IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CRANDELL McKINNON,

Defendant and Appellant.

S077166

CAPITAL CASE

Riverside County Superior Court No. CR69302
Honorable Patrick F. Magers, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Perry Coder was walking down the street when, for no apparent reason, appellant walked up to him, placed a gun against his head, and fired, killing Coder almost instantaneously. Five weeks later, in an unrelated incident, appellant shot and killed Gregory Martin, a gang member, in an apparent act of revenge, because appellant believed someone from Martin's gang had previously killed a member of appellant's gang. A jury convicted appellant of both murders, found a multiple-murder special circumstance allegation true, found true special allegations that appellant personally used a firearm in the commission of the murders, and sentenced appellant to death.

In this automatic appeal, appellant raises claims attacking the trial court's denial of a motion to sever, the jury selection process, a number of evidentiary rulings, and the adequacy of the jury instructions. He also raises claims regarding the constitutionality of, and the application of international law to, the death penalty.

Appellant failed to preserve some of his claims for appeal, the substance of his claims are without merit, and any errors were harmless. In sum, he

received a fair trial. Therefore, his convictions and the special-circumstance finding should be affirmed.

STATEMENT OF THE CASE

On October 21, 1996, the Riverside County District Attorney filed a four-count information charging McKinnon with two counts of murder (counts 1 [victim Perry Coder], and 3 [victim Gregory Martin]; Pen. Code, § 187), and two counts of being an ex-felon in possession of a firearm (counts 2 and 4; Pen. Code § 12021.1). As to counts 1 and 3, the information alleged that McKinnon personally used a firearm in the commission of the offenses within the meaning of Penal Code section 12022.5. In addition, the information alleged a multiple-murder special circumstance, within the meaning of Penal Code section 190.2, subdivision (a)(3). (1 CT 161-163.)

On October 22, 1996, the court arraigned McKinnon on the information, at which time McKinnon pled not guilty to the charges and denied the allegations. (1 CT 166-167.)

On September 28, 1998, McKinnon filed a motion to sever the murder charges and their corresponding firearm-possession charges. (2 CT 301-342.) On December 8, 1998, the prosecution filed an opposition to the motion. On the same date, the court conducted a hearing and denied the motion. (3 CT 732-750, 753-757; 1 RT 95, 110-112.) Jury trial in the guilt phase commenced December 10, 1998. (3 CT 833.)

On January 5, 1999, after previously reporting being deadlocked on counts 3 and 4, the jury found McKinnon guilty on all counts and found the gun-use and special-circumstance allegations true. (14 CT 4018-4019.)

On January 6, 1999, jury trial in the penalty phase commenced. (14 CT 4037-4038.) On January 13, 1999, the jury fixed McKinnon's punishment at death. (14 CT 4091-4092.)

On February 23, 1999, McKinnon filed motions for a new trial and, pursuant to Penal Code section 190.4, subdivision (e), to modify the death judgment. (15 CT 4116-4136.) On March 5, 1999, the court conducted a hearing on the motions. Following the hearing, the court denied the motions and imposed the judgment of death. (15 CT 4154-4155, 4157-4160.)

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

STATEMENT OF FACTS

A. Introduction

On January 4, 1994, Crandell McKinnon and Orlando Hunt, both members of the Crips street gang, were driving around in McKinnon's car when they decided to stop at the Desert Edge Motel, a local hangout for drug dealers, drug users, and prostitutes, located in a high-crime area in Banning. Moments after getting out of the car they saw a male, later identified as Perry Coder, walking down the street. McKinnon told Hunt to wait, walked up to Coder, pressed a gun to Coder's head, and shot Coder without a word transpiring between them.

Approximately five weeks after the Coder murder, Gregory Martin, a member of the Bloods street gang who went by the street name "Moto," was murdered at the Meadowbrook Apartments, not far from the Desert Edge Motel. The police located one witness to the murder, who told them he saw Moto and a person he knew as Popeye, McKinnon's nickname, arguing in the street, perhaps over money. A week later, a sheriff's deputy pulled over a car driven by McKinnon's girlfriend. McKinnon was a passenger in the car. During a search of the vehicle, the deputy found a loaded handgun in the girlfriend's purse. The gun belonged to McKinnon, who had told the girlfriend to put it in her purse because he was on parole. Ballistics testing revealed the gun was the murder weapon in the Martin murder. Later that month, while

imprisoned, McKinnon told a fellow inmate he was the person who shot Martin, and that he had shot a "white boy" at the Desert Edge Motel.

B. The Prosecution's Guild-Phase Case-In-Chief

1. The Murder Of Perry Coder

In 1994, Orlando Hunt lived in Banning, eight or nine blocks away from the Desert Edge Motel, with his wife and seven children. (4 RT 543-544, 547.) The motel was located in a high-crime, low-income area at the east end of Ramsey Street in Banning. It was primarily used as an apartment-type complex. (4 RT 517.) There were lots of criminals and drug activities in the area. (4 RT 519.) Behind the motel, to the west, was a dirt field containing rocks, gravel, grass, a few trees, shrubbery, and high weeds. (4 RT 519-521.)

Hunt and McKinnon, whose nickname was Popeye, were friends. (4 RT 544, 560.) McKinnon was the boyfriend of Hunt's aunt, Debra Bryant. Hunt hung out with McKinnon at times, although they were not particularly close. (4 RT 544-545.)

On January 4, 1994, McKinnon came by Hunt's house in the evening hours, driving Bryant's Cadillac. (4 RT 545-546.) Hunt and McKinnon had a couple of drinks, rode around a couple of blocks, and drove to the motel. They had been to the motel before; they knew people who lived there. (4 RT. 547.)

Gina Lee, who lived at the motel, saw McKinnon and Hunt arrive. (4 RT 646, 667.) McKinnon was driving and Hunt was in the passenger seat. (4 RT 549, 648-649.) McKinnon had been in Lee's room earlier that day, with a black handgun. (4 RT 655-656.)

McKinnon parked on the side of the motel, at the north end of the lot, and he and Hunt got out of the car. (4 RT 550, 596.) Hunt saw Lee, who had a child by Hunt, and another female, Johnnetta Hawkins, who was with Lee,

and spoke to them. (4 RT 550-551, 621.) Hunt and McKinnon then went around to the back of the building, when they saw a short, white male, subsequently identified as 23-year old Perry Coder, coming down the street. (4 RT 551-552; 11 RT 1411-1412.)

Kerry Don Scott was walking through the field that night, returning home from Cabazon. (6 RT 778, 791-792.) Scott saw Coder walking down Ramsey Street, alone. (6 RT 794.) Coder was not walking steadily. Scott thought he was drunk. (6 RT 795.)

Hunt had never seen Coder before. (4 RT 552.) McKinnon told Hunt to "hold on, wait right there." (4 RT 551.) Hunt thought McKinnon might know Coder, or maybe something else was "going down." (4 RT 551-552.) Hunt had never known McKinnon to have a beef with Mr. Coder. (4 RT 552.)

As Hunt stood by a tree approximately 47 feet from where Coder's body was subsequently found, McKinnon walked up and stood face-to-face with Coder, held a gun straight out in front of him, extended his arm, turned the gun to the side "gangsta style," put the gun against Coder's head, and shot Coder for no apparent reason. (4 RT 552-555, 594, 597-598; 6 RT 796-797, 832-833, 834.) McKinnon fired one shot, following which Coder just fell to the ground. (4 RT 555-556.) There was no confrontation, name calling, arguing, or conversation between the two before McKinnon shot Coder. (4 RT 552, 556; 6 RT 800.)

After McKinnon shot Coder, McKinnon and Hunt took off running. (4 RT 556.) Scott, who also witnessed McKinnon shoot Coder, fled the scene as well. (6 RT 796-797, 800, 832, 834.)

Lee, who had stepped outside her motel room, heard the shot. (4 RT 647, 650; 5 RT 730.) Lee saw McKinnon and Hunt running away from the scene, and thereafter left the motel to buy some rock cocaine. (4 RT 652, 657.)

When Lee returned to her room, about thirty minutes later, Hawkins was there.[1/] (4 RT 657.) McKinnon was also at the motel when she returned. (4 RT 658.) He had leaves or grass in his hair. (4 RT 667.) McKinnon looked "kind of strange," his eyes were "big and stuff." Lee later described McKinnon as very agitated, upset, and very hyper. Lee asked McKinnon, "What's up? What's up, Cuz?" McKinnon put his finger to his lips, said something like "Shhhhh," and said someone was dead out front. (4 RT 658.) Lee later told Hawkins that when she saw McKinnon outside at the motel, he threatened to kill her if she said anything. (5 RT 733, 736-737.)

At approximately 11:02 p.m., the Banning Police Department received a telephone call regarding a body that had been found behind the Desert Edge Motel in Banning. (4 RT 517, 520-521, 531.) City of Banning Police Officer Bill Caldwell, Jr., the assigned case agent, arrived on the scene at approximately 11:54 p.m. (4 RT 516-517.) Caldwell found Coder's body lying between the roadway and the sidewalk. (4 RT 521.) The police did not find any shell casings near the body. The police never found the murder weapon. (4 RT 524-525.) An army-type jacket was found by the body. (4 RT 536-537.) Coder appeared to be holding it. (4 RT 537.)

The next afternoon, while Hunt was sleeping, he rolled over and saw McKinnon standing in the doorway of the room. McKinnon told Hunt that if he said anything, this could happen to him. (4 RT 557-558.)

On December 29, 1994, Caldwell and Palmer interviewed McKinnon at Ironwood State Prison, regarding the Coder murder. The interview was recorded. The prosecution played a tape recording of the interview for the jury. (7 RT 1055-1056.) In the interview, McKinnon initially denied being in Banning in January of 1994. (13 CT 3768-3769, 3776-3777.) He then changed

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1. According to Hawkins, she was with Lee from the time she heard the shot until they got a ride and left the motel.

his story and admitted he had passed through the town that month to see his daughter. He said he was not supposed to be there because he was on parole in San Bernardino. (13 CT 3769, 3779, 3782, 3784.) When Palmer and Caldwell told McKinnon they had three eyewitnesses who saw him shoot Coder, McKinnon denied knowing Coder and denied having shot him. (13 CT 3772, 3774, 3781.)

Daryl Garber, Chief Forensic Pathologist for Riverside County, performed an autopsy on Coder's body. (5 RT 713, 715.) External examination revealed a gunshot wound to the head and a black eye associated with the wound. (5 RT 717-718.) The wound was a "tight contact" one, meaning the gun's muzzle was actually pressed tightly against Coder's skin when the trigger was pulled. (5 RT 718.) The wound was front-to-back, with a slightly left-to-right and slightly upward path. There was no exit wound. Dr. Garber estimated that the gun inflicting the wound would have been pretty much level with the ground. (5 RT 721.) There were skin lacerations, and there was gun powder in and beneath Coder's skin. (5 RT 719.) Coder's skull was extensively fractured. The bullet had coursed through the left cerebral hemisphere causing extensive damage to the brain and cranium. It was a rapidly-fatal wound. There was no other cause of death. (5 RT 720.) Dr. Garber said that Coder would have immediately lost consciousness, gone into a coma for a few minutes, and then rapidly died. During the autopsy, Dr. Garber recovered a bullet from Coder's head. (5 RT 721.) Coder probably had some detectable life signs for a few minutes. (5 RT 723.) Assuming Coder was walking at the time he was shot, he may have continued taking some steps as he went down, and certainly would have fallen within a step or two. (5 RT 724.)

C. The Murder Of Gregory Martin

On February 12, 1994, during the early evening, the Banning Police Department received a report of a homicide at the 300 block of West Barbour, in the Meadowbrook Apartments complex, in Banning. (6 RT 873-875, 878, 883.) The victim was Gregory Martin, whose nickname was Moto. It was common knowledge that Martin was a member of the Bloods gang. (6 RT 784, 789-790, 881.)

Marshall Lee Palmer, who was the Detective Bureau Sergeant at the time,[2/] had the crime scene secured for evidence technicians who arrived later. In the meantime, Palmer and other officers looked for relevant physical evidence, but they did not find any. Palmer had some patrol officers start knocking on doors to see if they could locate any witnesses. (6 RT 873-874, 876-877, 884.)

A patrol officer brought one witness to Palmer, a person named Lloyd Marcus. (6 RT 885-886.) Palmer interviewed Marcus at the Banning Police Department, within one to one-and-a-half hours of when Palmer first arrived at the murder scene. (6 RT 891-892, 895.) Marcus told Palmer that during the evening hours he was under a carport at the apartment complex when he saw two people in the street, and that there was an argument, "something about money." (6 RT 873, 893.) One of the people was Martin, who Marcus knew as Moto. (6 RT 894-895, 925.) Marcus knew the other person as "Popeye." (6 RT 894, 895-896.) Moto said "Where's my money" to Popeye. The two men pushed each other. Popeye then pulled a gun from his waistband and fired two rounds at Moto. (6 RT 894-895, 925.)

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2. At the time of trial, Palmer was a Division Commander with the Banning Police Department. (6 RT 873.)

Marcus described Popeye as an adult Mexican or Asian male, six-two to six-three, weighing 180 to 200 pounds.[3/] (6 RT 894-895, 947.) Palmer associated McKinnon with the name Popeye. (6 RT 897.) Palmer knew Martin was a Blood and McKinnon was a Crip. (6 RT 940.)

Palmer did not immediately arrest McKinnon. Instead, he put out word that he needed to talk to Popeye and wanted him brought in for questioning. (6 RT 897.) Palmer told on-duty patrol officers to look for McKinnon and pick him up, and to tell the same thing to the on-coming shift. (6 RT 926-928.) The next day, Palmer and a police corporal went to two or three locations where McKinnon was known to hang out. (6 RT 929.) Other patrol officers also went to various locations where McKinnon was known to hang out, but were unable to locate him until quite a few months later, when McKinnon was in prison in Blythe, on an unrelated matter. (6 RT 937-938.)

Riverside County Forensic Pathologist Joseph Choi conducted an autopsy on Martin's body. (5 RT 763, 765.) Choi found two gunshot wounds to Martin's head. One was just below the eyebrow of Martin's right eye. The other wound was on the back right side of Martin's head. There was gunpowder tattooing on Martin's forehead and between his eyelid and eyelash, indicating Martin's eye was open and the lid was folded up when the first wound was inflicted. (5 RT 766.) Choi estimated that the muzzle of the gun inflicting the wound had been approximately 6 to 12 inches away from the wound. (5 RT 767-768.) The wound was fatal. Although Choi said he could not be certain, he said that it would probably take a matter of minutes for death to occur. (5 RT 768.) A bullet had entered the eye, passed through the eye and upper part of the eye socket, perforated the flat bone separating the floor of the

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3. According to a Riverside County Sheriff's Department's arrest report dated February 19, 1994, McKinnon was a 26-year old Black male, 5 feet 10 inches tall, weighing 170 pounds. (7 SCT 10.)

skull and the brain, and then went left and backward through both lobes of the brain, remaining in the back left side of Martin's head. Choi recovered the bullet. (5 RT 768-769.) The second gunshot wound was behind Martin's right ear. The bullet had traveled from right to left and back to front, hit the left side of Martin's skull, and a little piece of the bullet had chipped off. Choi found the broken piece in Martin's frontal lobe, and found the main bullet in the victim's left parietal lobe. (5 RT 769-770.) The second wound had also been rapidly fatal. (5 RT 770.)

On February 19,1994, at around 11 p.m., Riverside County Deputy Sheriff Peter Herrera stopped a light blue Cadillac being driven by Kimiya Gamble, for going too slowly. (4 RT 636-638; 7 RT 1030-1031.) McKinnon was in the front passenger's seat. (7 RT 1031.) Gamble was McKinnon's girlfriend at the time. (7 RT 1029.) They had been driving the back road from Desert Hot Springs when they had a flat tire, stopped, and fixed it. (7 RT 1031.) Herrera stopped them a couple of seconds after they fixed the tire. (7 RT 1031-1032.) Before they were stopped, there was a gun on the front seat, between Gamble and McKinnon. (7 RT 1032.) Gamble saw the gun when she first got into the car. (7 RT 1045.) Gamble had a purse with her at the time. (7 RT 1032.) When the police stopped them, McKinnon told Gamble to put the gun in her purse. (7 RT 1032-1033.) She complied because he was on parole. (7 RT 1033.)

During a search of the car, Herrera found the gun in Gamble's purse, which was on the front seat of the vehicle. The gun was loaded. (4 RT 637-638, 680.) Gamble told Herrera she had borrowed the gun from some unknown person. (4 RT 642.)

Herrera arrested McKinnon and Gamble, and put her in the front of the police car. While she was in the car, McKinnon told her that when they got to

the precinct they were probably going to ask her about the gun, and that she should tell them she bought the gun on the street. (7 RT 1035-1036.)[4]

In late February of 1994, Harold Black, who grew up in Banning, was incarcerated with McKinnon, at Chino, and they were housed in the same dormitory. (6 RT 958-960, 961-962, 968.)[5] Black had run the streets with drug users and occasionally associated with gang members. He knew who claimed Crips and who claimed Bloods, and associated with members of both gangs. (6 RT 968.)

Black and McKinnon recognized each other from Banning. Prior to this, Black was not too close to McKinnon; he knew McKinnon, but "it wasn't no friendship, hatred or anything like that, just respectability, 'How are you doing,' 'How are you doing.'" (6 RT 960.) Black asked McKinnon why he was in jail. McKinnon said he was in for a gun violation; that he and his girlfriend were riding in a car and had been pulled over, and he had put a gun in her purse. (6 RT 968-969.)

Black had a bottom bunk and McKinnon had the top bunk next to him. One night, McKinnon asked Black if he knew Moto. Black said yes, and that he had heard Moto had been shot. McKinnon looked at Black, "a little smile, and he says, 'I did it.'" (6 RT 961-962.) McKinnon said he had gone over to a friend's house at the Meadowbrook Apartments "the previous night," and as he was leaving, he saw Moto, crept up on him, pointed a gun at him, said "this

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4. Gamble was charged with possession of a loaded, concealed weapon, and subsequently pled guilty to the charge. (7 RT 1033-1034.)

5. At the time of trial, Black had a pending robbery case. (6 RT 953.) Black entered into an agreement with the Riverside County District Attorney's Office to testify in this case. (6 RT 955-957.) A copy of the agreement, People's Exhibit No. 29, is included in the Supplemental Clerk's Transcript, Volume I of I, at pp. 22-26. When Black signed the agreement, he knew he was saving fifteen years in prison. (6 RT 980.)

is for Scotty," and shot him in the head. (6 RT 962-964.) McKinnon said Moto "just crumbled, the body just fell." McKinnon also said he "shot that white boy down at the Desert Edge motel." (6 RT 964.)

When asked if he knew what "This is for Scotty" meant, Black explained that Scotty was a Crip who was killed at a party, supposedly by a Blood, and that McKinnon was a Crip. (6 RT 784, 963.) It was common knowledge on the streets as to what gang Scotty Ware's killer was from. The subject was frequently talked about on the streets. (6 RT 784, 789-790.) The person who killed Ware was a Blood, supposedly from the Pomona Island Bloods, and was hanging out in Banning. (6 RT 790.) When asked whether McKinnon had provided any details about the motel shooting, Black said he did not hear because he was stunned by the description of how Moto had fallen. (6 RT 964-965.)

Black ran into McKinnon again, in September of 1995, at the Robert Presley Detention Center in Riverside. (6 RT 965.) On that occasion, McKinnon asked Black if he had been contacted by the police concerning these matters, and if he had said anything. (6 RT 965-966.) Black told him no, and asked why. McKinnon said that Gregory Taylor, also known as Buff, had said something to the police or to the district attorney. (6 RT 966.) That rang a bell with Black because Black had mentioned the shootings to Taylor. (6 RT 966-967.) Black told McKinnon that he had not talked to anyone, and had not been questioned. (6 RT 967.)

California Department of Justice Criminalist Richard Takenaga compared test rounds fired from the gun found in Gamble's purse with the bullets recovered from Martin. (6 RT 849, 851.) In Takenaga's opinion, the test round and one of the bullets recovered from Martin were fired from the same gun, to the exclusion of all other firearms. (6 RT 857-858.) As to the second bullet recovered from Martin, it had similar characteristics to the test

round, but due to degrading of the bullet Takenaga could not conclusively identify it as having been fired from the same weapon. (6 RT 859.)

D. The Defense's Guilt-Phase Case

The defense presented two witnesses, namely Jessie James Brown and Charles Neazer, in support of its theory that the prosecution witnesses misidentified McKinnon as the killer, and that the prosecution's theory that revenge was the motive for the Martin murder was not supported by the evidence.

On the night Coder was murdered, Brown was in his room at the Desert Edge Motel.[6] (8 RT 1067.) Nona Woodson, someone named G-Man, Chester Norwood, Melva Murray, Charles Hunt, a person named Tinker, and a person named Jackie were also in the room. (8 RT 1068-1069.) Brown heard one shot fired. (8 RT 1068.) After the shot, he waited in the room for fifteen to twenty minutes before leaving. (8 RT 1070.) Nona had access to Melva Murray's car, a light blue Buick with a white top, that was in the parking lot in front of Brown's door. (8 RT 1070-1071.) Brown and Nona tried to leave, but the police stopped them and arrested them for possession. (8 RT 1071.) Brown did not see Kerry Don Scott, a.k.a. K-Poo, there that night. Brown did not see McKinnon's car in the parking lot that evening. (8 RT 1072.)

According to Neazer,[7] who lived in Banning off and on from 1973 through 1997, there really was not any gang activity in the Banning area. The Crips and the Bloods were mutual friends because everyone knew everyone.

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6. Brown was in custody at the time of trial, for selling rock cocaine. (8 RT 1065-1066.) He had been convicted in 1984, of manslaughter. (8 RT 1065-1066.)

7. Neazer, a Blood, was in custody for involuntary manslaughter at the time of trial. He also had prior convictions for possession. (8 RT 1073-1075,1076.)

They were not sworn enemies in Banning.[8] (8 RT 1076-1077.) There had never really been any gang activities in Banning as far as Crips and Bloods.[9] (8 RT 1078.) Although Moto never lived at the Meadowbrook Apartments, he and Neazer went to Banning and spent a lot of time there. (8 RT 1079, 1093.) That was where they hung out, and that was where their families and friends were. (8 RT 1093.) A few days before the murder, Neazer, Moto and McKinnon had been together at the Eastside Park in Banning. (8 RT 1080-81.) The conversation had been friendly; there was no animosity. They had not come to the park together, but they ended up together, talking and drinking. (8 RT 1081.) Neazer knew Scotty Ware. Ware might have been affiliated with the Bloods, but Neazer did not think Ware gang-banged. (8 RT 1082.) Neazer was in Chino when he found out Ware had been killed. (8 RT 1082-1083.) Neazer estimated that Ware was killed in late 1989 or early 1990. (8 RT 1083.)

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8. According to Kerry Don Scott, the Crips outnumbered the Bloods in Banning in 1994. (6 RT 780.) The Bloods and Crips sometimes fought. Sometimes, different sets of Crips fought with each other. Nevertheless, for the most part, gang people got along in Banning despite their Crip/Blood status. (6 RT 781.)

9. On cross-examination, Neazer conceded that there had been thirteen murders in Banning in 1994. (8 RT 1090.) When asked if he was aware that the majority of victims killed in that year had been either Crips or Bloods, Neazer said he was aware that "a couple of them be gangbangers." (8 RT 1090-1091.)

E. The Penalty-Phase Case

1. The Prosecution's Evidence In Aggravation[10/]

On December 11, 1984, Margaret Miranda was working in the cafeteria at a continuation school in the Banning Unified School District. McKinnon bought a piece of beef jerky from Miranda, opened it, decided he did not like it, and said he wanted his money back. Miranda told McKinnon that he could not return the item since it had been opened. (11 RT 1363-1365.) Miranda was standing behind a table, and had a money box in front of her. She kept a small amount of money in the box; never more than ten dollars. (11 RT 1365.) McKinnon told Miranda he was going to take the money box. Miranda told McKinnon that if he did, he would go to jail. McKinnon picked up the box and started out the door, but a teacher stopped him. (11 RT 1365-1366.) McKinnon shoved the teacher and went out the door. (11 RT 1366.)

In August of 1985, Riverside County Probation Officer Lyle Huffman interviewed McKinnon concerning the cafeteria incident. (12 RT 1473-1474.)

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10. In addition to the evidence recited below, the prosecution also presented evidence in aggravation concerning an incident between McKinnon and a female named Linda Bethune. Bethune testified that in 1989, she and McKinnon both sold rock cocaine in Banning, that on one occasion McKinnon threw some drugs in her yard when the police came through, that someone gave the drugs to Bethune, and that she would not give them back to McKinnon when he asked for them a few weeks later. (11 RT 1373, 1375-1377.) Bethune said that sometime later McKinnon walked up to her in her yard and "hauled off and hit" her, following which she called the police. (11 RT 1378-79, 1381.) When asked if she ever knew McKinnon to be armed, Bethune said everybody that was dealing was armed. (11 RT 1381.)

Defense counsel subsequently moved to strike Bethune's testimony as failing to conform to the offer or proof and as unreliable. (11 RT 1385.) The court agreed that Bethune was an incredible witness (13 RT 1637), and ultimately instructed the jury identifying the evidence it could consider under Penal Code section 190.3, factor (b), which omitted Bethune's testimony. (14 CT 4065; 13 RT 1593-1594.)

McKinnon told Huffman that he had purchased a piece of beef jerky, taken a bite, and that it was stale. He wanted his money back and told the lady that if she did not give him his money back he would just take her money box. He took the box and exited the room. A teacher stood at the doorway to block his exit. He pushed the teacher aside. The teacher took the money box and McKinnon exited the room. (12 RT 1475-1477.)

On November 12, 1988, then Banning Police Officer Marshall Palmer was dispatched to Eastside Park in Banning. (11 RT 1389.) Banning Police Sergeant Hagan and Banning Police Corporal Shubin went with him. At the park, Palmer observed a group of ten to fifteen Black males, including McKinnon and Orlando Hunt, standing around a Toyota pickup. (11 RT 1390.) As Palmer approached the group, Hunt got up and walked away. When one of the officers called to him, Hunt pulled a gun from waistband and threw it on the ground. As a result, the police patted-down the others in the group for weapons. McKinnon had a number of .357 caliber rounds in his pocket. He also had several pieces of what looked like rock cocaine in a Tupperware container. (11 RT 1391-1393.)

On January 23,1991, Banning Police Officer Paul Herrera was dispatched to the Eastside Park area. (12 RT 1468-1469.) When he arrived on the scene, he saw McKinnon and a female standing near a vehicle parked in a lot at the park. At some point, Herrera found a .44 caliber, Ruger Redhawk firearm with a six-inch barrel under the vehicle's drivers seat. (12 RT 1469-1470.) McKinnon told Herrera the gun was his; that he had purchased it that afternoon. (12 RT 1470.)

On August 10, 1992, Banning Police Officer Lowell Wheeler interviewed McKinnon's sister, Robin McKinnon, regarding a crime she reported. (13 RT 1557.) Robin McKinnon said she had been standing behind McKinnon, who had a cast on his right hand, and he had hit her in her face with

his right hand. Robin McKinnon said that McKinnon turned around and began to choke her, they struggled, she broke loose from his grip, and she called the police. (13 RT 1558.) Wheeler returned to the home approximately twenty minutes later, in response to another call from Robin McKinnon, reporting that McKinnon had returned to the home and was breaking her property. As the police came in the front door, Wheeler saw McKinnon breaking a small, portable television. (13 RT 1559.) Later, at the police station, McKinnon spontaneously said, "You can keep me for a week or a month, but when I get out I'm going to take care of it." (13 RT 1560.)[11/]

On February 5, 1997, at approximately midnight, Thomas Cho, a correctional officer with the Riverside County Sheriff's Department, conducted a search of McKinnon's cell at the Robert Presley Detention Center. (13 RT 1564.) During the search, Cho found a metal shank, about nine inches long, in a small space where the light fixture in the cell attached to the ceiling. (13 RT 1565-1566.) A string was attached to the shank, which appeared to be useable to pull the shank out of the space. (13 RT 1569.) McKinnon told Cho he was in the cell for six to seven months. (13 RT 1568.) The cells are searched once a week, during clothing exchange, and more often if there is a reason to search. (13 RT 1569.) It is standard procedure to check the light fixtures when doing cell searches. (13 RT 1574.) The parties stipulated that at the time of the search, McKinnon was the only person living in the cell for about six months, but prior to that other inmates had been housed in the cell. (13 RT 1569-70.)

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11. Called as a witness for the prosecution, Robin McKinnon denied calling the police and reporting that McKinnon had beat her up, denied that she suffered a broken finger in a confrontation with McKinnon, denied they had fought over money, denied that she and McKinnon had any physical contact, denied that he had hit her with a cast, denied he had choked her, and denied he had been breaking her property. (12 RT 1484, 1486-88, 1488-91.)

Coder's fiancee, Darlene Shelton, and Coder had been dating for one-and-a-half years when he was murdered. They lived together at the Desert Edge Motel. They had been staying there for seventeen months. (11 RT 1402.) At the time Coder was murdered, Ms. Shelton was six months pregnant with his child. (11 RT 1403.) She also had another child, who was six years old at the time, who considered Coder his father. (11 RT 1406.) Coder's murder caused Ms. Shelton to have a difficult labor, during which the child's heart briefly stopped beating. (11 RT 1404-1406.)

Coder's sister, Dawn Coder, lived in the same building Coder lived in. On the night of the murder, Ms. Coder was in her room when she became dizzy and could not stand up. She saw police officers in the street and asked them what had happened. They told her Coder had died. Ms. Coder was an emotional wreck for a week. As of the time of trial, she was still an emotional wreck; she fought with her boyfriend, she would "freak out," and she got drunk. (11 RT 1407-1408.) She became "real sucked up," i.e., her thyroid became hyper, she became very thin, and she ran the streets. Coder had always been there for her. Whenever she had a problem she could go to him; he was her protector. He always set her straight when she needed it, and he was not there to do that anymore. (11 RT 1409.)

Coder was the oldest, by six minutes, of Suzanne Coder's identical-twin sons. (11 RT 1410.) Mrs. Coder was the night manager at the Desert Edge Motel when Coder was murdered. She heard the shots, went outside, and walked toward a crowd that had gathered near the manager's office. She saw somebody's feet laying in the street. She knew it was Coder by the size of the feet. (11 RT 1411.) Since Coder's murder, Mrs. Coder had fits of depression, cried all the time, and overprotected and spoiled her grandson because his father was no longer there. She was very close to Coder. He was partially deaf and

she often took him to Loma Linda for speech therapy and operations on his ears. They were "very, very, very close." (11 RT 1412.)

Gregory Martin's sister, Mary Martin, was living in Riverside at the time of Martin's murder. She learned about his death via a telephone call from a girl in Banning. She was "[r]eal close" to her brother, and he told her he would never leave her. (11 RT 1420.) After his death, she felt like somebody was "just taking everything away" from her; she had lost her mother, and her other brother was killed five months apart from Martin. Martin's death resulted in her not trusting people and staying to herself. (11 RT 1421-1422.)

F. The Defense's Evidecne In Mitigation

Janie Scott was McKinnon's mother and Robert Smith was his father. Mrs. Scott had three other children by Smith; Jovina, Marcina, and Robin. (12 RT 1499.) She met Smith in 1962 or 1963, when she was seventeen years old. (12 RT 1499, 1534.) Smith was married when he met Mrs. Scott, and he had ongoing relationships with other women during the time he was seeing her. (12 RT 1402, 1500, 1577.)

During the time he knew Mrs. Scott, Smith used alcohol, marijuana, cocaine, and heroin, but heroin was his drug of choice. (12 RT 1578.) Smith never provided any financial support to the family. He never bought the children toys, clothes, or food. There were no Christmases or birthday parties. The year McKinnon was born, Mrs. Scott went on welfare. (12 RT 1511-1513, 1541.) She was not allowed to cash her checks. Instead she had to wait for Smith to come buy, and he took all the money. (12 RT 1512.) She had trouble putting food on the table and had to borrow from relatives and friends. She once sent the children to bed hungry because she did not have anything for them to eat. (12 RT 1512.) There were many days when the family did not have enough to eat. (12 RT 1541.)

Smith did not come around often, typically three times a month, but when he did he injected heroin while in the house. (12 RT 1502-1503, 1541.) Smith often nodded off in front of the children, i.e., became groggy from shooting heroin. (12 RT 1503.) He committed armed robbery and larceny to get money for drugs. He often sold heroin. (12 RT 1579-1580.) Jovina Brown's earliest memories of Smith consisted of him shooting heroin into his arm and then passing out. (12 RT 1538-1539.)

Smith was very abusive. He slapped Mrs. Scott around when she was pregnant with Jovina. Once, while they were arguing, he slapped her around and burnt her arm with a cigarette. (12 RT 1501.) He often beat her with an extension cord, knocked her around, slapped her, punched her, and kicked her. (12 RT 1501, 1505, 1541, 1582.) He frequently beat her up in front of the children. Once, he beat her all the way as they traveled from her sister's house on one side of town to her own house on the other side of town. (12 RT 1504.) On another occasion, when Mrs. Scott was seven months pregnant with McKinnon, Smith hit her in the stomach, with his fist. (12 RT 1507-1508.)

Smith began abusing McKinnon around the time that McKinnon began walking. He beat the children with belts and electrical cords. (12 RT 1583, 1542.) He made the kids stay in their room, and if they came out he would get violent and slap them around. (12 RT 1402.) On one occasion, Mrs. Scott took her oldest daughter to the emergency room after Smith put the child in a tub of hot water. (12 RT 1504-1505, 1537.) On another occasion, when McKinnon was two, Smith held the child up by one hand, beat him, and threw him in a closet. (12 RT 1505.) He made the children stand in the corner facing the wall for hours at a time. (12 RT 1584.) He picked them up, shook them like rag dolls, and put them in dark closets for extended periods of time, up to six hours. (12 RT 1509, 1582, 1585.) One of his daughters was so afraid of him that she would start shaking when he came in, and her hair started falling out in clumps.

(12 RT 1585.) Jovina sustained bruises from some of Smith's beatings. (12 RT 1542.) Jovina and McKinnon tried to comfort each other. (12 RT 1539.)

McKinnon was very afraid of Smith. When McKinnon wet his bed, Smith would whip him and make him stand in the corner, sometimes for more than an hour, in his wet underwear. (12 RT 1508-1509.) McKinnon sometimes had nightmares as a child. He would wake up screaming and hollering, balled up in a corner, screaming that Smith was "whooping" him. (12 RT 1510.) The nightmares began when McKinnon was three years old. (12 RT 1510.)

In 1971, the family moved to the projects in Newark. (12 RT 1513.) Crime was a problem there. (12 RT 1514.) There were shootings, drugs, fights, killings, and rapes. Taxicabs would not come there. (12 RT 1514-1515, 1540.) The selling and using of drugs was prevalent. People used drugs in the hallways. (12 RT 1515.) McKinnon saw that on pretty much a daily basis. (12 RT 1516.) On one occasion, Jovina and McKinnon were playing outside when someone hit a man in the head with a bat, and there was blood everywhere. (12 RT 1540.) When McKinnon was five, he lost part of one of his fingers. (12 RT 1517-1518.) Despite his surroundings, McKinnon did well in school and his grades were good. (12 RT 1519.)

Smith went to prison in 1972, after being convicted of homicide. (12 RT 1500, 1518, 1579-1580.) Life got better for the family after he went to prison. (12 RT 1544-1545.)

That same year, Mrs. Scott began to develop a relationship with a man named Troy Scott. (12 RT 1520.) They eventually married. (12 RT 1535.) At first, Scott treated Mrs. Scott and the children okay. In 1975, they all moved to California. (12 RT 1520-1521.) Over time, Scott changed. He began using heroin. (12 RT 1521, 1546.) He used heroin and drank wine in front of the children. (12 RT 1521-1522, 1547.) He developed the "nodding" behavior, and did so in front of the children. (12 RT 1522.) There were times when the

lights or gas were turned off, and times when there was no food in the house to eat. (12 RT 1546.)

About four months after they arrived in California, Scott began abusing Mrs. Scott, slapping and punching her. (12 RT 1522.) He once gave her a black eye. (12 RT 1522-1523.) The abuse took place in their bedroom, not in front of the children. Nevertheless, Scott also beat the children, "with belts, and whatever." (12 RT 1523.) He slapped McKinnon around and once beat him with a belt. McKinnon was afraid of Scott. If McKinnon wet the bed, Mr. Scott made him lay in it for a couple of days before allowing him to get up and take a shower. (12 1523-1524.) Once again, there were no Christmases or birthday parties during the time Scott was in the family. (12 RT 1525.) McKinnon was very protective of his siblings. He tried to protect Ms. Brown from Mr. Scott. (12 RT 1548.)

When the family moved to Riverside County, McKinnon continued to do well in school and seemed to like it. He played Pop Warner football. (12 RT 1526.)

When McKinnon was fourteen or fifteen years old, he began to have trouble with the law. In 1984, the family moved to Banning. (12 RT 1527.) At some point while a teenager, McKinnon was shot in the arm and leg. (12 RT 1528-1529.)

McKinnon wrote poetry, well. He continued to write poetry over the years, including during the time of rial. (12 RT 1529.) McKinnon had a daughter, who was nine years old as of the time of trial. (12 RT 1529-1530.) He was a very good father. He has also been a good son. Anything Mrs. Scott asked him to do, he did. (12 RT 1530.) McKinnon was a good brother to Jovina Brown, and has been good to Ms. Brown's children and her mother-in-law. (12 RT 1548.) He loves his nieces and nephews, always tries to give them

advice, and tells them to listen to their mother and to not get into trouble, (12 RT 1549.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED MCKINNON'S MOTION TO SEVER

McKinnon contends the court abused its discretion, and violated his rights under the Fifth, Eighth, and Fourteenth Amendments to due process and reliable verdicts, when it denied his motion to sever the Coder murder charge and its related firearm-possession charges, from the Martin murder charge and its related firearm-possession charges. (AOB 45-128.) McKinnon's claim is without merit. The court properly exercised its discretion, and McKinnon has failed to establish that he was substantially prejudiced by joinder.

On May 1, 1995, the prosecution filed an information charging McKinnon with the Coder murder. On June 21, 1996, the prosecution moved to dismiss the information and file a new complaint consolidating the Coder murder charge with the Martin murder charge, in order to allege "a double murder special circumstance" making McKinnon eligible for the death penalty. (Pre-Trial RT 1-2.) The court granted the motion and ordered the new complaint filed.[12/] (Pre-Trial RT 1.)

On October 8, 1996, the court conducted a preliminary hearing on the new complaint, following which the court held McKinnon to answer on the consolidated charges. (1 CT 12-13.) On October 21, 1996, the prosecution filed a new information containing the consolidated charges. (1 CT161-163.)

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12. The prosecutor advised the court that, although the new filing rendered McKinnon eligible for the death penalty, a decision had not yet been as to whether the prosecution was going to seek the death penalty, and the decision would not be made until after the preliminary hearing. (Pre-Trial RT 2.)

On September 28, 1998, McKinnon filed a motion to sever the murder charges and their corresponding firearm-possession charges. (2 CT 301-342.) On December 8, 1998, the prosecution filed an opposition to the motion. On the same date, the court conducted a hearing and denied the motion. (3 CT 732-750, 753-757; 1 RT 95, 110-112.)

On February 23, 1999, following the jury's verdicts, McKinnon filed a motion for new trial, arguing, inter alia, that he had been prejudiced by the joinder of the charges, and that his state and federal constitutional rights to due process had been violated. (15 CT 4116-4136.) On March 3, 1999, the prosecution filed an opposition to the motion. (15 CT 4137-4141.) On March 5, 1999, both parties submitted the issue on the written pleadings, without argument, following which the court denied the motion. (15 RT 1689-1690.)

McKinnon's motion to sever was primarily based on *Williams v. Superior Court* (1984) 36 Cal.3d 441, superceded by constitutional amendment (see *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1070). The motion argued that McKinnon would suffer substantial prejudice, in violation of his right to due process, if the charges remained joined, because: (1) the evidence as to each homicide would not be cross-admissible in separate trials (2 CT 309-315); (2) aspects of the charges were unusually likely to inflame the jury, particularly gang evidence on the Martin murder (2 CT 315-317); (3) the evidence in both cases was weak, and therefore the spillover effect of the aggregate evidence would alter the outcome on some or all of the charges (2 CT 317-319); (4) McKinnon's willingness to testify as to one of the homicides would cast suspicion on his failure to testify on the other (2 CT 319-320); (5) joinder itself was the sole basis for seeking the death penalty (2 CT 320-323); and (6) no substantial benefit would be gained from joinder and therefore the benefits did not outweigh the prejudice joinder placed on McKinnon (2 CT 323-324.) He further contended that denial of severance would violate his state

and federal constitutional rights to equal protection. (2 CT 324-328.) In support of the latter claim, he argued that a defendant who was accused of first degree murder with a special circumstance was entitled to have his guilt determined by a jury that had not been tainted by prejudicial evidence of an unrelated matter. (2 CT 324-328.)

In its written opposition to the motion, the prosecution argued that the consolidated charges did not involve a weak case being joined with another weak case or a strong case. Rather, the prosecution argued, both cases had equally strong and convincing evidence, consisting of: (1) several eyewitnesses in the Coder murder; (2) the fact that the weapon used to murder Martin was found in McKinnon's girlfriend's possession; and (3) the fact that McKinnon admitted to a fellow inmate that he committed both murders. (3 CT 754.) The prosecution acknowledged that people might differ in their assessment of the relative strength of the two cases, but disagreed with McKinnon's contention that identity was an inherent weakness in either case. (3 CT 755.) The prosecution further argued that the evidence in each of the crimes was cross-admissible under Evidence Code section 1101, subdivision (b),[13] to prove modus operandi and identity. (3 CT 755-757.)

At the hearing, defense counsel generally presented the same arguments contained in the written motion. In particular, counsel emphasized that the

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13. Evidence Code section 1101, subdivision (b) provides:

> "(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."

evidence in the two murders was not cross-admissible, the patterns and characteristics of the crimes were not so unusual and distinctive that the evidence was cross-admissible as to identity, the gang evidence in the Martin murder was inflammatory as to the Coder murder, and the two cases were independently weak. (1 RT 95-100, 105-107.)

The prosecution responded that *Williams v. Superior Court* preceded the enactment of Penal Code section 954.1, added by initiative measure (Prop. 115) and approved by the voters June 5, 1990.[14] (1 RT 101.) The prosecution further argued that the gang evidence was relevant to motive and not so inflammatory that it would be unduly prejudicial. (1 RT 102-103.) As to the claim that both cases were weak, the prosecutor acknowledged both murders had witnesses who were drug users with criminal histories, but argued the consolidated charges did not tie an extremely strong case tied to an extremely weak one. Rather, the Coder murder involved eyewitnesses and McKinnon's admission that he committed the murder, and the Martin murder involved McKinnon's admission to the shooting. (1 RT 102-103.)[15] Therefore, the

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14. Penal code section 954.1 provides:

> "In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in he same accusatory pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact." (Cal. Pen. Code, § 954.1.)

15. McKinnon claims the prosecutor did not dispute that both cases were relatively weak, and instead had argued that the law was not concerned with the effect of joining two weak cases bit rather with the effect of joining an extremely strong case with a weak one. (AOB 52.) McKinnon's assertion overlooks the fact that the prosecution's written opposition to the motion had

prosecutor maintained, in light of Penal Code section 954.1, the counts should not be severed. (1 RT 104-105.)

Finally, the court and the parties addressed the possible logistical issues that might result if the charges were severed. The court was concerned that severance might necessitate three trials, i.e., a non-death-penalty qualified jury to consider the Coder murder, a second non-death-penalty qualified jury to consider the Martin murder, and a death-penalty qualified jury to consider the multiple-murder allegation and the penalty phase. (1 RT 107-108.) Defense counsel said severance would require only two trials, i.e., an ordinary non-capital murder trial, followed by a second trial in which the prosecutor could allege a prior-murder special circumstance under Penal Code section 190.2, subdivision (a)(2). (1 RT 108-109.) The prosecutor replied that the proposed two-trial procedure would not cure McKinnon's concerns because there would still be a spillover issue, i.e., the second jury would know McKinnon had been convicted of a prior murder. (1 RT 109-110.)

Following argument, the court denied the motion to sever. In support of its ruling, the court noted that Penal Code section 954 allowed the case to proceed with the charges joined. The court held Harold Black's testimony, that McKinnon admitted shooting Mr. Martin and also admitted shooting some "white boy" at the Desert Edge Motel, along with evidence indicating McKinnon had access to small handguns within a brief period of time between the homicides, was cross-admissible. As to the relative strength of the cases, the court found it was not a matter of one overwhelmingly strong case prejudicing McKinnon by influencing the jury to find him guilty in a second case where there was little or no evidence. As to the inflammatory nature of joining the cases, the court said the gang evidence appeared to be admissible as

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already addressed the assertion that two weak cases had been joined. (3 CT 754.)

to motive in one murder, but in the overall scheme of things that would not deprive McKinnon of due process on the other charge. Noting judicial economy was an issue and that it involves a balancing test, the court said that given the cross-admissibility of evidence, trying the matters together would not deny McKinnon his right to a fair trial. (1 RT 110-112.)

On December 10, 1998, the court clarified its ruling denying the motion. The court noted that the prosecution had been urging the court to consider the cross-admissibility of evidence as it related to California Evidence Code section 1101, subdivision (b). The court did not find the crimes distinctive enough under *People v. Ewoldt* (1994) 7 Cal.4th 380, to introduce for purposes of identifying the perpetrator; rather, the court found Harold Black's testimony cross-admissible regarding whether McKinnon made the admissions to Black in the first place, and as to whether McKinnon had been telling the truth in his admissions or was merely bragging. The court found it admissible because it showed Black had specific knowledge of the murder, namely the street name and the fact that Martin was shot, and therefore the evidence was circumstantial evidence of the knowledge imparted to Black and corroborated that McKinnon was telling the truth when he made the statements to Black. (2 RT 120-122.)

A. The Court Properly Exercised Its Discretion

The law prefers consolidation of charges because it ordinarily promotes efficiency. Whether a trial court properly joined crimes under Penal Code section 954[16/] concerns a question of law and is subject to independent review

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16. Penal Code section 954 provides:

> "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such

on appeal, but whether severance was required in the interests of justice is reviewed for an abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 188.) In determining whether the trial court abused its discretion in denying a severance motion, the record before the trial court at the time it ruled on the motion is examined. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120.)

The criteria used to evaluate whether there was an abuse of discretion are:

> (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of the aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.

(*People v. Manriquez* (2005) 37 Cal.4th 547, 574 (*Manriquez*).)

Ordinarily, cross-admissibility dispels any inference of prejudice. However, the absence of cross-admissibility alone does not demonstrate prejudice. (*People v. Stitely* (2005) 35 Cal.4th 514, 531-532 (*Stitely*); Pen.

> cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count."

Code, § 954.1 [evidence concerning one offense need not be admissible as to any other offense in order to be tried together].) In cases where the joinder itself gave rise to the special circumstance allegation, e.g., multiple murder under Penal Code section 190.2, subdivision (a)(3)), a higher degree of scrutiny must be given to the issue of joinder. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1318 (*Bradford*).)

Because a ruling on a motion to sever involves weighing the probative value of joinder against the prejudicial effect, the beneficial results from joinder are added to the probative-value side in the weighing process. (*People v. Walker* (1988) 47 Cal.3d 605, 623.) Therefore, in order to establish prejudice, a defendant must make an even stronger showing of prejudicial effect than he would have to show in determining whether to admit other-crimes evidence in a severed trial. (*Ibid.*)

If the trial court's ruling is correct, the defendant's convictions cannot be reversed unless joinder was so grossly unfair as to deny due process. (*Stitely, supra*, 35 Cal.4th at p. 531.) Improper joinder does not, by itself, violate the federal Constitution, but raises a constitutional violation only if it results in prejudice so great as to deny a fair trial. (*People v. Sapp* (2003) 31 Cal.4th 240, 259-260, citing *United States v. Lane* (1986) 474 U.S. 438, 446 fn. 8 [106 S. Ct. 725, 88 L. Ed. 2d 814.) Thus, even if the trial court abused its discretion in refusing to sever, reversal is unwarranted unless, to a reasonable probability, the defendant would have received a more favorable result in a separate trial. (*People v. Avila* (2006) 38 Cal.4th 491, 575.)

In light of the facts before the trial court at the time McKinnon made his motion to sever, he fails to establish that the court's denial of his motion was outside the bounds of reason.[17] (*Manriquez, supra,* 37 Cal.4th at p. 574;

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17. McKinnon's first allegation that the court abused its discretion involves a lengthy discussion on the issue of whether there was something so

People v. Bradford, supra 15 Cal.4th at p. 1315.) McKinnon concedes that the murder counts against him were properly joined under Penal Code section 954. (AOB 50-51.) Indeed, the crimes were of the same class, so as a matter of law, they were properly joined. (*People v. Stitely, supra*, 35 Cal.4th at p. 531.) The issue, therefore, is whether the trial court abused its discretion by not severing the counts based on the record before it at the time of the motion. The record reveals that the court properly exercised its discretion.

The court was correct when it ruled Black's testimony cross-admissible. Only relevant evidence is admissible. Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 177.)

According to the preliminary hearing transcript, Black said McKinnon told him he shot Mr. Martin and "some white boy" at the Desert Edge motel. (1 CT 122, 143.) Regardless of any defense attempts to impeach Black's credibility, in light of the fact that the murder weapon in both killings was a handgun, Black's proffered testimony had a tendency to prove, just as the trial court noted, that McKinnon had access to handguns in the brief time period

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distinctive about the two murders that it led to cross-admissibility for purposes of identification under Evidence Code section 1101, subdivision (b). (AOB 55-60.) This discussion is a strawman. The court rejected the notion that section 1101, subdivision (b), provided a basis for cross-admissibility. (2 RT 120-122.) (See *People v. Stern* (2003) 111 Cal.App.4th 283, 296-297 [Evidence Code section 1101, subdivisions (a) and (b) have nothing to do with the resolution of a case involving the victim's testimony as to an uncharged offense that was received solely on the issue of the victim's believability]; see Evidence Code, § 1101, subd. (c) ["Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."].)

surrounding the two murders. Moreover, the fact that Black said McKinnon told him he shot both victims and that he shot Martin in the head, as turned out to be the case, meant Black's proffered testimony also had a tendency to prove that McKinnon told Black the truth and had not just been bragging.

In addition, the proffered gang evidence was not unduly inflammatory. In fact, it was relatively minimal, particularly when it is compared to the most prejudicial aspect of the Coder murder, i.e., its total senselessness. In other words, neither case was more egregious than the other, and therefore neither was unusually likely to incite the jury against McKinnon. (See *Manriquez, supra*, 37 Cal.4th at p. 634 [none of the four charged homicides was "significantly more egregious" than any of the others, and "therefore none were 'unusually likely to inflame the jury against the defendant.'"].)

Further, contrary to McKinnon's assertion (AOB 70-89), this was not a matter of two weak cases being joined, resulting in a spillover effect that might alter the outcome. Although the lay witnesses to the murder had criminal records and substance abuse problems,[18/] the cases as a whole were not

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18. In 1994, Hunt was using cocaine, PCP, marijuana, and alcohol. (4 RT 548.) Gina Lee had several convictions for prostitution and was in custody at the time of trial. (4 RT 644.) Johnetta Hawkins was in custody at the time of trial. She had been using cocaine since 1984, and at the time of the murder, she had been stole to support her $100-a-day rock cocaine habit. (5 RT 725-727, 739-742.) At the time of the murder, Kerry Don Scott, who was in custody in Arizona at the time of trial, was a snitch for Banning Police Detectives Herrera and Caldwell. He used the money he was paid, as well as money he obtained by selling drugs, to buy cocaine for his hundreds-of-dollars-a-day habit. (6 RT 775-777, 811-812, 815.) He had also assisted the Banning Police Department and Riverside County District Attorney's Office in two other murder cases. (6 RT 813.) Harold Black had a history of criminal convictions, including assault with a deadly weapon resulting in great bodily injury, petty theft, and spousal abuse resulting in great bodily injury. (6 RT 952-954.) In addition, at the time of trial he had a pending robbery case. (6 RT 953.) Black entered into an agreement with the Riverside County District Attorney's Office to testify in this case. (6 RT 955-957.) A copy of the agreement, People's

independently weak. The Coder case was based on eyewitness testimony corroborated by McKinnon's admission. Moreover, the testimony was further corroborated by the fact that the eyewitnesses accounts of the murder were notably consistent with the findings of the pathologist who performed the autopsy, i.e., the gun was level to the ground and pressed against Coder's head, and Coder would have fallen within no more than a step or two (5 RT 718, 721, 724), just as Hunt and Scott described. As to the Martin murder, it was principally based on McKinnon's admissions that were just short of a confession, and the fact that one week after the murder, McKinnon gave the murder weapon to his girlfriend. Thus, there was strong evidence supporting both cases, and independently the cases were of relatively equal strength.

As to the fact that joinder turned this matter into a capital case, the trial court took that into consideration when it ruled on the severance motion. Consistent with *Bradford*, 15 Cal.4th at 1318, the court carefully scrutinized the motion and the proffered evidence before the court, and realized some fundamental facts, i.e., Black's testimony was cross-admissible, the gang evidence was minimally prejudicial on the Coder murder, and both cases were of relatively equal strength.

McKinnon also argues that the benefits of joinder were minimal, while severance would have actually conserved judicial resources. (AOB 90-95.) Respondent disagrees. Although people could reasonably quibble over whether severance would have required two or three trials, it is indisputable that the single trial was significantly more efficient than multiple trials would have been.

Disagreeing with the foregoing analysis, McKinnon argues that Black's proffered testimony was not cross-admissible on the basis the court cited.

Exhibit No. 29, is included in the Supplemental Clerk's Transcript, Volume I of I, at pp. 22-26.

(AOB 62-67.) In support of his argument, McKinnon cites *People v. Brown* (1993) 17 Cal.App.4th 1389 (*Brown*), and claims it is analytically identical to the instant matter. (AOB 65.) Specifically, he claims courts have repeatedly condemned the admission of a defendant's other crimes in order to bolster a prosecution witness's credibility regarding the charged crime. (AOB 62, citing *Brown, supra*, 17 Cal.App.4th at pp. 1396-1397.)

In *Brown*, the court allowed some detectives to testify that the defendant admitted molesting two females who were not the subject of the charged offenses. The court also admitted testimony from one of the victims in the uncharged matter. (*Brown, supra*, 17 Cal.App.4th at p. 1394.) The trial court admitted the evidence of the uncharged matters on the theory that it bolstered the detectives' testimony regarding the defendant's admission that he molested the victim in the charged offense. (*Id.* at p. 1396.) The court's reasoning appeared to be based on the notion that the defendant had volunteered the information regarding the uncharged victims. As the reviewing court explained, however, the record showed that rather than volunteering the information, the defendant had responded to questions asked by the detectives. Therefore, the reviewing court concluded, an inference could not be drawn from the detectives' knowledge of the uncharged victims that the defendant must have confessed to molesting the charged victim. Instead, the court said, the only inference that could be drawn from the referenced evidence was that the defendant had a propensity to molest young girls. (*Ibid.*)

Although the principle McKinnon cites is correct (see *Brown, supra*, 17 Cal.App.4th at 1396-1397 ["As a general rule, the courts have interpreted Evidence Code section 1101 as not permitting introduction of uncharged prior acts ***solely*** to corroborate or bolster the credibility of a witness."] [emphasis in original], that is not what happened here. The court did not rule that Black's testimony was admissible under Evidence Code section 1101. In fact, the

court's rejection of that theory of admissibility was consistent with Evidence Code section 1101, subdivision (c), which provides that nothing insection1101 affects the admissibility of evidence offered to support or attack a witness' credibility. Here, the court ruled the evidence was cross-admissible because McKinnon's statements to Black tended to corroborate Black's proffered testimony as to the charged crimes. Thus, *Brown* does not support McKinnon's contention.

McKinnon also argues that the court abused its discretion because, even assuming Black's testimony regarding one of McKinnon's admissions was relevant to his credibility regarding the other admission, it went to a collateral issue tangentially relevant, and was substantially outweighed by the prejudice created by admitting all of the testimony regarding the commission of another murder. (AOB 67.) McKinnon is incorrect. Black's proffered testimony cannot reasonably be characterized as tangential. It was significant to the prosecution's case on the Martin murder, and it corroborated Hunt's testimony. Therefore, its probative value was not substantially outweighed by its potential for undue prejudice. (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550 ["[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence."], quoting *People v. Lopez* (1969) 1 Cal.App.3d 78, 85)].)

In sum, McKinnon fails to establish "a clear showing of potential prejudice," or that the trial court's denial of his severance motion was "outside the bounds of reason." (*Manriquez, supra*, 37 Cal.4th at p. 576 citing *People v. Ochoa* (2001) 26 Cal.4th 398, 423; and see also *People v. Catlin* (2001) 26 Cal.4th 81, 110-113, 109 [upholding trial court's denial of the defendant's motion to sever one murder count from a second murder count].)

B. McKinnon Was Not Deprived Of His Right To A Fair Trial

McKinnon claims he was, in fact, ultimately prejudiced by the denial of his motion in the following respects. First, he argues that the prosecutor never argued the theory upon which the court based its ruling that Black's testimony was cross-admissible, and in fact deviated from the basis of the court's ruling. (AOB 100-101.) McKinnon is incorrect. During rebuttal argument, the prosecutor argued, inter alia, that Black's testimony, to the effect that Black said McKinnon told him he shot Martin in the head, reflected a fact that Black could only have known if McKinnon did, in fact, tell him. (9 RT 1219-1220.) This was consistent with the fundamental basis for the court's pre-trial ruling that Black's proffered testimony was cross-admissible, i.e., because it tended to prove whether McKinnon told Black the truth or had merely bragged about something. (2 RT 120-122.)

Although McKinnon is correct when he asserts that, in one instance the prosecutor deviated from the basis of the court's ruling on cross-admissibility when he argued, without objection by the defense, that the fact that Black's knowledge of the Martin murder weapon being seized by the police when McKinnon put it in "the girl's purse, in the car, something like that, close to that[,]" also proved Black's truthfulness. (9 RT 1220.) But the prosecutor only argued this point in response to defense counsel's argument that Black was a liar as evidenced by the fact that Black could not provide any details regarding the Martin murder. (9 RT 1191-1192.) (See *People v. Thornton* (2007) WL1839127 [in penalty phase argument, prosecutor may attack defense argument]; *People v. Huggins* (2006) 38 Cal.4th 175, 207 [prosecution may call attention to deficiencies in defense closing argument].)

Second, McKinnon claims he was prejudiced because the eyewitnesses to the Coder murder had strong motives to falsely implicate him, and they gave accounts of the crime that were inconsistent with each other, the physical

evidence, and their prior statements. (AOB 102-115.) But the witnesses' motives and inconsistencies were brought out on cross-examination and emphasized during the defense's closing argument. (9 RT 1149-1200.) In addition, as mentioned above, Hunt and Scott were consistent on key points, i.e., the gun being level to the ground and pressed against Coder's head, the absence of any conversation or confrontation between McKinnon and Coder prior to the shooting, and Coder falling to the ground immediately after being shot, just as the autopsies confirmed.[19/] Moreover, any inconsistencies simply went to Hunt's and Scott's credibility, which was an issue for the jury, and the same situation would have emerged in separate trials.

Third, McKinnon claims he was prejudiced because the gang evidence in the Martin case was irrelevant in the Coder case, highly inflammatory, and likely to lead to prejudicial inferences regarding McKinnon's criminal disposition to commit both murders. (AOB 67-70.) However, as discussed above and as will be discussed in greater detail in Argument II below, the gang evidence in this consolidated trial was relatively minimal, and the most prejudicial feature of the Coder murder was its senselessness. Thus, compared to the facts of the Coder murder, the gang evidence was not unusually likely to inflame the jury against McKinnon.

Fourth, McKinnon claims he was prejudiced because the evidence supporting the Martin charge was weaker than the evidence supporting the Coder charge. (AOB 115-122.) Once again, as discussed above, both cases primarily depended on whether the jurors believed the prosecution's witnesses,

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19. A point bears mention. McKinnon claims Scott testified that the gun was two to three feet from Coder's head when McKinnon fired it. (AOB 109.) Although McKinnon is correct when he asserts Scott so testified, he fails to mention that Scott later clarified that he meant McKinnon stood two to three feet from Coder, not that the gun was two to three feet away from Coder. (6 RT 831.)

and the fact that the Coder case had more witnesses to evaluate did not alter the fact that credibility was the principal issue at trial. Thus, the evidence in each case was relatively equal, and both had strong evidence supporting the charges, including consistency between the eyewitnesses' testimony and the forensic evidence.

Fifth, McKinnon claims he was prejudiced because the prosecutor improperly encouraged the jurors to consider the charges in concert as demonstrating a common modus operandi and an inference of identity, and the jurors were not instructed on these theories. (AOB 122-126.) In support of his contention, McKinnon highlights the prosecutor's statement that

> "nobody said anything different than the method and manner that the two murder [sic] were done, they were done by the same person, they were used by the same manner, shot, was even the same part of the body, there was no robberies, there was no physical fights, there was no – no rape cases . . . *They were basically very similar types of murders.* And the only witnesses that identified people identified Popeye as having done the murder."

(AOB 123, quoting 9 RT 1228, italics added in AOB.) McKinnon also points to another instance where the prosecutor argued, "Did anybody say that it wasn't shots to the head, that it wasn't out in the night, out in the open, *both murders being the same?* No." (AOB 123-124, citing 9 RT 1207, italics added in AOB.)

The quoted passages from the prosecutor's argument do not support McKinnon's contention. As to the first passage, he omits a portion of the argument preceding the quoted section. At that point in argument, the prosecutor was answering defense counsel's contention that discrepancies in the witnesses testimony rendered said testimony unbelievable. In response, leading up to the quoted section the prosecutor said,

> All right. It's the People's position in this case that the witnesses basically testified to the same basic facts. There was some discrepancies in the testimony from one person to the other, certainly counsel pointed

out all the discrepancies in the case, but nobody said anything different . . .."

(9 RT 1228.) Thus, when the relevant portion of the argument is viewed in context and in its entirety, it is apparent that the prosecutor was not urging the jury to infer a common modus operandi; instead, he was urging them to consider that, despite any discrepancies, the witnesses were relatively consistent in their descriptions of what they saw and heard. This construction of the prosecutor's remarks is bolstered by the fact that the defense did not object to the argument.

As to the second passage McKinnon quotes, the paragraph immediately preceding the quoted one reads as follows:

> And certainly defense counsel did an excellent job of pointing out every discrepancy in this case that took place in witnesses' testimony, anywhere, statements they had made in the past. But you have to remember, what was the importance of those items that were discrepant? Did anybody say a different person was the shooter? Did anybody say anything like that?

(9 RT 1207.) Thus, in context, the prosecutor was not improperly urging the jurors to infer a common modus operandi from viewing the two murders together. Rather, he was arguing that none of the witnesses were discrepant regarding the actual murders vis-a-vis other discrepancies going to collateral matters. And once again, this construction is bolstered by the fact that there was no objection to the argument.

Finally, as noted above, the evidence in both cases was relatively strong. The eyewitnesses in the Coder case were consistent on key points and were consistent with the forensic evidence. As to the Martin case, Marcus's account to Palmer of what he saw was also consistent with the forensic evidence, McKinnon virtually confessed to committing the murder, and the murder weapon was found in McKinnon's car a week after the killing.

In sum, it is not reasonably probable that McKinnon would have received a more favorable result in separate trials. (*People v. Avila, supra*, 38 Cal.4th at p. 575.) Accordingly, this Court should also reject McKinnon's contention that the joint trial violated his right to due process. (See *People v. Sapp, supra*, 31 Cal.4th at pp. 259-260, ["Having concluded that defendant suffered no prejudice from the joint trial of the three murder counts, we also reject his contention that the joint trial violated his due process rights.].)

II.

THE COURT PROPERLY EXERCISED ITS DISCRETION TO ADMIT RELEVANT GANG EVIDENCE

McKinnon contends the court abused its discretion, and violated his state and federal constitutional rights to confrontation, to a fair trial, and to a reliable jury determination, when it denied his motion to exclude evidence that he was a member of the Crips and that the Martin murder was gang-motivated. He argues that the evidence was irrelevant and inadmissible as to the joined murder charge, and the danger that it might create undue prejudice substantially outweighed its probative value. He further contends that the court erred in overruling defense counsel's objections, on hearsay and foundation grounds, to the prosecution's presentation of evidence to prove that the gang evidence was relevant to motive, thereby violating state law and his Sixth Amendment right to confrontation. (AOB 129-155.) McKinnon's contention is without merit. The evidence was not hearsay because it was not offered for the truth of the matter asserted. In addition, it was relevant to motive on one of the murders and not unduly prejudicial as to the other. Further, the court correctly concluded that the prosecution had laid an adequate foundation for what was common knowledge on the streets of Banning. Moreover, McKinnon's admissions to Harold Black authenticated the foundation.

Prior to trial, McKinnon filed a motion to exclude, pursuant to Evidence Code section 352, all evidence of gang membership and "activities of the defendant." (2 CT 435-440.) He argued that the prejudicial effect of the proffered evidence substantially outweighed its probative value because, if the jury became aware of his membership in a Los Angeles street gang, it would likely infer he had a violent nature and therefore was more likely to have committed the homicides. He further argued that the gang evidence was only linked to the Martin homicide, which would likely lead to the information spilling over into the jury's deliberations on the Coder homicide, which in turn would substantially increase the likelihood of a guilty verdict in the Coder matter even though there was nothing connecting the Coder murder to gang activities. He also argued that the evidence linking the Martin homicide to gang activity was weak and contradicted by other prosecution evidence, namely that one prosecution witness would testify that McKinnon told him he killed Martin in retaliation for the death of a friend who was a fellow gang member, whereas a second prosecution witness would testify he heard McKinnon arguing with Martin over money just before the shooting. Therefore, he maintained, admission of the evidence would create a substantial danger of tainting the jury pool, which would preclude a fair trial. (2 CT 438-39.)

The prosecution argued the evidence should be admitted as relevant to motive. The prosecutor proffered that years earlier Scotty Ware, a fellow member of McKinnon's gang, was shot by a member of Martin's gang, and when McKinnon saw Martin alone in the middle of the street he shot him in an act of revenge for Martin's gang having shot someone from McKinnon's gang. The prosecutor further argued that the evidence was not so inflammatory that a juror would convict McKinnon of murdering Coder because of what was known about the Martin murder. (1 RT 102-03, 105.)

Defense counsel replied that, at the preliminary hearing, Investigator Palmer testified that Martin was a member of the Bloods and, in Palmer's opinion, McKinnon was a member of the Crips. (1 RT 105.) Counsel argued that Black "waffled" at the preliminary hearing and said the shooting only might have been gang-affiliated.[20] (1 RT 106.) Counsel also asserted that Black said the gangs in Banning were not natural enemies and confrontations between the gangs tended to be minor. (1 RT 106-07.)

The court denied the motion, finding the evidence was relevant as to motive in the Martin murder. The court further found that, in the overall scheme of things, admission of the evidence would not violate McKinnon's right to due process. (1 RT 111-12.)

A. The Court Properly Exercised Its Discretion When It Denied McKinnon's Motion

Gang evidence is admissible to prove motive or identity, "so long as its probative value is not outweighed by its prejudicial effect." (*People v. Williams* (1997) 16 Cal.4th 153, 193 (*Williams*), citing *People v. Champion* (1995) 9 Cal.4th. 879, 922-923.) Nevertheless, the admission of evidence of a defendant's "gang membership creates a risk that the jury will improperly infer

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20. Contrary to counsel's assertion, Black was unequivocal at the preliminary hearing on the question of whether the Martin murder was gang related. Black said McKinnon told him he shot Martin "for the homey Scotty. . ." The prosecutor asked Black what the term "homey" meant. Black replied, "Guy, you know, you grew up with. Could be gang-affiliated, could not be gang-affiliated but, you know, it's just home boy." (1 CT 122.) Thus, Black was providing a generic definition for the term "homey," and was not suggesting that McKinnon said anything other than that he had killed Martin for gang-related reasons. Moreover, Scott specifically testified that McKinnon was a Crip, Ware was a blood, it was common knowledge on the streets that Ware's killer was a Blood, the subject of what gang Ware's killer was from was frequently talked about on the streets of Banning, and that the killer was hanging out in Banning. (6 RT 784, 789-790.)

the defendant has a criminal disposition and is therefore guilty of the offense charged." (*Williams, supra*, 16 Cal.4th at p. 193.) Therefore, even where evidence of gang membership is relevant, courts should carefully evaluate the evidence before admitting it, because it might have a highly inflammatory effect on the jury. (*Ibid.*; see *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [as with all 352 issues, particularly ones involving gang evidence, it involves a careful balancing test between the potential undue prejudice to the accused and the probative value of the evidence].)

In *Williams*, a capital case, the prosecution theory was that the victim, dressed in blue like a Crip, went into an area claimed by both the Bloods and the Crips and was shot by a Blood because he appeared to be a Crip. (*Williams, supra*, 16 Cal.4th at pp. 193-194.) In support of the theory, the prosecution presented testimony from experts and lay witnesses to the effect that the defendant was a member and leader of a Blood gang set operating in the area of the murder, and the defendant led a meeting of Blood gang sets where killing Crips was discussed and weapons were distributed, and testimony describing gang colors, behavior and areas of influence. (*Id.* at p. 194.) In rejecting the defendant's claim that evidence of the defendant's gang membership and gang activities was irrelevant, this Court explained that the evidence had a tendency in reason to prove the defendant had a motive for the murder. (*Id.* at pp. 193-194) In rejecting the defendant's claim that the probative value of the evidence was outweighed by its prejudicial effect, this Court explained that the evidence had more than minimal probative value because it tended to establish that the victim was a member of a gang that had a deadly rivalry with the defendant's gang. (*Id.* at p. 194.)

Here, the court was asked to rule on a motion in limine based on the transcripts of the preliminary hearing in the Martin case and the Coder case.[21] The transcripts revealed that the proffered gang evidence consisted of a witness who would testify that McKinnon admitted murdering Mr. Martin and admitted his motive for so doing. In addition, the transcripts revealed absolutely no suggested motive for the Coder murder. Thus the court knew there was a proffered gang-related motive in one case, the gang evidence was minimal, and the other murder was apparently senseless.

Given that the charges were joined, that gang evidence is generally admissible to prove motive (see *Williams, supra*, 16 Cal.4th at p. 193; *People v. Martinez* (2003) 113 Cal.App.4th 400, 413 ["Case law holds that where evidence of gang activity or membership is important to the motive, it can be introduced even if prejudicial."], quoting *People v. Martin* (1994) 23 Cal.App.4th 76, 81; *People v. Gonzalez, supra*, 126 Cal.App.4th at p. 1550, ["[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence."], quoting *People v. Lopez, supra*, 1 Cal.App.3d at p. 85), and the gang evidence in this case was narrow and minimal, in light of *Williams*, 16 Cal.4th 153, it cannot reasonably be said that the trial court abused its discretion under section 352 when it denied the defense's pre-trial motion to exclude evidence of McKinnon's gang involvement.

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21. At the commencement of the preliminary hearing in the Martin case, the parties stipulated that the court could consider the transcript of the preliminary hearing in the Coder case. (1 CT 78.) In addition, at the commencement of the hearing on McKinnon's multiple motions, including the motion to exclude, counsel said the defense anticipated the court reading the preliminary hearing transcripts in both cases in preparation for the motions. (1 RT 4.)

B. Admission Of The Gang Evidence Did Not Violate State Law Or McKinnon's Right To Confrontation

The confrontation clause of the United States Constitution bars the admission of out-of-court testimonial statements against a criminal defendant unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. (*People v. Geier* (2007) 41 Cal.4th 555, 597, citing *Crawford v. Washington* (2004) 541 U.S. 36, 59, 68-69 [124 S. Ct. 1354, 158 L. Ed. 2d 177].) "A statement is testimonial if it was made in a formal proceeding or in response to structured police questioning." (*People v. Smith* (2005) 135 Cal.App.4th 914, 924.) If the statement in question is non-testimonial, its admission does not violate the confrontation clause if the statement "bears adequate 'indicia of reliability,' " that is, if it either "falls within a firmly rooted hearsay exception" or is cloaked with "particularized guarantees of trustworthiness." (*Id.* at p. 924, quoting *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [100 S. Ct. 2531, 65 L. Ed. 2d 597].)

"Hearsay evidence" is evidence of a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter asserted. (Evid. Code, § 1200, subd. (a).) "Except as provided by law, hearsay evidence is inadmissible." (Evid. Code, § 1200,subd. (b).)

Kerry Scott testified that he knew McKinnon, he went to school with McKinnon's sister, and he saw McKinnon "all the time on the streets of Banning." (6 RT 781.) When the prosecutor asked Scott if he knew what gang McKinnon was affiliated with, defense counsel objected on hearsay grounds. The court sustained the objection, but did so on foundation grounds. Scott then testified that it was common knowledge in Banning that a certain person would claim a certain set and people knew what set McKinnon claimed. Scott said he never talked to people about what set McKinnon claimed, but he already knew based on gang signs. (6 RT 782-783.)

Scott said McKinnon had a "Grape Street Watts" tatoo on his arm, and that Grape Street Watts was a Crip set from Los Angeles.[22/] Scott testified that Scotty Ware had been shot at a party sometime before January 4, 1994. (6 RT 783-784.) When the prosecutor asked Scott if he knew what gang Ware claimed, defense counsel objected on hearsay and foundation grounds. When the court asked Scott if he ever talked to Ware, Scott said, "Yes." The prosecutor again asked Scott what set Ware claimed. Defense counsel said, "Same objection, your honor." The court overruled the objection. Scott testified that Ware claimed Eastside Crip. (6 RT 784.)

Scott testified that he talked to people on the streets after Ware was killed regarding who had killed him. (6 RT 784.) When the prosecutor asked Scott what the word was on the street about who killed Ware, counsel objected on hearsay grounds. At that point the court held a discussion with the attorneys outside the hearing of the jury. (6 RT 784-785.)

The court noted that the evidence was not being offered for the truth of the matter asserted, but rather to show the common understanding on the street. The court further noted that if McKinnon was part of the group on the streets, it could be inferred that he was also aware of the knowledge. (6 RT 786.) The court offered to admonish the jury that the evidence was not for the truth of the matter asserted. (6 RT 787.) Defense counsel objected that if the evidence was not being offered for the truth of the matter asserted, it would be irrelevant unless it was shown that McKinnon was aware of what was said on the street. The court said it agreed with counsel, but that if Scott testified as to what was common knowledge on the streets and that everybody talked about it, and if McKinnon was on the streets with everyone else, there was sufficient

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22. Subsequently, the parties stipulated that McKinnon had "East Side Watts Vario Grape" tattooed on his hand. (7 RT 1054.)

foundation and the prosecution did not have to prove McKinnon was actually told the information because his knowledge could be inferred. (6 RT 788.)

Defense counsel expanded his objection to include section 352 grounds, arguing that anything having to do with gangs was dangerous and prejudicial. (6 RT 788-789.) The court overruled counsel's objection and directed the prosecutor to lay a better foundation. (6 RT 789.)

When Scott resumed testifying, he said it was common knowledge on the streets that Ware's killer was from the Pomona Island Bloods and that the killer was hanging out in Banning. (6 RT 789-790.) Scott said most of the people involved in the Crips and Bloods in Banning had this information, and frequently talked about it. (6 RT 790-791.) Scott said he talked to both Blood and Crip members about it. (6 RT 791.)

McKinnon claims the court erred in overruling defense counsel's hearsay and foundational objections to Scott's testimony, because Scott's testimony that he had talked to Ware was meaningless in light of the fact that Scott never testified that Ware actually told him he belonged to or was affiliated with the Crips. Therefore, McKinnon argues, there was no evidence to show that Scott's testimony regarding Ware's gang affiliation was not hearsay or fell within an exception to the hearsay rule. (AOB 142-143.)

In order for Scott's testimony regarding Ware's gang affiliation to be hearsay, however, it would have to have been offered for the truth of the matter asserted, but that was not the case here. The evidence was not offered for the truth of the matter asserted; it was offered to demonstrate what was common knowledge in Banning's gang culture. Whether Ware was a Blood, a Crip, or unaffiliated, made no difference. The only thing that mattered was what was being talked about amongst gang members in Banning. In fact, even defense witness Charles Neazer, a self-admitted Blood, testified that he knew Ware, and when defense counsel asked Neazer if he knew whether Ware was a member

of a certain gang, Neazer said, "He might have been affiliated with the Bloods, but I didn't actually think he gang banged, though." (8 RT 1082.)

Recognizing this problem, McKinnon argues that if the evidence was not offered for its truth, then the prosecution had to prove he heard the statement and believed it, but there was "absolutely no evidence that [McKinnon] had even heard the alleged rumor, much less that he believed it." (AOB 144-145.) McKinnon further claims that the prosecution, which only produced Scott as a witness on this issue, should have produced a number of witnesses from the community testifying as to the rumor regarding Ware's killer. (AOB 145.)

McKinnon is incorrect. First, he fails to note that Black, who testified that he knew who claimed Crips and who claimed Bloods, also testified that Ware was supposedly killed by a Blood. (6 RT 963.) Second, he overlooks the centerpiece of the prosecution's case against him on the Martin murder. Black testified that McKinnon told him that he pointed a gun at Martin, said "This is for Scotty," and then fired. (6 RT 962-963.) Assuming the jury believed Black, McKinnon's own words established the fact that he had heard the word on the street about who killed Ware, and he believed it.

Moreover, the last thing the defense would have wanted at trial was a parade of expert and lay witnesses marching into the courtroom to testify as to what was common knowledge in Banning about gangs. That would have eroded any potential argument by McKinnon that Scott could not be believed. It also would have been contrary to the thrust of McKinnon's objections to the gang evidence that was presented at trial. In other words, had the prosecution done that, McKinnon would now be arguing on appeal that admission of so much gang evidence was cumulative and prejudicial.

Finally, McKinnon has failed to demonstrate that the prejudicial effect of the gang evidence ultimately presented at trial outweighed the evidence's probative value, such that it is reasonably probable he would have received a

more favorable result had the evidence been excluded (*People v. Watson* (1956) 46 Cal.2d 818, 834, 836-837 (*Watson*); *People v. Sakarias* (2000) 22 Cal.4th 596, 630), or that his constitutional rights were violated.

The gang evidence at trial consisted of: (1) Scott's claim that he knew who in Banning was in a gang and what set they claimed (6 RT 779); (2) Scott's admission that in 1994 he had considered himself a Blood (6 RT 780); (3) Scott's testimony that Bloods and Crips sometimes fight (6 RT 781); (4) Scott's testimony that for the most part, gang members in Banning got along despite their Crip/Blood status (6 RT 781); (5) Commander Palmer's testimony that it was common knowledge Martin was a Blood and McKinnon was a Crip (6 RT 881-882); (6) Harold Black's testimony that Scotty Ware was a Blood, Martin was a Blood, and McKinnon was a Crip, and that Ware had reputedly been shot by a Blood (6 RT 963); (7) defense witness Charles Neazer's testimony that he and Martin were Bloods (8 RT 1076); (8) Neazer's testimony that Ware might have been a Blood (8 RT 1082); (9) Neazer's testimony that there was not any real gang activity in the Banning area, that the Crips and Bloods there were mutual friends because everyone knew everyone, and that the respective gangs were not sworn enemies in Banning. (8 RT 1077.)

Unlike *Williams*, other than the referenced testimony, the prosecution did not present any evidence about gang culture. Nor did the prosecution present any evidence suggesting McKinnon was deeply immersed in gang culture. In other words, the gang evidence in this case was far less inflammatory than the evidence in *Williams*. Thus, it is not reasonably probable that the evidence was so inflammatory that had it been excluded, the jurors would not have convicted McKinnon of the Coder murder. If anything, the evidence simply helped the jury understand the unique aspects of gang culture in Banning.

Conversely, the gang evidence was more than minimally probative to the prosecution's case. In the Martin case, similar to the Coder case, the

prosecution faced the problem of establishing a motive. On one hand, according to Palmer, Lloyd Marcus said he saw the shooting from a block away, he saw two people standing in the street, there was an argument, and Martin said, "Where's my money," following which Popeye pulled out a gun and fired two shots. (6 RT 891, 893-894, 925.) On the other hand, Black testified that McKinnon admitted he shot Martin shortly after stating, "This is for Scotty." Given the lack of evidence as to a financial motive for the murder, the gang evidence was significant to the prosecution's theory.

Nevertheless, McKinnon argues the evidence should have been excluded because Black's testimony was negligible as to motive and bore minimal probative value. He argues that given the time that elapsed between Ware's murder and Martin's murder, it made little, if any, sense for McKinnon to wait years before committing an indiscriminate murder of a Blood as retaliation. In support of his argument, McKinnon cites the prosecutor's comment at oral argument on the motion to exclude (1 RT 102), i.e., that the murder of Scotty Ware occurred "some years" before Martin's murder. (AOB 136-137.)

McKinnon's argument overlooks an important piece of testimony. Regardless of what the prosecutor said at a motion hearing, Black testified at the preliminary hearing that Ware was murdered "the previous year. . .." (1 CT 48.) Thus, the elapsed time between Ware's murder and Martin's murder was not so long that the prosecution's theory made little sense. Besides, even if years elapsed between Ware's and Martin's murders, it would not have undercut the prosecution's theory that McKinnon killed Martin in an act of revenge. It is well known that gang members often retaliate years after an act of provocation. (*People v. Sanchez* (2001) 26 Cal.4th 834, 857, "History sadly establishes that killings motivated by revenge may occur in cycles lasting many years and even generations." [conc. opn. of Kennard, J.].)

Consequently, the ultimate question before this Court reduces to whether the spillover effect of the gang evidence in the Martin murder prejudiced McKinnon in the Coder case. It is apparent that it did not. Little, if anything, about these two murders makes any sense. McKinnon murdered Coder for no reason, whatsoever. And given Black's testimony about what McKinnon told him, and Palmer's testimony that Marcus said he heard Martin say "Where's my money" right before McKinnon shot him, the reasonable inference is that McKinnon may have become irritated when Martin pressed him for money, and finally acted out, citing vengeance. But that hardly would have inflamed the jury. Moreover, the prosecution went to great lengths to demonstrate that the Coder murder was without motive, thereby negating any possibility that the jury would let gang membership spill over to the Coder charge. Stated another way, in light of two senseless murders, generic background evidence to the effect that McKinnon belonged to a gang was not likely to have led the jury to infer that McKinnon had a criminal disposition and therefore was guilty of the Coder murder.

III.

THE COURT PROPERLY EXERCISED ITS DISCRETION TO EXCLUDE IRRELEVANT PORTIONS OF INVESTIGATOR BUCHANAN'S LETTER TO THE PROSECUTOR

McKinnon contends the court violated state law, as well as his rights under the Sixth, Eighth, and Fourteenth Amendments, when it denied his request to introduce into evidence a letter that Investigator Buchanan wrote to the prosecutor, and to allow McKinnon to examine Buchanan about the document. (AOB 156-179.) McKinnon's contention is without merit. He failed to preserve for several bases for his claim, the court properly exercised its discretion to exclude irrelevant evidence, and any error was harmless.

During the defense case, counsel informed the court that he wanted to call Buchanan to the stand and question him about a handwritten letter from Buchanan to the trial prosecutor, in which Buchanan said he intended to find Kimiya Gamble and make her a witness or arrest her as an accessory.[23/] Counsel said he wanted to ask Buchanan if he attempted to persuade Gamble to change her story, or otherwise pressured her. (8 RT 1099.)

The prosecutor objected, noting the letter was work product and not appropriate for the jury's consideration. The prosecutor said the letter contained irrelevant material, i.e., Buchanan's feelings about what might have happened to the gun. The prosecutor noted that the letter was "probably technically, was never discoverable," but said it was his policy to always allow the defense to go through everything he had. He said he had no objection to the defense asking Buchanan if he interviewed Gamble and threatened her with prosecution under Penal code section 32, but said it would not be proper to put the letter in front of the jury. He also said that the letter did not actually

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23. The text of the letter, Defense Exhibit B, is as follows:

"John -

As you can tell by this report McKinnon did not possess the handgun at the time of his arrest. However, I think he probably stuck it in the female's purse at the time of the car stop.

I will find this gal (Kimiya Gamble) and make a wit [sic] out of her. Or arrest her for 32 P.C. She apparently pled out to the 12025/12031 PC charge and took 36 mos. probation.

As of now, Steve Gomez and I plan to go to Folsom to interview Harold Black & Las Vegas to locate and interview Johnetta Hawkins on May 1 & 2.

I'm keeping an envelope for def. discovery. Buck"

(& SCT 38.)

impeach Buchanan because it did not say he threatened Gamble. The prosecutor proffered that Buchanan would testify that he did not threaten Gamble, that she was a witness, and that apparently once Buchanan found out the details, there was "no hint of a 32 and that he never threatened her with that." (8 RT 1100.)

Defense counsel responded that the letter's first paragraph indicated Buchanan's intent, and constituted "at least circumstantial evidence of what attempts, perhaps, were made. . ..." (8 RT 1100-1101.)

The court excluded the letter, but said the defense could examine Buchanan on what he said to Gamble. The court said the letter's first and third paragraphs were "totally" irrelevant. Noting Gamble had already testified that Buchanan explained to her potential liability under Penal Code section 32, the court said the letter's second paragraph might have some relevance, and the defense could examine Buchanan about his statements to Gamble. The court said that if Buchanan denied making any threats to Gamble or to having explained her liability under Penal Code section 32, the defense could ask Buchanan whether he intended to make Gamble a witness or arrest her for Penal Code section 32, as outlined in the second paragraph. (8 RT 1101.)

Defense counsel asked the court if he could question Buchanan as to whether he pressured Gamble to change her story to say McKinnon told her to put the gun in her purse. If Buchanan denied doing so, counsel wanted to ask him "isn't it true you wrote a memo?" The court said the defense first had to ask Buchanan if he intended to either make Gamble a witness or arrest her for violating Penal Code section 32, and if Buchanan denied it he could be impeached with his statements in the letter. The court said it would give Buchanan a chance to explain his state of mind, and if he denied it as outlined in paragraph 2 of the letter, the paragraph would come in for impeachment. (8 RT 1102.)

A few minutes later, counsel advised the court that in light of the court's ruling, and after discussing the matter with McKinnon and co-counsel, the defense made a tactical decision not to call Buchanan "at this point." (8 RT 1102.) The court then clarified its ruling for the record:

> ". . .as far as Exhibit No. B is concerned, paragraph [sic] 1 and 3 appears to me to be irrelevant. However, as far as the topic covered in paragraph 2, as indicated, I would certainly allow cross examination on that. And that portion of the document may well be admissible if the witness denies that state of mind."

(8 RT 1103.)

The court noted it was not restricting the defense's examination of Buchanan regarding statements he made to Gamble and his state of mind. Defense counsel said he wanted to introduce the letter "in toto," but in light of the court's ruling would not call Buchanan. (8 RT 1104.) Shortly thereafter, the defense rested its case. (8 RT 1104-05.)

A. McKinnon Waived Several Bases For His Claim By Failing To Raise Them At Trial

Evidence Code section 354[24] prohibits "appellate courts from reversing

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24. Evidence Code section 354 provides in relevant part,

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:
>
> (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;
>
> (b) The rulings of the court made compliance with subdivision (a) futile; or
>
> (c) The evidence was sought by questions asked during cross-examination or re-cross-examination.

a judgment based on the 'erroneous exclusion of evidence' unless there is a 'miscarriage of justice,' *and* the '*substance,* purpose, *and* relevance of the excluded evidence was *made known* to the [trial] court by the questions asked, an offer of proof, or by any other means.'" (*People v. Whitt* (1990) 51 Cal.3d 620, 648; accord *People v. Hill* (1992) 3 Cal.4th 959, 989 disapproved on another ground in *People v. Price* (2001) 25 Cal.4th 1046, 1069, fn. 13; accord, *People v. Valdez* (2004) 32 Cal.4th 73, 108 .) The requirement for an offer of proof "gives the trial court an opportunity to change its ruling in the event the question is so vague or preliminary that the relevance is not clear." (*People v. Whitt, supra*, 51 Cal.3d at 648.) Further, "even where the *question* is relevant on its face, the *appellate court* must know the "substance" or content of the *answer* in order to assess prejudice." (*Ibid.*) An offer of proof must be specific. (*People v. Schmies* (1996) 44 Cal.App.4th 38, 51, 53.)

McKinnon contends the letter as a whole was relevant to critical issues, and therefore he had an absolute right to present it independent of Buchanan's testimony. (AOB 160.) He reasons that the first two paragraphs of the letter were admissible for non-hearsay reasons, as evidence that Gamble changed her story to fit the prosecution's theory under threat of arrest and prosecution. (AOB 161.) He further argues that the third paragraph was admissible for a non-hearsay purpose, namely, to show that Buchanan approached Black and Hawkins with a theory already in mind, and that Black did not claim that McKinnon confessed to the Martin murder until after Buchanan interviewed him, and Hawkins did not change her story until after she was interrogated by Buchanan. (AOB 168-169.)

But McKinnon never presented the trial court with those theories of admissibility. Rather, counsel limited his theory of admissibility to his request to call Buchanan as a witness and ask him about the letter as it related to Gamble. Accordingly, McKinnon failed to preserve his claim that the first two

paragraphs were admissible independent of Buchanan's testimony, and the third paragraph was admissible because it tended to prove that Buchanan fed Black and Hawkins evidence supporting the prosecution's theory of the Martin murder.

B. The Court Properly Exercised Its Discretion To Exclude Irrelevant Evidence

Only relevant evidence is admissible. As previously noted, relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" (*People v. Garceau, supra*, 6 Cal.4th at p. 177.) Under the general rule:

> the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission in evidence in the interests of orderly procedure and the avoidance of prejudice. [Citation.]

(*People v. Lawley* (2002) 27 Cal.4th 102, 155.)

The trial court has broad discretion in determining the relevance of evidence but lacks discretion to admit irrelevant evidence. (*People v. Crittenden* (1994) 9 Cal.4th 83, 132; *People v. Kelly* (1992) 1 Cal.4th 495, 523 [a trial court has "wide discretion" in deciding the relevancy of evidence].) The trial court's discretion will not be disturbed on appeal unless its exercise is arbitrary, capricious, or absurd and results in a miscarriage of justice. (*People v. Cash* (2002) 28 Cal.4th 703, 727; *People v. Brown* (2003) 31 Cal.4th 518, 534; *People v. Cooper* (1991) 53 Cal.3d 771, 817.) The trial court "retains discretion to admit or exclude evidence offered for impeachment" and any "exercise of discretion in admitting or excluding evidence" is reviewed under

the abuse of discretion standard. (*People v. Brown, supra,* 31 Cal.4th at p. 534 quoting *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) A trial court's broad discretion includes the ability to control the "scope of cross-examination designed to test the credibility or recollection of the witness." (*People v. Belmontes* (1988) 45 Cal.3d 744, 788.)

Here, contrary to McKinnon's contention, the first paragraph was irrelevant to Gamble's testimony. Nothing in the paragraph tended to demonstrate that Gamble knew anything about Buchanan's alleged intent to have her testify that McKinnon told her to put the gun in her purse despite her having pled guilty to the firearm-possession charge. The only thing the paragraph might have demonstrated was Buchanan's intent when he interviewed Gamble. Thus, as the court correctly reasoned, counsel had to first establish what Buchanan said to Gamble and give Buchanan an opportunity to explain his state of mind. If Buchanan denied pressuring Gamble, the second paragraph would be relevant. In fact, had McKinnon pursued that approach, the first paragraph might then have become relevant as tending to provide a nexus between Buchanan's answers and his state of mind. Of course, McKinnon never established Buchanan's state of mind, because he decided not to call the investigator as a witness. Consequently, the court's ruling was not only correct, but McKinnon also failed to preserve for appeal this aspect of his claim. (See *People v. Whitt, supra*, 51 Cal.3d at 648.)

In any event, McKinnon argues that the entire letter was relevant under Evidence Code section 1250 as evidence of Buchanan's state of mind, and therefore independently admissible without calling Buchanan. (AOB 164-165.) Once again, McKinnon never presented this theory to the trial court. Accordingly, he failed to preserve for appeal this aspect of his claim. (See *People v. Witt* (1975) 53 Cal.App.3d 154, 174 [the state-of-mind exception to the hearsay rule cannot be raised for the first time on appeal].)

Citing *People v. Duran* (1976) 16 Cal.3d 282, 294-295 (*Duran*), however, McKinnon submits that the letter was admissible because this Court has recognized that extrajudicial statements are admissible for non-hearsay purposes without requiring the proponent to call the declarant and ask if he made the statement. (AOB 171.) *Duran* is distinguishable. In *Duran*, the court sustained a hearsay objection to the defendant's explanation of the circumstances which caused him to flee the scene of an in-prison stabbing. The defendant's offer was that correctional officers previously warned him, when he was punished for rules infractions, that he could not afford to be involved in any further incidents while a prisoner. (*Duran, supra*, 16 Cal.3d at pp. 294-295.)

In finding the trial court's ruling incorrect, this Court explained that the issue did not concern an extrajudicial declaration of state of mind offered as evidence, and therefore Evidence Code section 1250 was not applicable. Rather, the proffered evidence was background material offered to prove the defendant's state of mind when he fled, i.e., that he reasonably entertained the state of mind he claimed. Accordingly, the extrajudicial statements, which lent credibility to the defendant's asserted state of mind, were relevant competent evidence. This Court explained that the settled rule is whenever an utterance is offered to evidence the state of mind which ensued in another person as the result of the utterance, no testimonial use is sought, and therefore the utterance is admissible under the hearsay rules. (*Duran, supra*, 16 Cal.3d at p. 295, citing *People v. Roberson* (1959) 167 Cal.App.2d 429, 431.)

Duran is inapposite to the instant case. Here, the letter was not offered on the theory that it evidenced Gamble's state of mind; rather, it was offered as to Buchanan's state of mind when he interviewed Gamble. That is why the trial court required counsel to question Buchanan about what he said to Gamble before questioning him about the letter's second paragraph. Thus, the letter was

hearsay offered for impeachment. Accordingly, *Duran* does not support McKinnon's contention.

C. Any Error Was Harmless

In the event this Court determines McKinnon did not waive this issue, and that the trial court abused its discretion when it excluded the letter's first and third paragraphs, it was harmless.

As noted in section A, above, Evidence Code section 354 provides that a judgment will not be overturned for the improper exclusion of evidence unless a miscarriage of justice is shown. (Evid. Code, § 354.) The general rule is that a miscarriage of justice occurs when, in light of the entire record, "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Cahill* (1993) 5 Cal.4th 478, 492, citing *Watson, supra*, 46 Cal.2d at p. 836.)

Here, counsel elicited from Gamble evidence supporting the defense theory that Buchanan pressured Gamble into saying the gun was McKinnon's and that McKinnon told her to put it in her purse. (7 RT 1049-1052.) He also elicited testimony from her admitting that Buchanan told her about Penal Code section 32 and explained that she might be an accessory. (7 RT 1052.) In addition, Gamble conceded that she pled guilty to possessing the firearm, which was arguably inconsistent with her testimony that the gun was McKinnon's. (7 RT 1033.) Further, counsel elicited testimony from Black supporting the defense theory that Black changed his story after talking to Buchanan. (6 RT 969-970, 980, 987-988, 993-994; 7 RT 1018-1019.)

In light of the referenced evidence, it is not reasonably probable that McKinnon would have received a more favorable result had the jurors also seen a letter in which Buchanan said he suspected McKinnon told Gamble to put the gun in her purse, and that he was going to interview Black and Hawkins. Other than the fact that the letter's third paragraph was in the same document as the

first paragraph, nothing about it suggests a nexus between the seemingly independent statements; one expressed a belief Buchanan had, and the other simply told his colleague where he was going. Further, substantial evidence supported the prosecution's theory. Black testified that McKinnon admitted shooting Martin, Marcus identified the shooter as Popeye, which was McKinnon's nickname, and the forensic evidence was notably consistent with what Marcus told Palmer about the incident. Accordingly, any error in excluding the letter's first and third paragraphs was harmless.

Citing *People v. Minifee* (1996) 13 Cal.4th 1055 [prosecution improperly argued there was no evidence that the defendant feared he was going to be hurt or killed, when in fact the reason there was no such evidence was because the trial court had erroneously excluded evidence of a third-party threat], and *People v. Daggett* (1990) 225 Cal.App.3d 751 [prosecutor improperly argued that there was no evidence the child-molest victim, who was charged himself with molesting other children, must have learned the behavior by being molested by the defendant, when the reason there was no such was because the court had erroneously excluded evidence that the victim had told medical personnel that he had been previously molested by some older children], McKinnon disagrees, arguing that during closing argument the prosecutor capitalized on the court's erroneous ruling by highlighting the absence of the excluded evidence and encouraging the jurors to draw inferences they might not have drawn had they seen the letter. (AOB 171-177.) In particular, he focuses on a portion of closing argument in which the prosecution argued that given the evidence, the only way Black could have known about the gun being found in Gamble's purse was because McKinnon told him. (9 RT 1219-1220, 1224, 1228.) McKinnon argues that the letter would have called that argument into doubt, because it would have tended to show Buchanan had

a theory that McKinnon put the gun in Gamble's purse and then conveyed that theory to Black. (AOB 174-176.)

McKinnon's contention is predicated on an incorrect assumption. Unlike what happened in *People v. Minifee* and *People v. Daggett,* there was no erroneous exclusion of evidence here, as argued above. Furthermore, as also argued above, the defense never proffered that the third paragraph was admissible on the theory that it evidenced Buchanan had an agenda and fed information to Black and Hawkins. Consequently, the connection between McKinnon's argument on appeal and the substance of the letter's first and third paragraphs is far too tenuous to support his appellate argument.

Moreover, nothing prevented the defense from calling Buchanan as a defense witness and asking him if he conveyed the "gun information" to Black. If trial counsel had actually contemplated that theory, he could have argued that the letter gave him a good-faith belief supporting the line of inquiry. But he did not. Therefore, it appears McKinnon's argument on appeal is a theory never imagined at trial, and has simply been concocted from hindsight.

In sum, the court properly excluded the letter's first and third paragraphs, given the offer of proof presented, and it is not reasonably probable that McKinnon would have received a more favorable result at trial had the jury been presented with that evidence under the theory it was offered. Accordingly, any error in excluding the evidence was harmless. Similarly, assuming arguendo the error implicated McKinnon's rights under the federal Constitution, the error was harmless beyond a reasonable doubt for the reasons argued above. *Chapman v. California* (1967) 386 U.S. 18, 23-24 [87 S. Ct. 824, 17 L. Ed. 2d 705] (*Chapman*); *People v. Cash, supra*, 28 Cal.4th at p. 729.)

IV.

THE COURT DID NOT HAVE A SUA SPONTE DUTY TO INSTRUCT THE JURY REGARDING THE SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE, AS THE PROSECUTION'S CASE DID NOT SUBSTANTIALLY RELY ON SUCH EVIDENCE TO PROVE GUILT; REGARDLESS, ANY ERROR WAS HARMLESS

McKinnon contends the court erred when it failed to instruct the jury regarding the legal principles controlling the consideration of circumstantial evidence, thereby violating state law, as well as McKinnon's rights under the Sixth, Eighth, and Fourteenth Amendments to due process, a fair trial by jury, and a reliable determination of his guilt of a capital offense. Specifically, he claims the court should have instructed the jury pursuant to CALJIC No. 2.01 [Sufficiency Of Circumstantial Evidence–Generally], as to the gun in Gamble's purse. (AOB 180-190.) McKinnon's contention is without merit. The court had no sua sponte duty to instruct on circumstantial evidence because this was not primarily a circumstantial evidence case, and any error was harmless.

A. McKinnon Is Barred From Raising This Contention On Appeal

The prosecution submitted a checklist of requested jury instructions. The list included requests for CALJIC No's. 2.00 [Direct And Circumstantial Evidence–Inferences], 2.01 [Sufficiency Of Circumstantial Evidence–Generally], and 2.02 [Sufficiency Of Circumstantial Evidence To Prove Specific Intent Or Mental State]. (13 CT 3764.) When the court and parties conferred to discuss the requested instructions, the court asked the prosecutor if he wished to withdraw his request for CALJIC No. 2.01. The prosecutor said he did, and defense counsel made no comment. (8 RT 1107.) Subsequently, the court instructed pursuant to CALJIC No's. 2.00 and 2.02, but did not instruct with CALJIC No. 2.01. (9 RT 1232-34.)

"When a defense attorney makes a 'conscious, deliberate tactical choice' to forego a particular instruction, the invited error doctrine bars an argument on appeal that the instruction was omitted in error." (*People v. Wader* (1993) 5 Cal.4th 610, 657-58, citing *People v. Cooper, supra*, 53 Cal.3d at p. 831, and *People v. Duncan* (1991) 53 Cal.3d 955, 970.)

Here, McKinnon had a deliberate tactical purpose for not objecting when the prosecution withdrew its request for CALJIC No. 2.01. Just as the prosecutor and defense counsel argued in closing, the Martin murder was not primarily a circumstantial evidence case. (9 RT 1187-1188, 1194, 1221.) Rather, it was based on direct evidence, i.e., Black's testimony that McKinnon admitted murdering Mr. Martin, corroborated by circumstantial evidence, i.e., the murder weapon being found in gun in Gamble's purse, as Black claimed McKinnon told him. Accordingly, the record reveals counsel made a deliberate tactical choice to forego the instruction as inapplicable, and therefore McKinnon is barred from raising the issue on appeal.

B. The Court Did Not Have A Sua Sponte Duty To Instruct With CALJIC No. 2.01

CALJIC No. 2.01 "'must be given sua sponte when the prosecution substantially relies on circumstantial evidence to prove guilt.'" (*People v. Rogers* (2006) 39 Cal.4th 826, 884, quoting *People v. Wiley* (1976) 18 Cal.3d 162, 174.) "'[W]here circumstantial inference is not the primary means by which the prosecution seeks to establish that the defendant engaged in criminal conduct, the instruction may confuse and mislead, and thus should not be given.'" (*People v. Brown, supra*, 31 Cal.4th at p. 562, quoting *People v. Anderson* (2001) 25 Cal.4th 543, 582.)

The term "substantially relies" means that "direct evidence was a small part of the prosecution's case [citation omitted] or the defendant's guilt is to be inferred from a pattern of incriminating circumstances [citation omitted]."

(*People v. Williams* (1984) 162 Cal.App.3d 869, 875, citing *People v. Zerillo* (1950) 36 Cal.2d 222, 233, and *People v. Wiley, supra,* 18 Cal.3d at p. 174.) The instruction "need not be given when circumstantial evidence is only incidental to and corroborative of direct evidence." (*People v. Williams, supra*, 162 Cal.App.3d at 874, citing *People v. Jerman* (1946) 29 Cal.2d 189, 197.) "Circumstantial evidence" instructions are inapplicable to extrajudicial admissions. (*People v. Wright* (1991) 52 Cal.3d 367, 406.)

The prosecution's case regarding the identity of Martin's killer was based on the testimony of Harold Black and Kimiya Gamble. Black testified that while he and McKinnon were imprisoned in Chino, McKinnon said he shot Martin. (6 RT 961-64.) Black further testified that at some point in time before McKinnon admitted shooting Martin, McKinnon said he was in prison for a gun violation based on his having put a gun in his girlfriend's purse when he and she were riding in a car and were pulled over by the police. (6 RT 968-69.) Gamble testified that on February 19, 1994, she and McKinnon were driving around in McKinnon's car and that there was a gun, subsequently determined to be the weapon used to murder Martin, on the seat between her and McKinnon. (6 RT 851, 857; 7 RT 1030, 1032.) Gamble said that when the police pulled the car over, McKinnon told her to put the gun in her purse and she complied because McKinnon was on parole. (7 RT 1032-1033.)

It is apparent that the prosecution case in the Martin murder was not substantially based on circumstantial evidence. To the contrary, it was based on direct evidence of McKinnon's admissions. The fact that the gun was found in a car McKinnon was riding in merely corroborated his admission to Black. This construction is demonstrated by the fact that in closing argument even defense counsel argued that the Martin case was basically about Black's testimony and that the prosecution had used the gun to corroborate Black. (9 RT 1187-1195.)

McKinnon disagrees. Referring to the exception this Court recognized in *People v. Wright, supra*, 52 Cal.3d at p. 406, holding a circumstantial evidence instruction need not be given for evidence corroborative of a defendant's extrajudicial admissions, McKinnon argues that "even if it can be characterized as 'corroborative,' if the evidence is important and not merely 'incidental,' the exception does not apply." (AOB 185.) McKinnon's argument is based on the fact that in *People v. Jerman, supra*, 29 Cal.2d 189, which appears to be the genesis for the referenced exception, this Court said that the instruction need not be given where the circumstantial evidence is merely incidental to and corroborative of the direct evidence. (*Id.*. at p. 194.) He argues that here the evidence was more than incidental to and corroborative of Black's testimony, because the gun was central to the prosecution's case. He claims the gun evidence assured the jurors that they need not be concerned with Black's and Palmer's credibility, because if McKinnon possessed the gun a week after Martin was murdered, and if McKinnon failed to prove that the only explanation for possessing it was a reasonable one, the jurors would conclude he must have been the killer, regardless of any doubts they may have had about Black's and Palmer's credibility. (AOB 185-186.)

McKinnon's argument is flawed in two respects. First, although the court did not instruct with CALJIC No. 2.01, it did instruct the jurors to be cautious regarding Black's testimony (CALJIC No. 3.20; 14 CT 3826), and that the burden of proving McKinnon guilty beyond a reasonable doubt was on the prosecution. (CALJIC No. 2.90; 14 CT 3839.)

Second, a similar argument was rejected in *People v. Williams, supra*, 162 Cal.App.3d 869. There, the court explained that the type of case that requires CALJIC No. 2.01 is one in which the direct evidence is either a small part of the prosecution's case, "or the defendant's guilt is to be inferred from a pattern of incriminating circumstances." (*Id.* at p. 875.) That was not what

happened here. It cannot reasonably be said that the direct evidence in the Martin murder was a small part of the prosecution's case. Nor can it reasonably be said that McKinnon's guilt was to be inferred from a pattern of incriminating circumstances. To the contrary, the Martin case was based nearly entirely on direct evidence and there was only one incriminating circumstance, i.e., his possession of the murder weapon shortly after Martin was killed. Accordingly, the court did not have a sua sponte duty to instruct with CALJIC No. 2.01.

C. Any Error Was Harmless

Because CALJIC No. 2.02 was given, the absence of CALJIC No. 2.01 could only have affected the issue of identity. The evidence supporting the jury's determination that McKinnon killed Martin was Black's testimony that McKinnon admitted he shot Martin, Palmer's testimony that Marcus identified the killer by McKinnon's nickname, the gun being found in the car McKinnon was riding in, and Gamble's testimony that the murder weapon was McKinnon's. Thus, the only issue for the jurors was credibility, i.e., whether or not they believed Black, Palmer, and Gamble. Obviously, they did, despite the defense's extensive attempts to portray all three as liars who could not be believed or trusted. Once the jurors decided they believed the essential components of Black's, Palmer's, and Gamble's testimony, it is not reasonably probable (*People v. Watson, supra,* 46 Cal.2d at p. 836), that they would have concluded otherwise had they been told that they could not find McKinnon guilty unless the proved circumstances were consistent with McKinnon's guilt and could not be reconciled with any other rational conclusion. In fact, the circumstantial evidence, i.e., the murder weapon being found in a car McKinnon was riding in, and Gamble's testimony that he told her to put it in her purse, was not susceptible of a reasonable interpretation pointing to McKinnon's innocence.

As to the federal aspect of McKinnon's prejudice argument, the federal Constitution does not require courts to instruct on the evaluation of circumstantial evidence where the jury was properly was instructed on reasonable doubt. (*Holland v. United States* (1954) 348 U.S. 121, 140 [75 S. Ct. 127, 99 L. Ed. 150; see also *Victor v. Nebraska* (1994) 511 U.S. 1, 7-17 [114 S. Ct. 1239, 127 L. Ed. 2d 583 [approving California's pattern instruction on reasonable doubt].) Therefore, there was no federal constitutional error. And even if there was, it was harmless beyond a reasonable for the same reasons argued above.

V.

THIS COURT SHOULD FIND THAT THERE IS A STATE-OF-MIND EXCEPTION TO EVIDENCE CODE SECTION 351.1, AND THEREFORE THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED EVIDENCE TO REBUT THE DEFENSE'S CROSS EXAMINATION OF ORLANDO HUNT. IN ADDITION, ANY ERROR WAS HARMLESS

McKinnon contends the trial court violated state law, as well as his rights under the Sixth, Eighth, and Fourteenth Amendments, to a fair trial and a reliable jury determination, when it admitted evidence that Orlando Hunt failed a polygraph test. (AOB 191-203.) McKinnon's contention is without merit. The results of the test were not admitted; rather, in order to rebut an implication raised on cross-examination, Hunt was allowed to testify about the polygraph test's effect on his state of mind, namely, that he decided to tell the truth to prosecuting authorities after taking a the test and being told about his performance. Therefore, although Hunt's testimony referenced the taking of a polygraph examination, the testimony bore solely on Hunt's state of mind and did not seek to establish the reliability of the polygraph results. Thus, the trial court properly admitted the evidence. In any event, any error was harmless.

During direct examination, the prosecutor asked Hunt why he did not tell the police the truth when they first interviewed him. (4 RT 558.) Hunt said he initially withheld the truth from authorities because he was afraid for his own life and the lives of his wife and children. Hunt also said that he did not tell the truth to the prosecutor and Buchanan when they first interviewed him. (4 RT 558-559.) Hunt said he eventually told the truth after he "had an interview with the people in San Bernardino." (4 RT 559.) He said he decided to tell the truth about witnessing McKinnon shoot Coder, "Because it was bothering me for the simple fact that what happened to the guy. It was wrong. It happened for no apparent reason." (4 RT 560.)

On cross-examination, defense counsel repeatedly questioned Hunt about his claim that he eventually told the truth because his conscience bothered him. Counsel suggested that the real reason Hunt changed his story was because the prosecutor pressed him and threatened to charge him with the murder. In response, Hunt reiterated that he decided to tell the truth after speaking with the people in San Bernardino, and because his conscience bothered him. (4 RT 578-583.)

After the jury left the courtroom, the prosecutor said he had a brief issue to discuss. The prosecutor informed the court that the parties had avoided the San Bernardino interview because, in reality, Hunt had failed a polygraph test there. The prosecutor recognized that although the results of the test were inadmissible, he wanted to ask Hunt about the San Bernardino incident in relation to Hunt's decision to tell the truth. (4 RT 584.) Defense counsel objected, noting he and the prosecutor had previously discussed the issue and agreed not to discuss the test, but instead to refer to it as the San Bernardino incident. (4 RT 584-585.) Counsel asked the court to exclude any reference to the test or the examiner's conclusion that Hunt lied when he denied involvement in, or knowledge of, the Coder murder. Counsel argued that such

evidence is inadmissible, and if the jury heard it, it would give a scientific stamp of approval to what is otherwise inadmissible. (4 RT 585.)

The trial court realized the results of the test were inadmissible, but found that if Hunt was told or led to believe he failed the test, that evidence was independently admissible regarding Hunt's state of mind. (4 RT 585-586.) The court noted the matter was pivotal on the issue of Hunt's credibility, as defense counsel has "been going over the last 25 minutes." The court reiterated that the results of the test were immaterial and irrelevant, but ruled that if someone told Hunt he failed the test, and if there was a nexus between being told that information and Hunt changing his story, the evidence would be relevant and admissible. (4 RT 586-587.)

When re-direct examination resumed, Hunt confirmed that up until that point he had not told any authorities that he knew anything at all about the Coder murder. (4 RT 612.) The prosecutor asked Hunt more questions about why he had been in San Bernardino, and in response Hunt disclosed he had been there "to take a polygraph test." Hunt confirmed he took the test, and afterwards someone told him he "told the truth about some on certain things, and then I lied on certain things." Hunt said after that, he was told to just go ahead and tell the truth, and he decided it was time to do so. (4 RT 613.) Hunt confirmed that he then told the truth, for the first time, about being an eyewitness to the murder. (4 RT 613-614.) Hunt said that after he "talked to the guy" that gave him the test, he "got to thinking about what he was talking about. So once we got here, I just told you – told you guys the truth." (4 RT 614.)

A. The Trial Court Properly Admitted Rebuttal Evidence Of Orlando Hunt's State Of Mind After Taking A Polygraph Test

A trial court's ruling on the receipt of evidence will not be disturbed on appeal absent a finding that the trial court abused its discretion. (*People v.*

Robinson (2005) 37 Cal.4th 592, 626; *People v. Lenart* (2004) 32 Cal.4th 1107, 1123 [determination of relevancy reviewed on an abuse-of-discretion standard]; *People v. Price* (1991) 1 Cal.4th 324, 433.) "Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence, including evidence relevant to the credibility of a witness." (*People v. Kennedy* (2005) 36 Cal.4th 595, 615; see also Evid. Code, §§ 210, 351.)

Evidence Code section 351.1 provides:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

The statute creates an exception to the "truth-in-evidence" provision of Proposition 8 (Cal. Const., art. I, § 28, subd. (d)) that "relevant evidence shall not be excluded in any criminal proceeding." (*People v. Espinoza* (1992) 3 Cal.4th 806, 817 (*Espinoza*).)

This Court has held that Evidence Code section 351.1 codifies a long-standing rule that, since polygraph test results do not scientifically prove the truth or falsity of the answers given during such tests, they are not admissible to show guilt. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 849-851 *(Wilkinson); People v. Espinoza, supra*, 3 Cal.4th at p. 817 (*Espinoza*).) "'[L]ie detector tests themselves are not considered reliable enough to have probative value.'" (*Wilkinson, supra*, 33 Cal.4th at p. 849; *Espinoza, supra*, 3 Cal.4th at p. 817.)

Based upon this Court's rationale for excluding this type of evidence, there was no error here. (See *Wilkinson, supra*, 33 Cal.4th at p. 849; *Espinoza, supra*, 3 Cal.4th at p. 817.) The fact that Hunt took a polygraph test and, according to accounts made to him, told the truth on some things and lied on others, was not admitted to show the truth or falsity of his answers or the reliability of the polygraph examination, nor was it admitted for any probative value regarding guilt or innocence. Instead, the fact that Hunt was told he both told the truth and lied was essential to show his state of mind when he decided to tell the truth and to rebut an alternative implication raised by the defense.

Thus, contrary to McKinnon's assertion, the fact that Hunt failed a polygraph test was not admitted, at least not as that phrase is commonly understood. Rather, alleged results were communicated to Hunt and these results - true or not - had an effect on Hunt's state of mind. And Hunt's state of mind was entirely relevant to the jury's determination. Therefore, there was no violation of Evidence Code section 351.1, and McKinnon's claim should be rejected.

McKinnon argues that this court should adopt the holding in *People v. Lee* (2002) 95 Cal.App.4th 772 (*Lee*). In *Lee*, the trial court allowed the jury to hear a recording of the polygraph examination of the sole eyewitness to a murder. (*Id.* at pp. 781, 791.) The *Lee* Court held that ". . .there is no "state of mind" exception to the ban on polygraph evidence. Unlike hearsay evidence, which is only banned if it is offered "to prove the truth of the matter stated," polygraph evidence "shall not be admitted into evidence in any criminal proceeding." "Evidence Code section 351.1 ... simply and unambiguously prohibits the admission of evidence that a person took a polygraph test." (*Lee, supra*, 95 Cal.App.4th at pp. 772, 791.) Citing *Lee*, McKinnon argues that section 351.1 establishes a categorical ban on the admission of all polygraph evidence.

While it is true that *Lee* held there is no state of mind exception, that rule of law came from an intermediate court of appeal, and respondent submits this Court should overrule *Lee* and construe section 351.1 as having such an exception. Here, as the trial court recognized, the defense spent a great deal of time trying to establish that Hunt's claim, that he began to tell the truth because of his conscience, was untrue and that the real reason Hunt decided to tell the truth after having lied for so long was because the prosecution threatened to prosecute him for the murder. Of course, given *Lee's* construction of section 351.1, this line of questioning left the prosecution without a remedy to address and rebut the implications the defense raised on cross-examination. The trial court reasonably attempted to rectify this imbalance and unfair advantage by allowing a limited discussion of how the polygraph impacted Hunt's state of mind. Therefore, respondent respectfully submits that this Court should overrule *Lee* and hold that there is a state-of-mind exception to section 351.1

B. Any Error Was Harmless

In the event this Court determines the trial court abused its discretion when it admitted the contested evidence, it was harmless. Courts have found the admission of polygraph evidence prejudicial when it concerned the sole witness to a crime or when the evidence had a high potential to affect a jury's verdict. (*Lee, supra*, 95 Cal.App.4th at pp. 790-791; *People v. Basuta* (2001) 94 Cal.App.4th 370, 389-390 (*Basuta*).) These factors are simply not present in the instant case.

In *Lee* for example, the jury heard a recording of the actual polygraph examination of the sole witness to the murder, and then heard a recording of a police detective's interrogation of the witness based on the examination. (*Lee, supra*, 95 Cal.App.4th at p. 790.) The reviewing court rejected the People's harmless-error argument, explaining that it was impossible in that case to

separate the inadmissible "results" of the polygraph test from their "effect" on the witness. (*Lee, supra*, 95 Cal.App.4 at p. 791.)

In *Basuta, supra*, 94 Cal.App.4th 370, the defendant, who operated a day care center, was convicted of murdering a thirteen-month-old child by shaking him to death. (*Id.* at pp. 376-379.) Other than the defendant, the sole percipient witness to the events was the defendant's housekeeper. After initially telling lay persons and police officers a different story, the housekeeper ultimately told the police that the defendant had shaken the child, following which the child had stopped breathing. (*Id.* at pp. 379-380.) At trial, the court ordered the prosecution to ensure that none of the witnesses mentioned the fact that the housekeeper had taken and passed a lie detector test. (*Id.* at pp. 388-389.) Nevertheless, after a tape of the housekeeper's interview at the police station was played for the jury, the detective who authenticated the tape mentioned that the housekeeper had offered to take a polygraph. (*Id.* at p. 389.)

On appeal, the reviewing court rejected the People's harmless-error argument. The court explained that although the prosecution might have lost the battle of experts and still have obtained a conviction, the prosecution's case could not tolerate a loss in the conflict over the housekeeper's credibility, and thus the detective's comment "had a high potential to affect the jury's resolution of that issue." (*Basuta, supra*, 94 Cal.App.4th at p. 390.) The court further explained that a juror might conclude the housekeeper's readiness to take a polygraph reflected her confidence in its result, or might conclude that the "State would not base a serious prosecution on the testimony of a lone witness whose credibility it had cause to doubt," or that one or more jurors might conclude that the housekeeper passed the test and therefore was worthy of belief. (*Ibid.*)

Here, the contested testimony was of a entirely different nature than the evidence in *Lee* and *Basuta*, and certainly did not give rise to prejudice. First,

the only reason the evidence was admitted was to allow the prosecution to rebut an implication singularly pursued by the defense on cross-examination, i.e., that Hunt only changed his story after being threatened with prosecution. This implication was not entirely accurate, as the defense knew, as it was based on more reasons than the defense implied. Therefore, it had the potential to mislead the jury. Allowing Hunt to testify to his state of mind after the polygraph was the prosecution's only real way to rebut the implication raised by the defense. Thus, the harmless-error analyses in *Lee* and *Basuta* are simply not applicable to the unique facts of this case.

Second, the analysis in *Basuta* supports a finding of harmless error here. No juror was going to conclude that taking the test reflected Hunt's confidence in its result. Nor was any juror going to conclude that taking the test inspired confidence in Hunt's testimony because the People would not have undertaken the prosecution of McKinnon if they had any doubts about a sole witness's credibility. Hunt was not the sole witness, and at one point in the investigation the prosecution clearly had doubts about his credibility. This is amply demonstrated by the transcript of the prosecutor's interview with Hunt, where the prosecutor threatened to charge Hunt with murder, and lied and told Hunt that four other witnesses said Hunt was standing next to McKinnon when he killed Coder. In addition, Hunt himself, admitted he previously lied to authorities. Nor was there a danger that a juror was going to conclude Hunt was worthy of belief because he took the test. If anything, it simply rebutted the notion planted by the defense, that Hunt's only reason for changing his claim of ignorance was because the prosecution pressured him. In other words, it demonstrated, at the most, that Hunt was a self-admitted liar whose testimony had to be viewed with caution.

Finally, unlike the situations in *Lee* and *Basuta*, Hunt was not the sole eyewitness identifying McKinnon as the person who killed Coder. Kerry Don

Scott also identified McKinnon as the shooter, and Gina Lee's testimony essentially corroborated Scott's, as well as the reasonable inferences that could be drawn from Scott's and Hunt's testimony. Further, the pathologist's testimony was consistent with Hunt's and Scott's accounts of the murder. Thus, the prosecution's case did not exclusively hinge on Hunt's credibility with the jury, and given the strength of the other evidence, it is unlikely the mention of a polygraph test affected the jury's determination. Therefore, any error in admitting the evidence was harmless.

VI.

THE COURT PROPERLY ADMITTED EVIDENCE REGARDING ORLANDO HUNT'S STATE OF MIND, AS WELL AS A PRIOR INCONSISTENT STATEMENT IMPEACHING JOHNETTA HAWKINS, AND ANY ERROR WAS HARMLESS

McKinnon contends the court violated state law, as well as his rights under the Eighth and Fourteenth Amendments to a fair trial and reliable jury verdicts, when it admitted evidence that McKinnon attempted to suppress evidence, i.e., that McKinnon's sister had intimidated Orlando Hunt, and that McKinnon had threatened Gina Lee. (AOB 204-220.) He claims the evidence should have been excluded because: (1) it was cumulative; (2) it was highly prejudicial; (3) the prosecutor failed to provide notice to counsel that he was going to present the evidence; and (4) some of the evidence was inadmissible hearsay. McKinnon also complains that the court's limiting instruction regarding McKinnon's sister's threat to, and assault on, Hunt, was insufficient. McKinnon's contentions should be rejected. The court properly exercised its discretion to admit evidence regarding Hunt's state of mind and evidence impeaching Hawkins. Regardless, any error in admitting the evidence was harmless.

On direct examination, Hunt testified that initially he did not tell the police the truth because he feared for his own safety, and the safety of his wife and children. (4 RT 558.) On cross-examination, when the defense pressed him on the issue by rhetorically asking him where, in light of his fear, he went after he told the truth, Hunt said he came home, and after he did so he went to a party where "something happened." (4 RT 565-568.)

On re-direct examination, Hunt said he went to a party and had a problem. (4 RT 615-616.) Defense counsel objected, stating he had not received any discovery relating to an incident at a party. (4 RT 616.) The prosecutor acknowledged that he had not provided any discovery, but noted that Hunt had alluded to the incident during cross-examination, and that he [the prosecutor] recalled Hunt mentioning, during one of their conversations, that McKinnon's sister, Robin McKinnon, had confronted him at a party in Banning and told him something to the effect that he would be hurt if he testified. The prosecutor said Hunt was then hit on the head with a bottle, knocked to the ground, and kicked, and felt very threatened. (4 RT 616-617.)

Defense counsel repeated his objection, noting lack of discovery, and arguing the evidence was irrelevant because there was no connection tying McKinnon to the incident. Counsel also objected on section 352 grounds. (4 RT 617.) The prosecutor replied that the incident reflected on Hunt's credibility, and noted there is a jury instruction addressing the issue. (4 RT 617.) The court ruled the evidence admissible. (4 RT 617.)

Counsel asked for a limiting instruction to the effect that the evidence went only to Hunt's state of mind and that the jury should not consider it for its truth. The trial court offered to instruct the jury that the evidence went to state of mind and there was no evidence McKinnon caused the assault, and asked counsel to draft the proposed instruction. Counsel agreed with the court's

proposal, but asked the court to draft the instruction "off the cuff," because it would take the defense some time to do so. The court agreed. (4 RT 618.)

When re-direct examination resumed, Hunt testified that a year-and-a-half to two years earlier, at a party in Banning, Robin McKinnon said to him, "'What's going on with my brother? Are you going to tell on my brother?'" Hunt said there was a lot of cursing, and he told her he did not want to talk about it. Hunt said that as he turned his head, she hit him with a bottle, and that some guy came out of nowhere and started kicking Hunt in the face. Asked if "they" made any other statements to him, Hunt replied, "If I go to court, something will happen to me, if I testify." (4 RT 620.)

Shortly thereafter, the court instructed the jury as follows: "Ladies and gentlemen, this evidence was introduced as it bears upon the witness's state of mind and his demeanor and manner while testifying. There is no evidence that the defendant assisted or played any role in the alleged assault." (4 RT 621.)

A. The Court Properly Admitted Evidence Of The Hunt Incident

"[E]vidence that a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible." (*People v. Warren* (1988) 45 Cal.3d 471, 481, citing *People v. Avalos* (1984) 37 Cal.3d 216, 232.) "Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368, citing *People v. Malone* (1988) 47 Cal.3d 1, 30.) "It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible." (*Olguin, supra*, 31 Cal.App.4th at p. 1368, citing *People v. Green* (1980) 27 Cal.3d 1, 19-20.)

The court properly admitted Hunt's testimony regarding the incident. In *Olguin*, a prosecution witness testified on direct examination that he left the scene of a shooting and did not voluntarily provide information to the police

because he did not want anything to happen to his house or his family. Over objection, the witness testified that someone telephoned him a few days after the shooting and said they knew where he lived and that he had better watch his back. The witness further testified that when he asked the caller for her name, she made a reference to a gang. Subsequently, someone spray-painted the Spanish word for "rat" on the witness's driveway. The trial court instructed the jury that the evidence could only be used "'as it has relevance, if any, to the witness' state of mind, attitude, actions, bias, prejudice, lack or presence thereof.'" (*Olguin, supra*, 31 Cal.App.4th at p. 1368.)

The reviewing court held the evidence properly admitted, and the instruction adequate to properly limit the jury's consideration of it. The court explained that a

> "witness who testifies despite fear of recrimination of *any* kind by *anyone* is more credible because of his or her personal stake in the testimony, just as the fact that a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility . . .."

(*Olguin, supra*, 31 Cal.App.4th at pp. 1368-1369, citing *Calvert v. State Bar* (1991) 54 Cal.3d 765, 777.). The court noted that the fact a witness testified despite fear of recrimination is important to fully evaluating the witness's credibility. Therefore, the court explained, the source of the threat does not matter when it is offered for this purpose. The jury "is entitled to evaluate the witness's testimony *knowing* it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear." (*Olguin, supra*, 31 Cal.App.4th at p. 1369.)

What happened here is no different than what happened in *Olguin*. McKinnon's sister and someone else threatened Hunt that he would be hurt if he testified in McKinnon's trial, and they proved their sincerity by actually hurting him at the same time they uttered the threat.

Noting Hunt also testified that two to three days after the murder McKinnon stood in the doorway to Hunt's bedroom and threatened Hunt if he said anything about the shooting, McKinnon argues the evidence of the assault at the party was cumulative and should have been excluded even if relevant to Hunt's credibility. (AOB 209-210.) He also argues the evidence was of "dubious quality" because Hunt claimed he sought medical treatment for injuries suffered in the incident, yet the prosecution did not present any evidence corroborating that claim, and it carried a tremendous danger of prejudice because it was not just any third party that threatened and assaulted Hunt, it was McKinnon's sister. Therefore, the argument goes, there was a substantial danger the jury would speculate that McKinnon orchestrated the attack. (AOB 210-211.)

McKinnon's argument overlooks the fact that the defense devoted a substantial amount of time to attacking Hunt's claim that he feared for his safety and his family's safety. Under those circumstances, the court properly concluded that the prosecution was entitled to demonstrate Hunt's fear was sincere. Moreover, any danger that the jury might speculate McKinnon arranged the attack was negated by the limiting instruction. Unlike *Olguin*, where the limiting instruction addressed only the witness's state of mind, attitude, actions, bias, and prejudice, here the court told the jury, in no uncertain terms, that there was no evidence McKinnon played any role in the alleged assault. In light of the principle that the law presumes jurors adhere to limiting instructions on this sort of testimony (see *Olguin, supra*, 31 Cal.App.4th at p. 1368), the court's limiting instruction here negated any possibility that the jury would speculate McKinnon orchestrated the assault.

This conclusion is bolstered by common sense. It would come as no great surprise to anyone that a murder defendant's sister, who socialized in the community's gang scene, would threaten and assault a witness without

prompting by the defendant himself. Simply stated, that is the culture in some segments of society. In other words, the jurors certainly would have seen the incident for what it was; a sister angry at someone who was snitching out her brother. (See *People v. Long* (1974) 38 Cal.App.3d 680, 689 ["A juror is not some kind of a dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box"], disapproved on another point in *People v. Ray* (1975) 14 Cal.3d 20, 30-32 & fn. 8.)

McKinnon also complains that the limiting instruction was inadequate because it did not direct the jurors that they could not infer McKinnon authorized or orchestrated the incident, they could not consider it in any way against McKinnon, and they could only consider it to determine whether the incident rendered Hunt afraid to testify. (AOB 211-212.) The instruction said, in simpler terms, exactly what Hunt claims it failed to do. Jurors are not stupid. They can understand that when instructed that an incident of violence was introduced only as it bears upon the witness's state of mind and his demeanor and manner while testifying, and that there is no evidence that the defendant played any role in the incident, it means they cannot infer anything further from the incident itself.

Moreover, if the defense thought the instruction needed amplification, it was incumbent upon them to ask for it. (*People v. Kimble* (1998) 44 Cal.3d 480, 503.) In fact, that is initially what the court proposed. Nevertheless, the defense did not ask for any amplification or clarification of the limiting instruction. Thus, the defense apparently thought the instruction the court gave sufficiently addressed their concerns, and there is no reason to impute any greater lack of understanding to the jury. Accordingly, McKinnon's arguments go to the weight of the evidence, rather than its admissibility, and the court properly admitted the testimony.

B. The Court Properly Admitted Evidence Impeaching Johnetta Hawkins

On direct examination, Gina Lee acknowledged she was afraid to testify, she had lied at the preliminary hearing because she "was scared," and she lied when interviewed by the police eight to nine months after the shooting because she was scared. (4 RT 647, 653, 665-666.) Lee said she was standing in the field with Chester Norwood when she heard a gunshot. (4 RT 651.) After she heard the gunshot she continued on her way to buy drugs and returned to her room at the motel around thirty minutes after hearing the gunshot. Lee said her cousin, Hawkins, was in the room when she returned, and that she [Lee] saw McKinnon when she got back to the motel. (4 RT 657.) Lee said McKinnon "looked kind of strange," and that his "eyes was [sic] just big and stuff . . .." (4 RT 658.) She remembered telling Investigator Buchanan that McKinnon was very agitated, upset, and hyper. She said that when she asked McKinnon what was up, he put his finger to his lips, said "Shhhhh," and told her somebody was dead outside. (4 RT 658-659.) She admitted seeing two people running through the field, away from the gunshot, but said that after the shot she did not see McKinnon and Hunt at the motel until approximately a half-hour later. (4 RT 666, 670.)

On cross-examination, Lee said that when she returned to the motel after going to get drugs, she got high in her room before she saw McKinnon. (4 RT 687.) Lee said she saw McKinnon when she left her room to go to her friend Adrian's room at the motel. (4 RT 687-688.) McKinnon was in Adrian's room. (4 RT 688.) Asked if McKinnon said anything to her, Lee answered, "He just said -- he put his hand up like that (indicating), and he said, 'Shhhhh.' He said somebody was dead out in the front, or something like that." (4 RT 688.) She said Hawkins was present when McKinnon said this. (4 RT 689.)

The following day, defense counsel informed the court that the defense objected on hearsay grounds to the prosecution's proposal to call Johnnetta Hawkins as a witness. Counsel explained that Hawkins's proffered testimony would be that after the gunshots, Lee said she thought McKinnon and Hunt shot Coder, McKinnon told Lee not to tell anybody, and Lee was afraid of McKinnon. The prosecutor's offer of proof was that Hawkins would say Lee told her she ran into McKinnon and McKinnon told her not to say anything. (5 RT 709.)

The court said the proffered evidence was consistent with Lee's testimony the preceding day. (5 RT 709.) The prosecutor said Hawkins previously stated that Lee told her she was scared to death of McKinnon because McKinnon told Lee he would kill her if she said anything. The court asked the prosecutor if he specifically asked Lee that question. The prosecutor said he asked Lee if McKinnon said anything else to her, and that Lee answered he did not say anything other than putting his fingers to his lips and saying "Shhhhh, there's a guy dead outside." The court noted that Lee was still subject to recall. (5 RT 711.)

The court ruled Lee's statement to Hawkins, that she saw McKinnon and Hunt running away after hearing the shots, was admissible because it was inconsistent with Lee's testimony. Regarding the threat, the court remarked that Lee was not asked that specific question during her earlier testimony. (5 RT 711-712.) The prosecutor replied that he asked Lee if there had been any other contact between her and McKinnon, and she said nothing else. Therefore, the prosecutor argued, the proffered testimony from Hawkins was inconsistent with Lee's earlier testimony. Defense counsel said, "Your Honor, that was just simply a vague statement." The court said the prosecution could recall Lee and ask her specifically about threats McKinnon made to her, and if Lee denied it, the proffered testimony would be inconsistent. (5 RT 712.)

The following day, Johnnetta Hawkins testified she was alone in Lee's room when she heard the gunshot. She said Lee left the room just prior to the shot. (5 RT 730.) Hawkins said after hearing the gunshot, she and Lee left the area to get more drugs. (5 RT 731.) When the prosecutor asked Hawkins if, after hearing the gunshot, Lee said anything about what she saw at the time of the shot, Hawkins said Lee just said she saw two people running. (5 RT 732.) The prosecutor than asked Hawkins if she remembered telling Buchanan that she saw McKinnon the night of the shooting and that he came and said something to Lee. Hawkins denied having made such a statement. The prosecutor asked Hawkins if she saw McKinnon tell Lee something before the shooting. Hawkins said she did not. Hawkins said that when Lee returned to the room after the shooting she was acting high. (5 RT 733.) When the prosecutor asked Hawkins if Lee had acted scared, Hawkins said she did not know, that it had been "so many years." When the prosecutor asked if Lee had acted in any particular way, Hawkins said Lee was acting "high." The prosecutor responded, "Well, besides that. Do you remember telling Investigator Buchanan that she was scared? Hawkins answered, "She probably was. We was all scared. We had a murder scene." The prosecutor asked, "Okay. Do you remember her being scared?" Hawkins replied, "No, you cannot make me say I seen her being scared." (5 RT 734.)

At that point, the court called the attorneys to sidebar and told them, based upon Hawkins's responses to the prosecution's last several questions, the court would allow the prosecutor to ask Hawkins whether Lee said McKinnon threatened her, because that would be a contradiction to her testimony. (5 RT 735.)

When testimony resumed, the prosecutor asked Hawkins if Lee told her that McKinnon threatened her. Hawkins answered, "She said he did, but I don't know." (5 RT 735-736.) Hawkins said Lee did not tell her what the

specific threat was, but Lee said something to the effect that McKinnon was going to kill her. Hawkins said her conversation with Lee on this subject took place some time after she and Lee left the scene. (5 RT 736.) Hawkins said she asked Lee when she saw McKinnon, and Lee told her she saw McKinnon when she went outside at the motel. (5 RT 737.)

"Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." (Evid. Code, § 1235.) Evidence Code section 770 provides that extrinsic evidence of a witnesses's statement that is inconsistent with any part of his testimony shall be excluded unless the witness was given an opportunity while testifying to explain or deny the statement, and the witness has not been excused from giving further testimony. (Evid. Code , § 770, subds. (a) and (b).) "[T]he trial court has discretion to exclude impeachment evidence, including a prior inconsistent statement, if it is collateral, cumulative, confusing, or misleading." (*People v. Price, supra*, 1 Cal.4th at p. 412.)

Here, the court properly admitted Hawkins's recollection of what Lee said because it was inconsistent with Hawkins's previous testimony, namely her claim that prosecutor could not make her say she saw Lee "being scared." (See *People v. Ervin* (2000) 22 Cal.4th 48, 84 ["Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, courts do not apply this rule mechanically. 'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness.'].)

McKinnon argues that such reasoning is flawed, because even if Hawkins's prior statement was inconsistent with her evasive trial testimony, Lee's out-of-court statement that McKinnon threatened to kill her was not

inconsistent with Lee's trial testimony, and therefore not admissible for its truth under section 1235. (AOB 217.) He argues that any suggestion that Lee's out-of-court statement was admissible for the limited, non-hearsay purpose of showing she was afraid to testify, is no answer to his complaint, for two reasons. First, because the statement was admitted for its truth. Second, because it was cumulative in light of the admission of the tape recording of Officer Caldwell's interview of Lee, where Lee said she was afraid to testify because McKinnon was the type of person who "just goes off." (AOB 217, citing 13 CT 3593.)

Respondent disagrees. First, as discussed above, the court admitted Lee's statement to Hawkins as impeachment of Hawkins, and therefore it was admissible under Evidence Code section 1235. This construction of the record is supported by the court's absolute clarity when it ruled the evidence inadmissible as to Lee unless the prosecution recalled Lee and elicited a contrary statement from her, and the court's statement at sidebar when it allowed the evidence as impeachment of Hawkins. (5 RT 711-712.) Second, there is a significant difference between fear engendered by a general awareness of someone's personality, vis a vis a specific threat from that person that he will kill you if you say anything about what you saw. Thus, whether or not McKinnon threatened to kill Lee was directly relevant to Lee's credibility. But more importantly, the threat went to Hawkins' credibility.

Acknowledging that Lee's testimony contained multiple claims of failure to remember, and that the prosecutor frequently refreshed Lee's memory, McKinnon also argues that because Lee was a long-time crack-cocaine addict, her drug use affected her perception of time and reality, and therefore, she was not a reluctant witness feigning memory loss. Thus, he argues, Hawkins's contested testimony was not admissible on the theory that Lee's claimed loss of

memory was implicitly a deliberate evasion properly subject to impeachment by prior inconsistent statements. (AOB 212-213.)

McKinnon's argument is without merit. Although it is true the prosecutor effectively refreshed Lee's memory a number of times, it is also true that Lee was indisputably a reluctant witness. A number of times, Lee refused to directly answer relevant questions, claiming she did not remember. For example, when asked whether she remembered telling Investigator Buchanan she saw McKinnon driving the Cadillac that pulled up to the motel shortly before the shooting, she said, "I don't remember, but probably so." (4 RT 650.) Asked if she remembered telling officers she saw two people running away from the gunshot, she said she did not remember but that they were running the other way. (4 RT 653.) Asked whether she remembered telling officers she saw McKinnon and Hunt get out of the Cadillac, she said she saw two people run from the side of the motel. (4 RT 654.) When the prosecutor asked her if she saw McKinnon and Hunt running away within thirty seconds of hearing the gunshot, Lee said she did not remember. (4 RT 655.) When the prosecutor asked Lee if she remembered telling the police that about twenty minutes elapsed between the gunshot and the arrival of the police, she said she did not remember. (4 RT 665.) Asked again whether she saw McKinnon and Hunt running through the field, away from the gunshots, Lee said she did not remember. (4 RT 666.) She subsequently cited the same lack of memory when the prosecutor pursued the point again. (4 RT 669-670.) In addition, on cross-examination Lee said she did not remember telling Officer Caldwell that McKinnon was wearing black jeans and a "Pendleton" the day of the murder (4 RT 691), and on re-direct she said she did not remember telling Caldwell that she was not "using anything" the night of the murder, i.e., she was not hallucinating or seeing things. (4 RT 694-695.)

McKinnon attributes these memory lapses to Lee's long-standing drug abuse. But it is just as reasonable to attribute the lapses to deliberate evasion engendered by fear. Accordingly, her prior statement to Hawkins was admissible as to her credibility. (*People v. Ervin, supra*, 22 Cal.4th at pp. 84-85 ["As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper. [Citation.]"], citing *People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.)

C. Any Error Was Harmless

In the event this Court determines admission of the contested testimony was improper, it was harmless. In *People v. Arias* (1996) 13 Cal.4th 92, the trial court admitted evidence from a police detective concerning a prior interview he conducted of the defendant's mother. This Court found the prior statements largely consistent with the mother's trial testimony, and therefore erroneously admitted for their truth under section 1235. (*Id.* at pp. 152-153.) Nevertheless, this Court found the error harmless because the improperly-admitted evidence was "merely cumulative," and therefore it was not reasonably probable that the admission affected the verdict. (*Id.* at p. 153, citing *People v. Watson, supra*, 46 Cal.2d at p. 836.)

Here, the evidence was no more prejudicial than it was in *Arias*. As to the assault on Hunt, it is not reasonably probable that the jury learning about it affected the verdict. As discussed in section A, above, it was no secret that Hunt changed his story. Further, the jury learned the defense theory that Hunt changed his story out of fear he would be prosecuted for the murder vis-a-vis fear of what would happen to him if he testified against McKinnon. Nor was it surprising that McKinnon's sister, who participated in at least the social aspect of Banning's gang community, threatened and assaulted a person who was going to testify against her brother in a capital case. In other words, the

evidence was not that significant to begin with. Finally, Hunt's account of the murder was consistent with both Scott's account and the forensic evidence. Moreover, the court gave the jurors an instruction that correctly told them the proper use they could make of the evidence, and jurors are presumed to followed the trial court's limitations on testimony. (*People v. Olguin, supra*, 31 Cal.App.4th at p. 1368.) In other words, given the cast of players involved in these murders, it is unlikely that the jury's evaluation of Hunt's credibility was meaningfully influenced by the fact that he was assaulted.

As to the evidence impeaching Hawkins, Lee repeatedly conceded that she was afraid to testify, and in her interview with Caldwell she characterized McKinnon as the type of person who "just goes off," which frightened her. Thus, as McKinnon points out, Hawkins's testimony regarding what Lee told her was arguably cumulative, and on that basis alone it was not reasonably probable that its admission affected the verdict. (*People v. Arias, supra*, 13 Cal.4th at p. 153.)

Moreover, Kerry Don Scott, who saw McKinnon on the streets of Banning all the time, who had gone to school with McKinnon's sister, and who was not involved in either the Hunt incident or Hawkins' impeachment, positively identified McKinnon as the person who walked up to Coder, put a gun to Coder's head, and shot Coder for no apparent reason. (6 RT 794, 796-797, 800, 831, 834.) Given Scott's description of the murder and unequivocal identification of McKinnon as the killer, it is not reasonably probable that the jurors' awareness of the assault on Hunt and the alleged threat to Lee affected their verdict.

VII.

THE COURT DID NOT HAVE A SUA SPONTE DUTY TO INSTRUCT THE JURY TO VIEW MCKINNON'S ORAL ADMISSIONS WITH CAUTION, AND ANY ERROR WAS HARMLESS

McKinnon contends the court violated state law, as well as his rights under the Eighth and Fourteenth Amendments to a fair trial and reliable jury verdicts, when it failed to instruct the jury to view his oral admissions with caution, namely his jailhouse confession to Black, his threat to kill Gina Lee if she said something about what she had seen, and his threat to Hunt that something could happen to him if he said anything or opened his mouth. (AOB 221-229.) McKinnon's contention is without merit. The threats to Hunt and Lee were not oral admissions, and the court used another instruction regarding Black's testimony that adequately addressed the issue. Moreover, any error was harmless.

The parties made a joint request to the court to instruct pursuant to CALJIC No. 2.71 [Admission-Defined].[25] (13 CT 3764; 14 CT 3834.) At the conference on the proposed instructions, the court said CALJIC No. 2.71would

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25. The standard version of CALJIC No. 2.71 provides:

> An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence.
>
> You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part.
>
> [Evidence of an oral admission of [a] [the] defendant not made in court should be viewed with caution.]

be given, but questioned whether the "bracketed portion" should be included. The court said it believed "there's an instruction under 2.71 that applies to a situation where the statement is not tape recorded." (8 RT 1110-1111.) The prosecutor agreed, stating, "Right. I think that's supposed to be taken out in a situation like ours." Defense counsel concurred, stating, "Your honor, that's my recollection, as well." The court said it would strike the bracketed portion of the instruction, i.e., the last paragraph. (8 RT 1111.)

Ultimately, the court instructed the jury with CALJIC 2.71 but omitted the cautionary portion of the instruction. The court also instructed the jury with CALJIC No. 3.20 [Cautionary Instruction–In-custody Informant]. (14 CT 3826; 9 RT 1236.)

A. McKinnon Is Barred From Raising This Claim On Appeal

As noted in Argument IV, above, "When a defense attorney makes a 'conscious, deliberate tactical choice' to forego a particular instruction, the invited error doctrine bars an argument on appeal that the instruction was omitted in error." (*People v. Wader, supra*, 5 Cal.4th at pp. 657-58.)

Here, both sides below agreed that the exception for taped statements applied, seemingly because they understood the instruction went solely to McKinnon's tape-recorded interview, and both agreed to omitting the cautionary paragraph. In other words, defense counsel expressly agreed to having the court not include the last paragraph of CALJIC No. 2.71, and it is apparent why. As will be discussed in greater detail below, CALJIC No. 2.71 did not apply to McKinnon's threats to Lee and Hunt, because they were attempts to suppress evidence, not oral admissions. Consequently, the statements would have been addressed with another instruction, CALJIC No. 2.06 [Efforts To Suppress Evidence]. Nevertheless, when the prosecution indicated it would withdraw its request for CALJIC No. 2.06 if the defense opposed the instruction, the defense remained silent and the court ruled the

request withdrawn. (8 RT 1108.) Thus, the defense impliedly opposed the court giving that instruction. Moreover, CALJIC No. 3.20 addressed McKinnon's statements to Black. Thus, the record reflects the defense had a deliberate tactical purpose in mind for not wanting the instruction, i.e., because it did not apply and might have confused the jury. Accordingly, he is barred from complaining on appeal that the court failed to give instructions he declined at trial.

B. The Court Did Not Have Sua Sponte Duty To Instruct The Jury With The Cautionary Portion Of CALJIC No. 2.71

It is well-established that a trial court must *sua sponte* instruct the jury to view a defendant's oral admissions with caution. (*People v. Dickey* (2005) 35 Cal.4th 884, 905; *People v. Carpenter* (1997) 15 Cal.4th 312, 392; *People v. Beagle* (1972) 6 Cal.3d 441, 455).

McKinnon claims the court erred because the only recorded statements he made were his in-custody interrogations in which he denied complicity in the Coder murder and denied possessing the gun found in Gamble's purse. (AOB 221.) He argues the court should have given the cautionary portion of CALJIC No. 2.71 as to his other referenced statements, because they were oral admissions that were crucial to the prosecution's case. (AOB 221, 224.) He is incorrect.

McKinnon's threats to Lee and Hunt were not oral admissions, and therefore the court was not required to instruct the jury with the cautionary portion of CALJIC No. 2.71. As this Court explained in *People v. Sanders* (1995) 11 Cal.4th 475 (*Sanders*), those types of threats constitute attempts to suppress evidence. (*Id.* at p. 536.) Thus, for instructional purposes, they would have been addressed by CALJIC No. 2.06. (See *Sanders*, at p. 536 [noting instructions regarding efforts to suppress evidence properly addressed the defendant's pre-trial attempts to intimidate a witness]). Nevertheless, when the

prosecution requested CALJIC No. 2.06 (14 CT 3906; 8 RT 1108), the defense impliedly opposed it, and in response the prosecutor withdrew his request. (8 RT 1108.)

Regarding his statements to Black, the court instructed the jury pursuant to CALJIC No. 3.20, which informed the jurors that they should view an in-custody informant's testimony with caution and close scrutiny. (9 RT 1236.) In combination with the portion of CALJIC No. 2.71 that the court did give, the instructions adequately advised the jurors that they were the exclusive judges as to whether McKinnon made the statements to Black, and that they should view Black's testimony with caution. Thus, the court had no sua sponte duty to instruct with the cautionary portion of CALJIC No. 2.71.

C. Any Error Was Harmless

The applicable standard of review for prejudice is whether it is reasonably probable that the jury would have reached a result more favorable to appellant had the instruction been given. (See *People v. Dickey, supra,* 35 Cal.4th at p. 905; *People v. Carpenter, supra,* 15 Cal.4th at p. 393.) Because the primary purpose of the instruction is to help the jury determine whether the statements attributed to the defendant were made, the reviewing court examines the record to determine whether there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately, in assessing whether prejudice resulted from the omitted instruction. (*People v. Dickey, supra*, at pp. 905-906; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1268; *People v. Stankewitz* (1990) 51 Cal.3d 72, 94.)

Where there is no conflict, but simply a denial by the defendant that he made the statement attributed to him, this Court has found the omission of the cautionary instruction harmless. (*People v. Dickey, supra*, at p. 906; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1225-1226.) Similarly, when the testimony about the defendant's statements is uncontradicted, this Court has found that no

prejudice results. (See *People v. Stankewitz, supra*, at p. 94 [no prejudice found where "[t]he testimony concerning defendant's oral admission was uncontradicted; defendant adduced no evidence that the statement was not made, was fabricated, or was inaccurately remembered or reported" and "[t]here was no conflicting testimony concerning the precise words used, their context or their meaning"].) Likewise, when the jury has been instructed to view the same testimony with distrust, or has otherwise been thoroughly instructed on judging witness credibility, this Court has found that the jury was adequately alerted to view the testimony with caution, and any omission of the additional cautionary instruction harmless. (See *People v. Dickey, supra*, 35 Cal.4th at p. 906; *People v. Carpenter, supra*, 15 Cal.4th at p. 393; *People v. Stankewitz, supra*, 15 Cal.3d at p. 94.)

Here, the court instructed the jury with CALJIC No. 3.20. As Black was the only in-custody informant, the instruction clearly applied to his testimony. The court also instructed the jurors with CALJIC No. 2.71, omitting the cautionary portion. When the two instructions are viewed together, it is apparent that the court instructed the jurors to view Black's testimony with caution and told the jurors they were the exclusive judges as to whether McKinnon made the statements to Black. In other words, CALJIC No. 3.20 provided the portion of CALJIC No. 2.71 that McKinnon claims should have been given. Thus, the deleted portion of CALJIC No. 2.71 would not have added anything meaningful to the instructions that were given.

Moreover, there was no conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately, in assessing whether prejudice resulted from the omitted instruction. McKinnon simply argued that he never made the statements. (9 RT 1191-1194.) Therefore, any omission was harmless. (See *People v. Dickey, supra*, 35 Cal.4th at p. 906 [when the jury has been instructed to view the same testimony

with distrust, or has otherwise been thoroughly instructed on judging witness credibility, the jury was adequately alerted to view the testimony with caution, and any omission of the additional cautionary instruction is harmless].)

VIII.

THERE WAS NO CUMULATIVE ERROR DURING THE GUILT PHASE

McKinnon contends the cumulative effect of the errors discussed in Arguments I through VII of the AOB was prejudicial and violated his rights, under the Eighth and Fourteenth Amendments, rights to a fair trial and reliable jury verdicts. (AOB 230-235.) Because the trial court did not err in any of its disputed rulings, there is no error from which to consider whether McKinnon was prejudiced cumulatively or otherwise.

When a defendant invokes the cumulative error doctrine, "the litmus test is whether defendant received due process and a fair trial." (*People v. Kronmeyer* (1987) 189 Cal.App.3d 314, 349; *People v. Mincey* (1992) 2 Cal.4th 408, 454 [a defendant is entitled to a fair trial, not a perfect one].) Here, McKinnon received a fair trial. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1278 [defendant is not entitled to a perfect trial, just a fair one], overruled on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787, 835.) He had an impartial jury that represented a fair cross section of the community, the jury was made fully aware of the defense theory of the case, the trial court's rulings were fair, and the defense had ample opportunity to impeach the prosecution's witnesses in the eyes of the jury. Further, the prosecution's case was supported by eyewitness testimony, McKinnon's own admissions, and forensic evidence consistent with the eyewitnesses' accounts. Any errors, therefore, had little, if any, significance. Consequently, "[w]hether considered individually or for their 'cumulative' effect, they could not have affected the process or result to [McKinnon's] detriment." (*People v. Sanders, supra*, 11 Cal.4th at p. 565; see

also *People v. Bunyard, supra*, 45 Cal.3d at p. 1236 [given strong prosecution case, cumulative effect of errors did not prejudice defendant].) For the reasons stated above, and the strength of the evidence of McKinnon's guilt, he was not prejudiced, cumulatively or otherwise.

IX.

THERE WAS NO CUMULATIVE INSTRUCTIONAL ERROR

McKinnon contends the cumulative effect of a series of instructional errors was prejudicial and violated his rights to a fair trial, to trial by jury, and to reliable verdicts. (AOB 236-259.) Specifically, he claims that: (1) the court should not have instructed pursuant to CALJIC No. 2.03 [Consciousness Of Guilt–Falsehood] (AOB 237-247); (2) that giving CALJIC No. 2.02 [Sufficiency Of Circumstantial Evidence To Prove Specific Intent Or Mental State], undermined the requirement of proof beyond a reasonable doubt (AOB 248-251); and (3) that the provisions of CALJIC No's. 2.21.2 [Witness Willfully False], 2.22 [Weighing Conflicting Testimony], 2.27 [Sufficiency Of Testimony Of One Witness], 2.51 [Motive], and 8.20 [Deliberate And Premeditated Murder], vitiated the reasonable doubt standard (AOB 251-256). He acknowledges that this Court has previously rejected constitutional challenges to these instructions as discussed in this portion of his brief, but nevertheless asks this Court to reconsider its prior rulings upholding the challenged instructions. (AOB 256-258.) His contentions lack merit and should be rejected. Moreover, he invited all but one of the errors he now complains of, and therefore should be barred from rasing them.

The record indicates that the parties made joint requests for CALJIC Nos. 2.02, 2.21.2, 2.22, 2.27, 2.51, and 8.20. (8 RT 1107-1108, 1110, 1114). Having specifically requested the instructions, McKinnon invited the error and cannot assert the giving thereof as a ground for reversal. (*People v. Medina*

(1995) 11 Cal.4th 694, 763, citing *People v. Wader, supra*, 5 Cal.4th at pp. 657-658.) Accordingly, McKinnon should be precluded from raising on appeal objections to all of the referenced instructions.

In any event, this Court has repeatedly rejected the claims McKinnon raises here, and should do so again. In *People v. Stitely, supra*, 35 Cal.4th 514, this Court held CALJIC No. 2.03 is not improperly argumentative and does not generate irrational inference of consciousness of guilt. (*Id.* at p. 555; see *People v. Benavides* (2005) 35 Cal.4th 69, 100 [same]; *People v. Holloway* (2004) 33 Cal.4th 96, 142 [rejecting claim that CALJIC No. 2.03 is argumentative and fundamentally unfair]; *People v. Nakahara* (2003) 30 Cal.4th 705, 713 [rejecting claim that CALJIC No. 2.03 is impermissibly argumentative and allowed irrational inferences].) In *People v. Maury* (2003) 30 Cal.4th 342, this Court rejected the notion that CALJIC No. 2.21.2 undermines the reasonable doubt standard. (*Id.* at pp. 428-429; *People v. Nakahara, supra,* 30 Cal.4th at p. 714.) In *People v. Montiel* (1993) 5 Cal.4th 877, this court held that when read in context with the other instructions, CALJIC No. 2.27 in no way lessens the prosecution's burden of proof. (*Id.* at p. 941.) In *People v. Crew* (2003) 31 Cal.4th 822, this Court rejected claims that CALJIC Nos. 8.20, 2.21.2, and 2.22 lessen the prosecution's burden of proof. (*Id.* at p. 847-849.) In *People v. Stewart* (2004) 33 Cal.4th 425, this Court held CALJIC No. 2.02 does not unconstitutionally lessen the prosecution's burden of proof. (*Id.* at p. 521.) Moreover, as this Court explained in *People v. Rogers, supra*, 39 Cal.4th at p. 826, when, as here, the jury is instructed on the presumption of innocence and reasonable doubt under CALJIC No. 2.90, the instructions satisfy due process. (*Id.* at p. 889, citing *Victor v. Nebraska* (1994) 511 U.S. 1, 7-17, and *People v. Millwee* (1998) 18 Cal.4th 96, 161.)

In sum, because this Court has previously rejected arguments identical to the ones advanced by McKinnon here, and because McKinnon provides no compelling reasoning for revisiting these settled issues, this Court should summarily reject his claim.

X.

THE USE OF CALJIC NO. 17.41.1 DURING THE GUILT-PHASE DID NOT VIOLATE MCKINNON'S CONSTITUTIONAL RIGHTS, AND ANY ERROR WAS HARMLESS

McKinnon contends that by instructing the jury in the guilt phase with CALJIC No. 17.41.1, the court violated his rights under the Sixth and Fourteenth Amendments to due process, to trial by a fair and impartial jury, and to jury nullification. (AOB 260-267.) However, McKinnon waived this claim by failing to object at trial. Furthermore, this Court has held that the instruction in question did not violate the federal or state constitutions. Therefore, McKinnon's claim should be rejected. In addition, any error was harmless.

A. McKinnon Waived The Right To Raise This Claim On Appeal

The prosecution asked the court to instruct the jury pursuant to CALJIC No. 17.41.1. (13 CT 3764; 8 RT 1121.) At the conference on instructions, when the court asked defense counsel if he objected to the instruction, counsel said, "We'll submit." The court said it would give the instruction. (8 RT 1121.) The court subsequently instructed the jury pursuant to CALJIC No. 17.41.1, as follows:

> "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required b y these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of that situation."

(9 RT 1262-1263.) As McKinnon did not object to the instruction, he waived the right to raise this issue on appeal.

Acknowledging that defense counsel did not object to the court giving CALJIC No. 17.41.1, McKinnon claims that, in light of Penal Code section 1259,[26] an objection was not required in order to preserve the error for appeal. (AOB 267 n. 50.) In *People v. Elam* (2001) 91 Cal.App.4th 298, however, the court held that a failure to object to CALJIC No. 17.14.1 did not affect the defendant's substantial rights and was thus waived. (*Id.* at 311.) Accordingly, respondent submits an objection was required to preserve the claim, and McKinnon's contention to the contrary should be rejected.

B. The Court Did Not Violate McKinnon's Constitutional Rights

In *People v. Engelman* (2002) 28 Cal.4th 436 (*Engelman*), this Court held that the reading of CALJIC No. 17.41.1 to a jury does not infringe upon a criminal defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict. Specifically, this Court held that CALJIC No. 17.41.1 properly informs the jury that it has a duty to deliberate, because, as this Court previously held in *People v. Cleveland* (2001) 25 Cal.4th 466, 484, a juror who refuses to deliberate may be discharged by the trial court. (*Engelman*, at p. 442.) This Court also held that CALJIC No.

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26. Penal Code section 1259 provides:

> Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

17.41.1 properly informs the jury that it is to follow the law as given by the trial court because, as previously held in *People v. Williams* (2001) 25 Cal.4th 441, a juror who proposes to reach a verdict without regard to the law or the evidence, e.g., engages in nullification, may also be discharged by the trial court. (*Engelman*, supra, 28 Cal.4th at p. 442, citing *People v. Williams*, 25 Cal.4th at p. 463.) This Court further held that CALJIC No. 17.41.1, given along with CALJIC Nos. 17.40 [Individual Opinion Required - Duty To Deliberate], and 17.50 [Concluding Instruction]; ["all twelve jurors must agree to the decision"], fully informs the jury of its duty to reach a unanimous verdict based on the independent and impartial decision of each juror. (*Engelman, supra*, 28 Cal.4th at p. 444.) Finally, this Court held that CALJIC No. 17.41.1 is not tailored to a deadlocked jury and does not encourage the displacement of the independent judgment of the jury in favor of considerations of compromise and expediency; rather, along with other instructions given, the instruction encourages a unanimous verdict based on the independent and impartial decision of each juror. (*Id.*, at pp. 444-445, contrasting *People v. Gainer* (1977) 19 Cal.3d 835, 850.)

Although this Court in *Engelman* found the substance of CALJIC No. 17.41.1 proper, it exercised its supervisory power and directed that the instruction not be used in the future. In support of the directive, this Court noted the instruction could intrude on the deliberative process and "affect it adversely - both with respect to the freedom of jurors to express their differing views during deliberations, and the proper receptivity they should accord the views of their fellow jurors." (*People v. Engelman, supra*, 28 Cal.4th at p. 440.) This Court further explained that "it is not conducive to the proper functioning of the deliberative process for the trial court to declare-before deliberations begin and before any problem develops - that jurors should oversee the reasoning and decisionmaking process of their fellow jurors and

report perceived improprieties in that process to the court." (*People v. Engelman, supra*, 28 Cal.4th at p.440.)

McKinnon acknowledges *Engelman*. Nevertheless, in the portion of his argument addressing prejudice, he essentially maintains that the concerns expressed there, which persuaded this Court to preclude the use of CALJIC No. 17.41.1 in the future, were manifested here. In support of his contention, McKinnon notes that after four days of deliberations, the jury reported they were deadlocked at 11 to 1, and that they did not reach verdicts until the fifth day of deliberations. (AOB 267.)

McKinnon's contention misses the point. The jury did not contact the court for assistance, nor did it indicate any problems in deliberations. Thus, McKinnon has pointed to nothing in the record suggesting the concerns mentioned in *Engelman* came into play here. Therefore, his claim is entirely speculative, and would be more appropriately addressed on habeas corpus.

C. Any Error Was Harmless

McKinnon makes two arguments concerning prejudice that should be rejected. First, he claims giving CALJIC No. 17.41.1 amounted to a structural defect in the trial, and therefore requires automatic reversal. McKinnon's reasoning ignores this Court's holding in *Engelman*, that the challenged instruction does not violate either the state or federal constitutions in the first place. Without a finding that there has been a constitutional violation, it is unnecessary to consider what is the correct standard for reviewing the prejudice component of a violation.

McKinnon alternatively argues that the courts in this state have followed the Court of Appeal's decision in *People v. Molina* (2000) 82 Cal.App.4th 1329, 1331-1332 (*Molina*), where the court applied a *Chapman* standard to a claim that the defendant was prejudiced when the court instructed pursuant to CALJIC No. 17.41.1. *Molina* does not avail McKinnon. The case preceded

this Court's decision in *Engelman*. Moreover, it never held that *Chapman* was the correct standard. Rather, it applied a *Chapman* standard for the sake of argument. (*Molina*, 82 Cal.App.4th at 1332.) Accordingly, this Court's subsequent opinion in *Engelman* rendered the analysis used in *Molina* moot.

In sum, the jury heard closing arguments and instructions and retired to deliberate. Nothing in the record of this case indicates that the jury's deliberations were chilled or otherwise constitutionally impaired by the challenged instruction. Therefore, McKinnon's argument must fail.

XI.

THE COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DISMISSED CERTAIN PROSPECTIVE JURORS FOR CAUSE

McKinnon contends the court erred by dismissing five prospective jurors, namely prospective jurors Addington, Smith, Griggs, Fogg, and Harpster, for cause without sufficient evidence regarding whether their feelings about the death penalty would prevent or substantially impair their abilities to serve as jurors, thereby violating his rights under the Sixth, Eighth, and Fourteenth Amendments to a fair and impartial jury, to due process of law, and to a reliable verdict. (AOB 268-293.) Specifically, he claims: (1) the prospective jurors' answers on questionnaires did not provide sufficient evidence to support the court's ruling that they were disqualified under the standard set forth in *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S. Ct. 844, 83 L. Ed. 2d 841] (*Witt*) (AOB 272-290); and (2) trial counsel's non-opposition to the dismissals did not waive his right to raise this issue on appeal. (AOB 290-293.) McKinnon's claim is without merit. He waived the issue. Moreover, there was no error and no violation of appellant's constitutional rights from the court's determination of substantial impairment as to any particular prospective juror.

A. McKinnon Waived The Right To Challenge The Court's Removal Of The Referenced Prospective Jurors

Although the parties in a criminal trial may not waive, and the court may not forego, "compliance with the statutory procedures designed to further the policy of random jury selection, equally important polices mandate that criminal convictions not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced. [Citations omitted.]" (*People v. Ervin, supra*, 22 Cal.4th at p. 73).) Joining in an excuse-for-cause of a potential juror forfeits the issue for purposes of appeal. (*People v. Hill, supra*, 3 Cal.4th at p. 1003, overruled on other grounds by *Price v. Superior Court, supra*, 25 Cal.4th at p. 1046.)

Respondent submits that McKinnon forfeited this claim because he essentially joined in the court's excusing the five prospective jurors for cause.

McKinnon filed a motion to use jury questionnaires in the death-qualification portion of voir dire. (1 CT 262-285.) Noting the courtroom could accommodate ninety prospective jurors, the court said it would use the questionnaires to whittle down the list of prospective jurors to conform with that figure, where it was obvious to the court that the jurors were impaired. (1 RT 29-30.) The prosecution said the proposed process would be "Fine with the People." (1 RT 30.) The defense made no comment on the proposed procedure, and instead turned to the issue of how much time counsel would be granted for voir dire. (1 RT 30.) Subsequently, in noting for the record that he had brought the proposed questionnaires to the court for review, ex parte, the prosecutor mentioned that as far as he knew the parties had agreed on everything. (2 RT 119-120.) Defense counsel responded, "That's fine, Your Honor." (2 RT 120.) Eventually, the court and parties reviewed the questionnaires and, in relevant part, the court excused prospective jurors Addington, Smith, Griggs, Fogg, and Harpster. (3 RT 211-214.)

Regarding prospective juror Addington, the prosecutor offered to stipulate to excusing him for cause, noting that Mr. Addington indicated he did not agree with the death penalty, he did not think the State should take a life, and that it would be hard for him to vote for the death penalty under any condition.[27] (3 RT 212-213.) The court asked the attorneys what they wanted to do. (3 RT 213.) Defense counsel said he would "submit it. . ..." The court said its tentative ruling would be that Mr. Addington was substantially impaired, and asked defense counsel if he wanted further voir dire. Defense counsel said he did not. The court Mr. Addington would be dismissed. (3 RT 213.)

Regarding prospective juror Smith, the court noted that Mr. Smith did not think another human being has the right to determine someone else's death, that he could not agree to put another person to death, and that he was not in favor of the death penalty.[28] The court noted, however, that Mr. Smith's questionnaire indicated he would consider all the evidence. The court asked the defense if it wanted further voir dire. Counsel said he would "submit on that one." The court again asked counsel if he wanted further voir dire, and counsel confirmed he did not. The court found Mr. Smith substantially impaired and ruled he would be excused. (3 RT 212.)

Regarding prospective juror Griggs, the prosecutor offered to stipulate. The court noted that Mr. Griggs's questionnaire indicated he would always vote for life without the possibility of parole no matter what the evidence was, that his feelings about the death penalty are 'Thou shall not kill,' that "Man is not God," and that "[n]o one has the right to kill another human being as despicable

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27. A copy of Mr. Addington's questionnaire is included in the Clerk's Transcript at 6 CT 1609-1633.

28. A copy of Mr. Smith's questionnaire is include in the Clerk's Transcript at 8 CT 2059-2083.

as that person might be."[29] (3 RT 211.) The court said it seemed clear that Mr. Griggs was substantially impaired. Defense counsel responded, "Submit it, Your Honor." The court ruled that Mr. Griggs would be excused. (3 RT 211.)

Regarding prospective juror Fogg, the prosecutor offered to stipulate and defense counsel said, "Your Honor, we'd submit." (3 RT 213.) The court noted that Mr. Fogg's questionnaire indicated, "It would be very difficult for me to pass judge for death to life, is against my beliefs," and that he would always vote for life without the possibility of parole.[30] (3 RT 213.) The court found Mr. Fogg substantially impaired and ruled he would be excused. (3 RT 214.)

Regarding prospective juror Harpster, the prosecutor offered to stipulate and defense counsel said, "Defense submit, Your Honor." (3 RT 214.) The court noted that in her questionnaire Ms. Harpster indicated that she would always vote for life, no matter what the evidence, and that she said "Only God has the right to take a life. The more I study the word of God, I find it more difficult to put someone else in a position to die." The court also noted Ms. Harpster's questionnaire said, "'No one is to take a life. When one believes that God created us to follow him and Jesus by faith, it would be difficult to follow man's law. I understand the law is. . .'" At that point, the court said it could not read Ms. Harpster's writing, following which it excused the juror. (3 RT 214.)

Obviously, the defense did not expressly object to the court excusing the five prospective jurors. As McKinnon concedes, under current law his failure to object might constitute a waiver of the issue on appeal. (AOB 290-291.)

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29. A copy of Mr. Griggs' questionnaire is included in the Clerk's Transcript at 9 CT 2584-2608.

30. A copy of Mr. Fogg's questionnaire is included in the Clerk's Transcript at 5 CT 1284-1308.

(See *People v. Lewis* (2006) 39 Cal.4th 970, 1007, fn. 8 [comparing *People v. Hill, supra*, 3 Cal.4th at 1005, where this Court held the defendant waived any error by failing to object to the prosecution's challenges to prospective jurors, with *People v. Holt* (1997) 15 Cal.4th 619, 652, fn. 4, where this Court said federal precedent holds that *Witherspoon* error is not waived by a 'mere' failure to object, and stating that because the question is close and difficult this Court would assume in *Lewis* that the defendants preserved their right to raise the issue on appeal].) Nevertheless, he argues that in 1998, when his trial took place, the law did not require an objection or opposition to the erroneous dismissal of a prospective juror for cause in order to preserve the issue for appeal. (See *People v. Velasquez* (1980) 26 Cal.3d 425, 433 [rejecting the respondent's argument that the defendant waived *Witherspoon* error by failing to object to a prospective juror's dismissal].) Moreover, he notes, he did stipulate to the court excusing several prospective jurors for cause based solely on their answers in the questionnaires. (AOB 268, 290, citing 3 RT 212-217.) Therefore, he argues, because he is raising a substantive, rather than procedural, challenge to the court's excusal of the five prospective jurors, his failure to object did not constitute a waiver.

But McKinnon did more here than merely fail to object. He not only said he would "submit" as to the five prospective jurors, he also declined the court's offer to conduct further voir dire of Addington and Smith. In other words, he virtually acquiesced to the court excusing the five prospective jurors. Therefore, he waived this issue on appeal. Any other finding would endorse the creation of some permissible middle ground between a stipulation and an objection, whereby counsel's words would alert the trial court that he agreed with and even desired a particular action, yet still preserved the right to challenge that action on appeal. To draw such a semantic distinction would effectively nullify the doctrine that a defendant cannot challenge on appeal

defects in jury selection to which he "did not object or in which he has acquiesced." (*Benavides, supra,* 35 Cal.4th at 88, citations omitted.)

B. The Court Properly Dismissed The Prospective Jurors Because Their Questionnaires Demonstrated Substantial Impairment

A "criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." (*Uttecht v. Brown* (2007) __U.S.__ [127 S. Ct. 2218, 2224] (*Uttecht*), citing *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521 [88 S. Ct. 1770, 20 L. Ed. 2d 776] (*Witherspoon*).) The State, however, "has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." (*Uttecht*, 127 S. Ct. at p. 2224, citing *Witt*, 469 U.S. at p. 416.) A "juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible." (*Uttecht*, 127 S. Ct. at p. 2224, citing *Witt*, 469 U.S. at 424.

A prospective juror may be excused for cause based on his or her views on the death penalty where those views would "'prevent or substantially impair' the performance of his or her duties as a juror in accordance with the trial court's instructions and his or her oath." (*People v. Avila, supra*, 38 Cal.4th at p. 529, citing *Witt, supra*, 469 U.S. at 424, and *People v. Cunningham* (2001) 25 Cal.4th 926, 975.) Jurors may not be excluded for voicing general objections to the death penalty, or expressing conscientious or religious reasons for objecting to capital punishment. (*Witherspoon, supra*, 391 U.S. at 522.) "Those who firmly oppose the death penalty may nevertheless serve as jurors in a capital case as long as they state clearly that they are willing to temporarily set aside their own beliefs and follow the law." (*Avila, supra,* 38 Cal. 4th at 529, citing *Lockhart v. McCree* (1986) 476 U.S. 162, 176, 90 L. Ed. 2d 137, 106 S.

Ct. 1758, and *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146.) A prospective juror may be excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. (*Cunningham, supra*, 25 Cal.4th at 975.)

The trial court has discretion to deny all questioning by counsel when "a prospective juror gives 'unequivocally disqualifying answer[s].' [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 823.) In *Samayoa*, this Court noted several jurors were excused for cause by the trial court based upon their answers in a written questionnaire. (*Id.* at p. 824.)

An appellate court reviews a trial court's conduct of the voir dire of prospective jurors for an abuse of discretion. Thus, the trial court's decision to utilize a process of pre-screening jurors based on their answers to questionnaires is reversible only where it falls outside the bounds of reason. (*People v. Benavides, supra*, 35 Cal.4th at p. 69).) Ordinarily, a trial court's decision to exclude prospective jurors for cause is given deference on appeal, because the trial court is uniquely situated to gain information from interacting with jurors and observing their tone, demeanor and confidence. But where the ruling is based solely on the jurors answers in a questionnaire, no such deference is warranted, as the same information used by the trial court in its ruling is available on appeal. (*Avila, supra*, 38 Cal.4th at 529, citing *People v. Stewart, supra,* 33 Cal.4th at 451.) Accordingly, this Court reviews de novo the application of the substantial impairment standard to each individual juror.

In Addington's questionnaire, when asked about his general feelings regarding the death penalty, he said he did not agree with the death penalty, and neither the State nor another person should take a life. Asked if there was a particular reason he felt the way he did, he said, "It's wrong to kill people." Asked whether his feelings against the death penalty would make it difficult for him to vote for the death penalty regardless of the evidence in this case, he

checked the "Yes" response, explaining, "I think it would be hard to vote for the death penalty under any condition." On a scale of 1 to 10, with 1 being the strongest against the death penalty, he placed himself at 1. (6 CT 1627.) Asked how his views about the death penalty had changed over time, he said, "I have basically become more passive due to life's experiences." One of the questions on the questionnaire, question number 46, read as follows:

> It is important that you have the ability to approach this case with an open mind and a willingness to fairly consider whatever evidence is presented as opposed to having such strongly held opinions that you would be unable to fairly consider all the evidence presented during the penalty phase.
>
> There are no circumstances under which a jury is instructed by the court that they must return a verdict of death. No matter what the evidence shows, the jury is always given the option in a penalty phase of choosing life without the possibility of parole. Assuming a defendant was convicted of a special circumstance murder, would you:
>
> ____ a. No matter what the evidence was, ALWAYS vote for the death penalty.
>
> ____ b. No matter what the evidence was, ALWAYS vote for life without possibility of parole.
>
> ____ c. I would consider all of the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate.

(6 CT 1628.) Addington checked the "c" response to question number 46.

In Smith's questionnaire, when asked to describe his general feelings about the death penalty, he said he did not think another human being had the right to determine another's death. On the 1 to 10 scale, he placed himself at 1. As to whether his opinion would make it difficult for him to vote for the death penalty regardless of the evidence in this case, he checked the "Yes" response, stating he "Couldn't agree to put another person to death." (8 CT 2077-2078.) Asked whether his views about the death penalty had changed over time, he said he had never agreed with it. As to question number 46, he

initially checked response "b," then crossed that out and checked and circled response "c." (8 CT 2078.)

On Griggs' questionnaire, when asked about his feelings about the death penalty, he said, "Thou shall not kill." Asked if there was a particular reason why he felt the way he did, Griggs said, "Man is not God." As to whether his opinion would make it difficult for him to vote for the death penalty regardless of the evidence in this case, he checked the "Yes" response, explaining that no one has the right to kill another human being as despicable as that person might be." Inconsistent with his other answers, however, on the 1 to 10 scale he placed himself at 10. Regarding his opinion of the purpose of the death penalty, he said it only served to sell newspapers, and has never worked as a deterrent and never will. As to question number 46, he checked the "b" response. (9 CT 2602-2603.)

In Fogg's questionnaire, when asked about his feelings about the death penalty, he said it would be very difficult for him to pass judgment for death, and that to take a life was against his belief. Asked whether his opinion against the death penalty would make it difficult for him to vote for the death penalty regardless of the evidence in this case, he checked the "No" response and explained, "It is wrong to take a life." He placed himself at 1 on the 1 to 10 scale. He said he thought the death penalty served no purpose. As to question number 46, he checked the "b" response. (5 CT 1302-1303.)

In Harpster's questionnaire, when asked about her feelings about the death penalty, she said, "Only God has the right to take a life." Asked if there was a particular reason why she felt the way she did, Harpster said, "If it was my family member, it would be difficult not wanting that person to suffer." As to whether her opinion would make it difficult for her to vote for the death penalty regardless of the evidence in this case, she said, "Not able to answer." Asked whether, if she was in favor of the death penalty, her opinion would

make it difficult to vote for life without the possibility of parole, she checked the "Yes" response, and explained, "Again we are not to take a life." She placed herself at an 8 on the 1 to 10 scale. In response to a question asking her in what ways her views about the death penalty had changed over time, she said, "The more I study the word of our Lord - I find it more difficult to put someone else in a position to die." She said the death penalty's purpose is as a deterrent for others, but that at this time it was not working. Asked is she had any religious affiliations that took a stance on the death penalty, she said, "No one is to take a life." As to question number 46, she checked the "b" response. (5 CT 1377-1378.)

As can be seen, all five of the prospective jurors held strong feelings against the death penalty, despite the fact that Griggs and Harpster provided inconsistent answers on the "scale" question. Moreover, three of the five, Griggs, Fogg, and Harpster, expressly stated that they would always vote for life without the possibility of parole, no matter what the evidence was.

Although it is true that Griggs' and Harpster's answers on the scale question suggested further voir dire might clarify exactly how they felt and why they felt that way, in light of their other answers, particularly that they would vote for life without the possibility of parole regardless of the evidence, it is clear that they were unwilling to temporarily put their feelings aside and follow the law. The same holds true for Fogg, who also declared an unwillingness to consider any penalty other than life without the possibility of parole. Thus, a de novo review reveals that those three prospective jurors were substantially impaired and had to be excused.

As for Addington and Smith, although they both seemingly indicated a willingness to consider the evidence and impose the penalty they determined was appropriate, their responses to the other questions on the questionnaire suggests they either misunderstood question number 46, or failed to fairly

consider their responses. For example, both said their feelings about the death penalty would make it difficult for them to vote for it regardless of the evidence, and Addington said it would be hard to vote for it under any condition. As to Smith, his explanation for why he would find it difficult to vote for it was simply contradictory to his answer to question number 46; he said he could not agree to put another person to death.

In sum, a review of the checked and written responses provided by these five prospective jurors on their questionnaires, taken together, suggested no ambiguity or equivocation. Rather, they reflected a firm opposition to the death penalty that would prevent them from temporarily putting their feelings about punishment aside and following the law. Thus, they were disqualified under *Witt*. (See *Avila, supra*, 38 Cal.4th at 531.) Accordingly, a de novo review of the record supports the trial court's determination. (*People v. Avila, supra*, 38 Cal.4th at p. 529.)

Finally, assuming arguendo this Court determines the trial court erroneously removed prospective anti-death penalty prospective jurors for cause based on *Witt/Witherspoon* standards, McKinnon is entitled to a new penalty trial but his conviction should stand. (*Gray v. Mississippi* (1987) 481 U.S. 648, 667-668; *People v. Ashmus* (1991) 54 Cal.3d 932, 962.)

XII.

THE COURT PROPERLY ADMITTED FACTOR (b) EVIDENCE, AND PROPERLY INSTRUCTED THE JURY REGARDING THE SHANK INCIDENT

McKinnon contends the cumulative effect of the court having admitted evidence of other crimes, and its instructions on those crimes under Penal Code section190.3, factor (b), violated state law as well as his rights under the Fourth, Sixth, Eighth, and Fourteenth Amendments. (AOB 294-358.) Specifically, he claims: (1) the court erred in admitting evidence that he possessed bullets and

rock cocaine during a 1998 arrest, because the evidence should have been suppressed as the product of an unreasonable search, and the evidence did not amount to criminal activity involving force or violence, or the threat of force or violence (AOB 295-320); (2) the court erred in admitting evidence that he broke his television and made a statement to the police that could be construed as an implied threat against his sister, because the acts did not qualify as criminal activity involving force or violence (AOB 320-323); (3) the court erred in admitting evidence of his conduct during the cafeteria incident, because the evidence was insufficient to prove the elements of robbery, and the incident did not reflect a degree of force or violence as contemplated by factor (b) (AOB 324-339); and (4) the court erred when it omitted the "knowledge element" from the instruction on the Penal Code section 4502 incident, and when it failed to instruct on the sufficiency of circumstantial evidence. (AOB 339-346.) McKinnon's claims should be rejected. The evidence was properly admitted, the court correctly instructed the jury, and any error was harmless.

A. The Trial Court Properly Admitted The Bullets And Rock-Cocaine Evidence, And Correctly Instructed The Jury

In response to the prosecution's statement in aggravation, McKinnon filed a motion to suppress six rocks of suspected cocaine, twelve .357 caliber magnum bullets, and $168.00 in currency seized following a warrantless search of McKinnon on November 12, 1998. The motion argued that he was detained without reasonable suspicion, the search of his person and seizure of the items was unreasonable, and the search exceeded a permissible scope. (13 CT 3665-3675.) The defense agreed that the court could consider the police report concerning the incident for purposes of the hearing on the motion. (10 RT 1315.)

The People presented one witness at the hearing on the motion, Commander Palmer. According to Palmer, on November 12, 1998, at

approximately 1602 hours, he and two other officers, Hagans and Shubin, went to the Eastside Park in Banning regarding an anonymous call that had reported there was a group of Black males standing around a blue Mercedes, and that one of the males had a handgun. While en route to the park, the officers received information that a second subject also had a handgun. (11 RT 1324-1325.) One of the subjects with a gun was described as not wearing a shirt. The other was described as wearing all black with a black watch-cap. When the officers arrived, there was a group of Black males in the park, around a Toyota pickup. The Mercedes was gone. Two males were on a bench. (11 RT 1325.) One of the males, McKinnon, was dressed in black and wore a black watch cap. (11 RT 1325-1326.) As the officer approached the group, another male, Orlando Hunt, turned and started to walk away. One of the officers called to Hunt, twice. (11 RT 1326.) After the second call, Hunt began to back up, and as he did he took a .357 caliber magnum handgun from his waistband and threw it on the ground. (11 RT 1326-1327.) Because they had found one weapon, the officers conducted a patdown search of the other males, in order to see if there were any other weapons there. (11 RT 1326.) During the search, the officers found .357 caliber ammunition and some rock cocaine on McKinnon. (11 RT 1326-1327.)

On cross-examination, Palmer said Shubin was the officer who searched McKinnon, and that he, Palmer had not personally located anything in McKinnon's pockets, nor had he extracted anything. (11 RT 1328.) Palmer did not recall seeing any Black male without a shirt when the officers arrived at the park. (11 RT 1329.) On re-direct examination, Palmer recalled seeing a plastic container with what appeared to be rock cocaine inside. (11 RT 1329-1330.)

According to the police report, written by Officer Shubin, the officers were dispatched to Eastside Park regarding an anonymous report from a male who said a man with a gun was sitting on a bench. The male said the man with

the gun was not wearing a shirt. The tipster said the man with the gun was part of a group of approximately ten Black males standing near a blue Mercedes. The tipster said another male in the group, who was wearing all black and a black watch cap, also had a gun. The officers knew Eastside Park as a known hang-out for drug users and dealers, where street sales were commonplace. The report said it was also common knowledge that street dealers will carry weapons or have an accomplice nearby with a weapon. Therefore, the officers used extreme caution in responding to the call. (7 Supp. CT 54.)

Also according to the report, when the officers arrived at the scene, they saw the group standing around the pickup truck. Shubin observed McKinnon in the middle of the group. McKinnon was wearing all black and a black watch cap. Approximately ten to fifteen yards away, Hunt and another Black male were sitting on a bench. For officer safety purposes, the officers ordered the members of the group to put their hands on the truck, and all of them complied. At the same time, Hunt got up and started to walk away from the officers. Shubin ordered Hunt to come back. Hunt "slowly back[ed up]." As he did, Officer Hagans saw Hunt pull up his shirt, pull a handgun out of his "wristband," and drop the gun to the ground, while trying to shield what he was doing. Hagans took Hunt into custody, following which the officers searched the rest of the males for weapons. (7 Supp. CT 55-56.) While searching McKinnon, Shubin felt numerous bullets in his upper right jacket pocket. Because the pocket was deep and the jacket was bulky, and because McKinnon matched the description of one of the suspects, Shubin put his hand deeper into McKinnon's pocket in order to do a more thorough search for a gun and to recover the bullets. While recovering the bullets, which were .357 magnum caliber, Shubin recoverd a palstic tupperware container from the same pocket he found the bullets in. There were six rocks resembling rock cocaine inside

the container. Due to the amount of cash on McKinnon, $168.00, Shubin arrested him for possession of cocaine for sale. (7 Supp. CT 56-57.)

Following argument (11 RT 1330-1334), the court denied the motion to suppress. (11 RT 1334.) In support, the court noted that: (1) the police had received a tip that one of the males was shirtless, and another was dressed in black and wearing a black watch-cap; (2) the area was known for its crime activity and drug dealing; (3) while en route, the policed received information that two individuals had guns; (3) upon arrival, there was no one matching the description of the shirtless male, nor was there a blue Mercedes; (4) the police were dealing with "situations that "are subject to quick change"; and (5) upon arrival the police saw one person who matched the descriptions they had been given. (11 RT 1334-1335.)

The court said that was enough for a patdown detention under *Terry v. Ohio*,[31] i.e., the police had received a call reporting two individuals possessing firearms in a public place, a high crime area, and that a patdown was minimally intrusive in view of the potential danger to the community. The court noted that before the patdown, Hunt started to walk away and then dropped a .357 magnum, which corroborated the tip. Under the circumstances, the court said, the officers would have been derelict in their duty had they not conducted patdown searches of the other individuals who were in the company of Hunt. The court reasoned that, from an objective point of view, when the officer found .357 caliber ammunition in McKinnon's possession, they had probable cause to arrest him as an aider and abettor in constructive possession of Hunt's gun, in that McKinnon was in the company of Hunt, who had just dropped a gun that had been concealed on his person. The court said that at that point McKinnon was subject to arrest and therefore any subsequent search would be

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31. *Terry v. Ohio* (1968) 392 U.S. 1 [88 S. Ct. 1868, 20 L. Ed. 2d 889] (*Terry*).

incidental to a lawful arrest. As to the Tupperware container, the court said its removal from McKinnon would be incidental to a lawful arrest. (11 RT 1335-1337.)

1. The Court Properly Denied The Suppression Motion

In *Terry*, 392 U.S. 1, the Supreme Court held a police officer may conduct a reasonable search of an individual for weapons when the officer has reason to believe a suspect is armed and dangerous, regardless of whether the officer has probable cause to arrest. (*Id.* at p. 27.) The officer need not be absolutely certain that the individual is armed; the question is whether a reasonably prudent person in the totality of the circumstances would be warranted in the belief that his or her safety was in danger. (*Ibid.*)

> "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity."

(*People v. Souza* (1994) 9 Cal.4th 224, 231.) "The circumstances which will justify a temporary detention, however, are 'bewilderingly diverse'. . .. (*People v. Anthony* (1970) 7 Cal.App.3d 751, 760, quoting *People v. Manis* (1969) 268 Cal.App.2d 653, 659.)

In reviewing the denial of a motion to suppress evidence, the reviewing court must review the record in the light most favorable to respondent, must uphold all express and implied factual findings of the trial court that are supported by substantial evidence, and then must independently apply the proper federal constitutional standards to those facts. (*In re Arturo D.* (2002) 27 Cal.4th 60, 77.) The trial court is vested with the power to judge the credibility of the witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences. (*Ibid.*) On appeal, all presumptions favor the trial court's exercise of that power. (*Ibid.*)

Relying primarily on *Florida v. J.L.* (2000) 529 U.S. 266 [120 S. Ct. 1375, 146 L. Ed. 2d 254] (*Florida*), McKinnon complains that the anonymous tip did not create reasonable suspicion that he was engaged in criminal activity. He notes that in *Florida*, the court held that an anonymous tip of criminal activity, without more, is insufficient to create reasonable suspicion. (AOB 300, citing *Florida, supra*, 529 U.S. at p. 271.)

Florida is distinguishable from the instant matter. In *Florida*, the police received an anonymous report that a Black male, who was standing at a particular bus stop and who was wearing a plaid shirt, was carrying a gun. Officers went to the bus stop where they saw three Black males, one of whom, J.L., was wearing a plaid shirt. Apart from the anonymous report, the officers had no reason to suspect any of the three males of criminal activity. An officer frisked J.L. and seized a gun from his pocket. (*Florida, supra*, 529 U.S. at p. 268.) Noting that the "reasonableness of official suspicion must be measured by what the officers knew before they conducted their search," and that all the officers had to go on in *Florida* was the "bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L.," the Supreme Court held the tip lacked the indicia of reliability necessary to provide reasonable suspicion, and therefore did not justify the stop and frisk. (*Florida, supra*, 529 U.S. at p. 268.)

Here, the police had more than just the anonymous tip. As the trial court noted, the police also knew that the park was a hangout for drug users and dealers. And even though an individual's presence in a high-crime area is insufficient by itself to support reasonable suspicion, it is a relevant fact in a *Terry* analysis. (*Illinois v. Warlow* (2000) 528 U.S. 119, 124 [120 S. Ct. 673, 145 L. Ed. 2d 570], citing *Adams v. Williams* (1972) 407 U.S. 143, 144, 147-148 [92 S. Ct. 1921, 32 L. Ed. 2d 612].) In addition, even though the court did

not expressly mention it, the police report stated that the police knew drug sales were commonplace at the park, and it was commonly known that street dealers either had a gun themselves or had an accomplice nearby who had a gun. (See *People v. Limon* (1993) 17 Cal.App.4th 524, 534 [the connection between weapons and an area can provide additional justification for a patdown search].) Moreover, the police had received information that two males at the park had guns, one of whom's description matched McKinnon. Further, although the police initially detained McKinnon, they did not search him until after Hunt dropped the gun, which corroborated the tip. Given the totality of the circumstances, a reasonable officer in Shubin's position would have had a reasonable suspicion that McKinnon and the other males had to be detained in order to provide for officer safety. (See *People v. Avila, supra*, 58 Cal.App.4th at p. 1074 [an "officer need not be absolutely certain that the individual is armed; the crux of the issue is whether a reasonably prudent person in the totality of the circumstances would be warranted in the belief that his or her safety was in danger."], citing *Terry, supra*, 329 U.S. at 27.)

McKinnon further complains that even if the detention and search for weapons was lawful, the seizure and search of the Tupperware container was not because it exceeded the scope of a *Terry* frisk. McKinnon notes there is an exception to the rule that a search that exceeds the limited scope of searching for weapon is unreasonable, i.e., the "plain-touch or plain-feel" doctrine, which provides that an officer may continue a lawful search if he feels an item immediately apparent as contraband. (See *Minnesota v. Dickerson* (1993) 508 U.S. 366, 374-376 [113 S. Ct. 2130, 124 L. Ed. 2d 334].) But, he argues, a Tupperware container is not immediately apparent as contraband, and therefore seizure and search of the container improperly exceeded the scope of the frisk. (AOB 308-309.)

McKinnon's argument on this point is a strawman. The court did not find the cocaine admissible on the basis that the container was properly seized as part of the *Terry* frisk. It found the contents of the container admissible as the product of a lawful search incident to McKinnon's arrest as an aider and abettor of Hunt's possession of the magnum. McKinnon argues the court was wrong because Shubin did not determine there was probable cause to arrest McKinnon for gun possession, Shubin did not arrest McKinnon until after he conducted the search that produced the container, and Shubin never arrested McKinnon for possession of the gun. (AOB 309-310.)

McKinnon's argument is without merit. "An officer with probable cause to arrest can search incident to the arrest before making the arrest." (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 111 [100 S. Ct. 2556, 65 L. Ed.2d 633].) "The fact that a defendant is not formally arrested until after the search does not invalidate the search if probable cause to arrest existed prior to the search and the search was substantially contemporaneous with the arrest." (*In re Lennie H.* (2005) 126 Cal.App.4th 1232, 1239-1240.) In *United States v. Robinson* (1973) 414 U.S. 218 [94 S. Ct. 467, 38 L. Ed. 2d 427] (*Robinson*), the police detained the defendant for operating a motor vehicle after his license was revoked. (*Id.* at p. 220.) The parties did not contest that the officer had probable cause to arrest the defendant and did so. During a patdown search, an officer found capsules of what turned out to be heroin, in a cigarette pack located in the defendant's coat pocket. (*United States v. Robinson, supra*, 414 U.S. at pp. 222-224.) The defendant was subsequently convicted of possession of, and facilitating the concealment of, heroin. (*Id.* at p. 219.) The Supreme Court held, inter alia, that the authority to search a person incident to a lawful custodial arrest does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in

fact be found upon the person of the suspect. It is the fact of a lawful arrest that establishes the authority to search. (*Id.* at p. 235.)

What happened here is similar to what happened in *Lennie H.*, *Rawlings*, and *Robinson*. Shubin had probable cause to arrest McKinnon on a weapons charge, and therefore he could lawfully search him. During that search he discovered contraband that supported a different charge. The fact that Shubin chose to arrest McKinnon on the drug charge rather than the weapons charge is of no import. The prosecution might very well have added the weapons charge when they received the police report. (See *People v. Limon, supra*, 17 Cal.App.4th at p. 538 [an officer with probable cause to arrest may open any container found on the arrestee in the course of a full body search].

As to McKinnon's claim that the evidence did not amount to criminal activity involving force or violence or the threat of the use of force or violence, "Factor (b) of section 190.3 permits the introduction of evidence of "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (*People v. Michaels* (2002) 28 Cal.4th 486, 535.) A trial court's decision to admit evidence, at the penalty phase, of a defendant's prior criminal activity is reviewed under the abuse of discretion standard. (*People v. Smithey* (1999) 20 Cal.4th 936, 991, citing *People v. Rodrigues, supra*, 8 Cal.4th at p. 1167.)

Possession of a firearm is not, in every circumstance, an act committed with actual or implied force or violence. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1235 (*Jackson*).) Nevertheless, the factual circumstances surrounding the possession may constitute substantial evidence of an implied threat of violence. (*Id.* at pp. 1235-1236.)

When McKinnon contested the admission of the evidence at trial, the court denied the motion citing *Jackson, supra*, 13 Cal.4th at p. 1235, as the

closest case it could find to the instant matter. The court noted that McKinnon had possessed contraband, bullets, and money, and "his partner had the gun." The court said that it could be reasonably inferred that the gun was possessed for no good reason, and thus there was an implied use of force. (10 RT 1317-1318.)

The court was correct. McKinnon did not just possess bullets in general, he possessed rounds of the same caliber as Hunt's gun. In addition, the anonymous tipster described one of the males with a gun as wearing the same clothes McKinnon had on, suggesting McKinnon either disposed of another weapon, or he and Hunt were trading duties. Further, McKinnon and Hunt were only ten to fifteen yards apart in a park known to be a location where drug sales occurred, and the police report indicated it was common knowledge that street dealers either possessed weapons themselves or had an accomplice nearby who had one. Moreover, McKinnon had multiple rocks on him, along with enough currency to suggest he was dealing and Hunt was probably the guard. Thus, the circumstances surrounding McKinnon's possession of the drugs and the bullets constitutes substantial evidence of an implied intent to put the bullets and Hunt's gun to unlawful use, i.e., an implied threat to use violence of violence during their drug dealing. (See *People v. Limon, supra*, 17 Cal.App.4th at p. 535 [noting propensity of drug dealers to have weapons]; see *People v. Clair* (1992) 2 Cal.4th 629, 676 [defendant carrying a knife while committing a burglary, but not using it, constituted an implied threat to use it against anyone who might interfere].) Accordingly, it cannot be said that the trial court's ruling admitting the evidence was beyond the bounds of reason.

Finally, any error was harmless. The prosecution presented other evidence demonstrating McKinnon's well-established history of using force and violence, including doing so in a petty dispute with his own sister. Further, the evidence showed McKinnon walked up to another human being, placed a gun

against the victim's head, and dispassionately shot him. In addition, he murdered another human being in an act of revenge remote in time from the precipitating event. Thus, the murders McKinnon committed were so egregious in both their senselessness and nonchalance, that it is not reasonably probable that the jury's determination was affected by the additional fact that McKinnon once possessed bullets while engaged in selling cocaine.

2. The Court Properly Instructed The Jury

McKinnon complains that the jurors were not instructed that when circumstantial evidence is reasonably susceptible of two interpretations, one pointing to guilt and the other to innocence, they are bound to adopt the interpretation favoring innocence. (AOB 319.) Respondent submits McKinnon waived the claim, it is without merit, and any error was harmless

In *People v. Dunkle* (2005) 36 Cal.4th 861 (*Dunkle)*, at the penalty-phase instructional conference, defense counsel initially asked that CALJIC No. 2.01 not be given. Later, the court and counsel agreed the jury should be instructed on the elements of the Penal Code section 190.3, factor (b) evidence. On appeal, the defendant argued that trial counsel's actions constituted a withdrawal of his objection to CALJIC No. 2.01 and an affirmative request for the instruction. (*Id.* at pp. 539-540.) This Court disagreed, explaining that the record showed that counsel had individually considered potential penalty-phase instructions, and having disclaimed a wish to have the court instruct with CALJIC No. 2.01, his agreement to other instructions could not be interpreted as a request that 2.01 be given, and therefore the defendant had waived any error. (*People v. Dunkle, supra*, 36 Cal.4th at p. 861.)

Here, the prosecution's list of requested instructions included CALJIC Nos. 2.00, 2.01, and 2.02. (13 CT 3764. The defense's requested instructions included CALJIC Nos. 2.00 and 2.02, but did not include 2.01. (13 CT 3803.) Despite its inclusion on the prosecution's list, no one ever mentioned CALJIC

No. 2.01 at the instructional conference. (12 RT 1448-1461.) Respondent submits that, in light of the holding in *Dunkle*, McKinnon's failure to request the instruction waived the issue on appeal.

In the event this Court determines McKinnon did not waive this claim, his contention is without merit. As discussed in Argument IV, above, CALJIC No. 2.01 is only required sua sponte when the prosecution substantially relies on circumstantial evidence. (*People v. Brown, supra*, 31 Cal.4th at p. 563.) When circumstantial inference is not the principle means by which the prosecution seeks to establish that the defendant engaged in criminal conduct, the instruction should not be given. (*People v. Anderson, supra*, 25 Cal.4th at p. 582.)

McKinnon argues that because the bullets and gun evidence was admitted on an aiding and abetting theory, criminal liability rested entirely on circumstantial evidence, i.e., he possessed .357 ammunition while in the same park as Hunt, who possessed the .357 caliber gun, and therefore the jurors could infer that he knew Hunt had a concealed firearm and he intended to encourage or facilitate Hunt's crime by carrying the bullets. (AOB 318-320.)

In *Dunkle, supra*, 36 Cal.4th 861, this Court found that the trial court did not err in failing to give CALJIC No. 2.01, because in establishing the factor (b) evidence the prosecution had relied primarily on direct, rather than circumstantial, evidence. In support, this Court noted all of the various incidents presented under factor (b). (*Dunkle, supra*, 36 Cal.4th at pp. 927-928.)

Here, similarly, as to the consideration of evidence, the penalty-phase instructions went to the mitigating and aggravating circumstances in their entirety. As to aggravation, although McKinnon's aiding and abetting the concealed-firearm offense was based on circumstantial evidence, all of the remaining factor (b) evidence was based on direct evidence. Thus, the

prosecution's aggravation case was not primarily based on circumstantial evidence. This interpretation of the record is supported by other instructions the court gave, namely CALJIC Nos. 8.84.1 [Duty Of Jury–Penalty Proceeding] (CT 4065), and 8.88 [Penalty Trial–Concluding Instruction] (CT 4081), which together informed the jurors that they were to determine the facts from the evidence received during the entire trial, and that in weighing the various circumstances they were to consider the totality of the aggravating circumstances and the totality of the mitigating circumstances. In other words, McKinnon had no right to a pinpoint instruction singling out one aggravating factor, which would have informed the jurors that they were to consider one of the prior criminal acts differently than they considered the others. And indeed, the defense might well have wanted to avoid highlighting this act by directing a separate instruction to it. Accordingly, the court did not have a sua sponte duty to give CALJIC No. 2.01.

Moreover, any error in failing to give the instruction was harmless. Contrary to McKinnon's assertion (AOB 319), the evidence supporting the aiding and abetting instruction was not weak, nor could it be reasonably interpreted as pointing to innocence. The evidence showed that McKinnon and Hunt were in the same group,[32/] that Hunt began to walk away as the officers approached, that Hunt pulled a .357 caliber gun from his waistband and threw it to the ground as he walked away, and that in McKinnon's pocket were a number of .357 rounds and several pieces of rock cocaine in a plastic container. No juror could reasonably conclude that the evidence pointed to innocence. Evan a naive juror could see what was going on; McKinnon was selling rock cocaine, Hunt was the guard, and McKinnon had extra ammunition for Hunt's

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32. At the suppression hearing, Palmer said Hunt was sitting on a bench and McKinnon was standing in a group. (13 RT 1325.)

weapon. There is no other reasonable interpretation of the evidence. Accordingly, any error in failing to give CALJIC No. 2.01 was harmless.

B. The Trial Court Properly Admitted Evidence Surrounding The Battery On McKinnon's Sister

McKinnon contends the admission of evidence that he broke his sister's television, and that later, at the police station, he said "you can keep me for a week or a month, but when I get out I'm going to take care of it," as aggravating factors, was improper. He argues violence to property does not qualify as criminal violence under section 190.3, factor (b). He further argues that his statement was not part of a continuous course of criminal activity giving context to the battery on his sister. (AOB 320-323.)

In ruling the evidence admissible, the court initially said the battery and the breaking of property constituted criminal activity involving the use of force or violence. (11 RT 1432.) As to the statement, the court said it did not have to be a "422," and it could reasonably be construed as an implied threat. (11 RT 1433-1434.) Later, the court said it had thought more about the issue and concluded that to be admissible the statement had to be criminal activity. The court found the statement to be "part and parcel" of the earlier battery, and therefore, it involved criminal activity and was admissible. (12 RT 14537-1439.)

"Section 190.3, factor (b) permits evidence of any offense that in fact '*involved* the use or attempted use of force or violence or the express or implied threat to use force or violence.'" (*People v. Stanley* (1995) 10 Cal.4th 764, 824.) To be admissible under factor (b), a threat to do violent injury must violate a statute and be directed against a person, not property. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013 (*Kirkpatrick).*) Evidence of the surrounding circumstances is admissible, however, to give context to the act, even though it might include criminal activity not admissible on its own. (*Id.*

at pp. 1013-1014.) "Under section 190.3, factor (b), the prosecution may introduce evidence to show not only the conduct establishing the criminal violation, but also evidence of any relevant surrounding circumstances." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1133-1134.) "In particular, threats made while in custody immediately after an otherwise admissible violent criminal incident are themselves admissible under factor (b)." (*Id.* at p. 1134.)

In *Kirkpatrick*, for example, the prosecution presented evidence that the defendant made a threatening phone call, a violation of Penal Code section 653m. Relative to 653m evidence, the prosecution also presented evidence of, inter alia, the defendant's threats to injure property. This Court held the threats-to-property evidence properly admissible because it gave context to the 653m violation. (*Kirkpatrick, supra*, 7 Cal.4th at p. 1014.)

What happened here is not meaningfully different than what happened in *Kirkpatrick*. A battery is the willful and unlawful use of force or violence upon the person of another. (Pen. Code, § 243.) McKinnon's act of returning to his sister's home and breaking her property lent context to the batteries he committed upon her, because it explained why he was arrested even though the police had not arrested him twenty minutes earlier. Similarly, even though his implied threat at the police station did not constitute a criminal violation and was uttered at least twenty minutes after the initial batteries, it was close enough in time to constitute a continuous course of conduct that was probative on the willfulness of the batteries, i.e., it demonstrated he was willing to use violence to finish what he had started. (C.f., *People v. Kipp, supra*, 26 Cal.4th at p. 1114 [evidence that, immediately after the defendant's unsuccessful attempt to escape from jail, he said he would kill a sheriff's sergeant who had assisted in subduing him].)

Finally, even if the evidence was improperly admitted, it was harmless. The jury had already heard that McKinnon hit his sister with the cast and had

choked her. Plus, the charged crimes were particularly heinous in their callousness. Under the circumstances, it is not reasonably probable that the jury found McKinnon's destruction of the small televison, or the threat he uttered in anger after being arrested, particularly aggravating. Therefore, it is not reasonably probable that the jury would have rendered a different penalty phase verdict had the contested evidence been excluded. (See *People v. Hart* (1999) 20 Cal.4th 546, 653.)

C. The Trial Court Properly Admitted Evidence Of The Cafeteria Incident

McKinnon contends the court improperly admitted the cafeteria incident as factor (b) evidence, because the evidence was legally insufficient to prove the elements of robbery. He argues the incident constituted a misdemeanor battery rather than a robbery. (AOB 324-327.) In support of his argument, he notes that the court sustained defense objections during closing argument when the prosecutor twice argued that McKinnon's history of violence demonstrated his future dangerousness. He maintains that "[t]he court agreed as a point of law that future dangerousness is an appropriate argument *if based upon evidence of the defendant's history of violence*." (AOB 325, citing 13 RT 1636-1637.) He asserts that

> "the court characterized the incident as nothing more than a 'quasi-robbery,' during which McKinnon 'pushed' a teacher, which, even combined with the other factor (b) evidence of the battery upon Robin and gun possession, simply did not demonstrate a history of violence on which a future dangerousness argued could legitimately be made."

(AOB 325, citing 13 RT 1636-1637.) Building on that predicate, he further contends that a misdemeanor battery committed when he was a child does not reflect the degree of force or violence envisioned by factor (b). (AOB 327-339.)

Preliminarily, it must be noted that McKinnon's contention as to what happened at trial, is incorrect. In explaining its ruling sustaining the objections, the court did not say it agreed that future dangerousness is an appropriate argument if based upon evidence of the defendant's history of violence, whereas here the incident was only a quasi-robbery. Rather, the court said, ". . .a prosecutor can argue future dangerousness in state prison to the staff and other inmates, if there is a substantial record of violence to support that argument." (13 RT 1636-1637, emphasis added.) The court went on to question whether the aggravating factors here was the sort of "substantial violent history" that permitted a reasonable argument that McKinnon would be a threat in prison. (13 RT 1637.)

In any event, the evidence was sufficient to allow the jurors to find that McKinnon robbed the cafeteria worker. "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) Mere theft becomes robbery if the perpetrator gains possession of the property without using force or fear but resorts to force or fear while carrying away the property. (*People v. Estes* (1983) 147 Cal.App.3d 23, 27-28.) The force necessary to make an "offense a robbery is such force as is actually sufficient to overcome the victim's resistance." (*People v. Lescallett* (1981) 123 Cal.App.3d 487, 491, overruled on other grounds in *People v. Allison* (1989) 48 Cal.3d 879, 895, quoting *People v. Clayton* (1928) 89 Cal.App. 405, 411.)

Here, Ms. Miranda testified that after taking her money box, McKinnon started out the door but a teacher stopped him. McKinnon shoved the teacher aside and exited through the door. (11 RT 1365-1366.) Thus, although McKinnon did not use force to take the box, he used it while carrying away the box, in order to make his exit. Moreover, the force overcame the teacher's

resistance to McKinnon leaving the scene. Accordingly, the evidence was legally sufficient to allow the jury to conclude McKinnon committed a robbery.

Even if the evidence was improperly admitted, it was harmless. Although the incident demonstrated McKinnon's long-standing tendency to resort to force to get his way, in the overall scheme of things the incident was relatively trivial. When viewed in totality, the record reveals that the most damaging evidence supporting the jury's death verdict was the circumstances of the charged murders, i.e., the factor (a) evidence. It is not reasonably probable that the jury would have rendered a different penalty phase verdict had such insignificant evidence been excluded. (*People v. Hart, supra*, 20 Cal.4th at p. 653; see *People v. Bloom* (1989) 48 Cal.3d 1194, 123-1231 [evidence of attempted robbery inadmissible under section 190.3(b), but harmless because it was not reasonably probable the jury's verdict was affected by the evidence; not reasonably possible that the death verdict was affected by the inadmissible disclosure that the defendant carried a concealed BB gun and admitted that he considered firing it at police officers].)

D. The Court Properly Instructed The Jury Regarding The Shank Incident

McKinnon contends the court erred by failing to instruct on the knowledge element of a Penal Code section 4502 violation, and by failing to instruct the jurors that if the evidence regarding the shank was susceptible to an interpretation that McKinnon did not knowingly possess the shank, they were bound to accept that interpretation. (AOB 339-346.)

In *People v. Reynolds* (1988) 205 Cal.App.3d 776 (*Reynolds*), overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, the trial court instructed the jury on a section 4502 violation with an instruction essentially similar to the one the trial court gave here, i.e., CALJIC No. 7.38 [Possession

Or Manufacture Of Weapon By Prisoner (Penal Code § 4502(a)(b))] (14 CT 4078). The reviewing court held that because a trial court has a sua sponte duty to instruct on the general principles of law relevant to issues raised by the evidence, and to give explanatory instructions when terms used in an instruction have a technical meaning peculiar to the law, in a Penal Code section 4502 case, in addition to the instruction given there, a court must also instruct the jurors that they had to determine whether the defendant had knowledge of the presence of the object. (*Reynolds, supra*, 205 Cal.App.3d at pp. 779-780.) The court suggested that in the future, courts should instruct with language similar to that in CALJIC No. 12.00 [Controlled Substance-Illegal Possession], regarding actual, constructive, or joint possession. (*Id.* at p. 782 n.5; cf. *People v. Lucky* (1988) 45 Cal.3d 251, 291 [knowledge is an element of a violation of Penal Code section 4574, subdivision (a), prohibiting, inter alia, possession in prison of firearm, deadly weapon, explosive, or tear gas.)

Here, the court did not supplement the pattern instruction with language concerning McKinnon's knowledge of the shank, nor did it give an instruction such as CALJIC No. 1.24, defining actual or constructive possession, which includes a knowledge requirement. Nevertheless, this Court has held that instruction on the elements of the offenses under factor (b) is not required absent a request by counsel. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1168; *People v. Barnett* (1998) 17 Cal.4th 1044, 1175 [there is no duty "under state law or federal or state constitutional law to instruct the jury sua sponte on the elements of the crimes presented under factor (b)."].) As counsel did not request instructions on the knowledge element of the section 4502 violation, the court did not err in giving the instruction that it gave.

In the event this Court determines the trial court failed to properly instruct the jury regarding the knowledge element of a section 4502 violation, it was harmless. As alluded to in sections A and B, above, the circumstances

of the Coder and Martin murders were what caused the jury in this case to choose death for McKinnon. Although the evidence in mitigation painted McKinnon in a somewhat sympathetic light and disclosed his violent childhood, the evidence in aggravation showed his propensity for violence and his criminal history. More importantly, it was the cold-blooded nature and senseless violence of the Coder and Martin murders that sealed McKinnon's fate. Thus, it is not reasonably probable that the jury would have returned a verdict other than death had they been informed that they had to decide whether or McKinnon knew the shank was in his cell.

E. There Was No Cumulative Error, And Any Error Was Harmless

McKinnon claims that the cumulative effect of the alleged errors discussed in the previous portions of Argument XII was prejudicial and violated his rights under the Eighth and Fourteenth Amendments to a fair penalty trial and a reliable verdict. (AOB 346-358.) His claim is without merit. As discussed above, some of the alleged errors were waived, all are individually meritless, and all are individually harmless. Thus, there is no error to accumulate.

XIII.

THERE WAS NO CUMULATIVE GUILT-PHASE ERROR THAT SUBSEQUENTLY EFFECTED THE PENALTY PHASE

McKinnon contends the cumulative effect of any or all of the errors, at both the guilt and penalty phases, requires reversal of the death verdict. (AOB 359-365.) Specifically, he argues that: (1) the cumulative effect of the guilt-phase errors subverted a powerful penalty-phase defense based on lingering doubt (AOB 360-363); and (2) the guilt-phase errors resulted in the receipt of evidence, namely that McKinnon was a member of the Crips, his sister

threatened and orchestrated an assault on Hunt, and McKinnon had threatened to kill Gina Lee, that was inadmissible in the guilt phase and therefore should not have been considered as circumstances of the crime at the penalty phase. (AOB 363-365.) All of McKinnon's assignments of error have either been forfeited, or are meritless, or are harmless individually and in combination.

As set forth above, many of McKinnon's claims were forfeited due to his failure to object below. Moreover, as discussed in Arguments I through XII, even when the merits of the issues are considered, there were no errors or they were individually harmless. Thus, there are no multiple errors to accumulate. Whether considered individually or for their purported cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Avila, supra*, 38 Cal.4th at p. 615 [rejected defendant's claims of error, or any assumed errors, not prejudicial on an individual basis; assumed errors no more compelling in the aggregate]; *People v. Guerra, supra*, 37 Cal.4th at p. 1168; *People v. Hinton* (2006) 37 Cal.4th 839, 913; *People v. Jablonski* (2006) 37 Cal.4th 774, 838; *People v. Panah* (2005) 35 Cal.4th 395, 464; *People v. Burgener* (2003) 29 Cal.4th 833, 884; *People v. Seanton* (2001) 26 Cal.4th 598, 675, 691-692 [few errors identified were a minor in either individually or cumulatively would not alter the outcome of the trial].) Even a capital defendant is entitled to only a fair trial, not a perfect one. (*People v. Box, supra*, 23 Cal.4th at pp. 1214, 1219.) The record shows that McKinnon received a fair trial. Nothing more is required. This Court should, therefore, reject McKinnon's claim of cumulative error.

XIV.

THE SPECIAL CIRCUMSTANCE OF MULTIPLE MURDER ADEQUATELY NARROWS ELIGIBILITY FOR THE DEATH PENALTY, SUCH THAT IT DOES NOT VIOLATE THE CONSTITUTION

McKinnon contends the special-circumstance of multiple murder fails

to narrow the class of persons eligible for the death penalty, in violation of the Eighth Amendment. (AOB 366-370.)[33] McKinnon's contention is without merit. The special circumstance of multiple murder adequately performs the narrowing function required by the Eighth Amendment.

In *People v. Ochoa, supra*, 26 Cal.4th 398, this Court held that Penal Code "section 190.2 and its enumerated special circumstances adequately perform the narrowing function compelled by the Eighth Amendment." (*Id.* at pp. 458-459, citing *People v. Kraft* (2000) 23 Cal.4th 978, 1078 [section 190.2 adequately performs the Eighth Amendment's narrowing function as set forth in *Zant v. Stephens* (1983) 462 U.S. 862, 877 [103 S. Ct. 2733, 2742, 77 L. Ed. 2d 235] .) In *People v. Sapp, supra*, 31 Cal.4th 240, this Court held, inter alia, that the multiple-murder special circumstance narrows "the class of death-eligible first degree murderers to those who have killed and killed again. . .," and therefore does not violate the Eighth Amendment. (*People v. Sapp, supra*, 31 Cal.4th at pp. 286-287.)

McKinnon has presented nothing demonstrating those cases were wrongly decided and should be revisited. Accordingly, his claim should be rejected.

XV.

THE COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED MCKINNON'S MOTION FOR INDIVIDUALLY SEQUESTERED VOIR DIRE OF THE PROSPECTIVE JURORS

McKinnon contends the court's refusal to conduct individual sequestered

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33. McKinnon acknowledges that this Court has rejected similar challenges in *People v. Sapp, supra*, 31 Cal.4th at pp. 286-287, and *People v. Coddington* (2000) 23 Cal.4th 529, 656, but raises the issue here so that this Court can reconsider its previous decisions, and to preserve the issue for federal review.

voir dire, as well as the court's unreasonable and unequal application of state law governing juror voir dire, violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, and his statutory right under Code of Civil Procedure section 233, to individual voir dire where group voir dire is not practicable. (AOB 371-378.) McKinnon's claim is without merit. The trial court carefully supervised all aspects of the jury voir dire, encouraged the parties to use a questionnaire, and allowed the parties to individually question each potential juror at length. Thus, the trial court properly concluded it was neither practicable nor necessary to individually and privately voir dire each potential juror.

The defense filed a pre-trial motion requesting supplemental sequestered voir dire to be conducted by the attorneys. The motion argued that there was a significant possibility of prejudice in this case because the deaths of two young men raised emotional issues, there would be evidence of gang affiliation and rivalry, the defendant was a young Black man, and due to the nature of the death-qualification process itself. Therefore, the motion argued, court-conducted non-sequestered voir dire would be completely inadequate, in that group questioning would not be effective in bringing out prejudices, and the result would be a conviction-prone jury. (1 CT 251-261.) The court ruled that it would allow attorney voir dire, but denied the request that it be sequestered. (1 RT 5-6.)

The defense also filed a "Notice Of Motion And Memorandum Of Points And Authorities In Support Of Defendant's Death Qualification Voir Dire Questions." (1 CT 262-280.) Noting a concern with the number of prospective jurors who believe the death penalty is the only appropriate penalty once the defendant has been adjudged guilty as charged, the motion provided a list of nineteen suggested follow-up questions that could be used in voir dire. (1 CT 266-270.) The defense filed another motion, asking that a written

questionnaire be used to facilitate voir dire. (1 CT 281-285.) A questionnaire was attached to the motion. (1 CT 285.)

At the hearing on the motion, noting that it had not yet reviewed the defense's questionnaire, the court granted the motion. Defense counsel advised the court that he and the prosecutor were still working on the questionnaire and had not finalized it. (1 RT 8.) Ultimately, the court approved the use of a twenty-one page questionnaire, containing fifty questions. (E.g., see 3 CT 783-804.)

A. Non-Sequestered Voir Dire Of The Prospective Jurors Did Not Violate McKinnon's Constitutional Rights

McKinnon argues that a voir dire procedure that does not allow individually-sequestered voir dire on death-qualifying issues violates a defendants's constitutional rights to due process, to trial by an impartial jury, to the effective assistance of counsel, and to a reliable sentencing determination. (AOB 372-374.) This Court has previously rejected this claim. (*People v. Hoyos* __Cal.Rptr.__ (2007) [WL2079745, *16]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 627-628.) McKinnon has offered nothing demonstrating those cases were wrongly decided and need to be revisited. Accordingly, this Court should reject his claim.

B. The Court Properly Exercised Its Discretion When It Denied The Motion For Individually Sequestered Voir Dire

Noting the court's one-sentence denial of his motion (1 RT 6 ["The sequestered request, private voir dire, will be denied."], McKinnon claims the trial court's summary denial of his request for sequestered voir dire does not reflect a sound exercise of discretion, a reasoned judgment, or careful consideration about whether group voir dire was practicable. (AOB 375-376.) He is incorrect.

The state and federal guarantees of trial by an impartial jury include the right in a capital case to a jury whose members will not automatically impose the death penalty for all murders, but will instead consider and weigh the mitigating evidence in determining the appropriate sentence. (*People v. Weaver* (2001) 26 Cal.4th 876, 910.) Voir dire is critical to ensuring the right to an impartial jury. (*People v. Earp* (1999) 20 Cal.4th 826, 852.) Without adequate voir dire, the trial court cannot fulfill its "responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence ." (*Ibid.*, quoting *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 [101 S. Ct. 1629, 68 L. Ed. 2d 22].)

However, there is no constitutional right to a particular manner of conducting voir dire. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1086.) Voir dire is conducted under the supervision of the trial court, and its scope is necessarily left primarily to the sound discretion of that court. (*Ristaino v. Ross* (1976) 424 U.S. 589, 594 [96 S. Ct. 1017, 47 L. Ed. 2d 258].)

In *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80, this Court held that voir dire in capital cases concerning prospective juror views regarding the death penalty "should be done individually and in sequestration." This requirement was not based on the federal or state Constitutions, or on a statute, but rather on this Court's supervisory power. (*People v. Cudjo* (1993) 6 Cal.4th 585, 628.)

In 1990, Proposition 115 was enacted, which included the adoption of former Code of Civil Procedure section 223[34], providing that in all criminal

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34. At the time of McKinnon's trial in 1998 and 1999, former Code of Civil Procedure section 223 governed the manner in which voir dire was to be conducted. That code section provided:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to

cases, including those involving the death penalty, the trial court must conduct the voir dire of any prospective jurors, where practicable, in the presence of the other prospective jurors.[35] Thus, the holding in *Hovey* was abrogated by Proposition 115. (*People v. Stitely, supra*, 35 Cal.4th at pp. 537-538; *People v. Box* (2000) 23 Cal.4th 1153, 1180; *People v. Waidla* (2000) 22 Cal.4th 690, 713; *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1171.)

The trial court is vested with discretion to determine the practicability of large group voir dire. (See *People v. Waidla, supra*, 22 Cal.4th at pp. 713-714; *Covarrubias v. Superior Court, supra*, 60 Cal.App. 4th at p. 1180.) This Court employs the abuse-of-discretion standard to review a trial court's granting or denial of a motion on the conduct of the voir dire of prospective jurors. A trial court only abuses its discretion when its ruling "falls outside the bounds of reason." (*People v. Waidla, supra*, 22 Cal.4th at pp. 713-714, quoting *People v. Ochoa* (1998) 19 Cal.4th 353, 408.)

In *People v. Ramos* (2004) 34 Cal.4th 494, this Court explained that Code of Civil Procedure "section 223 requires that voir dire of any prospective jurors must, "where practicable," occur in the presence of other jurors, and

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> the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. ¶ Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause. ¶ The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

35. Code of Civil Procedure section 223 was amended in 2000 to allow counsel the right to examine prospective jurors.

applies "in all criminal cases, including death penalty cases." (*Id.* at p. 513.) This Court also explained that the question of sequestration is left to the trial court's discretion, "based on the court's determination that it is practicable to conduct voir dire in the presence of other prospective jurors." (*Id.* at p. 513, citing *Covarrubias v. Superior Court, supra*, 60 Cal.App.4th at p. 1172.)

Here, even though the court summarily denied the motion, that was not the court's only expression of how it decided the question. Prior to commencing voir dire, the court advised the prospective jurors that the reason it was using a questionnaire was because otherwise the questions would have to be asked in open court, and therefore the questionnaires saved a lot of time. (2 RT 128, 162.) The court also mentioned that if a prospective juror would feel more comfortable answering a question in private, to let the court know and the matter would be discussed in private. (2 RT 227.) In addition, after seating the alternates, the court noted that before courts began using questionnaires for voir dire, it once took the court two-and-a-half months to seat a jury in a capital case. (3 RT 472.)

When the court's remarks on this issue are viewed in their totality, it is apparent that the court gave thoughtful consideration to the issue and properly decided that group voir dire was practicable. Therefore, this Court should reject McKinnon's claim.

C. The Court Properly Applied The Law Concerning Juror Voir Dire

McKinnon claims the group procedure created a substantial risk that he was tried by jurors who were not forthright and did not reveal their true feelings about the death penalty. (AOB 377-378.) McKinnon is incorrect.

In addition to the remarks the court made as noted in section B above, the court told the jurors that their attitudes concerning the death penalty were very important (2 RT 133, 159), that the court and the parties were looking for

open-minded people who would be open to a sentence of life without the possibility of parole or the death penalty, depending on the evidence in the case (2 RT 137, 164), and to keep an open mind as to punishment. (2 RT 232-233.) Moreover, the questionnaire thoroughly explained why the panelists were being asked questions concerning their opinion about the death penalty, that the questions were not meant to imply guilt, that if they eventually found the special-circumstance allegation true they would be asked to weigh factors in aggravation and in mitigation, and that they would be asked to consider a wide spectrum of evidence. The questionnaire included questions concerning their feelings about the death penalty, and asked the jurors how would they rate themselves on a scale of 1-to-10 regarding their feelings about the death penalty, with 1 being the strongest against the penalty and 10 being strongest for the penalty. It asked the prospective jurors whether their opinion in favor of death penalty would make it difficult to vote for life without the possibility of parole regardless of the evidence, and whether they would consider all the evidence and instructions and impose the penalty they personally felt was appropriate. (E.g., see 4 CT 877-879.)

The record reveals that the jurors who tried McKinnon carefully completed the questionnaires and were forthright and revealed their true attitudes about the death penalty. For example, on the scale question, the jurors who tried McKinnon responded as 4, 6, 9, 8, 10, 5, 7, 9, 5, 8, 9, and 9. (4 CT 878-879, 903-904, 928, 952, 977,1002, 1027, 1052, 1077, 1102, 1127, 1152, 1177.) Given the wide range of responses to that question alone, it cannot reasonably be said that using group voir dire created a substantial risk that McKinnon was tried by jurors who did not reveal their true feelings about the death penalty.

Accordingly, based on the foregoing, McKinnon's contention should be rejected.

XVI.

THE COURT PROPERLY DENIED MCKINNON'S MOTION TO LIMIT THE VICTIM IMPACT EVIDENCE, AND PROPERLY DENIED HIS REQUEST FOR A SPECIAL INSTRUCTION REGARDING THE APPROPRIATE CONSIDERATION OF SUCH EVIDENCE

McKinnon contends the court's denial of his motion to limit the victim-impact evidence, and its refusal to provide a requested special instruction regarding the appropriate consideration of that evidence, violated his right, under the Eighth and Fourteenth Amendments, to a fair and reliable penalty determination. (AOB 379-392.) Specifically, he claims: (1) the evidence was admitted without the safeguards necessary to confine it within constitutional bounds (AOB 380-388); and (2) because the evidence exceeded the scope of what is permissible under *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S. Ct. 2597, 115 L. Ed. 2d 720], the court's refusal to instruct the jury as to the limited and appropriate use of the evidence prejudiced him. (AOB 388-392.) His claim should be rejected. The contested evidence here properly allowed the jury to assess McKinnon's moral culpability, did not divert the jury's attention from its proper role, and did not invite an irrational, subjective response. In addition, the principle addressed in the proposed instruction was covered by other instructions the court gave.

The prosecution filed a "Statement In Aggravation," indicating that it intended to present penalty-phase evidence of, inter alia, the impact of the murders on the members of Mr. Coder's and Mr. Martin's families. (3 CT 760-761.) In response, McKinnon filed a motion to limit the evidence to those facts about the victims that McKinnon was aware of or to evidence admitted during the guilt phase (13 CT 3698-3723), and a motion proposing a special instruction. (13 CT 3739-3740.) The proposed special instruction read as follows:

> Evidence has been introduced for the purpose of showing the specific harm caused by Crandell McKinnon's crimes. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether he should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as the result of an irrational, purely subjective response to emotional evidence and argument.

(13 CT 3740.)

At the hearing on the motion, the prosecutor offered that he would call Mr. Coder's mother and/or sister. He also informed the court that he was working on flying Mr. Coder's girlfriend in, along with her child who Mr. Coder fathered. In addition, he said that he had not been able to contact anyone in Mr. Martin's family. (10 RT 1301.) Based on the offer of proof, the court denied McKinnon's motion to limit the evidence (10 RT 1301), and denied the requested instruction. (12 RT 1461-1462.)

Under California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a),[36] as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180.) In addition, a family member or friend can testify about the impact of the crime on another family member of the victim. (*People v. Jurado* (2006) 38 Cal.4th 72, 132.)

In a capital case trial, evidence showing the impact of a murder on the victim's family and friends does not violate the Eighth or Fourteenth Amendment of the United States Constitution. (*People v. Pollock, supra*, 32 Cal.4th at p. 1180.) The due process clause only provides relief where the victim impact evidence is so unduly prejudicial as to render the trial

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36. Penal Code section 190.3, factor (a) provides, in pertinent part: "The circumstances of the crime of which the defendant was convicted in the present proceeding . . ."

fundamentally unfair. (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.) "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question." (*Ibid.*) States can properly conclude that victim impact evidence should be before a jury to assess a defendant's moral culpability and blame-worthiness. (*Ibid.*)

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

In *People v. Edwards, supra*, 54 Cal.3d at p. 787, this Court addressed the impact of *Payne v. Tennessee* on California law. This Court noted that prior to *Booth* and *Gathers*, it had approved of argument addressing the issue of victim impact in the case of *People v. Haskett* (1982) 30 Cal.3d 841, 863-864. (*People v. Edwards, supra*, 54 Cal.3d at p. 834.) After *Haskett*, this Court continued to approve of victim impact evidence - although primarily in the context of the suffering of the murder victim. (See *People v. Heishman* (1988) 45 Cal.3d 147, 195 [proper for prosecutor to comment on effect defendant's crimes had on victims]; *People v. Allen* (1986) 42 Cal.3d 1222, 1278 [prosecutor's argument about victim suffering caused by crimes proper].)

This Court subsequently found victim impact evidence inadmissible based on *Booth* and *Gathers*. (See *People v. Gordon* (1990) 50 Cal.3d 1223, 1266-1267 [improper to comment on impact crimes had on victim's family].) However, this Court later found that case law excluding victim impact

evidence, that had been based on *Booth* and *Gathers*, was no longer binding in light of the United States Supreme Court's holding in *Payne v. Tennessee*. (*People v. Edwards, supra*, 54 Cal.3d at p. 835; accord, *People v. Raley* (1992) 2 Cal.4th 870, 915.) Thus, on November 25, 1991 (the date this Court's opinion in *Edwards* was filed) the law in California returned to the holding of *Haskett*, and victim impact evidence was admissible.

This Court has since held that *Payne* and *Edwards* are fully retroactive. (*People v. Catlin, supra*, 26 Cal.4th at p. 175; *People v. Clair, supra*, 2 Cal.4th 629, 672; see also *People v. Thomas* (1992) 2 Cal.4th 489, 535 [*Payne* decided while appeal was pending]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063 [*Payne* decided while appeal was pending].) Accordingly, *Payne v. Tennessee* and *People v. Edwards* are applicable to the instant matter.

McKinnon first contends that in order to comply with the holding in *Payne v. Tennessee*, the admission of victim-impact evidence must be attended by three safeguards in order to minimize its prejudicial effect, namely that the evidence should be limited to testimony from a single witness, the evidence should be limited to testimony describing the effect of the murder on a family member present at the scene during or immediately after the crime, and the evidence should be restricted to testimony concerning those effects of the murder that were either known or reasonably apparent to the defendant at the time he committed the murder, or properly introduced to prove the charges during the guilt-phase. (AOB 383-384.) He claims the evidence here exceeded the limitations imposed by *Payne v. Tennessee*, because the prosecution presented three witness on the Coder murder, and the evidence included information McKinnon could not possibly have known about regarding the histories and characteristics of the victims and their families, and/or the idiosyncratic responses of the victims' family members to their deaths. (AOB 385.) Specifically, he notes the following:

1. Coder's fiancee, Darlene Shelton, was pregnant when Mr. Coder was killed, she brought the child into the courtroom, and the prosecutor pointed the child out to the jurors during Ms. Shelton's testimony. She testified that she almost lost the baby due to the effect on her of Mr. Coder's death. She also testified that her other child had considered Mr. Coder to be his father and missed him very much;

2. Coder's sister, Dawn Coder, testified she had a bad thyroid at the time of the murder and that her brain went totally berserk after Mr. Coder was killed;

3. Mr. Coder's mother testified that Mr. Coder was partially deaf and had a twin;and

4. Mr. Martin's sister testified that her other brother was killed within five months of Mr. Martin's death.

(AOB 385-386.) McKinnon argues that he could not have known about any of these facts, and therefore admission of the evidence violated his right to a fair and reliable penalty determination, as well as due process because it rendered the penalty trial fundamentally unfair. (AOB 386-388.)

Preliminarily, respondent submits that, although only one victim-impact witness testified in *Payne*, nothing in that decision suggests victim-impact evidence must be limited to one witness, or implied that such evidence would be limited to one witness in other cases. In any event, this Court has found that "evidence of the specific harm caused by the defendant" is generally a circumstance of the crime admissible under factor (a) of Penal Code section 190.3. (*People v. Edwards, supra*, 54 Cal.3d at p. 833.) This Court explained that the word "circumstance," as it is used under factor (a), means the immediate temporal and spatial circumstances of the crime, as well as that "which surrounds materially, morally, or logically" the crime. (*Ibid.*) Factor (a), therefore, allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. (*Id.*, at p. 835; see also *People v. Johnson, supra*, 3 Cal.4th at p. 1245.) This holding "only

encompasses evidence that logically shows the harm caused by the defendant." (*People v. Edwards, supra*, 54 Cal.3d at p. 835.)

While declining to explore the "outer reaches" of the kind of evidence admissible as a circumstance of the crime, this Court held "emotional" evidence was allowable, with the limitation that "'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'" (*People v. Edwards, supra*, 54 Cal.3d at pp. 835-836, quoting *People v. Haskett, supra*, 30 Cal.3d at p. 864.)

Simply put, the jury's proper role is to decide between a sentence of death and life without the possibility of parole. (*People v. Rodrigues, supra*, 8 Cal.4th 1060, 1193.) A penalty phase jury "performs an essentially normative task. As the representative of the community at large, the jury applies its own moral standards to the aggravating and mitigating evidence to determine if life or death is the appropriate penalty for that particular offense and offender." (*People v. Mendoza* (2000) 24 Cal.4th 130, 192, internal quotations omitted.) Therefore, the jury makes a "moral assessment," not a mechanical finding of facts. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1268, quoting *People v. Brown* (1985) 40 Cal.3d 512, 540.) In deciding which defendants receive a death sentence, states must allow "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." (*Zant v. Stephens, supra*, 462 U.S. at p. 879, emphasis in original.) That determination should not be based on abstract emotions, but should instead be rooted in the aggravating and mitigating evidence. (See *California v. Brown* (1987) 479 U.S. 538, 542 [107 S. Ct. 837, 93 L. Ed. 2d 934][discussing limitations on verdict based on "mere sympathy"].)

A trial court must "strike a careful balance between the probative and the prejudicial." (*People v. Lewis* (1990) 50 Cal.3d 262, 284.) However, in the

penalty phase of a capital trial, a trial court has less discretion to exclude evidence as unduly prejudicial than it has in the guilt phase because the prosecution is entitled to show the full moral scope of the defendant's crime. (*People v. Anderson, supra*, 25 Cal.4th at pp. 591-592.) As part of the jury's normative role, the jury must be allowed to consider any mitigating evidence relating to the defendant's character or background. (*Lockett v. Ohio* (1978) 438 U.S. 587, 604.) There is nothing unconstitutional about balancing that evidence with the most powerful victim evidence the prosecution can muster, because such evidence is most certainly one of the circumstances of the crime. (*People v. Kirkpatrick, supra*, 7 Cal.4th at p. 1017; *People v. Edwards, supra*, 54 Cal.3d at pp. 833-836.)

In the context of the penalty phase of a trial, "emotional evidence" and "inflammatory rhetoric" are different concepts. The limitation against "inflammatory rhetoric" is similar to the federal limitation against evidence which is "so unduly prejudicial that it renders the trial fundamentally unfair." (*People v. Howard* (1992) 1 Cal.4th 1132, 1190- 1191.) However, the United States Supreme Court has held that the admission of victim impact evidence is not unfair in any way. (*Payne v. Tennessee, supra*, 501 U.S. at p. 823.)

Because of the penalty phase jury's particular duties, even highly emotional victim impact evidence will not divert it from its proper role. An improper diversion might occur if, for example, the prosecution were to urge that a death sentence should be imposed on the basis of the race of the victim or defendant. (*Booth v. Maryland, supra*, 482 U.S. at p. 517 (dis. opn. of White, J.) [victim impact evidence should be held constitutionally permissible, but "the State may not encourage the sentence to rely on a factor such as the victim's race in determining whether the death penalty is appropriate"]; *South Carolina v. Gathers, supra*, 490 U.S. at p. 821 (dis. opn. of O'Connor, J.) ["It would indeed be improper for a prosecutor to urge that the death penalty be

imposed because of the race, religion, or political affiliation of the victim"]; *Furman v. Georgia* (1972) 408 U.S. 238, 242 [92 S. Ct. 2726, 33 L. Ed. 2d 346] (conc. opn. of Douglas, J.) [death penalty " unusual" if imposed on the basis of "race, religion, wealth, social position, or class"].) Here, however, the prosecutor did not urge a death sentence on an unconstitutional basis, so the jury was not diverted from its proper role.

McKinnon presented three penalty-phase witnesses, i.e., his mother, his sister, and his father. In addition to describing McKinnon's horrible childhood, McKinnon's mother testified that despite the violence and chaos that had surrounded him McKinnon had done well in school and received good grades, had begun writing poetry at a young age, and had continued to write poetry throughout his life. (12 RT 1519,1529.) She also testified that McKinnon had a daughter who was approximately nine years old at the time of trial, and that he was a good father. (12 RT 1529-1530.) McKinnon's mother and sister testified that McKinnon was a good son and a good brother to his siblings. (12 RT 1548-1549.) His sister testified that as McKinnon became older and bigger, he became very protective of his mother and siblings, and caused his stepfather to reduce his abuse of the family. (12 RT 1548.)

In light of McKinnon's sympathetic witnesses, the prosecution's victim-impact evidence was appropriate in order to allow the jury to meaningfully assess McKinnon's moral culpability. (See *Payne v. Tennessee, supra,* 501 U.S. at p. 809.) The prosecution called three witnesses as to the Coder murder, and one as to the Martin murder. Moreover, their testimony, which fills only fourteen pages of the Reporter's Transcript (11 RT 1402-1406, 1407-1409, 1410-1412, 1420-1422), was basically limited to the permissible subject of how the Coder and Martin murders had affected their lives. (*People v. Raley, supra*, 2 Cal.4th at p. 915; *People v. Johnson, supra*, 3 Cal.4th at p. 1245.)

As to McKinnon's complaint about Coder's mother's comments that Coder was a twin and deaf, her testimony must be viewed in context. At that point she was responding to the prosecution's questions about how close she and Coder had been. And the fact that he was an identical twin and also deaf were unique factors, supporting her claim that she and the deceased were particularly close. While that testimony was powerful, it cannot reasonably be said that it was so inflammatory that it diverted the jury from its proper role. (*Payne v. Tennessee, supra*, 501 U.S. at p. 809; see *People v. Edwards, supra*, 54 Cal.3d at p. 836.)

Moreover, the most powerful aggravating evidence against McKinnon had already been heard by the jury during the guilt phase of his trial. The jury heard evidence that McKinnon killed two people in cold blood, at least one of whom was murdered without any motive whatsoever. Thus, the victim impact evidence presented in this case was minimal when compared to the evidence presented during the guilt phase of the trial.

Further, the specific harm McKinnon caused when he murdered Coder and Martin, i.e., the impact of their deaths on the victims' siblings, and the impact on Coder's fiancee, his child, a child who thought of him as a father, and his mother, was relevant to the jury's meaningful assessment of his "moral culpability and blameworthiness." (See *Payne v. Tennessee, supra*, 501 U.S. at p. 809.) The evidence advanced the State's interest in "counteracting the mitigating evidence which the defendant is entitled to put in[.]" (*Id.*, at p. 825.) Fairness demands that evidence of the victim's personal characteristics, and the harm suffered by her family, be considered along with the "parade of witnesses" praising the "background, character, and good deeds" of the defendant . . . without limitation as to relevancy[.]" (*Id.*, at p. 826; see also *People v. Dennis* (1998) 17 Cal.4th 468, 498 [capital defendant in penalty phase presented evidence from friends and associates as to his childhood difficulties, his shyness

and loneliness due to his hearing problem, his friendly and easygoing nature, his pride and love for his son (including a tape recording of defendant and his son), his devastation at his son's death, his honesty, thoughtfulness, and sensitivity, his good record at work, and his compassion for others].)

McKinnon murdered a 23-year-old man who had done nothing other than be in what turned out to be the wrong place and time, and he murdered another man who had the misfortune to be a member of a gang thought to be responsible for the killing of a member of the gang McKinnon affiliated with. Though McKinnon may not have known the precise dimensions of the tragedies his actions would cause, the profound harm to the survivors was "so foreseeable as to be virtually inevitable." (*Payne v. Tennessee, supra*, 501 U.S. at p. 838 (conc. opn. of Souter, J.).) There was no due process violation. As the jury was properly allowed to hear evidence concerning the full impact of McKinnon's actions, the trial court did not err by admitting the victim impact evidence in this case. Accordingly, this claim should be denied.

McKinnon further claims the trial court erred by not instructing the jury on how it should consider victim impact evidence. This claim fails as well.

In *People v. Brown, supra*, 31 Cal.4th at p. 573, this Court rejected the claim that the trial court erred in not instructing the jury on how to consider victim impact evidence, where, as here, the court instructed the jury with standard CALJIC No. 8.85. In *People v. Ochoa, supra*, 26 Cal.4th 398, this Court refused to find error in the trial court's refusal to give the defendant's special instruction concerning the evaluation of the evidence of harm caused by his crimes. The proposed instruction read as follows (and was in part, identical to the appellant's proposed instruction in this case):

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

> impose the ultimate sanction as a result of an irrational, subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotion though relevant subjects may provide legitimate reasons for the Jury to show mercy to the Defendant.

(*People v. Ochoa, supra*, 26 Cal.4th at p. 455.)

This Court concluded that the trial court properly refused the instruction, since "[t]he proposed instruction would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1[.]" (*Ibid.*) To the extent McKinnon similarly contends the trial court should have cautioned the jurors not to base their decision on emotion, his claim fails for the same reason, i.e., CALJIC No. 8.84.1 adequately addressed the matter.[37/]

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37. The court instructed the jury with CALJIC No. 8.84.1 as follows:

> You will now be instructed as to all the law that applies to the penalty phase of this trial.
>
> You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise.
>
> You must accept and follow the law that I state to you. Disregard all other instructions given to you in other phases of this trial.
>
> In other words, Ladies and Gentlemen, the instructions I'm reading now are the instructions that apply in this phase of the case, and you are specifically instructed to please disregard all prior instructions given to you, which was during the guilt phase.
>
> You must neither be influenced by bias or prejudice against the defendant, or swayed by public opinion or public feeling. Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

(14 CT 4048; 13 RT 1597.)

XVII.

THE FEDERAL CONSTITUTION IS NOT VIOLATED BY THE FACT THAT CALIFORNIA DOES NOT AFFORD PROPORTIONALITY REVIEW IN CAPITAL CASES

Noting that California affords intercase proportionality review in non-capital cases, McKinnon contends California's failure to provide intercase proportionality review in capital cases violated his rights under the Eighth and Fourteenth Amendments to be protected from the arbitrary and capricious imposition of capital punishment. (AOB 393-395.) McKinnon's claim is without merit. This court has already decided that "intercase proportionality review is not constitutionally required[,]" (*People v. Morrison* (2004) 34 Cal.4th 698, 730; accord *People v. Box, supra*, 23 Cal.4th at p. 1217), and McKinnon has provided nothing suggesting this Court needs to revisit this long-settled issue. (See *People v. Cunningham, supra*, 25 Cal.4th at p. 1042 ["Neither the federal nor the state Constitution requires intercase proportionality review."]; see *Pulley v. Harris* (1984) 465 U.S. 37, 45-46, 50-51 [104 S. Ct. 871, 79 L. Ed. 2d 29] [intercase proportionality review is not constitutionally required].)

> As this Court summarized in *People v. Lewis* (2001) 26 Cal.4th 334:
> We also reject defendant's claim that because it does not require intercase proportional review, the California death penalty statute ensures arbitrary, discriminatory, or disproportionate impositions of death sentences. "[U]nless a defendant demonstrates that the state's capital punishment law operates in an arbitrary and capricious manner, the circumstances that he or she has been sentenced to death, while others who may be similarly situated have received a lesser sentence, does not establish disproportionality violative of the Eighth Amendment." [Citation.] Moreover, we disagree that defendant is denied equal protection and substantive due process because noncapital defendants receive some comparative review under the determinate sentencing law. [Citation.]

(*People v. Lewis, supra*, 26 Cal.4th at pp. 394-395; see also *People v. Kipp, supra,* 26 Cal.4th at p. 1139; *People v. Hillhouse* (2002) 27 Cal.4th 469, 515.)

This Court's conclusion is consistent with United States Supreme Court precedent. The High Court, after noting that the Eighth Amendment does not require comparative proportionality review by an appellate court in every case in which the death penalty is imposed and the defendant requests it, held that California's death penalty statute was not rendered unconstitutional by the absence of a provision for comparative proportionality review. (*Pulley v. Harris, supra*, 465 U.S. at pp. 50-54.) Thus, as this Court concluded in *People v. Farnam* (2002) 28 Cal.4th 107, 193, there is "no reason to rule differently here."

XVIII.

PENAL CODE SECTION 190.3, FACTOR (b), DOES NOT VIOLATE ANY ASPECT OF THE FEDERAL CONSTITUTION

McKinnon contends Penal Code section 190.3, factor (b), both as written and as applied in this case, violated the Sixth, Eighth, and Fourteenth Amendments. (AOB 396-408.) Specifically, he claims: (1) the use of factor (b), and its corresponding instruction, permitted the jury to consider in aggravation previously unadjudicated criminal conduct, thereby denying him his rights to a fair and speedy trial on the prior conduct, by an impartial and unanimous jury, to the effective assistance of counsel, to the effective confrontation of witnesses, and to equal protection of the law (AOB 397-402); (2) some of the unadjudicated criminal conduct occurred outside the applicable statute of limitations, and therefore was improperly introduced as evidence in aggravation (AOB 402-405); (3) McKinnon's juvenile misconduct was improperly introduced as evidence in aggravation (AOB 405-407); and (4) the alleged criminal activity was improperly considered as evidence in aggravation, because it was not required to be found true beyond a reasonable doubt by a unanimous jury. (AOB 407-408.) McKinnon's contention should be rejected.

At trial, McKinnon filed a motion to exclude evidence at the penalty phase, of unadjudicated criminal activity. (13 CT 3676-3692.) He also objected to, or alternatively asked for a modification of, CALJIC No. 8.85 [Penalty Trial-Factors for Consideration], regarding factor (b). (13 CT 3745-3747.) The court denied his motion, overruled his objections, admitted evidence of the unadjudicated criminal activities, and denied the request for a modification to the instructions. (10 RT 1305-1306, 1317-1318; 11 RT 1334-1338, 1346-1347, 1430-1432; 12 RT 1437-1439, 1450-1453, 1461-1462.)

It is well-settled that the introduction of unadjudicated evidence under factor (b) does not offend the state or federal Constitutions. (*People v. Boyer* (2006) 38 Cal. 4th 412, 483; *People v. Chatman* (2006) 38 Cal.4th 346, 410; *People v. Guerra* (2006) 37 Cal.4th 1067, 1165; *People v. Hinton, supra*, 37 Cal.4th at p. 913; *People v. Brown* (2004) 33 Cal.4th 383, 402; *People v. Kipp, supra*, 26 Cal.4th at p. 1138; *People v. Cunningham, supra*, 25 Cal.4th at p. 1042.)

This Court has "long held that a jury may consider such evidence in aggravation if it finds beyond a reasonable doubt that the defendant did in fact commit such criminal acts." (*People v. Samayoa* (1997) 15 Cal.4th 795, 863.) This Court has consistently rejected claims that factor (b) is impermissibly or unconstitutionally vague. (*People v. Anderson, supra*, 25 Cal.4th at p. 584; *People v. Osband* (1996) 13 Cal.4th 622, 704; *People v. Medina, supra*, 11 Cal.4th at p. 780; *People v. Balderas* (1985) 41 Cal.3d 144, 201.) The United States Supreme Court also rejected this claim by explaining,

> Factor (b) is phrased in conventional and understandable terms and rests in large part on a determination whether certain events occurred, thus asking the jury to consider matters of historical fact.

(*Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S. Ct. 2630, 129 L. Ed. 2d 750]; *id.* at p. 977 ["Here, factor (b) is not vague."].)

In addition, there is no requirement that the jury unanimously agree on the aggravating circumstances that support the death penalty, since the aggravating circumstances are not elements of an offense. (*People v. Medina, supra*, 11 Cal.4th at p. 782.) Nor is it necessary to instruct the jury that it must unanimously agree beyond a reasonable doubt that the defendant committed each unadjudicated offense. (*People v. Sims* (1993) 5 Cal.4th 405, 462; *People v. Anderson, supra*, 25 Cal.4th at p. 590.) Contrary to McKinnon's argument (AOB 402), neither *Ring v. Arizona* (2002) 536 U.S. 584 [122 S. Ct. 2428, 153 L. Ed.2d 556], nor *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S. Ct. 2348, 147 L. Ed. 2d 435], affect these holdings because *Ring* and *Apprendi* "have no application to the penalty phase procedures of this state." (*People v. Martinez, supra*, 31 Cal.4th at p. 700; *People v. Cox* (2003) 30 Cal.4th 916, 971-972.)

As to McKinnon's contention that the use of unadjudicated factor (b) evidence violated his right to equal protection, this Court has repeatedly held that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Hinton, supra*, 37 Cal.4th at p. 912; *People v. Smith, supra,* 35 Cal.4th at p. 374; *People v. Morrison, supra*, 34 Cal.4th at p. 731; *People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Boyette* (2002) 29 Cal.4th 381, 465-467; and *People v. Allen, supra*, 42 Cal.3d at pp. 1286-1288.)

As to McKinnon's contention that his constitutional rights were violated by admission of the factor (b) evidence because some of the underlying conduct occurred outside of the applicable statute of limitations, this Court has consistently rejected the contention that any of the statutory or constitutional rights of a capital defendant are violated by the consideration of evidence of unadjudicated criminal activity for which prosecution would be time-barred. This Court has "long recognized that, as "'[section 190.3, factor] (b) imposes

no time limitation on the introduction of "violent" crimes; the jury presumably may consider criminal violence which has occurred at any time in the defendant's life.'" (*People v. Williams, supra*, 16 Cal.4th at p. 233, citing *People v. Douglas* (1990) 50 Cal.3d 468, 529, quoting *People v. Balderas, supra*, 41 Cal.3d at p. 202, original italics.)

Lastly, regarding McKinnon's contention that his juvenile conduct was improperly introduced in aggravation, this Court has held, on numerous occasions, that evidence of prior juvenile criminal conduct may properly be considered as an aggravating factor. (*People v. Lewis, supra*, 26 Cal.4th at pp. 378-379; *People v. Avena* (1996) 13 Cal.4th 394, 426; *People v. Raley, supra*, 2 Cal.4th at p. 906; *People v. Lucky* (1988) 45 Cal.3d 259, 295; *People v. Hayes* (1990) 52 Cal.3d 577, 632-633; *People v. Burton* (1989) 48 Cal.3d 843, 862.)

In sum, this Court has previously rejected the claims McKinnon raises here, and McKinnon has not demonstrated that this Court needs to revisit those prior decisions. Accordingly, the instant claims must be denied.

XIX.

CALIFORNIA'S DEATH-PENALTY STATUE AND CORRESPONDING JURY INSTRUCTIONS ARE CONSTITUTIONAL

McKinnon raises a series of contentions to the effect that California's death penalty statute and corresponding jury instructions are unconstitutional because they fail to set out the appropriate burden of proof. (AOB 409-422.) Specifically, he claims: (1) the statute and instructions fail to assign the State the burden of proving beyond a reasonable doubt that aggravating factors exist, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty (AOB 409-413); (2) the State and Federal Constitutions require that the jury be instructed to the effect that it may impose death only if

persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty (AOB 413-416); (3) the Federal Constitution requires the State to bear some burden of persuasion at the penalty phase (AOB 416-418); (4) the instructions violate the Sixth, Eighth, and Fourteenth Amendments because they fail to require juror unanimity as to the aggravating factors (AOB 418-421); and (5) the jury at the penalty phase should have been instructed on the presumption of life. (AOB 421-422.) McKinnon's claims should be rejected. With the exception of the prosecution's burden of proving the truth of a prior criminal act beyond a reasonable doubt, neither side bears a burden of proof in the penalty phase of a trial, and this Court has repeatedly rejected similar claims.

McKinnon filed a "Memorandum Of Law On Penalty Phase Jury Instructions," raising the claims he raises in this appeal. (13 CT 3724-3739.) The court rejected the claims presented in the memorandum and instructed the jury with slightly modified versions of the standard instructions governing the jury's determination as to what penalty to impose. (13 RT 1596-1613.)

"Unlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79; see also *People v. Burgener, supra*, 29 Cal. 4th at pp. 884-885; *People v. Anderson, supra*, 25 Cal.4th at p. 601; *People v. Welch* (1999) 20 Cal.4th 701, 767; *People v. Daniels* (1991) 52 Cal.3d 815, 890; and *People v. Carpenter, supra*, 15 Cal. 4th at pp. 417-418.) This Court has repeatedly rejected any claims that focus on a burden of proof in the penalty phase. (*People v. Welch, supra*, 20 Cal. 4th at pp. 767-768; *People v. Ochoa, supra*, 19 Cal.4th at p. 479; *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Box, supra*, 23 Cal.4th at p. 1216; *People v. Carpenter, supra*, 15 Cal.4th at pp. 417-418; *People v. Dennis, supra*, 17 Cal.4th at p. 552; *People v. Holt, supra*, 15 Cal.4th 619, 683-

684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"].) McKinnon fails to offer any valid reasons why this Court should vary from its past decisions.

Nevertheless, McKinnon argues that as a result of the United States Supreme Court's decisions in *Apprendi v. New Jersey, supra*, 530 U.S. at p. 466; *Ring v. Arizona, supra*, 536 U.S. 584, and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S. Ct. 2531, 159 L. Ed. 2d 403], in order to impose a death sentence, the jury is now constitutionally required under the Sixth, Eighth and Fourteenth Amendments to find aggravating factors true beyond a reasonable doubt. (AOB 410-413.) McKinnon's contention fails. As discussed in Argument XVIII above, this Court has determined that *Ring* and *Apprendi* simply have no application to the penalty phase procedures of this state. (*People v. Gray* (2005) 37 Cal.4th 168, 237; *People v. Monterroso* (2004) 34 Cal.4th 743, 796; *People v. Morrison, supra*, 34 Cal. 4th at p. 730; *People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Prieto* (2003) 30 Cal.4th 226, 262-264, 271-272, 275.) The United States Supreme Court's subsequent decision in *Blakely v. Washington, supra*, 542 U.S. at p. 296, does not alter this conclusion. (*People v. Ward* (2005) 36 Cal.4th 186, 221.)

As this Court explained,

> [U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole. ([Pen. Code] § 190.2, subd. (a).) Hence, facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate do not come within the holding of *Apprendi.*

(*People v. Anderson, supra*, 25 Cal.4th at pp. 589-590, fn. 14.)

Further,

> The death penalty law is not unconstitutional for failing to impose a burden of proof-whether beyond a reasonable doubt or by a

> preponderance of the evidence-as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence. [Citation.] Unlike the statutory schemes in other states cited by defendant, in California 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification. [Citations.] ¶ The jury is not constitutionally required to achieve unanimity as to aggravating circumstances. [Citation.] ¶ Recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 have not altered our conclusions regarding burden of proof or jury unanimity.

(*People v. Brown, supra*, 33 Cal.4th 382, 401-402.)

In California:

> once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole."

(*People v. Ward, supra*, 36 Cal.4th at p. 221 quoting *People v. Prieto, supra*, 30 Cal.4th at p. 263, [emphasis in original].)

Moreover, the United States Supreme Court's decision in *Cunningham v. California* (2007) ___ U.S. ___ [127 S. Ct. 856, 166 L. Ed. 2d 856], does not alter the conclusion that California's death penalty scheme is constitutional. *Cunningham* held that California's middle term under its determinative sentencing law was the statutory maximum under the Sixth Amendment, and thus the imposition of the upper term by the trial court, without the requisite beyond-a-reasonable-doubt finding by the jury of aggravating circumstance(s), was unconstitutional. (*Cunningham, supra*, 127 S. Ct. at p. 858.) Here, the verdict of death is the constitutionally valid prescribed statutory maximum. (See *People v. Ward, supra*, 36 Cal.4th at p. 221.) Thus, *Cunningham* is essentially an extension of the principles set forth in *Apprendi v. New Jersey*, *Ring v. Arizona*, *Blakely v. Washington*, and *United States v. Booker*, to

California's determinate sentencing law, and does not compel a different result than this Court has previously reached in interpreting these same claims.

As to McKinnon's contention that the death-penalty instructions are flawed because they fail to instruct the jury that a verdict of death may only be returned if they are persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty, before a verdict of death can be returned, this Court has repeatedly rejected this contention. (*People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Carter* (2005) 36 Cal.4th 1114, 1215, 1280; *People v. Robinson, supra*, 37 Cal.4th at p. 655; *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Mendoza, supra*, 24 Cal.4th at p. 191.) Neither the due process clause of the Fourteenth Amendment nor the cruel and unusual punishment clause of the Eighth Amendment require a jury to find beyond a reasonable doubt that aggravating factors outweigh mitigating factors, or that death is the appropriate penalty. (*People v. Blair, supra*, 36 Cal.4th at p. 753.) McKinnon provides no reason for revisiting this Court's prior holdings.

McKinnon's claim, that California's death penalty statute and jury instructions are unconstitutional because they fail to require juror unanimity on the aggravating factors, is also without merit. This Court has repeatedly determined that penalty-phase juries do not need to unanimously agree as to which aggravating circumstances apply. (*People v. Dunkle, supra*, 36 Cal.4th at p. 939; *People v. Davis* (2005) 36 Cal.4th 510, 572; *People v. Carter* (2005) 36 Cal.4th 1215, 1280 [jury not required to agree unanimously as to aggravating circumstances]; *People v. Bolin* (1998) 18 Cal.4th 297, 345-346.)

Likewise, the claim that, as the correlate of the presumption of innocence in non-capital jury trials, penalty phase jurors should be instructed that there is a "presumption of life", is also meritless. As this Court has explained,

> [N]either death nor life is presumptively appropriate or inappropriate under any set of circumstances, but in all cases the determination of the appropriate penalty remains a question for each individual juror.

(*People v. Samayoa, supra*, 15 Cal.4th 795, 853.)

McKinnon offers no valid reason why this Court should revisit these issues. Accordingly, these claims should be denied.

XX.

CALJIC NO. 8.88 PROPERLY INSTRUCTS THE JURORS ON THE SCOPE OF THEIR SENTENCING DISCRETION

McKinnon contends the instructions defining the scope of the jury's sentencing discretion and the nature of its deliberative process violated his rights under the Sixth, Eighth, and Fourteenth Amendments to a fair trial by jury, to a reliable penalty determination, and to due process. (AOB 423-434.) Specifically, he claims: (1) the instruction used the impermissibly vague term "so substantial" in telling the jurors how to weigh the aggravating and mitigating circumstances (AOB 424-426); (2) the use of the broader term "warrants," in the instruction, instead of the narrower term "appropriate," fails to clearly tell jurors that their central inquiry is to determine if the death penalty is appropriate (AOB 426-428); (3) the instruction failed to tell the jury that a life sentence is mandatory if the aggravating circumstances do not outweigh the mitigating circumstances (AOB 428-430); (4) the instruction failed to tell the jury that it is required to return a sentence of life without the possibility of parole if it determines the mitigating circumstances outweigh the aggravating circumstances (AOB 430-431); (5) the instruction failed to tell the jury it could impose a life sentence even if it found the aggravating circumstances outweighed the mitigating circumstances (AOB 432); and (6) the instruction was defective in that it failed to advise the jurors that McKinnon did not have to persuade them that the death penalty was inappropriate. (AOB 432-433.)

McKinnon's claim should be rejected, as this Court has previously rejected identical claims concerning this jury instruction.

Prior to commencement of the penalty-phase trial, McKinnon filed a motion requesting, inter alia, that the court modify CALJIC No. 8.88 [Penalty Phase–Concluding Instruction], in various respects as noted in the preceding paragraph. (13 CT 3756-3761.) The court denied the motion and instructed the jury pursuant to CALJIC No. 8.88 in its standard form.[38/] (12 RT 1461-1462;

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38. The court instructed the jury as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, 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 enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.
>
> A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> In the weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignments of weights to 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

13 RT 1610-1611; 14 CT 4081-4082.)

All of the claims McKinnon now raises concerning CALJIC No. 8.88 have been consistently rejected by this Court. This Court has repeatedly rejected the claim that the term "so substantial" is vague or otherwise violates the Eighth Amendment. (*People v. Prieto, supra*, 30 Cal.4th at p. 273; *People v. Boyette, supra*, 29 Cal.4th at p. 465; *People v. Gurule* (2002) 28 Cal.4th 557, 662; *People v. Ochoa, supra*, 26 Cal.4th at p. 452.) As this Court has explained,

> Defendant also faults CALJIC No. 8.88 for calling on the jury to impose death if they find "substantial" aggravating factors, implicitly compelling a death verdict if aggravating circumstances outweighed mitigating ones. Defendant observes that under our case law, the jury may reject a death sentence even if mitigating circumstances do not outweigh aggravating ones. Our reading of the instruction discloses no compulsion on the jury to impose death under such circumstances. Instead, the instruction simply explains that no death verdict is appropriate unless substantial aggravating circumstances exist which outweigh the mitigating ones. This instruction was proper under our case law.

(*People v. Taylor* (2001) 26 Cal.4th 1155, 1181.)

McKinnon's claim that the use of the term "warrants" fails to clearly advise jurors that they may only impose the death penalty if they conclude it is the appropriate penalty, has also been rejected by this Court. (*People v. Boyette, supra,* 29 Cal.4th at p. 465, citing *People v. Breaux* (1991) 1 Cal.4th 281, 316.)

This Court has also rejected the notion that CALJIC 8.88 is defective in failing to tell the jury that a life sentence without possibility of parole is mandatory if the mitigating circumstances outweigh the aggravating circumstances. As this Court explained,

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> in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(13 RT 1610-1611.)

> Defendant faults the sentencing instructions (CALJIC No. 8.88) for failing to direct the jury to impose a life imprisonment without parole sentence if it concluded the mitigating circumstances outweighed the aggravating ones. We have repeatedly rejected the claim in light of other language in this instruction, allowing a death verdict only if aggravating circumstances outweighed mitigating ones.

(*People v. Taylor, supra*, 26 Cal.4th at p. 1181.)

Further, this Court has previously rejected the claim that CALJIC 8.88 is defective in failing to tell the jury it is required to return a sentence of life without the possibility of parole if it determines the mitigating circumstances outweigh the aggravating circumstances. (*People v. Hughes* (2002) 27 Cal.4th 287, 405, citing, *People v. Duncan, supra*, 53 Cal.3d at p. 978.)

Similarly, this Court has rejected the contention that CALJIC No. 8.88 is constitutionally flawed in failing to tell the jury it could impose a life sentence even if it finds the aggravating circumstances outweigh the mitigating circumstances. (*People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 123; *People v. Taylor, supra*, 26 Cal.4th at p. 1181 ["We have rejected the argument in past cases"].)

Finally, McKinnon's claim, that CALJIC No. 8.88 is defective because it failed to advise the jurors that he did not have the burden of persuading them that the death penalty is not appropriate, has also been rejected by this Court. Unlike the guilt phase of a trial, where the prosecution carries the burden of proving every element of a charged offense beyond a reasonable doubt, there is no particular burden of proof in the penalty phase. Therefore, no burden instruction is required, either as to the presence or absence of any such burden, because the sentence selection process is normative, not factual. (*People v. Manriquez* (2005) 37 Cal.4th 547, 589; *People v. Dunkle, supra*, 36 Cal.4th at p. 939; *People v. Panah, supra*, 35 Cal.4th at p. 499.)

As stated above, this Court has repeatedly rejected the claims McKinnon raises, and should do so here. (See *People v. Moon* (2005) 37 Cal.4th 1, 42- 43;

People v. Boyette, supra, 29 Cal.4th at p. 464 ["We agree none of the claims has merit and that no reason appears to reconsider our past decisions."]; *People v. Taylor, supra*, 26 Cal.4th at p. 1183 ["Once again, as defendant acknowledges, we have repeatedly rejected similar arguments, and we see no compelling reason to reconsider them here."].) McKinnon fails to offer a compelling reason for this Court to revisit any of its prior holdings. Accordingly, these claims should be denied on their merits.

XXI.

THE COURT PROPERLY DENIED MCKINNON'S REQUEST TO MODIFY, AMEND, AND SUPPLEMENT CALJIC NO. 8.85

McKinnon contends the court's denial of his request for modifications, amendments, and supplements to CALJIC No. 8.85 [Penalty Trial–Factors For Consideration], and the application of those sentencing factors, rendered his death sentence unconstitutional. (AOB 435-444.) Specifically, he claims: (1) the instruction on Penal Code section 190.3, subdivision (a), and the application of the factor, resulted in the arbitrary and capricious imposition of the death penalty (AOB 437-439); (2) the failure to delete inapplicable sentencing factors, i.e., factors (e), (f), (g), and (j), or alternatively to instruct the jurors that the absence of a mitigating factor could not be considered in aggravation, violated his rights (AOB 439-440); (3) the court's failure to instruct the jurors that the statutory mitigating factors are relevant solely as mitigators, precluded a fair, reliable, and evenhanded application of the death penalty (AOB 440-441); (4) the inclusion of the word "extreme" in the instruction on factor (d) was misleading (AOB 441); (5) the court's failure to require that the jury make written findings regarding the aggravating factors violated his rights to meaningful appellate review and equal protection of the law (AOB 441-443); and (6) California's death-penalty scheme is inadequate to ensure reliable

capital sentencing, thereby violating his right to equal protection. (AOB 443-444.) McKinnon's contentions should be rejected; this Court has previously rejected similar claims, and the instructions provided to the jury were constitutionally sound.

This Court has consistently held that CALJIC No. 8.85 is not unconstitutionally vague and that it does not allow the penalty process to proceed arbitrarily or capriciously. (*People v. Perry* (2006) 38 Cal.4th 302, 319; *People v. Farnam* (2002) 28 Cal.4th107, 191-192; *People v. Lucero* (2000) 23 Cal. 4th 692, 728; *People v. Earp, supra*, 20 Cal.4th 826, 899.) This Court has also found the aggravating factors described in CALJIC No. 8.85 are not impermissibly vague. (*People v. Earp, supra*, 20 Cal. 4th at p. 899; *People v. Arias, supra*, 13 Cal.4th at pp. 188-189.)

As to McKinnon's claim regarding the failure to either delete the inapplicable factors or to instruct the jury that the absence of a mitigating could not be considered as an aggravating factor, in *People v. Ghent* (1987) 43 Cal.3d, this Court rejected a similar claim, explaining that to delete the inapplicable factors would prejudice the defendant, and that the jury is capable of deciding which factors are applicable in a particular case. (*Id.* at p. 776-777.)

Regarding McKinnon's claim that the failure to instruct that the statutory mitigating factors are relevant solely as mitigators, precluded a fair, reliable, and evenhanded application of the death penalty, he is wrong. This Court has repeatedly found no error in this regard. (*People v. Moon, supra*, 37 Cal.4th at p. 42, citing *People v. Morrison, supra*, 34 Cal.4th at p. 730.)

As to McKinnon's claim regarding the inclusion of the word "extreme" in the factor (d) instruction, this Court has previously determined the word is neither unconstitutionally vague, nor does it improperly limit consideration of mitigating evidence.

Factor (d) provides the penalty jury must consider "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." (Pen. Code, §§ 190.3, subd (d).) Factor (g) then provides the jury must consider "[w]hether or not the defendant acted under extreme duress or under substantial domination of another person." (Pen. Code, §§ 190.3, subd. (g).) It is well established that use of the adjective "extreme" to describe potential mitigating circumstances in factors (d) and (g) is constitutional and does not create an impermissible barrier to the jury's consideration of mitigating evidence. (E.g., *People v. Weaver, supra*, 26 Cal.4th at p. 992; *People v. Ochoa, supra*, 26 Cal.4th at p. 462; *People v. Lewis, supra*, 26 Cal.4th at p. 395; *People v. Riel* (2000) 22 Cal.4th 1153, 1225; *People v. Jenkins* (2000) 22 Cal.4th 900, 1054-1055; *People v. Davenport* (1995) 11 Cal.4th 1171, 1230; see also, *People v. Visciotti* (1992) 2 Cal.4th 1, 73-75 [instruction that speaks to "extreme" duress is not constitutionally vague]. This is especially so because "catchall" factor (k), which allows for consideration of other mitigating evidence, then provides the means whereby mitigating evidence such as non-extreme mental or emotional conditions may be considered. (*People v. Welch, supra*, 20 Cal.4th at pp. 768-769; *People v. Davenport, supra*, 11 Cal.4th at p. 1230.)

As to McKinnon's claim that the failure to require written findings violated his rights to meaningful appellate review and equal protection, this Court has held, and should continue to hold, that the jury need not make written findings disclosing the reasons for its penalty determination. (*People v. Young* (2005) 34 Cal.4th 1149, 1233; *People v. Maury, supra*, 30 Cal.4th at p. 440; *People v. Hughes, supra*, 27 Cal.4th at p. 405; *People v. Welch, supra*, 20 Cal.4th at p. 772; *People v. Ochoa, supra*, 19 Cal.4th at p. 479; *People v. Frye* (1998) 18 Cal.4th 894, 1029.) The above decisions are consistent with the United States Supreme Court's pronouncement that the federal Constitution

"does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746, 750 [110 S. Ct. 1441, 108 L. Ed. 2d 725], citing *Hildwin v. Florida* (1989) 490 U.S. 638 [109 S. Ct. 2055, 104 L. Ed. 2d 728].)

Finally, as to McKinnon's claim that California's death-penalty scheme fails to ensure reliable capital sentencing, thereby violating his right to equal protection, this Court has previously held California's capital sentencing scheme does not deny equal protection because of a different method of determining penalty than is used in non-capital cases. (*People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Smith, supra*, 35 Cal.4th at p. 374.

In sum, the instructions given were constitutionally sound. Moreover, this court has previously rejected claims similar to the ones McKinnon raises here, and McKinnon has not provided a persuasive reason for this Court to revisit those decisions.

XXII.

THE COURT PROPERLY DENIED MCKINNON'S REQUESTED SPECIAL INSTRUCTIONS ON THE SCOPE OF THE PENALTY-PHASE JURY'S CONSIDERATION OF AGGRAVATING AND MITIGATING EVIDENCE

McKinnon contends the court violated state law, as well as his rights, under the Eighth and Fourteenth Amendments, to a fair penalty trial and a reliable penalty determination, when it rejected his request for instructions clarifying the scope of aggravating and mitigating evidence the jury could consider, as well as the scope of the jury's sentencing discretion. (AOB 445-451.) McKinnon's arguments in support of his claim have been consistently rejected by this Court, and should be rejected in this case.

In addition to objecting to the standard penalty-phase instructions, McKinnon requested a series of modifications and/or supplements to the instructions, as follows:

> (1) supplement CALJIC No. 8.84.1 with an instruction informing the jurors that deterrence and cost are improper considerations in determining the penalty (13 CT 3729-3730);
>
> (2) supplement CALJIC No. 8.85 with an explanation that a special-circumstance renders the defendant eligible for the death penalty, but the appropriate penalty remains entirely in the jurors' hands (13 CT 3740-3741);
>
> (3) supplement CALJIC No. 8.85 with an instruction informing the jurors that they are prohibited from "double counting" the same facts as both a special circumstance of the crime and a special circumstance under factor (a) (13 CT 3744-3745);
>
> (4) modify the instructions on CALJIC No. 8.85, factor (k), to specify that the enumerated mitigating factors are only examples, and that the jurors could consider any other circumstances as a reason to not impose death, that a single mitigating factor alone may be sufficient to reject death as the appropriate penalty, that the jurors need not be unanimous in finding mitigating factors, and that the mitigating factors need not be proved beyond a reasonable doubt but may be supported by any evidence, no matter how weak (13 CT 3754-3757, 3762);
>
> (5) supplement CALJIC No. 8.88 with an explanation that the jurors could return a verdict for life without the possibility of parole even in the absence of mitigating factors and despite the presence of aggravating factors (13 CT 3758);
>
> (6) instruct the jurors that they could spare McKinnon's life based solely on mercy or sympathy.

(13 CT 3756-3758, 3761-3762.)

The court denied the requests (12 RT 1461-1462), and gave the jury standard penalty-phase jury instructions, including CALJIC No. 8.84 [(Penalty Trial—Introductory], CALJIC No. 8.84.1 [Duty of Jury—Penalty Proceeding], CALJIC No. 8.85 [Penalty Trial—Factors for Consideration], and CALJIC No. 8.88 [Penalty Trial—Concluding instruction]. (14 CT 4047-4048, 4062-4063, 4081-4082; 13 RT 1596-1597, 1602-1604, 1610-1611, 1678-1679.)

This Court has explained that the standard CALJIC penalty phase instructions "'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.'" (*People v. Gurule*, *supra*, 28 Cal.4th at p. 659, quoting *People v. Barnett* (1998) 17 Cal.4th 1044, 1176-1177; see also *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1192; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 593; *People v. Raley*, *supra*, 2 Cal.4th at pp. 919-920.) Moreover, the general rule is that a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative. (*People v. Sanders*, *supra*, 11 Cal.4th at p. 560.) Instructions should also be refused if they might confuse the jury. (*People v. Hendricks* (1988) 44 Cal.3d 635, 643.)

As to McKinnon's first requested instruction, CALJIC Nos. 8.85 and 8.88 fully and accurately conveyed to the jurors the applicable law governing their task in the penalty phase. For example, CALJIC No. 8.85 expressly told the jurors what factors they could consider. Consequently, it was unnecessary to enumerate what factors they could not consider, with particular emphasis on deterrence and cost. Further, CALJIC No. 8.88 advised the jury that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." Thus, CALJIC No. 8.88 properly described the weighing process as "'merely a metaphor for the juror's personal determination that death is the appropriate penalty under all the circumstances.'" (*People v. Jackson, supra*, 13 Cal.4th at p. 1244, quoting *People v. Johnson* (1192) 3 Cal.4th 1183, 1250; see also *People v. Gutierrez, supra*, 28 Cal.4th at p. 1161.) Accordingly, the court did not err when it denied McKinnon's request.

Similarly, CALJIC No. 8.84 informed the jurors that the penalty for a special circumstance murder was death or confinement in prison for life without

the possibility of parole, and that ". . .you must now determine which of these penalties shall now be imposed on the defendant." (13 CT 4047.) Thus, McKinnon's second requested instruction, to inform the jury that the determination of the appropriate penalty was in the jurors hands, was duplicative of, and added nothing meaningful to, the standard instruction. Consequently, the court did not err when it rejected McKinnon's request.

As to the "double counting" issue, in *People v. Lewis* (2001) 25 Cal.4th 610, this Court explained that CALJIC No. 8.85 does not encourage the jury to double-count the evidence in aggravation under Penal Code section 190.3. (*Id.* at p. 669.) Accordingly, McKinnon's third requested instruction was unnecessary, and the court did not err in refusing to give it.

As to the "factor (k)" issue, the court instructed with CALJIC No. 8.85, which informed the jurors they were to be guided by the factors listed in the instruction, but that they could consider any other circumstance extenuating the gravity of the crime, including any sympathetic or other aspect of McKinnon's character or record, offered by the defense. Thus, the jury was given sufficient guidance as to how it should evaluate and weigh the factors. (See *People v. Brown, supra*, 31 Cal.4th at 565.)

Regarding McKinnon's request to supplement CALJIC No. 8.88, this court has held that the standard instruction adequately informs the jurors of their sentencing responsibilities. (*People v. Gurule, supra*, 28 Cal.4th at p. 659; *People v. Barnett, supra*, 17 Cal.4th at pp. 1176-1177; *People v. Rodrigues, supra*, 8 Cal.4th at p. 1192; *People v. Tuilaepa, supra*, 4 Cal.4th at p. 593; *People v. Raley, supra*, 2 Cal.4th at pp. 919-920.) Moreover, as this Court has stated several times in the past, "The standard instructions in CALJIC No. 8.88 (1989 rev.) adequately advised jurors on the scope of their discretion to reject death and to return an LWOP verdict." (*People v. Stitely, supra*, 35 Cal.4th at p. 574, citing *People v. Rodrigues, supra,* 8 Cal.4th at p. 1192; *People v.*

Duncan (1991) 53 Cal.3d 955, 978-979.) In addition, in *People v. Pollock* (2004) 32 Cal.4th 1153, this Court rejected a claim that it was error to refuse an instruction like McKinnon's fifth requested instruction. (*Id.* at 1193-1194.) Therefore, the court did not err when it denied McKinnon's request.

As to the "Mercy or Sympathy" issue, in *People v. Prieto, supra*, 30 Cal.4th 226, this Court held that CALJIC No. 8.85 adequately covers the role of mercy in deliberations. (*Id.* at 271, citing *People v. Lewis, supra*, 26 Cal.4th at p. 393.)

In sum, the pattern instructions adequately addressed the issue presented in McKinnon's requested special instructions, this Court has previously rejected claims similar to the ones McKinnon now presents, and McKinnon has not offered any persuasive reason why this Court should deviate from its prior holdings.

XXIII.

MCKINNON'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW OR THE EIGHTH AND FOURTEENTH AMENDMENTS

McKinnon contends his death sentence violates international law, as well as the Eighth and Fourteenth Amendments. (AOB 452-455.) McKinnon's contention is without merit. International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 512; *People v. Jones, supra*, 29 Cal.4th at pp. 1267-1268.) Because international law would not prohibit a death judgment that complied with federal and state constitutional and statutory requirements, it follows that international norms impose no greater bar. (See, e.g., *People v. Jenkins, supra*, 22 Cal.4th at p. 1057.) In any event, in terms of the Eighth Amendment, it is American concepts of decency which

are dispositive. (*Ropers v. Simmons* (2005) 543 U.S. 551 [125 S. Ct. 1183, 161 L. Ed. 2d 1].)

Acknowledging that this Court has previously rejected similar arguments, McKinnon contends California's death penalty law violates international law because it is imposed arbitrarily and is cruel and inhuman under the International Covenant on Civil and Political Rights (ICCPR), and falls short of international norms and human decency. (AOB 453-454.) However, this Court has consistently rejected identical claims and should do so here.

Preliminarily, respondent submits that McKinnon should be precluded from claiming violations of international customary law or treaties for the first time on appeal, since he never raised any such claims in the trial court. Convicted defendants are generally precluded from raising claims on appeal if the claim was not previously raised in the trial court. (See, e.g., *People v. Jones* (1997) 15 Cal.4th 119, 181; *People v. Collie* (1981) 30 Cal.3d. 43, 64.)

Additionally, McKinnon lacks standing to challenge California's death penalty statute as violating international law. It is the general rule that international law does not confer standing on individuals to raise claims of international law violations in domestic courts. (See *Committee of U.S. Citizens Living in Nicaragua v. Reagan* (D.C. Cir. 1988) 859 F.2d 929, 937; see also *People v. Brown*, *supra*, 33 Cal.4th at p. 403, citing *Hanoch Tel-Oren v. Libyan Arab Republic* (D.D.C. 1981) 517 F.Supp. 542, 545-547.) Accordingly, this Court should reject McKinnon's contention as he lacks standing to challenge California law on international law grounds.

Regarding his Eighth Amendment claim, McKinnon notes that all Western European countries[39], Australia, New Zealand, Canada and other

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39. McKinnon excepts the crime of treason from Western Europe's prohibition against the death penalty. (AOB 454.)

countries have abolished the death penalty. (AOB 454.) However, as to Eighth Amendment analysis; "it is *American* conceptions of decency that are dispositive[.]" (*Stanford v. Kentucky* (1989) 492 U.S. 361, 369 fn. 1 [109 S. Ct. 2969, 106 L. Ed. 2d 306] emphasis in original.) Interpretation and application of the provisions of the United States Constitution to questions presented by state or federal statutory or constitutional law is ultimately an issue for the United States Supreme Court and the lower federal courts, not customary international law. The United States Supreme Court recently reaffirmed this principle in *Roper v. Simmons* (2005) 543 U.S. 551, 575 [125 S. Ct. 1183, 161 L. Ed. 2d 1], noting that, while the United States Supreme Court "has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments,'" it remains the task of the High Court ultimately to interpret the Eighth Amendment. Although the United States Supreme Court has never directly addressed the issue of whether the death penalty violates international law, the lower courts that have considered the question have uniformly concluded that it does not. (See *Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337, 376.)

Furthermore, the prohibition of the death penalty is not so extensive and virtually uniform among the nations of the world that it is a customary international norm. According to Amnesty International, 96 countries and territories in the world still have some sort of death penalty law in place, while 90 countries have abolished the death penalty for all crimes.[40] (Facts and Figures on the Death Penalty,

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40. Of the 96 countries which retain the death penalty, 11 reserve the death penalty only for so-called "exceptional crimes," and 29 have not carried out an execution for at least the past 10 years. (Facts and Figures on the Death Penalty, <http://web.amnesty.org/pages/deathpenalty-facts-eng> [as of August 8, 2007].)

<http://web.amnesty.org/pages/deathpenalty-facts-eng> [as of Aug. 8, 2007].)

As the Sixth Circuit Court of Appeal explained in *Buell*,

> There is no indication that the countries that have abolished the death penalty have done so out of a sense of legal obligation, rather than for moral, political, or other reasons. Moreover, since the abolition of the death penalty is not a customary norm of international law, it cannot have risen to the level that the international community as a whole recognizes it as jus cogens, or a norm from which no derogation is permitted.

(*Buell v. Mitchell*, *supra*, 274 F.3d at p. 373.) Therefore, there is no basis for this Court to conclude that the abolition of the death penalty is a customary norm of international law or that it has risen to the higher status of jus cogens.

Additionally, this Court has previously rejected the claim that California's death penalty law violates the ICCPR. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 403-404; see also *People v. Wilson* (2005) 36 Cal.4th 309, 363.) As this Court noted in *Brown*,

> Although the United States is a signatory [to the ICCPR], it signed the treaty on the express condition "[t]hat the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." (138 Cong. Rec. S4781-01 (Apr. 2, 1992); see Comment, The Abolition of the Death Penalty: Does "Abolition" Really Mean What You Think It Means? (1999) 6 Ind. J. Global Legal Studies 721, 726 & fn. 33.) Given states' sovereignty in such matters within constitutional limitations, our federal system of government effectively compelled such a reservation.

(*Ibid.*)

Finally, McKinnon's claim lacks merit because it has repeatedly been specifically rejected by this Court. (*People v. Harris* (2005) 37 Cal.4th 310, 376; *People v. Wilson*, *supra*, 36 Cal.4th at p. 362; *People v. Ward* (2005) 36 Cal.4th 186, 222; *People v. Brown*, *supra*, 33 Cal.4th at p. 403; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; *People v. Ghent* (1987) 43 Cal.3d 739,

783.) McKinnon has presented no basis to revisit these decisions and his claim should be rejected.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: August 30, 2007

Respectfully submitted,

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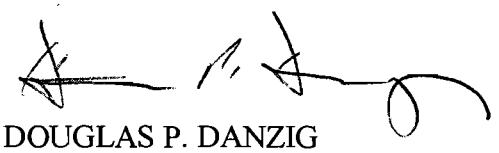

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 56127 words.

Dated: August 30, 2007

Respectfully submitted,

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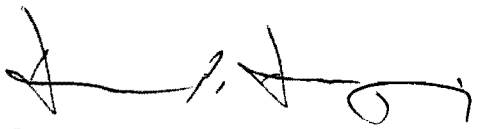
Attorney General of the State of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Crandell McKinnon**

No.: **S077166**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On August 31, 2007, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 31, 2007, at San Diego, California.

D. Perez
Declarant

Signature

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