SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ALBERT JONES, Defendant and Appellant.	CAPITAL CASE Case No. S056364

SUPREME COURT
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DEPUTY

Riverside County Superior Court Case No. CR~~53009~~
The Honorable Gordon R. Burkhart, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On June 2, 1994, the Riverside County District Attorney filed an information alleging Albert Jones committed two first degree murders on or about December 13, 1993, in violation of Penal Code section 187; in count one, the murder of James H. Florville and in count two, the murder of Madalynne Florville. It was further alleged as to both counts that Jones personally used a deadly and dangerous weapon in the commission of the murders, within the meaning of Penal Code sections 12022, subdivision (b) and 1192.7, subdivision (c)(23). Special circumstances were alleged that the murders were committed during the commission of a robbery (Pen. Code, § 211), within the meaning of Penal Code section 190.2, subdivision (a)(17)(i); that the murders were committed during the commission of a burglary (Pen. Code, § 459), within the meaning of Penal Code section 190.2, subdivision (a)(17)(vii); and that Jones committed multiple murders, within the meaning of Penal Code section 190.2, subdivision (a)(3). It was also alleged that Jones had one prior conviction for a serious felony, within the meaning of Penal Code section 667, subdivision (a) and three prior convictions for which he had served a separate prison term, within the meaning of Penal Code section 667.5, subdivision (b). (1 CT 62-65.) On June 3, 1994, Jones pled not guilty to all counts and denied all allegations. (1 CT 68-69.) On May 1, 1996, a Riverside County jury returned guilty verdicts as to both counts and found the enhancement and special

circumstance allegations to be true. (2 CT 450; 3 CT 592-600.) On May 6, 1996, after a court trial on the prior conviction allegations, the allegations were found true. (2 CT 475.) The penalty phase of the trial commenced on May 13, 1996. (3 CT 609-610.) On May 22nd, the jury returned with a verdict of death. (3 CT 736, 738.)

On September 20, 1996, Jones's motion for new trial and motion to reduce the penalty from death to life without parole were denied and Jones was sentenced to death. (3 CT 793-795.)

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

STATEMENT OF FACTS

THE GUILT PHASE

The victims: James and Madalynne Florville.

On December 13, 1993, 82-year-old James Florville and his 72-year-old wife, Madalynne, lived at 19565 Una Street in Mead Valley in a trailer. The main entryway into the home was a glass patio door on Una Street which led out to a gate. Their driveway was on Souder Street and was accessible through a locked gate. Mr. Florville was ill with emphysema and the flu at the time of the murders. He often slept on the couch in the living room. Mrs. Florville was more active, was an early riser, usually at 5:30 or 5:45 a.m., when she would eat breakfast, sit at the dining room table and do her crafts until her husband woke up. The Florvilles' son, James,

lived about 60 miles away. (12 RT 1891-1898, 1940-1943.) The Florvilles had a dog, which was afraid of everything and everyone. (12 RT 1900.)

The murder scene.

On December 13, 1993, the Florvilles' son James called them at 6:20 a.m., as was his custom. There was no answer and he called again at 6:30 and 6:40 with the same result. James called his parents again from work but again got no answer. (12 RT 1901-1902.) Beth Hunnicutt, the Florvilles' friend and neighbor, received a call at approximately 11:00 a.m. asking her to go to the Florvilles' home to check on them. At first she tried to go through the gate leading to the Florvilles' garage but the gate was locked. She then walked through the unlocked gate which led to the sliding glass doors and entered the Florvilles' home. Ms. Hunicutt saw Ms. Florvilles' glasses on the floor of the dining room and then walked to the bedroom where she saw the bodies of the Florvilles. Ms. Hunicutt ran back to her residence and had someone call the police. (12 RT 1969-1977.)

On December 13, 1993, Riverside County Sheriff's Deputy Dennis Haynes was on patrol. He received a call around noon to respond to the Florvilles' residence. When he arrived he met Beth Hunnicutt, who was very upset, and had a short conversation with her. Deputy Haynes entered the Florvilles' residence through a sliding glass patio door that was about a

foot open. He saw no signs of forced entry. He took great care not to disturb the scene. (12 RT 1868-1875.) Deputy Haynes walked into the dining room and saw the torso of a body sticking out into the hall from a bedroom. Deputy Haynes walked down the hallway and saw the body of Mr. Florville on the floor and the body of Mrs. Florville lying in the doorway. The blood around the bodies indicated they were deceased. (12 RT 1875-1878.)

Just before 2:00 p.m., Detective Robert Joseph of the Riverside County Sheriff's Department responded to the scene and began processing it. The gate near the entrance to the mobile home was open and there was no lock to the gate. A sample of blood was collected from the gate and latch. The gate to where the Florvilles parked their car was locked and the car was in the carport. (13 RT 2051-2062.) There were no signs of forced entry into the Florvilles' residence. A curtain covered the sliding glass door. In the living room area there was no sign of ransacking or a struggle. There was a spot of blood on the curtain that was collected. (13 RT 2065-2069.) In the living room area was a couch with an afghan. Under the afghan was a man's brown wallet with cash and credit cards in the name of James Florville. There was a bottle of cough medicine and cigarettes on the end table. (13 RT 2069-2071.) On the kitchen table was knitting or crocheting items. There appeared to be a blood drop on one of the kitchen

chairs. On the floor was another blood drop, a woman's purse and eyeglasses. In the purse were numerous documents and cards in the name of Madalynne Florville, including credit cards, a checkbook, a five-dollar bill and a penny. (13 RT 2072-2076, 2094-2097.) In the entryway in front of the sliding glass door was a sliver of a latex glove. (13 RT 2076-2077.) In the dining room, the light from a ceiling fan was on. A lamp on the end table with the cigarettes and cough medicine was also turned on. (13 RT 2078.) There were blood drops in the hallway and more blood drops on the bathroom door. No fingerprints were found in the residence. (13 RT 2079-2081.)

Two drawers had been removed from a dresser in the alcove. An envelope with "house $600" written on it was taped beneath one of the drawers. The envelope had been ripped open and nothing was inside of it. (12 RT 1937-1939; 13 RT 2085-2092.) The Florvilles had a small safe in the back bedroom which was missing after the murders. Numbers, probably the combination, were written on the bottom of the safe. The safe was approximately five by seven inches and was four inches deep. It held papers, money and a few special coins. There was a slot on top which allowed one to put items in the safe without opening the door. A box where Mrs. Florville kept important papers was also missing. (12 RT 1903-1908, 1942-1943.) There was a small Doberman-type dog at the residence but the

dog only barked and ran away when the officer approached it. (13 RT 2093-2099.)

At the end of the hall one could see the naked legs and buttocks of Mrs. Florville inside the doorway of the bedroom at the end of the hall. She was hogtied; her ankles were tied together behind her back and the wire continued up her back to where her wrists were bound. (13 RT 2078-2079.) She had on a print floral dress, a bathrobe and black slippers. (13 RT 2084.) Mrs. Florville's clothing was pulled up covering her head. (13 RT 2082, 2085.) Mrs. Florville had numerous stab wounds to her chest and to her side beneath her arm. (13 RT 2090.) Towards her head on the floor was a pool of blood. There were no shoe prints or tracks. Most of the blood in the house was located near the bodies. (13 RT 2083.)

Mr. Florville was dressed in a black jacket pulled up to cover his head, a flannel shirt, a T-shirt, a belt, jeans, socks and shoes. His hands were tied behind his back with wire, similar to his wife, but his feet had a loop of wire around them that attached to his belt. Mr. Florville had stab wounds in his chest. There was blood on the carpet near his chest. There was blood near the wounds in his chest. In the knot where Mr. Florville's hands were tied by the wire was a tip of the finger of a latex glove that had been caught in the knot. (13 RT 2084-2089.)

Events leading up to the murders.

Debbie Russell, 17 years-old at the time of the murders, lived in the Florvilles' neighborhood on Hunter Street. She belonged to a group of early teenagers living in the neighborhood that often hung out at the home of Rochelle Timmons, whom they called Auntie Ro. (13 RT 2115-2116.) Jones, age 29 at the time of the murders, was the only adult in the group. Jones referred to the teenage girls in the group, Russell, Mary Holmes, and Ryan McElroy as part of his "clique." The boys in the group were Alon Johnson[1], Ray Butler and Jack Purnell. Jones referred to Johnson and Purnell as his "disciples." Jones told the group that they were "insiders" and that everyone else was an "outsider." Jones told the group that he would kill them if they told "outsiders" anything and that they were to do as Jones told them. (13 RT 2116-2119; 15 RT 2426-2427, 18 RT 2842-2843, 2896-2897.)

Kimberly Stoddard-Brown worked for the Val Verde Career Center in Perris. Ms. Brown taught math, child care and some other classes. The child care class was held in a room with changing tables for changing

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[1]Alon Johnson was 15 years old at the time of the murders. Johnson was declared a ward of Riverside County Juvenile Court after allegations of two counts of murder of the Florvilles were found true on March 17, 1994. Johnson was committed to the California Youth Authority. (3 CT 788.)

baby's diapers with latex gloves next to it. In November 1993, Alon Johnson, a student of Ms. Brown, was walking in the hallway between first and second period. Johnson was supposed to be going to Ms. Brown's math class but instead, he went into the child care classroom. Johnson came out of the classroom with a handful of the latex gloves, stuffing the gloves into his pocket. She told Johnson he was not permitted to take the gloves and told him to put the gloves back. She watched as he took the gloves out of his pocket and put them back in the child care room. (16 RT 2592-2594.)

December 12, 1993: the day before the murders.

The day before the murders, Debbie Russell and Mary Holmes were in the bathroom at Rochelle Timmons's house, getting ready for church. (13 RT 2119-2121.) Jones, Alon Johnson and Jack Purnell were in the back room, talking about a burglary. Jones described a residence and doors and fences. Jones said Johnson would go first, then Purnell and then Jones. Jones said when they left the burglary Johnson would leave first, then Purnell and Jones would leave last to make sure everyone got away. (13 RT 2121-2122; 15 RT 2428-2430.)

The morning of the 12th, before they went to church, Jones drove a smaller group of the teens to the store to get nylons for a couple of the girls.

On the way back from the store, Jones slowed the car down as they passed the Florvilles' residence and told Johnson and Purnell to look at the residence. Jones pointed out the sliding glass door and the fences surrounding the residence, saying they could hop over the fences. (13 RT 2122-2125; 15 RT 2430-2433; 18 RT 2897-2898.) Later, back at Rochelle Timmons's house, Jones, Purnell, and Johnson talked more about the robbery. Jones said they would rob the old people on the corner because they had money and guns and they might have a safe. Jones said he would go to the door and say his mother had a heart attack and he needed to call paramedics. Purnell was supposed to tie them up and put them in a closet. Johnson was supposed to go around the back of the house and go through a window. Jones would look for the money, the safe and the guns. Jones said they would stab the victims if the victims saw them. Jones mentioned using gloves so they would not leave fingerprints and using rope to tie up the victims. Purnell said that the victims' dog would not be a problem because he had played football near there, the football had landed in their yard and when they retrieved the football, the dog ran. (15 RT 2434-2438; 18 RT 2898-2900, 2930.)

The day of the murders.

On the morning of the 13th, Beth Hunicutt, a friend and neighbor of the Florvilles, returned home at 3:00 a.m. The lights at the Florvilles'

residence were not on. (12 RT 1981-1982.) When Ms. Hunicutt walked her husband out to go to work at 4:00 a.m., the Florvilles' lights were on, which was not unusual because Mrs. Florville sometimes got up that early. (12 RT 2002-2003.)

Judy Johnson was the aunt of Alon Johnson and was Jones's girlfriend. In December 1993 she lived on Club Drive with Jones. Sometimes Alon slept at their place. In December of 1993 Jones was not working and Ms. Johnson sometimes gave him money. Jones drove her to work on the morning of December 13, 1993. When she left for work, Alon was sleeping on the couch. Ms. Johnson worked in Perris and Jones dropped her off. She clocked in at 5:23 a.m. When she returned home from work that day, Jones had washed the clothes. There were surgical gloves at her house that she assumed Jones brought in. (15 RT 2522-2530, 2537.) The investigation showed that the driving time from Judy Johnson's work to Jones's and Johnson's residence was 16 minutes, a total of ten miles. Detective Spidle also measured the distance and driving time from Jones's residence to where Jones parked next to the victim's home. That route took 11 minutes and was 7.9 miles. (17 RT 2779-2784.)

Dorell Arroyo was 16 years old at the time of trial. Lillie McElroy was his and Ryan's mother, who lived about a block from the Florvilles' home. In December 1993, Arroyo was living with Beth Brown on Souder

Street across from the Florvilles. On the night of December 12th, Arroyo was out in a camper where he stayed in the yard of Beth Brown's home. In the early morning he saw Jones's car pull up alongside the Florvilles' residence. Arroyo walked out of the camper to get a drink of water at the side of Brown's residence when he saw Jones and Johnson get out of the car. Arroyo had known Johnson all his life and had known Jones for about four years. Johnson walked to the gate where the Florvilles' car was parked and jumped into their yard. Jones walked toward the gate going into the Florvilles' sliding glass door. (14 RT 2224-2232.) Jones walked up to the sliding glass doors of the Florvilles' residence. The sliding glass door moved, but Arroyo saw nothing else at that time. Sometime later Jones came out of the Florvilles' home. Jones appeared to be scratching his hands as he walked out of the gate. Jones walked toward his car. Johnson walked to the fence where he had originally jumped over, threw an object which looked like a square box over the fence and hopped over the fence. Johnson picked up the object he threw over the fence, put it in Jones's car on the passenger side and got in. Jones's car made a U-turn and went down Hunter Street. Jones then pulled into Rochelle Timmons's driveway. (14 RT 2237-2250.)

Arroyo went next door to Dakota Whitney's house. Arroyo wrapped himself in a blanket and laid on the couch. (14 RT 2250-2251.) Arroyo

laid on the couch staring into space. He appeared scared. Later that morning Arroyo tried to talk to Ms. Whitney but she just brushed him off because she thought he was going to tell her something she did not want to hear. (14 RT 2252; 19 RT 3087-3089, 3095.) Later that day, Arroyo went to Rochelle Timmons's house. Jones was there talking about how to commit a perfect crime and how to steal. Jones grabbed Arroyo's hand, pulled him close and stared at him. Jones said, "If Alon tell you to tie up anybody, you better tie them up. If Alon tell you to kill anybody, you better do it. If Alon tell you to shoot anybody, you better do it." (14 RT 2252-2254.)

The night of December 13th, Arroyo slept at his mother's, Lillie McElroy's residence. In the morning, Arroyo went into Debbie Russell's room in McElroy's residence and told Russell what he saw. Arroyo told Russell that he was going to tell his mother but Russell told him not to. Nevertheless, Arroyo and Russell told Arroyo's mother what they saw and she called the police. Arroyo was interviewed by the police later that day and then returned to the scene with police where he explained what he saw and where he was. (14 RT 2254-2255, 2261-2263; 13 RT 2129, 2036-2039.) On December 20th Detective Spidle spoke to Dorell Arroyo again and took photographs from where Arroyo was standing when he saw Jones and Alon Johnson. Arroyo said it took between 15 to 30 minutes from

when Jones and Johnson drove up to the victims' residence to when they left. (17 RT 2735-2737.) The distance from where Arroyo was standing to where Jones parked the car was 166 feet, 8 inches. Arroyo was 127 feet from the victims' gate. (17 RT 2739-2742.) It was during this interview that Arroyo told Detective Spidle about seeing Alon Johnson throwing something over the fence. Arroyo demonstrated how Johnson threw it over. Prior to the conversation, Detective Spidle was not aware of the existence of a safe or file box taken from the victims' residence. The next day was the first time the victims' family indicated that a small safe was missing. (17 RT 2770-2773.)

On the way to the school bus stop on the morning of the murders, at approximately 6:20 a.m., Mary Holmes (also called Shababy) found a bloody glove in Rochelle Timmons's yard. She flushed the glove down the toilet of Rochelle Timmons's residence because she was scared of Jones and apparently thought he was somehow involved with the glove. On Monday, December 13th at Timmons's house, Debbie Russell told Jones that Holmes had found a bloody glove that morning and flushed it down the toilet. In response, Jones asked Johnson what he had done with his gloves. Johnson said he had removed the gloves and thrown them into the car. Jones told Holmes, "Good job." Holmes did not tell the police at first that she found the glove. During the investigation, when the police found the

glove in the septic tank, Holmes admitted to Detective Spidle that she was the one that flushed the glove down the toilet. She originally told the police that she found the glove down the street but she actually found it in Timmons's yard. (13 RT 2127-2129; 18 RT 2900-2906; 19 RT 3098-3100; 22 RT 3449-3451.)

Jack Purnell returned home before 10:00 p.m. on the night before the murders. Purnell got up around 7:00 a.m. the next morning and went to school. Johnson was late for school that morning (Monday the 13th), which was unusual. (15 RT 2438-2440.)

On December 13th, Debbie Russell got a call from Jones, telling her to look out the window at the Florvilles' home. Jones told her that Johnson's grandmother said the Florvilles had been killed. Jones said the victims had been tied up, thrown in the closet and shot. Jones told Russell that she should be careful, that next time it could be her. (13 RT 2126-2127.)

The days after the murders.

The morning after the murders, Tuesday the 14th. Purnell went to a funeral with Ryan McElroy, Johnson, Jones and Mary Holmes. Jones, Johnson and Purnell had a conversation in the car at the funeral. Holmes and Ryan McElroy were not present. Johnson told Purnell they had

committed the robbery. Jones did not respond.[2] At some point during or after the funeral, according to Ryan McElroy, Jones said that the victims should have cooperated and they would not have been stabbed. (15 RT 2440-2443; 18 RT 2848-2849.)

On the morning of Wednesday, December 15th, Rochelle Timmons got a call from Judy Johnson, Jones' girlfriend. Jones got on the phone and asked Timmons to help him with an alibi. She cut the conversation short because she did not want to be involved. (20 RT 3169-3171.)

The investigation.

Senior Detective Eric Spidle conducted the investigation of the murders. The day after the murders Detective Spidle went to the neighborhood to speak to Dorell Arroyo and Debbie Russell. They were concerned about speaking to law enforcement. At that time Arroyo was 14-years-old and Debbie Russell was 17. He conducted taped interviews of Arroyo and Russell and then made arrangements to interview Mary Holmes, Ryan McElroy and Rochelle Timmons at the police station. (17 RT 2707-2711.) Arroyo was unsophisticated, fast-talking, and nervous. (17 RT 2715-2716.) Debbie Russell was terrified and scared for her life.

[2]Purnell did not tell Detective Spidle what he knew right away because he was afraid of getting into trouble. Eventually Purnell told Detective Spidle what he knew. (15 RT 2443-2444.)

Russell said if Jones found out they were talking to police, he would kill them. Purnell was also reluctant to talk to him. (17 RT 2717-2718.)

On December 14, 1993, Detective Joseph went to Jones's residence. There were two vehicles at the residence, a brown Oldsmobile Cutlass and a yellow Chevy pickup. When Detective Joseph arrived, Jones, Alon Johnson and Judy Johnson were at the residence. Inside the residence Detective Joseph noticed freshly washed and folded laundry. A pair of wet tennis shoes were on top of the washing machine. In a coin purse located in the master bedroom at the bottom of a trash can liner, beneath the trash bag, were $140 cash and one penny. A latex glove was at the bottom of the east fence of the residence. Two latex gloves were found in a trash bag in the back of the yellow pickup. The Oldsmobile Cutlass was taken from the scene to process. No latex gloves or blood were found in the Cutlass. (16 RT 2602-2612.)

Jones was arrested around 3:00 a.m. on Wednesday morning. (17 RT 2719.)

The autopsies of the victims.

Dr. Swalwell conducted an autopsy on Madalynne Florville on December 17, 1993. There were abrasions on her wrists and ankles. There were cuts on her hands and fingers. She had ten stab wounds on her

shoulder, left arm, and chest area. There was blood in her chest cavity and around her heart. The cause of death was multiple stab wounds. The assailant would not have necessarily got blood on themselves. (18 RT 2976-2994.)

Dr. Stalwell testified regarding the estimate of Mrs. Florvilles' time of death. Mrs. Florville had pieces of hot dog and celery in her stomach. (18 RT 2996-2999.) There were mild decompositional changes to her body. (18 RT 3000-3002.) Using decomposition to estimate the time of death is not very precise because temperature effects decomposition. Rigor mortis is also used to approximate the time of death. It depends upon a number of factors and can be used to estimate time of death only to a matter of hours. Looking at stomach contents is even less precise than the other methods. The use of a measure of potassium in vitreous fluid in Mrs. Florville and a formula developed for estimating time of death would produce an estimate that Mrs. Florville died between 53 and 77 hours before the samples were drawn. This estimate was inconsistent with other factors and inconsistent with when she was known to be alive. (19 RT 3027-3033.)

Dr. DiTraglia performed the autopsy on James Florville on December 16, 1993. (19 RT 3037.) There were abrasions and contusions on his hands, wrists and upper arms. There were abrasions on the front of

his left knee and on the back of his right leg. (19 RT 3040-3046.) Mr. Florville had one stab wound on the left side of his chest. It went through the chest wall and into his left lung. (19 RT 3047-3049.) A second stab wound went through his chest wall and into his left lung as well. The irregular pattern of the wound indicated movement of the knife or body during the stabbing. (19 RT 3049-3050.) A third stab wound was near stab wound two. It was more shallow and also had an irregular pattern, indicating movement of the knife or body. (19 RT 3053.) There was internal bleeding inside his left chest cavity consistent with being stabbed in the chest. The cause of death was multiple stab wounds to the chest. A stabbing of this sort may not result in much external bleeding because of the way the layers of skin, tissue and organs may overlap. (19 RT 3053-3054.)

Dr. DiTraglia also testified regarding estimating the time of death. There are a number of factors that affect decomposition, including temperature, weight, clothing, weather, and health. Mr. Florville had no signs of decomposition. All of the various estimates of time of death, including decomposition, body temperature, rigor mortis, and liver mortis, are somewhat imprecise. (19 RT 3064-3068.) Body decomposition as an accurate measure of time of death is useless. (19 RT 3072.) Liver mortis

and rigor mortis are very unreliable to determine time of death. Looking at stomach contents is also useless. (19 RT 3072.)

Other forensic evidence.

After Detective Spidle found out that a latex glove had been flushed in the toilet at Rochelle Timmons's house, he contacted a company to search the septic tank. They found a latex glove floating on the top of the septic tank. They sent the glove to the California Department of Justice ("DOJ") crime lab. (17 RT 2773-2776.) In February 1994, Paul Sham, a criminalist with the DOJ, performed analysis on the fingertip of the latex glove found in the wire binding Mr. Florville, the sliver of latex glove found near the victims' sliding glass door, the glove found in the septic tank, the latex glove found in the yard of Jones's residence and the two latex gloves found in the bed of the truck at Jones's residence. All the gloves were creamy white in color and glossy and smooth in texture. The thickness of the gloves measured at between .003 and .005 of an inch. (19 RT 3114-3116.) The size of the gloves were medium or large. The glove found in the septic tank was difficult to examine because the color of a latex glove changes when it has been immersed in water. (19 RT 3122-3130.)

The 1985 Vernon robbery.

Evidence of a prior robbery committed by Jones was admitted under Evidence Code section 1101, subdivision (b), to show Jones's intent and motive in the murders of the Florvilles. On Saturday, August 3, 1985, Raymond Latka was working at a furniture store called "Status" in Vernon. Around noon he left the store with Robert Valdez and Randy Vasquez. As Mr. Latka left the store and locked the door, a white LeBaron pulled up to them abruptly, and Jones and another man got out of the car. The driver of the LeBaron stayed in the driver's seat. Jones pointed a blue Luger 9 millimeter handgun at them, told them it was a robbery and told them to hand over their money. Jones said he would kill them. The other man took money from Vasquez and Valdez, hitting Vasquez in the course of taking the money. Mr. Latka gave them $6, all the money he had. (11 RT 1840-1844, 1845-1851.) The victims identified the car Jones was found in as the vehicle used in the robbery and identified a gun found in that car as the gun used in the robbery. (13 RT 2107-2110.)

DEFENSE EVIDENCE

Gerald Monahan, a private investigator employed to work for the defense, went out to the scene of the murders on December 14, 1994, because the sunrise on that day of 6:47 a.m. was close to the sunrise of 6:46 a.m. on December 13, 1993, the day of the murders. He also went out to

the scene on December 12, 1995, when the sunrise was 6:45 a.m. (21 RT 3270-3273.) The area was dark until 6:17 a.m., when the light was such that it was much easier to see. (21 RT 3275-3282.) There were no lights on at many of the houses in the neighborhood. (21 RT 3284-3285.) As for other houses, he did not remember if the lights were on.[3] (21 RT 3287-3290.) Elizabeth Carter, a professor of math and meteorology at Sierra Nevada College, compared the atmospheric conditions that existed near the victims' residence on December 13, 1993, December 14, 1994 and December 12, 1995. On December 13, 1993, there was a new moon, with no illumination. On December 14, 1994 and December 12, 1995 there was a moon. There was cloud cover and fog on December 12, 1995. There were scattered clouds and fog on December 14, 1994. There were scattered clouds on December 13, 1993. (21 RT 3297-3307.)

Mr. Monahan interviewed Dorell Arroyo. Arroyo said he spent most of the evening of December 12th at Dakota Whitney's house but got too warm and went to the camper shell outside Beth Brown's house. Arroyo said when he saw Jones, the porch lights from Beth Brown's residence were illuminating the street. Arroyo said when he first saw Jones, Arroyo

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[3]This evidence was admitted by the defense to support the theory that it was too dark on the morning of the murders for Dorell Arroyo to have made the observations that he claimed he made.

was getting a drink from a faucet outside Beth Brown's residence. Arroyo never said anything about being inside the camper shell when he first saw Jones in his car. (24 RT 3614-3615.)

Monahan spoke to Dr. Stalwell regarding the time of death of the victims. Dr. Stalwell said that decomposition occurs 18 to 24 hours after death and the condition of the bodies at the scene looked like it was closer to 24 than 18 hours. Dr. Stalwell looked at the photographs of the bodies taken at the scene and said he believed that Ms. Florville died 18 to 24 hours prior to the photographs being taken. Dr. Stalwell said Ms. Florville's hand and face showed early signs of decomposition.[4] (24 RT 3639-3642.)

Deputy Coroner Alan Wesefeldt went to the scene of the homicides on December 13, 1993. He noted there was rigor mortis present in Mr. Florville's body. He found the postmortem lividity was set and consistent with the position of the body. He took a vitreous humor sample at 8:20 p.m. He did the same thing with Mrs. Florville's body, noting rigor mortis was present and was breaking down. The bodies were taken from the scene

[4]This evidence and what follows was admitted to support the defense theory that the Florvilles were murdered much earlier than 6 a.m. on December 13, 1993.

at 9:26 p.m. (23 RT 3523-3531.) There was no decomposition or marbling on either of the bodies. (23 RT 3540-3543.)

Dr. Cyril Wecht, a pathologist and Coroner of Allegheny County, reviewed autopsy reports on both victims, investigative reports by the Coroner's office and microscopic tissue slides from both victims. (25 RT 3779.) Dr. Wecht attempted to determine a likely time of death for the victims. The factors he looked at were rigor mortis, livor mortis, food in the stomach, and potassium levels in vitreous humor from the eyeballs. Putting all four factors together and looking at both victims, Dr. Wecht estimated the time of death would be 2:20 a.m. A range of midnight to 4:30 a.m. would be a liberal range for the time of death of the victims. (25 RT 3781, 3790-3792.)

Rickey White worked at Star Crest Industries, the employer of Judy Johnson, on December 13, 1993. That morning White left for work from home at 4:45 a.m. She got to work about 10 or 15 minutes later. She saw Jones in the parking lot. Jones was alone and was coming out of the lot as she was going in. (22 RT 3437-3439.) Ms. White punched in at 5:24 a.m. on December 13, 1993. Generally employees punch in at the time clock in the area where they work. It would take some time for an employee to go from the parking lot through security to get to the area where they work and punch in. (24 RT 3603-3609.)

Impeachment of Jack Purnell.

Brad Williams testified that in April of 1995 he was attacked by Jack Purnell. Williams was standing at the back of the school waiting for his ride when Jack Purnell came up to him and asked him for money. Williams gave Purnell 15 cents because he was afraid of what Purnell would do. Purnell came back a short time later, approached Williams and said, "I know you." Purnell punched Williams, knocking him down, and began kicking Williams as he was down. Purnell stopped kicking Williams when his shoe came off. (22 RT 3428-3433.)

Officer Paul McDavitt interviewed Jack Purnell. Purnell told him that Williams jumped him on a prior occasion, but he could not remember when. Purnell confronted Williams about it. Purnell said Williams begged him not to beat him up and Williams gave him the money. The officer found 15 cents in Purnell's pocket. (23 RT 3496-3499.)

In May 1995, Jack Purnell was identified and detained as a suspect in a shoplifting incident. Purnell admitted taking some shoes. Purnell gave an incorrect name and date of birth. (23 RT 3501-3504, 3507-3510.)

Impeachment of Dorell Arroyo.

On June 4, 1995, Riverside County Sheriff's Deputy John Stahley was called to a rural area of Mead Valley. He approached an abandoned

car in the brush with Dorell Arroyo and Deshaun Evans in the front seat. Arroyo and Evans ducked as they saw the officer. He ordered them out of the car. The steering column of the car had been opened and the ignition switch had been tampered with. (23 RT 3516-3520.)

In May of 1994, Dorell Arroyo took up residence in an uninhabited house. Arroyo told a neighbor he had rented the property and was living there with his mother. One day Arroyo removed mini-blinds and other items from the residence. (23 RT 3559-3563; 24 RT 3594-3599.)

Prosecution rebuttal evidence.

Dr. DiTraglia, who performed the autopsy on James Florville, testified regarding the use of livor mortis, rigor mortis, potassium vitreous and stomach contents to determine the time of death. Livor mortis, the settling of blood in the lowest part of the body after death, is not useful in determining a specific time of death. There has never been a study that has measured the accuracy of livor mortis to determine a time of death. (26 RT 3989-3990.) Rigor mortis is also inaccurate to measure time of death as it appears and disappears at an unpredictable rate, there are many factors which affect the time it takes to develop and there have been no studies to determine its accuracy. (26 RT 3991.) The potassium level in vitreous fluid increases after death. However, the factors that can affect the

potassium level are many and the variability is so great that it is not useful in determining the time of death. (26 RT 3991.) Measuring stomach contents in determining the time of death is also problematic because the rate of stomach emptying varies significantly and in this case they did not know the time Mrs. Florville ate her last meal, which is crucial in this calculation. (26 RT 3991-3992.) In this case there were too many variables to use any of the measures used by Dr. Wecht to estimate an accurate time of death. He characterized Dr. Wecht's estimate of time of death of the victims to be "glorified guesswork." (26 RT 4005-4007.)

THE PENALTY PHASE

The 1992 Delano robbery.

Kyong Hui Yang worked as a cashier at the Delano Fairway Market on July 21, 1992. That day, Jose Plancarte was working in the meat area. Around 8:30 a.m., a Black male, age 29-30 came into the store, pointed a gun at Yang's head and told her to open the cash register.[5] The robber told the customers to lie down on their stomachs and said that if anyone came out after him, he would kill them. The man took the cash from the cash register, Yang's purse, a lighter and a carton of Newport 100's. Another Black man that entered the store with the man that robbed Yang was in the

[5]The parties stipulated that the man that robbed Ms. Yang was not Jones. (30 RT 4626-4627.)

butcher area of the store and asked Plancarte for pig's feet. As Plancarte was getting a plastic bag, the man jumped over the refrigerator case and pointed a gun at him. The man hit him with the gun, took him to the bathroom, locked him into the bathroom and told him if he came out he would kill him. (30 RT 4613-4621, 4625, 4637-4641.) When the men left the store they went in the direction of Garces Highway. (30 RT 4626.)

Maria Gamez was in the Fairway Market that morning to buy groceries and cash her check. As she was waiting in front, the cashier told her to call the police. She saw a Black man in the back of the store pointing a gun at the head of an employee. She saw another man pointing a pistol at Yang and telling the customers to lie down. Ms. Gamez slowly walked toward the door and once outside the store ran to her house and called the police. The police showed her a group of photos and she identified Jones as one of the men who robbed the store.[6] (30 RT 4644-4654.) Gamez identified Jones in court as one of the men that robbed the market. (30 RT 3650.) Detective Massey of the Delano Police Department responded to an armed robbery call at Fairway Market in Delano. The police received a 911

[6]Officer Robert Aguero testified that Gamez picked out Jones's photo as one of the robbers but said she was only fifty percent sure. Officer Aguero was present a month later for a live line-up. Jones's hair looked different he had it rolled up and pushed to the back. Ms. Gamez did not pick him out of the live line-up. (30 RT 4662-4665.)

call from Daryl Lucas. Mr. Lucas said that the robbers of the Fairway Market had run into his apartment at 302 Garces Highway. The police arrived at Mr. Lucas's apartment five minutes later. The police secured the area around the apartment. They could see some movement inside the apartment. Kern County SWAT was called to the scene and eventually entered the apartment. (30 RT 4595-4602.) Jones and another Black male were arrested in the apartment. Inside the apartment they also found Yang's purse and phone, 21 Bic lighters, and a carton of Newport 100 cigarettes. (30 RT 4608-4611, 4656-4662.) Jones told the police his name was John Paul Jones. (30 RT 4636.)

The 1995 jail incident.

Numerous custody staff testified regarding an incident at the Robert Presley Detention Center on September 23, 1995. Jones was being housed with another inmate named Robinson. Around midnight, there was a disturbance in Jones's cell. Officers responded and opened the cell. Jones was removed from the cell and handcuffed. Robinson was found under his bunk. There was a lot of blood on the cell floor. Robinson had blood on the back of his head. Robinson's face was bleeding and he had a contusion on his lip. Robinson's clothing was stained with blood. Robinson was taken to receive medical treatment. Jones had no injuries. (31 RT 4704-4705, 4710-4712, 4716-4718.) Jones was interviewed and said that

Robinson was a young kid and did not know when to keep his mouth shut. Jones said he was an old gangster, Robinson was a young gangster, and Robinson needed to show him more respect. Jones admitted to punching Robinson in the face and the ribs. (31 RT 4718-4720.)

The threat to Debbie Russell.

In December of 1993, Jones asked Debbie Russell to get into his car so they could talk. She was supposed to be dating Jones at the time. Once in the car, Jones yelled at her and called her a bitch because she went to the store with a male friend. Jones told her he could have gotten a gun and shot her right there. Jones said he could kill her or have Alon Johnson get a gun and kill her. Jones told her he could kill her male friend and that she would never see her son again. He told her that if he ever saw her with another man, he would kill her. (31 RT 4723-4725, 4730.)

Prior convictions.

Louis Herbert took fingerprints from Jones. He compared the fingerprints to a fingerprint card under the name of John Paul Jones. The fingerprints matched. He also compared Jones's fingerprints with a certified copy of prison records, a Penal Code section 969, subd. (b) packet. (Exhibit 166.) He concluded that the three fingerprint cards in Exhibit 166 were also Jones. (31 RT 4735-4738.) Jones's convictions included three

robbery convictions in 1985 (Vernon robbery), convictions for sales of marijuana and inducing a minor to sell marijuana in 1985, a conviction for being a felon in possession of a firearm in 1989, and a conviction for possession of a controlled substance in 1990. (16 Supp. CT 4297-4314.)

The victims' family.

James Florville was the Florvilles' son. When his father retired, his parents moved to Oklahoma. They returned to California a few years before the murders. Every weekend he visited his parents. He called his parents three times a week and sometimes would bring his son to do projects on his parents' home. He tried to call them the Monday they were murdered. Later someone called him and said something was wrong. He picked up his daughter and went to their home. A detective told him what happened. After their deaths James had to clean up his parents' home from the fingerprint dust and replace the carpeting. He took their personal effects. (31 RT 4755-4761.)

Karen Anderson was the daughter of the victims, Mr. and Mrs. Florville. Her father James was 82 at the time of his murder. Her mother, Madalynne was 72. They had been married for 52 years. As a kid she went camping with her mother, her father taught her a love for animals and taught her how to ride a horse. Her father worked as a diesel mechanic but when he was laid off he cleaned chicken coops to provide for his family.

Karen was 16 years old and unmarried when she got pregnant and her mother was there for her and taught her everything. She was very close to her mother, who taught her how to fish, to crochet and how to be a mother. She was her father's "little girl" and he supported her always, even when she got pregnant. After Karen's divorce she and her children moved to Oklahoma with her parents. Her parents moved to Mead Valley after her mother got sick, deciding it was too cold in Oklahoma. The grandchildren called her father "Poppo" and she would often visit her parents in Mead Valley. She talked to her parents frequently on the telephone. Her father developed emphysema as he got older. Her mother had heart problems and Lupus, making it hard for her to walk. Her mother had a lot of friends with whom she played bingo. September of 1993 was the last time she saw her parents. She was devastated when she found out about her parents' murder. She flew to California that night. The only thing harder than burying her parents was going through their belongings at their home. Karen now locks all of her doors, day and night. She has nightmares and wakes up shaking from being scared. For a year after the murders she cried constantly. She had to get counseling. Her mother never saw Karen's granddaughter. (30 RT 4682-4690.)

Kendrick Wallace, the Florvilles' grandson, spent a lot of time with both grandparents. They were generous and loving with all their

grandchildren. He visited them in California and Oklahoma. He found out about their death at work when he received a call from his fiancee. He was in shock. The hardest thing about their deaths was when he had to meet his mother at the airport. He thinks about his grandparents every day. It was a huge trauma to the whole family. (31 RT 4739-4743.)

Patricia Valenzuela was raised by her grandmother, Madalynne Florville's mother. Madalynne was like a mother, sister and best friend to her. James Florville was like a brother and father to her. He built Patricia a bicycle and a wagon. Madalynne was a doer, they went to a lot of craft shows together. The Florvilles were there for the births of all four of her children. Patricia lived about 50 miles from the Florvilles but talked to them on the phone every morning. She stayed with them on December 10th, the Friday before the murders. Mr. Florville was very sick. She spoke to Madaynne the Sunday night before the murders. Madalynne did not call her as usual on Monday morning. When the Florvilles could not be reached, she drove to their house but could not get close. She was originally told that both of the Florvilles had heart attacks and died. Subsequently she was told what really happened. Patricia spent 18 months in counseling as a result of the murders and suffers from insomnia, nightmares and other disorders as a result. (31 RT 4744-4748.)

David Florville was the Florvilles' grandson. He lived with them for two years when they were in Oklahoma. They taught him how to ride horses and took him fishing. Once the Florvilles moved back to California, he visited them every weekend. He talked to them the weekend before they were murdered. He has not been back to their home since the murders because he could not bear to go there. (31 RT 4752-4754.)

DEFENSE PENALTY EVIDENCE

Sheriff's Deputies Michael Hanna and Abraham Sears worked in the Robert Presley Detention Center. They both testified they never had any problem with Jones being disrespectful or aggressive toward them or other staff. (32 RT 4784-4785, 4792-4793.)

Connie Jones, Jones's sister, is five years older than Jones. She testified they grew up in Los Angeles. There were nine children in the family. They moved to Oregon in 1976, and moved back to south central Los Angeles in 1977 or 1978. When Jones was in prison they communicated through letters and telephone calls. Jones had a daughter named Ebonisa who was seven years old. (32 RT 4795-4803.)

Anthony Casas, a former prison guard, Associate Warden and parole agent, testified that he reviewed Jones's entire central file from state prison. He testified there was no indication in Jones's prison file that he had been

violent or aggressive to any other inmate while he was housed with the Department of Corrections. (32 RT 4816-4824.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED JONES'S *BATSON/WHEELER*[7] MOTION

Jones claims the prosecutor used three of his peremptory challenges to exclude African-American jurors based solely upon the fact that they belonged to a cognizable racial group. Jones claims the reasons for the challenges given by the prosecutor were inherently discriminatory, were not supported by the record and were pretextual. Jones argues that this Court should give no deference to the trial court's conclusion that the challenges were not racially based because the trial court failed to question the prosecutor regarding the basis for the challenges. Finally, Jones claims that a comparative analysis of the challenged jurors and the seated jurors supports his claim of discrimination by the prosecutor. (AOB 28-80.)

Jones's jury included one African-American juror and one African-American alternate juror. (10 RT 1702, 1710-1714.) Two African-American jurors were excused for hardship and another African-American

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

juror was challenged for cause by the defense.[8] (5 RT 540-541, 545, 650; 10 RT 1661, 1673-1675.) The prosecutor exercised peremptory challenges on two prospective African-American jurors, based upon their demeanor and a number of their answers to questions in the jury questionnaires and during voir dire. (10 RT 1700, 1702.) After the twelve seated jurors were sworn, during the selection of the six alternates, the prosecutor challenged an African-American prospective alternate juror. This particular juror was challenged after the defense had used all of their peremptory challenges on the alternates and as part of five consecutive peremptory challenges by the prosecutor on the alternates. In fact, the prosecutor's primary basis for striking the prospective alternate African-American juror was tactical, because there were several more favorable prospective alternate jurors which the prosecutor could put on the jury as alternates. (10 RT 1729-1731.) The prosecutor's reasons for challenging the three African-American prospective jurors, given after the trial court found that the defense had made a prima facie showing that the challenges were racially motivated, were genuinely race neutral and were based on the record. The

[8] The prospective juror excused for cause, Ms. Syndor, was excused because of her pro-prosecution views on the death penalty despite the prosecutor's efforts to rehabilitate the juror during voir dire. (5RT 631-633, 650-651.) The conduct of the prosecutor as it relates to Ms. Syndor, among other things, demonstrates that the prosecutor was not challenging prospective jurors based upon being identified as African-American.

trial court made a finding that the reasons were race neutral and denied Jones's motion for mistrial, a finding that should be given deference. (10 RT 1731.) Finally, a comparative analysis of the African-American prospective jurors challenged by the prosecution and seated jurors identified by Jones does not support Jones's claim because the jurors were not comparable.

Standard of Review.

The role of the reviewing court considering a trial court's denial of a *Batson/Wheeler* motion is a limited one. This Court reviews the trial court's ruling on the question of purposeful racial discrimination for substantial evidence. (*People v. McDermott* (2002) 28 Cal.4th 946, 971.) It is presumed that the prosecutor uses peremptory challenges in a constitutional manner, and this Court gives deference to the court's "ability to distinguish bona fide reasons from sham excuses." (*People v. Burgener* (2003) 29 Cal.4th 833, 864; *Batson, supra*, 476 U.S. at p. 98, fn. 21.) When the trial court "makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (*People v. Avila* (2006) 38 Cal.4th 491, 541; *People v. Boyette* (2002) 29 Cal.4th 381, 422; *People v. Alvarez* (1996) 14 Cal.4th 155, 196-197.)

As to the final stage of a *Batson/Wheeler* motion, trial judges are in the best position to assess the credibility of prosecutors and evaluate their reasons for exercising peremptory challenges. (See *People v. Jackson,* (1996) 13 Cal.4th. 1164, 1197; *People v. Turner* (1994) 8 Cal.4th 137, 168.)

In a first stage *Batson/Wheeler* claim, however, where the trial court failed to articulate or appears to have applied an incorrect standard in its prima facie case ruling, its decision is not entitled to deference. (*People v. Avila, supra,* 38 Cal.4th at pp. 553-554.) Rather, the issue is subject to independent review. (*People v. Howard* (2008) 42 Cal.4th 1000, 1017; *People v. Bonilla* (2007) 41 Cal.4th 313, 342.)

In such cases, this Court must:

> apply the high court's standard articulated in *Johnson* [citation] and "resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror on the basis of race."

(*People v. Avila, supra*, 38 Cal.4th at p. 554, quoting *People v. Cornwell* (2005) 37 Cal.4th 50, 73 [emphasis in original].) Where the record discloses "reasons other than racial bias for *any* prosecutor to challenge" the juror, no inference of a discriminatory purpose in the exercise of the

peremptory challenge can be drawn. (*People v. Cornwell, supra,* 37 Cal.4th at p. 70 [emphasis in original].)

***Batson/Wheeler* claim.**

"Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on group bias." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1100, citing *Batson, supra*, 476 U.S. at p. 89 and *Wheeler, supra*, 22 Cal.3d at pp. 276-277.) However, peremptory challenges are presumed to have been based upon constitutionally permissible grounds. (*People v. Alvarez, supra*, 14 Cal.4th at p. 193.)

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

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

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

looks and gestures' by a prospective juror that may alienate one side." (*Id.* at p. 171, quoting *People v. Wheeler, supra,* 22 Cal.3d at p. 276.)

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

The complaining party must then "make out a prima facie case by 'showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" (*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129] quoting *Batson v. Kentucky, supra,* 476 U.S. at pp. 93-94.) "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Id.* at p. 170 [rejecting this Court's previous "more likely than not" standard of testing sufficiency of prima facie case].)

If a prima facie case of discrimination is established, the burden shifts to the party exercising the peremptory challenge to show the absence

of discrimination by offering permissible race-neutral reasons for the challenge. (*Johnson v. California, supra,* 545 U.S. at p. 168; *People v. Alvarez, supra,* 14 Cal.4th at p. 197.) "[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." (*People v. Williams* (1997) 16 Cal.4th 635, 664, quoting *Batson, supra,* 476 U.S. at p. 97.) "Rather, adequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias." (*People v. Williams, supra,* 16 Cal.4th at p. 664.)

Finally, the trial court must decide whether the objecting party has proved purposeful racial discrimination. (*Johnson v. California, supra,* 545 U.S. at p. 168.) Where a prima facie case has been established, the trial court must make a "sincere and reasoned" evaluation of the offered explanations in light of the particular case, the court's knowledge of trial techniques, and how the party exercising the challenge questioned jurors and exercised other challenges during voir dire. (*People v. Snow* (1987) 44 Cal.3d 216, 222.)

The believability of the reasons stated by a prosecutor for exercising a peremptory challenge is measured, among other things, by how reasonable or improbable the reasons are and by whether it appears "the proffered rationale has some basis in accepted trial strategy." (*Miller-El v.*

Cockrell (2003) 537 U.S. 322, 339 [123 S. Ct. 1029, 154 L. Ed. 2d 931]; *People v. Lewis* (2008) 43 Cal.4th 415, 469.)

Excluding even a single juror for impermissible reasons under *Batson* and *Wheeler* requires reversal. (*People v. Huggins* (2006) 38 Cal.4th 175, 227, citing *People v. Silva* (2001) 25 Cal.4th 345, 386.) However, "the challenge of one or two jurors, standing alone, can rarely suggest a pattern of impermissible exclusion." (*People v. Howard, supra,* 42 Cal.4th at p. 1018, fn. 10, citing *People v. Bell* (2007) 40 Cal.4th 582, 598.)

The presence of members of the allegedly discriminated against group on the jury is strongly indicative of good faith by the prosecutor in exercising his peremptories. (*People v. Lewis, supra,* 43 Cal.4th at p. 480, quoting *People v. Huggins, supra,* 38 Cal.4th at p. 236; *People v. Lenix* (2008) 44 Cal.4th 602, 630; see also *People v. Avila, supra,* 38 Cal.4th at p. 555 [several African-American jurors remained on the panel]; *People v. Ward* (2005) 36 Cal.4th 186, 203 [5 out of 12 sitting jurors were African-American].)

The United States Supreme Court has noted that a prosecutor's failure to conduct voir dire on a subject the party claims was important might suggest the stated reason is pretextual. (*Miller-El v. Dretke* (2005)

545 U.S. 231, 246, 250, fn. 8 [125 S.Ct. 2317, 162 L.Ed.2d 196].)
However, where the prosecutor has had the opportunity to listen to the prospective juror's answers to questions by the trial court and defense counsel, "the prosecutor's failure to question her on voir dire does not undermine the trial court's conclusion that the prosecutor's stated reasons for striking her were not pretextual." (*People v. Lewis*, 43 Cal.4th at p. 476.)

A defendant has the burden to show that a peremptory strike was motivated in substantial part by discriminatory intent. The burden then shifts to the prosecution to show at the least that this factor was not determinative. (*Snyder v. Louisiana* (2008) ___ U.S. ___, [128 S.Ct. 1203, 1212, 170 L.Ed.2d 175].)

The proceedings below.

During the extensive voir dire by both the trial court and counsel, three African-American jurors were excused for cause. The parties stipulated to excuse prospective juror Benny Jordan after he explained that his employer would pay him for only 10 days of jury service. (15 Supp. CT 4046; 5 RT 540-541, 545.) After voir dire, immediately prior to the parties' peremptory challenges, Sharon Beeks, another prospective African-American juror, was also excused for hardship. She indicated to the court that her husband was unemployed, they had four children and her employer

would only pay her for only 10 days of jury service. (10 RT 1661, 1673-1675; 7 Supp. CT 1831.) A third African-American prospective juror was excused for cause by the court. Prospective juror Mary Sydnor was extensively questioned during voir dire by the parties and was questioned in detail by defense counsel regarding her strong belief that a person who takes another's life should receive the death penalty. (5 RT 575-576, 578, 583, 585, 593, 607-610.) Ms. Sydnor indicated she was strongly in favor of the death penalty and did not believe she would consider life without parole for a person convicted of murdering two persons. (5 RT 609; 11 Supp. CT 2990, 2995.) The prosecutor attempted to "rehabilitate" Ms. Sydnor during his questioning, and elicited from her that she would consider both punishments, would determine the appropriate punishment under the circumstances and could vote for a life sentence. (5 RT 631-633.) However, when questioned by the court, Ms. Sydnor explained that if she determined that Jones committed the crimes charged, it would overwhelm any potentially mitigating evidence that could be presented during the penalty phase. (5 RT 641-644.) The court granted the defense challenge of Ms. Sydnor for cause. (5 RT 650.)

During the peremptory challenges, the first African-American prospective juror seated in the jury box was Gary Gaither. He was challenged by the prosecutor. (10 RT 1700.) After several more

peremptory challenges, an African-American juror, Samuel Sullivan (juror No. 5) was seated. Mr. Sullivan served as a juror in this case. (10 RT 1702; 1 Supp. CT 88-91.) After one more peremptory challenge by each side, African-American prospective juror Norman Culpepper was seated in the jury box. The prosecutor used a peremptory challenge to excuse Mr. Culpepper.[9] (10 RT 1702.) Immediately after Mr. Culpepper was excused by the prosecutor, the defense asked the trial court to make a note for the record and asked to discuss the issue later. (10 RT 1702.)

After the jury was impaneled, but before the alternates were selected, the defense moved for a mistrial.

"MR. BENDER [defense counsel]: Your Honor, we're going to move for a mistrial. That's in the *Wheeler* line of cases. Mr. Bentley kicked two of the three – the first two black jurors that were called, Mr. Gaither and Mr. Culpepper. I carefully reviewed the voir dire questions that were asked of each of those jurors, and I saw nothing in there that would indicate there was any rational reason for excusing, other than race. And I don't think that's too rational.

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[9] Prior to the prosecutor using a peremptory challenge to excuse Mr. Culpepper, the defense had used 17 peremptory challenges and the prosecutor had used 11 peremptory challenges. (10 RT 1702-1703.)

THE COURT: Is there – are there any blacks up there now?

MR. BENTLEY [the prosecutor]: Yes.

MR. BENDER: (Juror No. 5) is black.

MR. PORTER [defense counsel]: The reason – I didn't want to draw attention to it, but I think I mentioned to the Court we wanted to note that.

THE COURT: Yes. I did take note of that. Well, inasmuch as there were three that were brought up and two have been excused, I would like to hear from the People.

MR. BENTLEY: I'm not prepared at this time. My first suggestion would be that – the People all along have tried to keep sound, good solid citizens that were minorities that were on this panel. Ms. Sydnor, which I was hesitant to go along for cause, was an elderly black female; the defense was anxious for her to leave for cause. There was I think Mr. Owens, who was a black male, that the people were trying to keep, and the defense wanted to stip. to Mr. Owens. There were several that the People felt were pro prosecution jurors before this time. There is one remaining black on the jury panel at this time. It was my opinion that that does not arise for cause. I do have some – nonetheless do have some notes. I just don't have my notes on me.

THE COURT: Where are they?

MR. BENTLEY: I think they're at the desk.

THE COURT: Or do you want to take that up after?

MR. BENTLEY: I'd like to take it up after.

THE COURT: We'll take up the alternates and take up the *Wheeler* motion afterwards."

(10 RT 1707-1708.)

Six prospective alternate jurors were called up prior to the parties exercising their peremptory challenges on the alternates. An African-American, James Powell, was initially seated as alternate juror No. 2 and was not challenged by either the defense or prosecutor. (1 Supp. CT 228, 231; 10 RT 1710-1714.) After the prosecutor exercised his first peremptory challenge, the defense used all six of their peremptory challenges for the alternate jurors while the prosecutor passed. (10 RT 1710-1713.) Once the defense had used all of their peremptory challenges for the alternate jurors, the prosecutor exercised five straight peremptory challenges, including a challenge to an African-American prospective alternate juror, Deborah Ladd. At that time jury selection was complete. (15 Supp. CT 4183, 4186; 10 RT 1713-1714.)

After the alternates were selected, the trial court heard the motion for mistrial. The defense indicated they were objecting to the prosecutor's use of peremptory challenges to excuse three African-American jurors, Ms. Ladd, Mr. Culpepper and Mr. Gaither under *Batson* and *Wheeler*. (10 RT 1723-1724.) The defense argued that there was a prima facie case of systematic exclusion because there was nothing in the responses of the challenged African-American jurors to indicate they would be biased against the prosecution. Defense counsel noted that the challenged African-American jurors were substantially younger than the two African-American jurors who were seated. (10 RT 1725.) The prosecutor claimed that no prima facie case of purposeful discrimination had been shown as there were several African-American jurors on the panel that he had rated as pro-prosecution jurors, including Ms. Syndor, whom the defense challenged for cause. The prosecutor noted that the seated African-American juror and alternate juror were rated by the prosecutor as very favorable for the prosecution. (10 RT 1725-1726.)

The prosecutor then addressed the challenged African-American jurors individually. As to Mr. Culpepper, the prosecutor referred to his questionnaire where Mr. Culpepper indicated he had a son Ricardo who had been falsely accused of murder or attempted murder. The prosecutor also indicated Mr. Culpepper's responses and body language, when defense

counsel discussed false accusations, were very troubling. In addition, Mr. Culpepper had a lengthy pause – a count of 25 – after being asked by the defense whether he would help Jones because they were both African-American. The prosecutor indicated that the fact that Mr. Culpepper's son had been accused of a crime, in conjunction with other responses, indicated to the prosecutor that Mr. Culpepper would not be a good juror on this case. (10 RT 1726-1727.)

Regarding Mr. Gaither, the prosecutor had a small concern that he had adult unemployed children but acknowledged that Mr. Gaither was favorable in some respects. However, the prosecutor believed Mr. Gaither's experience as a bus supervisor in the area where the crime took place, where a significant issue in the trial would be the route taken by Jones and the time it took to drive the route, concerned the prosecutor. Finally, Mr. Gaither's answers to the defense voir dire regarding scapegoats troubled the prosecutor, and caused concern that Mr. Gaither might buy into a defense theory that Jones was a scapegoat. (10 RT 1728-1729.)

Finally, the prosecutor indicated that the challenge of Ms. Ladd was a close call but he exercised the challenge because there were stronger prosecution jurors behind her that the prosecutor preferred to have on the jury. The prosecutor was also concerned because Ms. Ladd left blank in her questionnaire a response to a question about whether anyone in her

family had been accused of a crime. An additional factor was that she belonged to the AME church, which the prosecutor assumed was in Los Angeles, a church that was portrayed on television as involved in controversy. It also appeared to the prosecutor that Ms. Ladd might be buying into the defense's "falsely accused" theory and also that she might look down on the prosecution witnesses, a bunch of "rough Black kids." The prosecutor emphasized that when Ms. Ladd was seated as an alternate, the defense had used all of their challenges for alternates and that three of the prosecution's favorite jurors were coming up behind Ms. Ladd, specifically alternate jurors Nos. 5 and 6. (10 RT 1729-1731.)

After defense counsel chose not to respond to the prosecutor's reasons for challenging the jurors, the court ruled: "Okay. Well, I think I did imply, although I don't think I said it specifically, that I - and I'll say it now – that I do think there was a prima facie showing sufficient to want [sic] me to receive input from the prosecutor's standpoint. However, now having heard from the prosecution, it appears that the reasons that these persons were excluded from the jury was for nonracial purposes and racially neutral purposes. Therefore, the Court feels that the motion pursuant to *Wheeler*, and its progeny, should be denied." (10 RT 1731.)

The trial court's determination that the challenges of the three African-American prospective jurors were race neutral is entitled to deference.

Jones argues that the trial court's finding that the prosecutor had provided race-neutral reasons for his exercise of peremptory challenges as to the three African-American prospective jurors, is not entitled to deference because the trial court failed to challenge the prosecutor's reasons "in spite of overwhelming evidence of the prosecutor's discriminatory intent." (AOB 76-77.)

As this Court has explained:

> Although we generally 'accord great deference to the trial court's ruling that a particular reason is genuine,' we do so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. [citations] When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient.

(*People v. Silva*, *supra*, 25 Cal.4th at p. 386; *People v. McDermott, supra*, at p. 980, quoting *Silva*, at p. 186 ["When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings."].)

Even where the trial court denies a *Wheeler* motion without comment or discussion, where the prosecutor's stated reasons are neither

inherently implausible nor unsupported by the record, the finding of the trial court is entitled to deference.

> The trial court denied the motions only after observing the relevant voir dire and listening to the prosecutor's reasons supporting each strike and to any defense argument supporting the motions. Nothing in the record suggests that the trial court either was unaware of its duty to evaluate the credibility of the prosecutor's reasons or that it failed to fulfill that duty. [citations] Moreover, the trial court was not required to question the prosecutor or explain its findings on the record because . . . the prosecutor's reasons were neither inherently implausible nor unsupported by the record.

(*People v. Lewis*, 43 Cal.4th at p. 471; *People v. Silva*, 25 Cal.4th at p. 386; *People v. Cummings* (1993) 4 Cal.4th 1233, 1283 ["It was not necessary for the court to make additional inquiry. There is no basis in the record for the assertion that the court failed to scrutinize the prosecutor's reasons to determine if they were pretextual."].)

The trial court's finding that the prosecutor's peremptory challenges of the three African-American prospective jurors were race-neutral is entitled to deference. The prosecutor gave specific and detailed reasons to justify his challenges of the African-American prospective jurors which required no additional questioning by the trial court. There is no basis in the record to support an assertion that the race-neutral reasons given by the prosecutor as the basis for his peremptory challenges were inherently implausible or unsupported by the record. (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1283.) As will be demonstrated, the prosecutor's reasons for

exercising the three peremptory challenges were credible and based upon the record. This is especially true in light of the fact that the prosecutor never challenged two African-American jurors, one who sat on the jury and another who sat as an alternate.

In any event, even where the trial court's findings are not given deference, this Court must review the record to "resolve the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race." (*People v. Avila*, *supra*, 38 Cal.4th at p. 554, quoting *People v. Cornwell*, *supra*, 37 Cal.4th at p. 73; see also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1101; *People v. Lancaster*, *supra*, 41 Cal.4th at p. 75.)

A review of the record in this case demonstrates that the prosecutor had a number of legitimate reasons unrelated to the prospective jurors' race to challenge Mr. Culpepper, Mr. Gaither and Ms. Ladd. In light of the fact that two African-American jurors sat on the jury, one of those as an alternate, that the prosecutor identified several legitimate reasons for challenging the jurors which have support in the record, and that the trial court accepted the prosecutor's reasons as legitimate, this Court should uphold the denial of Jones's *Batson/Wheeler* motion.

Comparative Analysis.

Jones has requested this Court do a comparative analysis between the reasons given by the prosecutor for challenging the prospective African-American jurors and the jurors that sat on the jury, whom the prosecutor failed to challenge. (AOB 36-37.) Jones asks for a comparative analysis for the first time on appeal.

This Court recently held that

> "evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons."

(*People v. Cruz* (2008) 44 Cal.4th 636, 658, quoting *People v. Lenix, supra*, 44 Cal.4th at p. 622.) "[R]eviewing courts must consider all evidence bearing on the trial court's factual finding regarding discriminatory intent." (*Ibid.*, quoting *People v. Lenix, supra,* 44 Cal.4th at p. 607.)

Although comparative analysis is one form of relevant circumstantial evidence, it is "not necessarily dispositive [] on the issue of intentional discrimination." (*People v. Cruz, supra*, 44 Cal.4th at p. 658 quoting *People v. Lenix, supra,* 44 Cal.4th at p. 622.) The reviewing court must still be mindful of the inherent limitations of conducting comparative juror analysis "on a cold appellate record." (*People v. Lenix, supra,* 44 Cal.4th at p. 622, citing *Snyder v. Louisiana* , *supra*, at p. 1211.)

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

(*People v. Cruz, supra,* 44 Cal.4th at pp. 658-659, quoting *People v. Lenix, supra,* 44 Cal.4th at p. 623.)

In *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed. 2d 196], the United States Supreme Court conducted a comparative juror analysis to examine the credibility of the prosecutor's stated reasons for challenging minority prospective jurors. The Court reasoned that where the prosecutor's reason for challenging a juror belonging to a cognizable group also applies to an "otherwise-similar" non-minority juror who was permitted to sit as a juror, it is relevant to prove purposeful discrimination at the third step of a *Batson* analysis. (*Id.* at p. 241; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1109.)

"We recognize that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." (*Snyder v. Louisiana*, *supra*, 128 S. Ct. at p. 1211.)

Even where the defendant can point to several similarities between the stricken jurors and jurors who were allowed to serve on the jury, where the record reflects a factual basis for the reason given by the prosecutor and there are jurors belonging to the stricken juror's group on the jury, the court will reject the *Batson/Wheeler* claim. (*People v. Huggins*, *supra*, 38 Cal.4th at pp. 234-236.)

As will be seen below, the limited comparative analysis requested by Jones does not support his claim that the prosecutor's reasons for challenging Mr. Gaither, Mr. Culpepper and Ms. Ladd were pretextual. Even ignoring the weaknesses of conducting a comparative analysis for the first time on appeal and using a cold record in performing such an analysis, the comparisons urged by Jones show that jurors he claims were comparable had significant distinctions and that the record supports the prosecutor's rac- neutral reasons for challenging the jurors.

Prospective juror Gary Gaither.

In his questionnaire Mr. Gaither indicated he was a 47-year-old African-American who had been married for 19 years and had three grown children, two of whom were unemployed. (8 Supp. CT 2110, 2113.) From 1982 he had been a transit service supervisor, a job in which he supervised bus drivers. He also stated that he was familiar with Mead Valley because the transit service operated through some of Mead Valley and that he would not be able to avoid the area during the trial. (8 Supp. CT 2114, 2120.) He identified himself as moderately in favor of the death penalty. (8 Supp. CT 2122.)

During the voir dire by the defense of a group of jurors including Mr. Gaither, the defense extensively discussed the concept of a "scapegoat," blaming a person for what another had done. (8 RT 1339-1341.) The prosecutor specifically addressed that issue in voir dire, and asked Mr. Gaither about the concept.

"MR. BENTLEY: Everybody in the front row? Okay. Defense counsel threw the word out, "scapegoat." I am not sure where that is going. I don't know what kind of evidence. [sic] But the question in my mind is, since you heard it – and I can't count them – maybe 100 times or 50 times, or something. Does anybody believe there is going to be evidence of a scapegoat in this case? Mr. Gaither? You are giving me a blank look, sir.

PROSPECTIVE JUROR GARY GAITHER: No.

MR. BENTLEY: Is that an I-don't-know 'No'or is it a No, 'No'?

PROSPECTIVE JUROR GARY GAITHER: I don't know 'No'.

MR. BENTLEY: Okay. I will come back to you."

MR. BENTLEY: Just like at this moment there is no evidence that two elderly people have been killed, until I call a witness to prove it. Would you agree with that Mr. Gaither?

A: Yes.

Q: If there is sufficient evidence, and the defense puts it on, so be it. If there's not, there's not. Can you live with that?

A: Yes.

Q: Mr. Gaither, you are not going to be sitting there saying, 'They mentioned it so many times, there's got to be something there'? You wouldn't do that, would you?

A: No.

Q: You'd sit there and listen to what the witnesses have to say?

A: The evidence, yes."

(8 RT 1370-1372.)[10]

It appears that the prosecutor's most significant concern with Mr. Gaither was his reaction to the defense voir dire questions regarding a "scapegoat" and the prosecutor's concern that Mr. Gaither might "buy into" that defense theory. Jones claims that this reason was pretextual because the prosecutor mischaracterized Mr. Gaither's responses when the prosecutor told the court, "Finally, when defense counsel talked about scapegoats, and I asked Mr. Gaither about a scapegoat, at first it appeared to me his response was, 'Yes, this case could be about a scapegoat,' even though there had been no evidence at all. That led me to think this particular juror was buying into something that the defense was trying to get across with their voir dire questions. So at that point it was when I finally made up my mind that he wouldn't be an acceptable juror either." (10 RT 1728-1729.) Jones claims the record of Mr. Gaither's answers to the prosecutor regarding "scapegoats" shows no support for the prosecutor's claim that Mr. Gaither was buying into the defense theory. (AOB 60-63.) However, the prosecutor never said that Mr. Gaither explicitly stated he was buying into the "scapegoat" theory, rather the

[10] The questioning of Mr. Gaither in voir dire took place on March 6, 1996. The hearing on the *Wheeler* motion took place on March 12, 1996. (10 RT 1723-1731.)

prosecutor claimed he was concerned because it appeared to the prosecutor that Mr. Gaither's response – reaction - to the questioning indicated he might be buying into the "scapegoat" theory. Mr. Gaither was never asked by the defense about the "scapegoat" theory. (8 RT 1339-1341.) And while Mr. Gaither never stated he was buying into the defense theory when questioned by the prosecutor, it appeared to the prosecutor based upon Mr. Gaither's demeanor and answers that he was at least considering the "scapegoat" theory. More importantly, it is clear from the record that the prosecutor had some concerns regarding the "scapegoat" issue and Mr. Gaither because he specifically asked Mr. Gaither about the issue, commented that Mr. Gaither was giving him a "blank look" and then came back to Mr. Gaither regarding "scapegoats." This appears to be significant evidence in the record that the prosecutor had real concerns about Mr. Gaither in this regard, unrelated to Mr. Gaither's race.

The other of the prosecutor's primary concerns with Mr. Gaither as a juror was his knowledge, because of his job with the bus company, of the area where Jones drove from his girlfriend's work to the area where the crimes were committed. The prosecutor was aware that the area and the time it took for Jones to drive the route would be significant issues in the trial. Mr. Gaither indicated in his questionnaire that he was familiar with the area and that he would not be able to avoid the area during the trial

because "transit operates thru some of the Meade Valley." (8 Supp. CT 2114, 2120.) Jones acknowledges that a juror's familiarity with the location of the crime would appear to be a legitimate basis for challenging a prospective juror, but claims in this case it was pretextual because two Caucasian sitting jurors, Ms. Fawcett and Ms. Smith, also were bus drivers in the area of the crime. (AOB 59-60.) However, although Ms. Smith did indicate she was a school bus driver and was familiar with the Meade Valley area, she did indicate she could avoid the area during the trial. (10 Supp. CT 2562, 2568.) Ms. Fawcett indicated in her questionnaire that she was a school bus driver and was familiar with the Meade Valley area, and claimed she could not avoid the area during trial because she lived on the "east end of Meade Valley." (1 Supp. CT 175-176, 182.) More importantly, both Ms. Smith and Ms. Fawcett rated themselves in their questionnaire as strongly in favor of the death penalty and made other similar statements in their questionnaires. (10 Supp. CT 2570, 2572-2573; 1 Supp. CT 184, 186-187.) Ms. Smith made it very clear during questioning by defense counsel that she had strong feelings in favor of the death penalty. (5 RT 604-607.) Mr. Gaither in his questionnaire rated himself as only moderately in favor of the death penalty. (8 Supp. CT 2122.) Therefore, despite the fact that Mr. Gaither had bus driving in common with two seated jurors, the jurors' views on the death penalty were

clearly dissimilar. These dissimilarities support a finding that the challenge of Mr. Gaither was race-neutral. (*People v. Huggins*, *supra*.)

Lastly, the fact that the prosecutor mentioned concerns about two of Mr. Gaither's three grown children being unemployed (as Jones was at the time of the murders), but did not conduct follow-up questions with Mr. Gaither on the subject, does not show pretext on the part of the prosecutor. That two of Mr. Gaither's grown children were unemployed was not the principal basis for the challenge of Mr. Gaither, nor is it remarkable that the prosecutor would not request an explanation from Mr. Gaither as to why two of his grown children were unemployed.

Prospective juror Norman Culpepper.

Mr. Culpepper indicated in his questionnaire that he was 54-years-old, had four grown children, had lived in the Riverside area all his life, and had spent 20 years in the military. His second grown son, Ricardo, had been accused of committing a crime. Mr. Culpepper had no prior jury experience. (15 Supp. CT 4130, 4133, 4135-4136.) Mr. Culpepper rated himself as moderately in favor of the death penalty. (15 Supp. CT. 4139.) Mr. Culpepper stated that the death penalty serves no purpose because people commit the crimes anyway. (15 Supp. CT. 4141.) He "disagreed somewhat" that anyone who killed should be sentenced to death ("you have

to know all the facts, it could be the other person push [sic] you into it") and "agreed somewhat" that someone who kills should never be sentenced to death. (15 Supp. CT. 4144.)

During voir dire by defense counsel, the following exchange took place:

"BY MR. PORTER:

Q-Mr. Culpepper, let me talk to you a little bit because you're black, also. And sometimes – sometimes people might feel that you might relate because you're black and Albert Jones is black. Do you think that you would have a tendency of trying to protect Albert Jones on a case like this because you're black?

A- Yeah. In a way, yes.

Q- Okay. Tell me why.

A- Because I feel like they are downgrading the race.

Q- Say that again.

A- They are being racist.

Q- Who is being racist now?

A- Whoever is talking about the way he looks, his hair style.

Q- But let me ask you this question. Let's go away from that for a second. Let's look at the fact that Albert Jones is black. Let's forget his hair, forget his goatee. Let's forget all that. Do you feel that because he's black and you're black that you would have a tendency of trying to protect him in a sense that you would obstruct justice in a sense that you wouldn't look at the facts and be fair?

A- Oh, no.

Q Okay, do you understand what I am saying? Tell me what you think I am saying?

A- Well, you're saying just because he's black and I'm black, would I try to protect him.

Q- Okay. Would you?

A- No.

Q- Let's talk about the other side of that. Because you're black and he's black and he's being accused of this charge – you know, you're talking about two murders here. You're talking about a home that was burglarized, as well as folks being robbed. Do you think that he's an embarrassment to you to the point that you say he's guilty?

A- No.

Q- No. What am I saying to you now?

A- Because he's -- you're saying like he's a black man, I'm a black man, would you -- he did this crime and how would I feel about other people thinking about him?

Q- Right.

A- No.

Q- Okay. So what it comes down to is just like I've asked everybody else, can you be fair - - -

A- Yes.

Q- – based on your definition, meaning people being equal?

A- Mm-hmm.

Q- Okay Yes. "

(6 RT 827-829.)

Later, during the prosecutor's questioning, the following took place:

"Q- Now, Mr. Culpepper, Mr. Porter kind of put you on the spot, and so I'm going to put you on the spot a little bit. I am coming over here

because the wall is kind of hiding us. He was asking you a question, basically talking about his client and how do you look at him. And at first it sounded like, to me, that you were saying you were going to give him some extra benefit, protect his race, or do something extra. I know when Mr. Porter asked you the question, you hesitated for an extra long time. He gave you some follow-up questions. It seemed like you reversed yourself. Could you explain your feelings to me?

A – That's what you are dealing with, the Afro –

Q – Yes. Yes sir.

A – I know some people look at the Afros as being militants; right? And stuff like that. I was saying I don't look at him as a militant.

Q – And what about this long hesitation?

A – I was just trying to get it right.

Q – Okay. So let me ask you this, then; You feel you can be fair to the People in this case?

A – Yes.

Q – Okay. And that hesitation was no reflection that you couldn't be fair to the People in this case?

A – No."

(6 RT 872-873.)[11]

The prosecutor's main reasons for exercising a challenge on Mr. Culpepper was because he had a son accused of a crime and because of the way Mr. Culpepper responded to the defense questions regarding whether he would want to help Jones because both of them were African-American. Jones claims because the prosecutor told the court he thought Mr. Culpepper said his son was falsely accused of committing either murder or attempted murder, rather than accused of committing a crime, this demonstrates the pretextual nature of the reason because it was unsupported by the record. (AOB 68-71.) Again, the fact that the prosecutor was incorrect on the details of what Mr. Culpepper said, even though he clearly remembered that Mr. Culpepper's questionnaire stated his son Ricardo was accused of committing a crime, does not demonstrate the prosecutor's reason was not legitimate.

An isolated mistake or misstatement by the prosecutor will generally be deemed insufficient to demonstrate discriminatory intent, as distinguished from circumstances where the record provides no factual

[11] The questioning of Mr. Culpepper during voir dire took place on March 4, 1996. (6 RT 772, 808.)

support whatsoever for the prosecutor's stated non-discriminatory reasons for challenging a prospective juror and the trial court has failed to conduct an adequate inquiry. (*People v. Silva*, *supra*, 25 Cal.4th at p. 385.)

A prospective juror's experience with a close relative's involvement in the criminal justice system, even where the juror believes the experience would not impact his or her responsibilities as a juror, is a legitimate ground to base a prosecutor's exercise of a peremptory challenge and does not support an inference that the challenge is racially motivated. (*People v. Farnam* (2002) 28 Cal.4th 107, 138; *People v. Avila*, *supra*, 38 Cal.4th at p. 555.)

In *Farnham*, a prospective juror stated that a few times during the previous year he had visited a nephew who was incarcerated in Chino. The juror stated the experience would not affect his ability as a juror. The court held that the prosecutor could "reasonably surmise" that the prospective juror's nephew's contact with the criminal justice system "might make a prospective juror unsympathetic to the prosecution." (*People v. Farnam*, 28 Cal.4th at p. 138; see also *People v. Williams*, *supra*, 16 Cal.4th at p. 666 [trial court found legitimate race-neutral explanation for challenged juror who had three sons with criminal records]; *People v. Arias* (1996) 13 Cal.4th 92, 138 [the prosecutor could reasonably deduce that prospective

juror whose daughter was being criminally prosecuted might be an undesirable juror for the prosecution].)

Jones urges that his position is supported by *People v. Silva*, *supra*, 25 Cal.4th 345. (AOB 68-69.) Not so. In *Silva*, as a reason for challenging prospective juror Jose M. (stated by the prosecutor during an erroneously held ex parte hearing), the prosecutor claimed he challenged the prospective juror because the juror said "he would look for other options" to imposing the death penalty and because the juror appeared to be "an extremely aggressive person" who might impact the cohesiveness of the jury. (*Id.* at 376.) The trial court erroneously conducted no inquiry regarding the factual basis for the prosecutor's stated reasons. (*Id.* at 385.) This Court held that there was no factual basis in the record to support either of the prosecutor's stated reasons "as disclosed by the transcripts of M.'s voir dire responses." (*Ibid.*) This Court concluded that the defendant's equal protection rights were violated as he was denied the right to a fair penalty trial. (*Id.* at 386.)

In contrast, in the present case the most significant facts supporting the challenge by the prosecutor, that Mr. Culpepper stated that his son Ricardo was accused of committing a crime, was accurately reflected in his jury questionnaire. (15 Supp. CT 4135.) It was the fact that he was accused of committing a crime rather than the nature of the crime, not

stated by Mr. Culpepper but misrecollected by the prosecutor as murder or attempted murder, that was the basis for the challenge by the prosecutor. This was not a case where there was no factual basis in the record to support the prosecutor's reasons for challenging the prospective juror.

Finally, Jones suggests that a comparison of Mr. Culpepper with juror Huey supports his claim that the prosecutor's reason related to Mr. Culpepper's son was pretextual because juror Huey also stated in her questionnaire that her brother had been accused of committing a crime but she was not challenged by the prosecutor. (AOB 70.) Juror Huey indicated in her questionnaire that in 1978 her brother was accused of assault and battery in Japan regarding an incident when he was on heroin.[12] (1 Supp. CT 152.) And while Ms. Huey rated herself as moderately in favor of the death penalty, the same as Mr. Culpepper, the information she provided had significant differences. Ms. Huey stated, "I believe heinous crimes deserve the death penalty." (1 Supp. CT 156.) While in response to the same question, Mr. Culpepper said, "It depends on the case and what happened during the crime." (15 Supp. CT 4139.) Ms. Huey checked "agree somewhat" in response to a statement "Anyone who kills another person

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[12] Jones claims, citing Ms. Huey's questionnaire, that her brother was convicted of the offense and that the victim of the assault died a week later. (AOB 70.) Respondent has not found this additional information in Ms. Huey's responses to the questionnaire. (1 Supp. CT 152.)

should **always** get the death penalty." She "strongly disagree[d]" with the statement "Anyone who kills another person should **never** get the death penalty." (1 Supp. CT 161.) On the other hand, Mr. Culpepper stated that the death penalty serves no purpose because people commit the crimes anyway. (15 Supp. CT. 4141.) He "disagreed somewhat" that anyone who killed should **always** be sentenced to death ("you have to know all the facts, it could be the other person push [sic] you into it.") and "agreed somewhat" that someone who kills should **never** be sentenced to death. (15 Supp. CT. 4144.) In addition, Ms. Huey seemed to be skeptical of paid expert witnesses. She stated, "I have a problem with someone being paid -- money buys a lot." (1 Supp. CT 164.)

This type of comparison of jurors is difficult on a cold record and does not seem to be particularly helpful in determining whether the prosecutor's challenge of Mr. Culpepper was racially based. However, this comparison shows that apparently there were significant distinctions between how Mr. Culpepper and Ms. Huey looked at the death penalty. It is reasonable that a prosecutor would look at the two prospective jurors and distinguish between them, not because of different races, but because of their different views of the death penalty.

Next, the prosecutor was also concerned with Mr. Culpepper's responses to defense counsel's questions regarding whether he would want

to help Jones because they were both African-American. During the prosecutor's voir dire, the prosecutor made a point of confronting Mr. Culpepper with his responses to those questions. The prosecutor said,

> "[Defense counsel] was asking you a question, basically talking about his client and how do you look at him. And at first it sounded like, to me, that you were saying you were going to give him some extra benefit, protect his race, or do something extra. I know when Mr. Porter asked you the question, you hesitated for an extra long time. He gave you some follow-up questions. It seemed like you reversed yourself. Could you explain your feelings to me?"

(6 RT 872.)

The prosecutor's interpretation of Mr. Culpepper's initial answers to defense counsel was reasonable. When asked by defense counsel whether he might have a tendency to protect Jones because they are both African-American, Mr. Culpepper initially said "Yeah. In a way, yes."[13] (6 RT 827.) After additional questioning by defense counsel, it appeared that Mr.

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[13] Compare Mr. Culpepper's response with the responses from other African-American prospective jurors who were asked a similar question. When Mr. Gaither was asked almost the identical question, he said, "Sir, the issues are the same, whether it's black or white. It doesn't matter." (8 RT 1325-1326.) Ms. Ladd's response, made directly after Mr. Culpepper responded, was "Racial identity has no bearing." (8 RT 1326.) Ms. Sydnor, when asked whether she would have some alliance with Jones because they were both African-American, simply said, "No, I don't." (5 RT 576.) Juror Samuel Sullivan responded "no" when asked whether he might protect Jones because they both were African-American. Juror Sullivan went on to say, "Well, I have being in the military, I've had people under me that were the same race. Didn't show them any favors." (8 RT 951.)

Culpepper may have initially misunderstood what he was being asked. (6 RT 827-828.) In response to the prosecutor's questions, Mr. Culpepper corrected his previous answers, "I was saying I don't look at Afros as being militants." (6 RT 872.) However, regardless of what Mr. Culpepper meant to say, there was clearly support in the record for the prosecutor's race-neutral concern that Mr. Culpepper might not be an ideal juror in this case. Because there was support in terms of Mr. Culpepper's statements on the record, the trial court properly concluded that the prosecutor stated race-neutral reasons for challenging Mr. Culpepper.

Prospective alternate juror Deborah Ladd.

Ms. Ladd in her questionnaire indicated that she was 40 years old, was African- American, was married, had lived in and around the Los Angeles area, had been a senior insurance rate analyst since 1989 and belonged to the African Methodist Episcopal (AME) church. (15 Supp. CT 4186-4189.) Ms. Ladd indicated she was moderately in favor of the death penalty. (15 Supp. CT 4195.) As to question No. 20, that asked whether she, a friend or relative had been accused of a crime, she gave no response. (15 Supp. CT 4191.) Although Ms. Ladd responded with "N/A" to a number of questions, question No. 20 was the only question in the questionnaire that was unanswered. (15 Supp. RT 4183-4208.)

In her response to questioning in voir dire, during questioning by both counsel for Jones and the prosecutor, Ms. Ladd made no statements of note. (8 RT 1319-1320, 1326-1327, 1331, 1336, 1341, 1343, 1354, 1362.)

The prosecutor's reasons for exercising a challenge to Ms. Ladd included that there were stronger prosecution alternate jurors behind Ms. Ladd and the defense had used all of their peremptory challenges, that she had left a question blank on the jury questionnaire, that she belonged to what the prosecutor believed was a controversial church, and that she might look down upon the prosecution's witnesses, "rough Black kids." (10 RT 1729-1730.)

The tactical challenge to place stronger prosecution jurors on the jury was race neutral.

Prospective Alternate Juror Ladd was called into the group of six prospective alternate jurors after the defense had used all of their six peremptory challenges for the group of alternate jurors and the prosecution had used only one of its six peremptory challenges. (10 RT 1709-1713.) At that time Mr. Sullivan, an African-American juror, was seated on the jury and another African-American juror, Mr. James Powell, Alternate Juror No. 2, was seated as a member of the alternates. Mr. Powell was not challenged by the prosecution. (10 RT 1710-1714.) However, the

prosecutor took this as an opportunity to select the alternate jurors he preferred, aware the defense was out of challenges.

> '[T]he critical question in determining whether [a party] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike.' (*Miller-El v. Cockrel, supra,at p.* 338-339.) The credibility of a prosecutor's stated reasons for exercising a peremptory challenge 'can be measured by, among other factors . . . how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' (*Id.* at p. 339.)"

(*People v. Lewis*, *supra*, at p. 469 [emphasis added].)

It can hardly be doubted that exercising a challenge to a juror, even a moderately strong juror, would be a reasonable trial strategy where the challenge allowed the advocate to place stronger jurors on the jury, or in this case, an alternate juror.

The alternate jurors who served on the jury were strong prosecution jurors. A review of the information in the record regarding the alternate jurors who sat on the jury reveals the prosecutor's strategy was race-neutral. Ms. Lichtenberger, Alternate Juror No. 1, who eventually became Juror No. 2, was a strong prosecution juror. According to her jury questionnaire, Ms. Lichtenberger had a cousin who had a friend whose workplace was robbed and the robbers killed three boys. (1 Supp. CT 39.) She knew three persons with law enforcement experience, including her sister, her son and her son's father. (1 Supp. CT 40.) She indicated she

was strongly in favor of the death penalty and indicated a strong belief that the death penalty was a deterrent to crime, stating in her questionnaire she believed in "an eye for an eye." (1 Supp. CT 44, 46.) She believed the death penalty was used "too seldom." (1 Supp. CT 47.)

Mr. Powell, a 77-year-old African-American man, was also strongly in favor of the death penalty, indicating, "I think if a person commit[s] a crime and is sentence[d] to die it should happen." (1 Supp. CT 231, 240.) He believed the death penalty was a deterrent and believed the death penalty was imposed too seldom. (1 Supp. CT 242-243.) He had never had a negative experience with a police officer but did have positive experiences with the police. (1 Supp. CT 247.) The fact that the prosecutor kept an African-American juror as one of six alternates "strongly suggests" that Ms. Ladd's race was not a factor in the decision to challenge her. (*Lenix*, *supra*, 44 Cal.4th at p. 629.)

Steve Esquivel, Alternate Juror No. 3, had a brother-in-law who was a former police officer. (1 Supp. CT 264.) He was moderately in favor of the death penalty, thought the death penalty should be used "when there is loss of life" and believed the death penalty was appropriate "If a crime is done with loss of life -- and evidence is shown -- beyond question then let it be used." (1 Supp. CT 268, 270.)

William Cowelson, Alternate Juror No. 4, was seated after the defense was out of challenges and because the prosecutor peremptorily challenged both Ms. Ladd and Caucasian prospective juror Janet O'Neal. (10 RT 1713.) Mr. Cowelson was previously married to a State Correctional Officer and had a brother-in-law in law enforcement. (2 Supp. CT 289, 292.) He had previously served on a criminal jury in a murder case where the jury reached a verdict. (2 Supp. CT 293.) Mr. Cowelson claimed he was moderately in favor of the death penalty and noted in his questionnaire, "In some serious crimes, capital punishment is justified and doesn't serve any good purpose to keep a prisoner locked in a cell for the rest of their lives without parole." (2 Supp. CT 296.) Mr. Cowelson also noted that he believed serious offenders were properly being sentenced to death but that it took too long for them to be executed. (2 Supp. CT 299.)

Another juror the prosecutor was able to place as an alternate was David Stuck, Alternate Juror No. 5. Mr. Stuck believed that the message a verdict would send to the community was "that if you do the crime you will pay for it." (2 Supp. CT 323.) He was moderately in favor of the death penalty. (2 Supp. CT 324.) He indicated that the death penalty should be imposed in cases of murder and where a defendant is found guilty of murder "his life should end." (2 Supp. CT 326.) Mr. Stuck strongly agreed

that a person who kills another should always get the death penalty because they took a life. (2 Supp. CT 329.)

Finally, Richard Capello, Alternate Juror No. 6, stated on his questionnaire that he and his mother had both twice been the victims of a burglary and had several friends and a brother-in-law who were police officers. (2 Supp. CT 347-348.) He indicated he was strongly in favor of the death penalty and gave several strong statements as to why a person who has taken a life should be executed.[14] (2 Supp. CT 352, 354, 357.)

The record clearly supports the prosecutor's principal reason for challenging Ms. Ladd as an alternate juror. The prosecutor took advantage of a situation where he had five peremptory challenges left for the alternates after the defense had used all of their challenges. The prosecutor challenged five prospective jurors in a row, including Ms. Ladd, to place the jurors the prosecutor wanted as alternate jurors. The challenge of Ms. Ladd was clearly not based on race.

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[14] In fact, during the hearing on the *Wheeler* motion the prosecutor specifically identified Mr. Stuck and Mr. Capello as "very strong [prosecution] jurors" who the prosecutor sought to place on the jury as alternates. (10 RT 1730.)

Ms. Ladd's failure to respond to only one specific question in the questionnaire was a legitimate concern and was race neutral.

Ms. Ladd responded with "N/A" to a number of questions in the questionnaire and responded in some way to every question except question No. 20, which was the only question in her questionnaire that was left unanswered. (15 Supp. RT 4183-4208.) Question No. 20 stated, "Have you, a close friend, or relative ever been ACCUSED of a crime, even if the case did not come to court?" (Emphasis in original.) She gave no response. (15 Supp. CT 4191.)

"An advocate may legitimately be concerned about a prospective juror who will not answer questions." (*People v. Howard*, *supra*, 42 Cal.4th at p. 1019.)

Certainly the prosecutor, who admittedly did not raise this issue with Ms. Ladd during voir dire, could have been reasonably concerned regarding Ms. Ladd's failure to respond to this question. A "no" response would have required Ms. Ladd to simply circle "no," something she did on several other questions. The question called for information that most people would deem very personal and embarrassing if it pertained to themselves or a close family member. In addition, a positive answer to such a question could have a huge impact on the juror's view of the police, the courts or the criminal justice system as a whole. In light of the circumstances surrounding the failure of Ms. Ladd to respond to the question, the nature

of the question and the fact that this one issue was not the only or even the principal basis for the challenge, there is no basis to find the prosecutor challenged Ms. Ladd because of her race.

Despite Jones's comparison of this case to *People v. Turner* (1986) 42 Cal.3d 711, (AOB 50-51), there is little similarity. In *Turner*, after striking all three African-American prospective jurors, resulting in a jury with no African-American jurors, the prosecutor explained that his peremptory challenge of the third African-American prospective juror was based on her response that she could not be impartial because she was a mother of children. The prosecutor challenged the juror without asking her any questions. The prospective juror actually said, "I'd be too emotionally [sic] as a mother." The juror subsequently told the court she could follow the law and reach a just verdict. This Court held that under those circumstances, the prosecutor's failure to ask the prospective juror any questions, in light of her ambiguous statements, was one factor supporting an inference that the challenge was based on group bias, a factor that was not rebutted by the prosecutor. (*People v. Turner*, *supra*, 42 Cal.3d at p. 727.)

In the present case, the prosecutor asked Ms. Ladd a number of questions during voir dire and referred to her failure to answer question No. 20 as one of a number of reasons he challenged her. Because the record

shows that Ms. Ladd did in fact fail to answer the question in the questionnaire, the only question she failed to answer, and the failure to answer the question was not relied upon by the prosecutor as his exclusive or even principal reason for exercising the challenge, there is no basis to infer his failure to question Ms. Ladd on this subject supports an inference the challenge was based on group bias.

The prosecutor did not challenge Ms. Ladd on religious grounds.

Jones claims one of the reasons given by the prosecutor for challenging Ms. Ladd, that she belonged to the AME church that the prosecutor believed was "controversial," was an improper basis to challenge a prospective juror and in itself violated his Equal Protection rights. Jones claims that this basis was not only inherently racially discriminatory but was also improperly based upon religious affiliation. (AOB 40-45.)

First of all, to the extent Jones is claiming his constitutional rights were violated because the prosecutor challenged Ms. Ladd on the basis of religious affiliation, he forfeited that argument because he did not make it in the trial court. Further, it is contradicted by the record.

At trial Jones never claimed or objected that the prosecutor excused Ms. Ladd on the basis of religious affiliation. (10 RT 1707-1708, 1723-

1725, 1731.) Accordingly, any such claim is not cognizable on appeal. (*People v. Cleveland* (2004) 32 Cal.4th 704, 734 [failure at trial to raise issue that prosecutor's challenge was gender based waives issue on appeal]; *People v. Cornwell, supra*, 37 Cal.4th at pp. 70-71, fn. 4 [same].)

Even if this Court found no forfeiture of the issue, it has no merit.

In *People v. Schmeck* (2005) 37 Cal.4th 240, 266, this Court recognized that religious groups are cognizable under *Wheeler*, although the United States Supreme Court had not similarly extended *Batson*. In *Schmeck*, this Court assumed without deciding that *Batson* also applied to peremptory challenges based upon bias against religious groups, but concluded that the defendant failed to show purposeful discrimination against Jewish prospective jurors. (*Ibid.*)

However, in the present case, the prosecutor did not challenge Ms. Ladd based upon her religious affiliation. As part of his rationale for challenging Ms. Ladd he indicated he was concerned, as an "additional factor," based upon her questionnaire that Ms. Ladd belonged to the AME church in Los Angeles (where she lived most of her life). The prosecutor had seen that church on television and it appeared to be "controversial." This was not a challenge based on race or religious affiliation, it was a challenge based in small part on the prospective juror's involvement in a controversial organization. This situation is unlike *United States v. Bishop*

(9th Cir. 1992) 959 F.2d 820, 825-826, where the prosecutor struck an African-American juror solely because she lived in a predominantly African-American neighborhood and based upon stereotypes about the views of people from low income African-American neighborhoods regarding violence. The prosecutor here was concerned about Ms. Ladd's involvement in a specific Los Angeles church with a public reputation for being involved in controversy. As such, the prosecutor's comment in this regard cannot be used to support Jones's claim.

The prosecutor's concern that Ms. Ladd was buying into the defense's "falsely accused" theory had a basis in the record.

Jones claims the prosecutor's stated concern that Ms. Ladd might be "buying into" the defense theory about false accusations, has no basis in the record, was pretextual and therefore supports his claim that she was challenged because of her race. (AOB 51-57.)

A common theme during the defense voir dire was that of a scapegoat or being falsely accused of something, an obvious suggestion that somehow Jones had been falsely accused or was being used as a scapegoat in the murders of the Florvilles. During the defense voir dire, Ms. Ladd was asked whether she had ever experienced being a scapegoat. She replied, "Certainly." As an example Ms. Ladd said, "I manage a number of people. And if they do something wrong, I have to take the fall for it." (8 RT 1340-1341.)

As one of several reasons he had for challenging Ms. Ladd, the prosecutor told the court,

> "Another thing that I responded to was, when she was asked about being falsely accused, she almost had a defensive, combined with an overbearing manner. And two things occurred to me. One, she was buying into some of this "falsely accused" business that voir dire degenerated into, because it degenerated into an instruction or an educating the jury, which it's not supposed to be. I had the feeling she was buying into it. But also, at the same time, I have many witnesses. The witnesses are Black kids, and they are just kind of rough. And I had the feeling that she would look down upon those kids, and I can't have a juror that does that."[15] (10 RT 1730.)

It is impossible to tell from a cold record the facial expressions, demeanor or tone of voice a juror uses in responding to a question. Peremptory challenges are properly made on the basis of "bare looks and gestures" by a prospective juror. (*People v. Turner*, *supra*, 8 Cal.4th at p. 171, quoting *People v. Wheeler, supra,* 22 Cal.3d at p. 276.) A hunch by the prosecutor can also serve as adequate justification for challenging a prospective juror. (*People v. Williams, supra,* 16 Cal.4th at p. 664.) "A prospective juror may be excused based upon facial expressions, gestures,

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[15] It is important to note that the questioning of Ms. Ladd took place on Wednesday, March 6, 1996, while the hearing on the *Wheeler* motion took place on Tuesday, March 12, 1996. (8 RT 1132, 1202; 10 RT 1723.) It seems that the prosecutor would have been relying on notes or his memory from a week before to explain the basis for his challenge of Ms. Ladd.

hunches, and even for arbitrary or idiosyncratic reasons." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613.)

As this Court has observed:

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

(*Id.* at 622.)

This reason given by the prosecutor seemed to reflect a feeling or perception by the prosecutor based upon observing Ms. Ladd answer this particular question. The content of the answer certainly supports the perception of the prosecutor in that Ms. Ladd stated she had experienced being a scapegoat by being a supervisor, being held responsible for the mistakes of others. It is reasonable that such an answer would support a perception by the prosecutor that Ms. Ladd would be sympathetic to another person who claimed they were being blamed for what another person did. And in the context here, identified by the prosecutor as one of a number of reasons he challenged Ms. Ladd, there is no basis to conclude that this reason was false or pretextual.

The prosecutor's concern that Ms. Ladd might look down on his "rough" African-American witnesses was race neutral.

The prosecutor was also concerned that Ms. Ladd might somehow look down on his juvenile witnesses, rough African-American youths from a neighborhood in Meade Valley. (10 RT 1730.) Jones claims this reasoning constituted racial stereotyping and was inherently pretextual because there was no basis in the record to support such a concern. (AOB 45-48.) Jones concedes that "there is always a risk that older individuals with more stable, settled lives will disapprove of rough youths." (AOB 45.) However, he asserts that because this would have been a concern applicable to many of the Caucasian jurors as well, the prosecutor must have been using an improper racial stereotype that a stable, settled African-American woman would look down upon less successful members of her own race. Such a speculative assertion is unsupported by anything in the record. The prosecutor was stating a number of concerns he had with Ms. Ladd as a juror, some of which may have also applied to other jurors. However, taken in the context of the prosecutor's explanation, it can hardly be said that his concern regarding Ms. Ladd's views of the prosecution witnesses was based on racial stereotyping and therefore the challenge of Ms. Ladd was racially based. Peremptory challenges may properly be based upon a "broad spectrum of evidence suggestive of juror partiality." (*People v. Wheeler, supra,* 22 Cal.3d at p. 275.)

Based upon his observations of Ms. Ladd and her responses to questions, the prosecutor had the impression, among other impressions, that she might not completely accept the testimony of his juvenile witnesses. Such an impression could be genuine but, because of the nature of the impression, might not be susceptible to being documented on a cold record. Therefore, in light of the presumption that such a challenge is based upon permissible grounds, and the deference given to trial courts to differentiate between permissible grounds and sham excuses, this Court has no basis to conclude that the prosecutor's reason was based upon a racial stereotype or was pretextual.

Jones's comparative analysis does not support his claim.

Jones claims that because sitting juror Huey stated she had been made a scapegoat before and sitting juror Fawcett revealed she had been falsely accused by a family member, those reasons stated by the prosecutor to challenge Ms. Ladd must be deemed pretextual. (AOB 55-57.) First of all, a comparison between sitting jurors and Ms. Ladd, who was challenged as an alternate, is distinguishable to begin with. Any comparison of other jurors to Ms. Ladd should be done, if at all, with other prospective alternate jurors available at the time she was challenged by the prosecutor. In any event, the dissimilarities regarding Ms. Ladd's stated view of the death

penalty and Ms. Fawcett's and Ms. Huey's views of the death penalty shows that they were not similar prospective jurors.

Ms. Ladd indicated she was moderately in favor of the death penalty. (15 Supp. CT 4195.) Juror Fawcett rated herself as strongly in favor of the death penalty and made other consistent statements in her questionnaire. (1 Supp. CT 184, 186-187.) This distinction alone makes any comparison of Ms. Fawcett's and Ms. Ladd's other answers irrelevant. And while Ms. Huey rated herself as moderately in favor of the death penalty, the same as Ms. Ladd, the information she provided had significant differences. Ms. Huey stated, "I believe heinous crimes deserve the death penalty." (1 Supp. CT 156.) While in response to the same question, Ms. Ladd said, "Too many conflicting views pros/con; gets confusing. However, a clear message must be sent to prospective criminals." (15 Supp. CT 4195.) Ms. Huey checked "agree somewhat" in response to a statement "Anyone who kills another person should **always** get the death penalty." She "strongly disagree[d]" with the statement "Anyone who kills another person should **never** get the death penalty." (1 Supp. CT 161.) Ms. Ladd "disagree[d] somewhat" with both statements. (15 Supp. CT. 4200.) In addition, Ms. Huey had a negative view toward paid expert witnesses. (1 Supp. CT 164.) In light of the distinction between the answers given regarding their views of the death penalty, the similarity of Ms. Ladd's and Ms. Fawcett's

answers regarding false accusations, as well as the similarity of Ms. Ladd's and Ms. Huey's experiences as a "scapegoat" provide no support for Jones's claim that the prosecutor's challenge of Ms. Ladd was racially motivated.

II. THE ADMISSION OF EVIDENCE OF JONES'S PRIOR ROBBERY WAS PROPERLY ADMITTED TO SHOW INTENT; IN ANY EVENT, THE EVIDENCE DID NOT PREJUDICE JONES

Jones contends the admission of evidence of a robbery he committed in 1985 was an abuse of the trial court's discretion and requires reversal of his convictions. Jones also claims the admission of the evidence deprived him of a fair trial, due process and reliable guilt and penalty determinations, in violation of his constitutional rights. Specifically, Jones claims that his intent, the proof of which was the basis for the admission of the prior crimes evidence, was not really disputed, and the evidence of the Vernon robbery was insufficiently similar to prove his intent in the present case. (AOB 81-105.)

Proceedings below.

On January 26, 1996, the prosecution filed a trial brief which addressed the admissibility at trial of evidence of crimes Jones had previously committed. (1 CT 255-268.) The prosecutor, citing *People v. Ewoldt* (1994) 7 Cal.4th 380, argued that prior instances of misconduct

were admissible under Evidence Code section 1101, subdivision (b). (1 CT 258-260.) The proffered evidence the prosecution sought to introduce was a robbery committed by Jones on August 3, 1985 ("Vernon" robbery) where he and two other males approached the victims, while Jones carried a handgun. Jones told the victims, "This is a robbery. Do as I say and I will not kill you all. I am a murderer and I have killed before. I'm not afraid to shoot." Jones and his companions took the victims' valuables and Jones struck one of the victims in the back of the head. Jones pled guilty to the robbery, admitted an allegation that he was armed and was sent to prison. (1 CT 261-262.)

The second incident sought to be introduced was a robbery committed by Jones on July 21, 1992 ("Delano" robbery), where Jones robbed the Fairway Market in Delano, California. Jones and another individual entered the market, Jones's companion placed a handgun to the neck of the store clerk and demanded her to open the cash register. Money was taken from the register and Jones put a gun to the head of the store butcher. Jones subsequently entered a guilty plea to a reduced charge. (1 CT 262-263.)

The third offense sought to be introduced occurred on December 12, 1984, where Jones used a 15 year-old girl to help him sell marijuana to

persons in vehicles from the street. Jones entered a guilty plea in that case. (1 CT 263.)

The prosecution in its brief argued that the charged offenses and special circumstances allegations required the prosecution to prove Jones had the intent to permanently deprive the victims of their property for the robbery allegation and had the intent to steal prior to the entry of the victims' residence to prove the burglary allegation. The prosecutor argued that there were similarities between the prior robberies and the charged offenses: Jones conspired with others to commit the offenses, one of the accomplices was a relative, Jones went to the scene in a vehicle and in all the offenses Jones was armed. The prosecutor argued that the marijuana sales offense was admissible to show the use by Jones of a minor to commit the crime. (1 CT 263-266.)

On February 20, 1996, Jones filed an opposition to the prosecution's request to admit evidence of the prior offenses. (2 CT 349-368.) Jones argued that the prior crimes were too dissimilar to be relevant to the charged offense. (2 CT 354-359.) Jones argued that if the jury believed he committed the charged acts, there could be no dispute as to his intent at the time of the commission of the offenses. In other words, Jones argued there was no dispute as to whether he harbored the requisite intent, citing *People v. Balcolm* (1994) 7 Cal.4th 414, 422. (2 CT 359-360.)

The trial court held a hearing on the admissibility of the prior offenses committed by Jones. The prosecution argued that the 1984 marijuana sales offense showed that Jones had a modus operandi of using minors to help him commit crimes, the way he used minor Alon Johnson to help him commit the murders in the present case. (3 RT 311-313.) The defense argued that the 1984 marijuana sales offense was too dissimilar to the present offense to be admitted. (3 RT 313-315.) The trial court ruled that the 1984 marijuana sales incident would not be admitted because it was remote, it was dissimilar to the present offense and because Jones was also a teenager when he committed the offense, making the use of a minor less significant. (3 RT 316.)

Next the prosecution argued that evidence of the "Vernon" robbery should be admitted to prove Jones had the intent to rob the Florvilles and had the intent to steal when he entered the Florvilles' home, as alleged in the special circumstances, and that he had the intent to kill. When the defense argued that the issue in this case was identity rather than intent, the prosecutor explained that Jones pleaded not guilty and the prosecution had the burden to prove his intent when he entered the Florvilles' home. (3 RT 317-319.) The defense argued that the evidence should not be admitted to prove intent where intent was not going to be a disputed issue in the case and that the prior robbery was too dissimilar to the murder-robbery of the

Florvilles. The defense argued that other evidence would adequately show the murderer's intent and the evidence of the "Vernon" robbery would be cumulative. (3 RT 328-330.)

The trial court ruled that pursuant to *Ewoldt*, it would allow the admission of evidence of the "Vernon" robbery as relevant to Jones's intent. (3 RT 334.) The trial court indicated that it had weighed the probative value of the evidence of the Vernon robbery with the prejudicial effect. The court indicated that the other evidence of Jones's intent was circumstantial and the issues of Jones's intent as to the robbery and burglary were required to be proven by the prosecution. (3 RT 344-348; 5 RT 421-424.)[16] The trial court excluded the statement attributed to Jones by the victims in the Vernon robbery, that he had killed before, as overly inflammatory. (3 RT 354.)

The parties then argued the admissibility of the "Delano" robbery. In that case Jones pleaded guilty to a misdemeanor charge of receiving stolen property, in violation of Penal Code section 496. The defense argued that the identification of Jones in the Delano robbery was questionable and asked the court for an evidentiary hearing. In light of the defense request,

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[16]Jones raised the issue of the admissibility of evidence of the Vernon robbery in a petition for writ of mandate in the Fourth District Court of Appeal, Division Two, which was denied. (2 CT 393; 5 RT 416.)

the trial court ordered the prosecutor not to mention the Delano robbery to the jury until the facts had been determined by the court. (3 RT 334-339, 349.) Evidence of the Delano robbery was not admitted at the guilt phase of the trial.

The evidence presented at trial.

On Saturday, August 3, 1985, Raymond Latka, Robert Valdez and Randy Vasquez were working at a furniture store called "Status" in Vernon. Around noon, as they left the store and locked the door, a white LeBaron pulled up to them abruptly, and two men got out of the car. The driver of the LeBaron stayed in the driver's seat. One of the men, Jones, pointed a blue Luger 9 millimeter handgun at them, told them it was a robbery and told them to hand over their money. Jones said he would kill them. The other man took money from Vasquez and Valdez, hitting Vasquez in the course of taking their money. Mr. Latka gave them $6, which was all the money he had. (11 RT 1840-1844, 1845-1851.) Vernon Police Officer Kelly Moore was flagged down by the victims. They gave Officer Moore a description of the robbery suspects, a description of the car and a partial license number. (11 RT 1852-1854.) Jones and his three cousins were stopped and arrested. The car Jones and the others were stopped in was identified as the vehicle used in the robbery and a gun found in that car was identified as the gun used in the robbery. (13 RT 2107-2112.)

The trial court did not abuse its discretion by allowing admission of evidence of the Vernon robbery.

"The decision whether to admit other crimes evidence rests within the discretion of the trial court." (*People v. Lindberg* (2008) 45 Cal. 4th 1, 23; see also *People v. Kelly* (2007) 42 Cal.4th 763, 783.) "Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Hovarter* (2008) 44 Cal. 4th 983, 1004, quoting *People v. Guerra* , *supra*, 37 Cal.4th at p. 1113.)

The deference afforded a trial court in determining whether to admit other crimes evidence requires affirming the decision of the trial court unless its ruling "falls outside the bounds of reason." (*People v. Carter* (2005) 36 Cal.4th 1114, 1149; *People v. Kipp* (1998) 18 Cal. 4th 349, 371; *People v. De Santis* (1992) 2 Cal.4th 1198, 1226.)

Evidence Code section 1101 states in relevant part: ". . . evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

The admissibility of other crimes evidence depends on the materiality of the fact or element sought to be proved, the tendency of the prior crime evidence to prove that material fact or element, and the balancing of the probative value of the evidence against the potential for undue prejudice. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 203; *People v. Roldan* (2005) 35 Cal.4th 646, 705.)

"The least degree of similarity is required in order to prove intent." (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1223, quoting *Ewoldt*, *supra*, 7 Cal.4th at p. 402 [emphasis omitted].) "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense to support the inference that the defendant probably

acted with the same intent in each instance. [Citations]" (*Lindberg*, *supra*, 45 Cal.4th at p. 23; *Kipp*, *supra*, 18 Cal.4th at p. 371.)

> "[W]hen the other crime evidence is admitted solely for its relevance to the defendant's intent, a distinctive similarity between the two crimes is often unnecessary for the other crime to be relevant. Rather, if the other crime sheds great light on the defendant's intent at the time he committed that offense it may lead to a logical inference of his intent at the time he committed the charged offense if the circumstances of the two crimes are substantially similar even though not distinctive." (*People v. Nible* (1988) 200 Cal.App.3d 838, 848-849.)

(*People v. Demetrulias* (2006) 39 Cal.4th 1, 17.)

Prior crimes evidence is also admissible to prove motive. "Motive is not a matter whose existence the People must prove or whose nonexistence the defense must establish. [Citation.] Nonetheless, '[p]roof of the presence of motive is material as evidence tending to refute or support the presumption of innocence.'" (*People v. Roldan, supra*, 35 Cal.4th at p. 707, quoting, *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017.)

People v. Lindberg, *supra*, is instructive. In *Lindberg*, the defendant was charged with first degree murder with alleged special circumstances that the defendant killed the victim in the course of an attempted robbery (Pen. Code, § 190.2, subd. (a)(17)(A)) and also a hate-murder special circumstance (Pen. Code, § 190.2, subd. (a)(16)). The defendant claimed on appeal that the trial court improperly admitted uncharged crimes evidence. The evidence showed that on the evening of January 28, 1996,

the victim, Ly, left his home wearing Rollerblades and leaving behind his wallet and car keys. The next morning, a groundskeeper at Tustin High School noticed the victim lying on one of the tennis courts. The victim was not breathing, had blood on his shirt and a cut on his neck. Next to the victim's body were a cap and a key to the victim's residence. The victim suffered multiple injuries including contusions and abrasions on his face, slash wounds on the right and left sides of his neck, and multiple deep stab wounds on his chest. (*Lindberg*, 45 Cal.4th at p. 7.) Evidence was also admitted that in late February 1996, the defendant's cousin received a handwritten letter from the defendant describing in detail his stabbing of the victim with a knife at Tustin High School. (*Ibid.*)

The prosecution also admitted evidence of prior uncharged robberies committed by the defendant. Evidence was presented that in October 1990, defendant, who was 15 years old, and his companions attempted to rob a Hispanic landscaper. The defendant attempted to rob the victim by holding a stick and demanding money. When the victim said he did not have any money, the defendant hit him on the head and in the arm with the stick. As the victim ran, the defendant and a companion followed, pulling at his arms, and kicking him. The victim was taken to the hospital, where he received 14 to 19 stitches. In another incident, on October 31, 1990, the defendant and another 15-year-old male, armed with knives, entered the home of an elderly woman and demanded money. One of the males held a

knife to her neck while restraining her. One of the two males took $90 from the victim's purse in her bedroom. Before leaving, the defendant struck the victim on her face with his hand. The next day the defendant admitted to a police officer that he and his friend entered the victim's residence, that he held the victim by her shirt and punched her on the right side of her face. He denied having a knife, but admitted he and his companion took the victim's money. (*Id.* at pp. 13-14.)

This Court concluded the evidence of the prior robberies tended to prove the material fact that the defendant murdered the victim with the intent to rob him and that the circumstances of the murder shared numerous distinctive common features with the prior robberies. In each crime the defendant brought a companion to assist him; assaulted his victims; was the aggressor; and did not know any of the victims. Moreover, all victims were vulnerable, did not fight back, and were assaulted whether or not he or she cooperated. (*Lindberg*, *supra*, 45 Cal.4th at p. 24.)

This Court held that evidence of the uncharged robberies "reasonably could assist the jurors in determining whether defendant assaulted [the murder victim] in an attempt to rob him," and thus the trial court was within its discretion allowing the admission of the evidence of the uncharged robberies. (*Id.* at p. 25.) This Court also concluded the admission of the evidence was within the trial court's discretion under Evidence Code section 352 because the evidence had substantial probative

value as to the issue of whether the defendant intended to rob the victim at the time of the murder, the evidence of the prior robberies was brief, and the uncharged conduct was not particularly inflammatory compared to the evidence of the murder of the victim. In addition, the trial court instructed the jury as to the limited purpose of the evidence. (Id. at pp. 25-26.)

In the present case, not only was intent to kill an issue, but Jones's intent to rob the victims at the time he murdered them and his intent to steal when he entered the victims' home was at issue because of the special circumstances allegations.[17] "The People were required to prove that defendant harbored such an intent in order to establish the robbery-murder special circumstance. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1263; § 190.2, subd. (a)(17)(A).)" (*People v. Yeoman* (2003) 31 Cal.4th 93, 121.)

The similarities between the charged offense committed against the Florvilles and the prior offenses committed in 1985 were sufficient to

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[17] The jury was instructed that if they found Jones guilty of first degree murder, they were to determine whether the alleged special circumstances were true. Those circumstances included murder in the course of a robbery and murder in the course of a burglary. (28 RT 4341-4342.) Robbery and burglary were also defined and the elements set out in the instructions. The jury was told the prosecution had the burden to prove Jones had the specific intent to permanently deprive a person of his or her property to establish the robbery special circumstance; and had to prove Jones had the intent to steal someone else's property at the time he entered the residence. (28 RT 4343-4346.)

support the trial court's discretion in allowing admission of the evidence. In both offenses Jones was the aggressor and carried the weapon. In both offenses Jones rode to where the victims were located in a car, committed the offense with companions, and drove away in a car. In both cases, despite the cooperation of the victims, Jones imposed unnecessary violence upon the victims. Finally, in both cases Jones employed the services of persons close to him, in the present case the nephew of his girlfriend, Alon Johnson; in the robbery, his three cousins. The evidence was sufficient to tend to prove Jones intended to rob the victims in the commission of the murders, intended to steal from the Florvilles prior to entering their residence, and was motivated to enter the Florvilles' home and kill them in order to steal their money and/or valuables.

Jones claims his intent to kill or to steal were not contested issues, that the killer's identity was the only issue and that the prior robbery evidence should have been excluded on that basis. (AOB 98-99.) However, as the United States Supreme Court stated in *Estelle v. McGuire*, "[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." (*Estelle v. McGuire* (1991) 502 U.S. 62, 69 [112 S.Ct. 475, 116 L.Ed.2d 385]; see also *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 400.) Even where the defense focus is identity rather than intent, this

does not eliminate the prosecution's burden to establish intent beyond a reasonable doubt. (*People v. Soper* (2009) 45 Cal. 4th 759, 777; *People v. Alcala*, *supra*, 43 Cal.4th at p. 1223.)

By pleading not guilty, a defendant places all the elements of the charged offenses as well as the elements of the special circumstances allegations in dispute at trial. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 23; *People v. Roldan*, *supra*, 35 Cal.4th at pp. 705-706.) Even where intent is conceded by the defense, "the prosecution is still entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent. (*People v. Scheid* (1997) 16 Cal.4th 1, 16-17.)" (*People v. Steele* (2002) 27 Cal.4th 1230, 1243-1244.)

Moreover, the fact that the Vernon robbery took place in 1985, eight years before the commission of the murders, did not negate the probative value of the evidence as to Jones's intent. (*People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 205 [uncharged conduct took place between seven and 10 years before the date of the charged murder but did not significantly lessen the probative value of the evidence].)

Jones claims the evidence of his intent was clear and therefore the evidence of the Vernon robbery was cumulative, citing *People v. Balcom*, *supra*, 7 Cal.4th at 414. (AOB 98-100.) In *Balcom*, evidence of a subsequent uncharged forcible rape was admitted to prove intent in the

charged offense where the defendant put a gun to the victim's head, demanded she have sex with him and then engaged in intercourse with her. This Court concluded that although the uncharged similar offense would have some relevance regarding the defendant's intent, the circumstances of the offense established the perpetrator's intent, making evidence of the uncharged offense cumulative on the intent issue. The Court concluded that the probative value of the evidence of uncharged offense to prove intent was outweighed by the prejudicial effect of the evidence. However, this Court found the evidence of the uncharged offense was properly admitted to show common design or plan. (*People v. Balcom*, *supra*, 7 Cal. 4th at p. 423; See also, *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 406 [uncharged misconduct inadmissible to prove intent where the conduct involved in the charged crimes, lewd acts with a minor, clearly indicated the perpetrator had the requisite intent].)

In the present case Jones was charged not only with murder, but also was charged in the special circumstances to have murdered the victims during a robbery and during a burglary. Jones's intent to steal when he entered the victims' residence and his intent to steal from them by force was not conclusively established by the circumstances of the murders. The special circumstances were required to be proven beyond a reasonable doubt by the prosecution. Because the evidence of the Vernon robbery was

relevant to the issue of Jones's intent to steal from the victims and his motive in entering their home and killing them, the evidence was properly admitted. The admission of the evidence was not arbitrary, capricious or absurd and did not fall outside the bounds of reason, thus, the admission of the evidence was within the trial court's wide discretion.

The evidence was properly admitted under Evidence Code section 352.

Jones claims the undue prejudice of the evidence of the Vernon robbery substantially outweighed the probative value. (AOB 101-104.) A trial court's ruling on the admission of other crimes evidence under Evidence Code section 352 is also evaluated applying the abuse of discretion standard. (*People v. Hovarter*, *supra*, 44 Cal.4th at p. 1005; *People v. Cox* (2003) 30 Cal.4th 916, 955.)

"Prejudice" in the context of Evidence Code section 352 does not mean "damaging" to the defendant's case but is rather evidence "which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues." (*People v. Bolin* (1998) 18 Cal. 4th 297, 320; *People v. Coddington* (2000) 23 Cal. 4th 529, 588.)

"The primary factors affecting the prejudicial effect of uncharged acts are whether the uncharged acts resulted in criminal convictions, thus minimizing the risk the jury would be motivated to punish the defendant for

the uncharged offense, and whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses." (*People v. Walker* (2006) 139 Cal.App.4th 782, 806, citing *People v. Ewoldt, supra*, 7 Cal.4th at p. 405.) The fact that Jones was convicted of the Vernon robbery reduced the prejudicial effect in that it minimized the chance a jury would punish him for the prior offense, for the jury was aware he had already been convicted and punished. (27 RT 4153-4154; *People v. Balcom, supra*, 7 Cal. 4th at p. 427; *People v. Steele, supra*, 27 Cal.4th at p. 1245; *People v. Walker, supra*, 139 Cal.App.4th at p. 807.) In addition, the evidence of the Vernon robbery, a standard armed robbery where there was no significant injuries to the victims, was not nearly as inflammatory as the stabbing murders of an elderly couple. The trial court's conclusion that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice was well within its discretion.

Jones was not prejudiced by any error.

Even assuming the trial court erred by admitting the evidence of the Vernon robbery, Jones was not prejudiced. Where a trial court erroneously admits evidence of prior crimes committed by the defendant, reversal is not required unless it is reasonably probable the outcome would have been more favorable to the defendant had such evidence been excluded. (*People*

v. Kipp, *supra*, 18 Cal.4th at p. 374; *People v. Carter*, *supra*, 36 Cal.4th at p. 1152; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

First of all, the jury was admonished by the trial court that the evidence of the Vernon robbery was to be used only to determine Jones's intent as to the robbery and burglary and only after the jury had determined whether Jones had committed the murders.[18] It is presumed that "jurors understand and follow the court's instructions." (*People v. Gray* (2005) 37 Cal.4th 168, 231; *People v. Hovarter*, *supra*, 44 Cal.4th at p. 1005; *People v. Stitely* (2005) 35 Cal.4th 514, 559.)

In addition, in argument the prosecutor mentioned the Vernon robbery only very briefly and each time reminded the jurors that the

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[18] The jury was instructed as follows:

"Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which the defendant is now on trial.

Such evidence, if believed, was not received and may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. Further, it may not be considered by you unless you find beyond a reasonable doubt that the defendant is the person or one of the people who committed the acts charged at the Florville residence.

Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show the existence of the intent which is a necessary element of robbery and/or burglary.

And I'll discuss that intent with you later."

(28 RT 4327-4328; 2 CT 513.)

evidence was admitted for the limited purpose of showing Jones's intent to commit robbery and burglary. (27 RT 4153-4154; 28 RT 4261-4262.)

Lastly, the presentation of the evidence of the Vernon robbery was relatively brief in the course of a lengthy trial, four witnesses and a total of 22 pages of transcript. (11 RT 1840-1854; 13 RT 2107-2113.) The evidence of the Vernon robbery was not unusually inflammatory, a run-of-the-mill armed robbery, especially in comparison to the brutal nature of the murder of James and Madalynne Florville.

Furthermore, the evidence of Jones's participation in the murders was significant. Multiple witnesses attributed statements to Jones, both before and after the murders, showing that he planned the robbery of the Florvilles and participated in their murders. The day before the murders, Jones was at Rochelle Timmons's home talking to Alon Johnson and Jack Purnell about committing the robbery. (13 RT 2119-2121; 15 RT 2428-2430; 18 RT 2844, 2929-2930.) That same morning, Jones took the group of teenagers to the store and on the way back slowed down as he drove past the victims' home while discussing the entrances to the home and how they would gain access to the home. (13 RT 2122-2125; 15 RT 2430-2433; 18 RT 2898-2900, 2906-2907.) The night before the murders Jones spoke to Alon Johnson and Jack Purnell again about committing the robbery. (15 RT 2434-2437.)

After the murders, Mary Holmes and Debbie Russell spoke to Alon Johnson and Jones about Mary finding a bloody glove and flushing it down the toilet. Jones asked Johnson what he did with his gloves. Johnson said he threw his gloves in the back of the car. Jones told Mary Holmes she had done the right thing by flushing the glove down the toilet. (13 RT 2126-2129; 18 RT 2847, 2905-2906.) Debbie Russell told the police about Mary Holmes flushing the glove down the toilet prior to any information being released about gloves being used in the murders. (22 RT 3374-3380.) Later, the septic tank at Rochelle Timmons's home was searched and a latex glove was found. (17 RT 2773-2776.) After the murders, Jones also said the two victims should have cooperated and they would not have been stabbed. (18 RT 2849.)

In addition to this evidence, on the morning of the murders, Dorell Arroyo saw Jones and Alon Johnson drive up to the victims' home, enter the home and then leave the home a short time later. (14 RT 2227-2232, 2237-2239, 2244-2246.) Arroyo told the police that as Jones left the victims' home he made a motion with his hands consistent with removing gloves. (14 RT 2244, 2247.) Arroyo also saw Johnson throw an object over the fence as he left and retrieved the item after jumping over the victims' fence. (14 RT 2247-2249.) Arroyo told the police about Johnson throwing something over the fence before it was known that a small safe

was missing from the victims' home. (17 RT 2770-2773; 22 RT 3380-3384.)

This evidence, along with other circumstantial evidence, was overwhelming evidence of Jones's guilt. This evidence was provided by numerous witnesses, some of whom were corroborated, and involved information uncovered during the investigation which was unknown to the public. In light of this evidence, and the minimal nature of the evidence of the Vernon robbery, Jones would not have obtained a more favorable result if the evidence of the Vernon robbery had not been admitted.

Admission of the evidence of the Vernon robbery did not violate Jones's federal constitutional rights.

Jones attempts to elevate a standard ruling on an evidentiary issue into a violation of his constitutional rights. Specifically he briefly suggests that the admission of the evidence of the Vernon robbery deprived him of "a fair opportunity to defend against [the] particular charge[s] against him," rendered his trial fundamentally unfair, deprived him of his right to due process, and deprived him of his right to reliable guilt and penalty determinations. (AOB 104.)

Generally the application of the ordinary rules of evidence by a trial court does not violate a defendant's federal constitutional right to present a defense. (*People v. Lawley* (2002) 27 Cal.4th 102, 155; *People v. Abilez*

(2007) 41 Cal.4th 472, 503.) This Court has rejected similar constitutional claims based upon alleged erroneous admission of prior crimes evidence.

> We reject defendant's contention that the admission of the uncharged robberies violated his constitutional rights to due process, a fair trial, and a reliable adjudication at all stages of a capital trial. We have long observed that "[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights." (*People v. Kraft* (2000) 23 Cal.4th 978, 1035.)

(*People v. Lindberg*, *supra*, 45 Cal. 4th at p. 26.)

Where evidence is admitted in a criminal trial of prior conduct which is relevant to the issue of the defendant's intent, the defendant's due process rights are not violated by the admission of the evidence. (*Estelle v. McGuire* (1991) 502 U.S. 62 [112 S.Ct. 475, 116 L.Ed. 2d 385], *People v. Roldan*, *supra*, 35 Cal.4th at p. 705, fn. 23.)

This Court has also rejected Jones's claim that the admission of prior crimes evidence violates a defendant's right to a fair trial, recognizing that federal courts have determined that there are due process limitations only on the admission of evidence which is not material to any legitimate issue. (*People v. Catlin* (2001) 26 Cal.4th 81, 123, citing *Henry v. Estelle* (9th Cir. 1994) 33 F.3d 1037, 1042, revd. on another point in *Duncan v. Henry* (1995) 513 U.S. 364 [115 S.Ct. 887, 130 L.Ed.2d 865] and *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1382-1385.) Where the disputed evidence is material to an issue set forth in Evidence Code section 1101,

subdivision (b), no federal right is violated. (*Catlin*, at p. 123.)

McKinney v. Rees, *supra*, 993 F.2d at p. 1384, a case relied upon by Jones, established only that where there "are no permissible inferences the jury may draw from the evidence can its admission violate due process." Only after determining that there was no permissible inference the jury could draw from the evidence does the court undertake an analysis to determine whether the admission of the propensity evidence rendered the trial fundamentally unfair, and whether the error "had substantial and injurious effect or influence in determining the jury's verdict." (*Id.* at p. 1385.)

The evidence of the Vernon robbery was relevant to the issue of Jones's intent in the robbery and burglary allegations and to his motive for entering the victims' home and killing them. Therefore Jones's due process rights were not violated by the admission of the evidence. Moreover, even if the evidence was not relevant to a disputed issue, in light of the limiting instruction, the comments of the prosecutor, the minimal nature of the evidence and the overwhelming evidence of Jones's guilt, any error did not render Jones's trial fundamentally unfair.

III. THE TRIAL COURT WAS WITHIN ITS DISCRETION WHEN IT DENIED JONES'S REQUESTS TO ADMIT A VIDEOTAPE OF THE LIGHTING CONDITIONS AT THE SCENE AND TO CONDUCT A JURY VISIT TO THE SCENE; THE DENIALS DID NOT RESULT IN A VIOLATION OF JONES'S CONSTITUTIONAL RIGHTS

Jones complains that the trial court erred when it denied his request to admit a videotape of the outdoor area near the victims' home to show the lighting conditions existing at the time Dorell Arroyo saw Jones and Alon Johnson enter and exit the victims' home. Jones also claims the trial court erred when it denied his request to have the jury visit the scene outside the victims' home, again to show them the lighting conditions that existed at the time Dorell Arroyo saw Jones enter and then exit the victims' home. (AOB 106-117.) Jones maintains that the denial of these requests violated his constitutional rights, specifically his right under the Sixth and Fourteenth Amendments to present a defense; his right under the Fourteenth Amendment to a fair trial and due process; and his right under the Eighth and Fourteenth Amendments to a reliable determination of guilt and penalty. (AOB 115-116.)

The trial court properly excluded the evidence of the defense videotape because the evidence was irrelevant and misleading regarding the lighting conditions at the time Dorell Arroyo made his observations. Similarly, the defense failed to demonstrate how a jury visit to the scene under dissimilar conditions to those at the time of Arroyo's observations

was necessary or provided information unavailable through the admission of other evidence. For those same reasons, the exclusion of the evidence did not violate Jones's constitutional rights.

The trial court's denial of Jones's request to admit videotapes taken of the scene.

Near the end of the prosecution's case-in-chief, the defense requested a hearing on the admissibility of two videotapes taken by defense investigator Gerald Monahan. The tapes were made by Mr. Monahan on December 12, 1994 and on December 14, 1995, with a camera placed near Beth Brown's residence pointing toward the residence of the Florvilles during the early morning hours. The defense claimed the relevance of the tapes were to show the "natural" lighting available at certain times during the early morning, to impeach Dorell Arroyo's testimony that he could see Jones enter and leave the Florvilles' residence. The defense made an offer of proof that sunrise on the days Mr. Monahan took the videos was close to the time of sunrise on the morning of the murders. The defense also stated they would present an expert witness, Dr. Carter, who would testify that the position of the sun on the days filmed by Mr. Monahan was similar to that on the morning of the murders. The defense also clarified that the evidence was not to show the light available on the morning of the murders but only to show the "natural light," unrelated to any artificial lighting. The defense claimed Dorell Arroyo testified that he could see Jones because of natural

light, rather than from other artificial light sources, and this video evidence would impeach Arroyo's testimony. (20 RT 3147-3160.)

A hearing was held outside the presence of the jury. Gerald Monahan, an investigator with law enforcement experience hired by the defense, testified he set up a video camera facing the victims' residence at approximately 5:00 a.m. on December 14, 1994. He set the camera up in a field, west of Beth Brown's residence. He determined that sunrise was at 6:46 a.m. on December 13, 1993 and it was at 6:47 a.m. on December 14, 1994. He claimed the video accurately reflected the lighting conditions at the time the video was taken. On December 12, 1995, Mr. Monahan did the same thing, filming from the same general location. Sunrise on December 12, 1995 was at 6:45 a.m. Monahan testified that the film accurately depicted the lighting conditions at the time of the filming. (21 RT 3203-3207.)

In 1994, Mr. Monahan did not notice whether the light on the porch of the victims' residence was turned on when he filmed and his recollection was that all of the lights in the surrounding houses were out. When the prosecutor asked about growth of vegetation, the defense objected on relevance grounds. The defense argued that the videos were being admitted to replicate the artificial lighting conditions at the time to impeach Arroyo's

testimony that he could see because of the natural light. The defense suggested a limiting instruction. (21 RT 3208-3210.)

The prosecutor argued that Arroyo testified that in 1993 there was an outside light that came on and off and other sources of light when he made his observations. It was impossible to separate lighting conditions as a result of natural light from lighting conditions as a result of artificial light. The defense acknowledged that the evidence was that there was a light on in the victim's residence at the time of the observations. The defense claimed it was only offering the evidence to show "the natural progression of daylight." (21 RT 3211-3212.) The trial court questioned how anyone, articulate or not, could differentiate the source of light that allows them to see. (21 RT 3218.) The court concluded there was no evidence to replicate the lighting conditions at the relevant time on December 13, 1993. (20 RT 3220.) The court indicated it had reviewed the tapes which showed nothing but pitch black for 45 minutes, yet the camera operator indicated he could see someone coming, even though the film showed nothing. (20 RT 3227.) The court ruled that under Evidence Code section 352 the tapes would be misleading to the jury because the tapes did not reflect what the human eye could see, the evidence would consume too much time merely to try to impeach Arroyo about what he could see with natural light as opposed to

any light source.[19] (21 RT 3227-3232, 3263.) The court ruled that the defense could present testimony regarding the lighting conditions on the dates of the taping if the defense chose to, without any reference to the tapes. (21 RT 3264-3267.)

Exclusion of the tapes was within the trial court's discretion.

> Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. (*People v. Dyer* (1988) 45 Cal.3d 26, 73.) Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

(*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

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[19] During cross-examination, Mr. Monahan said that when he was taping there was no light turned on from Ms. Brown's residence and the light inside the victims' residence was not turned on. (21 RT 3232-3233.) He said there were no lights from the inside or outside the residence of Mr. Gonzalez, another neighbor. (21 RT 3233.) Monahan did not notice if there were any lights on at Rochelle Timmons's home and did not know whether the foliage was the same as the morning of the murders. (21 RT 3234.) Mr. Monahan did not know the extent of cloud cover, of lighting from nearby Cajilco Expressway, the condition of the moon or the condition of the stars. (21 RT 3235-3236.) He used a small Panasonic camcorder. He did not know what lens was used. (21 RT 3237.) He said the tapes reflected what he saw with the naked eye -- it went from dark to light as it got later in the morning. (21 RT 3241-3242.) James Hearn was with Mr. Monahan during the filming and testified in less detail but consistently with Mr. Monahan's testimony. (21 RT 3243-3259.)

The determination as to whether to admit a videotape requires a trial court to assess whether: "(1) the videotape is a reasonable representation of that which it is alleged to portray; and (2) the use of the videotape would assist the jurors in their determination of the facts of the case or serve to mislead them." (*People v. Gonzalez* (2006) 32 Cal.4th 932, 952, citing, *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1114.)

In *Gonzalez*, *supra*, like in the present case, the defendant offered into evidence a videotape to show the lighting conditions existing at the time of the crime. A defense expert testified that "the human eye is able to see things in the dark better than a video camera." (*People v. Gonzalez*, *supra*, 32 Cal.4th at p. 952.) There was also evidence that the lighting at the time of the videotape was different than the lighting at the time of the crime. The trial court determined that the differences prevented the defense from being able to lay a sufficient foundation for the admission of the videotape.

> "Based on the testimony and the perceived differences, as well as the inability of the camera to recreate accurately the ability of the human eye under the same or similar circumstances, that this videotape will mislead the jury, and I am going to find that [the] foundation has not been sufficiently made and order it to be excluded."

(*Ibid.*)

This Court held that the trial court's conclusion, that the lighting conditions at the time of the crimes were not sufficiently similar to the

lighting conditions on the videotape, was reasonable and the videotape was properly excluded because it did not accurately show the lighting at the scene at the time of the crime. (*People v. Gonzalez*, *supra*, 38 Cal.4th at pp. 952-953.)

In *People v. Boyd* (1990) 222 Cal.App.3d 541, a case cited by this Court in *Gonzalez*, the defendants sought to admit into evidence a film which purportedly recreated the lighting conditions at the crime scene, for the purpose of showing that a witness could not have observed events clearly enough to identify the perpetrators. A defense expert testified that he had followed the manufacturer's recommendations as to film speed and type of film and had positioned the camera where the witness stood at approximately the same time of night. The trial court excluded the film, stating that the court thought the human eye could see more than the film showed, "and that no witness testified that the film was an accurate representation of the lighting conditions on the night of the crime." (*Id.* at p. 565.)

The Court of Appeal, after recognizing the wide discretion given to trial courts to admit or exclude such evidence under Evidence Code section 352, held that because the defense witness could not reproduce conditions existing on the night of the crime in terms of moon angle, other sources of light and shadows from existing foliage, the trial court was reasonable in

concluding that the lighting conditions portrayed on the film were not sufficiently similar to the lighting conditions at the time of the crime to warrant admission of the film. (*Id.* at p. 566.)

The reasoning in *Gonzalez* and *Boyd* are applicable to the present case. The defense was unable to establish that the lighting conditions portrayed in the video were sufficiently similar to the lighting conditions at the time of Dorell Arroyo's observations to justify the admission of the videotape. In fact, the defense conceded that the lighting conditions portrayed in the videotape were not the same as those on the morning of the murders and instead claimed that the videotape was offered only to replicate the "natural" lighting conditions, the light available with the sun as its source. (21 RT 3208.) When the trial court asked defense counsel whether the relevancy of the videotape was to determine what Dorell Arroyo could see, defense counsel said "no." (21 RT 3208.) The defense argued that the videotape was not offered to show what artificial light was available to aid Arroyo's observations, but that the video was offered to impeach Arroyo's testimony that he could see Jones on the morning of December 13, 1993, because of the natural light available. [20] (21 RT 3209-

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[20]Arroyo testified on cross-examination as follows: "Q: Okay. Now, when you talked about this lighting being good, could you give us a description of what you meant by that?
A: It was just that it just you know, just the crack of morning. It was just morning time. The sun ain't up, but its clear enough so that you can see.
(continued...)

3210.) The prosecutor pointed out that several witness including Arroyo testified that there were lights illuminating the area, including a car's lights, lights from the victim's home and lights from other nearby residences. (21 RT 3211.) The court asked a crucial question to the defense, a question that illustrates why the videotape was inadmissible, "The difficulty I have with that is: How does one determine, articulate or not, what is the source of the light? I mean, all they know is they can see." (21 RT 3218, 3222.) The court also pointed out that in the videotape a voice indicated they could see a person coming, where nothing was visible on the video, indicating that the video did not accurately portray what the human eye could see during the videotaping. (21 RT 3227-3228.)

In describing the conditions existing at the times he videotaped the scene, Mr. Monahan testified that the light from Beth Hunicutt's house was off, the light from inside the victims' home was off, that he did not notice whether other houses in the neighborhood had lights on, he did not notice whether lights were on at Cajilco Expressway, he could not recall the cloud cover or whether there was a full moon and he did not note the condition of the foliage in the area. (21 RT 3232-3236.) Mr. Monahan was also unfamiliar with the video camera he used, and did not know anything about

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(...continued)
and everything. You know." (14 RT 2290.)

the lens or film he used and whether they were appropriate for the lighting conditions. (21 RT 3237-3240.)

Not only did the defense fail to demonstrate that the lighting conditions on the tapes were similar to the lighting conditions on the morning of the murders, the evidence was that the lighting conditions described by Mr. Monahan at the time of his taping were significantly different than the lighting conditions at the time Dorell Arroyo made his observations. Beth Hunicutt testified that the inside lights at the Florvilles' home were on when she entered the home and discovered the bodies. (12 RT 1975.) Ms. Hunicutt also testified the lights at the Florvilles' were on when she walked her husband out at 4:00 a.m. on the morning of the murders. (12 RT 2002-2003.) Dorell Arroyo testified that the light was on in the victims' residence when he made the observations. (14 RT 2239.) Arroyo also testified there was a motion detector light on from Beth Brown's porch. (14 RT 2239-2241, 2295-2296.) The porch light at Rochelle Timmons's was also turned on the morning of the murders. (20 RT 3171.)

Based upon the evidence presented, the trial court properly excluded the tapes under Evidence Code section 352, finding the tapes did not accurately depict the lighting conditions at the time Dorell Arroyo made his observations and that the lighting conditions depicted on the tapes would be

unduly prejudicial in that they misrepresented what could actua lly be seen on the morning of the murders. The court decided the admission of the tapes would be "terribly inappropriate." (21 RT 3263.) The trial court's determination was not arbitrary or capricious and therefore the trial court's determination that the videotapes were inadmissible must be upheld. (*People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1124-1125.)

The trial court properly denied Jones's request for a jury view of the scene.

During the defense case, on April 16, 1996, the defense filed a written request to allow the jury to visit the scene for the purpose of assessing Dorell Arroyo's credibility regarding the observations he made of Jones entering and exiting the victims' home on the early morning of the murders. (2 CT 428-432.) On April 17, 1996, the court held a hearing on the request. The defense argued that the aerial photographs admitted by the prosecution did not "do the scene justice," and that the photographs taken of the scene were taken after the road was paved, therefore they were not representative of the scene on December 13, 1993. The defense argued it was critical for the jury to view the scene to see the residence of the victims from the perspective that Dorell Arroyo saw it, in order to properly judge the distances involved. (23 RT 3577.) The prosecutor objected to the request, arguing that the photographs and descriptions by the witnesses were sufficient and that the scene had changed substantially since the

morning of the murders.[21] (*Ibid.*) The defense suggested that if the court was inclined to deny the motion for a jury view, the defense be allowed to call Janet Whitford, a technician who measured the scene.[22] (23 CT 3578.)

The trial court recognized that there had been a number of photographs admitted showing the scene on the day of the murders, and aerial photographs which gave some perspective of distance. These photographs, along with the several descriptions of the scene given by the witnesses, made a jury view of the scene unnecessary in order to give the jury a perspective as to what a persons was able to see on the morning of the murders. Thus, the trial court denied Jones's request. (23 RT 3579.)

California Penal Code section 1119 provides:

> When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, or any personal property which has been referred to in the evidence and cannot conveniently be brought into the courtroom, it may order the jury to be conducted in a body, in the custody of the sheriff or marshal, as the case may be, to the place, or to the property, which must be shown to them by a person appointed by the court

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[21] The prosecutor also mentioned the security issues involved in a jury view, to which the defense responded that Jones would waive his right to be present for the jury view. (23 RT 3578.)

[22] The defense subsequently called Janet Whitford, a Forensic Pathologist for Riverside County, who prepared a diagram of the scene on December 13, 1993. (Exhibit RRRR.) Ms. Whitford testified to the distances from various points to other points at the scene. (24 RT 3658-3668.)

for that purpose; and the officer must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself or herself, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

The standard of review for a trial court's decision to grant or deny a request for a jury view is abuse of discretion. (*People v. Kraft*, *supra*, 23 Cal. 4th at p. 1053; *People v. Price* (1991) 1 Cal. 4th 324, 422; *People v. Howard* (1915) 28 Cal. App. 180, 181 ["It thus appears that the making of such order is a matter committed solely to the discretion of the court, and it is difficult to conceive of a case in which the facts would justify a reversal for an abuse of such discretion."].)

In *Price*, similar to the present case, the defendant requested the jury be allowed to view the scene where a prosecution witness had identified the defendant having contacts with the victim. The prosecution witness, who lived across the street from the victim's residence, testified that during the two weeks before the killing, she saw a brown car parked nearby on about five occasions, and twice saw the victim enter her apartment with a man she identified as the defendant. The witness made all these observations between midnight and 2:00 a.m. from the street as she was walking to her residence and from a window of her residence. The defense requested a jury view of the scene between the hours of midnight and 1:00 a.m. The trial court denied the request, concluding there was "insufficient evidence

of the conditions under which [the witness] made the observations and of any changes that may have occurred since that time." (*People v. Price*, *supra*, 1 Cal.4th at p. 421.) The defendant claimed the denial of the jury view request was an abuse of discretion and that it violated his Fifth, Sixth, and Fourteenth Amendment rights to a fair trial, to present a defense, and to meaningfully confront the witnesses against him. (*Ibid.*)

> "When the purpose of the view is to test the veracity of a witness's testimony about observations the witness made, the trial court may properly consider whether the conditions for the jury view will be substantially the same as those under which the witness made the observations, whether there are other means of testing the veracity of the witness's testimony, and practical difficulties in conducting a jury view. [Citation] (*People v. Mooring* (1982) 129 Cal.App.3d 453, 460.)

(*Id.* at pp. 421-422.)

This Court held that the trial court's denial of the request was within its discretion because the witness described the lighting conditions only in general terms, she was not asked about subsequent changes to the scene from the time of her observations, and the defense could challenge her testimony by other means. This Court also recognized that the trial court could have properly considered the inconvenience of conducting a jury view at the time requested by the defense. (*Ibid.*)

In *Kraft*, *supra*, the defendant requested the trial court to transport the jury to the remote mountain area where the body of a victim was found

so that the jury would appreciate "both the difficulty of defendant's disposing of the body in that location and the dissimilarity of the method of the Hall murder to others with which defendant was charged." The trial court denied the request, concluding that the testimony of witnesses, and the admission of photographs and a map were sufficient to allow the jury to make the appropriate factual determinations. On appeal, the defendant claimed the denial of the request for the jury view deprived him of his constitutional right to present a defense and undermined the reliability of the judgment of death. (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1053.)

This Court found no error in the trial court's ruling, concluding that the photographs admitted into evidence and the testimony of witnesses were sufficient to allow the jury to understand the nature of the terrain and to draw inferences regarding the relevant issues. This Court held that the defendant was not denied the right to present a defense nor did the trial court's ruling undermine the reliability of the death judgment under the Eighth and Fourteenth Amendments. (*Ibid.*)

In *People v. Lawley*, *supra*, 27 Cal.4th 102, the defendant claimed the trial court's denial of a defense request for a jury view constituted a miscarriage of justice, denial of due process and an unreliable verdict. A witness testified that while inside a cabin he saw the defendant and two others "enter the cabin's bathroom and, through its partly open door, saw a

gun change hands." (*Id.* at p. 157.) At trial, the defense requested the jury view the interior of the cabin to determine whether the witness "could have seen into the bathroom from where he was sitting." (*Ibid.*) The trial court denied the request, finding the jury had adequate information from the photographs and diagram admitted into evidence. This Court held that the trial court's decision was not absurd or irrational in light of the other sources of testing the witnesses' credibility regarding the observations he made. (*Id.* at pp. 158-159.)

People v. O'Brien (1976) 61 Cal. App.3d 766, cited by Jones, does nothing to support his position. In *O'Brien*, the trial court allowed the jury to view the scene after recognizing that the videotape of the scene and the photographs of the scene, both admitted into evidence, appeared to be very different. The Court of Appeal found the trial court did not abuse its discretion under Penal Code section 1119. (*Id.* at p. 780.) *O'Brien* merely demonstrates the unremarkable conclusion that the trial court enjoys wide discretion in this type of decision.

The trial court's conclusion that the jury should not be taken to the scene where the observations of Jones were made by Dorell Arroyo was not an abuse of discretion. It was clear that the defense could not duplicate the scene at the time of trial that existed at the time Arroyo made his observations. There were photographs and a diagram as well as the

testimony of witnesses to describe the scene in question. The defense also presented a witness that gave exact measurements of the distance between the victims' home and where Dorell Arroyo made his observations. Under these circumstances, the trial court's denial of the defense request for the jury to visit the scene was not absurd or irrational and therefore was not an abuse of discretion. (*People v. Price*, *supra*, 1 Cal.4th at p. 421; *Lawley*, 27 Cal.4th at pp. 158-159.) For the same reasons, Jones was not denied the right to present a defense nor did the trial court's ruling undermine the reliability of the death judgment under the Eighth and Fourteenth Amendments. (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1053.)

IV. ADMISSION OF EVIDENCE OF ALON JOHNSON'S ATTEMPT TO STEAL LATEX GLOVES WAS WELL WITHIN THE TRIAL COURT'S DISCRETION

Jones claims that the testimony of Kimberly Stoddard-Brown, a teacher at Val Verde Career Center, regarding her observations of Alon Johnson attempting to steal latex gloves from the school in the month before the murders, should not have been admitted at trial. He claims the evidence was irrelevant and that its introduction at trial deprived him of a fair trial and deprived him of his Eighth Amendment right to a reliable guilt and penalty determination in a capital case. (AOB 118-123.)

The trial court properly admitted the evidence that Alon Johnson, Jones's partner in the commission of the murders, attempted to steal latex

gloves from his school in the month before the murders because it was established in numerous ways that the murderers used latex gloves to commit the murders. The trial court held a hearing and heard testimony regarding the latex glove theft incident by Johnson. It limited the evidence that was admitted regarding Johnson's attempted theft of the gloves and properly found the evidence of the attempted theft of the gloves was relevant to show Johnson had access to latex gloves and attempted to acquire the gloves in the month before the murders. The admission of the evidence neither deprived Jones of a fair trial nor made the jury's guilt and penalty determinations unreliable. Any error in admitting the evidence did not prejudice Jones.

Proceedings below.

The defense moved to exclude any evidence regarding an incident at Val Verde Career Center where Alon Johnson was seen taking latex gloves from a classroom. (15 RT 2544-2545, 2549-2550.) The prosecutor argued the evidence was relevant to show Alon Johnson had an interest in and access to latex gloves prior to the murder. (15 RT 2553.) The defense argued that there was no evidence that Alon Johnson ever took the gloves from the school and no evidence that the gloves he attempted to steal were the same gloves used in the murders. (15 RT 2557-2558.) The trial court initially believed the evidence of Alon Johnson trying to steal the gloves

was too speculative but agreed to hear the testimony of the teacher regarding the incident before making a final determination. (15 RT 2558, 2563, 2565-2566.) Kimberly Stoddard-Brown testified outside the presence of the jury that she was a teacher at Val Verde Career Center, where Alon Johnson went to school. One day, between first and second period, Ms. Brown saw Johnson go into the childcare room instead of to her math classroom, where he was supposed to go. She saw Johnson leaving the childcare room stuffing a handful of latex gloves into his pocket. She told Johnson to return the latex gloves into the childcare room. She watched as he took the gloves back to where he had taken them but could not tell if he returned all of the gloves he had taken. A week or two later, all the latex gloves were taken from the childcare room and never returned. (16 RT 2572-2574.)

After Ms. Brown's testimony, the trial court ruled that evidence of Johnson attempting to take the gloves was admissible but that Ms. Brown could not testify that gloves were subsequently stolen from the childcare room. (16 RT 2589-2590.)

Ms. Brown testified at trial that she taught at Val Verde Career Center in Perris. Alon Johnson attended the school. At the school there was a childcare classroom that had changing tables with latex gloves to be used when changing the babies' diapers. In November 1993, between first

and second period, she saw Alon Johnson in the hallway. Johnson was supposed to be going to Ms. Brown's math class, but instead went into the childcare classroom. Ms. Brown saw Johnson leave the classroom with a handful of latex gloves which he was stuffing into his pocket. She walked over to Johnson, told him to return the gloves to the childcare classroom and watched as he returned the gloves to the childcare classroom. (16 RT 2592-2594.)

Jack Purnell testified that the day before the murders, Jones told Johnson and Purnell that they would need gloves to commit the robbery so they would not leave fingerprints. (15 RT 2436-2437.) Debbie Russell testified that after the murders, after being told that Mary Holmes found the bloody glove, Jones asked Johnson what Johnson had done with his gloves and told Holmes she had done a good job flushing the glove she found. (13 RT 2127-2129.)

In argument to the jury the prosecutor said,

> I'm going to spend a little bit of time talking about these latex gloves. It was the plan to use latex gloves. Use gloves was the plan we know about. We know that Alon Johnson was interested in latex gloves because at school he went in and made a grab, the teacher told him to put them back. And she thought he put them back. We know he was interested in latex gloves. We know that Mary Holmes found a latex glove. We know that Dorell saw this motion (indicating) on Albert Jones. We know that latex gloves were used.

(27 RT 4151-4152.)

The prosecutor went on to discuss the gloves found at Jones's residence, in the yard near the fence and in the back of the truck. The prosecutor also pointed out that they did not know whether the gloves were the same or whether the gloves at Jones's residence were the same type of gloves that were found in the septic tank or in the victims' home. "So the best we can say is they had gloves. They had an interest in gloves, had access to gloves."

(27 RT 4152.)

In rebuttal, the prosecutor spoke briefly about gloves, in the context that the testimony regarding gloves by Debbie Russell, Mary Holmes, Dorell Arroyo and Jack Purnell, none of which were privy to information regarding the crime scene, were corroborated by the physical evidence. The prosecutor said, "Now, the teacher– obviously, the teacher is in this conspiracy too, because the teacher comes in and says, 'You know, I saw Alon. He is in there grabbing some gloves. And I told him to put them back. Loose gloves.'" (28 RT 4299-4300.) The prosecutor pointed out that the evidence showed Jones and Alon Johnson had access to gloves. (28 RT 4300-4301.)

The trial court did not abuse its discretion in allowing admission of the evidence regarding the gloves.

No evidence is admissible except relevant evidence. (Evid. Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) It has been said that "the test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive." [Citations.] (*People v. Garceau* (1993) 6 Cal.4th 140, 177.)

A trial court's ruling in admitting or excluding evidence is reviewed for abuse of discretion. (*People v. Alvarez, supra*, 14 Cal.4th at p. 201.) Abuse of discretion may be found if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner, but reversal of the ensuing judgment is appropriate only if the error has resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Jones* (1998) 17 Cal.4th 279, 304; *People v. Coddington, supra*, at p. 587-588.)

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. (*People v. Dyer, supra*, at p. 73.)" (*People v. Rodrigues, supra*, 8

Cal.4th at p. 1124.) The exercise of discretion by a trial court in determining the admissibility of evidence under Evidence Code section 352 is similarly not grounds for reversal unless the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*Id.* at pp. 1124-1125.)

"The prejudice [that section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*People v. Zapien* (1993) 4 Cal.4th 929, 958, quoting *People v. Karis* (1988) 46 Cal.3d 612, 638.) "Prejudicial" in this context is "'evidence that uniquely tends to evoke an emotional bias against a party as an individual,' and has only slight probative value." (*People v. Carey* (2007) 41 Cal.4th 109, 128, quoting *People v. Crittenden* (1994) 9 Cal.4th 83, 134.)

Extensive evidence was presented by the prosecution that the murders were committed by persons using latex gloves and that Jones and Alon Johnson committed the murders. No fingerprints were found at the victims' residence. (16 RT 2662-2665.) At the crime scene, a sliver of a latex glove was found in front of the sliding door that was used as an entryway. (13 RT 2076-2077.) The male victim, Mr. Florville was "hog tied" with wire and a piece of a latex glove was found in the knot of the wire. (13 RT 2088.) Mary Holmes testified that on the morning of the

murders, on her way to the bus stop, she found a bloody latex glove outside Rochelle Timmons's house. Ms. Holmes flushed the glove down the toilet at Rochelle Timmons's house. (18 RT 2900-2903.) Subsequently Mary Holmes had a conversation with Jones, Johnson and Debbie Russell in which Russell told Jones that Holmes had found a bloody glove and had flushed it down the toilet. Jones responded by telling Holmes, "Good job." (18 RT 2905-2906.) Holmes's testimony was corroborated by Debbie Russell, who confirmed the conversation between Russell, Holmes, Johnson and Jones. (13 RT 2127-2129.) The septic tank at Rochelle Timmons's house was pumped out by police and a latex glove was found in it. (17 RT 2773-2776.) Russell also testified that during the conversation Jones asked Johnson what he had done with his gloves and Johnson said he threw the gloves in the back of the car. (13 RT 2128-2129.)

Dorell Arroyo testified that after Jones and Alon Johnson left the victims' residence on the morning of the murders, as Jones was walking to his car, Jones was making a motion with his hands like he was scratching or rubbing his hands. He demonstrated the motion to the jury. (14 RT 2247.) Arroyo demonstrated the same motion during his interview with Detective Spidle when he described what Jones did as he left the residence. This interview was before any information regarding the use of gloves by the killers was released. (22 RT 3380.) Jack Purnell testified that on the day

before the murders, Jones talked about robbing the victims and mentioned using gloves so they would not leave fingerprints. (15 RT 2436-2437.)

During a search of Jones's residence on December 14, 1993, police found a latex glove at the bottom of the east fence in the yard and found two latex gloves in a trash bag in the back of a yellow Chevy pickup truck.[23] (16 RT 2607-2610.)

The relevance of Jones's or Alon Johnson's access to or interest in latex gloves was thus established. The fact that a month before the murders one of the murderers sought out and attempted to steal latex gloves was relevant to both their intent and their identity in the murders, whether or not the prosecution could prove Johnson actually retained some of the gloves he attempted to steal from the school or whether there was proof that the gloves from the school were the same as those used in the murders. The standard or relevance required for the admission of evidence is not that of proof beyond a reasonable doubt. The jury could have concluded that a month before the murders Alon Johnson was interested in obtaining latex

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[23] Paul Sham, a criminalist with the California Department of Justice examined the pieces of latex found at the crime scene, the latex gloves found at Jones's residence and the latex glove found in the septic tank. Mr. Sham described the range of thickness of each sample of latex, the size of the gloves and general color and texture but could not determine whether the samples matched each other. (19 RT 3113-3130.)

gloves as part of a plan to rob and burglarize the victims in this case or in preparation for any similar crime. This interest in obtaining latex gloves became highly relevant in light of the evidence that Jones and Johnson planned to use gloves in the robbery of the victims and that the murderers did use gloves in the robbery and murders of the victims. In short, the prosecution's inferences regarding Alon Johnson's interest in and attempt to obtain the latex gloves had a basis in the evidence, and were not based on mere suspicion, imagination, speculation, surmise, conjecture, or guesswork. (*People v. Morris* (1988) 46 Cal.3d 1, 21.)

In *People v. Thomas* (1992) 2 Cal.4th 489, the defendant claimed the trial court erred in admitting testimony that he liked to play a game he called "stalk," where he would sneak up on people and then sneak away without the person knowing of his presence. This Court held that the trial court was within its discretion in admitting the evidence which would be relevant under circumstances where the murder was committed in a darkened area and it was unclear how the contact between the killer and victim came about. This Court emphasized that the concept of relevancy should not be narrowly viewed. (*Id.* at pp. 519-520.)

Given this broad definition of relevance, and the wide discretion afforded a trial court in determining the admission of evidence, the trial court was well within its discretion in admitting the evidence that Alon

Johnson attempted to steal latex gloves a month before the murders. (See *People v. Lewis* (2001) 25 Cal.4th 610, 639-640 [trial court's ruling that question asked by prosecutor regarding the defendant previously practicing with Buck knives was relevant and not abuse of discretion where no evidence the murder weapon was a Buck knife]; *People v. Coddington*, *supra*, 23 Cal.4th at pp. 585-588 [admission of evidence that defendant had previously expressed an interest in the use of nylon ties as a method of killing proper where the victims were murdered using a similar method].)

Even if the admission of the evidence was erroneous, Jones was not prejudiced.

Even if this Court determines the admission of the evidence that Alon Johnson attempted to steal latex gloves from his school a month before the murders was erroneous, it is not reasonably probable, in light of the other evidence presented, that a result more favorable to defendant would have been reached had the evidence been excluded. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Alcala*, *supra*, 4 Cal.4th at pp. 797-798.)

The evidence admitted regarding Alon Johnson's attempt to steal latex gloves could not have prejudiced Jones even if it was erroneously admitted. The evidence was brief, was presented through one witness and was related to Alon Johnson, rather than Jones. The evidence showed Alon

Johnson attempted to steal the gloves, not that he actually was able to retain any gloves and there was no evidence that the gloves from the school were the same gloves used in the murders. Even without the admission of such evidence, the jury could have determined that Jones and Johnson could have obtained latex gloves in any variety of ways, including purchasing them in many stores. More importantly, the testimony of the witnesses, including an eyewitness to Jones and Johnson entering and leaving the victims' home at the time of the murders, and highly inculpatory statements attributed to Jones both before and after the murders supplied the basis for the jury's verdicts. It is not reasonably probable, in light of all this evidence, that Jones would have obtained a more favorable verdict absent the admission of the disputed evidence.

Even if erroneous, the admission of the evidence did not implicate Jones's constitutional rights.

Jones claims the trial court's application of the ordinary rules of evidence was so prejudicial that it violated his federal constitutional right to a fair trial and deprived him of his Eighth Amendment right to a reliable guilt and penalty determination. (AOB 122-123.)

However, "application of the ordinary rules of evidence . . . do not impermissibly infringe on a defendant's right to present a defense." (*People v. Mincey* (1992) 2 Cal.4th 408, 440; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1229.) Generally, application of these rules, which

permit a trial court to exercise its traditional discretion to control the admission of evidence in the interests of orderly procedure and avoidance of prejudice, does not implicate the federal Constitution. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611, citing *People v. Hall* (1986) 41 Cal.3d 826, 834-835.)

> And we also bear in mind our previous admonition that we "have defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling v. United States* (1990) 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708. "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Ibid.*

(*Estelle v. McGuire*, *supra*, 502 U.S. at pp. 72-73.)

Thus, Jones's constitutional arguments "are without merit for the same reasons that [his] state law claims" are without merit. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1229.)

Jones cites *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 886-888 and *McKinney v. Rees*, *supra*, for the proposition that the exercise of discretion by a trial court in admitting evidence can result in the deprivation of a defendant's federal constitutional right to a fair trial. (AOB 122.) In *Alcala*, the 9th Circuit Court of Appeals found that the admission at trial of two knife sets found in the defendant's residence, the same brand as the murder weapon though the murder weapon was not part of either set, was

erroneous.[24] And although the 9th Circuit stated that the admission of the knife sets was constitutional error, the court assessed the error along with several other errors including the erroneous exclusion of defense evidence and multiple findings of ineffective assistance of counsel to find the cumulative errors undermined the confidence in the verdict and required reversal of the judgment. (*Alcala v. Woodford*, *supra*, 334 F.3d at pp. 894-895.)

In *McKinney v. Rees*, the 9th Circuit concluded that the admission of evidence that the defendant, charged with stabbing his mother to death, had previously possessed a knife (that was not the murder weapon) and had previously dressed in camouflage pants and carved into his closet door "Death is His," was absolutely irrelevant to the issues in the case and therefore erroneously admitted at trial. The 9th Circuit found that because of the lack of significant evidence against the defendant and the "pervasiveness of the erroneously admitted evidence throughout the trial," the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" (*McKinney v. Rees*, *supra*, 993 F.2d at pp. 1383-1386.)

The evidence of Jones's guilt was proven through an eyewitness,

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[24] This Court addressed the same issue in *People v. Alcala*, *supra*, and reached the opposite conclusion, holding that the trial court was within its discretion in admitting the knife sets. (*People v. Alcala*, *supra*, 4 Cal.4th at p. 797.)

Dorell Arroyo, through the statements Jones made both before and after the murders and through physical and circumstantial evidence. The evidence of Alon Johnson's attempted theft of the gloves was merely a minor piece of the puzzle and paled in significance to the other evidence presented. Even if erroneous, the admission of this evidence did not violate Jones's right to a fair trial.

V. EVIDENCE OF THE DELANO ROBBERY COMMITTED BY JONES WAS PROPERLY ADMITTED UNDER PENAL CODE SECTION 190.3 SUBDIVISION (B) IN THE PENALTY PHASE OF THE TRIAL

Jones claims the trial court erred by admitting evidence during the penalty phase that he committed the robbery of a grocery store in Delano, California, in 1992 ("Delano" robbery). Jones argues that the evidence that he committed the Delano robbery was insufficient to show his guilt for the crime of robbery, therefore the evidence was improperly admitted during the penalty phase. He claims the trial court erred by refusing to conduct an evidentiary hearing on the admissibility of the evidence. Jones concludes that the admission of the evidence therefore violated his right to due process and to a reliable penalty verdict such that the death judgment must be reversed. (AOB 124-139.)

The evidence of the Delano robbery was properly admitted during the penalty phase under Penal Code section 190.3, subdivision (b), as a

previous crime of violence committed by Jones. He was identified as participating in the robbery by one witness and also through circumstantial evidence. The trial court was not required to conduct an evidentiary hearing on the admissibility of the evidence. Finally, even if the evidence of the Delano robbery was erroneously admitted, in light of the brutality of the murders Jones committed, the instruction that the jury not consider the evidence unless it was convinced beyond a reasonable doubt Jones committed the robbery, and the other evidence of crimes committed by Jones, he suffered no prejudice from the admission of the evidence.

Proceedings below.

On May 3, 1996, the defense filed a Request for a Foundational Hearing Pursuant to *People v. Phillips* (1985) 41 Cal.3d 29 and Opposition to Introduction of Evidence in Aggravation. The defense requested an evidentiary hearing to determine whether there was sufficient evidence that Jones was involved in the July 21, 1992 Delano robbery. (2 CT 455-462.) The prosecution filed an opposition to the request. The prosecution maintained that an offer of proof regarding the evidence was sufficient and no evidentiary hearing on the admission of the evidence was necessary. (2 CT 485-486.)

At the hearing on the defense request, the defense argued that the evidence of the Delano robbery was inadmissible because Jones pled guilty only to a misdemeanor charge of possession of stolen property and because the evidence of the identification of Jones as participating in the robbery was weak. (29 RT 4415-4417.) The prosecutor argued that evidence of Jones's participation in the robbery was sufficient to present to the jury in the penalty phase. (29 RT 4417-4420.) The trial court ruled that although a hearing on the admissibility of the evidence of the Delano robbery was required, that the hearing could be conducted without the presentation of live testimony, and based upon the offer of proof by the prosecution, the evidence was admissible. The court also ruled that a limiting instruction should be given to the jury regarding the evidence. (29 RT 4447-4450.)

The Delano robbery evidence.

On July 21, 1992, Kyong Hui Yang was working the cash register at the Delano Fairway Market. Around 8:30 a.m., a Black male, age 29 to 30 came into the store, pointed a gun at her head and told her to open the cash register. The man told the customers to lie down on their stomachs. The man took the cash from the cash register, Yang's purse, a lighter and a carton of Newport 100's. As he left the store, he said that if anyone came out he would kill them. (30 RT 4616-4618.) Another Black male entered the store with the man with the gun, went to the butcher area of the store

and hit a store employee, Jose Plancarte, with the gun. The man hit Plancarte with the gun, took him toward the bathroom, locked him into the bathroom and told him if he came out he would kill him. (30 RT 4618-4619, 4637-4641.) When the men left the store they went in the direction of Garces Highway. (30 RT 4626.) The parties stipulated that the person that robbed Ms. Yang was not Jones. (30 RT 4626-4627.)

Maria Gamez was in the store that morning to buy groceries and cash her check. As she was waiting in front, the cashier told her to call the police. She saw a Black male in the back of the store pointing a gun at the head of an employee. She turned toward the cashier and saw another man pointing a pistol at the cashier, telling the customers to lie down. Ms. Gamez slowly walked toward the door, left the store, ran to her house and called the police. (30 RT 4645-4646.)

Ms. Yang was unable to identify either of the men at either a photo lineup or live lineup. (30 RT 4620.) The police showed Ms. Gamez a group of photos and she picked Jones's photo as one of the robbers. She said she was only 50 percent sure of the identification. In court, she identified Jones as one of the men that robbed the store. (30 RT 4646-4648, 4650, 4663.)

The police received a 911 call from Daryl Lucas reporting that the robbers of the Fairway Market had run into his apartment at 302 Garces Highway. The officers arrived at Mr. Lucas's apartment five minutes later. Kern County SWAT was called to the scene, eventually entered the apartment and took two Black males into custody. Inside the apartment they found 21 Bic lighters, a carton of Newport 100 cigarettes, a BB gun, and a purse containing identification and a phone belonging to Ms. Yang. (30 RT 4597-4602, 4608-4611, 4655-4659.)

Jones was one of the two persons arrested at the apartment. He gave the name John Paul Jones. (30 RT 4632, 4659-4662.)

The evidence was admissible under Penal Code section 190.3, subdivision (b).

Penal Code section 190.3, subdivision (b), allows a capital jury in the penalty phase to consider the presence or absence of other criminal activity by the defendant involving "the use or attempted use of force or violence." The violent activity is conduct other than that committed during the capital crime. (Penal Code section 190.3, subdivision (b); *People v. Balderas* (1985) 41 Cal.3d 144, 200-201.) Evidence of other violent conduct by the defendant is admissible regardless of whether the conduct resulted in criminal charges or convictions and excludes conduct for which the defendant was acquitted. (*People v. Hart* (1999) 20 Cal.4th 546, 648-

649.); *Balderas*, *supra*, at pp. 201-202.) The evidence of violent conduct must constitute an actual crime and the court must instruct the jury that it may not consider the other violent conduct in aggravation of the sentence unless they are satisfied beyond a reasonable doubt that the defendant committed the conduct. (*People v. Anderson* (2001) 25 Cal.4th 543, 584; *People v. Clair* (1992) 2 Cal.4th 629, 672-673; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1052.)

A determination of whether to admit evidence in the penalty phase pursuant to Penal Code section 190.3, subdivision (b), is subject to review for abuse of discretion. (*People v. Clair*, *supra*, 2 Cal.4th at p. 676; *People v. Box* (2000) 23 Cal.4th 1153, 1201.)

The trial court did not err in failing to hold an evidentiary hearing.

In *People v. Phillips* (1985) 41 Cal.3d 29, a capital murder trial, during the penalty phase the prosecution admitted evidence of other acts by the defendant pursuant to Penal Code section 190.3, subdivision (b). Specifically, that the defendant had discussed numerous plans he had to commit various crimes including murder, a plan to burglarize a supply shop and kill the security guard, a request of another man to kill four witnesses including the defendant's mother and a plan to offer stolen property as collateral for a loan and then kill the persons who gave him the loan. (*Id.* at pp. 65-66.)

On appeal, it was determined that the trial court erred in the penalty phase by failing to instruct the jury that they could consider evidence of other criminal activity under Penal Code section 190.3, subdivision (b), only if they concluded beyond a reasonable doubt that the defendant had engaged in the criminal activity. (*Id.* at p. 65.) The court also found that the trial court committed error by failing to require that the evidence presented by the prosecution pursuant to Penal Code section 190.3, subdivision (b), "be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute." (*Id.* at p. 72.)

In reference to the error by the trial court in admitting evidence that did not constitute an actual crime, this Court made an observation in a footnote:

> The problems revealed by the record in this case suggest that in many cases it may be advisable for the trial court to conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element of the other criminal activity. This determination, which can be routinely made based on the pretrial notice by the prosecution of the evidence it intends to introduce in aggravation (§ 190.3), should be made out of the presence and hearing of the jury. (Evid. Code, § 402.)

(*Id.* at p. 72, fn. 25.)

However, Jones has mischaracterized the footnote in *Phillips* as a requirement for a trial court to hold an evidentiary hearing outside the

presence of the jury before admitting evidence pursuant to Penal Code section 190.3, subdivision (b). This Court has made it clear that no such requirement exists. In *People v. Clair*, *supra*, the defendant also claimed that the trial court erred by ruling on the admissibility of other violent crime evidence based upon an offer of proof by the prosecutor rather than holding an evidentiary hearing. This Court held that *Phillips* does not require the trial court to conduct an evidentiary hearing under these circumstances:

> Defendant argues in addition that the trial court was required, under the plurality opinion in *Phillips*, to conduct a preliminary inquiry whether the People's evidence of the Owens burglary was substantial. (41 Cal.3d at p. 72, fn. 25 (plur. opn.).) Not so.
>
> *Phillips* did not impose such a requirement. (*People v. Jennings* (1991) 53 Cal.3d 334, 389.) The language in question states only that a preliminary inquiry may be advisable. (41 Cal.3d at p. 72, fn. 25, italics added (plur. opn.).) Further, *Phillips* could not impose any such requirement. The pertinent language did not command the support of a majority of the court, and was clearly dictum.

(*People v. Clair*, *supra*, 2 Cal.4th at pp. 677-678.)

In *Jennings*, a witness testified at the penalty phase that the defendant assaulted her with a butcher knife. The assault charges were dismissed when the defendant accepted a plea bargain and pleaded guilty to assaulting a different victim. The defendant claimed, as Jones does, that evidence of this incident should not have been admitted because the trial court failed to conduct a pretrial hearing to determine whether an assault actually occurred. This Court stated, "We did not [in *Phillips*], however,

require such a hearing nor predicate admission of such evidence on the holding of a hearing." (*People v. Jennings*, *supra*, 53 Cal.3d at p. 389.)

This Court in *Jennings* held that an evidentiary hearing is unnecessary under circumstances where the witnesses to the offense were subject to cross-examination during the penalty phase, the conduct had been charged in a prior criminal information, the witness to the crime testified in a preliminary hearing, and the defendant was held to answer for the assault crime. In addition, the jury was instructed at the penalty phase regarding the elements of the offense and was told it must unanimously agree that the elements of the assault offense were proved beyond a reasonable doubt. The *Jennings* court concluded that there was sufficient evidence to prove the elements of the assault, that a evidentiary hearing was not required, and that the trial court properly admitted the evidence in the penalty phase. (*Ibid.*)

Finally, in *People v. Daniels* (1991) 52 Cal.3d 815, this Court again stated that *Phillips* does not require such an inquiry but merely authorizes an evidentiary hearing. (*Id.* at p. 880; *People v. Hart*, *supra*, 20 Cal.4th at p. 649 [no error by the trial court in denying defendant's request to impanel an advisory jury or conduct an evidentiary hearing on the admissibility of evidence under Penal Code section 190.3, subdivision (b)].)

In the present case the prosecutor made an offer of proof regarding the evidence of the Delano robbery that would be admitted during the penalty phase. Jones had been charged with the robbery but was allowed to plead guilty to a lesser charge, receiving stolen property. (29 RT 4417-4420.) The evidence admitted regarding the Delano robbery showed that two Black males robbed the store, Jones was identified by a witness during a photo lineup after the robbery and again during her testimony at the penalty phase as being one of the robbers. (30 RT 4646, 4650.) Jones was also identified as being one of two Black males arrested in a residence where the robbers of the market fled and where items stolen in the robbery were found. (30 RT 4597-4602, 4608-4611, 4629-4632, 4659-4662.) This evidence was consistent with the prosecutor's offer of proof to the trial court. All the witnesses who testified at the penalty phase were subject to cross-examination and the jury was instructed that before other criminal act evidence could be considered as an aggravating factor the jury must be convinced beyond a reasonable doubt that Jones committed the criminal act. (3 CT 666; 33 RT 4990.) In light of this Court's decisions and all the circumstances present in this case, no evidentiary hearing regarding the Delano robbery evidence was required or appropriate. The trial court did not err in refusing Jones's request for an evidentiary hearing on this issue.

The evidence of the Delano robbery was properly admitted in the penalty phase.

This Court has held that where there is a dispute as to whether other violent crimes evidence is sufficient to prove beyond a reasonable doubt that a defendant in fact committed a crime of violence, the evidence is admissible and the issue is a jury question. In *People v. Valencia* (2008) 43 Cal.4th 268, during the penalty phase the prosecution admitted the preliminary hearing testimony of a victim that the defendant had robbed of his wallet using a baseball bat. (*Id.* at p. 291.) Also admitted was the testimony of a police officer who found the defendant and his cohort in the house with the victim, found a baseball bat in one of the rooms and took the victim's statement identifying the defendant as one of the men that robbed him. (*Ibid.*) After determining that the preliminary hearing testimony of the victim was properly admitted, this Court rejected the defendant's claim that the evidence of the robbery was too unreliable to be admitted at the penalty phase in light of evidence impeaching the victim.

> The trial court properly admitted the preliminary hearing testimony and the rest of the prosecution's evidence, and permitted defendant to present his impeaching evidence, and then let the jury decide whether the prosecution had proven this crime beyond a reasonable doubt so that it could consider it in aggravation. The reliability of this evidence "was a jury question, and went to the weight of the evidence, not its admissibility." (*People v. Anderson* (2001) 25 Cal.4th 543, 587.)"

(*Id.* at p. 295.)

In *Anderson*, the defendant complained that the evidence that he committed another murder should not have been introduced in the penalty phase under Penal Code section 190.3, subdivision (b), because the principal witness "was delusional and unstable" and therefore the evidence was "too unreliable to be admitted in light of its inflammatory nature." (*People v. Anderson*, *supra*, 25 Cal.4th at p. 587.) This Court held that once the trial court found the witness was qualified to testify, the prosecution was entitled to present the evidence under Penal Code section 190.3, subdivision (b), and the reliability of the testimony went to the weight rather than the admissibility of the evidence. (*Ibid.*)

Similarly in *People v. Hart*, *supra*, evidence of the murder of a child was admitted during the penalty phase under Penal Code section 190.3, subdivision (b), despite the defendant's claim that the evidence that he committed the murder was insufficient to present to the jury. This Court found no error, ruling that the evidence "was sufficient to allow a rational trier of fact to determine beyond a reasonable doubt that defendant murdered [the victim]." (*People v. Hart*, *supra*, 20 Cal.4th at p. 650.)

The evidence of Jones's participation in the Delano robbery was more than sufficient to allow the jury to determine whether they were convinced beyond a reasonable doubt that Jones committed the Delano robbery. Kyong Hui Yang, the cashier at Delano Market, testified that two

Black males entered the store. One of the robbers pointed a gun at her head and told her to open the cash register. That robber, not Jones, took the cash from the cash register, Yang's purse, a lighter and a carton of Newport 100's. The other robber went to the butcher area of the store and hit another employee, Jose Plancarte, with a handgun. Ms. Yang could not identify either of the robbers. (30 RT 4613-4620, 4625-4627.) Mr. Plancarte testified that he was working in the butcher area when two Black males walked in, one went to the cash register and the other came to the butcher area. The robber that came to the butcher area jumped the refrigerator, pointed a gun at him and hit him with the gun. (30 RT 4637-4641.) A customer, Maria Gamez, witnessed the robbery but was able to leave the store and call the police. She identified Jones's photo in a photo lineup as one of the robbers. During her testimony she identified Jones as one of the men that robbed the store. (30 RT 4644-4647, 4650, 4663.) After receiving information that the robbers had fled from the Delano Market and run into an apartment, the police eventually entered the apartment and took Jones and another Black male into custody. Inside the apartment they found items stolen in the robbery, including items belonging to Ms. Yang. (30 RT 4597-4601, 4608-4611, 4655-4659, 4662.) When he was arrested, Jones gave a false name. (30 RT 4662.)

This evidence was sufficient to allow the jury to determine whether the evidence proved Jones committed the Delano robbery beyond a reasonable doubt. If the jury came to that conclusion, only then could the jury use the evidence as an aggravating factor in determining Jones's sentence. (CALJIC 8.87; 3 CT 666; 33 RT 4990.)

Finally, Evidence Code section 352 is no aid to Jones's claim. A trial court has narrow discretion under Evidence Code section 352 to exclude such other violent crime evidence at the penalty phase. (*People v. Karis* (1988) 46 Cal.3d 612, 641–642, fn. 21.) Even where the other crimes evidence indicates a dispute as to whether the conduct by the defendant was deliberate or accidental, the prosecution is even entitled to present additional evidence of another incident to show the defendant's intent during that other crime. (*People v. Jablonski* (2006) 37 Cal.4th 774, 834-835.)

Penal Code section 190.3, subdivision (b), "expressly makes a capital defendant's other violent crimes admissible on the issue of penalty. Evidence Code section 352 therefore does not permit the trial court to exclude from a capital penalty trial all evidence of such a crime on grounds that the jury's consideration of the episode would be more prejudicial than probative." (*People v. Anderson*, *supra*, 25 Cal.4th at p. 586.)

Therefore, even if the trial court had determined that the probative value of the evidence of the Delano robbery was outweighed by the prejudicial effect, the evidence was properly admitted at the penalty phase.

Jones was not prejudiced by the admission of the evidence.

State law error regarding the admission of other violent crimes evidence during the penalty phase in a capital case is reviewed under the "reasonable possibility" standard. (*People v. Clair*, *supra*, 2 Cal.4th at p. 629, 678, fn. 11; *People v. Brown* (1988) 46 Cal.3d 432, 446.) Even where substantial evidence of other violent crimes is admitted, the focus of the penalty phase is the defendant and his capital crime and the evidence of other crimes is "of marginal significance to the picture presented of the murder and the murderer." (*Clair*, at pp. 678, fn. 11, 681.)

Where, as here, the jury is instructed not to consider the prior crimes evidence unless it found beyond a reasonable doubt that the defendant had committed the alleged offenses, absent evidence to the contrary, it is presumed the jury used the evidence appropriately. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1089; *People v. Cunningham* (2001) 25 Cal.4th 926, 1014.)

Where the jury is instructed not to consider other crimes evidence unless it found beyond a reasonable doubt that defendant had committed

the crime, the jury has already convicted the defendant of significant and multiple violent criminal acts, additional other violent crimes evidence is presented at the guilt phase, and the prosecution does not rely on the other crimes evidence in closing argument, there is no reasonable possibility that consideration of the erroneously admitted evidence could have improperly influenced the jury. (*People v. Jennings*, *supra*, 53 Cal.3d at p. 390.)

In the present case, Jones had already been convicted of the brutal stabbing murders of an elderly couple. Jones used a juvenile, Alon Johnson, to perpetrate the murders and robberies of the victims. At the penalty phase several family members testified regarding the impact of Jones murdering their loved ones, the Florvilles. (30 RT 4682-4690; 31 RT 4739-4743, 4744-4748, 4752-4754, 4755-4761.) Also during the penalty phase, other evidence of Jones's violent criminal acts was presented. Evidence was presented that in 1995 Jones engaged in the beating of his cellmate. (33 RT 4703-4720.) Evidence was presented that in December 1993 Jones threatened to kill Debbie Russell, apparently his girlfriend at the time. (33 RT 4723-4725, 4730.) The prosecutor also argued the Vernon robbery evidence, presented at the guilt phase, could be considered by the jury in determining penalty. (33 RT 4930.) The prosecutor made only a few brief references to the Delano robbery in the context of Jones's criminal history. (33 RT 4931, 4934, 4941, 4948-4949.)

In light of the evidence of the brutal murders of the elderly victims, the impact on the victims' family and the other evidence of Jones's criminal behavior, the evidence of the Delano robbery, even if erroneous, did not prejudice Jones.

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

Jones presents a number of routine challenges to California's capital sentencing scheme which he acknowledges have been previously rejected by this Court. Jones presents these claims to urge this Court to reconsider its prior rejection of these claims and to preserve the claims for federal review. (AOB 140-157.)

A. The application of Penal Code section 190.3, subdivision (a), does not violate the Fifth, Sixth, Eighth or Fourteenth Amendments to the United States Constitution.

Jones contends that Penal Code section 190.3, subdivision (a), which allows the jury to consider the "circumstances of the crime" to determine whether to impose death, is too broad a concept and without some limitation violates a capital defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB 140-141.) Jones also recognizes that this Court has rejected this claim in *People v. Kennedy* (2005) 36 Cal.4th 595, and in *People v. Brown* (2004) 33 Cal.4th 382.

This Court held in *Kennedy*, "Allowing the jury to consider the circumstances of the crime (§ 190.3, factor (a)) does not lead to the imposition of the death penalty in an arbitrary or capricious manner. (*People v. Brown*, *supra*, 33 Cal.4th at p. 401.)" (*Kennedy*, 36 Cal.4th at p. 641.)

In *Brown*, this Court directly rejected Jones's argument, finding that an individualized assessment of the defendant's crime properly judges each defendant on the "particulars of his offense." (*People v. Brown*, *supra*, 33 Cal.4th at p. 401; see also *People v. Lewis* (2001) 26 Cal.4th 334, 394.) The United States Supreme Court has rejected the same challenge to Penal Code section 190.3, subdivision (a), under the Eighth Amendment. (*Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [96 S.Ct. 2978; 49 L.Ed.2d 944][finding the consideration of the offender and the circumstances of the offense a "constitutionally indispensable part of the process of inflicting the penalty of death"].)

B. Jones's death sentence is not unconstitutional based on the jury instructions failure to set forth a burden of proof.

Jones claims California's death penalty statute and accompanying jury instructions are unconstitutional because there is no requirement that the trier of fact in the penalty phase find that aggravating factors outweigh

the mitigating factors beyond a reasonable doubt. (AOB 142-143.) Specifically, he claims that *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536 U.S. 584, 604 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Cunningham v. California* (2007) 549 U.S. 270, [127 S.Ct. 856, 166 L.Ed.2d 856], require that the jury's determination that the aggravating circumstances outweigh the mitigating factors must be found beyond a reasonable doubt. However, as Jones acknowledges, this Court has rejected this claim in *People v. Prieto* (2003) 30 Cal.4th 226, 263. (AOB 143.) In *Prieto*, this Court held that the "finding of aggravating factors during the penalty phase does not 'increase[] the penalty for a crime beyond the prescribed statutory maximum,'" therefore *Apprendi* and *Ring* did not apply to the jury's penalty determination in a California capital case. (*Id.* at 263.)

Jones also submits that the Due Process Clause and the Eighth Amendment require a jury determining the proper punishment in a capital case be convinced beyond a reasonable doubt that death is the proper sentence. (AOB 143-144.) Jones correctly acknowledges that this Court has rejected this claim in *People v. Blair*, *supra*, 36 Cal.4th at p. 753.

Jones claims he had a constitutional right to have the jury instructed that the state had the burden of persuasion regarding the existence of factors in aggravation, whether aggravating factors outweighed mitigating factors, the appropriateness of the death penalty and that there is a presumption that life without parole is the appropriate sentence. (AOB 144-145.) These claims have been rejected by this Court. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1137 ["the jury need not be instructed on the burden of proof at the penalty phase"]; *People v. Jones* (2003) 30 Cal.4th 1084, 1127 [jury's decision on penalty in capital case does not have to be made beyond a reasonable doubt]; *People v. Arias*, *supra*, 13 Cal.4th at p. 190 [no burden of beyond a reasonable doubt in penalty phase and no constitutional right to instruction on presumption that life is the appropriate penalty].) Jones has provided no reasons for this Court to reconsider these previous decisions.

Jones claims his constitutional rights under the Sixth, Eighth and Fourteenth Amendments were violated because the jury was not required to unanimously agree upon the aggravating circumstances upon which the death penalty was based. Jones also suggests that the lack of a requirement of jury unanimity regarding the aggravating factors violated the Equal Protection clause of the federal Constitution. (AOB 145-146.) This Court has consistently held that the federal Constitution does not require the jury to unanimously agree as to aggravating factors. (*People v. Fairbank* (1997)

16 Cal.4th 1223, 1255; *People v. Salcido* (2008) 44 Cal.4th 93, 167; *People v. Ochoa* (2001) 26 Cal.4th 398, 462; *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.) Jones presents no reason for this Court to depart from this long line of authority.

Jones also claims, while acknowledging that this Court has routinely rejected the claim, that his rights to due process and under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated because the jury was not required to unanimously find the unadjudicated criminal activity admitted pursuant to Penal Code section 190.3, subdivision (b). This Court has routinely rejected this claim. (*People v. Jenkins*, supra, 22 Cal.4th at p. 1054; *People v. Samayoa* (1997) 15 Cal.4th 795, 863.)
This Court has also reexamined the issue in light of *Apprendi*, *Ring*, and *Blakely*, and has come to the same conclusion. (*People v. Ward*, *supra*, at p. 221; *People v. Morrison* (2004) 34 Cal.4th 698, 731.)

Jones complains that the use of the phrase "so substantial," in the instruction directing the jury how to weigh the aggravating and mitigating factors, is impermissibly broad, vague and directionless.[25] (AOB 148.)

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[25] The jury during the penalty phase was instructed in part, as follows: "To return a judgment of death, each of you must be persuaded that the aggravating factors are **so substantial** in comparison with the mitigating factors that it warrants death instead of life in prison without parole." (Emphasis added.) (33 RT 4997; 3CT 681.) (CALJIC No. 8.88.)

This claim has been rejected recently and regularly. (*People v. Page* (2008) 44 Cal.4th 1, 56; *People v. Harris* (2008) 43 Cal.4th 1269, 1321; *People v. Breaux* (1991) 1 Cal.4th 281, 315.)

Jones complains that the instructions, specifically CALJIC No. 8.88, failed to inform the jury that the "central determination" is whether death is the appropriate penalty. (AOB 148-149.) This Court has rejected Jones's claim, holding that "the instruction clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty." (*People v. Arias*, *supra*, 13 Cal.4th at p. 171; *People v. Cook* (2007) 40 Cal.4th 1334, 1367; *People v. Smith* (2005) 35 Cal.4th 334, 370.) Jones provides no reason to reconsider this authority.

Jones makes another claim that CALJIC No. 8.88 failed to inform the jury that they are required to impose a sentence of life imprisonment when the mitigating circumstances outweigh the aggravating circumstances. (AOB 149-150.)

The jury was instructed with CALJIC No. 8.88 as follows:

> It is now your duty to determine which of the two punishments o- or [sic] penalties, death or confinement in State prison without possibility of parole, shall be imposed on the defendant.
>
> After having heard all of the evidence, and now having heard the arguments from the attorneys, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or gravity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating factor -- or a mitigating circumstance is any fact, condition or event which, as such, does not constitute a justification or excuse for a crime -- for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. The weighing of aggravating and mitigating factors -- or circumstances, this does not mean a mere mechanical counting of factors on each side of this imaginary scale, or the arbitrary assignment of weight to each or any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances, with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole.

(33 RT 4996-4997.)

As Jones recognizes, in *People v. Duncan* (1991) 53 Cal.3d 955, 978, this Court held that, "The instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating. There was no need to additionally advise the jury of the converse (i.e., that if mitigating circumstances

outweighed aggravating, then life without parole was the appropriate penalty)."[26]

This Court has more recently rejected this claim again. (*People v. Page*, supra, 44 Cal.4th at p. 58; *People v. Boyer* (2006) 38 Cal.4th 412, 486.)

Jones claims his rights under the Sixth, Eighth and Fourteenth Amendments were violated because the jury was not instructed regarding the standard of proof and the lack of need for unanimity as to mitigating circumstances. (AOB 150-151.) The standard jury instructions do not mislead a jury into believing that unanimity is required for mitigating circumstances. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 104; *People v. Crew* (2003) 31 Cal.4th 822, 860.)

"Moreover, the trial court should not instruct the jury as to the burden of proof at the penalty phase, and failure to do so does not violate a defendant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 830; see also *People v. Lewis*, *supra*, 43 Cal.4th at p. 533.)

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[26] The trial court in this case also instructed the jury that mitigating factors are unlimited and that anything mitigating should be considered in deciding to impose a life sentence. (33 RT 4997; 3 CT 682.) The jury was also instructed that the jury need not find any mitigating circumstances to impose a life sentence and that a life sentence may be returned regardless of the evidence. (33 RT 4997-4998; 3 CT 684.)

Jones claims the jury should have been instructed that there is a presumption of life. (AOB 151-152.) Not so. (*Gutierrez*, 45 Cal.4th at p. 833; *Arias*, 13 Cal.4th at p. 190; see *Tuilaepa v. California*, *supra*, 512 U.S. at 972.)

C. The failure to require the jury to make written findings did not violate Jones's rights under the Sixth, Eighth or Fourteenth Amendments.

Jones claims that the jury's failure to make written findings deprived him of his federal constitutional rights and his right to meaningful appellate review. (AOB 153.) As Jones recognizes, this claim has been rejected by this Court. (*People v. Riggs* (2008) 44 Cal.4th 248, 329; *People v. Cook* (2006) 39 Cal.4th 566, 619.) Jones has presented no reason for this Court to reconsider its decisions in *Riggs* and *Cook*.

D. The instructions on mitigating and aggravating factors did not violate Jones's constitutional rights.

Jones contends the use of the words "extreme" and "substantial" in Penal Code section 190.3, subdivisions (d) and (g) and in CALJIC No. 8.85, (regarding duress or the domination of another person) acted as impermissible barriers to the jury considering mitigation evidence, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 153.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Parson* (2008) 44 Cal.4th 332, 369-370; *People v.*

Salcido, *supra*, 44 Cal.4th at p. 168; *People v. Prince* (2007) 40 Cal.4th 1179, 1298.)

Jones claims that the failure to delete many of the inapplicable sentencing factors set forth in CALJIC No. 8.85 violated his constitutional rights. (AOB 154.) This Court has repeatedly stated that the trial court has no obligation to delete from CALJIC No. 8.85 inapplicable mitigating factors. (*People v. Cook*, *supra*, 39 Cal.4th at p. 618; *People v. Jones*, *supra*, 30 Cal.4th at p. 1129.)

Jones contends that his constitutional rights under the Eighth and Fourteenth Amendments were violated because the jury was not instructed that certain sentencing factors were relevant only as possible mitigating factors. (AOB 154-155.) However, this Court has held that the trial court has no obligation to instruct the jury that certain factors may only be considered in mitigation of the sentence. (*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1268; *People v. Hillhouse* (2002) 27 Cal.4th 469, 509.)

E. Intercase proportionality review is not constitutionally required.

Jones contends the failure to conduct intercase proportionality review violates his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 155.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Cornwell*, *supra*, 37

Cal.4th at p. 105; *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.)

F. The California capital sentencing scheme does not violate Equal Protection.

Jones claims that because California's death penalty scheme provides fewer procedural safeguards than those afforded persons charged in non-capital crimes, the death penalty scheme violates the Equal Protection clause. (AOB 155-156.) Jones recognizes that this Court rejected this contention in *People v. Manriquez* (2005) 37 Cal.4th 547, 590 ["capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law"].) Jones provides no basis to reconsider this issue.

G. The use of the death penalty does not violate international law, the Eighth or Fourteenth Amendments or "evolving standards of decency."

Jones claims that in light of the international community's rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision in *Roper v. Simmons* (2005) 543 U.S. 551, 578 [125 S.Ct. 1183, 161 L.Ed.2d 1], prohibiting the use of the death penalty against juvenile offenders, the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments and "evolving

standards of decency." (AOB 156-157.) This Court has held that international law does not prohibit the imposition of a death sentence rendered consistently with state and federal constitutional and statutory requirements. (*People v. Cook*, *supra*, 39 Cal.4th at pp. 619-620; *People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511.) Jones has provided no reason to reconsider these decisions.

VII. THERE WAS NO CUMULATIVE ERROR

Jones contends reversal is required because of the cumulative effect of the errors that undermined the fairness of the trial and the reliability of the death judgment. (AOB 158-160.) "[A]ny number of 'almost errors,' if not 'errors' cannot constitute error." (*Hammond v. United States* 356 F.2d 931, 933 (9th Cir. 1966)) Even assuming error, taken individually or together, these errors do not require the reversal of Jones's conviction or death judgment. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1223; *People v. Koontz*, *supra*, 27 Cal.4th at p. 1094 [guilt phase instructional error did not cumulatively deny defendant a fail trial and due process]; *People v. Cooper* (1991) 53 Cal.3d 771, 839 ["little error to accumulate"]; *People v. Jablonski*, *supra*, 37 Cal.4th at p. 837 [the cumulative effect of few demonstrated errors found harmless does not warrant reversal of the judgment].)

Jones was entitled to a fair trial, not a perfect trial. (*People v. Stewart* (2004) 33 Cal.4th 425, 522.) He received a fair trial.

CONCLUSION

Respondent respectfully requests the judgment of conviction and sentence of death be affirmed in its entirety.

Dated: July 27, 2009

Respectfully submitted,

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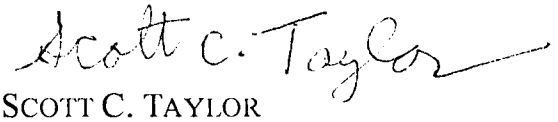

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 38,261 words.

Dated: July 27, 2009

EDMUND G. BROWN JR.
Attorney General of California

Scott C. Taylor

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Albert Jones**
No.: **S056364**

I declare:

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

On July 27, 2009, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 27, 2009, at San Diego, California.

M. Torres-Lopez
Declarant

M. Torres-Lopez
Signature

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