IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. BERNARD A. NELSON, Defendant and Appellant.	S085193 CAPITAL CASE

Los Angeles County Superior Court No. BA162295
The Honorable Jacqueline A. Connor, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

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STATEMENT OF THE CASE

In count 1 of an information filed on August 26, 1998, by the District Attorney of Los Angeles County, appellant was charged with the April 5, 1995, murder of Richard Alexander Dunbar in violation of Penal Code section 187, subdivision (a). A special circumstance was alleged that the murder was committed while appellant was engaged in, or an accomplice was engaged in, the crime of robbery and/or attempted carjacking in violation of Penal Code section 190.2, subdivision (a)(17). Appellant was charged in count 2 with the second degree robbery of Dunbar in violation of Penal Code section 211 and in count 3 with attempted carjacking of Dunbar's vehicle in violation of Penal Code sections 664 and 215, subdivision (a). Counts 1, 2 and 3 each alleged that appellant personally used a firearm, to wit, a semi-automatic handgun, within the meaning of Penal Code sections 1203.06, subdivision (a)(1) and 12022.5, subdivision (a), during the commission of the offense. (1CT 159-161.)

In count 4, appellant was charged with the August 16, 1996, attempted murder of Miguel Cortez in violation of Penal Code sections 664/ 187, subdivision (a). It was further alleged that the attempted murder was willful, deliberate and premeditated within the meaning of Penal Code section 664, subdivision (a). Appellant was charged in count 5 with the second degree

robbery of Cortez in violation of Penal Code section 211. It was alleged as to both counts 4 and 5 that appellant personally used a firearm, to wit, a semi-automatic handgun, within the meaning of Penal Code sections 1203.06, subdivision (a)(1) and 12022.5, subdivision (a)(1), and personally inflicted great bodily injury upon Cortez within the meaning of Penal Code section 12022.7, subdivision (a). (1CT 161-163.)

Appellant was also charged with the May 7, 1997, attempted murders of Giovanni Boccanfuso (count 6), Charles Coleman (count 7), and John Doe (count 8) in violation of Penal Code sections 664/187, subdivision (a). It was alleged that the attempted murders of Boccanfuso (count 6), Coleman (count 7) and John Doe (count 8) were willful, deliberate and premeditated and that the attempted murders of Boccanfuso and Coleman were committed against peace officers engaged in the performance of their duties within the meaning of Penal Code section 664, subdivision (e)(1). Counts 6, 7 and 8 each alleged that appellant personally used a firearm, to wit, a semi-automatic handgun, within the meaning of Penal Code sections 1203.06, subdivision (a)(1) and 12022.5, subdivision (a)(1). (1CT 163-165.)

Appellant entered a plea of not guilty to each count and denied all the special allegations. (1CT 166-167.)

On July 19, 1999, the prosecution filed a notice of penalty phase evidence pursuant to Penal Code section 190.3. On August 13, 1998, the prosecution filed an addendum to the notice. (2CT 222-224, 225, 227-229.)

Trial was by jury. (See 2CT 260.) The guilt phase commenced on October 4, 1999. (2CT 260.) On September 23, 1998, the jury returned guilty verdicts on all counts. The jury found the murder of Richard Dunbar (count 1) to be of the first degree and further found the robbery/carjacking special circumstance related to Dunbar's murder to be true. The jury further found the allegation that the attempted murders in counts 6 and 7 were committed against

a peace officer engaged in the performance of his duties in violation of Penal Code section 664, subdivision (e)(1) to be true. The jury also found the allegation that the attempted murders in counts 4, 6, 7 and 8 were willful, deliberate and premeditated to be true. The weapon and the great- bodily-injury allegations were also found to be true. (2CT 323-332.)

The penalty phase commenced on September 27, 1999. (2CT 333.) On September 30, 1999, the jury returned a verdict of death. (3CT 363.) Appellant's motion for a new trial was argued and denied. (3CT 450.) Appellant's automatic motion for modification of the verdict pursuant to Penal Code section 190.4, subdivision (e), was denied. (3CT 441-445; 453-455.)

The trial court denied probation and sentenced appellant to death as to count 1, in accordance with the jury's verdict. The trial court selected count 5 as the base term, imposing the upper term of 5 years, and further imposed an additional consecutive term of 10 years for the weapon enhancement under Penal Code section 12022.5. The trial court imposed and stayed pursuant to Penal Code section 654 one-third the mid term for counts 2 and 3. The trial court imposed life terms on counts 4, 6, 7 and 8 and ordered them to run consecutive to the term previously imposed but stayed those sentences pending service of the sentence on count 1. Sentences on the remaining weapon and enhancement allegations were imposed and stayed pursuant to Penal Code section 654. (3CT 439-440, 471-473, 474-475.)

This appeal is automatic following a judgment of death. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

I. GUILT PHASE EVIDENCE

A. Prosecution's Case-In-Chief

1. The Murder Of Richard Dunbar (Counts 1-3)

On April 5, 1995, at approximately 9:45 p.m., Richard Dunbar left his Inglewood Avenue apartment to go pick up Raynard Scott, a friend who lived at the West Palms Apartment complex on Alvern Street. (See Peo. Exhs. 13 C and E.) Dunbar took his house keys and car keys with him. He did not carry a wallet on his person, only money in his front pocket. Dunbar drove his new BMW 325I convertible (see Peo. Exh. 13B). After purchasing the BMW, Dunbar replaced all four wheels on the vehicle with "distinctive" rims "to make [the car] look nicer." (6RT 1030-1042, 1043-1044, 1046; see Peo. Exh. 13B.)

Later that evening, Christina Dunbar, Dunbar's sister, and Maurice James, Dunbar's roommate, were called to the Alvern Street address by the police. Dunbar had been murdered. He suffered two fatal gunshot wounds: one to the right side of his lower chest which struck his lung and another which went through his chest and perforated his aorta. (6RT 908-910, 1044-1046; 7RT 1175-1181.)

James identified Dunbar's body lying in the street next to the BMW. He also identified the BMW at the scene as belonging to Dunbar. Christina Dunbar also identified her brother and the BMW. The BMW was towed to Christina's apartment because keys to the car could not be found at the scene. The car alarm sounded as the BMW was towed. Christina also recovered Dunbar's club identification (the club he was going to that evening), his driver's license, and $30. (6RT 908-912, 1044-1046.)

On the evening of April 5, 1995, between 10:30 and 10:45 p.m., Christie Hervey was standing on her second floor balcony of her Alvern Street

apartment when she heard two gunshots in the area of the nearby West Palms Apartment complex (see Peo. Exhs. A-G). She immediately told her son to call 9-1-1. After the two shots were fired, Hervey heard a man lying on the ground cry for help: "Help me, please help me." Hervey then heard a third gunshot fired. (6RT 1047-1050, 1053-1055, 1058.)

After the third shot was fired, Hervey saw a security guard "coming from the opposite direction toward the victim." She also saw appellant moving away from the victim and the area where the shooting took place and toward her apartment. She observed appellant's face for approximately two minutes. Appellant, who was carrying a gun in his left hand down on his side, kept looking over his shoulder back toward the direction where the man had been shot was laying on the ground. Appellant, who appeared nervous, was kind of "walk-running" down the street and, according to Hervey, "wasn't running at a high pace . . . but he was swiftly walking-running." Appellant ran toward the alley. When Ms. Hervey saw the approaching security guard "standing in close proximity to the body," she walked downstairs to the security guard booth "to see if the other guard was over there to see if anyone had called for help other than [herself]." (6RT 1049-1058, 1070, 1081, 1100.)

Hervey had a clear view of the area and nothing obstructed her view or impeded her vision that evening. The lighting conditions on Alvern were "very bright" and there was "lighting in the alleyway in the carport area, so that the area was also lighted." She "very clearly" observed appellant at a distance of between approximately 42 to 100 feet. (6RT 1049-1056, 1081, 1100; see Peo. Exhs. 21A-E.)

Hervey, who worked in a miniature museum and paid attention to detail, positively identified appellant in court as the person she saw on the evening of April 5, 1995. As Hervey explained, she was "looking at the details as [she] saw the man walking with the gun down the street." (6RT 1063, 1064,

1098, 1099, 1101, 1107-1108.) Hervey also identified appellant at the preliminary hearing (6RT 1063-1064) and from a photographic display (Peo. Exhs. 22, 24) approximately two years after the incident. Hervey recognized in appellant's photograph "the overall look of [appellant's] face" and "just the way [the eyes] were looking." (6RT 1058-1062, 1100-1101; see 6RT 1087-1090.)

Lacourier Davis, a uniformed security guard who worked on Alvern Street, heard a couple of gunshots when he arrived for work that day. Davis walked "real fast" up the street after parking his car and saw a Black male sitting on the ground with his back against a BMW (see Peo. Exh. 13C). Davis slapped the man's leg and said, "Hey, man, you all right? You're okay?" The man, whose tongue was out of his mouth, did not respond. Davis then grabbed the man's arm and saw a "hole in his chest and some blood come out." Davis ran to the guard booth and called 9-1-1. Davis identified Dunbar as the man he saw on the ground. (6RT 1016-1022.) Ms. Hervey saw the uniformed security guard (Davis) walk toward the victim before she went downstairs and talked with another guard in the security booth. (6RT 1057-1058.)

Detective William Cox responded to the crime scene at 7077 Alvern Street. (See Peo. Exh. 32 [diagram] and Peo. Exh. 33A-E [photos].) He recovered three spent .380 caliber shell casings and a pizza box. He booked the items as evidence in case number DR95-1416227. (6RT 1297-1300.) Detective Cox also saw Dunbar's BMW (see Peo. Exh. 13) in the area but no car keys were recovered. (6RT 1301-1302.) When the police arrived they mistakenly thought security guard Davis might be involved in Dunbar's murder and arrested him. (6RT 1024-1025.)

Several days after the incident, Ms. Hervey related the following to Detective Cox: she heard two gunshots, went outside on her balcony, and then heard two additional gunshots; she saw a security guard (Davis) walking on the

sidewalk toward the victim (Dunbar) and, at the same time, saw a Black male (appellant) standing in the street near the security guard and facing her apartment and the victim on the ground; the man standing over the victim looked toward the left and the approaching security guard and then ran eastbound across the street and northbound toward her apartment; the man, who was moving at a "slow jog" and holding a .38 caliber, disappeared from her sight after he entered the alley. (6RT 1307-1316.)

Three weeks after the incident, Detective Cox went to Ms. Hervey's apartment and stood on her balcony. There was a "clear shot" from the balcony to where Dunbar's body was found. (6RT 1314.) Detective Cade also went to the Hervey residence and stood on the balcony between 8:30 and 9:00 p.m. He could clearly see the area where Dunbar had been murdered. (8RT 1391-1393.)

2. The Attempted Murder Of Miguel Cortez (Counts 4-5)

On August 16, 1996, at approximately 1:00 a.m., Miguel Cortez, an armed security guard for the Arena and Paradise nightclubs, was alone guarding the area of the west gate when appellant approached and grabbed him from behind. When Cortez looked at appellant's face, appellant shot him in the area of his rib cage on the left side and, according to Cortez, "then from there [appellant] just kept shooting at me" and "[appellant] shot me another three times." Cortez was shot twice on the left side, once in the inside corner of the right eye, and once in his right elbow. A fifth bullet hit his Sam Belt and did not injure him. After Cortez fell to the ground face down, appellant stood over him and removed Cortez's nine-millimeter Beretta from his holster. When he took the weapon, appellant told Cortez, "I took your shit." A pager from the Beeper Company was also taken from Cortez. After appellant fled the scene, Cortez used his radio and called for help. Cortez was hospitalized for 15 to 30 days and underwent four surgeries. As a result of the shooting, Cortez suffered

permanent injuries relating to his breathing, bones, and stomach. At the time of trial, Cortez had not returned to work. (7RT 1130-1140, 1149-1150, 1151-1152.)

Los Angeles Police Officer Thomas Holzer was on patrol in the area at the time of the shooting. When he arrived at the location, Officer Holzer observed Cortez laying face down on the ground. He had been shot several times. Officer Holzer called for an ambulance and cordoned off the area. Officer Holzer spoke briefly with Cortez before the paramedics arrived. Although Cortez "was in a lot of pain" and had difficulty speaking because he had been shot in the hand, body and face, Cortez described the shooter as a Black male approximately 6'1" tall and weighing approximately 190 pounds with an earring on his left ear. The shooter was wearing a beige shirt and a long-sleeved brown jacket. (7RT 1133-1136, 1286-1288, 1293.)

Officer Holzer collected evidence at the scene. He recovered nine spent shell casings and three deformed spent bullets. The evidence was booked under case number DR96-0629580. (7RT 1288-1292; see Peo. Exhs. 25A-I, 26A-F and 27A-E.)

Detective Thomas Chevolek of the Los Angeles Police Department investigated the shooting. He spoke with Cortez in the hospital a couple of days after the shooting but Cortez, who had been shot several times, "was in very poor condition." Thereafter, it was determined that the weapon taken from Cortez during the shooting -- a nine-millimeter Beretta – was registered and the serial number of the weapon was L12526Z. Thereafter, Detective Chevolek was advised that Cortez's firearm was recovered by the Inglewood Police Department. Detective Chevolek obtained the weapon and booked it into evidence under case number DR96-0629580. (7RT 1194-1198.)

On August 26, 1997, approximately one year after the shooting, Detective Chevolek, realizing a suspect for the Cortez shooting might be in

custody, prepared a six-pack photo display with appellant's photograph in the number three position. Detective Chevolek showed the photo display (Peo. Exh. 28) to Cortez and Cortez identified appellant as the person who shot him. Cortez stated at the time of his selection: "The person, number 3, looks like the one that shot me." (See Peo. Exh. 29.) Cortez was 90-95% certain of his photograph identification of appellant. Cortez was 95 to 100% certain of his preliminary hearing identification of appellant as the shooter. And, Cortez was "around 100%" certain of his in-court identification of appellant at trial. (7RT 1135-1136, 1140-1145, 1172, 1198-1200, 1205.)

Cortez eventually received back his Beretta from the police. Although the firearm was loaded when it was taken from Cortez, the firearm did not have any rounds in it when it was returned. (7RT 1150-1151.)

3. The Recovery Of The .380 Caliber Automatic On Glasgow Street

On September 20, 1996, police responded to 9700 Glasgow after shots had been fired. Police Officer Julian Pere, one of the responding officers, observed approximately 10-15 members of the Moneyside Hustler gang standing in front of the apartment complex. The police officers advised the individuals in the group to stand still and to place their hands over their heads. One individual, however, did not obey the commands of the officers. This individual -- a Black male approximately 5'10" tall, 180 pounds, black hair, medium brown complexion, and carrying a clear plastic jacket -- strayed from the group and Officer Pere pursued him on foot. Officer Pere told the man "to freeze." As he turned toward Officer Pere, the man dropped a handgun to the ground. The pursuit continued and the man ran through an alley and scaled a six-foot high fence. Officer Pere did not scale the fence. Officer Pere did not get a good look at the man's face and was unable to make an identification. (8RT 1320-1324, 1328.)

The dropped handgun and clear plastic jacket carried by the fleeing man were recovered by the police. The handgun (Peo. Exh. 37), which contained a fully loaded magazine with nine live rounds, was found near a gate at the location. The handgun was a Beretta .380-caliber model with a blue steel three and one-half inch barrel. The serial number of the Beretta was F189831Y. Both items were booked into evidence under case number DR96-14351191. (7RT 1113-1116; 8RT 1323-1324.)

4. Glenn Johnson

Glenn Johnson, who was serving a five-year state prison term of robbery, was a reluctant witness for the prosecution who did not want to testify. (7RT 1221-1222.) Several prior inconsistent statements made by Johnson during tape-recorded interviews with Detective Cade were introduced by way of impeachment.

Johnson, who was not in custody at the time he made the statements, related the following to Detective Cade: He was a member of the Moneyside Hustler gang; on September 20, 1996, he and other members of the Moneyside Hustlers, including appellant, were shooting some guns when members of the CRASH Unit arrived; appellant, who was present at the time, walked away from the group of individuals that had gathered in front of the apartment complex; as appellant walked away from the group, two of the CRASH officers ordered appellant to stop and "freeze"; appellant responded, "fuck you," dropped a .380 caliber automatic (see Peo. Exh. 37) on the ground, and took off running; and officers pursued appellant. (RT 1371-1372, 1375-1383, 1389-1390, 1461-1465; Peo. Exhs. 38-41; see RT 1220-1241, 1255, 1256.)

Detective Cade interviewed Johnson for the specific purpose of trying to obtain information about the Dunbar murder. Johnson also related the following to Detective Cade: "Jason" shot Dunbar; Johnson received a .380 caliber automatic (see Peo. Exh. 37) from "Jason" and "Jason" told him to be

careful with it because "there were some murders on that weapon"; appellant used several names including "Terry James," "Jaye," and "Jason"; Johnson was picked up at school one day by appellant and the Fountano brothers, who were talking about the Dunbar murder; appellant said that Dunbar did not cooperate and "so he [appellant] had to smoke him"; the Dunbar murder took place off of La Tijera and Alvern Street at the West Palms apartment complex; and appellant was "trigger happy" and that appellant would "shoot you in a minute." (8RT 1371-1372, 1375-1377, 1381-1382, 1389-1390.)

Johnson also related in his interview with Detective Cade that the .380 caliber automatic (Peo. Exh. 37) which appellant dropped at the Glasgow location is the same .380 caliber appellant offered Johnson when he told him to be careful with it because "there were some murders on that weapon." (8RT 1383-1384, 1389-1390.) Johnson also related during one of the interviews that appellant drove a red Mustang and a white Cherokee. (8RT 1383.)

5. Leonard Washington

Leonard Washington, a former member of the Moneyside Hustlers, was in prison for bank robbery at the time he testified. He was also impeached with prior inconsistent statements he had made during an interview with Detective Cade. Washington knew appellant since 1995 and identified him as "Jaye" belonging to the Van Ness Gangster gang. "Jaye" or appellant gave Washington a nine-millimeter revolver to do a drive-by shooting in Inglewood. Appellant told Washington that he had to "gun down somebody to get [the nine-millimeter]." The nine-millimeter revolver was later lost during a police pursuit. When Washington told appellant that the nine-millimeter was lost and that the Inglewood police had recovered it, appellant said, "No big deal, I smoked a security guard to get the gun." Appellant told Washington that he (appellant) thought he had killed the security guard (Cortez). (8RT 1330-1336, 1347-1348, 1351-1352, 1393-1394.)

Appellant also related how to get guns from security guards. Appellant told Washington to "just draw down on them and take the gun." When they conducted bank robberies together, "Jaye" told Washington that "if we go in a bank and there's a security guard, lay him down and take the gun." (8RT 1339.)

6. Frank Lewis

On July 11, 1994, Frank Lewis, age 14, belonged to the Moneyside Hustlers and went to a party with appellant and Bryant Allen. They drove to the party in appellant's 5.0 Mustang. At the party, Lewis did "a lot of weed, marijuana, alcohol." They left the party at some point in appellant's Mustang. Appellant gave Lewis a fully loaded gun (Peo. Exh. 37). At some point, Lewis exited the Mustang, approached a car, and shot a person. Lewis then returned to the Mustang. He and appellant returned to the party. Lewis drank more alcohol, felt sick, and vomited. He was in custody at the time of his testimony for his participation in this shooting. (9RT 1475-1480.)

7. Ballistics Evidence

The Beretta .380 caliber semiautomatic recovered from Glasgow Street was identified as People's Exhibit 37 and booked under case number DR96-14351191. (7RT 1113-1116; 8RT 1323-1324, 1389-1390.)

In 1995, Starr Sach, a firearms examiner with the Scientific Investigation Division of the Los Angeles Police Department, examined the three cartridge casings and one fired bullet from the Dunbar murder scene (DR95-1416227) and determined that the expended casings and bullet were .380 automatic caliber. He did not have a weapon to test fire at that time. (7RT 1117-1120.) On November 5, 1996, Sachs examined the three cartridge casings and bullet recovered from the Dunbar murder scene once again but this time with the Beretta firearm from case number DR96-14351191 (Peo. Exh.

37). He determined that the cartridge casings and bullet from the Dunbar murder scene were fired from that Beretta (Peo. Exh. 37) and no other weapon. (7RT 1122-1126, 1128.)

Anthony Paul, a firearms examiner, examined the Beretta (Peo. Exh. 37) recovered from Glasgow Street with the nine spent cartridge casings and three deformed spent bullets recovered from the Cortez attempted murder scene. He determined that the evidence of the casings and bullets from the Cortez attempted murder scene were fired from the .380 caliber Beretta (Peo. Exh. 37) recovered on Glasgow to the "exclusion of all others." (7RT 1275-1277.)

It was stipulated that one expended .380 caliber semi-automatic cartridge casing recovered on July 11, 1994, from the incident involving Frank Lewis was analyzed by a firearms expert and determined to have been fired from the .380 semiautomatic firearm in People's Exhibit 37 (appellant's firearm recovered from Glasgow Street). (8RT 1425.)

8. The Attempted Murders Of John Doe And Police Officers Boccanfuso And Coleman (Counts 6-8)

On May 7, 1997, at approximately 12:30 a.m., uniformed Los Angeles Police Officers Charles Coleman and Giovanni Boccanfuso were on patrol in a marked patrol car in the area of 52nd Street and Crenshaw Boulevard. They observed an older model dark Chevrolet Monte Carlo (see Peo. Exhs. 4B-E) with two occupants "roll through" a stop sign at 11th Avenue and proceed northbound on 52nd Street while picking up speed. The Monte Carlo is a type of car "generally used by gang members" and "frequently stolen." Since the area was known for stolen vehicles, the officers decided to check the license plate number of the Monte Carlo. Officer Coleman, the driver of the patrol car, proceeded after the Monte Carlo down 52nd Street in an effort to catch up to it so Officer Boccanfuso could see the license plate number. (5RT 762-766, 879-883; Peo. Exhs. 1 and 4.)

As the patrol car and the Monte Carlo approached the intersection of 52nd Street and 4th Avenue, the Monte Carlo stopped at a stop sign. After the patrol car had caught up to the Monte Carlo, Officer Boccanfuso was about to run the license plate number of the Monte Carlo. At that point, however, the officers noticed a dark blue or green Jeep Cherokee parked at the curb on the east side of 4th Street with only its parking lights on. The Cherokee Jeep, which contained a Black male, pulled away from the curb and stopped at the stop sign. The Cherokee Jeep then started to proceed through the intersection without its headlights on. The Monte Carlo started to proceed through the intersection and appeared to intend to turn northbound on 4th Avenue. At that point, appellant, the passenger in the Monte Carlo, raised himself out the passenger window and sat on the window sill of the door facing the Monte Carlo. Appellant had a gun or firearm and was holding it with both hands. He extended the firearm across the roof of the Monte Carlo and used the roof to balance himself. The gun was pointed toward the Black male occupant in the Cherokee Jeep. (5RT 764, 767-771, 883-887; see Peo. Exhs. 2 and 3.)

Without discharging the firearm at the Monte Carlo, appellant then suddenly turned the weapon toward the patrol car, which was directly behind the Monte Carlo, and fired five or six gunshots at the officers. Officer Coleman and Officer Boccanfuso saw the "muzzle flash" from the gun when it was fired at them. Appellant then got back inside the Monte Carlo as it "took off" northbound on 4th Avenue. The patrol car pursued the Monte Carlo to the intersection of 48th Street and 11th Avenue at a distance of no more than one car length. At some point during the pursuit, Officer Coleman activated the overhead lights and siren. As the Monte Carlo made an abrupt turn, the passenger door opened and appellant "tumbled out of the vehicle" with a weapon falling onto the street and sliding across the pavement. The Monte Carlo continued on. Appellant, who did not pick up the dropped weapon, got

up off the ground and ran in a northeasterly direction toward 11th Avenue. Officer Boccanfuso got out of the patrol car and pursued appellant on foot. Officer Coleman drove the patrol car after the Monte Carlo. Appellant was wearing a light blue "Starter" jersey and gray sweat pants. (5RT 767-776, 788, 790, 840-841, 888-892, 899-902; Peo. Exhs. 6A-D.)

Officer Boccanfuso chased appellant at a distance of three or four feet. At one point during the pursuit, appellant turned toward Officer Boccanfuso and pulled a weapon out of his waistband and pointed it at Officer Boccanfuso. The weapon did not fire. Thereafter, appellant dropped the weapon and continued running. Officer Boccanfuso removed his service revolver from his holster and continued the foot pursuit of appellant until appellant scaled a 10-foot fence. (5RT 776-779, 890-892; Peo. Exh. 1.)

Officer Boccanfuso returned to the intersection of 48th Street and 11th Avenue where he saw the driver of the Monte Carlo, subsequently identified as Ricardo Yearwood, attempt to retrieve the handgun which had fallen to the ground when appellant "tumbled out" of the Monte Carlo. Officer Boccanfuso told Yearwood to "put your hands up" and move away from the weapon. Yearwood hesitated for a moment and then continued walking without complying with Officer Boccanfuso's directions. Officer Boccanfuso called for police assistance and Yearwood was arrested. A perimeter was set up around the Monte Carlo and a registration check of the Monte Carlo revealed a nearby address for the owner. Police officers proceeded to that location. Appellant was amongst a group of 10 individuals at the location. Officers Boccanfuso and Coleman identified appellant as the person who shot at them from the Monte Carlo. The identifications were made at that location approximately 60 to 90 minutes following the shooting. Appellant was arrested. Appellant was wearing seat pants but no shirt. He was also sweating and had abrasions on his knees, between his knuckles, and on his elbows. (5RT

785-788, 779-783, 841-842, 843-846, 855-856, 893-899; see Peo. Exhs. 9-12.)

Detective Peter Razanskas responded to the crime scene at the intersection of 48th Street and 11th Avenue in the early morning hours of May 7, 1997. He recovered the following items of evidence from the scene: a pager, four expended cartridge casings (Peo. Exhs. 6A-D), and two Glock .40 caliber handguns (see Peo. Exhs. 5A-E). One handgun (Peo. Exhs. 5A-C) was found near the southwest corner of the intersection. This weapon, the one that fell from appellant as he tumbled out of the Monte Carlo, was loaded and contained a magazine. The other handgun (Peo. Exhs. 5D and E), the one which appellant pointed at Officer Boccanfuso, did not have a magazine but there was an expended shell casing inside the chamber indicating the weapon had malfunctioned. The items were booked into evidence under case number DR97-1215376. (6RT 949-961, 1216; see 6RT 997-1002; Peo. Exhs. 7 and 8.)

Detective James Louis of the Los Angeles Police Department responded to the crime scene at approximately 2:30 a.m. on May 7, 1997. He observed two firearms (Peo. Exhs. 5B and 5E) at the scene. A round had been fired from People's Exhibit 5E but the "casing was still stuck in the chamber" which indicated the weapon had malfunctioned. Normally the casing would eject but if the casing lodges in the firearm then the firearm cannot be discharged. (5RT 784-786, 788-789; 7RT 1208-1210, 1211-1214.)

Richard William Catalani, a firearms examiner employed by the Los Angeles County Sheriff's Crime Lab, examined the two Glock .40 caliber handguns and four expended cartridge casings recovered from the crime scenes. The firearms were both semiautomatic pistols with Smith and Wesson caliber. However, one firearm was a Model 22 (Peo. Exh. 5B) and the other was a Model 23 (Peo. Exh. 5E). He received a 10-round magazine with the Model 22 firearm and no magazine with the Model 23 firearm. Each firearm can be discharged without a magazine. (5RT 858-861, 863-866.) Mr. Catalani

testified, however, that if the handguns were operating normally that the shell casings should eject from the chamber. If an expended casing remained inside the chamber and did not eject (such as what happened with Model 23 or People's Exhibit 5E) that meant that the weapon could not be fired again as there would be no opportunity for a live round to enter the chamber. (6RT 866-868.)

After an analysis and examination of the Model 22 and Model 23 firearms (Peo. Exhs. 5B and E) and the four expended cartridge casings, Mr. Catalani concluded that the three of the four casings were fired from the Model 22 firearm (Peo. Exh. 5B) and the fourth was fired from the Model 23 firearm (Peo. Exh. 5E). His opinion was "conclusive" that those casings came from "those guns and those guns alone." (5RT 866-868.)

Robert Cross was the owner of the two Glock .40 caliber handguns (Peo. Exhs. 5B and E). On March 11, 1997, appellant, whom Cross had known since 1984, accompanied Cross to Bateman Brothers and Company when Cross purchased a .45 caliber handgun and two nine-millimeters which are also known as .40 caliber Glocks. He purchased the weapons for target practice and because he liked to trade and sell guns. (6RT 966-971.) Appellant and Amer accompanied Cross back to Bateman Brothers to pick up the weapons in late March or early April after the waiting period had elapsed. After examining the weapons inside the store in appellant's presence, the trio returned to Cross' apartment at 1 North Venice Boulevard. Cross hid the weapons in an upstairs closet. (6RT 974, 976-981, 994.)

Thereafter, appellant and Amer visited Cross. On one visit, approximately two to three weeks after Cross had picked up the weapons and hid them in the upstairs closet, Cross left appellant, who was carrying a black leather backpack (see Peo. Exh. 17), and Ameer upstairs alone for approximately 20 to 30 minutes while he went downstairs. When Cross

returned upstairs, appellant, with the shoulder bag, and Ameer left the house. Approximately one week after this incident, Cross went to the closet to retrieve the weapons for target practice but they were missing. During the week between the visit by appellant and Ameer and the discovery that the weapons were missing, no one was left unattended in Cross' apartment. Cross did not give anyone permission to take the weapons. Cross did not call the police when he discovered the weapons missing, but he did call appellant. (6RT 980-987, 989-990.)

9. The Recovery Of The Backpack From Appellant's White Cherokee Jeep

Cross heard others refer to appellant as "Terry," "Jaye," and "Bernard." He saw appellant arrive at his residence in two vehicles -- a grayish-blue Oldsmobile and a white Jeep Cherokee Jeep (see Peo. Exhs. 15 and 16). Cross lived at 1 North Venice Boulevard, Apartment #1. Cross saw the paperwork regarding the purchase of the Jeep by "Terry James" reflecting Cross' address. He did not give appellant or "Terry" permission to use his address to make purchases of furniture or cars. Cross did not give appellant permission to purchase the Cherokee Jeep by using his address. He was not that concerned that appellant purchased the Jeep using his address because appellant showed him the insurance coverage on the Jeep. (6RT 970-975.)

On July 1, 1997, Detective Mark Campbell of the Inglewood Police Department recovered a 1997 white Jeep Cherokee from "Cher" at 6921 Glasgow in Westchester. "Cher" identified herself as appellant's girlfriend. The Jeep had been purchased by "Terry James" at 1 North Venice Boulevard. Cross lived at the Venice Boulevard location and he identified appellant as the owner of the Jeep: "it was Bernard [appellant], who was also Terry James, that purchased the vehicle." (8RT 1362-1367, 1370.)

Detective Campbell recovered a backpack (see Peo. Exh. 17) from the rear of the Jeep. Found inside the backpack was a photograph depicting appellant and Ahmad (see Peo. Exh. 19) and a piece of paper (Peo. Exh. 34) containing a purported alibi for appellant for the incident involving the attempted murders of "John Doe" and Police Officers Coleman and Boccanfuso. (8RT 1365-1368.)

B. Defense Evidence

Dr. Scott Frasier, an expert on eyewitness identification, testified that there is a scientific basis for the principles of eyewitness memory. (9RT 1496-1499.)

Dr. Frasier related several principles related to eyewitness identification, including the following: the greater the distance between two individuals, the less likely an accurate identification of one by the other (9RT 1512-1513); if the distance between two individuals is greater than 80 feet, recognition of even a well-known individual drops to "essentially nil" and for strangers the recognition accuracy "even for long, long durations drops off precipitously to very low rates after you get beyond 40 and 50 feet" (9RT 1514-1515); there is a "kinetic distortion" reducing the accuracy of identification when the person being observed is in motion (9RT 1519-1522); there is also reduced accuracy in identification if the person is carrying a weapon (9RT 1522-1524); over a period of time, memory decays, making it difficult to recall an observed person's face (9RT 1529-1531); a failure to accurately recognize facial hair (i.e., a distinctive cue), reduces the reliability of an identification (9RT 1528); "relative judgment eristic" refers to the longer an individual looks at something, the less reliable the identification (9RT 1533-1534); "progression to certainty" refers to the more often a person is shown a photo or image of a person, the more certain the person becomes of the identification (9RT 1536-1538); and there is no direct correlation between confidence in an identification

and its accuracy (9RT 1538-1539).

Dr. Frasier also related he viewed the Dunbar crime scene on two evenings in August 1999 when lunar and climatic conditions were similar to the evening of the Dunbar murder. He measured the distance from Mrs. Hervey's balcony to the area where Dunbar's body was found "by pacing" and determined it to be "somewhere around" 300 feet. Using a "surveyor's wheel," Dr. Frasier determined that the distance from Mrs. Hervey's balcony to the middle of the alley where Mrs. Hervey last saw appellant was 99 feet, 3 inches. (9RT 1502-1509.)

On September 20, 1996, Darren Hill, a police officer with the Los Angeles Police Department, responded to the area of the 9700 block of Glasgow Place. At the location, Officer Pere handed Officer Hill a handgun (Peo. Exh. 37), which contained a magazine clip and ammunition, and a jacket. Officer Pere told Officer Hill that the person who had dropped the handgun at the scene was a male Black wearing dark pants. The male Black was approximately five feet, seven inches tall, 120 pounds, and 18 or 19 years of age. The label inside the jacket indicated "XX Mecca." (10RT 1588-1590, 1592.)

On April 5, 1995, Jamie Gibson was watching television with his mother, Christine Hervey, when he heard gunshots. He first heard two gunshots, then a man scream for help, and then two more gunshots. After hearing the gunshots, Gibson got up and looked out the window in the front of the living room. Gibson could see the West Palms apartment complex at 7077 Alvern Street from the window. He "vaguely" saw a Black male running. The Black male was wearing a oversized T-shirt and dark pants. The Black male was holding a gun and "kind of trott[ed]" or jogged into the alley. (10RT 1651-1660.)

Gibson acknowledged on cross-examination that from his vantage point at the window he saw a man lying on the ground and an approaching uniformed security guard "all the way down the block, coming from the other entrance of the West Palms." Gibson indicated that his mother, Christine Hervey, got a better view of the Black male jogging toward his apartment because of the better view from the balcony than from the window. He also acknowledged that it was difficult for him to remember "how things were back in 1995" when he was 19 years old. (10RT 1660-1662.)

C. Rebuttal Evidence

Detective Cade made the following measurements at Christie Hervey's apartment: the distance from the landing on the balcony to the bottom step was ten feet, four inches; the distance from the balcony and the sidewalk underneath the balcony to the mouth of the alley was approximately 75 feet; and the distance from the curb to the alley was approximately 138 feet. (10RT 1663-1667.)

D. Surrebuttal Evidence

On September 19, 1999, Eldridge Moore, a private investigator retained by appellant, went to the Alvern Street location where the Dunbar murder took place. He testified regarding measurements he took at the location. (11RT 1678-1686.)

II. PENALTY PHASE EVIDENCE

A. Prosecution's Evidence

1. The Attempted Murder Of Lisa La Pierre

On the evening of July 11, 1994, Lisa La Pierre, a student at the University of Southern California, and several of her friends went to the House

of Blues to go dancing. The group thereafter left the House of Blues around 1:30 or 1:45 a.m. to go to Jerry's Deli. Ms. La Pierre left the House of Blues in her 1988 Honda CRX. Ms. La Pierre was the driver of the car and her friend Samantha Holcomb was a passenger. The others in the group caravanned behind Ms. La Pierre's car. En route, Ms. La Pierre stopped and parked as Bobby Burton took Michelle Cook back to her apartment on Sweetzer. Ms. La Pierre talked on her cell phone while she waited in her Honda CRX. (12RT 1892-1895.)

The next thing Ms. La Pierre recalled was waking up in the hospital a couple of days later. She had been shot in the neck but did not recall being shot. Ms. La Pierre was in the hospital for three weeks and thereafter in a second hospital for approximately eight and one-half months. As a result of the shooting, Ms. La Pierre was permanently paralyzed: unable to walk or move her hands; no ability to move her body below the shoulders; unable to breath on her own; and unable to ever be by herself. (12RT 1892-1896.)

On the evening of July 11, 1994, Frank Lewis, age 14, went to a party with appellant whom he had known for about four years. Lewis and appellant had been engaged in gang activity together. Lewis, who drank alcohol and smoked marijuana, was "sort of tipsy" when he arrived at the party. After about 30 minutes, Lewis left the party with appellant because appellant "wanted to go rob somebody." Lewis needed the money so he decided to go. with appellant. Lewis, however, did not take his .25 caliber with him when he left the party. Appellant told Lewis "he [appellant] got a gun, [Lewis] don't need that little gun." Lewis gave the .25 caliber to his "homie" Bryant Allen. Appellant and Lewis left the party in appellant's burgundy 5.0 Mustang. Appellant drove as Lewis was too short to drive the car. (12RT 1900-1904.)

They drove around Hollywood and stopped where a group of four women and one man were standing outside a nightclub. Appellant told Lewis

to rob one of the people in the group. Lewis approached the man in the group, showed him the gun appellant had given him, and took the man's wallet. Lewis got back into the car and gave the wallet to appellant. They drove around looking for someone else to rob. They followed a BMW into a garage and appellant told Lewis to rob the male driver. When Lewis approached the BMW, the driver reached underneath the car seat and pulled out a can of mace. Lewis felt sorry for the man and did not rob him. Lewis returned to the car and appellant got mad at him because he did not have any money. Appellant slapped Lewis twice. Lewis was "painfully hurt" when appellant slapped him. Lewis was "mad" when appellant slapped him and ashamed when he did not complete the robbery. As Lewis noted, "[a]nd I got a gun, and I didn't do nothing about it." (12RT 1905-1906.)

Appellant and Lewis continued driving around Hollywood until they saw a woman sitting in a red car (Ms. La Pierre's Honda CRX) talking on a cell phone. Appellant parked in an alley and told Lewis to rob the occupants of the red car and to "take the phone" the woman was talking on. Lewis took the gun appellant provided him, exited the Mustang, walked around and approached the red car. As he approached the red car, Lewis, who did not want to get slapped again by appellant, "pulled the trigger" and "I didn't do anything else but pull the trigger." Lewis never saw the cell phone and, when he returned to appellant's car, appellant inquired, "Where the phone at?" Lewis said, "I just shot somebody, man. I ain't got no phone." Appellant, who was only concerned about the phone, told Lewis, "Go get the phone. Go get the phone." Lewis responded, "I can't go get no phone. I just killed somebody." (12RT 1907-1910, 1912.)

Appellant and Lewis returned to the party. Appellant told Lewis not to tell anyone at the party what had happened. Lewis, however, told Bryant Allen that he thought he had killed someone. Lewis started to drink to "drink

my problems away." Lewis threw up and then left the party with his .25 caliber. (12 RT 1910-1912.) The next day, Lewis saw a report on television about the shooting incident. When he saw a picture of the red car and a person on a stretcher, Lewis said to a friend, "I did that right there." The friend told Lewis, "Man, don't talk about that. You know what I'm saying." (12RT 1911-1914.)

Lewis, who did not know the identity of Ms. La Pierre at the time of the shooting, was convicted of the attempted murder of Ms. La Pierre and was in custody for that offense at the time he testified in the instant case. Lewis did not receive any deal for testifying in the instant case. (12RT 1914-1915, 1923-1926.)

2. The Bank Robberies In December 1996

Leonard Washington, who was incarcerated for a series of bank robberies, testified as to two bank robberies he committed with appellant. They used a stolen Honda Accord to do the robberies and appellant decided which banks to rob. (12RT 1932-1935.)

On December 17, 1996, appellant, Washington, age 17, and Ibn Jones robbed the Topa Savings Bank on Ventura Boulevard. Appellant, who had a .38 caliber, directed Washington and Jones to enter the bank while he waited in the car. Washington and Jones, who was armed with a gun, entered the bank. Jones told everyone to lay down or get down on their knees. Washington pretended to have a gun and his job was to "go and get the money." Washington jumped over the counter and took the money. Washington and Jones then walked out of the bank, got in the waiting car with appellant, returned to appellant's house, and thereafter divided the money. (12RT 1932-1937.)

Edward Vargo, a teller at Topa Savings Bank, described the robbery as a "take-over" robbery. He testified that the man with the gun took about

$2,500 to $3,000 from his cash drawer. The armed robber had a .357 caliber revolver and Vargo "saw the bullets in the chamber." The robbers left the bank "in a hurry." (12 RT 1975-1981.)

Later that day, the trio robbed the Great Western Bank on Reseda Boulevard. Washington and Jones, who was armed, entered the supermarket where the bank was located, while appellant remained in the car "keeping it running, waiting for us to jump back in." Washington jumped over the counter, opened the teller drawers, and took the money. Washington and Jones then left the bank, got into the waiting car, returned to appellant's house and divided the approximately $6,000 from the robbery. (12RT 1937-1942; see 12RT 2031-2035.)

Washington participated in another robbery in Long Beach. Appellant was involved in this robbery but did not enter the bank and was in another car. Washington and two others entered the bank armed with a .38 caliber revolver. Appellant left the scene when the policed arrived and went to a hotel across the street from the bank. Washington was angry with appellant for leaving them at the scene and not getting them a lawyer "or anything" following the arrests. (12RT 1939-1942.)

Washington entered a plea bargain where he received a four and one-half year sentence and two "strikes" for the robberies. Washington felt he got "cheated" on the plea bargain as his attorney was "dapping" with the District Attorney. (12RT 1953-1954.)

3. Evading A Police Officer

Appellant was convicted in case BA 101006 of evading a police officer on September 4, 1994.

On September 4, 1994, at approximately 8:25 p.m., Los Angeles Police Officer Christopher Jordan was on patrol in a marked patrol car when he observed a green Honda Accord go through a stop sign on Crenshaw

Boulevard without stopping. Officer Jordan made a U-turn and pulled up behind the Honda which had stopped for a traffic light at Hyde Park and Crenshaw. Officer Jordan ran the license plate number of the Honda. The Honda proceeded southbound on Crenshaw through a barricaded area which had been blocked off for street cruising. The report on the license plate indicated that the Honda had been stolen in a robbery. Officer Jordan activated the overhead lights and siren of the patrol car. The Honda sped off. Officer Jordan pursued the Honda and advised the dispatcher and other police vehicles in the area that he was in pursuit. (12 RT 1884-1887.)

The Honda proceeded through a residential area and had a minimum of "at least" three "near misses" of colliding with another car. The Honda proceeded down an alley and one of the tires went flat but the Honda continued without stopping. At some point, the driver, identified as appellant, "bailed out and ran." Officer Jordan followed appellant in a foot pursuit through houses and over fences. Appellant was apprehended "when he was cornered off by other officers that had blocked the street." (12RT 1887-1890.)

Officer Jordan was not able to make an in-court identification of appellant as the driver of the Honda and the person he apprehended. However, criminal charges were filed against the driver of the Honda in People v. Nelson (case BA 101006). Officer Jordan and Detective Javier Lozano testified at the preliminary hearing in that case and Officer Jordan identified appellant as the driver of the Honda. Appellant was ultimately convicted of evading a police officer. (12RT 1890-1891, 1983-1984.)

4. Appellant's Prior Convictions

Appellant was convicted on January 19, 1995, in case BA101006 of violating Vehicle Code sections 2800.2 and 10151. (See above.) Appellant was convicted in 1997 in case YA03240 of a violation of Penal Code section 12031.5, subdivision (a). Appellant received a probationary sentence in each

case. (13RT 2164.)

5. Victim Impact Evidence

Christina Dunbar, the sister of murder victim Richard Dunbar, received a telephone call on April 5, 1995, regarding the murder of her brother. She proceeded to the Alvern Street location and saw her brother dead on the street. She was responsible for telling the other family members. (12RT 2005-2006.)

Christina had a "good relationship" with her brother and as his "big sister" was "looking out for him." Her brother was "snatched" out of her life and his death changed her life "tremendously." Christina explained, "I have come to terms only that because I'm taking it day by day. It is just a day-by-day effort." And, "I've learned just to take each day as it comes." The death changed her life "in a way where I just take it as it comes, and I do, and I try to enjoy life because I never know when my end is coming or someone is just going to come up and take my life." Christina also explained that her brother had a lot of friends. (12RT 2006-2010.)

Damon Dunbar, the younger brother of murder victim Richard Dunbar, had a "very close" relationship with his older brother when growing up because "it was pretty much just fun and games and [we] had a fairly close relationship." Damon's brother Richard had moved out to California to pursue an acting and modeling career. At the time of his death, Damon's brother had appeared in a Nike commercial as well as several television shows including Red Shoe Diaries and Twin Dragons. (12RT 1986-1989.) Victim Dunbar's career was "picking up" and "he was getting continuing roles and acting jobs." (12 RT 1990-1991.) Damon also testified that his brother was "very proud" of his BMW after making wheel and rim modifications. (12RT 1991-1992.)

Damon was in Atlanta when he received a telephone call at 4:00 a.m. from his hysterical mother regarding the murder of his brother. Damon

indicated it is a "call that I'll never forget receiving." Since his brother's death, Damon's life has changed "tremendously." As Damon explained" "I no longer have an older brother, a friend, somebody I can talk to or come up and visit whenever I wanted to. He will no longer be part of my life, my kid's life, my wife's life, my family. He's gone." (12RT 1990-1992.)

Sandra Dunbar, the wife of Damon, had a "very close" relationship with her brother-in-law. He was in their wedding. She was pregnant at the time of the murder. Sandra's brother-in-law's murder changed her lifestyle "dramatically" in the following respect: "My child will never know her uncle. She was named afer her uncle. She sees pictures of her uncle and all she knows is uncle Alex, but she'll never know him." (12RT 1993-1995.)

Henrietta Dunbar, the mother of murder victim Richard Dunbar, was "very close" to her son and "I miss him very much every day." Her son's death has affected her "tremendously" in that "ever since that day I have not been the same." As Mrs. Dunbar explained: "Holidays, birthdays I just wish that they would come and go because he used to always call me, send me a card or send me something at birthdays, Christmases. It doesn't mean anything to me anymore because he's not there." Mrs. Dunbar noted that her son called her once or twice a week just to talk. He also gave her the trophies he had received for modeling. She was very proud of her son since his career was picking up at the time of his death. Mrs. Dunbar had seen her son in Baywatch, Red Shoe Diaries, Lies of the Twins, and another movie. Mrs. Dunbar also observed that her son was "very proud" of his BMW after having paid over $1,800 for new rims. (12RT 1998-2002.)

Marc Dunbar, the younger brother of the decedent by seven years, did not, because of the age difference, spend much time with him growing up as children. However, Marc explained that the death affected his life in that "now that I've gotten older and our ages haven't made that much of a

difference and now that I'm able to be with him or would have been able to be with him, I can't do that." And, "I can't know him as a person . . . I don't know him heart to heart. I will never get that chance." (12RT 2011-2012.)

Richard Dunbar, the father of the decedent, testified that victim Dunbar was his first-born son and it was a family tradition that the father and first son are very close. Mr. Dunbar also testified that since his son's death "there's been a hole inside of me ever since I got the message from Marc, especially coming from my youngest that the oldest was gone." Mr. Dunbar was very proud of his son's acting career. (12RT 2036-2037.)

B. Defense Evidence

Dr. Richard Romanoff, a psychologist, gave extensive psychological testimony of appellant's mental health, diagnosing him following interviews and extensive testing as having an anti-social personality disorder with a high addiction potential. (13RT 2040-2042, 2056-2058; see 13RT 2042-2055.) Dr. Romanoff opined that the absence of attachment in the years from one to three as well as the following two years, with a responsible loving adult, contributed to his inability to sustain relationships, and explained appellant's tendency toward criminality and his manipulative behavior. (13RT 2061-2067, 2068-2072, 2077-2107.)

The mitigation evidence presented by appellant included background information about appellant's family life as a child, the physical and mental abuse of his mother by his alcoholic and suicidal father, and the physical abuse appellant was personally subjected to from his father in the face of his increasingly detached and unresponsive mother. (See 13RT 2114-2124, 2130-2144, 2145-2148.) It appears that appellant's father may have been further responsible for the death of appellant's younger brother James. Appellant's father committed suicide. (13RT 2124-2130, 2136-2137.)

ARGUMENT

I.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENTS OF CONVICTION (RESPONSE TO AOB ARGS. I, II AND III)

Appellant raises several issues regarding the sufficiency of the evidence to support the convictions and the special-circumstance finding. First, appellant claims the evidence is insufficient to support the attempted murder conviction of "John Doe" in count 8. He maintains insufficient evidence was presented to the jury to prove the specific intent to commit attempted murder. (AOB 57-63; Arg. I.) Second, appellant contends insufficient evidence was presented to support the enhancement that the attempted murder of "John Doe" was deliberate and premeditated. (AOB 63-70; Arg. I.) Third, appellant contends insufficient evidence was presented to support either the robbery conviction in count 2 or the attempted carjacking conviction in count 3, and, regardless of whether sufficient evidence was presented to support the robbery or attempted carjacking convictions, insufficient evidence was presented to sustain the true finding on the special circumstance. (AOB 70-77; Arg. II.) And, finally, appellant contends insufficient evidence was presented to support the murder conviction of Mr. Dunbar in count 1 because it was based on the "unbelievable" and "unreliable" testimony of eyewitness Christine Hervey and "the equally incredible evidence from Detective Cade" relating the prior inconsistent statements of Glenn Johnson. (AOB 78-90; Arg. III.) Respondent submits appellant's contentions are meritless.

To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the

defendant guilty beyond a reasonable doubt. (*People v. Kipp* (2000) 26 Cal.4th 1100, 1128; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) The same test applies with respect to special-circumstance findings, in which case the issue is whether any rational trier of fact could have found true the essential elements of the allegation beyond a reasonable doubt. (*People v. Chatman* (2006) 38 Cal.4th 344, 389; *People v. Lewis* (2001) 26 Cal.4th 334, 366; *People v. Mickey* (1991) 54 Cal.3d 612, 678.)

In addition, in evaluating the sufficiency of the evidence, an appellate court must presume in support of the judgment the existence of every fact the trier of fact could reasonably have deduced from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) The often-repeated rule is that, when a verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it; when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trier of fact. It is of no consequence that the trier of fact, believing other evidence, or drawing different inferences, might have reached a contrary conclusion. (*People v. Johnson, supra*, 26 Cal.3d at pp. 576-577.) The appellate court does not reweigh evidence or redetermine issues of credibility. (*People v. Ochoa, supra,* 6 Cal.4th at p. 1206.)

In cases in which the People rely primarily on circumstantial evidence, the standard of review is the same. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) If the circumstances reasonably justify the conviction, the possibility of a reasonable contrary finding does not warrant a reversal. (*People v. Kraft* (2000) 23 Cal.4th

978, 1053-1054.)

A. Substantial Evidence Supports Appellant's Attempted Murder Conviction Of "John Doe" In Count 8 (Response To AOB Arg. I)

Appellant contends insufficient evidence was presented to support the conviction for the attempted murder of "John Doe" (the driver of the Cherokee Jeep) in count 8. Appellant maintains insufficient evidence was presented, as a matter of law, to support the conclusion he had the specific intent to commit the attempted murder of the driver of the Jeep Cherokee. (AOB 59-63; Arg. I.) Appellant is incorrect.

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623, quoted in *People v. Smith* (2005) 37 Cal.4th 733, 739.) The evidence must show express malice, i.e., a deliberate intention to kill a human being unlawfully. (Pen. Code § 188; *People v. Bland* (2002) 28 Cal.4th 313, 327; *People v. Carpenter* (1997) 15 Cal.4th 312, 391.) "A defendant's state of mind must, in the absence of the defendant's own statements, be established by the circumstances surrounding the commission of the offense." (*People v. Mincey* (1992) 2 Cal.4th 408, 433.)

The law regarding the finding of a specific intent to kill in the case of an attempted murder was aptly summarized in *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690:

> There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions. (*People v. Lashley, supra*, 1 Cal.App.4th at p. 946.) The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to

support an inference of intent to kill . . . ." (*Id.* at p. 945.) "The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind." (*Id.* at p. 945.)

Here, the jury could reasonably infer from the evidence presented that appellant had the specific intent to murder the driver of the Jeep Cherokee. The evidence reveals that the Jeep Cherokee was parked at the curb on 52nd Street with only its parking lights on before entering the intersection of 52nd and 4th Avenue. The driver of the Jeep Cherokee was a Black male. Appellant was a passenger in the Monte Carlo which, after stopping for a stop sign on 52nd Street, entered the intersection from the opposite direction. The Monte Carlo appeared to intend to turn northbound onto 4th Avenue. While both cars were in the intersection, the following occurred: appellant raised himself out of the passenger window; appellant sat on the window sill facing the Monte Carlo and the Jeep Cherokee; appellant, holding a Glock .40 caliber handgun with both hands, extended the firearm across the roof of the Monte Carlo and used the roof of the Monte Carlo to brace himself; appellant aimed the Glock at the Black male occupant in the Jeep Cherokee; and then, realizing a patrol car was behind the Monte Carlo, appellant immediately turned away from the Jeep Cherokee and fired five or six shots at the police officers in the patrol car.

Clearly, any reasonable jury could infer that appellant had the specific intent to kill the male occupant of the Jeep Cherokee. Aiming a loaded Glock at an individual at such a close range, as is the case here, truly supports no other reasonable conclusion. And, that there could be no serious question regarding appellant's state of mind is evidenced by the fact that he *immediately*

turned and *fired* five or six shots at the police officers in an attempt to kill them.

The fact appellant did not actually fire the Glock at the occupant of the Jeep Cherokee does not save appellant from an attempted murder conviction. The jury could reasonably infer that appellant was poised to kill the occupant of the Jeep Cherokee with a loaded Glock, and was only prevented from doing so because appellant realized the patrol car was directly behind the Monte Carlo. Moreover, because appellant was in a firing position, his claim on appeal that "there was insufficient circumstantial evidence that [appellant] specifically intend[ed] to kill, rather than threaten, scare or otherwise intimidate the occupant of the Jeep" (AOB 60) must be rejected. (See *People v. Chance* (2006) 141 Cal.App.4th 618, 629.)

Appellant's claim regarding the lack of sufficient evidence of specific intent to support the attempted murder conviction in count 8 must therefore be rejected.

B. The Jury Could Reasonably Infer That The Attempted Murder Of "John Doe" In Count 8 Was Deliberate And Premeditated (Response To AOB Arg. I)

Appellant further contends that, as a matter of law, insufficient evidence was presented to support the jury's finding that the attempted murder of "John Doe," the occupant of the Jeep Cherokee (count 8), was deliberate and premeditated. (AOB 63-70; Arg. I.) Once again, appellant is incorrect.

Review of the sufficiency of the evidence supporting the finding of deliberate and premeditated attempted murder involves consideration of the evidence presented and all logical inferences from that evidence in light of the legal definition of premeditation and deliberation. (See *People v. Perez* (1992) 2 Cal.4th 1117, 1124.) Premeditation requires that the act of killing be considered beforehand. Deliberation requires careful thought and weighing of considerations for and against the act. The extent of the reflection, not the

length of time, is the true test of premeditation. Those processes can occur very rapidly, even after an altercation is under way. (*People v. Mayfield* (1997) 14 Cal.4th 668, 767; *People v. Sanchez* (1995) 12 Cal.4th 1, 34.) "Evidence concerning planning, motive, and manner of killing are pertinent to this determination, but these factors are not exclusive or nor are they invariably determinative." (*People v. Marks* (2003) 31 Cal.4th 197, 230.)

As noted by this Court in *People v. Stitley* (2005) 35 Cal.4th 514, 543:

> An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse. [Citations.] However, the requisite reflection need not span a specific or extended period of time. . . . [¶] Appellate courts typically rely on three kinds of evidence in resolving the question [of sufficiency of evidence of premeditation/deliberation]: motive, planning activity, and manner of killing. [Citations.] These factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation. [Citation.] However, "when the record discloses evidence in all three categories, the verdict generally will be sustained." [Citation.] In conducting this analysis, we draw all reasonable inferences necessary to support the judgment.

Applying the foregoing to the instant case, there was clearly ample and substantial evidence from which the jury could reasonably infer that the attempted murder of "John Doe" – the male occupant of the Jeep Cherokee – was deliberate and premeditated. Based on the facts of this case, the jury could reasonably conclude that appellant planned to kill the driver of the Jeep Cherokee – for whatever reason – in a drive-by shooting. Appellant waited at the stop sign until the Jeep Cherokee, with only its parking lights on, moved

into the intersection. At that point, the Monte Carlo moved into the intersection and appellant raised himself out of the passenger window, sat on the window sill facing the Monte Carlo and Jeep Cherokee, and, holding a loaded Glock .40 caliber in both hands, stretched out over the roof of the Monte Carlo and took aim at the driver of the Jeep Cherokee. The jury could reasonably conclude, based on these facts, that appellant planned to kill the driver of the Jeep Cherokee by shooting him at close range with the Glock .40 caliber handgun. (See *People v. Chance, supra,* 141 Cal.App.4th at p. 630.)

Appellant's claim there is insufficient evidence to support the jury's finding that the attempted murder was deliberate and premeditated must therefore be rejected.

C. Substantial Evidence Supports Appellant's Convictions For Robbery In Count 2 And Attempted Carjacking In Count 3, As Well As The True Finding On The Special Circumstance (Response To AOB Arg. II)

1. The Robbery Of Mr. Dunbar

Even though Mr. Dunbar's car keys were not found following the murder, appellant nevertheless contends insufficient evidence was presented to support the jury's conclusion that there was a "taking" of personal property from Mr. Dunbar. Appellant argues that only a "mere modicum" of evidence was presented that a "taking" of personal property took place and thus the robbery conviction "is based upon speculation and conjecture as to what might have happened to Mr. Dunbar." (AOB 72-75; Arg. II.) Respondent disagrees.

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." (§ 211; *People v. Hill* (1998) 17 Cal.4th 800, 849.) The victim's possession of the property may be either actual or constructive, and it need not be exclusive. (*People v. Miller* (1977) 18

Cal.3d 873, 880-881.) Constructive possession does not require direct physical control over the item, but it does require that a person knowingly exercise control or the right to control a thing, either directly or through another person or persons. (*People v. Nguyen* (2000) 24 Cal.4th 756, 759-762; *People v. Austin* (1994) 23 Cal.App.4th 1596, 1609.) "Immediate presence" means that property must be within the victim's reach or control, so that she could, if not overcome by violence or prevented by fear, retain her possession of it. (*People v. Harris* (1994) 9 Cal.4th 407, 415.) This Court has held that the taking of a victim's car keys from his person satisfied the requirement, as a matter of law, that the victim's property was taken "from his person or immediate presence." (*People v. Harris, supra,* 9 Cal.4th at pp. 420-421.)

Here, the jury could reasonably infer, based on the evidence presented, that Mr. Dunbar's car keys were taken from his person after he parked and got out of his BMW. Mr. Dunbar's roommate, Mauricio James, testified that Dunbar left the apartment at approximately 9:45 p.m. on the evening of the murder to go pick up Raynard Scott, a friend who lived on Alvern Street. Dunbar had his car keys with him when he left the apartment used those car keys to drive his BMW 325I to the apartment complex on Alvern Street. Later that evening, James was called to the Alvern Street crime scene where he identified Dunbar's BMW parked next to the curb and Dunbar's body lying in the street next to the BMW. James was not given the keys to Dunbar's BMW. (6RT 1040-1042, 1044-1046.)

Detective William Cox responded to the Alvern Street crime scene. No keys for Dunbar's BMW were recovered by the police. (6RT 1301-1302.) The following items were recovered from Dunbar's person: $30, a driver's license, and a club identification card. (6RT 908-912, 1044-1046.) When Christina Dunbar, Dunbar's sister, arrived at the crime scene, she had to have Dunbar's BMW towed from the scene because no keys for the BMW could be

found. (6RT 908-911.)

Respondent submits that based on the foregoing evidence, the jury could reasonably infer that "a taking" of Dunbar's personal property (i.e., car keys) took place. Dunbar had his car keys when he left his apartment and used those car keys to drive his BMW to Alvern Street. After he parked the BMW on Alvern Street, he exited the car and, while standing next to his car, was murdered. The only item of personal property missing from Dunbar were his car keys. The jury could reasonably infer that Dunbar's car keys were taken during the murder. (See *People v. Harris, supra,* 9 Cal.4th at pp. 420-421, where this Court held that the taking of a victim's car keys satisfied the requirement that the victim's property was taken "from his person or immediate presence.") Indeed, respondent submits no other reasonable conclusion is even remotely possible on this record.

Finally, it must be noted that appellant's argument that the fact the police were not able to find Dunbar's car keys ". . . may well have been more a reflection on the quality of the investigation than a state of sufficiency of the evidence to uphold the conviction . . ." (AOB 74) is not record based. Appellant fails to cite to any portion of the record in support of the claim. The claim is purely speculative and contrary to all the evidence which was presented that Dunbar's car keys were taken during the robbery. It should accordingly be rejected.

2. The Attempted Carjacking

Appellant contends the evidence is insufficient to support his conviction for attempted carjacking. (AOB 72-76.) He is incorrect.

Penal Code section 215, subdivision (a), defines carjacking as

> the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of a motor vehicle, against his or

her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.

In order to prove an attempt, the prosecution must prove an intent to commit the crime and a direct but ineffectual act done toward its commission. As this Court stated in *People v. Carpenter, supra,* 15 Cal.4th at page 387:

> An attempt to commit a crime has two elements: the intent to commit the crime and a direct ineffectual act done toward its commission. The act must not be mere preparation but must be a direct movement after the preparation that would have accomplished the crime if not frustrated by extraneous circumstances.

(See *People v. Jones* (1998) 75 Cal.App.4th 616, 627.)

Here, appellant argues that there was "no evidence as to either the intent of the perpetrator nor that any direct but ineffectual act taken to effectuate said attempt." (AOB 75.) Respondent disagrees because the intent to commit the crime and a direct but ineffectual act undertaken toward the commission of the crime were satisfied when appellant took Dunbar's car keys.

And, appellant's assertion that "nothing prevented the assailant from taking the victim's car" (AOB 75) overlooks the fact that the carjacking was interrupted when uniformed security guard Lacourier Davis arrived on the scene. Christie Hervey testified that after she heard the third gunshot she saw a security guard (Davis) "coming from the opposite direction towards the victim." At that point, Hervey saw appellant, who was carrying a gun in his left hand, move away from the area where the shooting took place and quickly proceed down Alvern toward Hervey and away from the approaching security guard. Appellant continually looked over his shoulder back to the area where the man had been shot. Hervey saw the security guard (Davis) "standing in close proximity to [Dunbar's] body." (6RT 1049-1050, 1053-1055, 1057.)

Davis testified that after he parked his car he heard gunshots. He got out of his car and walked down Alvern where he saw a Black male (Dunbar) sitting on the ground with his back against a BMW. When he grabbed Dunbar's arm, Davis saw a "hole in his chest and some blood come out." (6RT 1016-1022.) Based on this evidence, the jury could reasonably infer that the carjacking would have been completed but for the arrival of uniformed security guard Davis on the scene.

3. The Special-Circumstance Finding

Appellant also contends insufficient evidence was presented to support the true finding on the special circumstance that the murder was committed while appellant was engaged in the crime of robbery or attempted carjacking in violation of Penal Code section 190.2, subdivision (a)(17). This is so, argues appellant, because "[t]here was no proof before the jury that the shooter had any independent felonious purpose to either rob Mr. Dunbar or to steal his car" and the "true finding was based on conjecture and speculation as to what might have been in the mind of the shooter." (AOB 76-77; Arg. II.) Respondent disagrees because there was ample evidence from which the jury could reasonably infer that Dunbar was murdered during the commission of the robbery and/or attempted carjacking.

The applicable law regarding the sufficiency of the evidence in support of findings on special circumstances was summarized by this Court in *People v. Bolden* (2002) 29 Cal.4th 515, 554:

> To prove a felony-murder special circumstance like murder in the commission of a robbery, "the prosecution must show that the defendant had an independent purpose for the commission of a felony, that is, the commission of the felony was not merely incidental to an intended murder." (*People v. Mendoza* (2000) 24 Cal.4th 130, 182 [99 Cal.Rptr.2d 485, 6 P.3d 150].) "Concurrent

intent to kill and to commit an independent felony will support a felony-murder special circumstance." (*People v. Raley* (1992) 2 Cal.4th 870, 903 [8 Cal.Rptr.2d 678, 830 P.2d 712].) It is only when the underlying felony is merely incidental to the murder that the felony-murder special circumstance does not apply. (*Ibid.*)

(See *People v. Maury* (2003) 30 Cal.4th 342, 401-402.)

This Court repeatedly has observed that "when one kills another and takes substantial property from the victim, it is ordinarily reasonable to presume the killing was for purposes of robbery." (*People v. Turner* (1990) 50 Cal.3d 668, 688; accord, *People v. Bolden, supra,* 29 Cal.4th at p. 553; *People v. Hughes* (2002) 27 Cal.4th 287, 357; *People v. Kipp, supra,* 26 Cal.4th at p. 1128.) "If a person commits a murder, and after doing so takes the victim's wallet, the jury may reasonably infer that the murder was committed for the purpose of obtaining the wallet, because murders are commonly committed to obtain money." (*People v. Marshall, supra,* 15 Cal.4th at p. 35.)

Here, based on the evidence presented below, the jury could reasonably conclude that Dunbar was murdered for his car and car keys. The uncontradicted evidence presented reveals that Dunbar used his car keys to drive his BMW to Alvern Street. After he parked the BMW at the curb on Alvern Street, Dunbar exited the car with his car keys. Appellant approached Dunbar and fired two shots. Dunbar cried, "Help me, please help me." Appellant fired another shot. Thereafter, uniformed security officer Davis arrived at the scene and walked down Alvern Street toward Dunbar and appellant. Appellant, seeing Davis, ran across the street and proceeded quickly down Alvern Street toward Ms. Hervey's location and in the opposite direction from the approaching Davis. When Davis arrived at the BMW, he lifted up Dunbar's arm and "saw a hole in his chest." The only thing missing from Dunbar was his car keys. His other possessions – $30, a driver's license, and

a club identification card – were not taken. Based on this evidence, respondent submits, the jury could reasonably conclude Dunbar was murdered during the commission of the robbery of his car keys and the attempted robbery of the car.

Appellant's claim must therefore be rejected.

D. Substantial Evidence Supports Appellant's Conviction For The Murder Of Mr. Dunbar In Count 1 (Response To AOB Arg. III)

Appellant contends insufficient evidence was presented to support his conviction for the murder of Richard Dunbar (count 1). Specifically, appellant argues insufficient evidence was presented to establish his identity as the perpetrator of the murder. (AOB 78-89; Arg. III.) Appellant maintains that the evidence presented to establish the identity of appellant as the killer of Mr. Dunbar -- namely, the eyewitness identification by Christine Hervey and the contents of the interviews Detective Cade conducted with Glenn Johnson -- "was neither reasonable, credible nor of solid value" and inspires nothing "but incredulity." (AOB 86-89.) Respondent disagrees for several reasons.

1. The Eyewitness Identification By Christine Hervey

Christine Hervey positively identified appellant as the individual who shot Mr. Dunbar on the evening of April 5, 1995, between 10:30 and 10:45 p.m. A single witness's uncorroborated testimony, unless physically impossible or inherently improbable, is sufficient to sustain a conviction. (*People v. Abercombie* (2007) 151 Cal.App.4th 585, 591, citing *People v. Thornton* (1974) 11 Cal.3d 738, 754; *People v. Franz* (2001) 88 Cal.App.4th 1426, 1447, citing *People v. Mayberry* (1975) 15 Cal.3d 143, 150; *People v. Elwood* (1988) 199 Cal.App.3d 1365, 1373; *People v. Allen* (1985) 165 Cal.App.3d 616, 623; *People v. Keltie* (1983) 148 Cal.App.3d 773, 781.)

Contrary to appellant's claim (see AOB 78-89), there is nothing physically impossible or inherently improbable about the testimony of Ms.

Hervey. She testified that on the evening of April 5, 1995, she was standing on her second floor balcony of her Alvern Street apartment when she heard two gunshots in the area of the West Palms Apartment complex. After the two shots were fired, Hervey heard a man lying on the ground cry for help: "Help me, please help me." Hervey then heard a third gunshot fired. (6RT 1047-1050, 1053-1055, 1058.) After the third shot was fired, Hervey saw a security guard "coming from the opposite direction towards the victim." She also saw appellant moving toward her apartment complex and away from the area where the shooting took place and the approaching security guard. She observed appellant's face for approximately two minutes. Appellant, who was carrying a gun in his left hand down at his side, kept looking over his shoulder back toward the direction where the man had been shot. Appellant, who appeared nervous, was kind of "walk-running" down the street. According to Hervey, appellant "wasn't running at a high pace . . . but he was swiftly walking-running." Appellant ran toward the alley. (6RT 1049-1058, 1081, 1100.)

Ms. Hervey had a clear view of the area and nothing obstructed her view or impeded her vision. The lighting conditions on Alvern Street were "very bright" and there was "lighting in the alleyway in the carport area, so that the area was also lighted." She "very clearly" observed appellant at a distance of between approximately 42 to 100 feet. (6RT 1049-1056, 1081, 1100; see Peo. Exhs. 21A-E.)

Hervey, who worked in a miniature museum and paid attention to detail, positively identified appellant in court as the person she saw on the evening of April 5, 1995. As Hervey explained, she was "looking at the details as [she] saw the man walking with the gun down the street." (6RT 1063, 1064, 1098, 1099, 1101, 1107-1108.) Hervey also identified appellant at the preliminary hearing (6RT 1063-1064) and from a photographic display (Peo. Exhs. 22, 24) approximately two years after the incident. Hervey recognized

in appellant's photograph "the overall look of [appellant's] face" and "just the way [the eyes] were looking." (6RT 1058-1062, 1100-1101.)

Appellant argues that the identification by Ms. Hervey was "unbelievable" because it was simply "impossible"for her to have observed the shooter for an adequate period of time in which to make an accurate identification. Appellant, relying on the defense testimony of Dr. Frazier, a eyewitness identification expert, points out what he perceives as certain shortcomings in the testimony of Ms. Hervey regarding the actual amount of time she observed the shooter and the distance from her porch to where the shooter turned down the alley. Appellant also takes exception to the identification process claiming it "belies the credibility of [Ms. Hervey's] evidence." Specifically, appellant claims Ms. Hervey's identification of appellant from a photographic identification of appellant two years after the crime is suspect because she looked at the photographs for approximately 20 minutes before making an identification. (AOB 87-88.)

There is simply nothing physically impossible or inherently improbable about the identification testimony of Ms. Hervey. And, that there was nothing physically impossible or inherently improbable regarding the testimony of Ms. Hervey identifying appellant, was demonstrated in the testimony of two police officers – Detective Cox and Detective Cade – who independently went to Ms. Hervey's apartment to observe the view from her porch. Detective Cade went to Ms. Hervey's residence at approximately 8:30 to 9:00 p.m. and could clearly see the area where Mr. Dunbar was murdered. Detective Cox testified that when he stood on the balcony he had a "clear shot" to the area where Mr. Dunbar's body was found.

Appellant's complaints on appeal regarding the eyewitness identification by Ms. Hervey are really nothing more than minor discrepancies in her testimony and factual differences between her observations and the

opinions of defense eyewitness identification expert Dr. Frazier as to his views of eyewitness identification. Unfortunately for appellant, the law is clear that the jury was free to reject the expert's opinion as unsupported by the evidence, and in the absence of a physically impossibility or inherent improbability, such as the case here, purported weaknesses in identification testimony of a single eyewitness are to be evaluated by the jury. (*People v. Elwood, supra*, 199 Cal.App.3d at p. 1373; *People v. Turner* (1983) 145 Cal.App.3d 658, 671.) And "[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of the judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]'" (*People v. Allen, supra,* 165 Cal.App. 3d at p. 623.) The purported discrepancies to which appellant refers were matters for the jury to consider and do not warrant the rejection of Ms. Hervey's testimony as a matter of law.

Accordingly, appellant's claim regarding the eyewitness identification testimony of Ms. Hervey must be rejected.

2. Other Evidence Implicating Appellant In The Murder Of Mr. Dunbar

In addition to Ms. Hervey's identification of appellant, there was considerable other compelling evidence which implicated appellant in the murder of Mr. Dunbar. Perhaps most compelling was appellant's confession to Glenn Johnson that "he [appellant] had to smoke [Dunbar]" because Dunbar did not cooperate. This is a devastating statement implicating appellant in the murder of Mr. Dunbar. It is well-settled that confessions can operate "as a kind of evidentiary bombshell which shatters the defense." (*People v. Schrader* (1965) 62 Cal.2d 716, 731; see also *In re Sassounian* (1995) 9 Cal.4th 535, 548.) Indeed, the United States Supreme Court has observed that a defendant's own confession "is like no other evidence," and "'is probably the most

probative and damaging evidence that can be admitted against him . . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.'" (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296, quoting *Bruton v. United States* (1968) 391 U.S. 123, 139-140 (dis. opn. of White, J.).)

In addition to appellant's confession that he murdered Dunbar, there was other damning evidence linking appellant to the murder: appellant's possession of the murder weapon when it was recovered on Glasgow Street; appellant's incriminating statements to Glenn Johnson when he gave Johnson the murder weapon to be careful with the gun because "there were some murders on that weapon;" and Johnson's testimony that appellant was "trigger happy" and that appellant would "shoot you in a minute." Respondent submits that the evidence connecting appellant to the Dunbar murder was truly overwhelming, not just sufficient to support the jury's conclusion he was the murderer.

3. The Testimony Of Detective Cade

Most of the evidence discussed in the preceding section was admitted through the testimony of Detective Cade when he related the prior inconsistent statements of Glenn Johnson. Detective Cade interviewed Johnson on four occasions and related certain parts of those interviews which contradicted Johnson's trial testimony. Appellant, without much elaboration, maintains the testimony of Detective Cade was as "equally incredible" as the testimony from Christine Hervey and that "[t]wo times zero still equal zero." (AOB 89.) Respondent will briefly summarize Detective Cade's testimony regarding his interviews with Johnson to demonstrate that there is simply nothing "incredible" about the officer's testimony.

As mentioned, Detective Cade conducted four interviews with Glenn Johnson. The first interview occurred at the Pacific Station following the

incident on Glasgow Street. Detective Cade had received a telephone call from a CRASH officer indicating an individual they had stopped on Glasgow Street had information about the Dunbar murder. Detective Cade proceeded to the Pacific Station to interview Johnson about the Dunbar murder. Johnson was not in custody. Detective Cade told Johnson he was going to tape record the interview. Johnson was cooperative and friendly. Johnson was not hostile. Johnson stated that "Jason" had committed the Dunbar murder. Johnson did not identify "Jason" at that time. Detective Cade informed Johnson that there was reward money available for information regarding the murder of Mr. Dunbar. Detective Cade also told Johnson that he (Cade) had some money available for information about the Dunbar murder. Johnson, however, did not receive any money from Detective Cade or any of the reward money at that time. Johnson was transported back to his mother's house on Glasgow Street. (8RT 1375-1378, 1385.)

Detective Cade conducted a second interview with Johnson which, unbeownest to Johnson, was tape recorded. Johnson was not in custody at the time of the interview and no money exchanged hands between Detective Cade and Johnson. Johnson related that "Jason" had previously given him a .380 automatic handgun and told him to be careful because "there were some murders on that weapon." Johnson needed a gun to retaliate for a killing of one of his homeboys in Fontana. Johnson thought about it for awhile and then gave the gun back to "Jason." Johnson again did not identify "Jason" at that point. Johnson told Detective Cade that he learned of the Dunbar murder one day after being picked up from school by appellant and the Fountano brothers. Appellant told Johnson that Dunbar did not cooperate "so he [appellant] had to smoke him." Johnson also related that appellant was "trigger happy" and would shoot someone "in a minute." (8RT 1378-1382.)

During this second interview, Johnson also told Detective Cade that appellant was the individual who dropped the .380 automatic handgun (Peo. Exh. 37) on Glasgow Street when the police arrived on September 20, 1996. Johnson also told Detective Cade that the gun appellant dropped was the same gun he had previously offered Johnson. Johnson also told Detective Cade that "Jason" was "Jaye" and that "Jaye" was appellant and that appellant drove a red 5.0 Mustang and also had a white Jeep Cherokee. Johnson said he referred to appellant as "Jason" because he was lying. Johnson was "cooperative and friendly" during the second interview and did not indicate he was fearful of appellant. (8RT 1382-1386.)

The fourth interview Detective Cade conducted with Johnson was the only interview which was not tape recorded. Prior to this interview, Detective Cade requested and received $100 of Secret Service funds to provide to Johnson for the information he had received about the Dunbar murder. Detective Cade gave Johnson the $100. No other consideration of special treatment was accorded Johnson for the information he received. (8RT 1386-1388.)

As can be seen from the foregoing, there is simply nothing incredible about the testimony of Detective Cade. He simply related prior inconsistent statements a gang member provided him during the course of four interviews. Appellant's claim regarding the "incredulity" of Detective Cade's testimony is meritless.

II.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AT THE GUILT PHASE (RESPONSE TO AOB ARGS. V AND XVII)

Appellant raises two issues relating to the jury instructions at the guilt phase. First, asking this Court to reconsider its holding in *People v. Birks* (1998) 4 Cal.4th 108, appellant contends the trial court was required to instruct the jury on appellant's request for lesser-related instructions on assault with a deadly weapon and negligent discharge of a firearm as to the attempted murder counts (counts 6, 7 and 8). (AOB 100-112; Arg. V.) Second, appellant contends the circumstantial evidence instructions undermined the constitutional requirement of proof beyond a reasonable doubt. (AOB 245-247; Arg. XVII.) Respondent submits the jury was properly instructed.

A. The Trial Court Was Not Required To Instruct The Jury On Appellant's Request For Lesser-Related Instructions On Assault With A Deadly Weapon And Negligent Discharge Of A Firearm As To the Attempted Murder Counts (Response to AOB Arg. V)

Appellant contends the trial court committed prejudicial error in refusing his request for lesser-related instructions on assault with a deadly weapon and negligent discharge of a firearm as to the attempted murder counts. (AOB 100-112; Arg. V.) He readily acknowledges that neither assault with a deadly weapon nor negligent discharge of a firearm are lesser included offenses of attempted murder, but rather are lesser related offenses, and therefore under this Court's holding in *People v. Birks, supra,* 19 Cal.4th 108, the trial court was not required to give the instructions. (AOB 100-106.) Appellant argues, however, that "this Court either reconsider its holding in *Birks* or distinguish said holding in that *Birks* was not a capital case and [the] instant case is such a case." (AOB 106.) Respondent submits appellant's contentions are meritless.

In *People v. Geiger* (1984) 35 Cal.3d 510, this Court held that, in certain situations, the defendant had a unilateral right to request instructions that, although not necessarily included within the charged offense, were related to the charged offense. Fourteen years later, this Court, after "careful reflection," overruled *Geiger* since it represented an unwarranted extension of the right to instructions on lesser offenses. (*People v. Birks, supra,* 19 Cal.4th at pp. 112, 136.) *Birks* concluded that the *Geiger* rule created an "unfair one-way street" in favor of the defense regarding lesser related instructions. (*People v. Birks, supra,* 19 Cal.4th at p. 127.) In overruling *Geiger*, this Court stated that "*Geiger* was wrong to hold that a criminal defendant has a unilateral entitlement to instructions on lesser offenses which are not necessarily included in the charge." (*People v. Birks, supra,* 19 Cal.4th at pp. 112, 136.) Accordingly, a trial court cannot instruct on a defense request for lesser related offenses absent an agreement by the prosecution. (*People v. Birks, supra,* 19 Cal.4th at p. 136, fn. 19.)

The foundation of appellant's argument that *Birks* was incorrectly decided and should be reconsidered by this Court is that he disagrees with the *Birks* holding and believes *Geiger* is the better rule and therefore this Court erred in overruling *Geiger* in *Birks*. But, he offers nothing new or persuasive as to why this Court should reconsider *Birks*. Rather, the arguments he presents (see AOB 105-110) are simply a rehash of arguments which were previously considered and, after "careful consideration," rejected by this Court in *Birks* when it overruled *Geiger*. (*People v. Birks, supra,* 19 Cal.4th at pp. 112, 116-136.) The arguments raised by appellant that *Geiger* is the better rule and should not have been overruled were effectively disposed of when this Court stated the following in *Birks:*

> On careful reflection, we now agree that *Geiger* represents an unwarranted extension of the right to instructions on lesser offenses.

> *Geiger's* rationale has since been expressly repudiated for federal purposes by the United States Supreme Court, and it continues to find little support in other jurisdictions. The *Geiger* rule can be unfair to the prosecution, and actually promotes inaccurate factfinding, because it give the defendant a superior trial right to seek and obtain conviction for a lesser uncharged offense whose elements the prosecution has neither pled nor sought to prove. Moreover, serious questions arise whether the holding of *Geiger*, ostensibly based on the due process clause of the California Constitution, can be reconciled with other provisions of the same charter. By according the defendant the power to insist, over the prosecution's objection, that an uncharged, nonincluded offense be placed before the jury, the *Geiger* rule may usurp the prosecution's exclusive charging discretion, and may therefor violate the Constitution's separation of powers clause.

(*People v. Birks, supra,* 19 Cal.4th at pp. 112-113.) Appellant's arguments to the contrary must therefore be rejected.

Appellant's alternate argument to reconsidering *Birks* is that *Birks* should not be applied in capital cases. (AOB 106, 110-112.) Respondent submits there is no reason in law or logic as to why a rule relating to instructions regarding lesser related offenses in a determination of guilt should not equally apply in a capital case where there is the possibility of the death penalty being imposed. Indeed, this Court has consistently applied the rule in *Birks* regarding instructions for lesser related offenses in capital cases. (See *e.g., People v. Schmeck* (2005) 37 Cal.4th 240, 291-292; *People v. Yeoman* (2003) 31 Cal.4th 93, 129-130; *People v. Box* (2000) 23 Cal.4th 1153, 1212; *People v. Kraft, supra,* 23 Cal.4th at pp. 1064-1065.) Thus, appellant's claim is meritless.

B. The Circumstantial Evidence Instructions Did Not Undermine The Constitutional Requirement Of Proof Beyond A Reasonable Doubt (Response to AOB Arg. XVII)

Appellant maintains that the circumstantial evidence instructions at the guilt phase undermined the constitutional requirement of proof beyond a reasonable doubt as articulated in CALJIC No. 2.90. (AOB 245-247; Arg. XVIII.) Specifically, appellant takes exception to the language in the circumstantial evidence instructions which advises the jury that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (See 2CT 285-286, 291-292.) Appellant maintains that by "telling jurors that they 'must' accept a guilty interpretation of the evidence as long as it 'appears reasonable' is blatantly inconsistent with proof beyond a reasonable doubt and allows for a finding of guilt based on a degree of proof less than that required by the Due Process Clause." (AOB 246.) Respondent submits appellant's contention is meritless because this Court has repeatedly rejected this identical claim in prior cases.

In *People v. Maury* (2003) 30 Cal.4th 342, 428, in rejecting the defendant's claim that the circumstantial evidence instructions impermissibly diluted the reasonable doubt standard for the same reason raised by appellant, this Court stated:

> Regarding the instructions on circumstantial evidence, we have repeatedly rejected defendant's argument. Those instructions, which refer to an interpretation of the evidence that 'appears to you to be reasonable' and are read in conjunction with other instructions, do not dilute the prosecution's burden of proof beyond a reasonable doubt. (*People v. Hughes, supra*, 27 Cal.4th at pp. 346-347; *People*

v. Osband, supra, 13 Cal.4th at pp. 678-679; *People v. Ray, supra*, 13 Cal.4th at pp. 347-348.)

Thus, appellant's claim is meritless and, once again, should be rejected.

III.

THE TRIAL COURT PROPERLY ADMITTED THE "STATEMENT FOR JAYE BERNARD NELSON" RECOVERED FROM THE BACKPACK FOUND IN APPELLANT'S WHITE JEEP CHEROKEE (RESPONSE TO AOB ARG. IV)

Appellant contends the trial court erred in admitting the handwritten "statement for Jaye Bernard Nelson" (Peo. Exh. 34) recovered from the backpack (Peo. Exh. 17) found in appellant's white Jeep Cherokee on July 1, 1997. (AOB 90-99; Arg. IV.) The document (Peo. Exh. 34) appears to be a statement someone wrote to "alibi" appellant for the early morning May 7, 1997, incident involving the police officers -- Coleman and Boccanfuso – and "John Doe." The statement appears written for "Anthony" or "Tone" and details the interactions of appellant ("Jaye") with "Anthony" and "Kendall" for May 5 and May 6, 1997. (Peo. Exh. 34; see 8RT 1359-1361, 1365-1367.) Respondent submits the trial court properly admitted the statement (Peo. Exh. 34).

A. The Relevant Facts

Prior to the testimony of Detective Mark Campbell, the following proceedings occurred outside the presence of the jury:

> THE COURT: On the record before we have the jurors come out.
>
> Yes, Sir?
>
> MR. BATISTA: Your Honor, I have been informed that the District Attorney's Office wishes to admit the contents of the backpack that Mr. Nelson had or owned at one point in time. Part of my problem is in the contents that the People wish to enter into are lyrics to rap songs.

THE COURT: That he supposedly wrote or did somebody else?

MR. BATISTA: Yeah, he wrote.

THE COURT: We are not admitting anything now. Why is this now?

MS. MEYERS: The next witness –

THE COURT: What is the relevance? What is the argument?

MS. MEYERS: One of them, the contents of the backpack, one is sort of like an alibi, a statement that someone wrote to alibi [appellant] for the police officer incident.

THE COURT: Is that one of the raps?

MS. MEYERS: No. It's a statement for Jaye Bernard Nelson.

THE COURT: What about the raps?

MS. MEYERS: The raps go to things he [appellant] said about killing police officers, your honor.

And additionally, the other raps go toward jacking someone for their car. And it's all consistent with the case and shows premeditation on the part of the murder because he talks about killing someone for his car and taking his keys.

THE COURT: So this witness would basically say this is what came out.

You don't have an expert to translate the raps?

MS. MEYERS: I think it's pretty self-explanatory.

THE COURT: Whatever it is. You need to lay a foundation as to what is in it other than the alibi statement.

Why don't you hold off on what comes in.

MR. BATISTA: I think it's also -- these are gangster rap type songs.

THE COURT: You can bring in your expert to show this is on all the gangster raps.

MR. BATISTA: I didn't know that was coming in.

THE COURT: Nothing is coming in right now.

Is anything going to come in?

MS. MEYERS: What was in the bag, all this was in the bag where he found the bag in the [appellant's] jeep.

THE COURT: The contents other than the alibi statement, the contents are irrelevant at this point. This witness is not going to testify to the content of the rap songs.

MR. BATISTA: *I would object to the so-called alibi statement because it's not in [appellant's] handwriting..*

THE COURT: *But it's among his possessions.*

Whose handwriting is it, do we know?

MS. MEYERS: The girlfriend who had [appellant's] car and backpack and gave it to the detective and said this is all his stuff.

THE COURT: *Your specific objection is it's not in his handwriting.*

MR. BATISTA: *Yes, your Honor.*

THE COURT: *That is the only objection.*

MR. BATISTA: *Yes, your Honor.*

THE COURT: *The objection is overruled.*

No reference to the rap lyrics. I would like to see them before they come in and before we say what is going to come in and what is not and why.

MS. MEYERS: Okay.

THE COURT: Do you want to buzz them in.

(8RT 1359-1361; emphasis added.)

Thereafter, Detective Mark Campbell of the Inglewood Police Department testified in the presence of the jury. He related that on July 1, 1997, he recovered a 1997 white Jeep Cherokee from "Cher" at 6921 Glasgow in Westchester. "Cher" identified herself as appellant's girlfriend. The Jeep had been purchased by "Terry James" at 1 North Venice Boulevard. Cross lived at the Venice Boulevard location and he identified appellant as the owner of the Jeep: "it was Bernard [appellant], who was also Terry James, that purchased the vehicle." (8RT 1362-1367, 1370.)

Detective Campbell recovered a backpack (see Peo. Exh. 17) from the rear storage area of the Jeep. Inside the backpack was a piece of paper (Peo. Exh. 34) dated May 22, 1997 entitled: "Statements for Jaye Bernard Nelson. Court." The statement relates proposed testimony for "Anthony" or "Tone" regarding appellant's interactions with "Anthony" ("Tone") and "Kendall" for May 5th through the late evening hours of May 6th. (See Peo. Exh. 34.) The handwritten piece of paper contained the following words:

> Statements for Jaye Bernard Nelson. Court.
>
> May 22, 1997, Thursday.
>
> Anthony (Tone): Jaye came over to the house on Monday, May 5th, and asked if he could spend a couple nights at the house because he was sleeping in cars. Jaye offered to help with working on cars, and said he knew some people that needed some car service. You told Jaye he could stay there, but he needed to get his act together.
>
> Jaye spent the night Monday. Tuesday he helped with cars all day, and his friend Perry stopped by to get an oil change at 1:00 p.m., but you and Jaye were busy with another car. So Jaye told him to try back that night or tomorrow morning. Perry said okay and left. Jaye was wearing gray sweat pants and a white T-shirt. The T-shirt was dirty from working on cars.

Tuesday night, May 6, Jaye left on foot going to the store at about 10:40 p.m. with the same sweat pants and dirty T-shirt. The next time you saw Jaye was about 30 to 40 minutes about 11:15 to 11:20 p.m. getting out of a blue compact-sized car with one male individual, the driver, the same car that had come by for an oil change earlier.

You, Kendall noticed cuts and abrasions on Jaye's arms as he approached the house. You and Kendall told him to go to the back room and lay down, and he did. The next time you saw him he was in his underclothes.

(8RT 1365-1368.)

On cross-examination, Detective Campbell stated he received the backpack from appellant's girlfriend, "Cher," on July 1, 1997. Detective Campbell acknowledged that he also found two pages of handwritten notes dated May 6, 1997 (Def. Exh. C) inside the backpack. When asked by defense counsel whether the handwriting on the two pages of handwritten notes (Def. Exh. C) was the same as the handwriting on the above statement (Peo. Exh. 34) read to the jury, Detective Campbell responded, "I'm not an expert, but, no, it doesn't look the same to me." (8RT 1369-1370.) On redirect examination, Detective Campbell stated he did not know who wrote the two pages of handwritten notes (Def. Exh. C) shown him by defense counsel during cross-examination. (8RT 1370.)

During argument, defense counsel attempted to persuade the jury that appellant's girlfriend wrote the alibi statement:

We are not going to deny when [appellant] was arrested for this particular case that his girlfriend started interviewing some people and started preparing some statements. I have stipulated I came on this case June 1, 1998. [Appellant] was arrested on that shooting in

May 7th of 1997, just so nobody thinks I am trying to create some sort of alibi. I wasn't involved in that, that was his girlfriend. You can see the whole thing. And she prepares the statement. It was in his backpack.

(11RT 1770.)

In rebuttal argument, the prosecutor responded to the defense argument as follows:

Mr. Batista went on to talk about two items of evidence, two items of evidence. And those were items of evidence regarding the incident with the police. People's 34. And then there was another sheet of paper, it was a defense exhibit -- I don't have it readily at hand here -- here it is, defense C.

He stood up and said we know the defendant's girlfriend wrote that. Did I miss that day? Did she come in court and testify that she wrote either of these? Did you hear that evidence? Did you hear it? Because if you heard it, I want to know about it. It didn't exist. That might be something Mr. Batista knows, but it wasn't shared with the rest of us.

Again, the hopes and desires and the thoughts of lawyers as we stand and talk to you, ladies and gentlemen, that is what verdicts are not based upon. It is only the evidence.

(11 RT 1817-1818.)

B. Appellant's Claim

On appeal, appellant contends the trial court erred in admitting into evidence the handwritten statement (Peo. Exh. 34) recovered from the backpack found in appellant's white Jeep Cherokee. (AOB 90-99.) He maintains it was error for the trial court to admit "a statement that appeared to set forth a fabricated exculpatory story for appellant as to the attempted murders of the two

police officers and 'John Doe.'" (AOB 90.) His claim is meritless.

The challenged document (Peo. Exh. 34) consisted of a piece of paper found amongst appellant's possessions in his backpack which, in turn, had been recovered from appellant's Jeep Cherokee. The document appears to be a statement in the form of proposed court testimony for "Anthony" or "Tone" and details the interactions of appellant ("Jaye") with "Anthony" and "Kendall" for May 5 and May 6, 1997 -- at the time of the shooting incident involving"John Doe" and Police Officers Coleman and Boccanfuso. It appears the document was written by someone to "alibi" appellant for the incident involving the police officers and John Doe. (see Peo. Exh. 34.)

Below the trial court properly overruled appellant's sole objection that the document was inadmissible "because it's not in [appellant's] handwriting." (8RT 1359-1361.) Because the document was found amongst appellant's possessions, the jury could reasonably infer a consciousness of guilt on the part of appellant —regardless of who authored the document. The prosecution never claimed appellant penned the document. And, respondent submits, the prosecution was not required to demonstrate who authored the document since the document was found amongst appellant's possessions. The identity of the author of the document went to the weight, not the admissibility, of the evidence. The trial court properly overruled appellant's sole objection and admitted the document.

Appellant raises several arguments for the first time on appeal which he did not raise below. (See AOB 90-99.) For example, appellant argues the handwritten statement was irrelevant because there was no proof, direct or circumstantial, that appellant authorized, encouraged or solicited the statement. (AOB 93-96.) No claim was ever made that appellant did anything of the kind. Once again, appellant's claim, in addition to being waived, is meritless because the document was recovered from appellant's possessions.

Appellant also argues the handwritten statement should not have been admitted because the prosecutor did not authenticate it under Evidence Code section 1401. (AOB 94-98.) Again, in addition to the claim being waived because it was not raised in the trial court (*People v. Williams* (1997) 16 Cal.4th 625, 661-662, *citing People v. Sims* (1993) 5 Cal.4th 405, 448 [failure to object to introduction of transcript of tape-recorded interview for lack of authentication waives issue on appeal]; see *People v. Baylor* (2005) 130 Cal.App.4th 355, 371), it was not necessary for the prosecution to authenticate the document since it was found amongst appellant's possessions.

Appellant contends the trial court compounded its error in admitting the handwritten statement when it failed to instruct the jury on the proper method to analyze the testimony. Specifically, appellant argues the trial court had a sua sponte duty to instruct the jury with the consciousness of guilt instruction contained in CALJIC No. 2.05. (AOB 90-99.) CALJIC 2.05 involves the situation where there is an effort to procure fabricated evidence by another person for the benefit of the defendant. CALJIC 2.05 has nothing to do with the instant case since the prosecution did not rely on that theory, there was no evidence of that theory, and the admissibility of the document was proper since it was found amongst appellant's possessions.

Finally, appellant claims the admission of the document constituted prejudicial error. (AOB 98-99.) Respondent submits it is inconceivable on the facts of this case that the admission of the document prejudiced appellant in any manner whatsoever for the following reasons: (1) rather than provide an "alibi" theory for the incident, during argument, appellant *acknowledged* he was a shooter in the incident involving "John Doe" and the two police officers but maintained he did not have the requisite intent to kill (see 11RT 1792-1800); and (2) the prosecutor did not even refer to the document in argument to the jury except during rebuttal argument to explain to the jury that there was no

evidence in the record to support appellant's claim that appellant's girlfriend authored the statement (see 11RT 1817-1818).

Accordingly, appellant's claim must be rejected.

IV.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE AT THE PENALTY PHASE RELATING TO THE LISA LA PIERRE SHOOTING AND THE BANK ROBBERIES (RESPONSE TO AOB ARG. VIII.)

Appellant contends the "jury's reliance upon improperly admitted, non-statutory factors in aggravation deprived [him] his right to a fair trial, due process of law and reliable, non-arbitrary determination of penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." Specifically, appellant argues that the jury, in reaching its penalty decision, improperly considered the Lisa La Pierre shooting as related by Frank Lewis and the bank robberies as related by Glenn Johnson because both Lewis and Johnson were accomplices in those incidents and their testimony was not corroborated as required by Penal Code section 1111. Accordingly, appellant maintains the penalty verdict should be reversed. (AOB 127-133; Arg. VIII.) Respondent disagrees.

A. The Relevant Law

The accomplice corroboration rule applies to both the guilt and penalty phases of a death penalty case. (See *People v. McDermott* (2002) 28 Cal.4th 946, 1000; *People v. Mincey, supra,* 2 Cal.4th at p. 461; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1180; *People v. Miranda* (1987) 44 Cal.3d 57, 100.) Thus, where, as here, the prosecution introduces evidence of the defendant's unadjudicated prior criminal conduct, the jury should be instructed at the penalty phase that an accomplice's testimony must be corroborated. (*People v. McDermott, supra*, 28 Cal.4th at p. 1000; *People v. Mincey, supra*, 2 Cal.4th at p. 461; *People v. Easley* (1988) 46 Cal.3d 712, 734.) Here, the jury was so instructed. (2CT 347-348.)

Accomplice corroboration may be established entirely by circumstantial evidence, and such evidence "'may be slight and entitled to little consideration when standing alone.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 982.) While corroborating evidence "'must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime.'" it is *not* necessary that the corroborative evidence "'be sufficient in itself to establish every element of the offense charged.'" (*People v. Zapien, supra*, 4 Cal.4th at p. 982, quoting *People v. Sully* (1991) 53 Cal.3d 1195, 1228.) Accordingly, the prosecution need only "produce independent evidence which, without aid or assistance from the testimony of the accomplice, *tends* to connect the defendant with the crime charged." (*People v. Perry* (1972) 7 Cal.3d 756, 769, emphasis added; see *People v. Rodrigues, supra*, 8 Cal.4th at p. 1128.) And, "unless a reviewing court determines that the corroborating evidence should not have been admitted or that it could not reasonably *tend* to connect a defendant with the commission of the crime, the finding of the trier of fact on the issue of corroboration may not be disturbed on appeal." (*People v. Perry, supra*, 7 Cal.3d at p. 774, emphasis in original & footnote omitted; *People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543.) Finally, in making this determination, because "an appellate court must view the evidence in a light most favorable to the verdict [citation]," the reviewing court "must uphold the trial court's disposition if, on the basis of the evidence presented, the jury's determination is reasonable." (*Ibid.*)

B. The Lisa La Pierre Incident

Appellant contends the testimony of Frank Lewis relating the details of the shooting of Lisa La Pierre should not have been considered by the penalty jury because Lewis was an accomplice and his testimony was not adequately corroborated. Appellant argues that "[r]egarding the shooting of

Lisa La Pierre, the only evidence that connected appellant to the crime was the testimony of the man who shot her, Frank Lewis." Since Lewis was an accomplice in the La Pierre shooting, appellant reasons the penalty jury improperly considered the La Pierre incident in reaching its penalty determination. (AOB 127-132.) Respondent disagrees.

It was established at the guilt phase that one of the expended .380 caliber semi-automatic cartridge casings recovered on July 11, 1994, from the La Pierre crime scene was analyzed by a firearms expert and determined to have been fired from appellant's .380 semiautomatic firearm (Peo. Exh. 37) -- the same weapon used in the other crimes -- which the police recovered from Glasgow Street. The fact appellant's gun was used in the La Pierre incident amply corroborates the testimony of Lewis and "tends" to connect appellant to the incident. Even defense counsel acknowledged in argument to the penalty jury that the testimony of Lewis was corroborated:

> You take Frank Lewis's statements out as to Lisa La Pierre, the person in the BMW, taking the wallet. And *you are left with some evidence, yeah, the gun.* During the guilt phase, there is evidence that came in that the gun that shot Miss La Pierre was the same .380 semiautomatic that was used in the other crimes. *So there is some corroboration.*

(14RT 2219; emphasis added.) Respondent agrees with defense trial counsel that the fact appellant's .380 semiautomatic weapon was used to shoot Ms. La Pierre adequately corroborated the testimony of Lewis as it "tended" to connect appellant to the shooting. Appellant's claim must therefore be rejected.

C. The Bank Robberies

Appellant also contends that the testimony of 17-year-old Leonard Washington relating the details of two 1996 bank robberies he committed with appellant should not have been considered by the penalty jury because

Washington was an accomplice and his testimony was not corroborated. (AOB 127-132.) Respondent disagrees.

Representatives of the banks testified as to the detail of the robberies. Washington testified that appellant planned the bank robberies and decided on which banks to rob but appellant did not go into the banks himself. Rather, appellant had Washington enter the banks and commit the robberies while he sat outside in the car. This is remarkably similar to the modus operandi appellant used in the La Pierre shooting. There, he used Lewis, a young teenager like Washington, to approach La Pierre and commit the crime while he waited in the car. Thus, in both incidents, appellant used young, vulnerable teenagers "to do his dirty work." Given the remarkably similarities in appellant's utilization and exploitation of young, vulnerable teenagers to do his bidding in the La Pierre shooting and the bank robberies, respondent submits the Lewis incident corroborates Washington's testimony as to the bank robberies because it supports the conclusion Washington was telling the truth.

Assuming, without conceding, the evidence is insufficient to corroborate Washington's testimony, appellant's claim still fails because the jury was instructed it could not consider the testimony in the absence of adequate corroboration. The penalty jury was instructed "[y]ou cannot find a defendant committed a criminal act based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense" and "[i]f there is no independent evidence which tends to connect [appellant] with the commission of the crime, the testimony of the accomplice is not corroborated." (2CT 347, 348.)

Given the jury instructions, if inadequate evidence of corroboration was presented by the prosecution at the penalty phase, then the penalty jury could not consider Washington's testimony regarding the bank robberies. This

is so because jurors are presumed to follow the court's instructions. As this Court stated in *People v. Yeoman, supra,* 31 Cal.4th at page 139, "we and others have described the presumption that jurors understand and follow instructions as '[t]he crucial assumption underlying our constitutional system of trial by jury.' [Citations.]." And, in *People v. Holt* (1997) 15 Cal.4th 619, 662, this Court stated, "Jurors are presumed to understand and follow the court's instructions." Thus, if there was inadequate corroboration of Washington's testimony, the penalty jury could not, and presumably did not, consider Washington's testimony regarding the bank robberies in reaching its penalty decision and it must be assumed the jury followed that instruction. Thus, appellant's claim must be rejected.

Finally, assuming, without conceding, the evidence of the bank robberies should not have been admitted because Washington's testimony was not adequately corroborated, the error must be deemed harmless since it is not reasonably possible the jury would have returned a different penalty verdict absent the evidence. In addition to the instruction precluding the penalty jury from considering the bank robberies absent adequate evidence of corroboration, the bank robberies did not play a significant role in the prosecutor's argument as to why the jury should return a death verdict. (See 14RT 2195.) The significance of Washington's testimony was not the bank robberies per se, but rather the fact appellant used and exploited young, vulnerable teenagers to do his bidding and that fact was already before the penalty jury with the La Pierre incident. Thus, the evidence of the bank robberies was not that critical to the prosecution.

And, respondent submits, the jury did not return a death verdict in the instant case because appellant sat outside in a car while Washington went inside the bank and robbed the tellers. Rather, a death verdict was returned in this case because of the murder of Richard Dunbar, the attempted murder of

Miguel Cortez, the attempted murder of Police Officer Boccanfuso, the attempted murder of Police Officer Coleman, the attempted murder of "John Doe" (the driver of the Jeep Cherokee), the attempted murder of Lisa La Pierre, appellant's evasion of a police officer, and appellant's prior convictions. As noted by the prosecutor in his argument as to why the jury should return a verdict of death:

> You go back there, *weigh the circumstances in aggravation, the ones you saw so substantially outweigh those in mitigation.* You can say, yes, they do, you see, because Lisa La Pierre's cell is smaller than any cell in state prison. Her cell for the rest of her life is that wheelchair. Miguel Cortes' cell are the scars, his permanent injuries that he will never lose. The officers, their cell is their fear, the fear that they will carry with them every day as they pursue a car, the fear that never goes away. And Richard Dunbar's cell is a box, six feet under the ground.
>
> You decide *is the aggravation much more, so substantially more than the mitigation*? If it is, you come back with a verdict of death.

(14RT 2244; emphasis added.) Thus, even if the bank robbery evidence was not adequately corroborated, it is clear that it played no significant role in the jury's determination of their death verdict. Based on this record, there is simply no reasonably possibility the penalty jury would have returned a verdict other than death in the absence of the bank robbery evidence. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1299; *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 10; *People v. Ochoa* (1998) 19 Cal.4th 353, 479; *People v. Jackson* (1996) 13 Cal.4th 1164, 1232; *People v. Brown* (1988) 46 Cal.3d 432, 446-448.) Accordingly, appellant's claim must be rejected.

V.

THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE AT THE PENALTY PHASE (RESPONSE TO AOB ARGS. X, XI AND XII)

Appellant raises several issues regarding the admission of victim impact evidence at the penalty phase. First, appellant contends that the admission of victim impact evidence – photographs of Mr. Dunbar as a child, a poem read at Mr. Dunbar's funeral, and a photograph of Lisa La Pierre before she was shot – exceeded the limits set by this Court and thus violated his right to a reliable penalty determination under the federal Constitution. (AOB 148-158; Arg. X.) Second, appellant contends that the admission of a poem written by a family friend and read at Mr. Dunbar's funeral constituted prejudicial inadmissible hearsay. (AOB 159-161; Arg. XI.) And, third, appellant contends that this Court should reconsider its decision in *People v. Edwards* (1991) 54 Cal.3d 787 and redefine the meaning of "circumstances of the crime" so that it only includes victim impact evidence when it relates to the characteristics of the victim which the defendant knew or reasonably should have known prior to committing the offense. (AOB 161-177; Arg. XII.) As set forth below, none of appellant's contentions have merit and the victim impact evidence in this case was properly admitted by the trial court.

A. Relevant Facts

1. People's Exhibit 54: The Poem Superimposed Over A Photograph Of Mr. Dunbar

The prosecution prepared a posterboard entitled "Our Weekend With Alex Dunbar." (Peo. Exh. 54.) The posterboard consisted of a poem written by a friend of Mr. Dunbar's. The poem was superimposed on a picture of Mr. Dunbar. (Peo. Exh. 54; 12RT 1872-1873.). Appellant objected to the poem on

the ground that the author of the poem was not in court to testify. The prosecution stated that Mr. Dunbar's mother would testify about the poem. The trial court overruled appellant's objection "that the writer [of the poem] is not here" on the ground "I'm not sure that's a valid objection." (Peo. Exh. 54; 12RT 1872-1873.)

At the penalty phase, Christina Dunbar, the sister of the decedent, identified People's Exhibit 54 as containing one of her brother's modeling photographs and the poem which was written by a couple of her brother's friends and read as a eulogy at his funeral. (12RT 2007-2008.) The poem was neither read into the record for the jury or referred to by the prosecutor in his penalty argument. (12RT 2007-2008; 14RT 2189-2206, 2243-2244.)

2. People's Exhibit 53: The Photographs Of Mr. Dunbar As A Child

The prosecution presented two photo boards containing photographs of Mr. Dunbar. One photo board depicted Mr. Dunbar as an adult and the other (Peo. Exh. 53) depicted Mr. Dunbar as a child. The child photo board (Peo. Exh. 53) contained five photographs of Mr. Dunbar as a child with a photograph of Mr. Dunbar as her appeared prior to his death in the middle of the photo board. Appellant objected to People's Exhibit 53 on the ground it was unduly prejudicial since "I think [the jury] can understand from the other photographs of Mr. Dunbar what he was like in life." (12RT 1873.) The trial court overruled appellant's objection noting that "I don't see those [photographs] as being anything that particularly pulls at somebody's heart strings." (12RT 1874.)

Henrietta Dunbar, the mother of the decedent, testified at length about the photographs in People's Exhibit 53 and how they represented significant periods of time in her son's life. Her testimony was as follows:

A. His middle name was Allen, A-L-L-E-N, but when he moved out here, he turned it into Alexander.

Q. Why did he do that?

A. Why did he do it?

Q. Uh-huh.

A. Because he thought it would be more fancy or more -- you know, he said he never really liked the name Allen anyway.

Q. Did that bother you?

A. Did it bother me?

Q. Uh-huh.

A. In a way it did. In a way it didn't. But, you know -- because he was named after his Dad.

Q. Did he think that the middle name Alexander would help his career?

A. Yes, he did.

Q. You know what career he was trying to pursue?

A. Yes, I did.

Q. What career was he trying to pursue?

A. Modeling and also acting.

Q. I take it you miss your son?

A. I miss him very much everyday.

Q. These photographs, are they significant periods in time in his life that you want to talk to us about?

A. The one up on the top right was one of his school pictures. That was the first grade.

And I remember one time in the first grade that I was working nights, and his teacher had called because she said that he had been disrupting the class. And so I said, "Well, ain't no problem

about that. Just send him home."

So she sent him home, I beat his butt, sent him back to school, and I told her she shouldn't have no more problem. And from that day to this, nobody ever called me on Richard.

Q. He appears to have a cub scout photograph?

A. Yes.

Q. Was he in the cub scouts?

A. Yes, he was in cub scouts, and I used to help – I used to help with the cub scouts.

Q. And there's some photos on the other side, the left-hand side of that board which has been marked –

A. The one at the top –

Q. -- 53.

Tell us about those photographs.

A. It was one Sunday we had got out of church, and we took the kids to the zoo, all three of them because Mark was not born at the time. So it was Christina, Damond, and Richard.

Q. And then the bottom photographs underneath?

A. That was one vacation that he was on. That was New York, and we went up there to visit my brother, which is in the Air Force, and he made a career out of that. So we had took the kids up there to see him, to visit him for vacation.

And the one at the bottom, that was one year when he went to camp. Every year we sent the kids to camp.

I work for Chrysler, and they always -- every summer the kids would be able to go to camp for two weeks. So that was one of the times they went to camp, and we went up there to visit him on Sundays.

(13RT 1997-1999.)

3. A Photograph Of Lisa La Pierre

The prosecution indicated he had an enlarged photograph of Lisa La Pierre, as well as "a myriad of photographs" of her. The trial court limited the prosecution to one photograph of Ms. La Pierre. Appellant renewed "the same objections" to the photograph of Ms. La Pierre. The trial court overruled the objection noting "To the extent that Ms. La Pierre is in a little different position, I don't see what the People are asking for has gone overboard." (12RT 1874-1875.) Ms. La Pierre identified the photograph (Peo. Exh. 46) during her testimony and related that the photograph had been taken a couple of years prior to the attack. (12RT 1894.)

B. Victim Impact Evidence Is Admissible As A Circumstance Of The Offense

In *Payne v. Tennessee* (1991) 501 U.S. 808, the United States Supreme Court overruled its prior holdings in *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440] and *South Carolina v. Gathers* (1989) 490 U.S. 805 [109 S.Ct. 2207, 104 L.Ed.2d 876], which generally barred admission of victim-impact evidence and related prosecution argument during the penalty phase of a capital trial.

In *Payne*, the Supreme Court held that

> if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.

(*Payne v. Tennessee, supra*, 501 U.S. at p. 827.) The Court also held "that a

State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase, evidence of the specific harm caused by the defendant." (*Id.* at p. 825.) The evidence, however, cannot be cumulative, irrelevant, or "so unduly prejudicial that it renders the trial fundamentally unfair." (*Id.*)

In *People v. Edwards*, a post-*Payne* case, this Court 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; see also *People v. Robinson* (2005) 37 Cal.4th 592, 650; *People v. Panah* (2005) 35 Cal.4th 395, 494-495; *People v. Benavides* (2005) 35 Cal.4th 69, 107; *People v. Brown* (2004) 33 Cal.4th 382, 396-398.) This Court explained that the word "circumstance" 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.*)

This Court thus held that factor (a) 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 *People v. Johnson, supra,* 3 Cal.4th at p. 1245; see also *People v. Brown, supra,* 33 Cal.4th at p. 398; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171; *People v. Mitchum* (1992) 1 Cal.4th 1027, 1063; *People v. Pinholster* (1992) 1 Cal.4th 865, 869.) "This holding only encompasses evidence that logically shows the harm caused by the defendant." (*People v. Edwards, supra*, 54 Cal.3d at p. 835.) This Court, however, chose not to explore the outer reaches of evidence admissible as a circumstance of the crime and stated that its ruling did not mean there were no limits on emotional evidence and argument. (*Id.* at pp. 835-836.)

There are, however, limits on the permissible "emotional evidence and argument, and "[t]he jury must face its obligation soberly and rationally and

should not be given the impression that emotion may reign over reason." (*People v. Robinson, supra,* 37 Cal.4th at pp. 650-651.) The trial court

> [o]n the one hand, should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, 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. Jurado* (2006) 38 Cal.4th 72, 131, internal citations and quotations omitted; See *People v. Zamudio* (S074414) filed April 21, 2008 (Slip Opn. at p. 45); *People v. Kelly* (2007) 42 Cal.4th 763, 796-799.)

C. Victim Impact Evidence Is Not Limited To The Characteristics Of The Victim That The Defendant Knew Or Reasonably Should Have Known Prior To Committing The Offense

Relying primarily on Justice Kennard's concurring and dissenting opinion in *People v. Fierro* (1991) 1 Cal.4th 173, 259, as well as authority from other jurisdictions, both sate and federal, appellant contends this Court should reconsider its decision in *People v. Edwards, supra,* 54 Cal.3d 787 and redefine the meaning of "circumstances of the crime" so that it only includes victim impact evidence when it relates to the characteristics of the victim which the defendant knew or reasonably should have known prior to committing the offense. (AOB 161-177.) Appellant maintains it is necessary for this Court to better define the boundaries of victim impact evidence and to adopt his suggested definition "[b]ecause the definition of 'circumstances of the crime' adopted by this Court [in *Edwards*] is overbroad, inconsistent with the other provisions of Penal Code section 190.3, and in conflict with the Supreme Court' s construction of that term. . . ." (AOB 166.) Respondent disagrees as this Court has repeatedly rejected this claim since *Edwards*.

For example, very recently in *People v. Prince, supra,* 40 Cal.4th at page 1287, footnote 28, this Court rejected appellant's claim when it stated, "[w]e reject the assertion, as we have rejected similar claims in other cases, that our law disallows 'evidence of the victim's characteristics that were unknown to his killer at the time of his crime." Likewise in *People v. Roldan* (2005) 35 Cal.4th 646, 732, this Court rejected appellant's claim in the following language:

> Defendant next argues we should better define the boundaries of victim impact evidence and urges us to adopt a rule disallowing evidence of the victim's characteristics that were unknown to his killer at the time of the crime. [Fn. omitted.] Such a limitation, he claims, is necessary to ensure such evidence remains relevant to assessing the moral culpability of the offender. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 476, 24 Cal.Rptr.2d 808, 862 P.2d 808.) We disagree. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1183, 13 Cal.Rptr.3d 34, 89 P.3d 353.)

Accordingly, respondent submits appellant's claim should, once again, be rejected.

D. The Challenged Evidence Was Properly Admitted In This Case

1. The Poem

Appellant maintains on appeal that admission of the poem (Peo. Exh. 54) written by a friend of Mr. Dunbar's and read at the funeral constituted inadmissible hearsay and prejudiced appellant. (AOB 159-160; Arg. XI.) Although respondent is of the view that the poem did not constitute inadmissible hearsay, it is not necessary for this Court to reach that issue since appellant did not preserve the issue below with a timely and specific objection.

Appellate review is not available for questions relating to the admissibility of evidence without a *specific* and *timely* objection in the trial *on the ground urged on appeal.* (Evid. Code, § 353, subd. (a) [finding shall not be set aside by reason of erroneous admission of evidence unless, inter alia, there appears on record an objection that was timely and specifically made]; *People v. Rowland* (1992) 4 Cal.4th 238, 275; *People v. Raley* (1992) 2 Cal.4th 870, 892; *People v. Szeto* (1981) 29 Cal.3d 20, 32 [waiver of hearsay objection resulted from failure to raise objection at trial].) In the absence of a timely and specific objection in the trial court, the issue of hearsay may not be raised for the first time on appeal. (*People v. Wheeler* (1992) 4 Cal.4th 284, 300; *In re Marquez* (1992) 1 Cal.4th 584, 599; see *People v. Mullens* (2006) 119 Cal.App.4th 648, 669, fn. 9; *People v. Anderson* (1974) 43 Cal.App.3d 94, 103.)

Here, appellant did not present a timely and specific objection in the trial court to the poem (Peo. Exh. 54) on the ground it constituted inadmissible hearsay. Rather, appellant objected to the poem on the ground "that the person who wrote this [poem] is not going to be present." (12RT 1872.) That is not a hearsay objection because whether the writer of the poem was present is an irrelevant consideration as to whether the poem constituted inadmissible hearsay. And, as noted by the trial court, it's questionable whether appellant's objection was even valid. (12RT 1873.) At best, appellant might have been attempting to raise a foundational objection but it is clear he was not asserting a hearsay objection to the admission of the poem. Accordingly, appellant's claim as to whether the poem constituted inadmissible hearsay has been waived and need not be considered by this Court.

Appellant also claims that admission of the poem imposed over a photograph of Mr. Dunbar (see Peo. Exh. 54) exceeded the appropriate limits of victim impact evidence because it was "calculated to appeal to the jury's

emotions and deflect from, making a rational, measured decision as to the fate of appellant" (AOB 156) has likewise been waived. As mentioned above, appellant objected to the admission of the poem on the ground the author of the poem was not present in court to testify. (12RT 1872-1873.) Appellant never objected to the admission of the photograph or poem on the ground it constituted improper victim impact evidence. Accordingly, the claim raised by appellant for the first time on appeal has been waived. (See Evid. Code, § 353, subd. (a); *People v. Robinson, supra,* 37 Cal.4th at p. 652; *People v. Roldan, supra,* 35 Cal.4th at p. 732; *People v. Benavides, supra,* 35 Cal.4th 69, 106.)

2. Photograph Of Lisa La Pierre

Appellant's claim that the photograph of Lisa LaPierre violated the limitations of victim impact evidence established by this Court (see AOB 156-157) is also meritless. The photograph of Ms. La Pierre was not technically victim impact evidence since it pertained to aggravating evidence under factor (b). However, in *People v. Carpenter, supra,* 15 Cal.4th at page 401, this Court made clear that the admission of such evidence falls within the sound discretion of the trial court:

> The admissibility of the photographs of the other murder victims is less clear but also, we think, lies within the court's discretion. The jury is entitled to consider other criminal activity involving force or violence. (Pen. Code, § 190.3, factor (b).) As the trial court found, allowing the jury to know what the other murder victims looked like in life legitimately aided it in determining the appropriate punishment. We see no abuse of discretion.

Here, the trial court properly exercised its discretion. Although the prosecution had "a myriad of photographs," the trial court only permitted the prosecution to introduce a single photograph of Ms. La Pierre. That the trial court properly exercised its discretion is evidenced by its comment, "[t]o the extent that Ms.

La Pierre is in a little different position, I don't see what the People are asking for has gone overboard." Respondent submits the trial court did not abuse its discretion in admitting the photograph of Ms. La Pierre. (*People v. Carpenter, supra,* 15 Cal.4th at p. 401.)

3. The Photo Board Containing Photographs Of Mr. Dunbar

The posterboard containing the photograph of Mr. Dunbar as an adult and the five photographs of Mr. Dunbar as a child (see Peo. Exh. 53) did not constitute improper victim impact evidence. The adult photograph of Mr. Dunbar was proper since photographs of victims while alive constitute a "circumstance of the offense" which portrays the victim as the defendant saw him at the time of the killing. (*People v. Carpenter, supra,* 15 Cal.4th at p. 401; *People v. Cox* (1991) 53 Cal.3d 618, 688.) The photographs of Mr. Dunbar as a child did not exceed the proper limits of victim impact evidence. Those photographs depicted various significant periods in the upbringing of Mr. Dunbar (i.e., first grade, cub scout, family outing, New York vacation) and were illustrative of the testimony provided by Mr. Dunbar's mother. As noted by the trial court, "I don't see those [photographs] as being anything that particularly pulls at somebody's heart strings." (12RT 1874.) Respondent agrees and submits those photographs were not unduly inflammatory such that the jury would permit emotion to reign over reason. (See *People v. Robinson, supra,* 37 Cal.4th at pp. 650-651.)

Finally, it must be noted that appellant, without citation to the record, maintains the trial court was under the mistaken belief that "admission and consideration of victim impact evidence was mandatory." (AOB 174, 174-177.) Thus, appellant argues he is entitled to a new penalty phase since the trial court did not realize it had discretion to exclude the victim impact evidence. (AOB 174-177.) Appellant is simply incorrect. As the above

discussion reflects, trial court clearly understood and exercised its discretion in determining the admissibility of the victim impact evidence. Accordingly, appellant's claim is meritless.

E. Any Error In The Admission Of The Victim Impact Evidence Was Not Prejudicial

Here, assuming, without conceding, the admission of the some or all of the victim impact evidence was error, there was no reasonable possibility the jury would have returned a verdict other than death absent admission of the evidence. As mentioned previously, a death verdict was returned because of the murder of Richard Dunbar, the attempted murder of Miguel Cortez, the attempted murder of Police Officer Boccanfuso, the attempted murder of Police Officer Coleman, the attempted murder of "John Doe" (the driver of the Jeep Cherokee), the attempted murder of Lisa LaPierre, appellant's evasion of the a police officer, and appellant's prior convictions. As noted by the prosecutor as to why the jury should return a verdict of death:

> You go back there, weigh the circumstances in aggravation, the ones you saw so substantially outweigh those in mitigation. You can say, yes, they do, you see, because Lisa La Pierre's cell is smaller than any cell in state prison. Her cell for the rest of her life is that wheelchair. Miguel Cortes' cell are the scars. His permanent injuries that he will never lose. The officers, their cell is their fear, the fear that they will carry with them every day as they pursue a car, the fear that never goes away. And Richard Dunbar's cell is a box, six feet under the ground.
>
> You decide is the aggravation much more, so substantially more than the mitigation? If it is, you come back with a verdict of death.

(14RT 2244.) As can seen from the foregoing, the prosecutor did not rely to appellant's detriment on the victim impact evidence as to why the jury should return a verdict of death.

Moreover, the prosecutor made it clear to the jury near the end of his argument that the victim impact evidence was not designed to be inflammatory but rather to merely let the jury know that the murder involved a human being who was loved and missed by his family. As noted by the prosecutor:

> And so the *only* reason that you hear from the victim's family is to let you know, not to enrage you, but just to let you know that this young man with the promising future was loved, and all he did, all he did was drive up in a car. He loved to take a friend out to have a good time. That's all he did.

(14RT 2205; emphasis added.) Thus, given the overwhelming aggravating evidence and the very limited nature of the victim impact evidence, it can be said with confidence that if the trial court erred in the admission of any or all of the victim impact evidence, the error was nonprejudicial on the facts of this case. (See *People v. Prince, supra,* 40 Cal.4th at pp. 1289-1291; *People v. Robinson, supra,* 37 Cal.4th at p. 652; *People v. Jones, supra,* 29 Cal.4th at p. 1264, fn. 10; *People v. Brown, supra,* 46 Cal.3d at pp. 446-448.)

VI.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE AT THE PENALTY PHASE REGARDING THE RAP LYRICS FOUND IN APPELLANT'S BACKPACK (RESPONSE TO ARG. IX.)

Appellant contends the trial court committed prejudicial error at the penalty phase when it admitted as evidence the rap lyrics found in a red notebook recovered from the backpack found in the back of appellant's white Jeep Cherokee. (AOB 133-147; Arg. IX.) Appellant argues the rap lyrics constituted inadmissable non-statutory aggravation evidence since it did not qualify for admission under any of the listed factors in Penal Code section 190.3 and therefore the penalty jury was improperly allowed to consider non-statutory aggravating evidence in reaching its death verdict. (AOB 133-147.) Respondent submits the following: appellant waived the issue he raises on appeal since he did not raise it below; after the evidence at the guilt phase, the trial court properly exercised its discretion at the penalty phase in permitting the rap lyrics as evidence of the "circumstances of the crime" under factor (a); and, in any event, if the trial court erred in permitting the rap lyrics to be introduced, such error was nonprejudicial on the facts of this case -- especially since the prosecutor never once relied upon the rap lyrics in its argument to the jury as to why the aggravating evidence so substantially outweighed the mitigating evidence that a verdict of death should be returned.

A. The Relevant Proceedings

1. The Rap Lyrics

Preliminarily, it must be noted that the rap lyrics were introduced at the penalty phase, not the guilt phase. Respondent will demonstrate in the following sections of this argument how the trial court carefully weighed the

probative value versus the prejudicial impact of this evidence at both phases of the trial and ultimately concluded that the prosecution could not use the rap lyrics at the guilt phase but could use them at the penalty phase.

The backpack (Peo. Exh. 17) recovered from appellant's white Jeep Cherokee recovered on Glasgow included several items, including three photographs of appellant with a gun in his hand, a photograph depicting appellant and Ahmad Fountano, notebooks containing writing, and a pager. In the notebook were rap lyrics which contained current references to killing police officers with the Los Angeles Police Department (see Peo. Exhs. 47 and 48). The lyrics also referred negatively to women and the African American community. Some of the lyrics contained appellant's name with a copyright sign. (12RT 1958-1965, 1970-1971.)

One of the lyrics reads as follows:

"I'm pullin so many hoes I give my crew some
Pistol whips any bitch that wanna get dumb
I got so much money that it's crazy
Now the IRS wanna fade me
But I say fuck them cause I ain't the one to get played
So make room for the Youngsta
I stepped to one of the cops that tried to play me
Put the nine to his head –bam–rock a bye baby."

(12RT 1962; Peo. Exh. 48.)

Another lyric reads as follows:

"They had a gang sweep just the other day
Cops rushed the projects where I stay
Sheriff's on my ass–I am getting old. It says: Sheriff's on my ass cause I tried to run. Hopped a few fences and tossed my gun. I just barely got far enough to toss my gun.

Run up an alleyway but they gave me chase

If it wasn't for a fence I could've made my escape

But I didn't and got rushed by about six

All I could see was flashlights and nite sticks

And then I heard gunshots

And then all of a sudden cops started to drop

No time to waste I scooped up a nine

I could take a hint. I guess it's time to get mine."

(RT 1963-1964; Peo. Exh. 47.)

Another lyric, entitled Gang Solution, refers to the LAPD. The LAPD was mentioned throughout the lyrics found in the notebook as the law enforcement agency to which the lyrics referred. (12RT 1964-1965.) There were no "positive songs" in the collection of rap songs found in the notebook. Women were referred to as "bitches and hoes." The police were referred to as "Cops, five-o's" and the "notorious N word" was used throughout the rap songs. (12RT 1970-1971.) It appeared the rap songs had been updated to include references to then-Police Chief Willie Williams. (12RT 1970.)

2. The Trial Court Refuses To Permit The Prosecution To Introduce The Rap Lyrics At The Guilt Phase

The following appears in the record as to the reasons the prosecutor sought to introduce the rap lyrics into evidence during the guilt phase:

THE COURT: I would like to hear your argument about specifically why you think it comes in. And, Mr. Batista, having a chance now not out of context you can tell me why they don't come in.

I would expect we are talking 352. This is a pure 352 call.

So, Ms. Meyers, why don't we start with you.

MS. MEYERS: Your Honor, I believe that these come in, the

probative value outweighs the prejudicial value because it shows the defendant's state of mind on two distinct opportunities.

The first one being the shooting of the police officers where it's clear from these songs that the defendant's intent is, number one, if he sees the officers, he's going to shoot at them and kill them, and, number two, he clearly does not like police officers and certainly has a vendetta against police officers.

Two, he is gang affiliated, and this definitely shows he is gang affiliated.

The third reason I believe that they are probative is because he talks about jacking people and taking their keys.

And the theory of the People's case on counts I, II, and III is that the defendant approached Mr. Dunbar, had the gun at Mr. Dunbar, took his keys to his car, and the only reason why he did not take Mr. Dunbar's car is because there was, one, a security guard who was walking down the street, and, two, people started to come out of the complex.

As the court well knows from the evidence established, the keys to Mr. Dunbar's car were never recovered.

So it is my belief that based upon the reading of these lyrics it shows the defendant's state of mind, one, his premeditation and deliberation in terms of an intent to kill a man for his car keys, as well as his intent, premeditation and deliberation with respect to the attempted murder of the peace officers to shoot and kill them.

Obviously it's prejudicial because everything the People bring into court against the defendant is prejudicial. However, the probative value of it certainly outweighs any prejudicial effect.

If the theory was or the standard was it's prejudicial, and, therefore, excluded, we couldn't introduce any evidence in the case. (8RT 1429-1430.) Thereafter, the trial court heard additional and rather extensive argument from both the prosecution and defense as to the admissibility of the rap lyrics at the guilt phase. (See 8RT 1429-1443.) After hearing and considering the arguments of both parties, the following appears in the record:

> THE COURT: Okay. In terms of weighing it under 352, I note that there is particular scrutiny given to this case because the People are seeking death.
>
> To the extent that Mr. Batista has indicated he is not going to be really disputing the gang issue, I note that the lyrics don't direct themselves to any specific incident that is relevant to our case.
>
> I do note that it is from 1991, but I also notice that in one editing portion where I think it's red ink crossing out of the original lyrics from 1991, that Police Chief Gates is crossed out and it's updated to Willie.
>
> It's Willie Williams I'm assuming, which does bring it to the time frame more closely attuned to the incident in question.
>
> But there's nothing specifically directed. Certainly I think it's relevant, but in terms of the probative value, I think the negative mentality is shown more than any specific issue that the People can use for our incidences.
>
> Certainly it suggests a hatred of cops. It suggests he is not afraid to confront cops at least in terms of lyrics.
>
> But this is not a case where he went out looking the police officers. The police officer came on the scene at which he was doing something else. So it's not like a lying in wait or premeditated

assault which I think would give your argument more support.

Somehow maybe I'm just reading it too closely, but the idea of doing carjacks for keys, it's not like he's adding to his key collection, and I cannot believe in 1991 he was writing about collecting keys, and it shows that is what he was doing in our case.

As you point out, the only reason he is stuck with keys and not the car is because of the approach of the guard as well as other people in the area.

When you say, "Who writes lyrics like that?" That's quoting your words, Ms. Meyers. In a sense what you are suggesting is general predisposition, which I cannot do, I'm not allowed to do.

The fact that he is carrying it around at the time of the last incident, 1997, suggests the probative value, but at this point I'm not going to allow it.

I don't think that it's appropriate at this state. It's very broad. I can -- how may lyrics are there? There are -- what? -- a couple hundred pages of them?

MS. MEYERS: But, your Honor, the majority of them go toward the police officers, and you talk about the fact that it doesn't really talk about our case, but if you look at one of the lyrics in the binder, he talks about, "they had a gang sweep just the other day, cops rushed the projects where I stay. Sheriffs on my ass because I tried to run."

And then there's this -- in the red, the same red where there's the reference to Gates vis-a-vis Willie Williams, "You know I had to hop a few fences and toss my gun," which shows when these kinds of things happen that's exactly what the defendant does.

And I think we've brought two instances where in fact

that happened, and it happened on the 20th of September of 1996 when he tossed that .380 and hopped two fences, and then it happened again when he hopped -- scaled that ten-foot fence back on the 7th of May of 1997.

THE COURT: Okay. But it seems to me when you talk about hopping the fence and tossing a gun, that's the one that Mr. Batista says he is not disputing it was the defendant who did that, just the intent.

So hopping the fence and tossing the gun, if you're dealing with I.D., that helps you with I.D., but that's not the issue in that instance. That's the problem.

Now, I would tell you that I think that it might be an idea to reraise this issue at the penalty phase, if we have one, because that's certainly brings in more depth. You are allowed to bring out more of the circumstances of the crime.

But this is an issue I think you would lose on appeal with the closer scrutiny, and at this point I am going to rule in favor of the defense.

(8RT 1443-1446.) Accordingly, the rap lyrics were not introduced into evidence at the guilt phase.

3. The Trial Court Permitted The Prosecution To Introduce The Rap Lyrics At The Penalty Phase

The following appears in the record regarding the discussion of the admissibility of the rap lyrics at the penalty phase:

MS. MEYERS: Additionally, your Honor, I will be asking the backpack stuff, to put that into evidence.

THE COURT: I did indicate that I thought it was more appropriate at the penalty phase. Do you want to address that issue?

I am inclined to let it in. I think it does go to motivation under 352. Perhaps the prejudice outweighed the probative value at that time. I don't think it does now.

MR. BATISTA: First of all, it's nothing but lyrics basically. And it could be interpreted very prejudicially and I am sure the way Ms. Meyers will spin it will be very prejudicially.

And basically it's music -- well, it's not music, but lyrics that are in the field called gangster rap, and I just think it's prejudicial and I don't think it has any probative value as to what [appellant] was convicted of. Most of these things were written years ago and doesn't necessarily mean any of this was planned.

THE COURT: It seems to me it's relevant to the circumstances of the crime. It goes to the state of mind, his attitude towards the police, his attitude toward crime, attitude toward carrying weapons. Even if it was written in 1991, they were updated, and I think he was carrying them currently.

Having looked through the rap lyrics, you can certainly argue to the jury that they don't have the same import and you might have a better argument today because it's more common today even when it was updated perhaps in '96 or '97 when they were seized.

Weighing them under 352, I think that the probative value in the circumstances of the case outweigh the prejudice.

(11RT 1869-1870.)

B. Appellant Has Waived The Issue He Raises On Appeal As To The Admissibility Of The Rap Lyrics At The Penalty Phase

Appellant's main complaint on appeal regarding the admission of the rap lyrics at the penalty phase is that it constituted evidence of non-statutory

aggravation. (AOB 133-147.) As stated by appellant at page 139 of Appellant's Opening Brief, ". . . the rap lyrics in question were inadmissible in the penalty phase and should have been excluded in that they were not relevant to any of the factors in aggravation listed in Penal Code section 190.3." (AOB 139.) Respondent submits this issue has been waived since appellant did not raise it in the trial court.

As mentioned previously, appellate review is not available for questions relating to the admissibility of evidence without a *specific* and *timely* objection in the trial court *on the ground urged on appeal.* (Evid. Code, § 353, subd. (a) [finding shall not be set aside by reason of erroneous admission of evidence unless, inter alia, there appears on record an objection that was timely and specifically made]; *People v. Rowland, supra,* 4 Cal.4th at p. 275; *People v. Raley, supra,* 2 Cal.4th at p. 892.)

The issue appellant raises on appeal, namely, that the evidence of the rap lyrics constituted improper non-statutory aggravation evidence (see AOB 133-147) was not raised in the trial court. No such objection appears in the record of the trial proceedings and appellant fails to indicate in his opening brief where he raised this issue in the trial court. (See AOB 133-147.) Rather, the issue raised and argued in the trial court was whether the probative value of the rap lyrics were substantially outweighed by its prejudicial effect under Evidence Code section 352. (See 11RT 1869-1870.) That is not the issue appellant raises on appeal. Accordingly, appellant has thus waived the issue he raises on appeal regarding the admissibility of the rap lyrics as improper non-statutory aggravating evidence.

C. The Trial Court Properly Admitted Evidence Of The Rap Lyrics At The Penalty Phase

In any event, assuming arguendo the issue is properly before this Court, respondent submits the trial court properly admitted the rap lyrics as

evidence relating to the "circumstances of the crime" under factor (a). (See 11RT 1869-1870.) The trial court found that the rap lyrics were "relevant to the circumstances of the crime" and that under Evidence Code section 352 the probative value of the rap lyrics outweighed its prejudice. (See 11RT 1869-1870.) Respondent submits the trial court ruling was proper and supported by the record.

Preliminarily, it must be noted that appellant attempts to divert attention from the real issue in the case by initially arguing the evidence of the rap lyrics constituted improper and inadmissible character evidence and fell outside the statutory limitations of Penal Code section since the evidence did not constitute "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" under factor (b). (See AOB 139-143.) The evidence was neither offered nor admitted under factor (b). (See 11RT 1869-1870.) Focus on factor (b) is simply a red herring.

Rather, the evidence was admitted under factor (a) as evidence relating to the circumstances of the crime. (See 11RT 1869-1870.) Appellant argues, however, that there is no existing case law which permits such evidence to be introduced as a "circumstance of the crime." (See AOB 143-146.) Appellant is incorrect because the evidence of the rap lyrics was relevant to appellant's motivation as well as relevant to his state of mind and attitude toward the police and carrying weapons. (See 11RT 1870.) And, this court has repeatedly held that evidence of appellant's mental state or condition at the time of the offense is a relevant factor relating to the circumstance of the crime. As this Court recently stated in *People v. Guerra* (2006) 37 Cal.4th 1067, 1154:

> Factor (a) of section 190.3 allows the prosecutor and defense counsel to present to the penalty phase jury evidence of all relevant aggravating and mitigating matters "including, but not limited to, *the*

nature and circumstances of the present offense, . . . and the defendant's character, background, history, *mental condition* and physical condition." (Italics added.) Evidence that reflects directly on the defendant's state of mind contemporaneous with the capital murder is relevant under section 190.3, factor (a), as bearing on the circumstances of the crime. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1163-1164, 64 Cal.Rptr.2d 892, 938 P.2d 950; see also *People v. Smith* (2005) 35 Cal.4th 334, 354-355, 25 Cal.Rptr.3d 554, 107 P.3d 229 [the prosecution can present evidence of the defendant's mental illness or bad character under factor (a) even if it also bears upon a mitigating factor]; *People v. Avena, supra,* 13 Cal.4th at p. 439, 53 Cal.Rptr.2d 301, 916 P.2d 1000 ["The fact that evidence of defendant's [capital crime] was also indicative of his character or mental condition does not render the evidence inadmissible"].)

Also, in *People v. Ramos* (1997) 15 Cal.4th 1133, 1164, this Court stated:

"[F]actor (a) of section 190.3 allows the sentencer to evaluate *all aggravating and mitigating aspects* of the *capital crime itself*. . . . The defendant's overt indifference or callousness toward his misdeed bears significantly on the moral decision whether a greater punishment, rather than a lesser, should be imposed. [Citation.]" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232 [275 Cal.Rptr. 729, 800 P.2d 1159]; *People v. Breaux, supra*, 1 Cal.4th at p. 313.) The jury may also consider lack of remorse when presented in the context of the "defendant's callous behavior after the killings . . . ." (*People v. Crittenden* (1994) 9 Cal.4th 83, 147 [36 Cal.Rptr.2d 474, 885 P.2d 887]; *People v. Clark* (1993) 5 Cal.4th 950, 1031 [22 Cal.Rptr.2d 689, 857 P.2d 1099].)

And, finally, in *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232, this Court stated:

> In his closing argument-in-chief, the prosecutor did suggest as an aggravating consideration that defendant had shown lack of remorse by his defiant behavior when captured, by his boasts to jailmate Acker about "bagging a cop" who "had it coming," and by "stick[ing] to" his gang attack defense. [Fn. omitted.] Insofar as the prosecutor was urging defendant's *overt* remorselessness *at the immediate scene of the crime*, the claim of aggravation was proper. Overt remorselessness *is* a *statutory* sentencing factor in that context, because factor (a) of section 190.3 allows the sentencer to evaluate *all aggravating and mitigating aspects* of the *capital crime itself.* Moreover, there is nothing inherent in the issue of remorse which makes it mitigating only. The defendant's overt indifference or callousness toward his misdeed bears significantly on the moral decision whether a greater punishment, rather than a lesser, should be imposed. (Cf. *People v. Mitchell* (1966) 63 Cal.2d 805, 817 [48 Cal.Rptr. 371, 409 P.2d 211].)

Respondent submits it is thus clear that the evidence of the rap lyrics was admissible at the penalty phase as a "circumstance of the crime" from which the jury could evaluate appellant's mental state at the time of the crime as well as his attitude toward the police and carrying weapons.

It is equally clear that the trial court did not abuse its discretion as a matter of law in finding the evidence admissible under Evidence Code section 352. A trial court has wide discretion to determine the relevancy of evidence, subject to the requirements of Evidence Code section 352. (*People v. Marshall* (1996) 13 Cal.4th 799, 832-833; *People v. Yu* (1983) 143 Cal.App.3d 358, 376.) That section provides the trial court with broad discretion in assessing

whether the probative value of particular evidence is substantially outweighed by concerns of undue prejudice, confusion or consumption of time. (*People v. Rodrigues, supra,* 8 Cal.4th at pp. 1124-1125.) Cumulative evidence is to be admitted provided that the trial court does not find that exclusion is required by Evidence Code section 352. (*People v. Scheid* (1997) 16 Cal.4th 1, 15; *In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843-1844.) A reviewing court will not disturb a trial court's ruling under Evidence Code section 352 unless the trial court exercised its discretion in an "arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*Ibid.*) The reviewing court thus reviews the trial court's ruling for an abuse of discretion while giving the trial court's determination deference. (*People v. Kipp, supra,* 26 Cal.4th at p. 1121.)

The exclusion of evidence under Evidence code section 352 is not designed to avoid the prejudice or damage that naturally flows from relevant, highly probative evidence. (*People v. Zapien, supra,* 4 Cal.4th at p. 958.) All "evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.'" (*People v. Yu, supra,* 143 Cal.App.3d at p. 377; see also *People v. Karis* (1988) 46 Cal.3d 612, 638.) For purposes of Evidence Code section 352, prejudice refers to evidence which uniquely tends to evoke an emotional bias against the defendant without regard to its relevance on material issues. (*People v. Kipp, supra,* 26 Cal.4th at p. 1121.)

Applying the foregoing to the instant case, it can readily be seen that the trial court did not abuse its discretion as a matter of law of in admitting evidence of the rap lyrics at the penalty phase. Here, as noted by the trial court, the evidence was relevant and highly probative on the issue of motivation. As stated by the trial court, the evidence of the rap lyrics was "relevant to the circumstances of the crime" because the evidence "goes to the state of mind,

[appellant's] attitude towards the police, [and] attitude toward carrying weapons." (11RT 1869-1870.) It cannot be said on the facts of this case that the trial court abused its discretion as a matter of law under Evidence Code section 352 in admitting the evidence of the rap lyrics at the penalty phase. Moreover, that the trial court properly and seriously evaluated the probative value of the evidence versus its prejudicial effect is demonstrated by the fact the trial court exercised its discretion and refused to permit the evidence to be heard by the jury during the guilt phase.

Moreover, it must be noted that many of appellant's complaints regarding the rap lyrics (see AOB 143-147) go to the weight, not the admissibility, of the evidence. As noted by the trial court,

> Having looked through the rap lyrics, you can certainly argue to the jury that they don't have the same import and you might have a better argument today because it's more common today even when it was updated perhaps in '96 or '97 when they were seized.

(11RT 1870.)

D. Admission Of The Rap Lyrics Was Nonprejudicial

Finally, assuming arguendo the trial court erred in admitting evidence of the rap lyrics at the penalty phase, any such error must be deemed non-prejudicial. Respondent submits it can be said with confidence that the jury did not return a death verdict in this case because appellant possessed some rap lyrics. Rather, as mentioned in the previous arguments, the jury returned a death verdict because of the murder of Richard Dunbar, the attempted murder of Miguel Cortez, the attempted murder of Police Officer Boccanfuso, the attempted murder of Police Officer Coleman, the attempted murder of "Jon Doe," the attempted murder of Lisa LaPierre, appellant's evasion of a police officers, appellant's involvement in prior robberies, and appellant's prior convictions. And, significantly, the prosecutor never once referred to the rap

lyrics during its argument to the jury as to why the aggravating evidence so substantially outweighed the mitigating evidence that the jury should return a verdict of death. (See RT 2189-2206, 2243-2244.) There is simply no reasonable possibility the jury returned a death verdict based on the rap lyrics in this case. (See *People v. Prince, supra,* 40 Cal.4th at p. 1299; *People v. Jones, supra,* 29 Cal.4th at p. 1264, fn. 10; *People v. Ochoa, supra,* 19 Cal.4th at p. 479; *People v. Jackson, supra,* 13 Cal.4th at p. 1232; *People v. Brown, supra,* 46 Cal.3d at pp. 446-448.)

VII.

THE JURY WAS PROPERLY INSTRUCTED AT THE PENALTY PHASE (RESPONSE TO AOB ARG. XVI)

Appellant contends the language in CALJIC Nos. 8.84.1 and 8.85 contravenes the requirements of Penal Code section 190.3 which sets forth the specific aggravating and mitigating factors the jury should consider in determining the appropriate penalty. Specifically, appellant contends that the directive in CALJIC No. 8.84.1 and 8.85 to the jury to determine the facts from the evidence received during the entire trial violated his statutory and constitutional rights to limit the aggravating circumstances to specific legislatively-defined factors. As stated by appellant, the language in the instructions unconstitutionally "permitted the jury to sentence appellant to death even if it considered the nonstatutory aggravating circumstances or evidence introduced during the guilt trial." (AOB 241-244; Arg. XVI.) Respondent submits this claim is meritless.

This Court has repeatedly rejected the claim raised by appellant. As stated by this Court in *People v. Harris* (2005) 37 Cal.4th 310, 359:

> Defendant contends that CALJIC Nos. 8.84.1 and 8.85, in directing the jury in the penalty phase to determine what the facts are from the evidence received during the entire trial, unconstitutionally allowed the consideration of nonstatutory aggravating circumstances in the determination of penalty. We have held otherwise. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1180, 113 Cal.Rptr.2d 827, 34 P.3d 937 [standard sentencing instructions proper despite failure to limit aggravating evidence to factors enumerated in § 190.3].)

(See also *People v. Ramirez* (2006) 39 Cal.4th 398, 474.) Accordingly, appellant's claim must be rejected.

VIII.

THE TRIAL COURT DID NOT COMMUNICATE TO THE JURY AN IMPROPER LEGAL STANDARD FOR THE WEIGHING PROCESS IN THE PENALTY PHASE (RESPONSE TO AOB ARG. VII)

Appellant contends the trial court violated his right to due process of law, his right to a fair determination of penalty, and his right not be subjected to cruel and unusual punishment under the Fifth, Sixth, and Eighth Amendments to the federal Constitution when it communicated to the jurors during voir dire an "improper legal standard for the weighing process in the penalty phase" Appellant maintains that the trial court's questions to various jurors in the presence of other jurors whether they could vote for the death penalty if the "bad [aggravating factors] outweighs the good [mitigating factors]" constituted *de facto* jury instructions to the jury as to the weighing process to be utilized in determining the appropriate penalty. Since the trial court's questions did not indicate that the aggravating factors ("the bad") had to be "*so substantial*" in comparison to the mitigating circumstances ("the good") so as to warrant the death penalty, appellant maintains, the trial court unconstitutionally instructed the jury as to the applicable weighing process to be used in reaching a penalty determination. (AOB 115-126; Arg. VII.) Respondent submits this contention is meritless for several reasons.

A. The Relevant Proceedings

1. The Voir Dire

Before questioning the individual jurors, the trial court explained at length the nature of the guilt and penalty phases of the trial. (3RT 302-315.) In explaining what the penalty phase involved, the trial court informed the panel of jurors as follows:

At the penalty phase we deal with different kinds of evidence, mitigation and aggravation, good things, to make it simple, versus the bad things.

Essentially what they are is evidence produced by either side to persuade you, the judges, now that you have decided what it is that has happened, what the facts are, what the truth is, what you think the penalty ought to be.

(3RT 305.) After explaining what type of evidence might be introduced by the parties to demonstrate aggravation and mitigation, the trial court advised the jury in the following terms of the weighing process to be utilized at arriving at the appropriate penalty:

Now, some of you indicated that you could follow the law, that you would follow the law, that the law somehow is going to tell you -- and I will tell you right now it is not going to be that easy because the law is not going to tell you what to do. You are going to tell us what the appropriate penalty is.

And the way you do is you weigh the mitigation versus the aggravation, you weigh the good versus the bad. Again, it is not necessarily good. It is not like it is a bunch of good deeds. It is not necessarily a bunch of bad deeds. But it is things to explain and give you more depth in terms of background that really have nothing to do with what happened. It just explains the background so you can decide what the appropriate penalty is.

The only thing the law is going to tell you is that you weigh the good and the bad, the aggravation and the mitigation. If you feel -- this is the only direction you really get from the law. If you feel that the mitigation, the good weighs more than the bad, the aggravation, if there is more mitigation than aggravation, the law says no

problem, you have no choice, you have to vote for life. Okay?

That's when it is easy. You have to vote for life if in your opinion the mitigation is greater than the aggravation.

Keep in mind that your opinion may be very different than the person next to you. You have your own way of measuring. If they are the same, you have no choice. You have to vote for life.

Only if you feel the aggravation outweighs the mitigation so substantial compared to the mitigation do you have a choice. It does not mean you have to vote for death. The law never says you have to vote for death at that point.

That's where you have the choice, where you are wide open. That's in a sense what we are looking for in terms of judges who are open to either possibility.

The law tells you that if you believe the aggravation so substantially outweighs the mitigation, that death may be appropriate, that's when you can vote for death and not before that. Okay?

If the aggravation does not outweigh the mitigation, you are not allowed to vote for death. You have to vote for life.

So if they are the same, you vote for life. If the good or mitigation outweighs the aggravation, you vote for life. You have no choice. *The only time you have a choice*, again, is if in your opinion -- and your opinion may be different than everybody else in this room because it is an individual decision.

You are coming back to us as judge of the community. You are coming back not as experts but as members of the community.

If the bad outweighs the good, if it is so substantial compared to mitigation, then you have a choice. And you decide. You come

back and tell us. And any decision has to be unanimous just like the underlying guilt decision has to be unanimous.

(3RT 306-308; emphasis added.) A short time later the trial court reiterated:

> . . . the rules involve the fact that if you feel mitigation outweighs the aggravation, you cannot vote for death. If it is the same, they weigh the same in your opinion, you cannot vote for death. *And only when the aggravation is so substantial compared to the mitigation is death possibly warranted, only then can you possibly vote for death. Again you have a choice at that point.*

(3RT 311; emphasis added.) The trial court explained that life without possibility of parole and death are the only two sentencing options at the penalty phase and their decision "has to be based on that weighing process." (3RT 312.)

Thereafter, the trial court undertook an individual voir dire of each prospective juror to determine if he or she was death qualified. (3RT 319-500; 4RT 504-699; 5RT 701-728.) In that questioning, the trial court, as noted by appellant in his opening brief, typically asked many of the jurors, in simple language, the following two questions: (1) "If the bad [aggravation] outweighs the good [mitigation], can you see yourself actually voting for death"; and (2) "If the bad outweighs the good, can you see yourself nevertheless voting for life?" (See AOB 116.)

2. The Penalty Phase

a. The Penalty Phase Jury Instructions

At the penalty phase, the trial court specifically instructed the jury pursuant to CALJIC No. 8.88 that in order to return a verdict of death, each juror must be persuaded that the aggravating circumstances are *so substantial* in comparison to the mitigating circumstances that it warrants death instead of

life without parole:

> 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 [appellant].
>
> After hearing 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.
>
> 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 assignment 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 in comparison with the mitigating circumstances that it warrants death instead of life without parole.*

(2CT 348-349; emphasis added.)

b. Penalty Argument

During penalty argument, the prosecutor repeatedly advised the jury as to the appropriate weighing of aggravating and mitigating circumstances in the following passages:

> . . . what you can consider in determining the penalty in this case. The circumstances of the crime. Aggravation. What can you consider *in weighing whether aggravation so substantially outweighs mitigation* (14RT 2191; emphasis added);
>
> Aggravation. You can also consider in making a determination as to whether or not *aggravation outweighs mitigation so substantially* by the presence of other criminal activity (14RT 2194; emphasis added);
>
> You can consider that in making a determination as to whether or not *the aggravation so substantially outweighs the mitigation* (14 RT 2195; emphasis added); and
>
> You go back there, *weigh the circumstances in aggravation, the ones you saw so substantially outweigh those in mitigation.* You can say, yes, they do, you see, because Lisa La Pierre's cell is smaller than any cell in state prison. Her cell for the rest of her life is that wheelchair. Miguel Cortes' cell are the scars, his permanent injuries that he will never lose. The officers, their cell is their fear, the fear that they will carry with them every day as they pursue a car, the fear that never goes away. And Richard Dunbar's cell is a box, six feet under the ground.
>
> You decide *is the aggravation much more, so substantially more than the mitigation*? If it is, you come back with a verdict of death. (14RT 2244; emphasis added.)

Defense counsel likewise informed the jury as to the appropriate weighing process in the following passages:

> The law tells you *only if the aggravating factors substantially outweigh the mitigating factors can you even consider the death penalty* (14RT 2213; emphasis added); and
>
> Ladies and gentlemen, you have to determine what the appropriate penalty is. You have to make that weighing against aggravating and mitigating factors. *If you were to find that the aggravating factors substantially outweigh the mitigating factors, you can consider the death penalty.* But the law tells you you can have mercy. You don't have to put [appellant] to death. You don't have to kill him (14RT 2241-2242; emphasis added).

B. Analysis

1. The Issue Raised By Appellant Has Been Waived By Failing To Preserve It In The Trial Court With An Objection

Appellant contends the trial court unconstitutionally "instructed" the jury during voir dire when it asked various jurors if he or should could impose the death penalty "if the bad outweighed the good." Appellant maintains that the trial court's questions of the potential jurors were *de facto* jury instructions describing the weighing process the jury was to utilize in the penalty phase. And, appellant continues, since the trial court's description of the weighing of aggravating and mitigating evidence in the questions asked was incomplete and incorrect since it did not include the "so substantial" language in CALJIC No. 8.88, he was prejudiced and the penalty verdict is thus unreliable. (AOB 115-126.) Appellant, however, never objected in the trial court to any of the instances he cites in his opening brief as constituting error by the trial court. (See AOB 116; 3RT 342, 389, 433, 452, 458, 464, 468, 473, 477, 481, 491,

500; 4RT 525, 526, 548, 552, 558, 569, 592-593, 595-596, 600, 613, 615, 629, 631, 638, 650, 659, 676, 684, 687, 697, 699; 5RT 711, 715, 718, 726.) Respondent submits since appellant never objected to the alleged error by the trial court in questioning the potential jurors regarding their views on the death penalty, the issue has been waived and need not be considered by this Court. (See *People v. Seaton* (2001) 26 Cal.4th 598, 653; *People v. Medina* (1995) 11 Cal.4th 694, 741; *People v. Fierro*, *supra*, 1 Cal.4th at p. 209; see also Evid. Code, § 353, subd. (a).)

A similar issue was raised in *People v. Medina, supra,* 11 Cal.4th at pages 740-741, when the claim was the prosecutor made inaccurate statements during voir dire regarding the nature of mitigating and aggravating evidence and the weighing process. This Court stated appellant had waived the issue by failing to preserve it in the trial court with an objection:

> The prosecutor indicated to several ultimate jurors that mitigating evidence was the kind of evidence showing the "positive factors" in defendant's life, such as being a war hero or Boy Scout leader, whereas aggravating evidence would involve "negative evidence" such as a prior criminal conviction. The prosecutor further indicated that the jury's task in deciding the appropriate penalty was to weigh these positive and negative aspects. Defendant's only objection to such statements during voir dire was that the prosecutor's examples of mitigating evidence involved situations that were not present in the case.
>
> Defendant now contends the prosecutor's voir dire statements were incomplete and inaccurate, but as he did not object to the statements on this ground, the present objection was waived. (See *People v. Cooper* (1991) 53 Cal.3d 771, 843 [281 Cal.Rptr. 90, 809 P.2d 865].)

(*People v. Medina, supra,* 11 Cal.4th at p. 741.) Appellant's claim has thus been waived and need not be considered by this Court.

2. Appellant's Claim Is Meritless As The Jury Was Properly Instructed

Assuming arguendo this Court considers appellant's claim, it must be rejected for several reasons. Significantly, the complained-of language is contained in *questions, not instructions,* to the jurors. It simply strains credulity to conclude a juror would understand a question to constitute a "*de facto*" instruction as claimed by appellant. Second, the questions were merely designed to ascertain if the juror had the ability to possibly impose a verdict of death if the aggravating evidence outweighed the mitigating evidence. Third, the jury could not possibly have misunderstood the language in the question to constitute an improper weighing process for the penalty phase given the lengthy and accurate description of the weighing process in the preliminary comments to the entire panel. During those comments, the trial court repeatedly described the weighing process at the penalty phase in the "so substantial" language of CALJIC No. 8.88. Fourth, and perhaps most significantly, the jury was instructed at the penalty phase in accordance with the "so substantial" language in the weighing process in CALJIC No. 8.88 and the attorneys repeatedly repeated the "so substantial" language in their argument to the jury as to how the weighing process operated.

The law is clear that CALJIC No. 8.88 "accurately describes how jurors are to weigh the aggravating and mitigating factors." (*People v. Elliott* (2005) 37 Cal.4th 453, 488.) And, CALJIC No. 8.88 "explains to the jury how it should arrive at the penalty determination." (*People v. Perry* (2006) 38 Cal.4th 302, 320.) CALJIC No. 8.88 is the standard penalty phase concluding instruction describing the sentencing factors for the penalty phase, and it does not violate the Fifth, Sixth, Eighth, or Fourteenth Amendments. (*People v.*

Moon (2005) 37 Cal.4th 1, 41-42.)

It should also be noted that appellant's claim that the word "good" in describing mitigation is "meaningless and hopelessly vague" in describing mitigating evidence (AOB 122-125) is meritless. Significantly, the trial court explained what "good" evidence meant in the context of mitigating evidence and that it was not, as appellant claims, limited to "some positive act or behavior that a defendant performed through his own violation that would speak well for his character [and] hence ameliorate the punishment." (AOB 122.) Rather, the trial court told the jury the following:

> And the way you do it is you weigh the mitigation versus the aggravation, you weigh the good versus the bad. Again, it is not necessarily good. It is not like a bunch of good deeds. It is not necessarily a bunch of bad deeds. But it is things to explain and give you more depth in terms of background that really have nothing to do with what happened. It just explains the background so you can decide what the appropriate penalty is.

(3RT 306.) Thus, appellant's claim is meritless.

3. Any Error Was Utterly Harmless

Assuming arguendo the trial court erred in describing the weighing process to the jurors during the voir dire questioning, respondent submits any error was utterly harmless given the correct description of the weighing process during the general comments to the jurors during voir dire, the giving of CALJIC No. 8.88 at the conclusion of the penalty phase, and the arguments of both the prosecutor and defense counsel at the penalty phase describing the weighing process in the terms of CALJIC No. 8.88. And, as this Court noted in *People v. Medina, supra,* 11 Cal.4th at page 741:

> Morever, as a general matter, it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the

> jury's verdict in the case. Any such errors or misconduct "prior to the presentation of argument or evidence, obviously reach the jury panel at a much less critical phase of the proceedings, before its attention has even begun to focus upon the penalty issue confronting it.

(*People v. Ghent* (1987) 43 Cal.3d 739, 770.) The same is true here.

IX.

APPELLANT'S CHALLENGES TO THE DEATH PENALTY STATUTE ARE MERITLESS (RESPONSE TO AOB ARGS. XIII, XIV, XV, XVIII AND XIX)

Appellant alleges numerous aspects of the death penalty sentencing scheme violate the federal Constitution. (AOB 177-240; Args. XIII, XIV, XV, XVIII and XIX.) As appellant himself concedes (AOB 177-178) many of these claims have been raised and rejected in prior appeals before this Court. Because appellant fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should be rejected. Moreover, it is entirely proper to reject appellant's complaints by case citation, without additional legal analysis. (E.g., *People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

This Court has repeatedly rejected the claims raised by appellant. Recently, in *People v. Thornton* (2007) 41 Cal.4th 391, 468-469, this Court refused to reconsider the decisions rejecting the *identical* claims raised by appellant in the instant case. As stated by this Court in *Thornton*:

> Defendant raises additional challenges to California's death penalty statute and to other aspects of California law, as interpreted by this court and as applied at trial. We adhere to the decisions that have rejected similar claims, and decline to reconsider such authorities, as follows:
>
> **[See AOB 179-186; Arg. XIII]** The death penalty law adequately narrows the class of death eligible offenders. *(People v. Prieto* (2003) 30 Cal.4th 226, 276 [133 Cal.Rptr.2d 18, 66 P.3d 1123].)
>
> **[See AOB 186-193 (Arg. XIV) and 239-240 (Arg. XV)]** Section 190.3, factor (a), is not unconstitutionally overbroad,

arbitrary, capricious, or vague, whether on its face (*People v. Guerra* (2006) 37 Cal.4th 1067, 1165 [40 Cal.Rptr.3d 118, 129 P.3d 321]) or as applied to defendant.

[See AOB 194-216; Arg. XV] 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. (*People v. Brown* (2004) 33 Cal.4th 382, 401 [15 Cal.Rptr.3d 624, 93 P.3d 244].) Except for section 190.3, factor (b), no burden of proof is constitutionally required at the penalty phase. (*People v. Moon* (2005) 37 Cal.4th 1, 43 [32 Cal.Rptr. 894, 117 P.3d 591].) [See AOB 216-225] And there is no constitutional requirement that the jury find aggravating factors unanimously. (*People v. Osband* (1996) 13 Cal.4th 622, 709-710 [55 Cal.Rptr.2d 26, 919 P.2d 640].)

[See AOB 198-209, 219-225 ; Arg. XV] Neither *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348], nor *Ring v. Arizona* (2002) 536 U.S. 584 [153 L.Ed.2d 556, 122 S.Ct. 2428], has changed our prior conclusions regarding burden of proof or jury unanimity. *(People v. Lewis and Oliver, supra,* 39 Cal.4th 970, 1068.)

[See AOB 225-229; Arg. XV] There is no requirement that the jury prepare written findings identifying the aggravating factors on which it relied. (*People v. Cook* (2006) 39 Cal.4th 566,619 [47 Cal.Rptr.3d 22].)

[See AOB 229-235; Arg. XV] The statutory scheme is not unconstitutional insofar as it does not contain disparate sentence

review (i.e., comparative or intercase proportionality review). (*People v. Lewis and Oliver, supra,* 39 Cal.4th 970-1067.)

[See AOB 235-236; Arg. XV] Allowing consideration of unadjudicated criminal activity under section 190.3, factor (b) is not unconstitutional as a general matter; moreover, and contrary to defendant's argument, it does not render a death sentence unreliable. (*People v. Morrison, supra,* 34 Cal.4th 698, 729.) Neither *Apprendi v. New Jersey, supra,* 530 U.S. 466, nor *Ring v. Arizona, supra,* 536 U.S. 584, affects our conclusion that factor (b) is constitutional. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222 [30 Cal.Rptr.3d 464, 114 P.3d 717].)

[See AOB 236; Arg. XV] The use of adjectives in the sentencing factors as "extreme" (§ 190.3, factors (d), (g)) and "substantial" *(id.,* factor (g)) is constitutional. (*People v. Avila* (2006) 38 Cal.4th 491, 614 [43 Cal.Rptr.3d 1, 133 P.3d 1076].)

[See AOB 237-239; Arg. XV] There is no requirement that the jury be instructed on which factors are mitigating and which are aggravating. (*People v. Vieira* (2005) 35 Cal.4th 264, 299 [25 Cal.Rptr.3d 337,106 P.3d 990].)

[See AOB 248-250; Arg. XVIII] The guaranty of equal protection of the laws does not require this court to give capital defendants the same sentence review afforded other felons under the determinate sentencing law. (*People v. Cox, supra,* 30 Cal.4th 916, 970.)

[See AOB 250-254; Arg. XIX] The judgment and sentence against defendant do not violate international law. (*People v. Lewis and Olive, supra,* 39 Cal.4th 970, 1066.) Nor does California's asserted status as being in the minority of jurisdictions worldwide

that impose capital punishment, or this jurisdiction's asserted contrast with the nations of Western Europe in that we impose capital punishment and they purportedly either do not or do so only in exception circumstances, resulting in violation of the Eighth Amendment of the federal Constitution. (*People v. Moon, supra,* 37 Cal.4th 1, 47-48.) The record contains no suggestion that defendant is a foreign national or a dual national.

X.

THERE WAS NO CUMULATIVE ERROR AT THE GUILT AND PENALTY PHASES WHICH REQUIRE REVERSAL OF THE DEATH JUDGMENT (RESPONSE TO AOB ARG. XX)

Appellant contends the cumulative effect of the errors at the guilt and penalty phases resulted in a death verdict which requires reversal. (AOB 254-255; Arg. XX.) Respondent disagrees because there was no error, and, to the extent there was error, appellant has failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Seaton, supra,* 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa* (2001) 26 Cal.4th 398, 447, 458; *People v. Catlin* (2001) 26 Cal.4th 81, 180.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box, supra,* 23 Cal.4th at pp. 1214, 1219.) The record shows appellant received a fair trial. His claims of cumulative error should, therefore, be rejected.

XI.

THE TRIAL COURT PROPERLY IMPOSED A $10,000 RESTITUTION FINE (RESPONSE TO AOB ARG. VI)

Appellant contends the $10,000 restitution fine imposed under Penal Code section 1202.4 and Government Code section 13967, subdivision (a), was incorrectly imposed in disregard of appellant's ability to pay. Accordingly, appellant asks this Curt to reduce the amount of the fine to the statutory minimum of $200. (AOB 113-114.) Respondent submits the trial court properly imposed a $10,000 restitution fine.

Preliminarily, it must be noted that appellant is incorrect in stating the restitution fine was imposed "pursuant to Penal Code section 1202.4 and Government Code section 13967(a)." (AOB 113.) The trial court, in imposing the restitution fine, expressly relied solely on Penal Code section 1202.4. In imposing the fine, the trial court stated that it "will be ordering a restitution fine pursuant to Penal Code section 1202.4 in the amount of $10,000." (15RT 2329-2330.) The trial court did not rely on Government Code section 13967, subdivision (a), and appellant's reliance on that statute is misplaced.

In any event, the arguments appellant raises regarding the trial court's failure to consider his ability to pay the restitution fine were discussed in *People v. Romero* (1996) 43 Cal.App.4th 440, 448-449:

> Under subdivision (d) of section 1202.4, a defendant's ability to pay remains a relevant factor in setting a restitution fine in excess of the statutory minimum (here $200). However, subdivision (d) also says, "Express findings by the court as to the factors bearing on the amount of the fine shall not be required." Since ability to pay is a factor bearing on the amount of the fine, the trial court was not required to make a finding on that issue, and defendant's contention to the contrary is not meritorious.

> Nor need the record in this case contain substantial evidence showing defendant's ability to pay the fine. Subdivision (d) of section 1202.4 also provides, "A defendant shall bear the burden of demonstrating lack of his or her ability to pay." This express statutory command makes sense only if the statute is construed to contain an implied rebuttable presumption, affecting the burden of proof, that a defendant has the ability to pay a restitution fine. Whatever is necessarily implied in a statute is as much a part of it as that which is expressed. [Citations omitted.] The statute thus impliedly presumes a defendant has the ability to pay and expressly places the burden on a defendant to prove lack of ability. Where, as here, a defendant adduces no evidence of inability to pay, the trial court should presume ability to pay, as the trial court correctly did here. Since here defendant's ability to pay was supplied by the implied presumption, the record need not contain evidence of defendant's ability to pay.

Here, as in *Romero*, appellant cites to no evidence he produced in the trial court as to his inability to pay the fine. (See AOB 113-114.) Thus, the trial court properly presumed appellant had the ability to pay.

CONCLUSION

Based on the foregoing arguments, respondent respectfully urges that the judgment of conviction and the penalty of death be affirmed.

Dated: April 30, 2008

Respectfully submitted,

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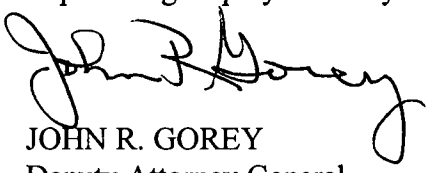

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 33,015 words.

Dated: April 30, 2008

Respectfully submitted,

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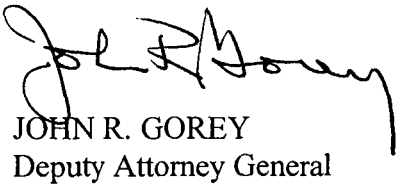

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Bernard A. Nelson**
No.: **S085193**

I declare:

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

On MAY 2 2008, I served the attached **RESPONDENT'S BRIEF (Capital Case)** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on MAY 2 2008, at Los Angeles, California.

M.I. Rangel
Declarant

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