's decisions in *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], have not changed this Court's analysis on this issue. (See, e.g., *People v. Ward* (2005) 36 Cal.4th 186, 221-222; *People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263, 275.) Thus, appellant's claim must be rejected.[17/]

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17. Appellant contends *Morrison* (and its progeny) is inapposite to the instant case because it did not address his "exact claim" regarding the effect of giving CALJIC No. 8.84.1 and the failure to instruct on reasonable doubt and the prosecution's burden at the penalty phase. (AOB fn. 185.) However, appellant's argument fails to offer any new argument on this "exact claim"

C. Any Error In Failing To Issue Various Evidentiary Instructions At The Penalty Phase Was Harmless

Assuming instructional error occurred (*People v. Carter,* 30 Cal.4th at pp. 1218-1219 [court failed to instruct the jury with applicable guilt-phase instructions, as recommended by the Use Note to CALJIC No. 8.84.1]; *People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26 [jury should be informed which guilt-phase instructions apply in penalty phase]), it was harmless. (*People v. Moon* (2005) 37 Cal.4th 1, 32 [although trial court erred in penalty phase of capital case when it failed to instruct the jury generally regarding the consideration and evaluation of evidence, the error was harmless under any standard where defendant failed to demonstrate that the instructions given, to a reasonable likelihood, precluded the sentencing jury from considering any constitutionally relevant mitigating evidence]; *People v. Carter*, *supra*, 30 Cal.4th at pp. 1220-1222 [no reasonable possibility that verdict was affected by failure to give applicable guilt-phase instructions in penalty phase]; *People v. Williams* (1988) 45 Cal.3d 1268, 1321 [finding absence of guilt-phase instructions harmless "under any standard"].)

Here, the jurors were instructed that, "[i]n determining which penalty is to be imposed on the defendant, you shall consider all the evidence which has been received during any part of the trial of this case." (2CT 364; 26RT 3906.) They were further instructed to "assign" "weights" and "value" to the applicable aggravating and mitigating factors in making this determination. (2CT 374-375; 26RT 3912-3913.) The jurors presumably had the common sense to accomplish this task. (See *United States v. Scheffer* (1998)

(AOB 291-301) and therefore, his claim is indistinguishable from the argument raised in *Morrison*. Accordingly, appellant's argument fails for the same reasons cited therein. (*People v. Ward*, *supra*, 36 Cal.4th at pp. 221-222; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730; *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263, 275.)

523 U.S. 303, 313 [118 S.Ct. 1261, 140 L.Ed.2d 413] ["Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.'"]; *Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [jurors "presumed to be intelligent" and "capable of properly assessing the evidence" since "'[a] juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box'"].) Thus, "[t]here is no realistic possibility that jurors were misled about how to evaluate the testimony of penalty phase witnesses, or that the absence of general instructions at the penalty phase induced arbitrary and capricious deliberations." (*People v. Melton* (1988) 44 Cal.3d 713, 758 [absence of guilt-phase instructions did not deprive jury of framework for evaluating evidence due, in part, to instructions described above].)

Moreover, the nature of the evidence presented during the penalty phase was relatively straightforward and familiar to the jury. The prosecution presented evidence that appellant had suffered two prior burglary convictions through documents and Identification Technician Kim Swobodzinski's testimony regarding matching fingerprints, which was identical to the kind of testimony she gave during the guilt phase. (Compare 12RT 1995-2009, 2021-2024, 2029-2034, 2036, 13RT 2038-2062, 14RT 2095-2102 with 23RT 3538-3542.) The prosecutor next presented the testimony of "common-law spouses" Julio Montulfar and Benita Rodriguez detailing appellant's attack against Rodriguez, also similar to the type of evidence of a violent attack the jury had heard and considered during the guilt phase. (23RT 3543-3559, 24RT 3635-3666.) However, as with the evidence of the burglary prior convictions, the jury was instructed that it could not consider the evidence of appellant's prior criminal activity as an aggravating factor unless it had been proved beyond a reasonable doubt. (2CT 372-373; 26RT 3910-3911.) Likewise, the jury had

previously been instructed that statements of counsel were not evidence and were not be considered as such. (23RT 3515.)

Based on the foregoing, the failure to re-issue the instructions did not confuse the jurors as to how to evaluate the evidence or cause them to misuse the evidence. Moreover, appellant has not pointed to any evidence in the record that shows the contrary. (AOB 301-308.) Therefore, it is not reasonably possible that the jury based its penalty determination based on any misunderstanding of the evidence or instructions. (*People v. Carter*, *supra*, 30 Cal.4th at pp 1220-1222 [jury did not express any confusion or uncertainty, or request clarification on how to evaluate evidence]; *People v. Holt* (1997)15 Cal.4th 619, 685 [jury "surely" would have requested further instruction had it been confused].) "In the absence of anything in the record indicating the jury was confused or misled by the court's failure to reinstruct [in the penalty phase], . . . defendant's argument must be rejected." (*People v. Danielson* (1992) 3 Cal.4th 691, 722; see also *People v. Hamilton* (1988) 46 Cal.3d 123, 153 ["Having reviewed the record of the penalty phase in its entirety, we are of the opinion that in the absence of the claimed [instructional] error the outcome would have been the same."].) Accordingly, no prejudice resulted from the omission of the guilt-phase instructions.

XIII.

THE TRIAL COURT PROPERLY RESPONDED TO THE JURY'S QUESTION REGARDING THE RESULT IF IT FAILED TO REACH A UNANIMOUS VERDICT

Appellant contends the trial court erred in its response to the jury's question regarding the consequences of its failure to reach a unanimous verdict. (AOB 309-325.) Respondent submits the trial court properly responded to the jury's question.

During penalty phase deliberations, the jury sent a note to the trial

court asking the following:

> ① What happens if the jury is unable to reach an unanimous decision? [¶] ② Will you decide? (on the sentence . . .) [¶] ③ Will life-without-parole be given automatically?

(2CT 411; Supp. II CT 906; 27RT 3917.)

Defense counsel requested the trial court tell the jury the truth pursuant to section 190.4, subdivision (b), i.e., that a hung jury would result in a new penalty phase trial (27RT 3918-3919), or alternately, instruct the jury: "You have received all the law and evidence. You may not speculate as to the consequences of your failure to agree." Subsequently, defense counsel requested the jury be instructed with CALJIC No. 17.40.[18] (27RT 3919-3920, 3923-3924, 3927). The prosecutor requested the trial court instruct the jury in the language of *People v. Thomas*, *supra*, 2 Cal.4th at pp. 538-539, i.e., "That subject is not for the jury to consider or concern itself with. You must make every effort to reach an unanimous decision if at all possible." (27RT 3920-3922, 3926.) The trial court noted that this statement had been approved by this Court in *Thomas* and instructed the jury accordingly. (27RT 3928.)

As the trial court stated, this Court has previously approved the response given to the jury in this case when the jury has asked about the consequences of failing to reach an unanimous verdict. (*People v. Thomas*, 2

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18. CALJIC No. 17.40 states:

> The People and the defendant are entitled to the individual opinion of each juror.
>
> Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.
>
> Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision.
>
> Do not decide any issue in this case by the flip of a coin, or by any other chance determination.

Cal.4th at pp. 538-539.) And more recently, this Court has noted that it has repeatedly held in other cases presenting the same question, "[t]he trial court 'is not required to "educate the jury on the legal consequences of a possible deadlock."'" (*People v. Hughes* (2002) 27 Cal.4th 287, 402, citing *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1193; see also *People v. Hines*, *supra*, 15 Cal.4th at p. 1075 and cases cited.) In fact, this Court has held that this is especially true in a case such as the instant one, where it is not clear that the jury has *actually* deadlocked. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 402 [where there is no indication that jury has deadlocked or misunderstood applicable law, "an instruction informing the jury of the consequence of a deadlock 'would have diminished the jurors' sense of duty to deliberate, and to be open to the ideas of fellow jurors. The effect of a hung jury is irrelevant to the jury's deliberation of any issue before it"], quoting *People v. Rich* (1988) 45 Cal.3d 1036, 1115.) Because appellant has not provided a sufficient reason for this Court to re-examine, much less overturn its prior decisions on this issue (AOB 315-325), his claim is meritless.

Appellant attempts to avoid the applicable law by bootstrapping an allegation that the jury foreperson engaged in misconduct to support the claim that the trial court's response to the jury was improper. (AOB 318-321). However, even if appellant could show (which he has not) that an alleged claim of jury misconduct that occurred after the jury had received the proper response to its questions was relevant to determining the propriety of the trial court's response to the jury's questions, he still has not shown any error.

The day after the jury's questions to the court, defense counsel told the court and counsel of his completely speculative theories that the jurors "could not stand one another," that the jury foreman was coercing the jurors because he was a law student and was the foreperson for both the guilt and penalty phases. Defense counsel also believed the foreman was researching criminal law issues and "huddling" and talking with jurors, orchestrating the

jury's questions, and was further preventing jurors from informing the court that they were deadlocked. As a result, defense counsel wanted the jury polled regarding their beliefs as to whether further deliberations would be useful in reaching a penalty determination. (28RT 3929-3931, 3933-3934, 3937-3939.)

The prosecutor objected to the request on the ground that it was inappropriate to question the jurors about their deliberations when they had not stated they were deadlocked. (28RT 3932-3933.) The trial court subsequently corrected the record to state that there was no evidence to support defense counsel's claim that the jurors had any problems with one another or that they were being coerced. The court did question counsel about his claimed observation of the jury foreperson reading law books and his sharing of that information with the jurors. However, defense counsel took great pains to clarify that he had no independent knowledge of whether the jury foreman was reading criminal law books and conveying that information to the jury. (28RT 3934-3939.)

In any event, the jury foreman was questioned and he stated that he had been reading his property law book since he was attending law school, but nothing related to criminal law, and he had not talked with the other jurors about anything related to criminal law. In fact, the jury foreman stated he had avoided reading anything related to criminal law and had not even used Westlaw and Lexis as he had been instructed by the court. (28RT 3939-3940.) Therefore, the record fails to support any claim of jury misconduct. (28RT 3942; see also Argument XVIII, *post.*)

Accordingly, for all the foregoing reasons, appellant has failed to show that the trial court's response to the jury's questions was erroneous.

XIV.

THE TRIAL COURT'S EXCLUSION AND MODIFICATION OF CERTAIN DEFENSE PENALTY PHASE EXHIBITS DOES NOT REQUIRE REVERSAL OF THE PENALTY DETERMINATION

Appellant contends the trial court's exclusion and modification of some photographs that were the defense produced in the penalty phase (Def. Exhs. Z, AA, DD, EE) violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments and their analogous California counterparts. (AOB 326-335.) Appellant's constitutional claims have been waived because he never raised them at trial. (11RT 1668-1671; *People v. Brown*, *supra*, 31 Cal.4th at p. 546; *People v. Gurule* (2002) 28 Cal.4th 557, 632; *People v. Sanders* (1995) 11 Cal.4th 457, 539, fn. 27.) Moreover, the trial court's finding that the some of the photographs were cumulative and the writing on the back was irrelevant did not result in any federal constitutional violations because "[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1035.) In any event, the evidence was properly excluded or modified, and any alleged error was harmless.

A capital jury may

> not be precluded from considering any relevant mitigating evidence, that is, evidence regarding "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." [Citations.]

(*People v. Frye*, *supra*, 18 Cal.4th at p. 1015; see *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [102 S.Ct. 869, 71 L.Ed.2d 1]; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 395-399 [107 S.Ct. 1821, 95 L.Ed.2d 347].) "At the same time, however, the United States Supreme Court has made clear that the trial court

retains the authority to exclude, as irrelevant, evidence that has no bearing on" these issues. (*Ibid.*; accord, *People v. Coffman* (2004) 34 Cal.4th 1, 116-117 [even during the penalty phase of a capital prosecution, trial court determines relevancy in the first instance and retains discretion to exclude evidence under Evidence Code § 352]; *People v. Smithey*, *supra*, 20 Cal.4th at p. 995 ["Although the Eighth and Fourteenth Amendments confer a right upon capital defendants to present all relevant mitigating evidence to the jury . . . , the United States Supreme Court never has suggested that this right precludes the state from applying ordinary rules of evidence to determine whether such evidence is admissible."].)

> [T]he concept of relevance as it pertains to mitigation evidence is no different from the definition of relevance as the term is understood generally. [Citation.] "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact finder could reasonably deem to have mitigating value . . . .'" [Citations.]

(*People v. Frye*, *supra*, 18 Cal.4th at pp. 1015-1016.) A trial court's exclusion of evidence on Evidence Code section 352 grounds is reviewed for abuse of discretion. (*People v. Brown*, *supra*, 31 Cal.4th at pp. 576-577; *People v. Frye*, *supra*, 18 Cal.4th at p. 1015.)

The trial court here properly exercised its discretion in admitting five photographs (Def. Exhs. X, Y, BB, CC, FF) and excluding the remaining four of appellant's son and/or his son's mother, Annie Antoine, and in excluding writings on some of the photos as cumulative and irrelevant. Here, even defense counsel conceded that at least one of the excluded photographs (Def. Exh. AA) was cumulative of those eventually admitted and he did not object to the writing on the back being "opaqued out" on several others (Def. Exhs. X and Z). Defense counsel also did not contend that writings that simply stated appellant's son's age (Def. Exh. CC) or "Check me out. I'm walking around." (Def. Exh. X) had any relevancy to any issue to be decided. (25RT 3830-3832.) Therefore,

he is precluded from making these assertions on appeal. (See *People v. Kennedy*, *supra*, 36 Cal.4th at p. 612; *People v. Scheid*, *supra*, 16 Cal.4th at p. 13.)

This notwithstanding, appellant's stated purpose in admitting the photos was to show that there was communication between appellant and his former girlfriend regarding their son. (25RT 3830.) This goal was accomplished because five of the nine photographs, more than half, were admitted that demonstrated this fact. Furthermore, this evidence was also properly presented to the jury through the direct testimony of Antoine, which likely had more impact on the jury than any hearsay statements that had been written by Antoine on the back of the photographs at issue. (25RT 3807-3809.) Therefore, there was no legitimate reason for the jury to see duplicate photographs and irrelevant writings to conclude that appellant was in regular contact with his son and his mother. Accordingly, the proffered evidence was thus correctly excluded and/or modified.

Even assuming some error in excluding this evidence

> the excluded testimony was only marginally relevant . . . there is no reasonable possibility the trial court's error in excluding it could have affected the outcome. [Citation.] We therefore conclude the error was harmless beyond a reasonable doubt.

(*People v. Frye*, *supra*, 18 Cal.4th at p.1017; accord, *People v. Brown*, *supra*, 31 Cal.4th at pp. 576-577 [applying equivalent *Chapman* standard to find exclusion of mitigating evidence harmless in light of other evidence presented].) As appellant acknowledges, he presented evidence of the positive and negative aspects of his relationship with Antoine. (See AOB 333.) He also presented extensive evidence of his childhood and his mother's poor parenting skills, particularly in her abusive treatment of him. (24RT 3704-3732, 3766-3768.) The jury also heard extensive testimony about appellant's unstable family background. (24RT 3704-3733.) Because none of this evidence was sufficient to convince the jury that appellant should be spared a death sentence, it is not

reasonably possible that four *more* photographs of appellant's son and his former girlfriend and/or writings on the back of the photographs would have made a difference. Appellant's claim should be rejected.

XV.

LYNN NGOV'S VICTIM IMPACT TESTIMONY REGARDING THE LIFE OF HER SISTER SOY LAO WAS PROPERLY ADMITTED AND THUS THE PROSECUTOR'S ARGUMENT REGARDING THE TESTIMONY WAS PROPER

Appellant contends the trial court error in permitting victim impact testimony from Lynn Ngov regarding the life of her sister Soy Lao and the prosecutor's argument related to this testimony requires reversal of his penalty judgment. (AOB 336-353.) Because the victim impact testimony was admissible, the prosecutor's argument was proper, and thus, there was no error.

A. Relevant Trial Proceedings

During discussion of the victim impact testimony to be admitted, defense counsel objected to the admission of Lynn Ngov's testimony regarding Lao's arrival from Cambodia, her involvement in the family's business, her educational history, and her goals in life. (23RT 3429-3433, 3436-3440, 24RT 3597-3598, 3601-3602.) The prosecutor argued that the testimony was admissible to show Lao's position in life, her position and relationship in her family's life, and who Lao was as a person in order to establish the impact her death had on her immediate family. (23RT 3433-3434, 34RT 3598-3601.)

After the prosecutor outlined the specific questions to be asked of Lynn, defense counsel only objected to any question regarding Lao's arrival from Cambodia to establish that the family came from a violent regime. (24RT 3602, 3604.) The trial court then ruled that under *People v. Edwards* (1991) 54

Cal.3d 787, the question had "objective relevance" in that the murder of a family member that takes place after the family has moved to a new location might have a different impact than a murder that had taken place in one's "own back yard." The court then concluded that the testimony was admissible because it was "not so prejudicial that an individual can't hear that kind of evidence and make a valid, rational judgment as to whether or not that is the type of evidence that they want to consider." (24RT 3602-3605.)

Subsequently, Lynn testified in pertinent part that Soy Sung Lao was born in Cambodia in 1970 and had three older brothers and two older sisters, including Lynn. Lao and several of her brothers and sisters immigrated to the United States in November 1980 to escape communism. Lao's parents died in 1975 and 1976 and the siblings took care of one another. Lao was very close to Lynn, who was her immediate older sister, and was closer to Lynn's two children than Lynn. Lao taught the children songs and how to write and even gave Lynn's daughter, Ariel, her name. (24RT 3693-3696.)

Lynn further testified that Lao had lived with her in San Diego until Lynn married her husband, Ty, in 1987 and the couple moved to the Los Angeles area. After Lao finished high school, she decided to attend USC and moved closer to Lynn. Lao lived with friends and planned to graduate in May 1993. (24RT 3696-3698.)

In closing argument, without objection, the prosecutor argued that appellant deserved a death sentence because as a result of his actions Lao would never attain the business degree and the better life for which she and her family had left the politically repressive and violent country of Cambodia. The prosecutor further argued that instead of Lao being able to take full advantage of all the opportunities of this country, she had been robbed of her goals, dreams, and ultimately her life at the hands of appellant. (26RT 3875-3876.)

B. Applicable Law

In *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720] (*Payne*), the United States Supreme Court overruled its prior holdings in *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440], and *South Carolina v. Gathers* (1989) 490 U.S. 805 [109 S.Ct. 2207, 104 L.Ed.2d 876], which generally barred admission of victim impact evidence and related prosecution argument during the penalty phase of a capital trial. In *Payne*, the United States Supreme Court held that the Eighth Amendment does not bar the admission of victim impact testimony in the sentencing phase of a capital trial. Victim impact evidence is designed to show the victim's uniqueness as an individual human being, "whatever the jury might think the loss to the community resulting from his death might be." (*Payne*, *supra*, 501 U.S. at p. 823.)

In *Payne*, the defendant was convicted of the first degree murder of a mother and her two-year-old daughter and first degree assault with intent to murder her three-year-old son. The capital sentencing jury heard that defendant was a caring and kind man who went to church and did not abuse drugs or alcohol. He was a good son and suffered from low intelligence. The prosecution presented testimony from the three-year-old victim's grandmother that he missed his mother and baby sister. Her testimony "illustrated quite poignantly some of the harm that Payne's killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant." (*Payne*, *supra*, 501 U.S. at p. 826.)

The *Payne* Court recognized that, within constitutional limitations, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished, and the Court has deferred to the State's choice of substantive factors relevant to the penalty determination.

> The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.

(*Payne*, *supra*, 501 U.S. at pp. 824-825.)

The *Payne* Court concluded that a state may properly determine that for the jury meaningfully to assess the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.

> The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.

(*Payne*, *supra*, 501 U.S. at p. 825.) Turning the victim into a faceless stranger at the penalty phase of a capital trial deprives the State of the "full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." (*Ibid.*)

Thus, if a state chooses to permit the admission of victim impact evidence, the Eighth Amendment erects no *per se* bar.

> A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

(*Payne*, *supra*, 501 U.S. at p. 827.)

In California, the admission of victim impact evidence is subject to the trial court's discretion. (See *People v. Raley*, *supra*, at p. 916 [permitting "evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose" the

death penalty]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1245 [court may admit evidence of impact of the crime on the victim's family]; Evid. Code, § 352.) This Court has consistently approved the trial court's admission of such evidence under Penal Code section 190.3, subdivision (a). (See *People v. Raley*, *supra*, 2 Cal.4th at p. 915 [the law "allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim"], citing *People v. Edwards*, *supra*, 54 Cal.3d at p. 835 [victim impact evidence is "a circumstance of the crime" admissible under factor (a)].)

Likewise, in *People v. Boyette*, *supra*, 29 Cal.4th 381, where the defendant killed two individuals, Gary Carter and Annette Devalier, the court admitted testimony from the victims' families to show the effect the deaths had had on their families. This Court upheld the admission of this testimony over claims that the extent and nature of the victim impact evidence was improper. (*People v. Boyette*, *supra*, at p. 443.)

C. The Trial Court Properly Ruled The Victim Impact Testimony Was Admissible; Consequently, The Prosecutor's Argument Was Also Proper

Initially, appellant waived his claim of error regarding the prosecutor's discussion of victim impact evidence during argument because he failed to make a timely and specific objection below and to request the court to admonish the jury regarding any impropriety (26RT 3852-3877). (*People v. Prieto*, *supra*, 30 Cal.4th at pp. 259-260.) This notwithstanding, the victim impact evidence presented in this case fell well within the parameters set out in *Marks v. Superior Court*, *supra*, 27 Cal.4th 176 and *People v. Boyette*, *supra*, 29 Cal.4th 381.

As in *Marks* and *Boyette*, the victim impact testimony presented in the instant case simply explained the "impact" that Lao's murder had had on many aspects of her relatives' lives: their family life; their mental and physical well-being as well as their business. Particularly, Lao had been especially close

to Lynn based on their closeness in age and their shared experience in leaving Cambodia after their parents' deaths to come to the United States for a better future, especially economically. Lao's and Lynn's lives were constantly intertwined after that as Lao lived with Lynn and chose to go to college in Los Angeles where her sister Lynn had relocated with her husband. Lao had been continually trying to improve her life by taking advantage of educational opportunities in this country and had remained close to her sister while doing so, even naming one of Lynn's children. However, as the prosecutor emphasized, she was never able to achieve her goals as a result of her violent death in her adopted country at the hands of appellant, for which he should receive a death sentence.

There was nothing unduly emotional or inflammatory about the evidence. In addition, Lynn's testimony was brief (24RT 3693-3703), compared to the length of the testimony of the two defense character witnesses (24RT 3704-3771, 25RT 3779-3828). Furthermore, contrary to what appellant contends, nothing the prosecutor said during his closing argument encouraged the jury towards "irrationality and an emotional response untethered to the facts of the case." (*People v. Boyette*, *supra*, 29 Cal.4th at p. 444.) The prosecutor's argument in this case was no different from the prosecutor's argument in *Boyette*. Like the prosecutor in *Boyette*, the prosecutor in the instant case

> emphasized the victim impact evidence, but also spoke of the relevance of the facts of the crime itself, as well as other aspects about defendant . . . that demonstrated why the death penalty was appropriate . . . a life sentence was not. The evidence was relevant and the argument appropriate. We find no danger that the jury's rationality was overborne and thus find no constitutional violation.

(*Ibid.*)

D. Any Error In Admitting The Victim Impact Evidence Or In Failing To Curtail Its Scope Was Harmless

In any event, assuming the trial court erred in admitting the victim impact evidence or erred in failing to curtail it, the error was harmless. When the victim impact evidence is considered in light of the record as a whole, it is not reasonably possible the admission of this evidence affected the verdict. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1170; *People v. Jackson* (1996) 13 Cal.4th 1164, 1232-1233.)

Initially, even without the victim impact evidence, the prosecutor was entitled to "urge the jury to draw reasonable inferences concerning the probable impact of the crime on the victim and the victim's family." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017.) Any reasonable juror could imagine the immense and insurmountable loss experienced by Lao's family members and their unending grief. Moreover, the jury had already heard testimony during the guilt phase regarding Lao's full-time attendance at USC and that she sometimes studied while working at the donut shop (11RT 1708-1709, 1719-1720, 1740-1741) and thus some of the victim impact testimony was not new to the jury.

In addition, aside from the victim impact evidence, there were the compelling aggravating facts of appellant's prior convictions and his violent attack of Benita Rodriguez (see Statement of Facts C-2, *ante*) which individually and collectively warranted the imposition of the death penalty. And as noted previously, in light of the single victim impact witness and the brevity of her testimony (24RT 3693-3703), compared to the two defense character witnesses and the length of their testimony (24RT 3704-3771, 25RT 3779-3828), the defense's argument against the jury being overly swayed by the evidence (26RT 3877-3904), the court's instructions, and the abundance of evidence which overwhelmingly established that appellant committed a heinous and brutal crime against an innocent young woman, it is not reasonably possible that the admission of the victim impact evidence, or its scope, affected the verdict.

As this Court has observed, "among the most significant considerations [in the jury's assessment of punishment] are the circumstances of the underlying crime." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1062.) The admission of the challenged testimony "did not undermine the fundamental fairness of the penalty-determination process." (*Id.* at p. 1063.) The admission of Lynn Ngov's testimony did not violate appellant's federal or state rights to due process, a fair trial, or a reliable penalty determination. Appellant's claims should be denied.

XVI.

APPELLANT HAS WAIVED HIS CLAIM THAT BENITA RODRIGUEZ'S VICTIM IMPACT TESTIMONY WAS IMPROPERLY ADMITTED; IN ANY EVENT, THE TESTIMONY WAS ADMISSIBLE UNDER SECTION 190.3, FACTOR (b)

Appellant contends the trial court erred in failing to limit the scope of the victim impact testimony to the capital offense against Soy Lao and thus, improperly permitted Benita Rodriguez's testimony regarding appellant's "other violent criminal activity." Therefore, appellant contends his rights to due process, a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their analogous California counterparts were violated. (AOB 353-361.) Respondent submits this claim is waived for appellant's failure to object to Rodriguez's testimony on these grounds and alternatively, the evidence was properly admitted under California law.

Initially, appellant failed to preserve his claim by making a timely and specific objection to the victim impact evidence at trial and/or raising constitutional objections. (24RT 3635-3649, 3652-3666, 3688-3692.) Accordingly, he has failed to preserve the issues for appeal. (See Evid. Code, § 353; *People v. Hines*, *supra*, 15 Cal.4th at p. 1047 [defendant's failure to

object to victim impact evidence waived issue on appeal]; *People v. Sanders*, *supra*, 11 Cal.4th at p. 549 [nonspecific objections to victim impact evidence failed to preserve claim for review]; see also *People v. Heard*, *supra*, 31 Cal.4th at p. 972, fn. 12; *People v. Memro* (1995) 11 Cal.4th 786, 867.)

In any event, this Court has repeatedly rejected the claim that it is a violation of the federal Constitution to admit victim impact evidence of other violent criminal activity and its physical and emotional impact on the victim(s). (*People v. Stankewitz* (1990) 51 Cal.3d 72, 106 [Eighth Amendment rights of capital murder defendant were not violated by victim impact statements from people injured by defendant in other crimes; evidence was admissible to show that defendant had committed violent assaults in past under section 190.3, factor (b)]; accord *People v. Mendoza*, *supra*, 24 Cal.4th at pp. 185-186 ["The impact of a capital defendant's past crimes on the victims of those crimes is relevant to the penalty decision . . . [Citation.]"]; *People v. Garceau* (1993) 6 Cal.4th 140, 201-202 [federal Constitution does not bar introduction of evidence showing effect of prior violent criminal activity on victims]; *People v. Visciotti* (1992) 2 Cal.4th 1, 68 ["Evidence of prior assaultive conduct is expressly made admissible as a statutory aggravating factor by section 190.3, factor (b)"]; *People v. Price*, *supra*, 1 Cal.4th at p. 479 ["At the penalty phase, the prosecution may introduce evidence of the emotional effect of defendant's prior violent criminal acts on the victims of those acts."].) Appellant has provided no reason why this case calls for a different result.

XVII.

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY WITH DEFENSE SPECIAL INSTRUCTIONS 1, 2 AND 8 BECAUSE THEY WERE ARGUMENTATIVE AND DUPLICATIVE

Appellant contends his death sentence must reversed because the

trial court refused to give defense proposed special jury defense instructions 1, 2, and 8 [19] which the court found were either an improper pinpoint instructions,

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19. Special instruction 1, based on *People v. Wharton* (1991) 53 Cal.3d 522, 600, fn. 23, read as follows:

> The mitigating circumstances that I have read for your consideration are given merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. A juror should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone[], to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstances to these specific facts. [ ] A juror may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty. [ ] A mitigating circumstance does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exist[s] if there is any evidence to support it no matter how weak the evidence is. [ ] A juror is permitted to use mercy, sympathy and/or sentiment in deciding what weight to give each mitigating factor.

(2CT 409.)

Special instruction 2 read as follows:

> If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may, based upon such sympathy or compassion alone, reject death as a penalty. A mitigating factor does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exist[s] if there is any evidence to support it no matter how weak the evidence is.

(2CT 406.)

Special instruction 8, based on *People v. Haskett* (1982) 30 Cal.3d 841, 864, read as follows:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed,[] was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose

argumentative or duplicative of other instructions. As a result of the trial court's error, appellant contends his federal and state rights to due process, a fair and impartial jury, and a reliable penalty determination were violated and thus reversal of his penalty judgment is required. (AOB 361-374.) Respondent submits the instructions were properly excluded because they were argumentative and superfluous. In any event, any alleged error was harmless.

The trial court instructed the jury in the penalty phase with CALJIC No. 8.85, which states in relevant part:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable: . . . [¶] (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(2CT 365; 26RT 3906-3908.)

Initially, appellant's claims of state and constitutional violations are forfeited for failure to raise them below. (See *People v. Kennedy*, *supra*, 36 Cal.4th at p. 612 [rule requiring objection to error at trial as prerequisite to appeal applies to claims based on statutory violations as well as claims based on violations of fundamental constitutional rights, other than any stated ground for the objection at trial]; *People v. Wilson*, *supra*, 36 Cal.4th at p. 358.) The claims

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> the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional thought [*sic*] relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(2CT 408.)

also fail on the merits.

Here, the trial court was not required to give defense special instruction 1 because most of it was duplicative as it was encompassed in CALJIC No. 8.85 (25RT 3835-3837, 26RT 3851). (*People v. Jones*, *supra*, 17 Cal.4th at p. 314 [a trial court need not give duplicative instructions.]; *People v. Hines*, *supra*, 15 Cal.4th at p. 1068; accord, *People v. Gurule*, *supra*, 28 Cal.4th at p. 659.) In addition, special instruction 1 was argumentative because it would have advised the jury that a single mitigating circumstance can be dispositive of penalty without stating that a single aggravating circumstance could have the same result. Nor did the proposed instruction reference the proof sufficient to consider an aggravating circumstance as it did for mitigating circumstances. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1225; *People v. Mickey* (1991) 54 Cal.3d 612, 697 [an instruction is argumentative when it is "of such a character as to invite the jury to draw inferences favorable to one of the parties."].)

In addition, this Court has repeatedly rejected the contention that it is error not to instruct a penalty phase jury that mitigating factors do not have to be proven beyond a reasonable doubt. (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1077 [similar proposed instruction rejected where the jury was otherwise properly instructed on how to consider mitigating factors].) Further, in *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 417-418, this Court clarified that during the penalty phase of a capital trial, instructions on the burden of proof are unnecessary because the decision-making process is inherently moral and normative rather than factual. Thus, except for other crimes evidence that is used as an aggravating factor, the trial court in *Carpenter* should not have instructed the jury on the burden of proof at all. (*Ibid.*) Therefore, this Court held there was no requirement for a special instruction informing the jury that mitigating factors need not be proven beyond a reasonable doubt and that mitigating circumstances may be found no matter how weak the evidence is.

For these reasons, defense special intrusion 1 and defense special instruction 2 -- which itself duplicated defense special instruction 1 – were not required to be issued to the jury.

And finally, defense special instruction 8 was likewise duplicative and argumentative and therefore properly rejected. First, CALJIC No. 8.84.1 properly instructed the jury that it was not to be influenced against appellant by bias, prejudice, public opinion or public feelings. The instruction also informed the jury that "[b]oth the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict." (2CT 362; 26RT 3905.) Thus, the trial court properly instructed the jurors as to how they were to approach their duty. Second, unlike the instruction proposed by appellant, the jury was informed that *both parties* were entitled to the jury's conscientious consideration of *all the evidence*. Instead, defense special instruction 8 only warned the jurors that they were to perform their duty soberly and rationally when considering the People's victim impact evidence to decide whether to impose the "ultimate sanction," but that "emotional evidence and argument" could properly be considered if it swayed the jury "to show mercy." For these reasons, the instruction was both duplicative and argumentative and was properly rejected. (See *People v. Carter*, *supra*, 30 Cal.4th at pp. 1225-1227 [defendant's proposed instruction on how jury was to consider mercy at penalty phase of capital murder trial was argumentative and thus improper because it invited jury to draw inferences favorable to only one side].)

Finally, any error was harmless. In determining whether an error in instructing the jury at the penalty phase is harmless, the reviewing court must affirm the judgment unless it concludes there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error not occurred. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) The assessment of prejudice is based on the assumption that the jury was reasonably,

conscientiously, and impartially applying the standards that govern their decision. (*Ibid.*)

Here, as discussed above, there was no possibility that the jury was somehow confused into thinking that mitigating circumstances had to be proven beyond a reasonable doubt or that they were not entitled to determine for themselves whether a mitigating circumstance had been shown. Regardless, assuming but not conceding error occurred, there is no reasonable possibility of a different verdict in light of the correct instructions actually given and the overwhelming evidence in aggravation, including the horrific and callous circumstances of Soy Lao's death. (See Argument XV-D, *ante*.)

Accordingly, the instructions that were given to the jury properly conveyed to the jury how they could consider the mitigating evidence in determining the appropriate penalty. Thus, no error occurred, let alone an error of constitutional dimension. Moreover, any error was harmless. Reversal is not warranted.[20/]

XVIII.

BECAUSE THERE WAS NO EVIDENCE OF THE JURY FOREPERSON COMMITTING ANY MISCONDUCT, THE TRIAL COURT WAS NOT REQUIRED TO CONDUCT AN EVIDENTIARY HEARING

Appellant contends the trial court's failure to conduct an evidentiary hearing, based on the jury foreperson for the guilt and penalty phases being a law student and the jury's question(s) about the consequences if it failed

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20. Respondent notes that appellant's argument (AOB 372-374) that as a result of the rejection of his special instructions, the prosecutor improperly urged the jury to return a verdict based on emotion is forfeited for failure to object to the argument. (*People v. Prieto*, *supra*, 30 Cal.4th at pp. 259-260.) The claim is also meritless because the prosecutor's argument was proper in light of the evidence, and there is nothing to suggest is was influenced in any way by the rejection of the special instructions.

to agree on a penalty, violated his federal and state rights to a fair trial, a fair and impartial jury, and a reliable penalty determination, and thus reversal of his penalty judgment is required. (AOB 375-389.) Because there was no evidence supported by the record that any juror misconduct occurred, the trial court was not required to conduct an evidentiary hearing. Thus, none of appellant's state or federal rights were violated, and his claim fails.

During voir dire, William M. stated that he was a law student and that he had completed only one semester, which included classes in torts, contract, and property. William M. stated that he was currently in his second semester, that he was not taking a criminal law class, and that he would not consult his law books or research death penalty law if he was chosen for the jury. William M. also stated that he would be able to follow the court's instructions regardless of his legal training. (4RT 422, 437-438, 445-446.) Upon further questioning, William M. stated that he could be fair and impartial and that he would be able to make a decision for life without the possibility of parole or death based on the evidence. (4RT 423-426, 436-438, 445-447, 459.) William M. was not challenged for cause and was seated as a juror. (See 4RT 459-487.) Subsequently, Juror William M. served as foreperson for the guilt and penalty phases of the trial. (see 28RT 3929-3930.)

As discussed previously (see Argument XIII, *ante*), defense counsel was "deeply disturbed" by Juror Mosby's service as foreperson for both phases of the trial and believed the jury submitted its question regarding the consequences of not agreeing on a penalty based on Juror Mosby's legal knowledge.[21/] (28RT 3929-3930.) Defense counsel also felt that Juror William

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21. The jury's questions were as follows:

① What happens if the jury is unable to reach an unanimous decision? [¶] ② Will you decide? (on the sentence . . .) [¶] ③ Will life-without-parole be given automatically? [¶] ④ If we are polled at the end of this procedure, can it be done by juror number instead of by name?

M. must have been asserting his influence over the jurors because he was a law student, had been studying law books and "huddling with jurors," and was preventing the other jurors from declaring that they were deadlocked. (28RT 3930-3931.)

After clarifying that none of defense counsel's beliefs and feelings were supported by the record (28RT 3934-3936), the court stated it would inquire as to whether Juror William M. had been reading law books (28RT 3936-3938). Defense counsel then backtracked and stated he had seen Juror William M. reading what appeared to be a law book the day prior and that morning had seen him talking to two jurors, but he had no personal knowledge about what the jurors spoke. (28RT 3939.)

After being questioned, Juror William M. stated he had been reading a property law book, but he had followed the court's instruction by not reading anything connected to criminal law. Juror William M. also stated that the questions he sent to the court were only because the jurors "as a whole wanted the[] questions" asked and answered. (28RT 3939-3940.)

As this Court has repeatedly held:

> The decision whether to investigate the possibility of juror bias, incompetence, or misconduct--like the ultimate decision to retain or discharge a juror--rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial. [Citation.] A hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case.

(*People v. Cleveland* (2001) 25 Cal.4th 466, 478; *People v. Prieto, supra,* 30 Cal.4th at p. 274 [although courts should promptly investigate allegations of juror misconduct to "nip the problem in the bud," they have considerable

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(Supp. II CT 906.)

discretion in determining how to conduct the investigation]; see e.g., *People v. Davis* (1995) 10 Cal.4th 463, 546-548 [no hearing required absent evidence that foreman's note was the product of improper discussion among jurors]; *People v. Espinoza* (1992) 3 Cal.4th 806, 821 [no hearing required absent evidence juror was actually asleep during trial]; *People v. Kaurish* (1990) 52 Cal.3d 648, 694 [no hearing required absent evidence juror's derogatory remark reflected bias against the defense as opposed to impatience with the proceedings].) Whether good cause exists to discharge the juror is subject to appellate review. (See *People v. Bradford*, *supra*, 15 Cal.4th at pp. 1348-1349.)

Initially, respondent submits appellant has forfeited his claim that the trial court erred in failing to conduct a full evidentiary hearing as he did not request the court conduct one at trial (28RT 3942). (*United States v. Olano* (1993) 507 U.S. 725, 731 [113 S.Ct. 1170, 123 L.Ed.2d 508] ["No procedural principle is more familiar to this Court than that a constitutional right . . . may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."].) This notwithstanding, appellant's claim fails because he has not and cannot show any juror misconduct in the record. As the trial court stated, defense counsel's claims below, and those asserted by appellant on appeal (AOB 379-385), are completely unsupported by the record and amount to nothing more than vague and unsubstantiated speculation created by tying together unrelated occurrences in order to allege some kind of improper juror conduct. (*People v. Prieto*, *supra*, 30 Cal.4th at pp. 273-274.) However, this type of daisy-chain argument is and was insufficient to require the trial court to conduct an evidentiary hearing. (*People v. Staten* (2000) 24 Cal.4th 434, 466 [hearing is "not be used as a 'fishing expedition' to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred."].)

Moreover, Juror Mosby's reading of a property law book did not

amount to misconduct. First, he had not been instructed previously that he was not allowed to read his property law book – especially as he was still currently attending law school – and thus he was not disobeying the court's instructions. (4RT 423-426, 436-438, 445-447, 459.) Second, when the court questioned him and was informed that he had been reading the book in the hallway, Juror William M. was still not instructed that he could not do so. (28RT 3939.) Therefore, absence any proof of specific juror misconduct and/or any inability of Juror William M. to complete his duty, the trial court's inquiry of him was sufficient. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 878 [A hearing is *required* only where the court possesses information which, if proven to be true, would constitute good cause to doubt a juror's ability to perform his duties and would justify his removal from the case.], quotation marks omitted; accord, *People v. Prieto*, *supra*, at 30 Cal.4th at p. 273 [absent threshold finding of misconduct, trial court has no duty to conduct a hearing].)

And finally, regarding the jury's question regarding the consequences of its failure to agree on a penalty, Juror William M. informed the court that all questions from the jury were submitted only because the jurors as a group wanted the questions asked and answered. (28RT 3940.) Thus, there is nothing in the record to support appellant's once again speculative claim that Juror Mosby's supposed knowledge of the 1977 death penalty statutes generated the question. (AOB 381-382, 388.) This is especially true where the virtually identical question has arisen in several cases wherein there has been no suggestion, much less a finding, that those jury forepersons were first year, second semester law students with an "inappropriate aura of authority" who were coercing their fellow jurors and generating questions based on their independent knowledge of the law. (See, e.g., *People v. Hughes*, *supra*, 27 Cal.4th at pp. 401-402; *People v. Hines*, *supra*, 15 Cal.4th at pp. 1071-1075; *People v. Thomas*, *supra*, 2 Cal.4th at pp. 538-539.)

Accordingly, the trial court properly exercised its discretion and

did not conduct a full evidentiary hearing regarding unsubstantiated claims that Juror William M. had committed misconduct.

XIX.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REQUIRING APPELLANT TO WEAR A REACT STUN BELT BASED ON HIS ATTEMPT TO ESCAPE AND/OR HELP ANOTHER INMATE ESCAPE BY ATTEMPTING TO UNLOCK THE HANDCUFF OF THE OTHER INMATE

Appellant contends the trial court abused its discretion by requiring him to wear a REACT stun belt during the penalty phase, thereby violating his constitutional rights, and thus the penalty judgment must be reversed. (AOB 389-402.) The trial court properly exercised its discretion and required appellant to wear the stun belt based on his security risk after it was discovered he had attempted to unlock the handcuffs of another inmate, who required special handling like appellant, and thus, appellant's rights were not violated. Therefore, his claim is meritless.

A. Relevant Trial Proceedings

On March 10, 1995, the day after the jury's guilty verdicts, the trial court informed the parties that it had a security concern because the previous day a deputy sheriff had seen appellant using a "make-shift metal item" to attempt to pick his handcuff lock and detach himself from another inmate. (23RT 3414.) The court outlined the available options – some form of shackle, increased bailiff personnel, and a stun belt device – but stated that nothing would be decided until after a hearing with testimony officers involved in the incident. (23RT 3415-3417.)

The trial court noted that a belt device might be the least intrusive and visible option and Los Angeles County Sheriff's Deputy Sergeant Robert

McGlin explained how the device operated and the protocols for its use. (23RT 3418-3420.) Subsequently, both counsel received the officer's report on the incident and were given the opportunity to review it and examine the evidence seized prior to the hearing. (23RT 3440-3442.)

At the hearing, Deputy Sheriff Dianne Norris, a bailiff, testified that at approximately 8:30 a.m. on March 9, 2005, appellant had been held in a small waiting room with two other inmates who also required special handling prior to being taken to court. The three inmates were each chained at their waists with their hands shackled to their sides to prevent them from moving their hands large distances. Inmate Ford, who was also on trial for murder, was wearing ankle chains. From outside the room and through a glass window, Deputy Norris saw appellant facing Ford and "playing" with Ford's handcuffs. Specifically, Deputy Norris saw appellant make a motion with the handcuffs as if he had a key. (23RT 3444-3450.)

When appellant saw Deputy Norris, he put his hands down, with a gray object in one hand, and backed against the wall. Through the window, Deputy Norris asked appellant what he had in his hand and he replied, "nothing." Appellant then put a silver object in his mouth, but stated he had put nothing inside and stuck out his tongue. When asked to step outside the room, appellant spat something onto the floor. Deputy Norris then found a metal clip on the floor. (23RT 3449-3457.)

Deputy Norris also testified that the type of shackles/handcuffs appellant was wearing have been "picked," i.e., successfully removed without a key. She also testified that she did not always check that an inmate was still shackled and/or that his handcuffs were locked before escorting them from the waiting room to the courtroom. Deputy Norris usually transported a handcuffed inmate who required special handling by herself and without other inmates in a non-public elevator. Deputy Norris also carried keys to all the doors in the court as she escorts the inmate to the courtroom. (23RT 3465-3466, 3471-3473,

3475-3476.)

Deputy Sheriff Thomas Harvey, a bailiff, examined the "makeshift key," which was created by modifying a heavy duty staple. (23RT 3479-3484.) Deputy Harvey had seen such a key successfully used to unlock cuffs on five or six occasions. (23RT 3485-3486.) Deputy Harvey further testified and demonstrated how it was possible to continue wearing unlocked chains/handcuffs in a manner that they were not visibly unlocked. (23RT 3486-3487.)

After this testimony, the prosecutor argued that the evidence showed appellant was an escape risk and a threat to the safety and security of the court and the REACT stun belt, which would not be visible to the jury, was warranted. (23RT 3498-3500.) Defense counsel argued that if the court found appellant to be a risk, there should be increased bailiff presence – two or three total – and leg shackles, shielded from the jury, rather than risk appellant being improperly shocked by the belt. (23RT 3500-3502.)

The trial court determined there was sufficient evidence that additional security was required based on appellant's attempt to escape and/or help another inmate escape. The trial court also determined that leg shackles were likely to be more visible to the jury since something would have to be constructed and/or added around appellant's legs to prevent them from being seen, rather than the belt which would be worn under appellant's clothing. Accordingly, the trial court ordered that appellant wear the belt and gave guidelines for its usage. (23RT 3501-3505.)

B. Applicable Law

A defendant may not be physically restrained while in the jury's presence without a showing of manifest need. (*People v. Duran* (1976) 16 Cal.3d 282, 290-291 (*Duran*).) A manifest need exists upon a showing of unruliness, an announced intention to escape, nonconforming conduct or

planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1213; *People v. Hill* (1998) 17 Cal.4th 800, 841; *Duran, supra*, at p. 292, fn. 11.) No formal hearing is required to fulfill the requirements of *Duran*, but the need for the restraints must appear as a matter of record. (*People v. Cox* (1991) 53 Cal.3d 618, 651-652; *Duran, supra*, at p. 291.) The evidence on the record must be sufficient for the court to make its own determination of the nature and seriousness of the conduct and to determine whether there is a manifest need for physical restraints on the defendant. (*People v. Cox, supra*, 53 Cal.3d at pp. 649-652 (*Cox*).) When a manifest need is shown, the restraints should be as "unobtrusive as possible, although as effective as necessary under the circumstances." (*Duran, supra*, at p. 291.)

This Court held the requirements of *Duran* apply to a trial court's decision to compel a defendant to wear a stun belt at trial. (*People v. Mar* (2002) 28 Cal.4th 1201, 1219-1220.) The Court found a showing of manifest need is required based on the possible adverse psychological effects the belt may have on the defendant's demeanor and his or her ability to focus on court proceedings, confer with his or her attorney, or otherwise assist in the defense at trial. (*Ibid.*)

It is the duty of the court alone to determine whether physical restraints should be imposed on a defendant. (*Duran, supra*, at p. 293, fn. 12.) A court may not delegate the decision of whether to use restraints, but it may certainly solicit and rely in part upon the views of persons responsible for courtroom and prisoner security. (See *People v. Mar, supra*, 28 Cal.4th at p. 1218; see also *People v. Jacla* (1978) 77 Cal.App.3d 878, 885.)

A defendant's prior violent criminal record or the nature of his current case cannot alone justify physical restraints. (*People v. Cunningham, supra*, 25 Cal.4th at p. 986; *People v. Hawkins* (1995) 10 Cal.4th 920, 944 (*Hawkins*)) Courts have generally read *Duran* as requiring a defendant make

specific threats of violence, escape from court or have a history of escape, engage in violent conduct while in custody, or demonstrate unruly conduct in court before restraints are justified. (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1215; *People v. Sheldon* (1989) 48 Cal.3d 935, 945-946; *People v. Garcia* (1997) 56 Cal.App.4th 1349, 1355; *People v. Valenzuela* (1984) 151 Cal.App.3d 180, 192; see also *People v. Mar*, *supra*, 28 Cal.4th at p. 1220.) However, a showing of manifest need does not have to be based on the conduct of the prisoner at the time of trial; nor does it require a previous attempt by the defendant to disrupt courtroom proceedings or to escape from custody. (*Small v. Superior Court* (2000) 79 Cal.App.4th 1000, 1016, citing *People v. Livaditis* (1992) 2 Cal.4th 759, 774 and *Hawkins*, *supra*, at p. 944.)

The decision to order physical restraints is committed to the trial court's discretion, which must be exercised on a case-by-case basis. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1218; *People v. Hamilton* (1985) 41 Cal.3d 408, 423.) The court's exercise of discretion will not be reversed on appeal absent manifest abuse. (*People v. Pride* (1992) 3 Cal.4th 195, 231; *People v. Cox*, *supra*, 53 Cal.3d at p. 651; *Duran*, *supra*, at p. 293, fn. 12.) Abuse of discretion implies an arbitrary determination, capricious disposition or whimsical thinking where the court exceeds all bounds of reason under the circumstances. (*People v. Giminez* (1975) 14 Cal.3d 68, 72; *People v. Pitcock* (1982) 134 Cal.App.3d 795, 801.)

C. The Trial Court Properly Exercised Its Discretion And Found A Manifest Need For Requiring Appellant To Wear The Stun Belt After Unrefuted And Uncontradicted Testimony Regarding Appellant's Attempt To Escape And/Or Help Another Inmate Escape

Here, the court did not abuse its discretion in ordering appellant to wear the stun belt. Appellant had just been convicted at the guilt phase of a violent crime (murder) and he had a history of violent crime (the prior assault

with a deadly weapon of Benita Rodriguez). The trial court heard uncontradicted and unrefuted testimony that appellant had attempted to release another inmate who was on trial for murder from his handcuffs, so that, inferentially, he could then be released from his own handcuffs and chains in order to escape. Based on this evidence, the trial court found a manifest need for restraints and determined that the stun belt would be the least restrictive and visible to the jury. It was not an arbitrary or capricious decision to decide that an escape attempt warranted physical restraints for the safety and security of the courthouse and those who were present.

Furthermore, the trial court considered the defense counsel's counter-balancing concerns regarding the protocols of the usage of the device and as a result, gave specific instructions regarding if or when it would be activated. Thus, the trial court did not abuse its discretion in ordering appellant to wear the belt.

D. Any Order Compelling Appellant To Wear The Stun Belt Was Harmless

The court in *Mar* declined to decide whether the *Watson* or *Chapman* standard of harmless error applied to erroneous orders compelling a defendant to wear a stun belt. (*People v. Mar, supra*, 28 Cal.4th 1225, fn. 7.)

Where the physical restraints of a defendant are visible to the jury, any error must be harmless beyond a reasonable doubt. Here, there is no evidence that the stun belt was visible to the jury. Appellant has not demonstrated that any juror noticed the belt. (AOB 401-402.) If no juror saw the belt, there can be no possible prejudice in the minds of a juror because of it. (*People v. Coddington* (2000) 23 Cal.4th 529, 651; *People v. Tuilaepa, supra*, 4 Cal.4th at pp. 583-584.)

Contrary to appellant's argument (AOB 401-402), there is no indication of an adverse affect on appellant's psyche or his case as a result of

wearing the belt. In *Mar*, the Court found the trial court's order that the defendant wear a stun belt was prejudicial because (1) the evidence in the case was close, (2) the defendant's demeanor while testifying was crucial because the case turned on the jury's determination of the credibility of the witnesses, and (3) there was an indication in the record that the stun belt might have had some effect on the defendant's demeanor while testifying. (*People v. Mar, supra*, 28 Cal.4th at pp. 1224-1225.) This case is wholly distinguishable from *Mar*. The evidence was not close and appellant did not testify. Furthermore, there is no evidence in the record that appellant was uncomfortable wearing the belt, that it prevented him from concentrating or thinking clearly, that he was concerned about being shocked, that it caused him anxiety, that it impacted his demeanor, that it limited his ability to communicate with counsel or participate in his defense, or that it otherwise rendered his trial unfair. Thus, no prejudice to appellant resulted from the restraint and his claim must be denied. (*People v. Anderson* (2001) 25 Cal.4th 543, 596 [there is "no basis for reversal . . . [when] the record contains no hint that physical restraints impaired the fairness of defendant's trial and thus caused prejudice"].)

XX.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION AND PRECLUDED DEFENSE COUNSEL FROM ARGUING ABOUT OTHER SPECIFIC MURDER CASES WHEREIN THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE HAD NOT SOUGHT THE DEATH PENALTY AND CASES FROM OTHER STATES WHEREIN DEATH WAS NOT IMPOSED AND/OR WAS NOT A PENALTY OPTION FOR THOSE JURIES

Appellant contends the trial court's decision that defense counsel could not compare appellant's case to other murder cases wherein the Los

Angeles District Attorney's Office had not sought the death penalty and to other murder cases within and without this state violated his federal and state rights to have the jury fully and adequately consider the gravity of his offense in deciding penalty. (AOB 403-423.) Respondent submits the trial court was not required to allow the requested argument.

During a break in the presentation of testimony in the penalty phase, the prosecutor indicated that he would oppose defense counsel's argument that the imposition of the death penalty was "arbitrary and capricious" by arguing that the penalty would not be imposed in the O.J. Simpson case. Defense counsel also proposed to argue that the decision not to seek the death penalty in the Simpson case was political. Defense counsel sought to compare the facts of other well known murder cases (the Menendez brothers, the "Night Stalker," the "Hillside Strangler") and the facts of cases of other states in support of his argument that the death penalty was not sought in cases of rich, white celebrities, but was for a Black, homeless man, to convince the jury it should not impose the death penalty in the instant case. (24RT 3607-3613, 3616-3617.) The prosecutor responded that the argument during the penalty phase was limited to the "aggravating and mitigating circumstances and not as to the propriety of the death penalty in unrelated cases." (24RT 3610, 3616.)

The trial court initially believed a general reference to the penalties sought in other cases of notoriety to show that the death penalty sought in the instant case, and cases in general, was arbitrary and made as a result of a political decision, was proper. The court believed under the language of section 190.3, subdivision (k), that "any circumstance which might mitigate the gravity of the offense" would permit such argument but reference to the facts of any other cases was improper. In particular, the court noted that it was impossible to know on what basis the juries made their decisions in other cases. (24RT 3613-3618.)

Later, the trial court indicated that it was re-considering its earlier

ruling based on its reading of three cases (*People v. Mincey*, *supra*, 2 Cal.4th 408; *People v. Wright* (1990) 52 Cal.3d 367; *People v. Grant* (1988) 45 Cal.3d 829) because it appeared defense counsel was attempting to make an argument covertly that could not legally be made overtly. (24RT 3682-3684.)

The next day, after further argument from defense counsel (25RT 3837-3841, 3844-3849) and the prosecutor (25RT 3841-3844), the trial court ruled that defense counsel could not make any argument comparing the penalties sought or received in any other cases, famous or not, to the penalty in the instant case to argue that the death penalty was unfairly, arbitrarily, or capriciously imposed. The trial court noted that the California Supreme Court had held in several cases that a co-defendant's penalty was an irrelevant consideration when a jury was to determine penalty, and there was no intercase proportionality requirement in California, so the penalties imposed or sought in any other cases were necessarily irrelevant to the jury's determination in the instant case. The trial court concluded that defense counsel was not precluded from arguing as a general principle that the death penalty is imposed unfairly or arbitrarily. (25RT 3845-3849.)

> We have held that when, as here, a factual comparison with other notorious crimes cannot be made without a time-consuming inclusion of all of the facts in mitigation and aggravation, the trial court can exercise its discretion to control the scope of oral argument by refusing to allow defense counsel to compare the subject crime to other murders. (*People v. Hughes* (2002) 27 Cal.4th 287, 398-400, 116 Cal.Rptr.2d 401, 39 P.3d 432; *People v. Roybal* (1998) 19 Cal.4th 481, 528-529, 79 Cal.Rptr.2d 487, 966 P.2d 521.)

People v. Benavides, *supra*, 35 Cal.4th at p. 110.)

As shown above, this Court recently addressed this issue in *People v. Benavides*, *supra*, 35 Cal.4th 69. In the penalty phase of that case, defense counsel argued:

> "There's plenty of examples through history that talk about cases where life was given, life without parole or the death penalty was

> involved. You may recall Angelo Buono, Hillside Strangler, some years back, early eighties, raped, murdered nine women, strangled them, left their nude bodies thrown by the side of the freeways in Los Angeles."

(*Id.* at p. 109.) The prosecutor objected to the argument. Defense counsel stated that he had only referred to cases that were common knowledge to "'give the jury some balancing, to give an idea'" of "'the worst of the worst,'" and that he wanted to argue two additional recent cases, one in which life without the possibility of parole was imposed and another where it was not. (*Ibid.*)

The trial court sustained the prosecutor's objection and stated

> "I have no problem with your talking about Charlie Manson . . . Adolf Hitler . . . the Boston Strangler . . . in general terms . . . suggesting that it is the people who commit crimes of such atrocity who are entitled to the death penalty. . . . And suggest then that by comparison an individual who has taken the life of an infant or someone who has gone in and shot two people while in their sleep ought not to receive the death penalty. [¶¶] But . . . you cannot appropriately single out one, two or three cases, talk about the facts in general and say this person killed nine nurses, fourteen nuns, did whatever, left them and then turned around and got life without parole. . . . . [C]ounsel, if your intent was to say that Buono got life without parole, and if that's what he got then from that jury down there that by contrast Mr. Benavides should get the same thing, I am not going to let you do it."

(*People v. Benavides*, *supra*, 35 Cal.4th at pp. 109-110.) The court then admonished the jury that they were not to consider "'what other jurors may or may not have done in any particular case at any particular time because you were not there. . . . [T]he decision is yours. And in making that decision you ought not to attempt to rely on what some other jurors may have done in any other case, one way or the other.'" (*Id.* at p. 110.)

Based on the foregoing, this Court concluded that the trial court had properly exercised its discretion when it "precluded defendant from presenting specific facts about other notorious murder cases where the death penalty was not imposed, but did not preclude him from arguing that there were

other murderers worse than he." (*People v. Benavides*, *supra*, 35 Cal.4th at p. 110.) The same is true in the instant case.

As the record shows, the trial court properly determined that defense counsel was not permitted to discuss the facts of other murder cases in his attempt to persuade the jury how to make its penalty determination. Particularly, defense counsel was not permitted to make any arguments regarding intercase proportionality because such comparison is not required under the federal or California Constitutions. (*Pulley v. Harris* (1984) 465 U.S. 37, 43-46 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. Lewis*, *supra*, 25 Cal.4th at p. 677.) However, the trial court informed defense counsel that he was free to argue generally that the death penalty is imposed unfairly and arbitrarily with reference to specific cases. (25RT 3846 ["I can certainly see a court allowing the argument, the death penalty is reserved for people like Richard Ramirez who was convicted of killing multiple victims; the death penalty was not designed to be used in the case involving our particular facts. That's not really inviting a comparison. It's a statement of principle."].)

Accordingly, because defense was not precluded, and specifically argued his principal point (26RT 3878-3883, 3895-3897, 3904), the trial court's limitation of defense counsel's argument was not an abuse of discretion. (*People v. Benavides*, *supra*, 35 Cal.4th at pp. 109-110; *People v. Hughes*, *supra*, 27 Cal.4th at pp. 398-400 [limitation of defense counsel's penalty phase closing argument by precluding counsel from specifying particular murder prosecutions in which crimes committed were more egregious than those committed by defendant, but defendants therein were not sentenced to death, was not error, where counsel was permitted to make his central point and to argue in general terms that there were "worse cases" than defendant's in which death penalty had not been meted out]; *People v. Sanders*, *supra*, 11 Cal.4th at pp. 554-555 ["The trial court did not err in excluding references to the notorious but unrelated crimes of Charles Manson or to the penalty of life imprisonment

that he ultimately received."].) Thus, his claim fails.

For the same reasons, appellant cannot show that the trial court's preclusion of his argument affected the death verdict (AOB 422-423). (*People v. Jones*, *supra*, 29 Cal.4th at p. 1229, fn. 11.) As noted above, defense counsel was able to make the very argument he purportedly wanted, but without improper references to specific cases. Thus, he suffered no prejudice.

And, to the extent appellant asserts his proposed closing argument was necessary to rebut the prosecutor's reference to Kitty Genovese and general argument that a defendant's financial status would not determine whether the death penalty was sought (26RT 3856, 3876), this claim is insufficient to support prejudicial error. First, appellant did not object to the argument at trial, so he is precluded from complaining about it on appeal. (*People v. Prieto*, *supra*, 30 Cal.4th at pp. 259-260.) Second, the argument was properly within the trial court's stated parameters, and thus, was proper. (See 25RT 3845-3849.) And lastly, even assuming the argument was error, the references were brief such that there was no harm. (See *People v. Hughes*, *supra*, 27 Cal.4th at p. 400 [defense counsel's attempt to engage in intercase proportionality analysis during penalty phase closing argument was not justifiable as rebuttal of prosecutor's proportionality discussion, where defense counsel did not attempt to justify his analysis to trial court on that ground, and where prosecutor had made only one brief reference to another murder case].)

Accordingly, this claim is meritless.

XXI.

THE DEATH SENTENCE IS PROPORTIONATE TO APPELLANT AND THE CRIME HE COMMITTED

Appellant contends application of the death penalty in his case is disproportionate to his personal culpability in violation of the Eighth Amendment and California law, and therefore the sentence must be reversed.

(AOB 423-429.) Respondent disagrees because, as explained below, appellant's punishment is proportionate to his offense.

Although this Court has rejected the argument that intercase proportionality analysis is required under California's death penalty law or by the Constitution (see, e.g., *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511), nevertheless, the cruel or unusual punishment clause of the California Constitution (art. I, §17) does entitle a capital defendant, on request, to intracase review by this Court to determine whether the death penalty is grossly disproportionate to his personal culpability. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; *People v. Weaver* (2001) 26 Cal.4th 876, 989; *People v. Anderson*, *supra*, 25 Cal.4th at p. 602; *People v. Hines*, *supra*, 15 Cal.4th at p. 1078.) Appellant must demonstrate that his sentence is so disproportionate to his personal culpability as to "shock the conscience" or "offend fundamental notions of human dignity." (*People v. Hughes*, *supra*, 27 Cal.4th at p. 406; *People v. Hines*, *supra*, 15 Cal.4th at p. 1078.)

In reviewing proportionality, the court examines "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*In re Lynch* (1972) 8 Cal.3d 410, 425; see also *People v. Morris* (1991) 53 Cal.3d 152, 234, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; *People v. Frierson* (1979) 25 Cal.3d 142, 183.) In reviewing the nature of the offender, the court may consider the defendant's prior criminality. (*People v. Dillon* (1983) 34 Cal.3d 441, 479.)

Here, appellant's death sentence is not so disproportionate to his personal culpability as to "shock the conscience" or "offend fundamental notions of human dignity." Although as appellant contends "only one person was killed" (AOB 427), he omits the fact that he killed Lao by brutally stabbing her 30 times, causing her to slowly bleed to death, in order to steal money from the donut shop. Furthermore, it can be reasonably concluded that appellant intended to kill Lao as the evidence showed he had committed other armed

robberies but had not killed his victims. Also, penalty phase evidence included appellant's vicious stabbing of Benita Rodriguez, which occurred five days after Lao's murder.

Moreover, because "intracase proportionality review examines whether [a] *defendant's* death sentence is proportionate to *his* individual culpability, irrespective of the punishment imposed on others" (*People v. Maury*, *supra*, 30 Cal.4th at p. 441, internal quotations and citations omitted), that defense counsel was unable to argue that O.J. Simpson was not facing the death sentence is irrelevant (AOB 427.) Likewise, appellant's speculative argument that the murder was a result of drug-use is also without merit as there is no evidence in the record that supports this claim (see 32RT 4038). (AOB 428.) Further, appellant's lack of a violent response when being chased and cornered by people who were not helpless and/or had not been subdued by him is not evidence of any redeeming quality. And finally, appellant's lack of a violent response during an altercation with Antoine (see 25RT 3800-3801, 3824-3825) almost a year prior to the instant crimes, fails to rebut the overwhelming evidence of appellant's violent, criminal lifestyle. (AOB 428-429.)

Thus, appellant's sentence is not disproportionate to his personal culpability, even if could be argued that he "was not the most heinous murderer or his crime the most abominable." (*People v. Maury*, *supra*, 30 Cal.4th at p. 441; see also *People v. Hughes*, *supra*, 27 Cal.4th at p. 406; *People v. Padilla* (1995) 11 Cal.4th 891, 962, overruled on other grounds in *People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1; *People v. Marshall* (1990) 50 Cal.3d 907, 938.)

XXII.

CALIFORNIA'S DEATH PENALTY LAW IS CONSTITUTIONAL

Appellant contends California's death penalty scheme is unconstitutional for various reasons. (AOB 423-490.) However, as he

concedes, this Court has previously rejected each of his claims (AOB 429-430) and respondent submits this Court should do so once again.

A. Section 190.2 Is Not Impermissibly Broad

Appellant contends his death penalty is invalid because section 190.2 is impermissibly broad. (AOB 431-435.) This Court has repeatedly rejected such arguments and should continue to do so. (*People v. Elliot* (2005) 37 Cal.4th 453, 487; *People v. Snow* (2003) 30 Cal.4th 43, 126-127; *People v. Anderson*, *supra*, 25 Cal.4th at p. 601.)

B. Section 190.3, Subdivision (a), Is Not Being Applied In An Arbitrary Or Capricious Manner

Appellant contends that the "circumstances of the crime" factor in Penal Code section 190.3, subdivision (a), "has been applied in such a wanton and freakish manner that almost all features of every murder" have been used as "aggravating" factors by prosecutors, amounting to a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.[22/] (AOB 436-442.) This Court has repeatedly rejected claims such as this. (See, e.g., *People v. Elliot*, *supra*, 37 Cal.4th at p. 487; *People v. Smith* (2005) 35 Cal.4th 334, 373; *People v. Turner* (2004) 34 Cal.4th 406, 438.) In doing so, this Court has noted that the "seemingly inconsistent range of circumstances" that "can be culled from death penalty decisions" shows "that each case is judged on its facts, each defendant on the particulars of his offense. Contrary to defendant's position, a statutory scheme would violate constitutional limits if it did not allow such individualized assessment of the crimes but instead mandated death in specified circumstances." (*People v. Brown* (2004) 33 Cal.4th 382, 401; see also *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1052-1053.) Therefore, appellant's claim

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22. Appellant does not contend that in this case any of the facts urged by the prosecution in connection with this factor were improper.

must be rejected.

C. The Constitution Does Not Require That The Jury Find Any Aggravating Factors True Beyond A Reasonable Doubt Or Find That The Aggravating Factors Outweighed The Mitigating Factors Beyond A Reasonable Doubt

Appellant contends his constitutional right to a jury determination beyond a reasonable doubt was violated because the jury was not instructed that it had to find any aggravating factors true beyond a reasonable doubt or that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt before deciding whether to impose the death penalty. Appellant further argues that recent decisions by the Supreme Court have rejected this Court's prior determinations on these issues. (AOB 442-466.) These claims are of no avail because they have all been rejected previously by this Court. (*People v. Elliot*, *supra*, 37 Cal.4th at p. 487; *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Vieira*, *supra*, 35 Cal.4th at p. 300.) And as noted previously, the Supreme Court's decisions in *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, have not changed this Court's analysis on this issue. (See, e.g., *People v. Elliot*, *supra*, 37 Cal.4th at p. 487; *People v. Ward*, *supra*, 36 Cal.4th at pp. 221-222; *People v. Stitely*, *supra*, 35 Cal.4th at p. 573 *People v. Morrison*, *supra*, 34 Cal.4th at p. 730; *People v. Danks* (2004) 32 Cal.4th 269, 316 ["trial court did not err in failing to require the jury to make unanimous separate findings of the truth of specific aggravating evidence" and "[n]othing in *Ring* . . . or *Apprendi* . . . affects our conclusions in this regard"]; *People v. Crew* (2003) 31 Cal.4th 822, 860; *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263, 275.) Thus, there was no error.

D. Written Findings For The Death Verdict Were Not Required

Appellant invites this Court to reconsider its previous ruling that

a capital jury is not required to submit written findings for its death verdict. (AOB 466-470.) Because this Court has repeatedly declined such an invitation, it should do so again here. (See *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Yeoman, supra*, 31 Cal.4th at pp. 164-165; *People v. Martinez, supra*, 31 Cal.4th at p. 701; *People v. Smith* (2003) 30 Cal.4th 581, 641-642.)

E. Intercase Proportionality Review Is Not Constitutionally Required

Appellant contends that the lack of intercase proportionality review violates the Eighth and Fourteenth Amendments. (AOB 470-477.) This Court has repeatedly rejected this contention and should do so here. (See, e.g., *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Panah, supra*, 35 Cal.4th at p. 500; *People v. Smith, supra*, 35 Cal.4th at p. 374; *People v. Burgener, supra*, 29 Cal.4th at p. 885; *People v. Anderson, supra*, 25 Cal.4th at p. 602.)

F. There Was No Error In Using Certain Adjectives In The List Of Mitigating Factors

Appellant contends the use of "restrictive" adjectives in the list of mitigating factors created a barrier to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 477.) This claim has been consistently rejected and is therefore meritless. (*People v. Elliot, supra*, 37 Cal.4th at p. 488 ["extreme," "substantial"]; *People v. Panah, supra*, 35 Cal.4th at p. 500; *People v. Smith, supra*, 35 Cal.4th at p. 374.)

G. The Trial Court The Trial Court Is Not Constitutionally Required to Instruct the Jury That Certain Sentencing Factors Are Relevant Only To Mitigation

Appellant contends the trial court was required to instruct that statutory mitigating factors were relevant solely as potential mitigators. (AOB 477-479.) This Court has previously rejected this contention and should also do

so here. (*People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Panah, supra*, 35 Cal.4th at p. 500; *People v. Smith, supra*, 35 Cal.4th at pp. 373-374; *People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079.)

H. The California Sentencing Scheme Does Not Deny Equal Protection

Appellant contends California's sentencing scheme violates the Equal Protection Clause because it denies certain procedural safeguards to capital defendants that are afforded non-capital defendants. (AOB 479-487.) This Court has previously rejected this contention and should also do so here. (*People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Panah, supra*, 35 Cal.4th at p. 500; *People v. Smith, supra*, 35 Cal.4th at p. 374; *People v. Allen* (1986) 42 Cal.3d1222, 1286-1288.)

I. California's Death Penalty Procedure Does Not Violate International Law

Appellant contends that California's death penalty scheme violates international law. (AOB 487-4990.) This Court has rejected this contention and has specifically rejected the argument that California's scheme violates the International Covenant of Civil and Political Rights. (See, e.g., *People v. Roldan, supra*, 35 Cal.4th at p. 744; *People v. Ramos* (2004) 34 Cal.4th 494, 533-534; *People v. Brown, supra*, 33 Cal.4th at p. 404.) Therefore, appellant's claim must be rejected here, as well.

XXIII.

ANY ALLEGED POLITICAL CONSIDERATIONS IN THE DEATH PENALTY REVIEW PROCESS DO NOT WARRANT REVERSAL OF APPELLANT'S DEATH SENTENCE

Appellant contends that his death sentence should be reversed because political considerations dominate California's death penalty review

process. (AOB 491-510.) This Court has previously addressed and rejected this claim and appellant has provided no reason to reconsider this ruling. (*People v. Kipp*, *supra*, 26 Cal.4th at pp. 1140-1141.) Thus, this claim is meritless.

XXIV.

INTERNATIONAL LAW DOES NOT REQUIRE REVERSAL OF APPELLANT'S DEATH SENTENCE

Appellant contends that the alleged violations of the state and federal constitutions also violates principles of international law, and thus, his death sentence must be set aside. (AOB 510-527.) This claim is meritless, as this Court has previously found. (*People v. Vieira*, *supra*, 35 Cal.4th at p. 304; *People v. Snow*, *supra*, 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779 ["a treaty or international declaration or charter has no effect upon domestic law unless it either is implemented by Congress or is self-executing."] Therefore, the Court should also reject appellant's claim.

XXV.

NO CUMULATIVE ERROR RESULTED

Appellant contends the cumulative effect of the alleged errors discussed in the previous arguments requires reversal. (AOB 528.) The claim is without merit because the foregoing arguments demonstrate "there was no error . . . to cumulate" (*People v. Phillips*, *supra*, 22 Cal.4th at p. 244), or there was no prejudice from any alleged error (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1056 ["trial was not fundamentally unfair, even if we consider the cumulative impact of the few errors that occurred"]; accord, *People v. Elliot*, *supra*, 37 Cal.4th at p. 487; *People v. Sapp* (2003) 31 Cal.4th 240, 287, 316; *People v. Jones*, *supra*, 29 Cal.4th at p. 1268).

CONCLUSION

For the foregoing reasons, respondent respectfully requests that appellant's conviction and death sentence be affirmed.

Dated: February 17, 2006

Respectfully submitted,

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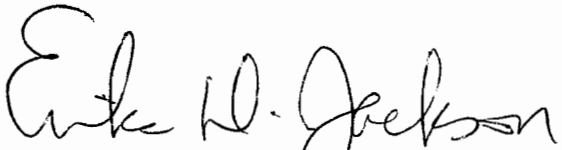

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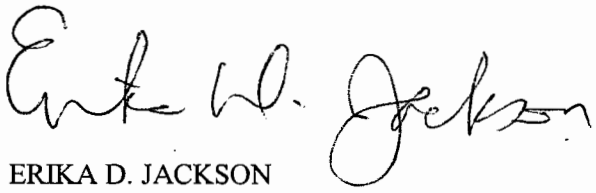
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 43,761 words.

Dated: February 17, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Lester Wayne Virgil**
No.: **S047867**

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 and older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 22, 2006, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

CAPITAL CASE

Manuel J. Baglanis
Attorney at Law
P.O. Box 700035
San Jose, CA 95170-0035
(two copies)

CALIFORNIA APPELLATE PROJECT
(SF)
Attention: Michael Millman, Director
101 Second Street, Suite 600
San Francisco, CA 94105-3647
(one copy)

That I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court; and that I caused a copy to be delivered to the appropriate District Attorney.

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 February 22, 2006, at Los Angeles, California.

M. Louie
Declarant

Signature

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60128307.wpd