SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ORLANDO GENE ROMERO & CHRISTOPHER SELF, Defendants and Appellants.	S055856 CAPITAL CASE

SUPREME COURT
FILED
FEB 27 2008
Frederick K. Ohlrich Clerk
Deputy

Riverside County Superior Court No. CR 46579
The Honorable Ronald L. Taylor, Judge

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **ORLANDO GENE ROMERO & CHRISTOPHER SELF,** Defendants and Appellants.	S055856 **CAPITAL CASE**

INTRODUCTION

From October 8 through December 7, 1992, appellants Orlando Gene Romero and Christopher Self engaged in a violent, and often murderous, crime spree in Riverside County. Either working together, alone, or with cohorts, appellants kidnaped, carjacked, robbed, and/or shot nearly a dozen victims, who were mostly chosen at random or for no discernable reason. The intensity of their crime spree increased as it progressed, and ultimately, appellants callously murdered three young men, Joey Mans, Timothy Jones, and Jose Aragon, in addition to attempting to take the lives of several other victims. During trial, the prosecution presented overwhelming evidence establishing appellants' guilt, including credible eyewitness identifications, considerable physical evidence obtained from both the crime scenes and from searches of appellants' homes and vehicles, appellants' damaging police interviews, and the corroborated testimony of Jose Munoz, an accomplice to the crimes.

On appeal, appellants raise over forty claims of error challenging their convictions and sentences. All of appellants' allegations of error are either invited, waived, lack merit, or harmless. Accordingly, this Court should affirm the judgments in their entirety.

STATEMENT OF THE CASE

On April 26, 1995, the Riverside County District Attorney filed a 23-count Amended Information charging appellant Christopher Self and his brother, appellant Orlando Gene Romero, with various crimes arising out of their two-month crime spree, as follows: the October 12, 1992, murders of Joey Mans and Timothy Jones (Counts I & II; Pen. Code, § 187, subd. (a)) with special circumstances of murder committed during the commission of robbery (Pen. Code, § 190.2, subd. (a)(17)) and the commission of multiple murders (Pen. Code, § 190.2, subd. (a)(3)); the November 25, 1992, murder of Jose Aragon (Count III; Pen. Code, § 187, subd. (a)) with special circumstances of murder committed during the commission of robbery (Pen. Code, § 190.2, subd. (a)(17)) and the commission of multiple murders (Pen. Code, § 190.2, subd. (a)(3)); the October 8, 1992, robbery of William Meredith (Count IV; Pen. Code, § 211); the October 23, 1992, attempted murder of Ken Mills, aggravated mayhem of Ken Mills, and attempted robbery of Ken Mills and Vicky Ewy (Counts V, VI, & VII; Pen. Code, §§ 664/187, 205, & 664/211); the October 23, 1992, shooting at an occupied motor vehicle [occupied by Ken Mills and Vicky Ewy] (Count VIII; Pen. Code, § 246); the October 26, 1992, attempted murders of Paulita Williams and John Doe/"Pint" [subsequently identified as Randolph Rankins](Counts IX & X; Pen. Code, § 664/187); the November 14, 1992, burglary and aggravated vandalism of Magnolia Interiors (Counts XI & XII; Pen. Code, §§ 459 & 594, subd. (b)(2)); the November 18, 1992, kidnaping and robbery of Alfred Steenblock (Counts XIII & XIV; Pen. Code, §§ 209, subd. (b), & 211); the November 20, 1992, robbery of Albert Knoefler (Count XV; Pen. Code, § 211); the November 21, 1992, robbery of Jerry Mills, Sr., and Jerry Mills, Jr. (Count XVI; Pen. Code, § 211); receiving stolen property from November 21, 1992, through November 17, 1992 [.22 Ruger handgun, .45 Colt handgun, and tackle box of ammunition] (Count XVII; Pen.

Code, § 496); and the December 7, 1992, robbery of Roger Beliveau (Count XXIII; Pen. Code, § 211).[1] In addition, for Counts I through X, XIII through XVI, and XXIII, the information alleged that a principal was armed with a firearm within the meaning of Penal Code section 12022, subdivision (a)(1). (4 CT 821-834.)

The information separately charged Self with the November 30, 1992, attempted murder and robbery of John Feltenberger (Counts XVIII & XIX; Pen. Code, §§ 664/187 & 211), and alleged during the course of this crime, a principal was armed with a firearm (Pen. Code, § 12022, subd. (a)(1)) and Self inflicted great bodily injury upon the victim (Pen. Code, § 12022.7). The

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1. The amended information also charged Daniel Chavez as a co-defendant on several counts, but the trial court severed Chavez's case before trial. (4 CT 903, 907-909, 917 [Chavez severance discussed]; 2 RT 88.) In their opening briefs, both appellants inform this Court of Chavez's subsequent conviction and sentencing in a separate, non-capital case. (Romero AOB ["RAOB"] at 7; Self AOB ["SAOB"] at 6, 31.) In doing so, appellants reference Chavez's trial transcripts, which are not part of appellants' record on appeal. Appellants have not moved to augment the record with the Chavez transcripts, nor have they asked this Court to take judicial notice of the facts contained in the Chavez record. Consequently, this Court should not consider this information on appeal. (Cal. Rules of Court, rule 14(a)(1)(C); *People v. Seaton* (2001) 26 Cal.4th 598, 634; *People v. Frye* (1998) 18 Cal.4th 894, 1030, fn. 5; *In re Hochberg* (1970) 2 Cal.3d 870, 875.)

Although not named in the Amended Information, Jose Munoz was originally charged as a fourth co-defendant in various felony complaints. (1 Supplemental CT ["SCT"] 1-3, 1 CT 32-35, 52-61, 95-116, 143-154.) Munoz entered into a plea agreement with the District Attorney's office in which he agreed to testify at appellants' trial and plead guilty to three counts of first degree murder, one count of attempted premeditated murder, three counts of robbery, and one count of attempted robbery. (2 CT 180-181; 45 3rd SCT 12906-12910.) Munoz later pled guilty to these crimes and received a sentence of 51-years-to-life in prison, in accordance with the terms of the plea agreement. (45 3rd SCT 13154-13156.)

information also alleged that Self inflicted great bodily injury upon Ken Mills in Counts V through VIII (Pen. Code, § 12022.7). (4 CT 825-827, 831-832.)

The information separately charged Romero with: receiving stolen property [an ammunition pouch] from November 30, 1992, through December 17, 1992 (Count XX; Pen. Code, § 496); and the December 5, 1992, kidnaping and robbery of Robert Greer (Counts XXI & XXII; Pen. Code, §§ 209, subd. (b), & 211). In addition, for Counts XXI and XXII, the information alleged that a principal was armed with a firearm within the meaning of Penal Code section 12022, subdivision (a)(1). (4 CT 832-834).

On September 15, 1995, the trial court ordered separate juries for Romero and Self, and trial by jury commenced on December 11, 1995. (4 CT 917-918; 5 CT 979-980.) Subsequently, Self moved pursuant to Penal Code section 995 to dismiss Counts IV through VI, IX through XII, XV, and XXIII, as well as the Penal Code section 12022.7 enhancements on Counts V, VII, and VIII. The prosecution conceded Self's motion as to Count XXIII. (5 CT 983-1006.) On January 11, 1996, the court dismissed Count XXIII as to Self, kept Romero as the sole named defendant in Count XXIII, and denied the remainder of Self's Penal Code section 995 motion. (5 CT 1071-1072, 1080-1081.) Following the determination of numerous other pretrial motions,[2] the juries were sworn and opening statements were made on March 20, 1996. (6 CT 1233, 1237.)

On April 25, 1996, the jury found Self guilty as charged and found true all special circumstances and sentence enhancement allegations. (8 CT 1715-1723, 1733-1785.) On April 29, 1996, the jury found Romero not guilty as to the kidnaping and robbery of Alfred Steenblock (Count XIII, Pen. Code, § 209,

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2. The specific details of the various motions in both the guilt and penalty phase will be fully set forth and detailed in the briefing, as necessary, to respond to the issues raised by Self and Romero.

subd. (b); Count XIV, Pen. Code, § 211), but returned guilty verdicts on the remaining charges and found true all special circumstances and sentence enhancement allegations. (8 CT 1724-1732, 1786-1835.)

On May 6, 1996, the penalty phase began, and the juries returned verdicts of death on May 28, 1996. (8 CT 1881-1882, 1961; 9 CT 2025-2030, 2086E-2086G.)

On August 28, 1996, the court denied appellants' motions under Penal Code sections 190.4, subdivision (e), and 1181, subdivision (7), declined to modify the verdict or grant a new trial, and sentenced appellants to death on each of the murder counts. (Counts I - III; 9 CT 2148, 2157, 2164-2173.) The court also sentenced appellants to consecutive one-year terms on the murder counts' Penal Code section 12022, subdivision (a), enhancements. (9 CT 2148-2149, 2157-2158, 2181-2184.) With regard to the remaining non-capital counts, the trial court sentenced Self to five life terms, plus 21 years, and Romero to four life terms, plus 15 years and 8 months, imprisonment. (9 CT 2148-2154, 2157-2163; 45 3rd SCT 13097-13101, 13140-13146, 13161-13164C.)

This appeal is automatic.

STATEMENT OF FACTS

Guilt Phase

In the fall and early winter of 1992, appellants Christopher Self, then 18 years old, and Orlando Gene Romero, then 21 years old, lived with their maternal grandmother on Baily Street in Perris, which was also near the home of their mother and stepfather, Maria and Philip Self.[3] (37 RT 5586; 39 RT

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3. Appellants are brothers and share the same mother and father, but at some point, Self legally changed his last name from Romero to his stepfather's last name of Self. (45 3rd SCT 12942, 13053.)

5880-5881; 42 RT 6403-6405, 6409; 45 3rd SCT 12930, 12960, 13054.) In September 1992, appellants met Jose Munoz, who recently moved to Perris from San Diego and lived with his sister on nearby Bonham Street.[4] (37 RT 5574-5575; 39 RT 5878-5881; 40 RT 6049-6050.) Munoz, then 21 years old, left San Diego in an attempt to end his drug use and to get away from local police.[5] (37 RT 5573-5575, 5608; 40 RT 6049-6053.) After their meeting in the early fall, appellants and Munoz socialized regularly and used alcohol and crystal methamphetamine together. (34 RT 5253-5259; 39 RT 5936, 5939-5940; 40 RT 6048-6049, 6117-6118, 6122, 6141, 6155-6156, 6237; 2 3rd SCT 298-299, 324-326; 45 3rd SCT 12924, 12935, 12964, 13058.) Daniel Chavez, a boyfriend of Munoz's cousin, also lived at Munoz's sister's house and likewise became acquainted with Self and Romero. (39 RT 5894, 5898; 2 3rd SCT 279, 297.)

At the outset of their crime spree, appellants possessed a sawed-off semi-automatic Remington .22 caliber rifle and a sawed-off "single-shot" .22 caliber rifle. Self purchased the Remington in early September during a trip to San Diego with Munoz. The Remington was designed as a semi-automatic, but due to a malfunction, a new round would not load into the chamber automatically after firing unless the weapon was aimed upwards. Self and Munoz knew about the malfunction at the time of purchase, although it appears Romero did not know, at least initially. The second weapon, referred to during testimony

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4. Munoz's sister was also friends with Romero's girlfriend, Sonia Alvarez. (39 RT 5896, 5951.)

5. In San Diego, Munoz used crystal methamphetamine on a regular basis and stole cars with friends. He and his friends targeted cars left by sailors as they went out to sea, knowing it would be months before the cars were reported stolen. He stopped stealing cars several months before moving to Perris, but still used drugs heavily. Although he abstained from methamphetamine for a few weeks after his move to Perris, he quickly resumed its use. (37 RT 5608-5610; 40 RT 6049-6053, 6056; 41 RT 6284-6285.)

at trial as the "single-shot," also malfunctioned. In order to re-load the single-shot, the user had to pry the action back with a knife or other tool and manually place a round in the chamber. The single-shot often misfired, and when it did work, the empty casing needed to be removed manually. (39 RT 5883-5884, 5912-5913; 40 RT 6174-6177, 6183-6185; 2 3rd SCT 281, 293; 45 3rd SCT 13044-13045.)

As for vehicles, Romero often drove his girlfriend Sonia's car, a Dodge Colt, and Self owned an Oldsmobile, which he bought with insurance proceeds he received on his 18th birthday. (32 RT 5044-5047; 37 RT 5676-5679; 39 RT 5882, 5896, 5927, 5936, 5955, 5957-5958, 5976-5977; 42 RT 6406-6408; 45 3rd SCT 12929-12931, 12943, 12955.)

Robbery Of William Meredith, October 8, 1992 (Count IV)

In the late evening of October 8, 1992, Self, Romero, and Munoz were driving around in Self's car, looking for an "easy target" to rob or carjack. At approximately 10:30 p.m., they came upon William Meredith's red 1991 Nissan Pathfinder, which was parked near the Sam's Club on Day Street in Moreno Valley. Meredith was sitting in the driver's seat and another man was in the front passenger's seat. The passenger's white compact car was parked next to the Pathfinder. Romero, who was driving, parked Self's car behind the Pathfinder, and then he and Self exited the vehicle, each armed with one of the .22 rifles. Munoz stayed behind in Self's car. (32 RT 5018-5021; 39 RT 5881-5887.)

Romero approached the Pathfinder's driver's side and pointed his gun at Meredith's face. Romero ordered Meredith to turn off the car, come around to the front of the vehicle, and empty his pockets on the hood. Scared, Meredith exited the Pathfinder, emptied his pockets, and placed his wallet and money clip containing $30 onto the hood. Romero then demanded that

Meredith drop his pants around his ankles, step behind a nearby guardrail, and lie down until appellants left the scene. Meredith complied. Likewise, Self pointed his weapon at the passenger and ordered him out of the vehicle and onto the ground. Self attempted to start the compact car next to the Pathfinder, but it would not turn over, so he fled with Munoz in his own car, while Romero made off with the Pathfinder. (32 RT 5020-5024; 39 RT 5887-5889; 2 3rd SCT 315-317; 45 3rd SCT 13037.)

When appellants and Munoz returned to Self's house, they rummaged through Meredith's wallet and found a PIN to one of his Visa cards. They initially used the card to buy gas, and later, Munoz, accompanied by Chavez, used the card to make two $100 withdrawals from an ATM. Munoz withdrew a total of $200, but he told the others he only withdrew $100. The men split the disclosed $100 four-ways, and Munoz pocketed the undisclosed $100 for himself. As for the Pathfinder, appellants stripped several parts, took it off-roading, and then pushed it down an embankment in a rural area known as "Cadillac Hill." Police later recovered the vehicle, which was completely totaled. (32 RT 5026-5030, 5064-5071; 33 RT 5084-5088; 39 RT 5889-5894.)

During his interview with police, Romero admitted to carjacking Meredith and his account of the crime was consistent with that of Munoz and Meredith.[6] (2 3rd SCT 315-317.) Police investigators also recovered a part from Meredith's Pathfinder and a receipt from one of the ATM transactions inside Self's car.[7] (32 RT 5035-5038, 5041-5042, 5049-5051, 5059-5060.)

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6. The Romero jury heard Romero's taped police interview (38 RT 5864-5865; 2 3rd SCT 275-328), the Self jury heard Self's taped police interview (43 RT 6607; 45 3rd SCT 13053-13082), and both juries heard Munoz's taped statement to police (41 RT 6349; 42 RT 6367, 6369, 6372; 45 3rd SCT 12911-13052.)

7. A box in the front seat of Self's car also contained 261 rounds of .22 caliber ammunition, and a .22 caliber expended shell casing. (32 RT 5038-

Murders Of Joey Mans And Timothy Jones, October 12, 1992 (Counts I & II)

Four days later, on the night of October 11, 1992, Self, Romero, Munoz, and Chavez decided to "go out stealing again," taking along the same .22 caliber rifles used in the Meredith robbery just a few days prior. Romero drove the group in his girlfriend Sonia Alvarez's Dodge Colt. Munoz made masks for everyone from a pair of his sister's stretch pants, but only Munoz ended up wearing the disguise. As they drove around that evening looking for a victim, Romero announced he had a feeling someone was going to die that night. He said it could be one of them, but more than likely it would be somebody else.[8] (39 RT 5895-5901; 45 3rd SCT 12970-12971.)

After driving around all night without finding an agreed-upon victim, Romero suggested watching the sunrise at a hilltop in the Lake Mathews area. It was now in the early morning hours of October 12, 1992. When they arrived at the hilltop, the group spotted two men, best friends Joey Mans and Timothy Jones, in an older-model Subaru station wagon. Romero proposed robbing them and Self agreed. At first, Munoz and Chavez disagreed with Romero's plan because the Subaru was old and inexpensive, and they did not believe Mans and Jones had anything worth taking. But in the end, Munoz and Chavez decided to participate. (33 RT 5184-5185; 38 RT 5719; 39 RT 5898-5903; 45 3rd SCT 12971.)

Romero, armed with the Remington .22, approached Mans at the driver's side, and Munoz, armed with the single-shot .22 and a box full of rounds in his pocket, approached Jones at the passenger's side of the Subaru. Romero pointed his weapon at Mans, ordered him out of the vehicle, and had him drop

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5039.)

8. In his interview with police, Romero said he did not recall making such a statement. (2 3rd SCT 283-284.)

his pants, telling him, "This is so you don't run." Romero then lit Mans a cigarette, put it in his mouth, and advised him to "relax," assuring him "everything was going to be all right." Meanwhile, Munoz ordered Jones out the vehicle and told him to hand over his wallet, which Munoz recalled having some sort of emblem on it. After Jones complied, Munoz ordered Jones to lie down, handed Chavez the single-shot .22, and began examining the wallet and the inside of the vehicle. (39 RT 5903-5908; 40 RT 6087-6088; 42 RT 6539; 45 3rd SCT 12972.)

Munoz took everything out of Jones' wallet and, not finding any money, dropped the wallet and its contents back on the vehicle seat. He then began to search the rest of the Subaru. To open the trunk, he used Mans' key ring, which had a unique shark bottle opener attached to it. Munoz did not find much worth taking in the Subaru, but he did grab a box containing some speakers, leather boots, cologne, paperwork, and pornographic magazines. (33 RT 5185-5186; 39 RT 5907-5910, 5922; 45 3rd SCT 12972-12973, 13048-13050.)

While Munoz scoured the vehicle, Romero ordered Mans to lie down next to Jones and began telling Chavez to "shoot." Both Romero and Chavez had their weapons pointed down toward the victims. Thinking Romero was just trying to scare Mans and Jones, Munoz stayed near the car but told Chavez, "Don't shoot." Immediately thereafter, Romero shot Mans in the back, killing him. Romero then tried to shoot Jones, but because the Remington .22 was still pointed downwards[9], a new round did not load into the chamber and all Romero heard was a "click" after he pulled the trigger. Romero pulled the

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9. As previously discussed, the Remington was designed as a semi-automatic, but due to a malfunction, a new round would not load into the chamber automatically after firing unless the weapon was aimed upwards. Self and Munoz knew about the malfunction at the time of its purchase in San Diego, but it appears Romero did not know this at least at the time of the murders of Mans and Jones.

trigger again, but again, it misfired. (39 RT 5910-5913; 40 RT 6089-6095; 45 3rd SCT 12973-12974.)

Seeing an opportunity for escape, Jones got up and took off running down the hill. Romero and Self told Chavez to shoot. Chavez fired and apparently missed, so Self and Romero chased after Jones down the hill. Romero still had the Remington .22, and Self was unarmed. (39 RT 5914-5915; 45 3rd SCT 12974, 12977.)

While Romero and Self chased Jones, Munoz approached Mans' body. Believing Romero had only fired a warning shot and that Mans was still alive, Munoz attempted to reassure him. When Mans did not respond, Munoz touched him on the back and discovered the bullet wound. Realizing Romero shot Mans, Munoz "panicked." (39 RT 5915-5917; 40 RT 6101-6102; 45 3rd SCT 12974, 12978.)

Munoz heard at least two shots from down the hill, and after two to three minutes, Romero returned to the hilltop unarmed and told Munoz to drive. Munoz refused, so Chavez got in the driver's seat. Less than a minute later, Self returned, holding the Remington. As they were driving away, Romero looked back toward Mans' body and said he thought he saw Mans move. Romero wanted to return and shoot Mans again, but Munoz told Chavez to keep driving. Romero remarked that if they ever were arrested, it would be Munoz's fault because the victim survived. As they kept driving down the hill, Munoz looked through the box he obtained from the Subaru and threw the victims' keys and leather boots out of the driver's side window of the car. (33 RT 5186-5187; 39 RT 5917-5922; 40 RT 6095-6098; 45 3rd SCT 12977-12978.)

The group returned to Self and Romero's grandmother's house on Baily Street, where they went through the rest of the box. While there, Self described how he caught up with Jones on the hill, beat him down with his fists, and hit

him with a "pipe or something" on the head. When Romero arrived, Self grabbed the Remington .22 from him and put the weapon up to the back of Jones' head. Because Jones had his hands behind his neck, Self said he tried to jam the gun through Jones' fingers to shoot him, but growing tired of that, he ended up just shooting at Jones until he moved his hands and then shot him in the head. (39 RT 5922-5925; 40 RT 6098-6099; 45 3rd SCT 12975.)

The bodies of Mans and Jones were discovered by a Riverside Police Department helicopter later that afternoon. Mans' body was lying face-down next to the Subaru, and he was partially clothed from the waist up. Police found a cigarette lighter clutched in his hand and a burnt cigarette just next to his hand. Mans had a visible gunshot wound to his back, and due to the presence of gunshot residue found on his shirt, it appeared to be a contact wound, *i.e.*, it appeared the muzzle of the weapon was fired close to or in contact with Mans' body. (32 RT 5089-5090; 33 RT 5100-5104.) Police found one .22 caliber Federal-brand shell casing near Mans' body, as well as several other casings of varying calibers[10] in the hilltop area, some of which were discolored and appeared to have been there for awhile. (33 RT 5107-5108, 5126, 5166-5171.)

Police discovered Jones' fully-clothed body approximately 150 yards away from the Subaru, lying face-down on a rocky hill in very uneven terrain. Jones had horizontal scrapes and abrasions on his back above the belt line, one bullet wound to the left side of his head, and two additional bullet holes to the rear of the neck area. Black smudges found around the neck area indicated Jones was shot at extremely close range, with the barrel of the gun either touching or close to touching the back of his neck. (33 RT 5133-5135.) Police found one expended .22 caliber Federal-brand shell casing next to Jones' body,

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10. Police found two additional .22 caliber casings, three .45 caliber casings, and twelve .44 caliber casings. (33 RT 5107-5108, 5137-5139.)

and another .22 caliber Federal-brand shell casing under Jones' body. Ballistics tests showed that the .22 casings found next to Jones' body were fired from the same semiautomatic weapon as the .22 casing found near Mans' body. (33 RT 5137-5139, 5144-5145; 43 6582-6583.)

Police found several shoe prints with a distinctive circle and diamond pattern both near the vehicle and Mans' body, at the edge of the hilltop area, and just next to Jones' body. (33 RT 5110-5115, 5135, 5143.) These shoe prints were consistent with the size and sole pattern of the British Knights tennis shoes worn by Self at the time of his arrest. (38 RT 5728-5729, 5733, 5831-5838.) Munoz testified Self wore these same British Knight tennis shoes during the Mans and Jones murders. (39 RT 5925; 45 3rd SCT 13040.) Police also found several shoe prints at the top of the hill and near Mans' body that were consistent with the size and sole pattern of the Nike Air Jordan tennis shoes recovered from Chavez after his arrest. (33 RT 5116-5117; 37 RT 5671-5674; 38 RT 5839-5843.) A tire impression on the hilltop area was consistent with one of the front tires on Alvarez's Colt. (38 RT 5845-5846.)

On the front passenger's seat of the Subaru, officers found wallet-sized paperwork and identification belonging to Jones. Mans' identification card was located on the driver's seat, and his shark bottle-opener was also found in the vehicle. (33 RT 5120-5122, 5174-5175, 5186-5188.) Leading down the road off the hilltop, police recovered the Subaru keys and leather boots, both belonging to Mans, that Munoz told police he tossed out the window after the murders. (33 RT 5171-5174, 5186–5187.)

An autopsy on Mans' body revealed he died from a single gunshot wound, and the presence of gunpowder on the skin indicated it was a contact wound. The bullet entered the left side of Mans' back, perforated his spinal column, lacerated his spinal cord, ripped through his right lung and heart, and came to rest in the right front chest area, where the coroner recovered a .22

caliber projectile.[11] This single gunshot wound likely paralyzed Mans immediately and killed him in a matter of between five and twenty minutes. (38 RT 5722-5723, 5740-5745.)

An autopsy on Jones' body revealed he died from multiple gunshot wounds, including two to the head, one to the neck, and one to the shoulder. (38 RT 5745, 5763.) In addition to the gunshot wounds, Jones' body had a number of abrasions and contusions on the lower back above the belt line, the left hip area, the palm of the right hand, and the right wrist. The abrasions appeared to have occurred at or about the time of death and were consistent with running through thickets and tumbling down a rocky or rough area. (38 RT 5745-5749.)

In the first wound to Jones' skull, the bullet entered his head behind the left ear and embedded itself in thick skull bone, where the coroner recovered a .22 caliber projectile. Although the bullet did not penetrate Jones' brain and the wound was not necessarily fatal, a large percentage of people would likely die from such a skull fracture. There was gunpowder on the jacket collar adjacent to this wound, but no soot on the skin itself. (38 RT 5727, 5750, 5753, 5755.)

In the second wound to the head, the bullet entered two inches up and two inches behind the left ear, tore through Jones' brain and brain stem, and lodged in the bone above his right eye, where the coroner recovered a .22. caliber projectile. This wound would have been fatal because it disrupted the

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11. In his opening brief, Romero states, "Mans was killed by a single bullet to the back, even though it apparently was of only .22 caliber." (RAOB 19.) Although Romero chose to shoot Mans with "only" a .22 caliber weapon, Romero also chose to shoot Mans near his major, life-sustaining organs, where ultimately the bullet ripped a hole through Mans' heart, halting his body's ability to pump blood and ending his life.

brain to such a large extent it could no longer function. A hole in Jones' jacket corresponded with the wound's entrance area. (38 RT 5725-5726, 5756-5759.)

In the wound to the neck, a bullet entered the back of Jones' neck and exited on the neck's right side. Gunpowder surrounded the entrance to the wound, which indicated the weapon was fired in contact with or at close range to Jones' neck. This wound would not have been fatal. In the wound to the shoulder, the bullet passed through Jones' jacket, entered the back side of his left shoulder, and exited the front side of the left shoulder. This wound probably was not fatal with medical attention. There was gunpowder near the corresponding bullet hole on Jones' jacket, but none on the skin itself. (38 RT 5759-5763.)

In his subsequent interview with police, Romero admitted robbing Mans and Jones, denied shooting either of them, and painted Chavez as the primary instigator and aggressor. However, Romero's story had inherent contradictions and/or directly contradicted the evidence. (2 3rd SCT 276-299.) Initially, Romero claimed Munoz ordered him to shoot Mans, Munoz shot Mans after Romero refused, and then Chavez grabbed Romero's gun to chase a fleeing Jones. (2 3rd SCT 278.) But later on, Romero said either "Danny [Chavez] or Jose [Munoz]" told him to shoot Mans, and when he refused, it was Chavez who took his gun (the single-shot) and "popped the one dude [Mans] in the back."[12] (2 3rd SCT 288-290, 292.) Romero also claimed that he and not Munoz confronted the passenger (Jones), patted him down, and did not find a

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12. Romero's claim that Chavez used the single-shot to kill Mans also seemed to contradict the ballistics evidence, which established that the three .22 casings found near Mans' and Jones' bodies all came from the same semi-automatic weapon. (43 RT 6583.) The Remington was a semi-automatic rifle, while the "single-shot" was, as indicated by its name and the description given by Munoz and Romero, not semi-automatic. (39 RT 5883-5884, 5912-5913; 40 RT 6174-6177, 6183-6185; 2 3rd SCT 281, 293; 45 3rd SCT 13044-13045.)

wallet or anything else on him. Romero asserted Munoz dealt with the driver (Mans). (2 3rd SCT 277, 285-288.) But the evidence showed that Jones had a wallet on him and this wallet was opened and emptied. Likewise, the evidence indicated it was Munoz who dealt with Jones and his wallet because Munoz was able to specifically describe the wallet and its contents. (33 RT 5120-5122; 39 RT 5903-5908; 42 RT 6539; 45 3rd SCT 12972.)

Romero further asserted that Munoz, Chavez, and Self chased Jones down the hill while he (Romero) stayed up on the hill to make sure Mans (who had already been shot) did not go anywhere. (2 3rd SCT 290.) While Romero admitted that one of the shoe prints found on the hill by Jones' body "look[ed] like" his shoes, he claimed he did not remember what he was wearing that night and someone else must have been wearing his shoes because they all wore each other's clothes on a regular basis. (2 3rd SCT 290-292, 297.) Romero also did not remember anyone giving Mans a cigarette, nor did he recall the keys or boots being thrown out the window as they made their way down the hill after the murders. (2 3rd SCT 288, 298.)

Attempted Murder Of Kenneth Mills And Related Crimes, October 23, 1992 (Counts V, VI, VII, & VIII)

Around midnight on October 22, 1992, Kenneth Mills and his girlfriend Vicky Ewy were driving along Moreno Beach Drive in Moreno Valley, on their way to watch a lightning storm. Mills was driving Ewy's red Nissan and Ewy was in the front passenger's seat. Appellants and Munoz were also driving on Moreno Beach Drive that evening, looking for a car to "jack." Romero was driving Alvarez's Dodge Colt, Munoz was in the front passenger's seat, and Self was in the rear. For weapons, they brought along the .22 caliber single-shot and a .20-gauge shotgun Self recently purchased from a neighborhood acquaintance. The shotgun was a single-shot, New England firearms brand,

and sawed off in front and in back. (33 RT 5191-5192; 39 RT 5926-5930; 45 3rd SCT 12933.)

After appellants and Munoz spotted Ewy's red Nissan coming towards them, Romero made a U-turn and began driving in front of Mills. At the next stop sign, Romero pulled his car to the right as if he were going to make a right turn, but after Mills pulled up to the stop sign and continued going straight, Romero followed him, immediately illuminating his high beam headlights. At the next stop sign, Mills planned to take a rolling stop and turn right to see if the car kept following him, but appellants had other plans for him. (33 RT 5192-5195; 39 RT 5930-5931, 5935.)

As the two cars reached the second stop sign, Mills looked over his left hand shoulder, saw Romero's car, and a person pointing a gun at him through the open passenger window. No more than a second later, he saw a muzzle flash, heard a pop, and felt something hit him across the face. Unable to see out of his right eye and barely able to see out of his left eye, Mills stepped on the accelerator and fish-tailed around the corner, while Ewy made a frantic prayer. Romero followed them around the corner and continued to follow them after Mills made another left turn in an attempt to evade his attackers. Finally, after Mills turned into a golf cart path (thinking it was a driveway), Romero ceased his pursuit. (33 RT 5195-5198, 39 RT 5931-5934.)

When police arrived at the scene, Mills had blood on his face and was holding a rag to his eye. He was in considerable pain, and Ewy was distraught and crying. At the hospital, Mills told officers he saw a man from the waist up pointing a gun at him, that the muzzle blast seemed to come from the front passenger window, and there were at least two occupants, a driver and a front passenger, in the attackers' car, but he could not identify or describe any of the occupants. As a result of the shotgun blast, Mills lost his right eye, portions of

his upper and lower lids were blown off, and he suffered permanent scarring to his face. (33 RT 5196, 5199-5201, 5215-5217.)

Police collected .20-gauge Remington-brand shotgun wadding from the floorboard of Ewy's car, as well as lead shotgun pellet fragments from the passenger door and passenger floor. There were pellet strike marks on the upholstery of the passenger door, but no strike marks on the head liner or inside roof. The driver's side window was shattered, with a hole in the top of the window where the shot entered the vehicle. The shot exited through the lower part of the passenger window, near the door frame and towards the front.[13] (33 RT 5207-5210; 5219-5224; 38 RT 5825-5826.) A later search of Alvarez's Colt uncovered shotgun pellets in the rear seat, and a briefcase in the trunk containing several shotgun shells. (34 RT 5324-5325; 37 RT 5687-5697.) The inside of another briefcase in the trunk contained Self's first name "Chris" written in block-letter graffiti. (37 RT 5687-5688.)

In his statement to police and during his testimony at trial, Munoz recounted how he, Self, and Romero chose Mills and Ewy "at random" and intended to carjack them. Munoz testified that when the group pulled up next to Mills, Romero told Munoz to "shoot 'em." Munoz pointed the .22 caliber single-shot out of the passenger side window towards his intended victims, but he "froze" and never fired the weapon. Instead, Self leaned out of the rear driver's side window and fired his .20-gauge shotgun over the top of the Colt, blasting out the Nissan's window. Munoz admitted that Mills probably saw him aim a weapon at him through the front passenger window, but insisted

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13. Mills pushed out the shattered passenger window after he stopped the vehicle on the golf cart path, but before he did so, there was a hole in the passenger window about two or three inches up from the door frame and about two-thirds forward. (33 RT 5208-5210.)

Mills was mistaken that the actual blast came from Munoz's weapon.[14] When Mills drove away, Romero said they were going to "take him out" and told Munoz to shoot as they gave pursuit. Munoz admitted he fired the .22 single-shot toward the Nissan. Munoz said they pursued Mills and Ewy for quite a distance until their victims pulled into an apartment complex and began honking their horn. (39 RT 5930-5935; 45 3rd SCT 12992, 13010-13027.)

In Romero's statement to police, he admitted driving the Colt that evening, remembered "somebody" shot at Mills, and described pursuing Mills and Ewy until they drove into the apartment complex. Romero believed their intent was to carjack Mills and Ewy, but he "wasn't sure." He also believed Munoz was "probably" in the Colt's rear seat with the shotgun and could not remember if either Self or Chavez was in front seat. Romero said he was not sure Mills was hurt because he kept driving, and someone in the Colt told him to chase Mills because "you can't leave something like that." Romero claimed he was "scared" and stopped the chase once the victims pulled into an apartment complex and started honking the horn. (2 3rd SCT 313-315.)

Attempted Murders Of Paulita Williams And Randolph Rankins, October 26, 1992 (Counts IX & X)

In the early morning hours of October 26, 1992, Self, Romero, and Munoz drove to a neighbor's house in the Colt looking to purchase methamphetamine. The neighbor introduced appellants and Munoz to Randolph Rankins, a.k.a. "Pint" or "Half-Pint," who acted as a runner for drug

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14. He also insisted that Chavez would back up his story because Romero told Chavez how Self shot Mills by leaning out the window. (45 3rd SCT 13023, 13025.)

dealers and knew where to buy methamphetamine.[15] Rankins hopped in the back seat of the Colt with Munoz, while Romero drove and Self sat in the front passenger seat. They went to a few houses looking for drugs, and at the second house, Rankins was given $20 and returned with rock cocaine. Romero was very upset that Rankins returned with rock cocaine instead of methamphetamine, although Munoz seemed willing to take the drugs. Rankins told them he could not take the drugs back and refused to give a refund. Romero angrily told Rankins he would be seeing him later. Rankins then took his cut of the drugs and left in a white Volkswagen Scirocco with Paulita Williams, a woman he met inside the house. Rankins and Williams subsequently smoked Rankins' share of the rock cocaine. (34 RT 5227-5229, 5253-5260, 5271; 39 RT 5935-5941.)

Appellants and Munoz returned to appellants' grandmother's house where they confirmed that Rankins had supplied them with rock cocaine and not methamphetamine. Romero was furious. He told Self and Munoz, "We're going to smash it up, we're gonna do lines, we're gonna go looking for him, and either he's gonna give us our money back or we're gonna take him out." Self agreed with Romero and seemed "pumped up" about his brother's plan. After snorting lines of rock cocaine, appellants and Munoz departed in the Colt, looking for Rankins and taking along the .22 caliber single-shot and the .20-gauge shotgun. (39 RT 5939-5940.)

After driving around for about 15 minutes, appellants and Munoz spotted Rankins and Williams in the Scirocco driving toward them. Romero

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15. Rankins has several prior convictions for mainly drug-related crimes and was rearrested just before trial on the charge of being under the influence. He was given a four-month jail sentence, but also risked being returned to prison on a parole violation. In exchange for his truthful testimony at appellants' trial, the prosecutor agreed to contact his parole agent and ask for reinstatement of his parole with 120 days jail time. (34 RT 5264-5268.)

stopped the Colt in front of Williams, got out of the driver's side, and pointed the single-shot at the Scirocco. Munoz, who was wearing a ski mask, got out of the Colt's rear seat and stood nearby holding the shotgun. Williams stopped, put her car into reverse, and proceeded to drive in a big circle toward the Colt. Munoz then fired the shotgun at the Scirocco, blowing out the driver's side window and hitting Williams on the left side of her back.[16] (34 RT 5230-5231, 5238-5239, 5246-5248, 5261-5262; 39 RT 5941-5943.)

Once Munoz fired, Rankins jumped out of the passenger seat and ran away. Romero had the rifle pointed at Rankins as he ran away, and Rankins heard three or four more shots fired from behind him. Rankins ran through a field and as shots were fired, he fell down, hoping the shooting would stop. He heard one of his attackers say, "We got him down, let's go finish him off." Rankins started running again and he heard more shots. He finally found his way inside a Dumpster, where he hid for several hours and at one point saw appellants and Munoz drive by in the Colt. (34 RT 5262-5263; 39 RT 5946.)

As Rankins fled, Self approached Williams, who was still in the driver's seat, and began slashing her arm with a knife. Williams was holding her hands up to protect herself and screaming, and Self was laughing and seemed to enjoy stabbing her. Munoz told Self to get out of the way and pointed the shotgun at Williams' head. Williams was screaming, "Please don't kill me," but Munoz pulled the trigger and shot Williams in the face. Before firing the shotgun, either Munoz or Self told Williams, "Die, bitch." (34 RT 5231, 5239-5242, 5249-5250; 39 RT 5943-5946.)

After Munoz shot her, Williams leaned over in the seat, hoping they would not shoot again. Once appellants and Munoz left the scene, Williams

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16. Rankins testified he believed the Colt's driver (Romero) shot out the driver's side window, but Munoz testified he actually shot at the Scirocco first and that, although Romero had his rifle aimed at the Scirocco, Romero told him later that the single-shot had misfired. (34 RT 5261; 39 RT 5941-5943.)

drove to a friend's house for help, fearing she would die from her injuries. Williams survived and suffered a punctured left lung, a nine-inch gash to her left arm, a shorter laceration on her palm, a Y-shaped gash to her wrist, deep scarring from shotgun pellets across the top of her shoulder, and a large one-inch wide and six-inch long scar to her back from more shotgun pellets. The pellets are still present in the bones of her shoulder, along her spine, and in her shoulder muscles, causing constant pain. Police responding to the shooting recovered shotgun wadding and a shotgun plug inside the Scirocco, as well as blood-stained glass fragments and vehicle tracks in the shape of a half-circle at the crime scene. (34 RT 5233-5237, 5294-5295, 5296-5305.)

The District Attorney did not know about the Williams shooting until Munoz confessed to the crime during plea negotiations. Munoz admitted he aimed at Williams' head and that he intended to kill her, and at the time of his confession, he actually believed Williams was dead. Munoz claimed he did not see the effect of the shotgun blast because he closed his eyes when he pulled the trigger, but Self later told him with great amusement that the shotgun blast "splattered her brains all over the windshield." Munoz did not recall anyone, including himself, saying "Die, bitch" or anything else before shooting Williams. (39 RT 5946-5947, 6030-6035.)

After shooting Williams, appellants and Munoz drove around looking for Rankins, but not finding him, they drove back to Munoz's sister's house. Romero and Munoz were panicked that Rankins escaped, but Self seemed relatively unaffected, eating cereal and humming while his brother stood watch outside. Munoz, believing Rankins would seek revenge and "shoot up" his sister's house, told his sister to leave the house for a few days and informed her of some the group's criminal activities. (39 RT 5947-5951.) Munoz also

obtained the Remington .22 caliber rifle for protection.[17] (39 RT 5953-5954.) At some point, Munoz attempted to modify the Remington .22 to make it fully automatic, but he was unsuccessful and ultimately made the weapon nearly inoperable.[18] (39 RT 5971-5974; 40 RT 6180; 43 RT 6585-6587; 45 3rd SCT 13047-13048.)

A few days later, Romero confronted Munoz about his disclosures to his sister. Munoz's sister had told Romero's girlfriend, Sonia Alvarez, about Munoz's admissions to criminal activities with Self and Romero. Romero warned Munoz that his brother Self wanted to "take him out," but Romero believed Munoz could "make it right" by telling his sister everything he said was a lie. Munoz later told his sister that everything he said was true but she needed to tell Alvarez it was all a lie. Munoz then refrained from going out with appellants for a period of about three weeks. In the meantime, appellants continued committing crimes. (39 RT 5951-5954; 45 3rd SCT 12931-12932.)

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17. This was the same Remington .22 used in the Lake Matthews shootings. Self had given the .22 to a neighbor, Al Cole, to use as collateral for a $20 loan. Munoz obtained the Remington from Cole after the Williams shooting. (39 RT 5953-5954.)

18. The Remington .22 was later examined by a ballistics expert who testified the gun was a "piece of garbage" and in "pretty bad shape." The safety button was missing, the stock was cut off, the grip and tubular magazine plunger was missing, the firing pin was no longer completely recessed into the firearm, and the trigger was inoperative. The expert testified that he was unable to match the Remington .22 to any of the bullets from any crime scene (including the Mans and Jones murders where the gun was apparently used), but he also testified that if the Remington had been modified since the crimes were committed, then it would leave different rifling impressions and any comparisons were futile. (43 RT 6585-6589.)

Burglary And Vandalism Of Magnolia Center Interiors, November 14, 1992 (Counts XI & XII)

At about 6 p.m., on November 13, 1992, James Murphy, the owner of Magnolia Center Interiors, locked the doors of his business for the night. There was no damage to the store's interior and the back door's glass panels were intact. However, when Murphy returned to his business the following morning, the first panel of glass on the back door was broken out and there was massive damage to the interior of his store. File drawers were turned upside down and emptied out, the numbers "666" and other graffiti were spray painted on the walls, new furniture had been stabbed with scissors and spray-painted, and the vandals had emptied a fire extinguisher all over fabric, carpet, and textile samples. Shoe prints resembling the "British Knights" prints found at the Mans-Jones murder scene were also found in the fire extinguisher dust at Magnolia Interiors. (34 RT 5354-5355, 5362-5375; 1 SCT [Exhs.] 45-46.)

The office area was in shambles. The vandals sprayed glue all over and inside the computers and other office equipment, Murphy's certificates and diplomas were stomped on and destroyed, the photocopier and check imprinter were sealed with spray contact cement, and the combination lock was removed from an antique safe in an apparent attempt to open it. The antique safe sustained a significant amount of damage to its hinges, and next to the safe, there were several chisels and screwdrivers that had been beaten flat in the vandals' attempt to pry open the safe's hinges. The vandals also took a sonogram of Murphy's then-unborn son from his desk drawer, defaced it, stabbed it, and wrote "You're going to die" on the top of it. Other graffiti on the walls read, "Just when you thought," "Now is then," and "Now you die." The graffiti found inside Magnolia Interiors matched the graffiti on a British Knights shoe box recovered from Self's Oldsmobile and a briefcase bearing

Self's first name found inside Alvarez's Colt. (32 RT 5039-5041, 34 RT 5354-5355, 5362-5375; 37 RT 5687-5688; 1 SCT [Exhs.] 15-16, 100-103, 319-320.)

The vandals stole a master set of keys, a set of shop keys, a dummy grenade of World War II vintage, a scorpion encased in Lucite that acted as a paperweight, and some Indian head pennies valued at $200 to $300. The master keys were to high-rise buildings the business serviced in the evenings, but were not labeled. The total out of pocket expense from the damage was approximately $18,000. (34 RT 5375-5376.)

A police investigation determined the vandals entered by breaking the glass panels on the back door, putting their hand through the window, and opening the door. (34 RT 5355-5356.) Latent fingerprints obtained from one of the broken glass panels were analyzed and determined to match the index and middle fingers of Romero's right hand. (34 RT 5357-5359; 37 RT 5550-5555.) In a search of Self's room at his grandmother's house, police located a paperweight which had a scorpion encased in resin bubble, as well as a set of keys bearing a tag reading "Magnolia Center Interiors, Jim Murphy." Murphy later identified the keys as belonging to him, but the police never seized the paperweight so Murphy was unable to make an identification. (37 RT 5655-5657, 5660-5662, 5667-5669.)

Kidnaping And Robbery Of Alfred Steenblock, November 18, 1992 (Counts XIII & XIV)[19/]

In the early afternoon of November 18, 1992, Alfred Steenblock was eating a sandwich in his Pontiac Grand Prix, which was parked in the Mission Grove Plaza parking lot in Riverside. At around 1:15 p.m., Self approached Steenblock's open window, pulled up his sleeve, and stuck the barrel of a gun

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19. As previously noted, Self was convicted on these counts, but Romero was acquitted. (8 CT 1715-1835.)

within six inches of Steenblock's face. Self came from the direction of a vehicle parked behind Steenblock's car. Self ordered Steenblock to move over to the passenger's seat, got in the car, and proceeded to drive out of the parking lot. Self continued to hold the gun across his lap with his right hand. Steenblock offered Self his car if he let him go, but Self refused. (34 RT 5308-5313, 5318-5319.)

Self drove Steenblock's car about a quarter of a mile to where the street dead-ended at a field. On the way there, Self chatted with his victim, asking for Steenblock's name and reassuring Steenblock he would not kill him. Self appeared cool, calm, and like he knew what he was doing. The car that had been parked behind Steenblock at the shopping center followed them to the dead-end, and two people, one of whom was Chavez, got out of the car. Steenblock described the vehicle as a dark blue or black, earlier model Oldsmobile Cutlass or Buick Regal, similar to Self's car. Chavez joined Self with Steenblock, while the third assailant stayed behind at the other vehicle. (34 RT 5313-5315, 5318, 5331-5332.)

Self demanded Steenblock turn over his wallet, while Chavez demanded Steenblock's money clip and watch. Chavez appeared uptight, excited, and quite belligerent. Self took Steenblock's wallet from inside the car, pulled out an ATM card, and asked Steenblock for the PIN, saying, "We know where you live." Steenblock disclosed the PIN to Self, whereupon Self ordered Steenblock to empty the glove box. Steenblock complied and then gave Self his watch and money clip containing $80. (34 RT 5315-5317.)

Self and Chavez told Steenblock to walk into the field and stay there for at least one hour. Steenblock walked into the field and when he turned around, he found both cars were gone. He walked about to the shopping center where he had been kidnaped and called police and his wife. He immediately canceled his ATM and credit cards, and in doing so, he learned one of his cards had

already been used to withdraw money from an ATM machine in Sun City. In the trunk of Steenblock's car were his brief case with business papers, a cell phone, a full set of Lynx USA golf clubs, and a box of a dozen golf balls. (34 RT 5317-5318, 5321-5328.)

Shortly after the robbery, Munoz saw Romero unload golf clubs, golf balls, a cell phone, and a watch from the trunk of Alvarez's car, in the presence of Self and Chavez. Romero admitted he stole the items from someone. Chavez had the watch, and Self later used the cell phone to make telephone calls. (39 RT 5954-5957.)

Self and Romero left Steenblock's cell phone with a friend shortly before their arrest and the cell phone was later recovered by police. Steenblock's golf balls and briefcase were recovered in a search of Alvarez's Colt. In a search of Self's room at his grandmother's house, police found a good-quality golf bag and clubs, but did not seize the items so they were unable to be identified at trial. (37 RT 5631, 5659-5660, 5683-5687; 41 RT 6254-6256; 43 RT 6549-6550.) Steenblock's car was recovered about a year later. The engine components had been removed, mostly everything under the dash had been removed, only one wheel was on the car, and the trunk had been forced open. (34 RT 5337, 5350-5352.) At trial, Steenblock identified Self as the man who kidnaped and robbed him. (34 RT 5318-5319.)

Robbery Of Albert Knoefler, November 20, 1992 (Count XV)

In the mid-afternoon hours of November 20, 1992, 70-year-old Albert Knoefler was tending his beehives at Markham and Washington in Riverside. His 1987 Chevrolet Tahoe pickup truck was parked nearby. At about 3:30 p.m., Self, Romero, Munoz, and Chavez were driving in the Colt and spotted Knoefler at the beehives. The group was looking to steal again and decided on

Knoefler as their victim. (34 RT 5340-5341; 39 RT 5957-5959; 2 3rd SCT 310; 45 3rd SCT 12978-12980.)

Romero parked the Colt out of Knoefler's sight and then approached Knoefler at the beehives. Self, Munoz, and Chavez stayed back at the Colt. At first, Romero made pleasant conversation with Knoefler, walking with Knoefler alongside the beehives and asking him about his work. But before long, Romero disclosed his true intentions, and holding a sawed-off shotgun, told Knoefler he needed the keys to the Tahoe. Knoefler responded, "I was wondering why you were being so nice to me," and gave Romero the keys. (34 RT 5341-5342; 39 RT 5959-5962; 2 3rd SCT 310; 45 3rd SCT 12978.) At this point, Munoz, wearing a ski mask, joined Romero and Knoefler at the beehives. Munoz had grown anxious waiting for Romero and decided to see what was taking him so long. Munoz got inside the Tahoe and Romero handed him the shotgun. Romero then told Knoefler he needed money for gas, and Knoefler gave Romero some cash from his wallet.[20/] Thereafter, Romero got in the Tahoe with Munoz and they drove off. (34 RT 5342-5345; 39 RT 5961-5964; 2 3rd SCT 310; 45 3rd SCT 12978-12980.)

Romero and Munoz drove the Tahoe back to where Self and Chavez were waiting in the Colt, and then they drove to an open field, with Self and Chavez following behind. At the field, Munoz looked through the truck but did not find anything to take, so Romero placed a fire extinguisher on the gas pedal, put the Tahoe in drive or neutral, and let the truck roll down a hill. After

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20. Knoefler testified he gave Romero $40 or $50 and Romero said, "That's enough," even though Knoefler had more money in his wallet. Munoz testified Knoefler at first offered only $25, but when Romero told Knoefler he would need all of it, Knoefler handed over more money. Munoz believed Romero stole about $75 from Knoefler. Munoz gave a similar account in his statement to police. Romero told police he took "whatever cash [Knoefler] had." (34 RT 5342-5343; 39 RT 5962-5963; 2 3rd SCT 310; 45 3rd SCT 12981.)

driving off in the Colt, the group used Knoefler's money to buy snacks, beer, and cigarettes. (39 RT 5964-5966; 2 3rd SCT 310; 45 3rd SCT 12981.)

In the meantime, Knoefler finished tending his beehives. Having no transportation home, he spoke to a young man walking by the area. The young man invited Knoefler into his house to use the phone, telling him, "My dad's a cop." The police then responded to the scene. About two weeks later, police recovered Knoefler's truck, which according to Knoefler, was "pretty well beat up." The alternator and other valuable parts were removed, the lights were vandalized, and only the driver's side window was intact. (34 RT 5345-5346.)

Romero confessed to robbing Knoefler during his interview with police. He originally intended to shoot Knoefler, but because Knoefler "reminded [him] of his grandpa," he just took his cash and truck. Romero said he left Knoefler with "water and everything he needed" and told him he would be "back in a few hours." Painting himself as the good Samaritan, Romero said he rolled Knoefler's truck down a nearby hill so that "if he went walking he'd find it at least." (2 3rd SCT 310.)

Robbery Of Jerry Mills, Sr., And Jerry Mills, Jr., And Receipt Of Their Stolen Property, November 21, 1992 (Counts XVI & XVII)

In the afternoon of November 21, 1992, Jerry Mills, Sr., and his 15-year-old son Jerry Mills, Jr., were target shooting two miles south of the Perris airport. Mills Sr. had four firearms in the back of his Nissan pickup truck: a .45 caliber Gold Cup Colt semiautomatic pistol with red sights, special grips, and an ammunition clip; a .22 caliber semiautomatic Ruger pistol with a 10-round clip; a .22 caliber Ruger convertible western-style single action revolver with two interchangeable cylinders; and a .22 caliber Ruger semiautomatic 10/22 rifle with a dark mahogany stock, leather sling, and telescope sight. He

also had a tool box, an ammunition box, two 10-round magazines, and one 25-round curved banana clip for the rifle. (35 RT 5382, 5390-5400; 2 3rd SCT 308-310.)

At around 12:30 p.m. to 1:00 p.m., Self, Romero, and Chavez drove up in the Colt and parked next to Mills' truck. Mills Sr. looked over and saw Self with a shotgun, pointing it directly in the victims' direction. In an attempt to protect his teenage son, Mills Sr. told Self, "Just take whatever you want." Mills and his son were then ordered to stand behind a telephone pole. While they stood behind the pole, Mills Sr. observed appellants and Chavez taking items out of his truck and loading them into the Colt. Self, still holding the shotgun but also now carrying Mills' .45 caliber Colt pistol in his belt, walked up to the telephone pole and asked Mills and his son for their money. After Mills Sr. opened his wallet, Self lifted about $150 from inside, wished his victims a merry Christmas, and walked away. (35 RT 5384-5388, 5403-5404; 2 3rd SCT 308-310.)

Self, Romero, and Chavez then split up, with two driving away in the Colt and one driving away in Mills' pickup truck. About a half an hour later, police found Mills' truck abandoned approximately one mile down the road. The keys were inside, but all of Mills' firearms and ammunition were stolen, as were his mobile phone adapter, radio, tool box, and ammunition box. (35 RT 5389-5400; 2 3rd SCT 308-310.)

Chavez later told Munoz that he, Self, and Romero robbed a father and son, and Munoz observed Self shooting Mills' .22 caliber semiautomatic Ruger pistol and .22 caliber Ruger revolver (which Munoz called the "cowboy gun") in Self's grandmother's back yard. Inside Self's room, Munoz saw Mills' .22 caliber Ruger rifle with the scope and banana clip, as well as Mills' ammunition box. Munoz's brother Ruben later observed Romero holding the .22 caliber Ruger rifle inside the grandmother's house. Self began carrying Mills' .22

caliber Ruger pistol with him "all the time" and he referred to it as "his gun." Likewise, Romero regularly carried Mills' .45 caliber Colt pistol, "liked it," thought it was "beautiful," and considered it "his gun." When Munoz once asked to see the .45 caliber Colt pistol, Romero told him "Fuck, no." Munoz said the .22 caliber Ruger revolver was eventually sold to a neighbor. (39 RT 5966-5971; 37 RT 5587-5588, 5590-5593, 5615; 2 3rd SCT 310, 326; 45 3rd SCT 12935-12936.)

Police later recovered the .45 caliber Colt pistol, the .22 caliber Ruger pistol, and the 25-round banana clip at the vacant house where Self and Romero were arrested. These items were found among identification belonging to Self and Romero. (35 RT 5390-5400; 37 RT 5638-5642, 5644, 5647-5651.) Mills' ammunition box was recovered from Self and Romero's grandmother's house. (35 RT 5399; 37 RT 5657.) Mills' .22 caliber Ruger semiautomatic 10/22 rifle with scope was recovered from the attic of a donut shop (The Donut Factory) where Romero's girlfriend Sonia Alvarez was previously employed.[21] (37 RT 5707-5714; 42 RT 6399-6401.) Romero admitted to robbing Mills Sr. and Mills Jr. in his statement to police. (2 3rd SCT 308-310.) At trial, Mills identified Self as the robber holding the shotgun.[22] (35 RT 5403-5404.)

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21. During the investigation into appellants' crimes, police learned that a man named Carl Rife was married to Alvarez's sister. After Alvarez's home was searched by police in December 1992, Alvarez asked Rife to check whether there was a gun in the attic of The Donut Factory. Rife checked the attic but found no weapon. Sometime before September 1995, Eric Davenport was helping an employee of The Donut Factory clean up the shop when he discovered Mills' .22 caliber Ruger rifle in the attic. The rifle was now missing its mahogany stock, but still retained its scope. Despite the attic's dirty and dusty appearance, the rifle was relatively clean and had minimal dust. Davenport turned the rifle over to police. (37 RT 5707-5714; 42 RT 6399-6401.)

22. In his opening brief, Romero asserts, "Mills did not identify the people who robbed him." (RAOB 33.) Romero misstates the evidence. Mills

Murder Of Jose Aragon, November 25, 1992 (Count III)

In the morning of November 25, 1992, the day before Thanksgiving, Self and Romero awakened Munoz at his sister's house, asked for the .20-gauge shotgun[23/], and told Munoz to accompany them. Self, Romero, and Munoz piled into Alvarez's Colt, taking along the .20-gauge shotgun as well the .22 caliber Ruger rifle with scope, the .22 caliber Ruger pistol ("Self's gun"), and the .45 caliber Colt pistol ("Romero's gun") stolen from Jerry Mills. Knowing they were about to commit another robbery, Munoz suggested they "jack" somebody who had guns so he could have a gun of his own. While driving around, Munoz consumed nearly a dozen beers. (39 RT 5974-5977; 40 RT 6138-6141; 45 3rd SCT 12981-12982.)

After a few hours, Self, Romero, and Munoz ended up in a mountainous area near Banning called San Timoteo Canyon, which contained a sandy riding area for motorcycle enthusiasts. In the Canyon they spotted Jose Aragon, a 22-year-old competitive motorcyclist, riding his motorcycle in the sand. Aragon had left a note at his parents' house in Redlands earlier that morning, telling them he was going riding in San Timoteo Canyon. Aragon's pickup truck, which he used to transport his motorcycle and riding gear, was parked nearby the sandy riding area. Aragon was wearing full protective racing gear, including shoulder pads, a kidney belt, thigh pads, racing boots, a helmet,

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clearly identified Self as the robber with the shotgun. (35 RT 5403-5404.) Although Mills did not specifically identify Romero as one of the robbers, Romero admitted to robbing Mills in his statement to police, he was often seen carrying the .45 caliber Colt pistol, and the .45 Colt and .22 caliber Ruger pistol were recovered at the location of appellants' arrests. (39 RT 5969-5970, 5976-5977; 2 3rd SCT 308-310; 45 3rd SCT 12936, 12976.)

23. Munoz had borrowed the shotgun from Self after Munoz broke the Remington while trying to make it fully automatic. (39 RT 5974-5975.)

goggles, and gloves. (35 RT 5406-5410, 5414; 38 RT 5719; 39 RT 5977-5978; 45 3rd SCT 12982.)

While watching Aragon ride his bike, Self, Romero, and Munoz began discussing the best method to rob Aragon. Specifically, Self wanted to use the scoped .22 Ruger rifle to shoot Aragon while he was riding, while Romero wanted to watch Aragon ride for a bit longer because it looked "cool." The group decided to park the Colt some distance away and wait until Aragon came back to his pickup truck. (39 RT 5978-5979; 45 3rd SCT 12982-12984.)

When Aragon returned to his truck, Self, Romero, and Munoz approached him, and Romero proceeded to engage Aragon in a pleasant conversation about motorcycle riding. Aragon was being "real nice" to everyone, showed off his bike to Romero, and ultimately agreed to perform some more riding tricks at Romero's request. While Aragon went off to perform the requested tricks, Self, Romero, and Munoz discussed robbing and shooting him. Romero remarked that Aragon was there all alone and was not expected anywhere that day, so they could just take all of his possessions and leave. Self reiterated that he wanted to shoot Aragon while he rode his bike. Munoz disagreed with shooting Aragon, and instead proposed to threaten Aragon into turning over all of his possessions. (39 RT 5980-5983;45 3rd SCT 12982-12984.)

When Aragon returned from performing his tricks, Munoz started walking towards him, intending to threaten him. Just after Aragon dismounted from his bike, Self, who was seated in the Colt, fired multiple shots at Aragon with the .22 caliber Ruger scoped rifle. Aragon appeared stunned and in pain, grabbed his side, and fell to the ground. Munoz ran to Aragon and asked him for his truck keys and wallet. Aragon told Munoz that everything was in the truck. (39 RT 5984-5987; 45 3rd SCT 12984-12986.)

Romero helped Aragon into the bed of the truck, and as Aragon was nodding out, Romero taunted him by asking, "How does it feel to get shot? Does it burn?"[24] Self, Romero, and Munoz then began removing items from Aragon's truck, including a red toolbox containing motorcycle parts, a set of Craftsman tools that Munoz later gave to his father, change from the ashtray, and Aragon's wallet. Romero took the toolboxes back the car, while Self and Munoz found Aragon's ATM card and asked Aragon for his PIN. Self told Aragon, "Give me the code or I'm going to kill you." Aragon seemed to be close to passing out, but he eventually gave his PIN to Munoz. Munoz repeated the PIN to himself in an attempt to remember it. (39 RT 5988-5991, 5994-5995, 6003-6004; 45 3rd SCT 12984-12987.)

Although Self promised not to kill Aragon if he gave his PIN, Self reneged on his promise, put the .22 Ruger pistol up to Aragon's ribs, and repeatedly shot him on his left side. Aragon's body jerked with the first shot, but with each shot, he moved less, until finally, his body laid still. Self then picked up the .20-gauge shotgun, stood directly above Aragon, and shot him in the neck with a sabot round. Munoz, who was now walking back to the Colt, heard the shotgun round hit the truck bed. (39 RT 5991-5993; 45 3rd SCT 12987-12988.)

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24. In his opening brief, Romero states when he helped Aragon into the back of the truck, Aragon was still conscious and "in just a little pain." (RAOB 37.) Romero's opinion about Aragon's level of pain has absolutely no support in the record other than his self-serving statement to police. The evidence established Aragon's abdominal wound likely came from the .22 caliber Ruger rifle, which both Munoz and Romero agreed was used to fire the first shot. The coroner testified that this projectile entered the right side of Aragon's abdomen, traveled though his abdominal wall, colon, and kidney, and came to rest in muscle tissue adjacent to the spine. Given these injuries, Aragon no doubt felt more than "just a little pain." (35 RT 5462; 38 RT 5785-5788; 43 RT 6571-6572; 2 3rd SCT 303-304; 45 3rd SCT 12984-12985.)

Munoz and Self then rejoined Romero at Alvarez's Colt. As they drove off, Self jovially recounted how he shot Aragon, stating, "Oh, wow, you should have seen the hole it made. It made a hole, went all the way through. And then it just closed with blood." He demonstrated the size of the hole – about two and half inches – with his hands. (39 RT 5993-5994; 45 3rd SCT 12988.)

After murdering Aragon, Self, Romero, and Munoz drove to Perris, where they bought gas with money taken from Aragon's wallet and unsuccessfully tried using Aragon's ATM card at two different banks. They then drove to Sun City, where Munoz used Aragon's ATM card to withdraw money from two other banks. At the first bank, Munoz checked Aragon's account balance and withdrew $120. The group then dined at a nearby Coco's restaurant, where they discussed how to retrieve more money from Aragon's account by first making a fake deposit.[25] During lunch, Self and Munoz headed over to the second bank which was across the street, made a fake $500 deposit, and withdrew $180 from Aragon's account. The group split the money they stole from Aragon's account and drove home. Munoz admitted he tried to use Aragon's ATM card again, but that the banks he tried would not accept the card and the final ATM machine took the card and did not return it. (35 RT 5468-5471; 36 RT 5479-5500, 5505-5507, 5510, 5513, 5523; 39 RT 5995-6003; 45 3rd SCT 12944-12945, 12951-12952, 12993-12998.)

Later in the afternoon of November 25, 1992, Ted Lehmann, a member of Aragon's motorcycle club, went riding with his 10-year old son and a friend at San Timoteo Canyon. When they arrived at around 2:00 to 2:30 p.m., Lehmann saw Aragon's truck and riding gear, as well as a body lying in the bed

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25. Self used to work at this Coco's restaurant. While they ate lunch after murdering Aragon, one of Self's former coworkers came over to speak with him. When she asked Self what he was doing for a job or to earn money, Self said he did not have a job, told her he was "getting by," and then looked over at his brother Romero with a "funny smirk." (35 RT 5503-5507.)

of the truck. He believed Aragon was asleep. At around 4:00 p.m., Lehmann's young son drove close to Aragon's truck and told his father something appeared wrong with the man lying in the truck. Lehmann went over to Aragon and, not yet realizing Aragon was dead, threw his white motorcycle helmet into the bed of the truck and tried to assist or revive Aragon. Lehmann soon realized Aragon was dead and observed his large throat injury (two- to two-and-a-half inches in diameter) and other wounds on the side of his torso. Once Lehmann realized Aragon was dead, he told everyone to move away from the truck and called the police. (35 RT 5422-5427.)

In the meantime, Aragon's father returned home and found Aragon's note. When Aragon did not return home by 5:30 p.m., his father drove to San Timoteo Canyon to look for him. It was already dark when he arrived and police vehicles and tape surrounded Aragon's truck. The police initially told him Aragon had an accident, but later informed him his son had been shot. When police returned Aragon's truck to him after the investigation, there were bloodstains and bullet indentations in the truck bed. (35 RT 5410-5412.)

Police found Aragon lying in the truck bed with his legs hanging over the tailgate. Police recovered one .22 caliber bullet casing on the ground behind the truck's tailgate, seven .22 caliber bullet casings on the truck bed near and forward of Aragon's body, and several bullet fragments near and under Aragon's body. Ballistics tests showed that several of the .22 casings found in the truck bed could have been fired from the .22 Ruger pistol appellants stole from Jerry Mills, but the casing found on the ground was fired from neither the .22 Ruger pistol nor the .22 Ruger scoped rifle. (35 RT 5431-5444; 42 RT 6574-6580, 6587-6588.)

Police later recovered the items Self, Romero, and Munoz took from Aragon's truck. Police found the red toolbox containing motorcycle parts in Alvarez's Colt, and based on information given to them by Munoz, police

seized the Craftsman socket set from Munoz's parents. Police were able to lift two latent fingerprints from the red toolbox found in the Colt, and these fingerprints matched Romero's left and right middle fingers and his right thumb. (35 RT 5414-5415, 5471-5473; 37 RT 5684-5685; 39 RT 6003; 42 RT 6380-6383, 6492-6495.)

An autopsy on Aragon's body revealed 11 gunshot wounds, including a very severe, devastating wound to the neck and head, as well as numerous wounds to the torso. The head wound was unusual, caused by a sabot shotgun round entering underneath the chin and exiting on the left back side of the head. The presence of plastic sabot halves found inside Aragon's throat indicated the weapon was fired close enough for the sabots to still be traveling with the projectile and enter the body along with the shotgun round. (35 RT 5455, 5462-5463; 38 RT 5764-5767, 5788-5791, 5795.)

In addition to the head wound, there was a graze wound to Aragon's left shoulder, eight wounds traveling left to right through the torso, and one abdominal wound entering from the right side. Most of the wounds to the left side of the body appeared to be contact wounds, as the coroner observed gunshot residue and powder burns on Aragon's skin. Most of these wounds also penetrated vital organs. The wound entering the abdomen from the right side did not appear to be a contact wound. The projectile entered the right side of the abdomen, traveled though the abdominal wall, colon, and kidney, and came to rest in muscle tissue adjacent to the spine. The projectile broke the skin near the spine but did not exit the body, perhaps owing to the presence of Aragon's kidney belt, which was stained with blood where the bullet attempted to exit. (35 RT 5451-5463; 38 RT 5768-5788; 42 RT 6373.)

In addition to the plastic sabot fragments recovered from Aragon's neck, the coroner recovered nine .22 caliber projectiles from Aragon's body. Ballistics tests confirmed that four of the .22 caliber projectiles found in

Aragon's torso could have been fired from the .22 Ruger pistol appellants stole from Jerry Mills and that the .22 caliber projectile recovered from Aragon's abdomen could have been fired from the .22 Ruger scoped rifle also stolen from Mills. The plastic pieces recovered from Aragon's throat were consistent with BRI .20-gauge sabot shotgun shells. (35 RT 5459-5462; 38 RT 5770-5788, 5815-5816, 5820-5822; 43 RT 6564-6573.)

The coroner determined Aragon died from multiple gunshot wounds, and while the head wound overshadowed the torso wounds, they all contributed to his death. The right abdominal wound was severe, but not absolutely fatal, and Aragon would have had a chance of surviving if given prompt medical attention. The coroner also concluded, even without the head wound, Aragon would not have survived because he received too many gunshot wounds through too many vital organs. All wounds were antemortem, meaning Aragon's heart was still beating when Self delivered the final shotgun round to Aragon's neck. (38 RT 5792-5800.)

In his interview with police, Romero admitted robbing Aragon, but denied knowing who shot him. Romero said he did not know who fired the first shot, and he immediately walked back to the Colt with the toolboxes after he helped Aragon into the bed of the truck. (2 3rd SCT 299-306, 320-321.) He also recalled that Self bought the "neatest" shotgun slugs at Coast to Coast Hardware. He described them as red and "bigger than any other." (2 3rd SCT 311-312.) Self confirmed to police that he bought shotgun shells at Coast to Coast Hardware before the Aragon shooting. (45 3rd SCT 13078-13080.) Munoz recalled seeing similar shotgun slugs in Self's room. (39 RT 6010-6011.)

The day after Aragon was murdered, Munoz drove to San Diego and gave the .22 caliber Remington rifle to his brother Ruben. He believed the police were going to arrest him soon and wanted to unload the rifle. (35 RT

5473-5475; 37 RT 5601-5602, 5618-5619; 39 RT 6008-6009.) As it turns out, a bank security camera caught Munoz on tape as he withdrew funds from Aragon's account on the day of the murder, and it was not long before police identified Munoz as the man in the photograph and arrested him. In the meantime, appellants and Munoz continued their crime spree. (35 RT 5468-5471; 36 RT 5489-5496; 39 RT 6029-6030.)

Self's Attempted Murder And Robbery Of John Feltenberger,[26] November 30, 1992 (Counts XVIII & XIX), And Romero's Receipt of Feltenberger's Stolen Ammunition Pack (Count XX)

At around 4 a.m., on November 30, 1992, Ontario Police Sergeant John Feltenberger was driving home from work in his red 1991 Geo Metro. He was off-duty and in civilian clothes. Less than a quarter mile from his home in Moreno Valley, Feltenberger noticed a white foreign model car on his left side, driving parallel to and maintaining speed with him. Believing it was his newspaper delivery man trying to get his attention, Feltenberger pulled over to the right side of the road and stopped his car. The white car, which was Munoz's sister's Toyota Tercel being driven by Munoz, stopped beside Feltenberger. Self stepped out of the Tercel's passenger seat. (32 RT 4945-4948; 39 RT 6012-6015.)

Before encountering Feltenberger, Munoz and Self had spent the last several hours drinking alcohol and using drugs. When they drove past Feltenberger's car, Self told Munoz to follow him and Munoz complied, believing they were going to carjack Feltenberger. They were armed with the

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26. Feltenberger's name was spelled "Feltonberger" in the charging documents, but during his testimony at trial, Feltenberger spelled his name without an "o." (32 RT 4944; 4 CT 831.)

.20-gauge shotgun. (39 RT 6012-6013; 45 3rd SCT 12964-12965, 13000-13004.)

When Self stepped out of the Tercel, he pointed the shotgun at Feltenberger, opened Feltenberger's door, told him to get out of the car, and demanded his wallet. Feltenberger got out of the car, raised his hands, and began to back away from Self, while Self again demanded Feltenberger's wallet. Feltenberger heard a voice from the Tercel yell, "Kill him" or "Shoot him." Feltenberger then threw his wallet toward Self, saying, "Nobody has to get hurt." He again heard the same voice say, "Kill him."[27] (32 RT 4948-4952; 39 RT 6015-6018; 45 3rd SCT 12964-12965, 13000-13004.)

After Self examined Feltenberger's wallet, Self muttered in a soft whisper, "I ought to shoot you." As Feltenberger started to reiterate "Nobody has to get hurt," Self shot him in the chest with a shotgun slug. Feltenberger collapsed to his knees as Self made off with his Metro and Munoz drove away in the Tercel. Feltenberger, bleeding profusely and out of breath from a collapsed lung, staggered and crawled to a nearby house for assistance. (32 RT 4952-4954; 39 RT 6015-6018; 45 3rd SCT 12964-12965, 13000-13004.)

Self shot Feltenberger in right chest, where the shotgun slug ripped through his right lung and exited out his right back. At the hospital, doctors removed a piece of red plastic from Feltenberger's right arm, which was later determined to be consistent with a BRI .20-gauge sabot shotgun round. Similar pieces of red plastic were found at the scene of Feltenberger's shooting. As a result of his injuries, Feltenberger remained in intensive care for three days and in a hospital ward for another seven days. His lung capacity was still only 90% of normal at the time of trial, and he continued to suffer breathing problems.

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27. Munoz denied telling Self to kill Feltenberger. Instead, Munoz said he yelled Self's name, "Chris," and said "Don't shoot."

He also underwent surgery on his right arm because of numbness. (32 RT 4953-4954, 4958-4959, 4982, 4998; 38 RT 5817-5820.)

After shooting and robbing Feltenberger, Self and Munoz met up at Munoz's sister's house, where they rummaged through Feltenberger's Metro. Inside they found a flashlight, a hatchet, a knife, a gym bag, an empty ammunition pouch, and a leather case containing police reports. Self took the flashlight and ammunition pouch, and Munoz put the hatchet in a shed in his sister's backyard. Later that afternoon, Romero saw the ammunition pouch in Self's room and said he wanted it for the .45 caliber Colt pistol he stole from Mills. After that day, Romero always had the ammunition pouch clipped to his pants. In his interview with police, Romero confessed to acquiring Feltenberger's stolen ammunition pouch, and admitted he knew Self and Munoz robbed and shot Feltenberger. (2 3rd SCT 323-324.) Police later recovered Feltenberger's flashlight from a shed outside appellants' grandmother's house. Police recovered the ammunition pouch, which contained two copper-jacketed .45 caliber bullets, inside the vacant house where Self and Romero were arrested. (32 RT 4960-4962; 37 RT 5587-5588, 5644, 5663; 39 RT 6018-6022; 45 3rd SCT 13005-13008.)

Later in the evening of the Feltenberger shooting, Self, Romero, Munoz, and Chavez watched a television interview where Feltenberger's wife stated that Feltenberger was alive in the hospital. Romero remarked that they "had to go to the hospital and take him out." (39 RT 6022-6023; 45 3rd SCT 13008.)

Self and Munoz disposed of Feltenberger's Metro by letting it roll down a hill about four or five blocks away from Munoz's sister's house. Police later recovered the Metro down a ravine and found shoe prints near the scene. One of the shoe prints was consistent with the size and sole pattern of the British Knights tennis shoes worn by Self at the time of his arrest. Technicians also dusted the Metro for latent fingerprints. Prints lifted from the Metro's driver's

door matched Self's right middle and ring fingers. (32 RT 4999-5007, 5013-5016; 38 RT 5838-5839; 39 RT 6023-6024; 42 RT 6496-6498; 45 3rd SCT 13007.)

Feltenberger identified Self as the shooter, both at trial and in a photographic line-up about two weeks after the shooting. At the preliminary hearing held on January 19, 1993, Feltenberger's wife overheard Self speaking to another man after Feltenberger's testimony. Self stated: "Well, I didn't know he was a cop. I thought he was a farmer," and "Do you think he could have remembered all of that if he hadn't been a cop?" (32 RT 4956-4957; 4986-4988.)

In his interview with police, Self at first denied even being present at the Feltenberger shooting, then changed his story to say he took Feltenberger's car but did not shoot him, and finally admitted shooting Feltenberger with the .20-gauge shotgun. (45 3rd SCT 13056-13066.) Self insisted that although he stole Feltenberger's Metro, he did not remove any items from inside the car and did not take Feltenberger's wallet. (45 3rd SCT 13064-13069.) He also seemed to suggest his shooting of Feltenberger was either accidental or in response to some sort of aggression from Feltenberger. Specifically, Self claimed Feltenberger pushed the car door into his leg and the gun "went off." (45 3rd SCT 13065-13066, 13071.) Self said the shotgun shell did not contain pellets ("birdshot"), and he purchased the shotgun ammunition at Coast to Coast Hardware a few weeks before the Feltenberger shooting. He said he obtained the shotgun about a month prior to the Feltenberger shooting. (45 3rd SCT 13073, 13078-13080.) Self admitted to being high on crystal methamphetamine at the time of the shooting, having used it just an hour before. (45 3rd SCT 13058-13059, 13063, 13075.)

Romero's Kidnaping And Robbery Of Robert Greer, December 5, 1992(Counts XXI & XXII)

At approximately 8:00 p.m., on December 5, 1992, Robert Greer parked his Honda Accord near an ATM machine in a Riverside shopping center. He withdrew $40 from the machine, and as he walked back to his car, Romero confronted him in the parking lot. Romero, who was wearing a ski mask, brandished a gun underneath his jacket and told Greer, "Throw me your car keys and get into the passenger side."[28] Greer complied, then Romero jumped in the driver's seat, took the $40 Greer had just withdrawn, and drove off. Romero drove with his right hand and held a .45 caliber semiautomatic weapon in his left hand. He placed the weapon across his lap and pointed it at Greer. (36 RT 5525-5530, 5537.)

During the 10-to-15-minute ride into Mead Valley, Romero made conversation with Greer, telling Greer he sang in the church choir. Romero asked Greer about the car's condition and maintenance, and informed Greer he was going to take the Honda to a chop shop in San Diego and Greer would never see the car again. Romero also commented on the large amount of paperwork and manuals in Greer's back seat, telling Greer he should keep his car cleaner. When Greer told Romero that he worked a lot, Romero told Greer he should get a social life. During their conversation, Romero seemed arrogant, but calm. He told Greer not to worry about it, that it was only business. (36 RT 5531-5534.)

During their drive, Romero ordered Greer to hand over his wallet, but allowed Greer to keep some personal items such as his social security card and photographs. Romero told Greer to give him his driver's license and ATM card

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28. Although Greer could not identify Romero because of the ski mask, Romero admitted to robbing Greer during his interview with police. (36 RT 5528-5529; 2 3rd SCT 317-318.)

with the PIN, and Greer complied. Although Greer initially wrote down the wrong PIN, he ultimately gave Romero the correct number after Romero threatened to send someone to kill him or hurt him if he did not cooperate. (36 RT 5532-5534, 5537.)

Romero drove down a dirt road in a rural part of Mead Valley and stopped the car. After letting Greer grab some manuals and paperwork from the car, Romero left his victim on the side of the road and drove off in his Honda, which contained recreational equipment and other personal items. Greer walked a few miles to a house, where he called the police and his bank. Before he could close his bank account, his ATM card was used to make 12 withdrawals totaling $800. Greer recovered his Honda four days later at a towing yard. It was completely burned. (36 RT 5535-5538; 38 RT 5810-5812.)

In his interview with police, Romero admitted he "did" the Honda robbery. Romero justified the robbery by telling police he had been sitting in the cold for two hours, became frustrated, and did not want to walk home because "it would look dumb." Romero admitted to using the .45 caliber semiautomatic to rob Greer. Romero told police Greer seemed scared, so he assured Greer he was only taking his car and not to worry. He called Greer a "pretty cool guy." Romero said he burned the Honda at Old Elsinore Road with the assistance of Munoz's brother Ruben. (2 3rd SCT 317-318.) Police later recovered Greer's ATM card during a search of Self's and Romero's grandmother's house. (37 RT 5660.)

Ruben Munoz testified at trial and recounted how he assisted Romero in disposing of Greer's Honda. On December 5, 1992, Ruben was visiting his brother Jose and sister Margarita at Margarita's house in Perris. At around 11 p.m., Self drove up in the Honda looking for Jose, but Jose was asleep, so Self left. At around 11:30 p.m., Self returned in the Honda accompanied by

Romero. Self and Romero asked Ruben for a ride so they could get rid of the Honda. Ruben drove his truck, with Romero in the passenger seat, while Self drove the Honda. They drove three to four blocks away and hid the Honda behind a rock, then Self and Romero torched it. (37 RT 5573-5577, 5583-5585.)

After burning the Honda, Ruben drove Self and Romero back to their grandmother's house and accompanied Romero into his room. When Romero took off his coat, Ruben saw Romero was carrying a .45 caliber pistol and ammunition clips in what appeared to be Feltenberger's ammunition pouch. Romero cocked the .45 caliber pistol and said, "Look at that hole." Romero pointed the gun at Ruben, who told Romero to point it away. Romero then started pulling a wad of money, an ATM card, and what appeared to be a driver's license out of his pocket. Ruben, recognizing the donor card and "little dot" on the driver's license, told Romero, "Oh, he's a donor." Romero replied, "Well, he was." (37 RT 5586-5592, 5615.)

Ruben also went into Self's room. Self showed him a .22 caliber pistol and told Ruben it was "his gun," and Romero showed Ruben a .22 caliber rifle with a scope and banana clip. Self and Romero also talked about another gun they called "Big Bertha," but told Ruben they lent Big Bertha to someone else. (37 RT 5590-5593.)

Romero remarked to Ruben that his brother Jose should also have a gun at his own house. Romero told Ruben that Jose was talking too much about what was going on between them and he did not like it. Romero said he might shoot or kill Jose because he was talking about the business. (37 RT 5598.)

Ruben made his way outside the grandmother's house, accompanied by Self, who was wearing white British Knights tennis shoes. Ruben asked Self, "What are you doing?" and "What would you do if the cops come after you guys?" Self told Ruben he would run if the police came after them, and if the

police caught Romero and not him, he would "jack harder." Self said he liked the feeling and satisfaction of carjacking and taking people's money. Self told Ruben, "I'm addicted to doing this," and claimed he would not go out without a bang. (37 RT 5593-5597, 5599.)

Romero's Robbery Of Roger Beliveau, December 7, 1992 (Count XXIII)

The next night, at around 12:45 a.m., on December 7, 1992, Roger Beliveau drove his maroon 1978 Ford LTD to a local Riverside park after leaving work. He was feeling a little depressed and intended to take a walk at the park. After walking for 10 to 15 minutes, he used the restroom, which was dimly illuminated by light coming in from the window. (37 RT 5559-5562.)

Romero approached him from a darkened corner in the restroom and asked him if the car outside was his. Due to the darkness of the restroom, Beliveau could not make out Romero's features or otherwise identify him.[29] Beliveau confirmed that the car outside was his and then heard the chambering of a pistol round. Romero told Beliveau to give him his car keys and he would not get hurt. At this point, Romero was silhouetted in the window, but Beliveau could see the barrel of a .45 caliber weapon pointed at him. (37 RT 5561-5564.)

Beliveau initially handed over all of his keys, but then asked Romero if he could just give him the ignition key and keep the others. Romero handed back the keys, and Beliveau gave him the ignition key. Romero then told Beliveau to wait in the bathroom for five minutes and he would not get hurt. Beliveau watched as Romero got in the car, drove to the other end of the

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29. Beliveau could not identify the perpetrator as Romero, but Romero confessed to robbing Beliveau and gave a nearly identical description of the crime. (237 RT 5569; 3rd SCT 319.)

parking lot, and picked up another individual who was waiting behind a column with some trash bags. They threw the trash bags in Beliveau's car and drove off together. (37 RT 5564-5565.)

Beliveau's car was found five days later parked behind a shopping center in Riverside. It had been ransacked and small items were missing. (36 RT 5514-5518; 37 RT 5566-5567; 45 3rd SCT 12924-12925.)

In his police interview, Romero admitted to robbing Beliveau and leaving his car behind a shopping center. Romero's confession matched Beliveau's description of the robbery, and he commented that Beliveau "got kind of mad" when he robbed him. (2 3rd SCT 319.)

Munoz's Arrest

Police ultimately identified Munoz as the man removing money from Aragon's account in the bank security video. Police arrested Munoz on December 11, 1992, at his sister's house. Munoz was wearing the same ball cap he was wearing in the bank security video. After reading him his Miranda rights, Munoz waived his rights and agreed to speak with the police. (39 RT 6029; 41 RT 6336-6337.) Munoz initially denied direct involvement in any crimes. In particular, he claimed Romero and Self gave him Aragon's ATM card and PIN, did not tell him where they got it, and asked him to help them take out money. (45 3rd SCT 12918-12924, 12948.) He also claimed Self and Romero told him they shot "two boys in the hills," and denied involvement in that crime as well. (45 3rd SCT 12942-12944.) But Munoz also began hinting to investigators that he knew much more than he was telling them and would be willing to tell "the truth" and "get it off [his] chest." (45 3rd SCT 12929-12940, 12946.)

Eventually, Munoz made a lengthy statement, cataloging the series of crimes he committed with Self, Romero, and Chavez. (45 3rd SCT 12970-

13052.) Munoz confessed not only to the Aragon murder (which was the only crime police were thus far aware Munoz had committed), but also to the other murders, attempted murders, and robberies of which police were not yet aware. (45 3rd SCT 12970-13052.) Munoz was made no promises in exchange for his statements, nor did police tell or suggest to Munoz what to say. (45 3rd SCT 12958, 12967-12968; 39 RT 6031; 41 RT 6342.) Investigators specifically told Munoz they wanted him to "say the truth," and when Munoz asked what he would "get out of this," the investigators told him they "do not make promises." (45 3rd SCT 12958, 12967.) Just before he confessed, Munoz told investigators, "I gotta pay for what I did." (45 3rd SCT 12970.)

Munoz subsequently entered into a plea agreement with the District Attorney in which he agreed to testify at appellants' and Chavez's trials and plead guilty to three counts of first degree murder, one count of attempted premeditated murder, three counts of robbery, and one count of attempted robbery. (2 CT 180-181; 45 3rd SCT 12906-12910.) Munoz later pled guilty to these crimes and received a sentence of 51-years-to-life in prison, in accordance with the terms of the plea agreement. (45 3rd SCT 13154-13156.) As previously indicated, Munoz also confessed to shooting Paulita Williams during his plea negotiations, a crime the District Attorney was unaware of before Munoz's confession to that crime. (39 RT 6033-6034.)

Searches And Recovery Of Evidence

Based on the information Munoz disclosed in his interview with police, investigators recovered the .22 caliber Remington rifle from Munoz's brother Ruben and Aragon's Craftsman tool set from Munoz's parents on December 12, 1992. (35 RT 5473-5475; 37 RT 5602, 5618-5619.)

On the same day, police located Sonia Alvarez's Dodge Colt, where they recovered several items linking Self and Romero to the charged crimes. In the

rear passenger compartment of the Colt, police recovered seven copper-colored shotgun pellets, three Super-X .22 caliber bullet casings, one live Super-X .22 caliber bullet, and Steenblock's Legacy Gold golf balls. (34 RT 5322-5323; 37 RT 5676-5679, 5683-5684, 5696-5702.)

In the Colt's trunk, police recovered Aragon's red toolbox, ski masks, an empty box of .22 caliber ammunition, 17 .22 caliber magnum cartridges, Steenblock's briefcase, and another empty briefcase. (37 RT 5675-5678, 5684-5685, 5702-5704.) Romero's fingerprints were found on the Colt's driver's door and on Aragon's red toolbox. (42 RT 6492-6495.) Steenblock's briefcase, which contained no ammunition when stolen, was filled with a box of Federal Premium Hi-Power .20-gauge shotgun shells, a box of BRI sabot three-inch magnum .20-gauge shotgun shells, and two loose .20-gauge shotgun shells tucked into the lining of the briefcase. (34 RT 5324-5325; 37 RT 5688-5696.) The inside of the empty briefcase contained Self's first name "Chris" written in block-letter graffiti. (37 RT 5687-5688.) The graffiti appeared similar to the graffiti drawn or sprayed inside Magnolia Center Interiors. (1 SCT [Exhs.] 15-16, 319-320.)

Police also searched Self and Romero's grandmother's house on December 12th, where they again found several items linking appellants to the crimes charged. Officers found a set of keys from Magnolia Center Interiors, a leather golf bag with a full set of clubs[30/], a paperweight with a scorpion encased in a resin bubble[31/], Robert Greer's ATM card, Jerry Mills' tackle box of ammunition, a .22 caliber rifle magazine, and Feltenberger's flashlight. (32

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30. Although this item was not seized, a leather golf bag with a full set of clubs was in Steenblock's car when Romero carjacked him. (34 RT 5321-5322.)

31. Although this item was not seized, James Murphy, the owner of Magnolia Center Interiors testified a similar paperweight was stolen from his business. (34 RT 5375-5377.)

RT 4960; 34 RT 5321-5322, 5375-5377; 35 RT 5399; 37 RT 5655-5663, 5667-5669.)

In a later search of Self's Oldsmobile, police recovered a plastic Nissan brake cover and a torn ATM receipt stemming from the Meredith robbery, as well as 261 rounds of .22 caliber ammunition, one expended .22 caliber shell casing, and a British Knights shoe box. The word "Flaco" was written on the top of the shoe box in block graffiti lettering, similar to the graffiti written on the walls of Magnolia Center Interiors and on the inside of the briefcase inside the Colt's trunk. (32 RT 5034-5043, 5049-5051, 5059-5060; 1 Supp CT [Exhs.] 100-103.)

Appellants' Arrests

Based on information supplied by Munoz, investigators contacted Florence Daul, an acquaintance of Romero, on December 17, 1992. Daul told investigators that Peggy Lopez, Self and Romero's aunt, brought the suspects to her home a day or two earlier. Self and Romero stayed at Daul's home overnight. The following night, Daul saw a television news report stating Self and Romero were wanted for murder and that a warrant had been issued for their arrest. Daul provided Self and Romero with food, cigarettes, some blankets, and a sleeping bag, and drove them to an abandoned house on Magnolia Drive in Riverside. Self and Romero left a cell phone at Daul's house, and Daul subsequently gave the phone and other items to her friend Tammy Villa for safekeeping. Villa, who was also Romero's former girlfriend, later turned the cell phone and other items over to police. (37 RT 5626-5631; 41 RT 6252-6256.) The cell phone was later identified as belonging to Steenblock. (34 RT 5323-5324.)

At 4:00 p.m., on December 17, 1992, police arrested Self and Romero at the abandoned house on Magnolia Drive. Self was wearing white British

Knights tennis shoes when arrested. Following their arrest, police searched the abandoned house and recovered several items linking appellants to the Jerry Mills robbery. Amidst wallets, driver's licenses, papers, and other identifying documents belonging to Self and Romero, police recovered Mills' .45 caliber Colt pistol, .22 caliber Ruger pistol, and 25-round banana clip for the .22 caliber Ruger scoped rifle. Inside the banana clip were four .22 caliber long copper-jacketed bullets. (35 RT 5390-5400; 37 RT 5636-5653; 38 RT 5728-5729.)

After their arrests, Self and Romero provided voluntary statements to police, wherein they confessed to several of the crimes charged. (38 RT 5858-5866; 43 RT 6604-6608.)

Self's Escape Attempt

At around 1 a.m., on December 16, 1994, Deputy Sheriff Scott Collins approached Sonia Alvarez in the parking lot of the Riverside County Southwest Detention Facility. Alvarez was parked in an "authorized vehicles only" area of the jail's parking lot, directly in front of the B pod housing area and the window of cell 54, where Self was housed alone. Cell 54 is on the ground floor. After Alvarez gave three conflicting stories as to why she was parked in that location, Deputy Collins took her into custody. Alvarez reported that she visited Self at the jail, and Collins relayed this information to other correctional deputies. (42 RT 6504-6515.)

When correctional deputies searched Self's cell, they noticed gouges and pry marks in the concrete around the cell's rear window and on the window itself. There were chips of concrete on Self's bed, which was located directly underneath the window. Self had a half-inch-to-one-inch cut on the little finger of his left hand, plus redness to both hands. A metal bracket which normally holds the television on to its stand was found floating loose underneath the

television, and there were scratches and paint on the end of the metal bracket. (42 RT 6515-6523.)

Correctional deputies also searched the cell next door to Self's cell, which was occupied by Richard Landis. Landis' cell window also had chips around the concrete and on the window itself, and the window had a crack approximately one-inch in diameter. The metal bracket to his television was also removed, and deputies found a lot of cement particles on the floor and on bedding just below the window. (42 RT 6527-6530.)

Romero's Escape Attempts

In early April 1994, Romero was housed next to Arthur Dicken in the Riverside County Jail.[32] Romero's cell mate was Michael Aragon.[33] Between April 1, 1994, and April 14, 1994, Dicken saw Romero and his cell mate use hacksaw blades to cut on the bottom bars of their cell door. Dicken heard scraping and filing sounds throughout the night, and by laying on the top of his bunk bed and looking at a television set outside of his cell, he observed reflected images of Romero and Michael Aragon using the hacksaw blades. Romero and his cell mate disguised their work by using scotch tape to hold the cell bars in place and toothpaste mixed with paint chips to cover the damage to the bars. (42 RT 6418-6423, 6450, 6460-6461.)

In order to escape from the jail, inmates need to pass through a number of locked doors or gates, either by using a key obtained from a deputy or getting

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32. Dicken had numerous felony convictions and used several aliases. In order to facilitate his crimes, he often held himself out as a government or military official, such as a CIA operative, an FBI agent, and a 20-year member of the Navy SEALs. (42 RT 6428-6437.)

33. Michael Aragon also made an escape attempt prior to April 1994. (42 RT 6482.)

a deputy to open them. Romero told Dicken they planned to escape by waiting until the night shift, slipping through the gap in their cell door, grabbing the deputy doing the head count, and holding him hostage with makeshift shanks. Romero's shank was made from a four-to-six inch sharpened piece of metal, while Michael Aragon had a small metal spear attached to tightly rolled up newspaper. (42 RT 6422-6423, 6425, 6479-6482.)

Dicken also learned how Romero obtained the hacksaw blades. Romero wanted Dicken to contact his (Dicken's) attorney and have the attorney mail something to Dicken in an attorney-mail envelope. Romero then wanted Dicken to turn over the attorney-mail envelope to Romero and his cell mate, who would then pass along the envelope to one of their visitors. The visitor would then use the envelope to mail back a legal pad with a hacksaw blade hidden in the rigid portion across the top. Romero pressured Dicken to give him his legal envelope so they could have extra envelopes to send out. Both Romero and Michael Aragon also received legal mail, and at one point, Dicken heard Aragon ask if "it" was in there, and Romero responded, "Yes, we got it." That night, they cut on their cell bars. (42 RT 6423-6425.)

After Dicken reported Romero and Aragon's plan to escape, deputies searched Romero's cell on April 14, 1994. The deputies discovered that two bars on the lower right portion of the cell door had been cut completely through. The bars were held in place by scotch tape and disguised by makeshift paint, and the damage was only visible through close inspection. The bars could be removed, which exposed a gap large enough for someone to crawl through. In between the cell wall and the lower bunk, deputies uncovered a four-point metal star that had one point missing and could be used as a stabbing instrument. Months later, in Romero's new cell, deputies found the missing point to the four-point star, hidden near the toilet bowl. This metal piece was

two-to-three inches long and, if sharpened, also could be used as a stabbing weapon. (42 RT 6426-6427, 6451-6459, 6472-6477.)

Defense

Appellants did not present any evidence during the guilt phase.

PENALTY PHASE

Impact Of Appellants' Crimes On Jose Aragon's Family And Friends

Jose Aragon's stepmother Lydia Aragon, friend Leighette Hopkins, and sister Stephanie Aragon testified to their love for Jose and the enormous impact of Jose's murder upon their lives. Jose, the eldest of four children, was a 22-year-old college senior at the time of his murder. He was quiet and shy, a dedicated student, an avid soccer player, and a competitive motorcycle racer. (49 RT 7276-7280, 7283-7284, 7303, 7307, 7318-7319.)

Lydia recounted how the family learned of Jose's murder, the traumatic experience of burying their child, and how they were deeply affected by his death. (49 Rt 7276-7302.) Lydia could not understand why anyone would murder Jose, who she described as a "kind and gentle soul" who "never hurt anybody." (49 RT 7289.) She often thinks of the last moments of Jose's life and how he was left to die alone in the bed of his truck. (49 RT 7300.) When the family received Jose's truck back from the police, it was riddled with bullet holes and still stained with Jose's blood. (49 RT 7292.)

Lydia recounted how after the funeral, the family had to deal with the "agonizing pain" of losing Jose. (49 RT 7294-7297.) Since his death, Jose's parents worry more about their other children's safety and are often overly protective. (49 RT 7294-7295, 7328.) Lydia described Jose's father, Steven, as a "shadow of the man he was." After Jose's death, Steven walled himself off

from the family and lost his purpose and interest in life. (49 RT 7294-7295, 7298.) In honor of Jose, friends restored Jose's Studebaker to mint condition, and family and friends obtained license plates with variations of Jose's nickname "Hoz." (49 RT 7299-7300, 7327-7328.)

Jose's brothers and sisters (Steven, Carlos, Stephanie, and Laura) viewed Jose as a role model and were deeply affected by their brother's death. Steven, who was only 11 months younger, was "extremely close" to Jose and the two were "inseparable." After Jose's murder, Steven withdrew from the family and had difficulty sleeping. (49 RT 7279-7281, 7295.)

Carlos, 14 at the time of the murder, idolized Jose and often played soccer with him. In the summer before his death, Jose made Carlos promise that he would study hard and "make something" of himself. After Jose's murder, Carlos devoted himself to his studies and whenever he feels depressed or angry, he "studies harder." He is often angry at his parents because they are so overprotective and irrational after Jose's death. (49 RT 7278-7279, 7282, 7294-7295.)

Stephanie, 15 at the time of the murder, testified that Jose always protected her and made her laugh. After Jose's death, she was very lonely and sad, but the hardest part of her grief was trying to understand why Jose was murdered. Stephanie felt like a big part of her life was ripped out and that she was cheated out of so much by losing her brother. Stephanie also felt blessed to have spent so many years of her life with such a wonderful brother. Since Jose's death, Stephanie lives in fear of something bad happening to her. (49 RT 7283-7284, 7318-7319, 7322-7327.)

Laura, who was five years old when Jose died, was always excited to see her brother. Jose doted on Laura and treated her like a princess. When Jose was murdered, Laura was surrounded by an angry, grief-stricken family, and this in turn caused her to misbehave in school and at home. Laura became

fearful and did not want to sleep alone, and often asked Lydia when she was "going to stop crying." (49 RT 7282-7283, 7294-7297, 7298, 7310.)

Jose's friend Leighette Hopkins described Jose as calm, upbeat, and somewhat fearful. It was difficult for Hopkins to lose her friend, and she even saved a Pepsi bottle he drank from the night before his death. Since Jose's death, Hopkins is more "paranoid" of being killed and fears someone will break into her house or car. (49 RT 7303-7304, 7307, 7310-7316.)

Impact Of Appellants' Crimes On Joey Mans' Family

Joey Mans' mother Catherine Mans and sister Angela Mans testified to their love for Joey, his unique personality, and the impact of his murder upon their family. Joey, the only son of six children, was 26 years old when he was murdered. He was "happy-go lucky," bright, and overprotective of his family. He loved the outdoors and enjoyed fixing things. Joey was friends with Timothy Jones since they were 12 or 13 years old. Like Timothy, Joey was quiet, shy, and trusting. (49 RT 7331, 7333-7336, 7343-7344, 7346, 7347-7348, 7355-7356.)

Catherine Mans last saw her son about a year before his death, after he moved from Florida back to the Riverside area. She last spoke to him about a month before he died. Catherine described how she was informed of her son's death and how losing her child was the "most horrible thing in the world." Catherine did not go to Joey's funeral because she did not want "to see her son in a box." Catherine often thinks about Joey's last moments and the pain he must have felt. In her dreams, Joey tells her, "I'm okay." (49 RT 7331-7332, 7337-7341, 7344.)

Angela Mans was 20 years old when her brother died. Angela is often angry and in pain from knowing she can not share life with Joey. Although she knows Joey must have been scared in his final moments, she now thinks of him

as peaceful and in a better place. She dreams of Joey telling her he is okay and to stop crying. Catherine described the funeral as the hardest thing she ever had to do and how her father was dazed and numb. She is now paranoid and fearful for her own safety, often awakening at night to check doors and windows. Her father is overprotective of his daughters now, drinks more, and has aged a lot since Joey's death. Their sister Charlotte is also "very edgy" after Joey's murder. Charlotte talks about Joey constantly and has not seemed to fully accept his death. (49 RT 7346, 7348-7354.)

Impact Of Appellants' Crimes On Timothy Jones' Family

James Jones, Timothy's father, testified to his love for his son, Timothy's unique personality, and the impact of his son's murder on the entire family. Timmy was 22 years old when he died. He was a "wonderful kid," lovable, and "wouldn't hurt a fly." Timmy never caused his parents any problems and was very polite and helpful. James recounted his son's birth, how Timmy loved all kinds of sports as a kid, and was a good mechanic. (49 RT 7360-7364.)

James saw Timmy the day before he died. James was devastated when he learned of Timmy's murder and wished it was himself instead of Timmy. Timmy's mother Darlene was in bad health at the time of her son's murder, and James believed the murder accelerated her decline. James thinks of Timmy constantly and it is hard to realize he must live his life without his son. James did not attend the trial very often because he did not want to know too much about how his son died. He can not understand why anyone would kill his kind, generous son. (49 RT 7366-7371.)

Appellants' Violence Continued While Awaiting Trial

Appellants continued their violent criminal conduct while in jail awaiting trial. Appellants assaulted and harassed fellow inmates, and they possessed various shanks and makeshift weapons in their cells.

Romero's Assault On Rodney Medeiros

On September 22, 1993, Romero assaulted fellow inmate Rodney Medeiros, who was a new transfer to Romero's cell block. Medeiros was the only inmate to receive a bag of commissary items that day, and shortly after he walked into his cell with the bag, Romero and five other men attacked him. The attackers tried to take his commissary items and would not settle for the few items Medeiros offered them. Medeiros fell to the floor and his attackers beat and kicked him. Medeiros suffered injuries to his head, the back of his shoulder, his arm, and his face, for which he recuperated in the hospital ward for about a week. Medeiros fled his cell and reported the incident to deputies. Medeiros immediately identified Romero as one of his assailants in a photo line-up. (50 RT 7375-7389, 7391-7396.)

Romero's Assault On Walter Jutras

On October 6, 1993, Romero assaulted Walter Jutras, an inmate recently transferred to Romero's cell block. Jutras had lost his trustee status[34/], but was still in the green jumpsuit worn by trustees instead of the orange jumpsuit worn by most inmates. At 9:30 p.m. on October 6th, Jutras was sleeping in his cell, when Romero came inside along with another inmate. Romero put his knee on

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34. Trustees are inmates afforded special housing and jobs within the jail. Sometimes, other inmates consider trustees in a negative light because trustees are seen as non-sworn staff and often worked closely with deputies. (50 RT 7412.)

Jutras' neck, hit him repeatedly, and demanded to know why Jutras was returned to the cell block. Romero and his cohort believed Jutras could be an informant. After the men left his cell, Jutras notified the deputies of the assault and asked to be transferred to another cell block. (50 RT 7399-7404, 7409-7412.)

Romero's Assault On Olen Thibedeau

On June 12, 1994, inmate Olen Thibedeau, who was awaiting trial on child molestation charges, was transferred to Romero's cell block. At 9 p.m. on his first day in the cell block, Thibedeau left his cell to take a shower and have his half-hour of solo day room time. The rest of the inmates were housed in their cells. As Thibedeau walked past Romero's cell, Romero asked Thibedeau "real politely" to get him some hot water for coffee. Thinking Romero was friendly and not knowing Romero, Thibedeau retrieved the water. (50 RT 7427-7429, 7437-7444.)

After Thibedeau put the water through the slot in Romero's door, Romero called Thibedeau back and tried to hand him peanuts through a crack in the floor. When Thibedeau was close enough, Romero lunged at him with a makeshift spear, hitting him on the stomach. The spear, which was a little over four feet long, was made out of tightly rolled newspaper with a sharpened toothbrush handle at the end. The spear came apart when Romero lunged at Thibedeau and thus only caused a scratch on Thibedeau's stomach. Romero seemed angry that the spear came apart and because he had not drawn blood. Romero said, "Son of a bitch," and the inmate next door told Thibedeau, "We're going to get you wherever you go." Romero tossed the spear out of the cell, and Thibedeau then reported the incident and turned over the spear to deputies. (50 RT 7429-7432, 7446-7453, 7458-7460.)

A subsequent search of Romero's cell uncovered two razor blades and some torn cloth strips. Deputies also discovered an apple on the floor in front of Romero's cell, which had four to five holes in it matching the tip of the makeshift spear. (50 RT 7461-7464.)

In a subsequent jail visit, Romero told the mother of his child that if authorities housed him with a child molester, they should expect an assault. He described a method of attack which was nearly identical to his attack on Thibedeau. (51 RT 7517-7519, 7522-7523; Exh 435-A.)

Romero's Assaults On Tyreid Hodges

From September 1994 through March 1995, Romero repeatedly harassed and assaulted fellow inmate Tyreid Hodges. At the time they were housed in the same cell block, Hodges was facing trial on several charges of child molestation. Romero often made references to Hodges being a child molester and that people like him did not have any rights in the day room. Romero said he would "take [Hodges] out" if it was up to him. In the six or seven months they were housed in the same area, Romero threw urine and feces at Hodges, flooded Hodges' cell by plugging up the shower, and assaulted Hodges with various toiletry items. (51 RT 7502-7511.)

In one instance, as Hodges walked by to take a shower, Romero threw urine at him through a slot in his cell door. Another time, Romero put feces in a milk carton, placed the opening of the milk carton under Hodges' cell door, and stomped on the end so feces splattered onto Hodges' feet and jumpsuit. Romero also squirted hot urine under Hodges' door on another occasion. Romero said he would keep up his attacks until Hodges asked to be moved to another housing unit. Romero seemed to "have it out for [Hodges]" more than other inmates. (51 RT 7503-7508, 7514.)

Romero's Shank Possessions

On October 27, 1993, Romero requested a transfer to another housing unit. During the transfer, deputies conducted a search of Romero and his property. When the deputies asked Romero to put his property box on the ground and empty his pockets, Romero removed something very quickly and tossed it into the box. The item was a toothbrush that was sharpened to a point on the handle end. Deputies also found a hairbrush in Romero's property box that was cracked and sharpened to form a point at the handle. (51 RT 7495-7499.)

On September 3, 1994, during a routine search of Romero's cell, officers found a shank taped to the underside of Romero's bunk bed. The shank was a pencil with a razor blade embedded near the lead tip and could have been used as a slashing or stabbing weapon. (50 RT 7416-7421.)

On October 29, 1994, during another routine search of Romero's cell, officer found a shank behind Romero's bookcase. The shank was made out of a six-inch toothbrush, with two razor blades melted into the handle of the toothbrush and formed into a point. Plastic was wrapped around the brush end of the toothbrush, forming a handle. Out of the shanks found by officers in the normal course of business, this shank was one of the more sophisticated and was capable of cutting or stabbing. (51 RT 7484-7489.)

Self's Assault On Richard Reyes

On July 22, 1994, Deputy Sheriff Alfonso Campa was working as a tank officer at the Riverside County Jail. At around 5 p.m., he heard an inmate call for help from Cell 5. When he arrived at the cell, inmate Richard Reyes was standing at the bars and appeared nervous, shaken, and scared. Reyes was bleeding from his lip and gum, had red marks on his face, was missing some front teeth, and had a puncture wound to his lip. (51 RT 7550-7553, 7562.)

Deputy Campa removed Reyes from the cell for medical attention, then checked the other inmates' knuckles for visible signs of being in a fight. Self hesitated in approaching the officer for the knuckle check, but when he did, Deputy Campa immediately noticed Self's red and bleeding knuckles. One knuckle had a small puncture wound. The other inmates in Cell 5 had no marks on their hands, and Reyes also had no redness to his knuckles. Deputy Campa pulled Self out of Cell 5, and subsequently interviewed Reyes. Reyes informed Deputy Campa that the attack occurred just as he put his food tray by the cell door. When he turned around after doing so, he was hit approximately four times in the face. Reyes told Deputy Campa that the assault happened so fast he did not see who hit him and he did not desire prosecution. (51 RT 7554-7562.)

Two days after Self's assault on Reyes, Self had a jail visit with his mother Maria Self. During their tape-recorded conversation, Self told Maria that he hit an inmate on the mouth and busted out two of his teeth. Self said the inmate was in jail for spousal abuse, and he did not want the inmate in his cell. (51 RT 7575-7578; 453rd SCT 13087-13088.)

Self's Assault On Oswaldo Vasquez

On June 24, 1993, inmate Oswaldo Vasquez was playing dominoes in inmate David Valenzuela's cell when Self and another inmate approached them. Self and the other inmate asked Vasquez to give them a back massage. When Vasquez refused, Self threatened him with a pencil, saying if Vasquez did not give him a massage, he would stick the pencil in Vasquez's neck. Fearing Self, Vasquez gave Self a back massage. (51 RT 7662-7664, 7669-7670.)

After the massage, Self told Vasquez to suck his penis, using the Spanish word "mamon." Vasquez refused and tried to leave the cell, but Self and his

cohort blocked Vasquez's exit. Self and his cohort then hit Vasquez on the back, stomach, and face, leaving Vasquez bleeding from his eyebrow. When Vasquez began bleeding, Self and the other inmates left the cell. They told Vasquez not to tell anyone or something worse would happen to him. (51 RT 7665-7667.)

When a deputy approached Vasquez about the cut over his eye, Vasquez told the deputy he hit himself on his bunk bed, but when pressed, Vasquez ultimately reported Self's assault on him. At a photo line-up, Vasquez identified Self as one of his assailants. (51 RT 7667-7668, 7674-7682.)

Self's Assault On Mario Garcia Pescador

On May 30, 1994, Self assaulted fellow cell mate Mario Garcia Pescador. Garcia had only been in the cell with Self for approximately five to ten minutes, when Self hit him in the face with a closed fist. Self, along with two other inmates, jumped Garcia for no apparent reason and hit him a couple of times before Garcia lost consciousness for a few moments. Garcia then called for help and deputies arrived to pull Garcia out of the cell. Garcia was bleeding from his face and appeared nervous and shaken. In a photo line-up, Garcia identified Self as the inmate who hit him first, as well as two other inmates who participated in the assault. Garcia ultimately received six stitches to close the cut over his left eye. (51 RT 7606-7621.)

Self's Assault On Jacob Aramburo

On June 5, 1994, Deputy Sheriff Manuel Correa was working as a tank officer at the Riverside County Jail. At around 1 a.m., he heard an inmate call for help from Cell 5. When he arrived at the cell, inmate Jacob Aramburo was curled up in a fetal position next to the cell door and sobbing. Aramburo had a small cut on the back of his head, pain in his left shoulder and lower back,

swelling on the right side of his face, and scrapes to his neck and chest. (51 RT 7564-7568.)

Deputy Correa removed Aramburo from the cell and performed a knuckle check on the remaining inmates, including Self. All of Self's knuckles were red, and he had a fresh cut on the knuckle of his right middle finger. Another inmate, Christopher Navarez, also had red knuckles, but no cuts. No other inmates had any redness or injury to their knuckles. When Deputy Correa interviewed Aramburo, Aramburo claimed he fell off his bunk and declined prosecution. (51 RT 7566-7572.)

Self's Shank Possessions

On September 19, 1993, during a routine search of Self's cell, officers found a handmade weapon in Self's personal property box. The shank consisted of a six- to seven-inch toothbrush that was filed down on the handle end to an extremely sharp point, and was capable of being used as a stabbing weapon. (51 RT 7647-7656.)

On November 25, 1994, officers conducted an unscheduled search of Self's cell. In a prior search, officers discovered that a large section of a plastic cup was missing from Self's cell, and officers performed the spot search in an attempt to uncover the missing piece of plastic. In the course of their spot search, officers found three handmade weapons in Self's cell. First, officers found a concealed shank taped to the underside of Self's bed rail. The shank was a pencil with a sharpened paperclip attached to the lead end, and was capable of being used as a weapon. The paperclip was affixed to the pencil with tightly-wound string, and the sharpened portion of the paperclip extended one inch past the tip of the pencil. Second, officers found the missing piece from the plastic cup, which was made into a puncture weapon and taped underneath the bed rail. The plastic piece was 2.3 inches long and 1 inch wide,

and one end was sharpened to a point. Third, officers found a sharpened pork chop bone underneath the toilet. The bone was approximately five inches long, ground down to a very sharp point at one end, and capable of penetration. (51 RT 7632-7642.)

Self's Prior Violent Conduct While In High School

On May 22, 1992, while he was a student at Valley View High School in Moreno Valley, Self attacked fellow student Milton Solorzano in the school cafeteria. Prior to this incident, Solorzano and Self had given each other dirty looks and exchanged words, but the confrontations were never physical. As Solorzano stood in the lunch line on May 22nd, Self charged toward him. Solorzano moved out of the way, and Self hit his head against the wall. Solorzano held Self in a headlock until school staff arrived. During this time, Self swung at Solorzano with his fists, saying "I'm going to get you. Let me go." Self struggled as he was led away by the staff. (51 RT 7540-7549, 7625-7631; 45 3rd SCT 13090-13094.)

Defense Evidence In Mitigation

Appellants presented evidence of their dysfunctional family, childhood abuse, and parental neglect, including the testimony of appellants' mother Maria Self, brother Anthony Self, aunts Carmen Burrola and Peggy Lopez, and cousins Mona Quezada, Corinna Leon, Catherine Mejia, Richard Torres, and Sheila Torres. Romero also presented evidence of his prior good character and attempts to improve his life, while Self presented evidence of his artistic ability.

Maria Self testified to the upbringing of both appellants, who are her children through her first marriage to Orlando Romero, Sr. Maria married Orlando Romero, Sr., when she was 17 years old, and they were married about six years. During that time, they had four children, Anthony, Gene (appellant

Romero), Timothy, and Chris (appellant Self). In her testimony, Maria claimed Orlando Sr. was an alcoholic, drug user, and philanderer, and that she got drunk and used narcotics as well. However, Maria never used drugs or smoked while pregnant. Maria testified that she and Orlando Sr. used drugs in front of the children, and Orlando Sr. often beat her in front of them. Maria claimed she pushed and hit her children, did not want them around, and never showed them any affection. She could only recall one instance where Orlando Sr. was abusive with the children, where he pushed Anthony into a wall when he was drunk. Maria believed she was harder on Romero than the other boys because Romero looked like Orlando Sr., whom she hated. Due to the family situation, Maria often left the children with either the maternal or paternal grandparents or with her sisters, who were kind and caring to the boys. Even when things were bad at home, the boys always had enough food and clothing, and received support and attention from her family. (52 RT 7697-7708, 7719-7720, 7748, 7761-7762, 7793-7794, 7820-7823, 7826, 7828, 7837, 7844-7846.)

Just before Self was born, Maria left Orlando Sr. and filed for divorce. Romero was between two and three years old at the time. For the next six years, Maria testified that the family moved around a bit, she dated several different men with abusive and addictive personalities, and she continued to use drugs and abuse her children. In one incident, Maria claimed she hit Romero in the head with a belt buckle, causing him to bleed profusely. Another time, one of Maria's boyfriends made Self sit in the corner with feces on his head after he messed his underwear. In another incident, Maria had a "nervous breakdown" and hit Self's face with a fly swatter, prompting Maria to turn herself into the Department of Mental Health and obtain assistance with the children. The children were removed from Maria's care for a year and a half; Self and Timothy lived with Maria's mother, and Romero and Anthony lived

with her sister Carmen. (52 RT 7708-7713, 7716-7717, 7725-7727, 7739-7740, 7750-7751, 7787-7789; 53 RT 7914.)

Maria testified that after the children were returned to her care, she continued her drug use and ignored the children, until she met Phillip Self about a year or two later. (52 RT 7713-7729.) Self was 5 years old and Romero was about 8 years old when she married Phillip and established a stable household. Phillip was very good to her and treated Maria's children as his own. He provided a loving, non-abusive home for the boys, and fathered two daughters with Maria. Phillip was "the best thing that ever happened" to them, and Maria quit drinking and using drugs. Maria became a bilingual teachers aide, which she enjoyed because it allowed her to work with children and help them learn. The boys were taught to be polite and well-mannered, not to fight, to stay away from drinking and drugs, and to do their homework. Appellants were "very bright and intelligent," but did not put the effort into it. Maria often helped them with their spelling because it was her favorite subject. All four sons went to church and through First Communion. (52 RT 7749, 7754-7756, 7762-7768, 7800; 53 RT 7915, 7920-7921, 7923.)

When Romero turned 14 years old, he wanted to live with his father and Maria let him go. Maria did not think it was a good idea, but she wanted Romero to learn to make his own decisions. It hurt Maria to have Romero living with his father, someone who "really doesn't care about him," and "all [she] could do was cry." When she learned Romero was getting involved in drugs, Maria talked to him about it, tried to get him into a teen drug program, and told him she would help him in "every way" she could. (52 RT 7769-7775.) Romero now has a son of his own, and Maria has never seen Romero be anything but loving toward his child. (52 RT 7723-7724.)

Similarly, Self also wanted to get to know his father when he turned 14 years old. Again, Maria "thought it was only fair and right to give him a chance

to see what his father was like" and let him go. Self quickly moved back home, but shortly thereafter, Maria discovered Self was using drugs and alcohol. Maria enrolled Self in a rehabilitation center, switched his high school, and home schooled him, but he continued to use drugs. (52 RT 7775-7782.)

In contradiction to her trial testimony, Maria previously told defense investigator Robin Levinson that although she went out a lot, she never used drugs around her children and always tried to find babysitters. Maria said that although she may have had a drink or two around the children, she did recall ever getting "plastered" in front of them and attempted to "shield" her children from such behavior. (52 RT 7761, 7783; 53 RT 7936-7937.) Maria also told Levinson that Romero's "attitude was very bad," "he never wanted to take responsibility for anything that he did," and always blamed things on others even when it was obvious he was the one responsible. (53 RT 7940-7941.)

Maria's sister Carmen Burrola, who took care of Romero and Anthony after Maria's "nervous breakdown," testified that Romero was a "very good boy," "kind," "polite," and had no bad marks in school during his stay with her. Romero stayed with her for nearly two years until Maria got well and wanted her children back. She confirmed that Orlando Sr. was a drunk who often did nothing, and Maria's home life with Orlando Sr. was "awful." However, Burrola never saw Maria abuse the boys. When Romero and Anthony lived with her family, she treated the boys like her own children and her husband particularly took to them, treating the boys with trips to amusement parks and to the mountains. Burrola confirmed that Phillip Self was a "very good man" and "very patient" with the boys. Anthony, who is a non-commissioned officer in the U.S. Army, later told Burrola he thought very highly of Phillip and also thanked Carmen for the good advice she gave him. Appellants' brother Timothy was also a non-commissioned officer in the U.S. Army, serving in Bosnia at the time of trial. Burrola was "very surprised" and "very sad" that

Romero was charged with murder because he was always "respectful" and "a good boy." (52 RT 7787-7800.)

Appellants' cousins Mona Quezada, Corinna Leon, Catherine Mejia, Richard Torres, and aunt Peggy Lopez, confirmed that Maria's life with Orlando Sr. was a "mess" and that Orlando Sr. and Maria did not provide a stable home for her children. Despite this, Romero was a "happy baby" and, as a child, seemed to have a good relationship with his brothers. Self never experienced life with Orlando Sr. because Maria divorced Orlando Sr. before he was born. Maria continued to show inattentiveness to her children's well-being after divorcing Orlando Sr. Accordingly, both during her marriage to Orlando Sr. and thereafter, Maria often left her children in the care of their grandparents. The grandparents were "very good" to Maria's boys, both loving and strict. They also universally described their shock at Romero's arrest for murder, calling his conduct "out of character" from what they knew of him. To these family members, Romero was a "good boy" and "respectful." Romero also seemed to be a good father to his son Kevin. (52 RT 7818-7831, 7836-7846, 7848-7853; 53 RT 7866-7869, 7894.)

Appellants' cousin Sheila Torres testified consistently with Maria Self's account of appellants' childhood. Torres testified that Maria often left the children completely unattended, "ran around" with a lot of men after her divorce from Orlando Sr., and had a drug problem. She also said Maria was mean to her children and always punished them or demeaned them, especially Romero. Torres did not agree with the other witnesses regarding Phillip Self's positive influence on the boys, believing Phillip was not "very helpful" as a stepfather. Torres was primarily raised by the same grandparents who took care of appellants. Despite a difficult upbringing, Torres worked hard, graduated from college, and became a Deputy Labor Commissioner. (53 RT 7893-7911.)

Appellants' older brother Anthony Self likewise described Maria's violent temper and relationships with men. In particular, Anthony singled out Maria's boyfriend Bobby Guzman who was particularly hard on appellant Self, one time making Self stand with dirty underwear on his head for two hours. However, Anthony described Phillip Self as the "best man" to Maria, "very good" to the boys, helpful, and supportive. Although Orlando Sr. was his biological father, Anthony considered Phillip his father and ultimately took his last name, like appellant Self. Anthony described Maria as strict, warning them against drugs and alcohol and encouraging them to do well in school. And despite the positive changes with Phillips' presence, Maria was still prone to violent outbursts. (53 RT 7912-7915, 7917, 7919-7921, 7923, 7925.)

Anthony testified that the older brothers, including Romero and himself, would send Self across the street to fight a neighbor boy named Allen and "see what [Self] could take." This started while Self was in elementary school and continued "for years." Like appellants, Anthony experimented with alcohol and drugs, but did not tell his parents because he knew they would be very upset. One time, when his mother discovered alcohol missing from the liquor cabinet, Anthony let Self take the blame, although it was Anthony who took the alcohol. Anthony enlisted in the Army at age 18, re-enlisted at 22 years old, obtained supervisory positions, and cleared mine fields during Operation Desert Storm. At the time of trial, he was stationed in North Carolina, and wanted to help his brothers in "any way" he could. (53 RT 7912-7913, 7916-7919, 7921-7922, 7923-7925.)

Romero's friend Christine Arrabito and Arrabito's mother Janice Babish testified to Romero's five-month stay with their family in the summer and fall of 1991. Romero knew Arrabito from high school and remained friends with her thereafter. In the last week of July 1991, Arrabito's family moved to the Bay Area. Romero asked to join them so he could make a fresh start and turn

his life around. Romero felt he could best accomplish this outside of the Riverside area. Arrabito's family allowed Romero to join them, with Romero agreeing to pay his share of the rent and pay for his own expenses. (53 RT 7871-7874, 7878, 7881-7882, 7884-7885, 7888.)

During his stay with Arrabito's family, Romero would land new jobs, brag about his stellar performance, and then suddenly lose the job. Romero would also claim to be still working at a job even after he was fired. After five months, Arrabito's family asked Romero to leave their home, as he was not paying his share of the bills and had amassed a $300 phone bill. Romero promised to pay the phone bill after he left, but he never did. Arrabito felt that her family gave Romero a chance but he "misused it," "blew the trust apart," and "took advantage of them." Arrabito's family gave Romero a chance for a fresh start but "he blew it." (53 RT 7873-7878, 7882-7883, 7886-7890.)

Arrabito recalled that in high school, Romero once told her he used to steal expensive cars by watching where people parked them, staking the area out for awhile, confirming which cars had alarms, and stealing them when the owners were not around. (53 RT 7878-7879.) She confirmed that she once told a defense inestigator that Romero was "real good at stabbing people in the back." (53 RT 7879-7880.)

Self presented evidence of his artistic ability. While in high school, Self assisted in painting a mural at Paloma Valley High School to honor a teacher who passed away. Self volunteered during and after school to create the mural. According to his art teacher Margaret Louie, Self was a "very talented, very motivated" art student, and submitted his artwork for other school projects, including for school logos and to the school literary magazine. Louie gave art supplies to Self's defense counsel while Self was in jail awaiting trial, and Self created several pieces of artwork, which were shown to the jury. (52 RT 7802-7805; 53 RT 7859-7864.)

ARGUMENT

I.

THE TRIAL COURT APPROPRIATELY DECLINED TO SEVER THE MAGNOLIA CENTER INTERIORS CHARGES (COUNTS XI & XII) AND THE RECEIVING STOLEN PROPERTY CHARGE (COUNT XX) FROM THE REMAINING CHARGES

Self and Romero contend the trial court abused its discretion by declining to sever the Magnolia Center Interiors charges (Counts XI & XII) from the remaining charges.[35] (SAOB 236-258; RAOB 314-341.) Romero separately contends the trial court also abused its discretion by not severing his receiving stolen property charge (Count XX). (RAOB 330-341.) These charges were properly joined and the trial court did not abuse its discretion

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35. Respondent will address appellants' claims of error based on the time-line and context in which they arose during trial, beginning with pre-trial issues and ending with penalty phase claims of error. With regard to the first argument presented in Romero's Opening Brief (RAOB 82-129), Romero's discussion fails to raise a claim of error; rather, it merely analyzes the state of the law with regard to this Court's assessment of penalty phase error (RAOB 82-105) and engages in an abstract evaluation of the evidence presented at trial (105-129). Romero's first argument presents no claim of error to which to respond. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [every brief should contain legal argument with points and authorities]; see also Cal. Rules of Court, Rule 8.204(a)(1)(B); *People v. Ramirez* (2006) 39 Cal.4th 398, 441, fn.8; *People v. Clay* (1964) 227 Cal.App.2d 87, 100 [affirmative duty of the defendants to show error and not shift burden to court or respondent]; *People v. Goodall* (1951) 104 Cal.App.2d 242, 249 [same].) Because it is unproductive to evaluate the evidence without reference to a claim of error, respondent will set forth the applicable standard of review and relevant evidence within the context of each claim raised by appellants. As will be demonstrated throughout respondent's brief, the prosecution's guilt- and penalty-phase evidence against appellants was overwhelming, there was no error, and even assuming error, it was harmless even under the most stringent of applicable standards.

when it declined severance. Appellants also cannot establish they were prejudiced or any gross unfairness from the trial court's decision.

In moving papers filed before trial, Self asked the trial court to sever the capital murder charges from all other non-capital counts. Self contended that joinder of the capital crimes and non-capital crimes prejudiced him and undermined his right to a fair trial and due process on the capital charges. (6 CT 1216-1222.) At the severance hearing, Romero joined in Self's motion to sever. (29 RT 4683.) After discussing the relevant legal precedent, the trial court determined that, except as to Counts XI and XII involving the burglary and vandalism of Magnolia Center Interiors, all of the crimes were of the same class, the evidence was cross-admissible, there was no incident significantly more or less inflammatory than the others, all of the charges were supported by substantial evidence, and it would waste judicial resources to try the counts separately. (29 RT 4685-4691.) As to Counts XI and XII, the court found that while these crimes were not of the same class as the other crimes, they were all linked together by a "common element of substantial importance," to wit, the felonious intent to obtain property, and they were not significantly less inflammatory or weaker in evidentiary strength than the other charges. The court then denied appellants' motion to sever. (29 RT 4691-4692.)

Appellants claim the Magnolia Center Interiors charges (Counts XI & XII) and receiving stolen property charge (Count XX) were unlawfully joined with the remaining charges, and in the alternative, they claim the trial court abused its discretion when it declined to sever Counts XI, XII, & XX. (SAOB 236-258, 492; RAOB 314-341, 596.) Appellants' claims are wholly without merit.

A. The Magnolia Center Interiors Charges (Counts XI & XII) And Receiving Stolen Proper Charge (Count XX) Were Properly Joined

"The law prefers consolidation of charges." (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) Joinder of criminal charges reduces the delay in the disposition of criminal cases, obviates the need to select an additional jury, avoids the waste of public funds, and conserves judicial resources. (*People v. Mason* (1991) 52 Cal.3d 909, 935; *People v. Bean* (1988) 46 Cal.3d 919, 939-940.) Whenever a defendant is tried for multiple crimes of the same class, the jury necessarily will be presented with evidence that the defendant committed multiple offenses. However, this is not a reason in and of itself to render joinder improper; rather, the danger to be avoided in joinder of offenses is that strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case on another crime. (*People v. Mason, supra,* 52 Cal.3d at p. 935.)

Where offenses charged are "connected together in their commission" or "of the same class," joinder is proper. (Pen. Code, § 954; *People v. Mandriquez* (2005) 37 Cal.4th 547, 574; *People v. Kraft* (2000) 23 Cal.4th 978, 1030.) Moreover, offenses "committed at different times and places against different victims are nevertheless connected together in their commission when they are . . . linked by a common element of substantial importance ." (*People v. Mendoza* (2000) 24 Cal.4th 130, 160, quoting *People v. Lucky* (1988) 45 Cal.3d 259, 276 [internal quotations and citations omitted].) This Court has found joinder proper where, as here, a defendant engages in a crime spree and the "element of intent to feloniously obtain property runs like a single thread through the various offenses. . . ." (*People v. Mendoza, supra*, 24 Cal.4th at p. 160 [kidnapings, robberies, rape, murder, and burglaries occurred during two-day crime spree and all involved the intent to illegally obtain property][internal citations and quotations omitted]; *People v. Lucky, supra,* 45 Cal.3d at p. 276

[six robberies properly joined with a robbery-murder charge because of common element of intent to feloniously obtain property and crimes' shared characteristics]; *People v. Chessman* (1959) 52 Cal.2d 467, 492 [simple robbery and robbery-kidnaping charges properly joined with robberies involving rape and oral copulation because one-month crime spree involved common thread of intent to feloniously obtain property].)

Appellants attempt to distinguish the instant case from this long line of precedent by minimizing the extent of their crime spree and mis-characterizing their criminal intent and conduct with regard to the Magnolia Center Interiors charges. (RAOB 319-322; SAOB 249-250, 492.) Specifically, Romero insinuates he merely "vandalize[d] a business . . . incidentally [found] some trinkets attractive and walk[ed] off with them"and that the Magnolia Center Interiors crimes had no common factors with the other crimes other than the same perpetrators and time frame. (RAOB 321-322.)

Review of the record confirms the trial court's finding that in fact *all* of appellants' crimes, including Counts XI, XII, and XX, displayed the common element of intent to feloniously obtain property and occurred amidst a prolific crime spree, wherein appellants kidnaped, carjacked, robbed, and/or shot nearly a dozen victims in a two-month period. The burglary and vandalism of Magnolia Center Interiors (Counts XI and XII) did not simply entail the destruction of property and taking of "trinkets." Rather, it is clear appellants broke into Magnolia Center Interiors with the intent to take valuable property from the store, as evidenced by their repeated attempts to open the store's antique safe. Appellants wore down screwdrivers and other tools in their efforts to open the safe, yet only managed to pry off the combination lock and damage the safe's hinges. Having not been successful in obtaining valuable property, appellants stole several less valuable items as consolation prizes,

leaving behind threatening graffiti and extensive damage to the store.[36] Thus, the Magnolia Center Interiors charges bore the same felonious intent to obtain property as appellants' other crimes. Likewise, the receiving stolen property charge (Count XX) involved Romero's knowing, intentional, and felonious obtainment of the ammunition pouch Self stole from Feltenberger. Accordingly, Counts XI, XII, and XX were part and parcel of appellant's crime spree involving the common thread of intent to feloniously obtain property, and the charges were thus properly joined.

B. The Trial Court Appropriately Declined To Sever The Charges

When the statutory requirements for joinder are met, as they were here, the trial court may sever counts only on a defendant's "clear showing of potential prejudice." (*People v. Stanley* (2006) 39 Cal.4th 913, 933; *People v. Ochoa, supra,* 19 Cal.4th at p. 409.) Prejudice is not assumed; instead, the defendant must clearly establish a substantial danger of prejudice - prejudice so great as to deny a fair trial and outweighing countervailing considerations. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243.) A trial court's denial of a motion to sever charges is reviewed for an abuse of discretion, that is, whether the denial fell "'outside the bounds of reason.'" (*People v. Carter* (2005) 36

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36. Burglary has also been recognized to be, like robbery, a property-related crime entailing danger to human life, and thus, it could be argued that appellants' crimes were not only connected in their commission but also of the same class:

"Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence. The laws are primarily designed, then, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety." (*People v. Gauze* (1975) 15 Cal.3d 709, 715.)

Cal.4th 1114, 1153, quoting *People v. Osband* (1996) 13 Cal.4th 622, 666.) The ruling is also reviewed in light of the record before the court at the time of the motion. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120; *People v. Arias* (1996) 13 Cal.4th 92, 127.)

However, even if the trial court's ruling was correct at the time it was made, the judgment of conviction must be reversed if a defendant shows the joinder actually resulted in "gross unfairness," amounting to a denial of due process and a fair trial. (*People v. Stitely* (2005) 35 Cal.4th 514, 531.) But a defendant bears a heavy burden to demonstrate joinder of offenses rendered his trial fundamentally unfair. (*People v. Ochoa, supra*, 19 Cal.4th at p. 409.) The United States Supreme Court has held that "[i]mproper joinder does not, in itself, violate the Constitution. Rather, misjoinder . . . rise[s] to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his . . . right to a fair trial." (*United States v. Lane* (1986) 474 U.S. 438, 446, fn.8 [106 S.Ct. 725, 88 L.Ed.2d 814].) Reversal for improper joinder is unwarranted unless, to a reasonable probability, the defendant would have received a more favorable result in a separate trial. (*People v. Avila* (2006) 38 Cal.4th 491, 575.)

In *Williams v. Superior Court* (1984) 36 Cal.3d 441, this Court set forth several factors to be considered in deciding whether charges should be severed: (1) the lack of cross-admissibility of evidence; (2) the prejudicial effect of joining a highly inflammatory charge with a non-inflammatory charge; (3) the prejudicial effect of joining a weak case with a strong case; and (4) whether the People sought to join a non-capital charge with a capital offense. (*Id.* at p. 452.) When examining these factors, the burden remains on appellants to clearly establish a substantial danger of prejudice. "While we have held that cross- admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate

prejudice." (*People v. Mason, supra,* 52 Cal.3d 909, 934; accord *People v. Stitely, supra*, 35Cal.4th at pp. 531-532.) Further, the "joinder of a death penalty case with non-capital charges does not by itself establish prejudice." (*People v. Marshall* (1997) 15 Cal.4th 1, 28.)

As this Court further explained in *People v. Ochoa* (2001) 26 Cal.4th 398 [*"Ochoa II"*],

> We developed criteria to guide evaluations of trial court decisions on severance motions. Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.
>
> Cross-admissibility of evidence is sufficient but not necessary to deny severance. As the four-part test is stated in the conjunctive, joinder may be appropriate even though the evidence is not cross-admissible and only one of the charges would be capital absent joinder. Even where the People present capital charges, joinder is proper so long as evidence of each charge is so strong that consolidation is unlikely to affect the verdict.

(*Ochoa II, supra*, 26 Cal.4th at p. 423 [internal citations and quotations omitted].)

1. The Evidence Was Cross-admissible

The Magnolia Center Interiors charges and Romero's receiving stolen property charge presented cross-admissible evidence with the remaining charges. With regard to Magnolia Center Interiors, keys and other items stolen from the store were found during a search of appellants' grandmother's house, along with property stolen from Feltenberger, Steenblock, Greer, and Jerry Mills. (32 RT 4960, 34 RT 5321-5322, 5375-5377; 35 RT 5399; 27 RT 5655-

5663, 5667-5669.) Shoe prints resembling the "British Knights" prints found at the Mans-Jones and Feltenberger crime scenes were also found in the fire extinguisher dust at Magnolia Center Interiors, thus further establishing Self's actual participation in the burglary and vandalism. (34 RT 5354-5355, 5362-5375; 1 SCT [Exhs.] 45-46.) The threatening graffiti written on the walls of Magnolia Center Interiors resembled the graffiti written on a British Knights shoe box recovered from Self's Oldsmobile and an empty briefcase bearing Self's first name recovered from the trunk of the Colt. (32 RT 5039-5041, 34 RT 5365-5373; 37 RT 5687-5688; 1 SCT [Exhs.] 15-16, 100-103, 319-320.) Furthermore, the graffiti's threatening nature tended to undercut appellants' attempts at trial to paint Munoz, who did not participate in the Magnolia Center Interiors burglary, as the violent ringleader in the murders and robberies, and instead displayed appellants' shared intent to steal property and harm people. Thus, there was more than substantial cross-admissibility of evidence between the Magnolia Center Interiors charges (Counts XI & XII) and the remaining counts.

With regard to Romero's receiving stolen property charge, it is clear that this crime shared cross-admissibility with not only the Feltenberger robbery-shooting itself, but also with the other murders and robberies. First, evidence detailing the Feltenberger robbery-shooting was cross-admissible with Count XX to prove that the ammunition pouch Romero received was actually stolen from Feltenberger and Romero possessed the property knowing it was stolen.[37] Second, evidence of Romero's knowing and active participation in the other robberies and murders was cross-admissible with Count XX because such evidence tended to prove Romero knew the ammunition pouch was stolen and negated any defense of innocent receipt. Third, the stolen ammunition pouch was recovered among the weapons Romero stole from Jerry Mills, and at the

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37. See Respondent's Argument IV, *infra*.

time of its recovery, the pouch contained two .45 caliber bullets that could have been used in Mills' .45 caliber Colt pistol. (35 RT 5390-5400; 37 RT 5636-5653; 38 RT 5728-5729.) Fourth, Romero's suggestion to "take [Feltenberger] out" once he heard Feltenberger was alive not only proved he knew the ammunition pouch was stolen, but also undercut his defense that Munoz was the group's ringleader in the rest of the crimes. (39 RT 6022-6023; 45 3rd SCT 13008.) Fifth and finally, physical and eyewitness identification evidence supported Munoz's account of both the Feltenberger shooting and Romero's receipt of the stolen ammunition pouch, thereby significantly bolstering Munoz's credibility and his testimony concerning the remaining charges.

In sum, the evidence supporting each crime was inextricably linked to the other crimes and created a web of evidence proving appellants' guilt. With this cross-admissibility of evidence, appellants cannot establish prejudice.

2. The Charges Were Unlikely To Inflame The Jury

The burglary, vandalism, and receipt of stolen property counts are certainly not "highly inflammatory," especially in light of the numerous murders and robbery-shootings charged against appellants in the other counts. Despite this, appellants claim the details of the Feltenberger robbery, as well as the threatening graffiti and defacement of the sonogram in the Magnolia Interiors incident, were "so inflammatory, [they were] likely to suffer unfair prejudice at a joint trial which included those charges." (SAOB 248, 254; RAOB 327-332.) This is simply untrue.

As recognized by the trial court in this case, although the graffiti and sonogram defacement can be considered inflammatory, this evidence is no more inflammatory, and is indeed much less inflammatory, than the gruesome accounts of appellants' murders and attempted murders of a half-dozen innocent people. (29 RT 4691-4692.) The same can be said for the receiving stolen property charge. The juries heard how Romero shot an unsuspecting

Mans in the back, Self chased down Jones and shot him four times in the head and neck, and Self shot Aragon eleven times while Romero asked the victim how it felt. It is utterly implausible that the juries were inflamed by threatening graffiti and defacement of a sonogram photograph in light of this incredibly powerful evidence. It is likewise implausible that Romero's jury was inflamed by his receipt of Feltenberger's stolen ammunition pouch and the circumstances surrounding Feltenberger's shooting when they knew Romero personally participated in the murders of three innocent young men. Indeed, Romero does not address the fact that his jury acquitted him on two counts. (Count XIII [Steenblock], Pen. Code, § 209, subd. (b); Count XIV [Steenblock], Pen. Code, § 211). (8 CT 1724-1732, 1786-1835.) This fact alone is compelling evidence that the Romero jurors were not unduly inflamed, took their oaths seriously, and weighed the evidence as to each count individually.

Finally, as also recognized by the trial court, the real danger to be avoided by joining inflammatory offenses with non-inflammatory offenses is that strong evidence of the inflammatory charge might be used to bolster a weak case of a non-inflammatory crime. (*People v. Mason, supra,* 52 Cal.3d at p. 935; 29 RT 4691.) That danger, as demonstrated below, was simply not present in the instant case.

3. Counts XI, XII, And XX Did Not Unfairly Bolster The Remaining Charges

Notably, appellants do not dispute that the evidence in this case was strong as to all of the charges, and there was no danger any of the charges would unfairly bolster the others. (RAOB 325-327; SAOB 246-252.) This is not surprising. The prosecution presented overwhelming evidence establishing appellants' guilt, including credible eyewitness identifications, considerable physical evidence obtained from both the crime scenes and from searches of appellants' homes and vehicles, appellants' damaging police interviews, and

Munoz's corroborated accomplice testimony. The trial court correctly recognized that the evidence was equally persuasive in its ruling on appellants' severance motion. (29 RT 4690-4692.) Accordingly, there was no likelihood that Counts XI, XII, and XX would unduly inflame the juries or unfairly bolster the other charges.

4. Defendants Were Not Prejudiced By Consolidation

Appellants contend the trial court failed to give due consideration to the capital nature of this case, and that by joining the burglary, vandalism, and receipt of stolen property charges, the trial court increased the likelihood that the juries would find appellants "committed three murders and deserved to die." (SAOB 257; RAOB 328-329, 333-341.) Appellants' contentions are without merit. First, the trial court recognized, quoting from *People v. Lucky, supra*, 35 Cal.3d at page 277, that "[e]ven in capital cases . . . consolidation may be upheld on appeal where the evidence on each of the joined charges is so strong that consolidation is unlikely to have affected the verdict." (29 RT 4690.) This case presents exactly such a situation.

As previously demonstrated in Respondent's Statement of Facts, each and every crime, including the capital charges, was supported by overwhelming evidence establishing appellants' guilt. The trial court instructed the jury to find and decide each special circumstance alleged and each offense charged separately. (45 RT 6859; 46 RT 7087; 7 CT 1473, 1652.) The jury was also instructed its finding as to each count was to be stated in a separate verdict. (45 RT 6859, 6864; 46 RT 7087, 7091-7092; 7 CT 1473, 1485, 1652, 1663.) And Romero's jury was further instructed that "no evidence was presented that Mr. Romero was involved in [the Feltenberger] incident," and "evidence [regarding this incident] is only being offered as it relates to Count XX receiving stolen property." (46 RT 7050; 7 CT 1567.) Additionally, as discussed above, it is inconceivable that the juries, after hearing how appellants callously murdered

three young men, were unduly inflamed by some threatening graffiti, defacement of a sonogram photograph, or the receipt of property stolen from yet another robbery-shooting. Indeed, Romero's jury clearly was not unduly inflamed, as it acquitted Romero of the Steenblock robbery-kidnaping. (8 CT 1724-1732, 1786-1835.)

Finally, with regard to the penalty phase, it is equally inconceivable that the burglary or stolen property evidence somehow tipped the scales in favor of a death verdict, when the juries were confronted with appellants' unrelenting crime spree, extreme brutality, lack of remorse, continuing violence in pretrial confinement, escape attempts, and utter disregard for human life. After all, it was appellants who, after shooting Aragon nearly a dozen times and leaving a two-inch gaping wound in his neck, actually had an appetite and sat down for lunch at Coco's restaurant. (35 RT 5468-5471; 39 RT 5991-6003.) Appellants' mitigation evidence simply could not compare with the strong evidence in aggravation. While appellants presented evidence of childhood neglect and abuse early in their lives, the same evidence also showed: they had the benefit of loving grandparents and other extended family members even during the worst of times; they had the influence of a devoted stepfather and stable family life by the time they were five (Self) and eight (Romero) years old; their mother taught them right from wrong and the value of manners and a good education; they were intelligent and did well in school when they made the effort; and their brothers raised in the same household achieved success in the military and rejected the criminal path chosen by appellants.

In sum, the statutory requirements of joinder were met, and appellants have failed to demonstrate undue prejudice, much less "gross unfairness" amounting to a denial of due process, resulting from the consolidated charges. The trial court did not abuse its discretion by declining severance and appellants were not denied due process from the consolidated charges.

II.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT EXCUSED SEVERAL PROSPECTIVE JURORS FOR CAUSE BASED UPON INFORMATION THEY PROVIDED IN THEIR QUESTIONNAIRES

Self contends the trial court violated his constitutional rights and committed reversible error when it excused several prospective jurors solely on the basis of their answers to questionnaires. (SAOB 143-154, 158-196.) Self also contends the questionnaire's single question asking prospective jurors to identify their race or ethnicity resulted in the non-representation of Hispanics on his jury. (SAOB 154-157, 189-196.) By not objecting to the question regarding race and ethnicity and by stipulating to the removal of prospective jurors based on their questionnaire responses, Self waived his claims of error. In any event, there was no violation of Self's constitutional rights and no error from the court's reliance on written questionnaires to dismiss prospective jurors for cause.

On October 2, 1995, the prosecution filed a proposed jury questionnaire to be used during jury selection in appellants' trial. (5 CT 919-949.) The proposed questionnaire asked prospective jurors, inter alia, to identify their name, age, date of birth, place of residence, race and ethnic origin, marital status, and family situation. It also asked prospective jurors to discuss their educational background, employment history, contacts with the judicial system, experience with crimes of violence, knowledge about the case, abilities to be fair and impartial, abilities to deliberate and reach a verdict, and attitudes toward capital punishment. Finally, the proposed questionnaire provided an explanation sheet with space for prospective jurors to provide additional information, if necessary. (5 CT 919-949.)

On December 11, 1995, counsel discussed the proposed questionnaire with the trial court. (10 RT 2021.) Self objected to the use of a questionnaire, but also recognized it was within the trial court's discretion to do so, stating "I think the only thing the Court has to know is that it's a discretionary decision. I mean, it's clearly set out, there is no mandate requiring the Court either use or not use a questionnaire. . . ." (10 RT 2021-2022.) Self's counsel indicated he would not provide a proposed questionnaire to the court because "an open forum to discuss these death penalty issues is a much better way to proceed than the questionnaire." (10 RT 2026.) Counsel believed the questionnaire was a means for the prosecution to identify jurors "who have some reservations about the death penalty," and "anybody that expresses even a minimal reservation about imposing the death penalty will be struck by the People." (10 RT 2026.)

The prosecution countered the defense assertions, arguing the questionnaire was "indispensable to . . . protect the defendant's rights," and "both from a time management standpoint and a fair trial standpoint," it was "very important" to use the questionnaire. The prosecution also noted the trial court's statutory authorization to use a written questionnaire, in California Code of Civil Procedure section 205. (10 RT 2023-2024, 2029-2030.) Finally, the prosecution argued that oral voir dire would disclose the same information as that explored in the questionnaire, but doing it in written format would have the added benefits of increased efficiency and preventing the "perceived evils" from group voir dire.[38] (10 RT 2029-2030.)

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38. The prosecution cited *People v. Cudjo* (1994) 6 Cal.4th 585, 627, which found that a written questionnaire was an adequate substitute for the individualized, sequestered voir dire mandated by *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80. Although *Hovey* voir dire was no longer required in light of Proposition 115, the prosecutor noted that the benefit of the questionnaire recognized in *Cudjo* would nevertheless benefit the process in the instant case. (10 RT 2023-2024, 2029-2030.)

The trial court allowed the use of a jury questionnaire. (10 RT 2025-2026, 2031-2032.) The trial court ruled the use of the questionnaire was "very fair" and "beneficial to the defendants" by providing detailed information about the juror's views, would allow the attorneys to "pinpoint those areas where they feel that they need follow-up," and was also a time-efficient manner of conducting jury selection. (10 RT 2025-2026, 2031-2032.) The trial court then encouraged defense counsel to either submit their own proposed questionnaire or seek modifications to the prosecution's proposed questionnaire. (10 RT 2032.)

At a hearing on January 11, 1996, the prosecution submitted suggested changes to the proposed jury questionnaire, and the trial court discussed these suggestions and solicited input from the defense. (5 CT 1088-1090; 10 RT 2049-2072.) While Self renewed his objection to the use of any questionnaire (which the trial court again overruled), and Self's defense counsel said he was "not taking any position" with respect to some of the proposed questions, Self also affirmatively concurred in many of the changes, voiced specific objections to the questions regarding the O.J. Simpson trial, and asked that the court add an additional page to the explanation sheet. (10 RT 2051-2054, 2060-2068, 2071.)

In addition to seeking input and changes to the proposed questionnaire, the trial court also discussed the conduct of voir dire, stating:

> [W]hat I suggest is that we spend a little bit of time in the morning before we undertake voir dire and see if we can agree together that certain of the jurors have stated cause to be excused and that no further voir dire of those jurors need be done just based on upon the answer that they put into the questionnaire. I would imagine in every group we will have some jurors that fit in that category. If all of us can agree, we will just excuse them for cause at that time.

(10 RT 2054-2055.)

The court also emphasized:

> But I'm not planning personally on asking the jurors any questions about their views on capital punishment unless I feel for some reason that that's necessary.
>
> But I want you to understand that is your responsibility. I feel that the question[naire] elicits their views, if you wish to follow-up, you should do so during your one hour of voir dire.
>
> Now, does anybody see a problem with that approach?

(10 RT 2056-2057.)

Romero's attorney affirmatively expressed satisfaction with the court's suggested approach, and Self's attorney did not object. (10 RT 2057.) Although the defense reiterated their objection to the use of a questionnaire, they did not object to the proposed conduct of voir dire, and as will be demonstrated, they ultimately stipulated to each and every one of the court's questionnaire-based dismissals. (10 RT 2054-2071.)

The finalized 32-page jury questionnaire asked the jurors, inter alia: to identify their "race and ethnic origin," (Question 1.D.); whether they or a close friend or relative had ever been a victim of, witness to, or accused of a crime (Questions 17-19); to describe any prior jury service (Questions 22-24); and to describe their feelings about the O.J. Simpson trial (Question 41 A.-F). (See, e.g., Exh. 2 [LeDonna F.], Augmented Jury Questionnaires[39/], pp. 1, 6-9, 12-13.)

In seeking information about the jurors' feelings toward the justice system, the defendants, their duties as jurors, and capital punishment, the questionnaire asked the following questions, in relevant part:

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39. On September 19, 2007, this Court granted Respondent's Motion to Augment the Record with ten jury questionnaires omitted from the clerk's transcript. The augmented questionnaires were labeled Exhibits 2 through 11.

25. Do you have any feeling about the nature of the charges in this case that would make it difficult or impossible for you to be fair and impartial?

(See, e.g., Exh. 2, Augmented Jury Questionnaires, p. 9.)

26. Do you have any religious or moral feeling that would make it difficult or impossible for you to sit in judgment of another person?

(*Ibid.*)

27. Would you be reluctant to serve as a juror on a crime involving acts of violence and where graphic photographs of the victim will be in evidence?

(*Id.* at p. 10.)

38. Do you have strong feelings towards the use of alcohol and/or drugs?

(*Id.* at p. 11.)

74. A. What are your GENERAL FEELINGS regarding the Death Penalty?

(*Id.* at p. 22.)

74 B. What are your GENERAL FEELINGS regarding life without the possibility of parole?

(*Ibid.*)

75. A. Do you feel that the death penalty is used too often? Too seldom?

(*Ibid.*)

75. C. Assume for the sake of this question only that the jury has found a defendant guilty of first degree murder and has found one or more special circumstances to be true and that you are in the penalty phase: would you, because of any views that you may have concerning capital punishment, **automatically refuse** to vote in favor of the penalty of death and **automatically vote** for a penalty of life imprisonment without the possibility of parole, without considering any of the

evidence of any of the aggravating and mitigating factors (about which you will be instructed)?

(*Id.* at p. 26, emphasis in original.)

75. D. Assume for the sake of this question only that the jury has found a defendant guilty of first degree murder and has found one or more special circumstances to be true and that you are in the penalty phase: would you, because of any views that you may have concerning capital punishment, **automatically refuse** to vote in favor of the penalty of life imprisonment with the possibility of parole and **automatically vote** for a penalty of death, without considering any of the evidence of any of the aggravating and mitigating factors (about which you will be instructed)?

(*Id.* at pp. 26-27, emphasis in original.)

75. F. Could you set aside your own personal feeling regarding what the law ought to be, concerning the killing of a human being and the appropriate punishment for such an activity, and follow the law as the court explains it to you?

(*Id.* at p. 27.)

75. G. Would your feeling about the death penalty prevent or substantially impair your ability to conscientiously consider the imposition of the death penalty where appropriate?

(*Ibid.*)

75. H. Would your feeling about the death penalty prevent or substantially impair your ability to conscientiously consider the imposition of life without possibility of parole where appropriate?

(*Ibid.*)

77. Do you believe that **background information** about a defendant is something relevant to the jury's consideration of penalty?

(*Id.* at p. 28, emphasis in original.)

78. Overall, in considering general issues of punishment, which do you think is **worse for a defendant** [death or life in prison without the possibility of parole]?

(*Ibid.*, emphasis in original)

After describing the law on felony murder and liability for aiders and abettors, Questions 79 and 80 asked jurors if they could follow these laws and whether they would automatically vote for life imprisonment without parole (or automatically against the death penalty) in such situations. (Exh. 2, Augmented Jury Questionnaires, pp. 28-29.) Finally, the questionnaire asked jurors if there was any reason they would prefer not to serve as a juror in this case (Question 81), and if there was any reason why they could not be fair and impartial to both the prosecution and the defense (Question 84). (*Id.* at pp. 29-30.)

On the cover sheet, the questionnaire requested that jurors to respond to the questions "as completely as possible," required them to sign the document under penalty of perjury, and warned: "The information contained in this questionnaire will be come part of the court's permanent record and therefore a public document." (See, e.g., Exh. 2, Augmented Jury Questionnaires, Cover Sheet.)

After all hardship discharges were heard and resolved, the court began voir dire of prospective jurors on March 4, 1996. Before bringing in the first 15-member panel of prospective jurors, the following exchange occurred between the trial court and counsel:

THE COURT: Now, Counsel, did you wish to stipulate that certain individuals have stated cause to be excused from service on this jury and that it is not necessary to conduct voir dire of them?

[PROSECUTOR]: Yes, Your Honor.

[SELF'S COUNSEL]: Yes, we would.

THE COURT: And who would be so stipulated?

[PROSECUTOR]: We would stipulate to number 1, La Donna [F.]

THE COURT: Okay.

[PROSECUTOR]: Number 2, Adrianne [F.]

THE COURT: All right.

[PROSECUTOR]: Number 10, Olga [V.]

THE COURT: All right.

[PROSECUTOR]: And number 13, Frank [D.]

THE COURT: Okay.

[SELF'S COUNSEL]: So stipulated.

(23 RT 3724-3725.)

The court then dismissed the prospective jurors stipulated for cause and counsel conducted oral voir dire on the remaining members of the 15-member panel. (23 RT 3728, 3731-3789.) After oral voir dire, the court asked counsel for their challenges for cause, ruled on those challenges, excused the relevant prospective jurors from service, and counseled the remaining jurors to return on a date when the jury would be selected. (23 RT 3790-3796.)

This process would be repeated 12 times until the court qualified 100 prospective jurors, from which Self's jury was ultimately selected. (23 RT 3798-3800; 24 RT 3867-3872, 3943-3947, 4008, 4012, 4015; 25 RT 4090-4091, 26 RT 4164-4166, 4240-4243; 27 RT 4314-4316, 4364-4367; 28 RT 4430, 4439, 4508-4509, 4512; 29 RT 4572-4573, 4575.) With regard to each and every panel, Self stipulated to prospective jurors for cause and voiced no objections to their dismissals, including the following prospective jurors he now complains were improperly discharged: Yolanda B.-M. (23 RT 3798-3799), Joshua V. and Jeffrey L. (24 RT 3867-3869), Kay T. and Peggy K. (25 RT 4086-4090), Beatrice M. (26 RT 4162-4163), and Pamela C., Brian S., Randy M., Michael H. and Ron U. (27 RT 4314-4316), and Robert G. (29 RT 4572-4573). (SAOB 150-153, 177, 180-182, 184, 187-189.)

Once the court qualified 100 prospective jurors, the court brought in a random selection[40] of 12 prospective jurors into the jury box, solicited peremptory challenges from both sides, replaced struck jurors with other jurors from the remaining qualified pool, and repeated the process until the parties accepted the panel as constituted. (29 RT 4649; 30 RT 4744-4745, 4747, 4753, 4756-4762.) During regular juror selection, the prosecutor exercised three peremptory challenges, eliminating prospective jurors Anne B., Sharon G., and Tracy W., none of whom were Hispanic. (33 3rd SCT 9522; 40 3rd SCT 11595; 41 3rd SCT 11965.) Self accepted the panel as constituted without exercising any peremptory challenges. (30 RT 4758-4762.) All of the 12 regular jurors were Caucasian. (3 SCT [Redacted Juror Questionnaires] 632, 706, 743, 780, 817, 4 SCT [Redacted Juror Questionnaires] 891, 928, 965, 1002, 1113; 5 SCT [Redacted Juror Questionnaires] 1150, 1185.)

During the selection of alternates, the same method was used, but with only 5 prospective jurors in the jury box. The prosecutor exercised four peremptory challenges, eliminating Linda L., Isabel R., Ronald F., and Burma M. (30 RT 4762-4776.) On her questionnaire, Isabel R. identified her race and ethnic origin as Mexican, while the other three preempted jurors identified themselves as either Caucasian (Linda L., Ronald F.) or Black (Burma M.). (22 3rd SCT 6315, 6352; 31 3rd SCT 8980; 43 3rd SCT 12490.) The defense also exercised four peremptory challenges, eliminating Nathaniel G., Jill M., Patricia C., and Deborah M. (30 RT 4762-4776.) Both sides then accepted the alternate panel as constituted, which included two Black members, one Black/Belizean[41],

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40. Self never objected to this randomized selection or otherwise asserted that Riverside County's jury selection criteria was not neutral with respect to race and ethnicity.

41. Self contends there were no Hispanics on his jury, either seated or alternates. (SAOB 154.) However, Alternate No. 2 (who later became Juror No. 14 when she replaced a seated juror on the first day of trial) identified

and three Caucasians. (30 RT 4776; 3 SCT [Redacted Juror Questionnaires 669; 4 SCT [Redacted Juror Questionnaires] 854, 1039, 1076; 5 SCT [Redacted Juror Questionnaires] 1224.)

A. Self Waived The Right To Challenge The Trial Court's Dismissal Of Prospective Jurors Based On Their Answers To The Questionnaire, Or The Race And Ethnicity Question In The Questionnaire

Although Self objected to the use of a questionnaire as part of jury selection procedures, he never lodged a specific objection to the race and ethnicity question (despite lodging specific objections to other questions), and he ultimately stipulated to all of the questionnaire-based dismissals of which he now complains. Accordingly, he is precluded from advancing his claims of error on appeal.

After the trial court overruled Self's objection to the use of a questionnaire, the trial court actively encouraged Self's counsel to participate in drafting the questions. Although trial counsel maintained his blanket objection to the use of a questionnaire and refused to submit a proposed questionnaire of his own, he did participate in making final changes to the questionnaire, and most telling, he chose to lodge objections to the questions concerning the O.J. Simpson trial. He did not, however, lodge any objections to the race and ethnicity question. (10 RT 2051-2054, 2060-2068, 2071.) Nor did Self ever raise a claim of racial bias, claim that Riverside County's jury

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herself as Black/Belizean in her jury questionnaire. (3 SCT [Redacted Jury Questionnaires] 669; 31 RT 4861-4862, 4866.) Belize is a country in Latin America, bordering on Mexico. Hispanic is defined as "of, relating to, or being a person of Latin American descent living in the United States." (Webster's Third New International Dictionary, Unabridged (2002).) Given that Juror No. 14 (Alternate No. 2) identified herself, at least in part, as "Belizean," she was, by very definition, a person of Latin American descent living in the United States. Thus, it is reasonable to infer from the questionnaire that Juror No. 14 can properly be classified as "Hispanic."

selection criteria was infirm with respect to race and ethnicity, claim that his jury was not drawn from a representative cross-section of the community, or claim that the prosecutor improperly targeted or dismissed prospective jurors based on race or ethnicity. Having failed to make specific and timely objections on these grounds in the trial court, he is now barred from asserting such claims on appeal. (*People v. Abilez* (2007) 41 Cal.4th 472, 493 [failure to object to alleged improper questioning or alleged prosecutorial misconduct during voir dire waives such claims on appeal]; *People v. Thornton, supra,* 41 Cal.4th 391, 462 [defendant barred from raising *Batson-Wheeler* challenge for first time on appeal]; *People v. Rogers* (2006) 39 Cal.4th 826, 858 [defendant barred from raising fair cross-section claim on appeal for failure to object at trial]; *People v. Seaton* (2001) 26 Cal.4th 598, 700 [defendant failed to object to jury panel on the ground that certain racial or ethnic groups were underrepresented, and he is thus precluded on appeal from raising a claim that the panel was racially or ethnically unbalanced].)

Self is likewise barred from appealing the questionnaire-based dismissals to which he stipulated. As Self acknowledges, in *People v. Benavides* (2005) 35 Cal.4th 69, this Court held a defendant was barred on appeal from raising the issue of a trial court's questionnaire-based dismissals when he stipulated to the dismissals at trial. (*Id.* at p. 88.) The facts of *Benavides* are remarkably similar to those in the instant case. In *Benavides*, the trial court submitted two questionnaires to prospective jurors; one regarding hardship, and the other specific to death qualification. The court and counsel conducted voir dire of groups of prospective jurors. After several days, the court stated,

> Counsel have indicated also, yesterday, that, having reviewed the questionnaires from today, and having the benefit of extensive voir dire of a number of other individuals in this particular case, that, in the interest of time, and more particularly in the interests of justice, they are

prepared to agree that certain of our prospective jurors for this morning may be excused.

(*Id.*, at p. 88.) Thereafter, counsel stipulated to the removal of eight prospective jurors based solely on the answers they provided in their jury questionnaires. On appeal, the defendant, like Self, claimed the process violated his right to an impartial jury. (*Ibid.*) This Court held the defendant was barred from raising the issue on appeal because he acquiesced in the procedure. Citing *People v. Ervin* (2000) 22 Cal.4th 48, 73, this Court stated,

> While the parties are not free to waive, and the court is not free to [forgo], compliance with the statutory procedures which are designed to further the policy of random selection, equally important policies mandate that criminal convictions not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced. [Citations.]' ([Citation]; see also Cal. Const., art. VI, § 13 [no reversal for procedural errors absent a 'miscarriage of justice'].)'

(*People v. Benavides, supra*, 35 Cal.4th at 88.)

In *People v. Ervin, supra,* 22 Cal.4th 481, with the agreement of counsel and to avoid lengthy delays, the court developed a screening process that allowed counsel jointly to review juror questionnaires to screen out those prospective jurors who appeared to be strong candidates for dismissal, because their questionnaires demonstrated they would automatically vote for death, they would never vote for death, or they suffered from a hardship. Using this process, the court eliminated more than 600 prospective jurors by stipulation of the parties. (*People v. Ervin, supra,* 22 Cal.4th at p. 72.) The Court rejected the defendant's challenges to the process, noting that "the defendant, through his counsel, stipulated to every aspect of the challenged procedure and further agreed to excuse every prospective juror he now asserts was improperly excused." (*Ervin, supra,* 22 Cal.4th at p. 73.) The Court held the defendant was barred from raising on appeal defects in the procedure in which he

acquiesced. (*Ibid.*; see also *People v. Hill* (1992) 3 Cal.4th 959, 1003 [joining in an excuse for cause of a potential juror forfeits the issue for purposes of appeal].)

In contrast, in *People v. Stewart* (2004) 33 Cal.4th 425, this Court held the defendant's challenge to the court's use of questionnaire-based dismissals was not waived. There, the Court found that nothing in the record indicated the defendant either implicitly or explicitly conceded the propriety of using such a procedure; the trial court repeatedly assured counsel it would conduct oral voir dire to address any ambiguous responses; and thereafter, defense counsel repeatedly objected to each of the five excusals on the basis that the answers provided in the questionnaires did not demonstrate substantial impairment. (*Id.* at p. 452.)

Here, although Self initially objected to the use of a questionnaire as part of jury selection procedures, he ultimately acquiesced to the trial court's proposed questionnaire-based dismissal procedure. The trial court made its proposal very clear: if counsel reached a stipulation for cause based on a prospective juror's questionnaire, the juror would be dismissed, and if counsel did not agree or wanted oral voir dire as to a particular juror, that juror would not be dismissed based on their questionnaire alone. Self did not object to this procedure, and like the defendants in *Benavides* and *Ervin*, Self stipulated to the dismissal of each and every prospective juror of which he now complains. Unlike the defendant in *Stewart*, Self never objected to the questionnaire-based dismissals of which he now complains, nor did he argue that the jurors' answers did not demonstrate substantial impairment. (23 RT 3724-3728, 3798-3800; 24 RT 3867-3872, 3943-3947, 4008, 4012, 4015; 25 RT 4090-4091, 26 RT 4164-4166, 4240-4243; 27 RT 4314-4316, 4364-4367; 28 RT 4430, 4439, 4508-4509, 4512; 29 RT 4572-4573, 4575.) Indeed, in discussing the stipulations with the trial court, Self affirmatively requested the dismissal of all

of the prospective jurors of which he now complains (SAOB 150-153, 177, 180-182, 184, 187-189),[42] including: Yolanda B.-M. (23 RT 3798-3799), Joshua V. and Jeffrey L. (24 RT 3867-3869), Kay T. and Peggy K. (25 RT 4086-4090), Beatrice M. (26 RT 4162-4163), and Pamela C., Brian S., Randy M., Michael H. and Ron U. (27 RT 4314-4316), and Robert G. (29 RT 4572-

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42. With respect to his more general constitutional challenge to the use of questionnaire-based dismissals, Self cites to nearly all of the prospective jurors who were dismissed based on their questionnaires alone. (SAOB 150-153.) As will be shown, the procedure was a constitutional exercise of the trial court's discretion, and in any event, Self stipulated to the dismissals. But with respect to his more specific claim that some prospective jurors were dismissed with insufficient cause, Self only cites to "no less than five" or "at least . . . six" prospective jurors, namely, Yolanda B.-M., Joshua V., Jeffrey L., Peggy K., Kay T., Beatrice M., Pamela C., Brian S., Randy M., Michael H., and Ron U. (SAOB 150-153, 177-178, 180-182, 184, 187.) Therefore, with regard to all other prospective jurors dismissed by stipulation, Self does not contest the sufficiency of the cause supporting the excusals, and thus this Court should affirm the judgment without undertaking any consideration of the basis for dismissal of these prospective jurors. "It is the duty of the defendants to show error, and that means defendants are under an affirmative duty in that respect. It is not proper to attempt to shift that burden upon the court or respondent." (*People v. Goodall, supra,* 104 Cal.App.2d at p. 242; *People v. Clay* (1964) 227 Cal.App.2d 87, 100.) To this end, "'every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' [Citations.]" (*People v. Stanley, supra,* 10 Cal.4th at p. 764; see also *People v. Ramirez, supra,* 39 Cal.4th at p. 398, fn.8; Cal. Rules of Court, Rule 8.204(a)(1)(B).) Further, to the extent Self "perfunctorily asserts other claims, without development and, indeed, without a clear indication that they are intended to be discrete contentions, they are not properly made, and [should be] rejected on that basis." (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19; see also *People v. Smith* (2003) 30 Cal.4th 581, 616, fn. 8.) As Self provides no argument or specific assignment of insufficient cause with respect to all but eleven of the prospective jurors, Respondent will only address these eleven identified prospective jurors.

4573).[43] Given his stipulations, Self has waived any claim of error with regard to the dismissed prospective jurors.

Recognizing his counsel "stipulated to the discharge of over 50 prospective jurors for cause," Self argues this court should still address his claims of error because: (1) any further objections on his part were futile after the trial court decided to use questionnaire-based dismissals (SAOB 188-189); (2) because the trial court here "did far more than merely pass on the 'the adequacy of trial counsel stipulations,'" (SAOB 188, citing *People v. Benavides, supra*, 35 Cal.4th at p. 88) and instead independently determined that the questionnaire of each excused prospective juror demonstrated substantial impairment, the trial court rendered the excusal procedure to be one based upon judicial discretion rather than stipulation of the parties; (3) the trial court's use of a questionnaire-based dismissal procedure was unconstitutional on its face and implicated his right to a fair and impartial jury, a right he asserts cannot be waived (SAOB 158-178, 186-187); and (4) his counsel was ineffective in stipulating to the dismissals (SAOB 194-195, fn. 123). All of these assertions lack merit.

First, Self's futility claim is belied by the record itself. The trial court made it very clear that unless both sides stipulated, the court would not dismiss a prospective juror based on the questionnaire alone. (10 RT 2054-2057.) And indeed, there were instances where either: Self proposed to dismiss a prospective juror based on his answers to the questionnaire, the prosecution objected, and the trial court then refused to dismiss the prospective juror; or Self proposed to dismiss a prospective juror not originally agreed upon by stipulation, and the trial court only dismissed the juror after the prosecution's concurrence. (See, e.g., 27 RT 4315 [Richard B.], 4365-4668 [Deborah M.].)

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43. Self even articulated grounds for his stipulations with regard to Yolanda B.-M. and Joshua V. (23 RT 3798-3799; 24 RT 3868-3869.)

Self had ample opportunity to object to the dismissal of the prospective jurors he now alleges were improperly discharged; he failed to do so, and thus his claim is waived.

Second, Self fails in his attempt to turn his stipulations into acts of judicial discretion. Self argues that in his case, although the parties agreed to the dismissal of each excused prospective juror, the trial court "did far more than merely pass on 'the adequacy of trial counsel's stipulations,'" and by doing so, independently determined that the questionnaire of each excused prospective juror demonstrated substantial impairment and thereby rendered the excusal procedure to be one based upon judicial discretion rather than stipulation of the parties. (SAOB 188, citing *People v. Benavides, supra*, 35 Cal.4th at p. 88.) Self appears to recognize his stipulations at trial forfeit his claims on appeal, and thus he attempts to categorize some of the stipulated dismissals as "sua sponte" dismissals by the trial court. (SAOB 189.) The trial court in no way excused these prospective jurors for cause on its own motion. As demonstrated, each and every prospective juror at issue was first stipulated to by the parties and then dismissed by the trial court.

The trial court here employed nearly the same procedure as that used and upheld by this Court in *Benavides*. The trial court asked the parties to submit a list of stipulated prospective jurors, and often asked counsel "to show a legitimate reason for agreeing to the stipulated excusals." (*People v. Benavides, supra*, 35 Cal.4th at p. 88.) This Court held there was "no indication that in making the request the trial court was passing on the adequacy of the reasons for the stipulation." (*Ibid.*) A perfect example of the trial court's conduct in the instant case occurred during the discussion of counsel stipulated dismissal to Yolanda B.-M. After counsel voiced its stipulation to Yolanda B.-M., the court inquired for the basis of the dismissal, and following exchange occurred:

> THE COURT: Okay. Now, Yolanda [B.-M.], I didn't list her as a candidate to be excused for cause. That's not to say that she hasn't

stated cause, but what in particular in her response justified her excusal for cause?

[PROSECUTOR]: As to –

[SELF'S COUNSEL]: Along with Mr. West, Your Honor, her brother was accused of a murder. She also "disagrees," is the language I think she put, is opposed to the death penalty and would go with life without parole. She did say she would support the law, but maybe it's an exercise in frustration.

THE COURT: She said she would support the law. But both of you feel –

[SELF'S COUNSEL]: I feel her responses are such that I would agree to stipulate at this point.

[PROSECUTOR]: I agree.

THE COURT: All right. The Court will accept that stipulation.

(23 RT 3798-3799.)

But even if this Court finds that the trial court here had a more active role than the trial court in *Benavides*, such an active role does not nullify the stipulations. In *People v. Avila* (2006) 38 Cal.4th 491, the trial court took a much more active role than that employed in the instant case; the trial court itself proposed the dismissal of prospective jurors for cause based on the answers in their questionnaires and asked counsel for comment. The defendant objected unsuccessfully to the dismissal of four of the fourteen proposed prospective jurors. On appeal, the defendant challenged, and this Court reviewed, the application of the substantial impairment standard to the four challenged prospective jurors but did not suggest that the standard should apply to the prospective jurors who were dismissed by stipulation. (*See People v. Avila, supra,* 38 Cal.4th at pp. 527-529.)

Likewise, in *People v. Stewart, supra,* 33 Cal.4th at p. 425, the trial court and counsel reviewed the questionnaires of prospective jurors, and then the court met with counsel "to rule on a number of stipulated challenges for cause

– that is, the elimination of those prospective jurors who both counsel agreed should be excused for cause." (*People v. Stewart, supra,* 33 Cal.4th at 443.) Although the trial court had "rule[d] on" the stipulated challenges, this Court did not review the trial court's determination that the agreed-upon prospective jurors were substantially impaired, but simply noted that many of their answers revealed unambiguous and entrenched support for, or opposition to, the death penalty. (*Id.*, at p. 444, fn. 11.) This Court reviewed only the dismissal of five prospective jurors who were excused without oral voir dire over the defendant's objection to the prosecutor's challenge for cause. (See *People v. Stewart, supra,* 33 Cal. 4th at pp. 440-455.)

At any rate, the dicta in *Benavides* cited by Self (i.e., "passing on the adequacy of the reasons for stipulations") should not be taken to mean that a judicial determination of substantial impairment nullifies an otherwise valid dismissal by stipulation. Such a departure from this Court's precedent would lead to an absurd result, in that a stipulated dismissal would be subject to appellate review if the trial court approved of the parties' determination of substantial impairment, but immune from appellate review if the trial court did not know the reasons behind the stipulation. Self has provided no reason for this Court to implement such a rule, which has not been applied in other cases. (See *People v. Avila, supra,* 38 Cal.4th at pp. 527-529; *People v. Stewart, supra,* 33 Cal.4th at p. 443; *People v. Hill, supra,* 3 Cal.4th at p. 1003 [joining in an excuse for cause of a potential juror forfeits the issue for purposes of appeal].)

Self's third assertion, i.e., that the trial court's use of a questionnaire-based dismissal procedure was unconstitutional on its face (SAOB 158-178, 186-187), fails as well. Self contends, by using the questionnaire, the trial court failed to conduct voir dire, in violation of his rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as his fundamental right to an

impartial jury drawn from a cross-section of the community. (SAOB 158-178.) Self's premise is flawed, because as he fails to acknowledge, there is no constitutional right to voir dire. Further, the extensive inquiries in the questionnaire constituted thorough and adequate voir dire of all prospective jurors, and the trial court did not err in utilizing the questionnaire-based procedure.

Although Self claims the trial court's use of a written questionnaire to dismiss prospective jurors without oral voir dire violated his constitutional rights, he fails to cite any authority so holding. This is not surprising. Both the United States Supreme Court and California Supreme Court have held that voir dire is *not* a constitutional right, but rather a means to achieve the end of an impartial jury. (*People v. Tafoya* (2007) 42 Cal.4th 147, 168; *People v. Ramos* (2004) 34 Cal.4th 494, 512; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1086, citing *People v. Coleman* (1988) 46 Cal.3d 749, and *Ross v. Oklahoma* (1988) 487 U.S. 1 [108 S.Ct. 2273, 101 L.Ed.2d 80].) Nor is there a constitutional right to any particular manner of voir dire or selecting a jury "so long as such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries are not transgressed." (*People v. Ramos, supra*, 34 Cal.4th at p. 512.) "[T]he trial court is given wide latitude to determine how best to conduct the voir dire. . . ." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 189 [101 S.Ct. 1629, 68 L.Ed.2d 22,]; *People v. Tafoya, supra*, 42 Cal.4th at p. 168.) "The trial court, moreover, has a duty to restrict voir dire within reasonable bounds to expedite the trial." (*People v. Avila, supra*, 38 Cal.4th at p. 1109, citing *People v. Wright* (1990) 52 Cal.3d 367, 419.) Self does not acknowledge this clear precedent, much less make any attempt to distinguish it. (SAOB 158-178.)

Further, the trial court did conduct voir dire in this case. The court distributed a 32-page questionnaire which asked thorough questions pertaining

to the prospective juror's background, employment, education, family, interests, military service, knowledge of participants, experience with the judicial system, experience with law enforcement, experience with crime, prior jury service, attitudes about and ownership of guns, attitudes about and use of alcohol and drugs, familiarity with the case, ability to follow particular instructions, ability to remain fair and impartial, attitudes about the death penalty, and expectations regarding his or her conduct during the deliberation process. (See, e.g., Exh. 2 [LaDonna F.], Augmented Jury Questionnaires].) Even Self admits the questionnaire called for "highly detailed, written explanations" to many of the questions. (SAOB 143.) And the prospective jurors responded to these questions under penalty of perjury. In other words, the written questionnaires asked the very same questions usually propounded during any oral voir dire session, with the added benefit of allowing the prospective jurors to take their time and respond in private, thereby increasing the likelihood of candor and completeness. In sum, the questionnaire *was* part of the voir dire process.

Statute and this Court's precedent further support the use of a questionnaire as part of the voir dire process. Code of Civil Procedure section 223, as enacted at the time of appellants' trial, provided for court-conducted examination of prospective jurors in a criminal case, including a death penalty case, in the presence of the other prospective jurors where practicable, but also "provided that the court's exercise of its discretion in the manner in which it conducted voir dire would not cause any conviction to be reverse absent a miscarriage of justice." (*People v. Avila, supra*, 38 Cal.4th at p. 534.) Code of Civil Procedure section 205, subdivisions (c) and (d), provide for the use of questionnaires "for assisting in the voir dire process." "Whether the prospective jurors are required to complete a written questionnaire is a matter within the trial court's discretion." (*People v. Tafoya, supra,* 42 Cal.4th at p. 168.)

In *People v. Lewis, supra,* 25 Cal.4th at p. 610, the Court failed to administer the oath required by Code of Civil Procedure, section 232 to prospective jurors before they filled out their questionnaires. The prosecutor argued the questionnaires were simply a guide to the oral questioning, so no oath was necessary. This Court disagreed, stating that ". . . recent decisions describing *the judicial practice of conducting voir dire in a capital case by having prospective jurors give written answers to a jury questionnaire* imply that a juror questionnaire is part of the 'examination' for purposes of Code of Civil Procedure section 232. [Citations.]" (*Lewis, supra,* 25 Cal.4th at 630, emphasis added.)

Self claims,

> There is no suggestion, direct or indirect, in any of [the relevant cases], that a written questionnaire could ever substitute for actual voir dire. On the contrary, the opinions have consistently emphasized the importance of the prospective jurors' physical presence in court for questioning so that the trial court can observe them.

(SAOB 164.) Respondent does not dispute that the cases cited by Self place great emphasis on a trial court's observations of a prospective juror's demeanor for the purpose of evaluating his or her impartiality in deciding challenges for cause. It does not follow, however, that such observations are necessary where the prospective juror's written answers reveal "unambiguous and entrenched" disqualifying positions. (See *People v. Stewart, supra,* 33 Cal.4th at p. 444, fn. 11.) In fact, the opinions of this Court hold otherwise. (*See People v. Avila, supra,* 38 Cal.4th at p. 531; *People v. Benavides, supra,* 35 Cal.4th at p. 88; *People v. Ervin, supra,* 22 Cal.4th at p. 73 [the procedure benefits all parties by screening out overzealous "pro-life" and "pro-death" venirepersons, substantially expediting the process, and "culling out" prospective jurors who probably would have been unable to serve as jurors in any event].)

Nor is there any merit to Self's claim that the process violated his, and the public's, right to a public trial under the First Amendment. (SAOB 184-186.) Self waived this claim by failing to raise it at trial (*People v. Ledesma, supra,* 39 Cal.4th at p. 641), and in any event, the public has no right to access the questionnaires of venirepersons never called to the jury box for oral voir dire. (*Copley Press v. Superior Court* (1991) 228 Cal.App.3d 77; *Lesher Communications v. Superior Court* (1990) 224 Cal.App.3d 774.) Further, Self received all the protections of a public trial. The prospective jurors were informed that their questionnaires were a public record, Self and his counsel had full access to the questionnaires, the stipulation process and dismissals for cause were conducted in open court, and the oral voir dire of prospective jurors was also conducted in open court. (See, e.g., Exh.2, Augmented Jury Questionnaires, Cover Sheet; *Press-Enterprise Co. v. Superior Court of California* (1984) 464 U.S. 501 [104 S.Ct. 81, 78 L.Ed.2d 629,] [holding First Amendment affords right of public access to voir dire in criminal trial].)

As to the content of the questionnaire, it was well-worded to screen prospective jurors for disqualification. The first several pages of the questionnaire were devoted to determining a prospective juror's capacity to perform their duties as a juror, their ability to be fair and impartial to both parties, and any implied bias. (See Civ. Pro. Code, §§ 208, 209.) As previously discussed, the finalized 32-page jury questionnaire asked the prospective jurors, inter alia: to identify their experiences with violent crime or the criminal justice system (Questions 17-19); to describe any prior jury service (Questions 22-24); and to describe their feelings about the O.J. Simpson trial (Question 41 A.-F). (See, e.g., Exh. 2 [LaDonna F.], Augmented Jury Questionnaires, pp. 1, 6-9, 12-13.) In seeking information about the prospective jurors' feelings toward the justice system, the defendants, and their duties as jurors, the questionnaire asked very specific questions, including:

25. Do you have any feeling about the nature of the charges in this case that would make it difficult or impossible for you to be fair and impartial?

(See, e.g., Exh. 2, Augmented Jury Questionnaires, p. 9.)

26. Do you have any religious or moral feeling that would make it difficult or impossible for you to sit in judgment of another person?

(*Ibid.*)

27. Would you be reluctant to serve as a juror on a crime involving acts of violence and where graphic photographs of the victim will be in evidence?

(*Id.* at p. 10.)

38. Do you have strong feelings towards the use of alcohol and/or drugs?

(*Id.* at p. 11.)

In addition, the questionnaire repeatedly asked prospective jurors whether they could follow particular instructions on the law and perform particular duties. (*Id.* at pp. 13-21.) These questions were more than sufficient to disclose a prospective juror's capacity to serve and areas of implied bias.

The questionnaire also asked detailed and expansive questions on capital punishment, which gave the prospective jurors ample opportunity to disclose the strength and nature of their views. In *People v. Avila, supra,* 38 Cal.4th 491, this Court upheld the dismissal of four prospective jurors for cause based on the answers provided in their jury questionnaires.[44] (*Id.*, at p. 530.) The Court held that "a prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is clear

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44. In *Avila*, the defendant objected to the removal of four of the fourteen prospective jurors that were dismissed by this process. (*Avila, supra*, 38 Cal.4th at pp. 528-529.)

from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." (*Avila, supra*, 38 Cal.4th at p. 531.)

Central to the decision in *Avila* was the adequacy of the questionnaire, which asked whether a prospective juror held such conscientious objections to the death penalty that, regardless of the evidence or the strength of the proof, he or she would "automatically" refuse to return a verdict of first degree murder, find a special circumstance to be true, or impose the death penalty. The Court held that any prospective juror who would "automatically" vote in ways that precluded the death penalty would clearly be disqualified. (*Avila, supra*, 38 Cal.4th at p. 531.) The Court found the questionnaire included detailed and expansive questions on capital punishment, which gave the prospective jurors a clear opportunity to disclose any views they had which were strong enough to disqualify them on a death penalty case. Further, the *Avila* Court found that the responses of each of the challenged jurors were sufficiently unambiguous to allow the court to identify disqualifying biases based on their questionnaires alone. (*Ibid.*)

In *Avila,* this Court distinguished *People v. Stewart, supra,* 33 Cal.4th 425. In *Stewart*, the defendant challenged the trial court's dismissal of four prospective jurors over the defendant's objection based on the questionnaires alone, without any oral voir dire. Noting that *Stewart* upheld the stipulated dismissal of 17 prospective jurors based on questionnaires revealing "'unambiguous and entrenched support for or opposition to the death penalty,'" the dismissal of the remaining prospective jurors was problematic because their answers to the questionnaire failed to make it clear whether they would be able to put aside their personal beliefs and follow the law. The questionnaire asked the prospective jurors whether they had a conscientious opinion or belief about the death penalty that "'would prevent *or make it very difficult*' for the juror to vote for first degree murder, find a special circumstance true, or impose the

death penalty." (*Stewart, supra,* 33 Cal.4th at 530, emphasis in original.) Further questioning was required of those prospective jurors whose questionnaires did not inquire whether they could put aside their personal reservations and properly weigh and consider the aggravating and mitigating factors. (*Ibid.*)

Here, as in *Avila*, the questionnaire asked specific, unambiguous questions to which certain answers were unequivocally disqualifying under the substantial impairment test.

Question 76.A. asked:

> Would you, because of any views that you may have concerning capital punishment, refuse to find that the defendant guilty of first degree murder, even though you personally believed that defendant to be guilty of first degree murder, just to prevent the penalty phase form taking place?

(See, e.g., Exh. 2, Augmented Jury Questionnaires, p. 25.)

Likewise, Question 76.B. asked:

> Would you, because of any views that you may have concerning capital punishment, refuse to find the special circumstance(s) true, even though you personally believed it (them) to be true, just to prevent the penalty phase form taking place?

(*Id.* at pp. 25-26.)

Unlike the question asked in *Stewart*, the inquiries here were framed so that an affirmative answer indicated an unambiguous refusal to follow the law.

Question 75.C. asked,

> Assume for the sake of this question only that the jury has found a defendant guilty of first degree murder and has found one or more special circumstances to be true and that you are in the penalty phase: would you, because of any views that you may have concerning capital punishment, **automatically refuse** to vote in favor of the penalty of death and **automatically vote** for a penalty of life imprisonment without the possibility of parole, without considering any of the evidence of any

of the aggravating and mitigating factors (about which you will be instructed)?

(*Id.* at p. 26, emphasis in original.)

Question 75.D. asked,

> Assume for the sake of this question only that the jury has found a defendant guilty of first degree murder and has found one or more special circumstances to be true and that you are in the penalty phase: would you, because of any views that you may have concerning capital punishment, **automatically refuse** to vote in favor of the penalty of life imprisonment with the possibility of parole and **automatically vote** for a penalty of death, without considering any of the evidence of any of the aggravating and mitigating factors (about which you will be instructed)?

(*Id.* at pp. 26-27, emphasis in original.)

Question 75.F. asked,

> Could you set aside your own personal feeling regarding what the law ought to be, concerning the killing of a human being and the appropriate punishment for such an activity, and follow the law as the court explains it to you?

(*Id.* at p. 27.)

Question 75.G. and 75.H. then asked prospective jurors whether their views on the death penalty would "prevent" or "substantially impair" their ability to conscientiously consider either penalty. (*Ibid.*) Finally, after describing the law on felony murder and liability for aiders and abettors, Questions 79 and 80 asked prospective jurors if they could follow these laws and whether they would "*automatically*" vote for life imprisonment without parole (or "*automatically*" vote against the death penalty) in such situations. (Exh. 2, Augmented Jury Questionnaires, pp. 28-29, emphasis added.)

Clearly, the questionnaire in the instant case, by using terms such as "prevent," "automatically," and "refuse," avoided the ambiguities inherent in the *Stewart* questionnaire, which asked prospective jurors whether they would find it difficult to do certain things. The terms used here allowed the court to determine those prospective jurors who held disqualifying and inflexible

positions because their answers necessarily indicated they would not put aside their own beliefs and follow the law. Moreover, the questionnaire as a whole gave a full picture of a prospective juror's attitudes and biases, as reflected by all of his or her answers. Accordingly, the questionnaire constituted an adequate basis from which to determine a prospective juror's capacity to serve as a capital juror, and the trial court did not abuse its discretion in utilizing the questionnaire as part of the jury selection process. (*People v. Benavides, supra,* 35 Cal.4th at p. 88 [a trial court's decision to utilize a process of pre-screening jurors based on their answers to questionnaires is reversible only where it falls outside the bounds of reason].)

Lastly, this Court should reject Self's perfunctory claim of ineffective assistance of counsel. (SAOB 194-196, fn.123.) Trial counsel's stipulations to the questionnaire-based dismissals did not constitute ineffective assistance. A successful claim of ineffective assistance of counsel has two components. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." (*Strickland v. Washington, supra,* 466 U.S. 668 [688 104 S.Ct. 2052, 80 L.Ed.2d 674].) In evaluating counsel's performance the reviewing court must be highly deferential, avoiding the "distorting effects of hindsight" and "indulg[ing] in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." (*Id.* at p. 689.) Second, the defendant must show that counsel's deficient performance deprived him of a fair trial, i.e., "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.)

In *People v. Ervin, supra*, 22 Cal.4th at page 78, the Court rejected a claim similar to Self's, stating, "We find no incompetence here. Defense counsel may well have had tactical reasons for avoiding the lengthy delays usually involved in capital case voir dire. As we previously stated . . . the

procedure benefitted all parties by substantially expediting the jury selection process and "culling out" prospective jurors who probably would have been unable to serve."

Defense counsel here likely had the same tactical reasons, i.e., to expedite voir dire by culling out overzealous, unalterably biased, or otherwise disqualified prospective jurors from the panel. After review of the questionnaires from the prospective jurors dismissed by stipulation, it is clear the process benefitted both sides, as many of the stipulated prospective jurors showed pre-existing bias against appellants due to the nature of the charges, an inability to follow instructions, or strong views in favor of capital punishment. (See, e.g., Exhs 2-4, 6, 7, & 10, Augmented Jury Questionnaires [LaDonna F., Adrianne F., Olga V., Carol P., Frank B., Charles M.]; 23 3rd SCT 6646-6719 [Richard B., Randy M.]; 25 3rd SCT 7090-7126 [Lorraine G.]; 29 3rd SCT 8201-8274 [Joseph F., Cynthia B.]; 30 3rd SCT 8756-8792 [Linda M.]; 33 3rd SCT 9631-9667 [Rochelle P.]; 34 3rd SCT 9668-9704 [Steve N.]; 35 3rd SCT 10002-10038 [Thomas W.]; 37 3rd SCT 10742-10778 [Rosaicela S.]; 38 3rd SCT 10853-10926 [Raul H., Ronald S.]; 43 3rd SCT 12414-12450, 12525-12561 [Bernice V., Randi D].) Moreover, once the preliminary screening process concluded, the court and counsel conducted oral voir dire in selecting the actual jurors that would try Self's case. (*See Ervin, supra*, 22 Cal.4th at p. 73.) Thus, Self cannot demonstrate his counsel's stipulation to excusing prospective jurors for cause was anything other than a reasonable tactical decision, nor any prejudice from his counsel's stipulations.

As Self has advanced no persuasive reason to ignore his otherwise valid stipulations for cause, this Court should reject his claim as forfeited.

B. Self Fails To Establish How The Single Question Asking For The Prospective Juror's Race And Ethnicity Amounted To Error Or Resulted In Prejudice

Self contends that the race and ethnicity question within the jury questionnaire resulted in the non-representation of Hispanics on his jury and the selection of a biased jury in violation of his rights to a fair trial and trial by jury drawn from a representative cross-section of the community, in violation of the Fifth, Sixth, and Fourteenth Amendments. (SAOB 154-157.) As previously discussed, Self waived this claim of error by failing to object to question in the trial court. Likewise, he waived any claims alleging racial bias, that his jury was not drawn from a non-representative cross-section, that the jury selection procedures were infirm with respect to race and ethnicity, or that the prosecutor improperly targeted or dismissed prospective jurors based on race or ethnicity. (*People v. Abilez, supra*, 41 Cal.4th at p. 493; *People v. Thornton, supra,* 41 Cal.4th at p. 462; *People v. Rogers, supra,* 39 Cal.4th at p. 858; *People v. Seaton, supra,* 26 Cal.4th at p. 700.) In any event, the single question on race and ethnicity did not amount to prejudicial error.

Self fails to demonstrate how asking a single question to identify the prospective juror's race and ethnicity amounted to error, much less error of constitutional dimension. First, even if the questionnaire had never been used and these prospective jurors were all orally voir dired, in all likelihood counsel would have found out their race and ethnicity. Self does not show why learning this information in written format amounts to error or the "'opportunity for discrimination'" (SAOB 157), while learning the information verbally or demonstrably does not.[45]

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45. In Argument VIII of his opening brief, Self raises a related claim of prosecutorial misconduct. He argues the prosecutor impermissibly targeted Hispanic prospective jurors during voir dire. In this Argument, he alleges that the race and ethnicity question somehow contributed to or created the

Second, if the prospective jurors had *not* been asked to identify their race and ethnicity in the questionnaire, Self would likely be complaining on appeal that the record is inadequate to permit meaningful review of his race-based claims. (See, e.g., *People v. Heard* (2003) 31 Cal.4th 346, 970 [defendant claimed that missing questionnaires contained information on the race of the excluded prospective jurors, and without that information, the record on appeal was inadequate to permit meaningful review of his *Wheeler-Batson* claim].) Having the prospective jurors identify their race and ethnicity provided counsel and the trial court with a more complete picture of the prospective jurors, and ultimately aided review of the claims Self now raises on appeal.

Third, Self fails to show how the alleged[46] lack of Hispanics on his jury "is due to systematic exclusion of that group in the jury selection process." (*People v. Rogers, supra*, 39 Cal.4th at p. 858.)

> To establish a prima facie violation of the Sixth Amendment's fair cross-section requirement, defendant would have to demonstrate: (1) the group allegedly excluded was a distinctive group in the community; (2) the representation of that group in the venire from which his jury was selected was not fair and reasonable in relation to the number of such persons within the community; and (3) the underrepresentation was due to systematic exclusion of that group in the jury selection process.

(*People v. Rogers, supra*, 39 Cal.4th at p. 858, citing *Duren v. Missouri* (1979) 439 U.S. 357, 364 [99 S,Ct, 664, 58 L.Ed.2d 579,]; *People v. Burgener* (2003) 29 Cal.4th 833, 855.) A defendant does not demonstrate systematic exclusion "merely by offering statistical evidence of a disparity. A defendant must show, in addition, that the disparity is the result of an improper feature of the jury

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opportunity for the prosecutor's alleged misconduct. (SAOB 157.) Again, Self fails to show why the prosecutor learning this information from the questionnaire was somehow worse than learning it during oral voir dire.

46. As previously discussed, Juror No. 14 (Alternate No. 2) identified herself in part as "Belizean."

selection process. [Citation.]" (*People v. Burgener, supra,* 29 Cal.4th at p. 855.)

Self theorizes that the alleged underrepresentation of Hispanics on his jury was caused, at least in part, by the race and ethnicity question; but he utterly fails to demonstrate *how* this is so. Indeed, the record belies Self's theory. Several Hispanics filled out the questionnaire, and several of them were discharged for cause based on their questionnaire responses, but only with Self's stipulation. (23 RT 3724-3728, 3798-3800; 24 RT 3867-3872, 3943-3947, 4008, 4012, 4015; 25 RT 4090-4091, 26 RT 4164-4166, 4240-4243; 27 RT 4314-4316, 4364-4367; 28 RT 4430, 4439, 4508-4509, 4512; 29 RT 4572-4573, 4575.) Several Hispanics were orally voir dired as well, and nearly all of them reached the pool of 100 qualified prospective jurors from which Self's jury was selected. (23 RT 3790-3793; 24 RT 3860-3861, 3934-3940, 4003; 26 RT 4155-4158, 4237; 28 RT 4504.) And it appears that the few who did not were either challenged or stipulated for cause by Self. (24 RT 4003; 27 RT 4371.)

By random chance, no Hispanics made it into the jury box during selection of the regular jury, and Self accepted the panel as constituted. (29 RT 4649; 30 RT 4744-4745, 4747, 4753, 4756-4762; 33 3rd SCT 9522; 40 3rd SCT 11595; 41 3rd SCT 11965; (3 SCT [Redacted Juror Questionnaires] 632, 706, 743, 780, 817, 4 SCT [Redacted Juror Questionnaires] 891, 928, 965, 1002, 1113; 5 SCT [Redacted Juror Questionnaires] 1150, 1185.) During the selection of alternates, a random selection was used as well, and only one Hispanic juror made it into the jury box. The prosecutor used a peremptory challenge to excuse this juror, Isabel R., and Self did not object or otherwise allege that the prosecutor used the peremptory based on race. (30 RT 4762-4776.) In fact, it's clear the prosecutor's challenge was based on information that Isabel R. disclosed during voir dire rather than her race. Isabel R.'s

husband was a Los Angeles County Deputy Sheriff, and she worked for the Los Angeles County Sheriff's Department as well, as a data entry clerk. In her questionnaire, Isabel R. indicated she would automatically vote for life without parole for an unintended felony murder, and equivocated on this point in oral voir dire. Her questionnaire also indicated that she believed her views on capital punishment ("an eye for an eye") would prevent or substantially impair her conscientious imposition of either punishment. (22 3rd SCT 6315-6317, 6336-6343; 25 RT 4151-4153). After each side used four peremptory challenges, Self accepted the panel as constituted, again not raising any race-based objection. (30 RT 4762-4776.) The alternate panel as constituted included two Black members, one Black/Belizean, and three Caucasians, with the Black/Belizean later becoming a regular juror.

Clearly, the alleged underrepresentation of Hispanics on Self's jury was the result of chance and valid dismissals, rather than any systematic excusal of Hispanics as a group. Self has utterly failed to set forth any evidence to the contrary. And rank speculation is insufficient to establish a violation of the Sixth Amendment's fair cross-section requirement. (*People v. Burgener, supra*, 29 Cal.4th at p. 858.) Likewise, Self fails to articulate how the single race and ethnicity question led to a jury biased in favor of the death penalty. As demonstrated in Respondent's Argument X, infra, Self's jurors did not demonstrate views on capital punishment that would prevent or substantially impair the performance of their duties, and Self in fact was afforded his right to a fair and impartial jury.

In sum, this Court should reject Self's unsupported claims or error regarding the race and ethnicity question.

C. Substantial Impairment Is Demonstrated By The Information In The Questionnaire Of Each Prospective Juror That Self Now Complains Were Improperly Discharged

Self contends that, in the event this Court nullifies his valid stipulations for cause, eleven of the venirepersons to whom he stipulated were wrongfully excluded from the venire because their questionnaires contained inappropriate, ambiguous and/or conflicting responses and comments that should have been followed up with oral voir dire. (SAOB 151-153, 177, 180-182.) Self is wrong. As previously discussed, this Court should not review Self's claim because he stipulated to each and every one of the prospective jurors of which he now complains were improperly discharged. In any event, as to each dismissed prospective juror, the answers in their questionnaire and the information they provided to the court demonstrated substantial impairment and supported their removal.

The for-cause removal of prospective jurors based on reasons other than the death penalty is governed by California Code of Civil Procedure sections 228 and 229. Section 228 sets forth the grounds for a challenge for cause based on general disqualifications, and includes,

> (b) the existence of any incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

Section 229 covers challenges for implied bias and states, in pertinent part,

> A challenge for implied bias may be taken for one or more of the following causes, and for no other: . . . (f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

A prospective juror may be excused for cause based on his or her views on the death penalty where those views would "'prevent or substantially impair' the performance of his or her duties as a juror in accordance with the trial

court's instructions and his or her oath." (*People v. Avila, supra,* 38 Cal.4th at p. 529, citing *Wainwright v. Witt, supra,* 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841] and *People v. Cunningham* (2001) 25 Cal.4th 926, 975.) Jurors may not be excluded for voicing general objections to the death penalty, or expressing conscientious or religious reasons for objecting to capital punishment. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 522 [88 S.Ct. 1770, 20 L.Ed.2d 776].) "Those who firmly oppose the death penalty may nevertheless serve as jurors in a capital case as long as they state clearly that they are willing to temporarily set aside their own beliefs and follow the law." (*People v. Avila, supra,* 38 Cal.4th at p. 529, citing *Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137] and *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146.) A prospective juror may be excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. (*People v. Cunningham, supra*, 25 Cal. 4th at p. 975.)

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

on the juror's responses to a questionnaire. Moreover, when a trial court is found to have erroneously removed a prospective anti-death penalty prospective juror for cause based on *Witt/Witherspoon* standards, the conviction is unaffected, as the appellant would be entitled only to a new penalty phase retrial. (*Gray v. Mississippi* (1987) 481 U.S. 648, 667-668 [107 S.Ct. 2045, 95 L.Ed.2d 622]; *People v. Ashmus* (1991) 54 Cal.3d 932, 962.).

1. Prospective Jurors Yolanda B.-M., Jeffrey L., Kay T., Randy M., And Ron U. Were Properly Dismissed For Reasons Other Than Their Positions On The Death Penalty

Prospective jurors Yolanda B.-M., Jeffrey L., Kay T., Randy M., and Ron U. were properly excused by stipulation for reasons other than their positions on the death penalty, as they were generally disqualified and "incapable of performing the duties of a juror." (Civ. Proc. Code, § 228, subd. (b).)

As argued by Self's counsel at trial, Yolanda B.-M.'s brother was serving a sentence for murder in a California prison. (23 RT 3799; Exh. 8 [Yolanda B.-M.], Augmented Jury Questionnaires, pp. 7-8.) Yolanda B.-M. described the circumstances of her brother's crime rather dismissively, "he killed some lady," then went on to express her opinion that he should serve at least half of the sentence for his crime. She indicated she visited him in prison, at "Folsom, Lancaster, also Juvenile hall." (Exh. 8 [Yolanda B.-M.], Augmented Jury Questionnaires, pp. 7-8.) In Question 41, Yolanda B.-M. voiced some very strongly held beliefs about the justice system and jury service in light of the O.J. Simpson trial, despite just watching "the end of the trial, summations." When asked to describe her feelings about jury service in light of the Simpson trial, she stated: "The white community dislikes seeing people of color not incarcerated." Although she said the Simpson case would not have an affect on her ability to be fair and impartial (Question 41.G.), she followed

up her answer to that question with another expression of her strong opinions, stating, "[S]pousal abuse does NOT equate murder!!" (Exh. 8 [Yolanda B.-M.], Augmented Jury Questionnaires, pp. 12-13.) The intensity of Yolanda B.-M.'s opinions, along with her status as a sister of a convicted murder, had a strong likelihood to infect her deliberative process (as well as those of other jurors) and thus established sufficient reasons for her dismissal.

Later, with regard to the two choices of potential punishment in this case (death penalty and life without parole), Yolanda B.-M. stated she disagreed with *both*, and was unsure whether she would *automatically* vote against the death penalty if the defendant was found guilty of murder as an aider and abetter. (Exh. 8 [Yolanda B.-M.], Augmented Jury Questionnaires, pp. 22, 29.) Yolanda B.-M. also did not want to serve on the jury given the approximated trial length. (Exh. 8 [Yolanda B.-M.], Augmented Jury Questionnaires, pp. 29.) Counsel stipulated and the court agreed to excuse her for cause based on counsel's stipulation. (23 RT 3799.)

Similarly, prospective juror Jeffrey L. was excused for reasons other than his views on the death penalty. As the prosecutor indicated to the court, many of Jeffrey L.'s answers were "weird," "unusual," and "extremely bizarre." (24 RT 3868.) These bizarre answers reflected a strong potential for difficulty with the deliberative process and a potential to alienate his fellow jurors, which amply supported his dismissal. For instance, he believed those who kill with their "bare hands compared to a weapon" should be executed first, such as "stranglers." (24 RT 3868; 25 3rd SCT 7298.) When asked if he believed a defendant's background information was relevant to the penalty determination, he stated he only "would consider the information's relativity [sic] to the jury's finding on guilt and innocence." (25 3rd SCT 7304.) But most importantly, Jeffrey L. stated he could *not* follow the court's instruction to consider only the facts of Self's case (and to disregard Romero's case) during deliberations

(Question 45), and he was not sure if the fact that appellants were brothers would influence his decision-making (Question 46). (25 3rd SCT 7291-7292.) Counsel stipulated to excuse Jeffrey L. for cause. Based on that stipulation and the court's agreement that his answers were "unusual" and "weird," the court excused Jeffrey L. for cause. (24 RT 3868.)

Prospective juror Kay T. was dismissed for cause after the court and the parties conducted oral voir dire and asked Kay T. about her present mental status. Kay T. indicated she was taking two medications, Klonopin and Prozac, to treat her long-term depression and anxiety. (25 RT 4086-4087.) The prosecution was concerned that Kay T. was "underestimating the emotional drain that a trial like this could be" and did not think she would be a "good juror for either the subject matter or trial of this length." He believed that because Kay T. needed two medications to maintain an even keel in her daily life, the "considerable amount of stress" from hearing and deciding this case would have a negative impact on her mental health. (25 RT 4088.) Self's counsel stipulated, and the court excused Kay T. for cause. (25 RT 4088-4089.) Kay T.'s delicate mental health situation caused the parties to question her capacity to handle a case of this magnitude, and thus, she was properly discharged on this basis.

In her questionnaire, Kay T. also gave disqualifying responses. She knew a prospective witness, Dr. Atkavi Sawadisavi, whom she saw for a workers compensation injury. (25 3rd SCT 7134.) With regard to the death penalty, Kay T. believed the penalty was used too seldom and "Some crimes committed should be given the death penalty right away." (25 3rd SCT 7150.) She also indicated she would *automatically* vote in favor of life without the possibility of parole if she convicted the defendant of felony murder and believed the death was accidental or unintentional (Question 79). (25 3rd SCT 7156.) She was unsure if she would automatically vote against the death

penalty if she convicted the defendant of murder under an aiding and abetting theory and did not believe he was the actual killer (Question 80). (25 3rd SCT 7157.) She was also unsure as to whether there were situations where she would automatically vote for the death penalty without considering aggravating and mitigating factors (Question 76.D.). (25 3rd SCT 7155.)

Prospective juror Randy M. was dismissed by stipulation based on his strong bias against appellants and his inability to conscientiously consider all sentencing alternatives. Randy M. indicated strong bias against appellants given the nature of the charges ("appeared to be a gang type action"), the fact appellants were brothers ("seems like they are together causing harm"), and the fact they were arrested ("Usually people are not placed in custody for nothing 'especially brothers.'"). (23 3rd SCT 6693, 6700, 6702.) Randy M. also stated he would require a defendant to testify in order to acquit him, could not be fair and impartial towards those with different lifestyles, would find it difficult "to judge another man based on human evidence," would have difficulty judging all witnesses by the same standards, and would give the "laws of God" precedence over the court's instructions. (23 3rd SCT 6693, 6702-6704.) Randy M. was against the death penalty, would *automatically* refuse to find the defendant guilty to prevent the penalty phase from occurring because of his anti-death views, believed he would *automatically* vote against the death penalty but could not "say for certain," and would *not* be able to put aside his personal feelings about the death penalty and follow the law. (23 3rd SCT 6706, 6709-6711.) In the end, Randy M. made it very clear he could not be fair and impartial:

> I have tried to see the fairness of this from what little I know, but as I stated before I unfortunately see brothers accused with several violent crimes as a very strong potential of being guilty. I would not like this assumption to poision [sic] my judgement. Also, the potential of gang activity also makes me sick and as these brothers are hispanic and come

from an area of gang related activity, I think my feelings would override my judgment.

(23 3rd SCT 6714.)

Prospective Juror Ron U. was dismissed by stipulation for cause given his "extremely bizarre, unusual" answers which indicated "bizarre thought processes." (27 RT 4315.) These bizarre thought processes reflected a strong likelihood of difficulty with the deliberative process and a potential to alienate his fellow jurors, which amply supported his dismissal. In his questionnaire, Ron U. gave unusually in-depth and detailed responses to the questions, showing himself to be strongly opinionated, yet internally conflicted. (23 3rd SCT 6609-6645.) He said he was "torn between thow [sic] shall not judge and the law of Moses. An eye for an eye." (23 3rd SCT 6619.) He was unsure if the fact appellants were brothers would influence his decision-making, and believed if appellants were arrested for "related crimes" showing "a pattern or m.o.," he might have a bias against them. (23 3rd SCT 6626, 6641.) He was also unwilling to use his common sense and common experience in evaluating the evidence, saying, "I don't think so!!!" (23 3rd SCT 6629.) When asked whether he believed the death penalty was used too often or too seldom he stated, "It's not a matter of how often!!! It's a matter of how cruel, how deliberate, how often the crime is repeated. It depends on how much real sorrow. It depends on much more - or much less. I don't know!" (23 3rd SCT 6632.) He also indicated he would *automatically* vote for life without parole if he convicted the defendant of felony murder but believed the killing was unintentional or accidental, stating "I would reserve the death penalty for deliberate 1st degree murder." (23 3rd SCT 6638-6639.)

Accordingly, there was no error in excusing Yolanda B.-M., Jeffrey L., Kay T., Randy M., and Ron U. In any event, any error in excusing these prospective jurors is not reversible, because reversal is not required for an error

in excusing a prospective juror for reasons unrelated to the prospective jurors' views on the death penalty. (*People v. Holt* (1997) 15 Cal.4th 619, 656; *People v. Mickey* (1991) 54 Cal.3d 612, 683.) The general rule is that the erroneous exclusion of a prospective juror for cause provides no basis for overturning a judgment. A defendant has a right to jurors who are competent and qualified, but does not have the right to any particular juror. (*People v. Holt, supra,* 15 Cal.4th at p. 656.)

2. Prospective Jurors Joshua V., Peggy K., Beatrice M., Pamela C., Brian S., And Michael H. Were Properly Dismissed Because Their Questionnaires Demonstrated Substantial Impairment Based On Their Views Toward The Death Penalty

Prospective jurors Joshua V., Peggy K., Beatrice M., Pamela C., Brian S., and Michael H. were properly dismissed because their questionnaire responses demonstrated substantial impairment, including an inability to conscientiously consider all of the sentencing alternatives or an inability to set aside their personal views on the death penalty and follow the law. (*People v. Avila, supra,* 38 Cal.4th at p. 529; *People v. Cunningham, supra,* 25 Cal.4th at p. 975.)

Prospective juror Joshua V. believed the death penalty was "wrong, but also in some cases it may be right." (23 3rd SCT 6595.) He indicated, because of his views on the death penalty, he would *automatically* vote in favor of the death penalty or *automatically* vote in favor of life in prison, without considering any of the evidence or any of the aggravating or mitigating circumstances. (23 3rd SCT 6599-6600.) Asked if he could set aside his personal feelings on the death penalty, he responded, "Just like they do in Pacasan [sic], cut off their hand." (23 3rd SCT 6600.) Finally, he stated he would *automatically* vote for life imprisonment without parole for aiders and

abettors of murder (Question 80) and in a felony murder where the killing was unintentional or accidental (Question 79). (23 3rd SCT 6601-6602.)

Prospective juror Peggy K. was reluctant to serve as a juror in a case involving graphic photographs because she does not "like violence" and preferred not to serve on a murder trial given the potential for extreme stress. (25 3rd SCT 7064, 7083-7084.) She preferred the sentence of life without parole "in most cases." (25 3rd SCT 7076.) Although she "believe[d]" she could set aside her personal feelings on the death penalty and follow the law, she was "not sure" as to whether she would automatically vote in favor of life imprisonment without parole at penalty. (25 3rd SCT 7080-7081.) She ultimately stated that, in a felony murder situation where the killing was unintentional or accidental, she would *automatically* vote in favor of life without the possibility of parole (Question 79). (25 3rd SCT 7082.)

Prospective juror Beatrice M. believed it would be difficult or impossible for her to serve as a juror in this case because she was unsure if she could "bear the responsibility of deciding on someone's right to [live]." (29 3rd SCT 8322.) She also believed her religious views would make it difficult or impossible to serve as a juror in this case, stating, "I believe that God is the only one that can take our lives away." (29 3rd SCT 8322.) Beatrice M. was reluctant to serve because she becomes emotionally disturbed by graphic photographs. (29 3rd SCT 8323.) As to her general feeling toward the death penalty, Beatrice M. again stated her belief that "God is the only one that can take a life away," and made it very clear that her views were based on her Catholic faith. (29 3rd SCT 8335-8336.) She was unsure as to whether she would ever refuse to find a defendant guilty of first degree murder or a special circumstance just to prevent the penalty phase from occurring, and was also unsure as to whether she would automatically vote for life without parole (Questions 76 A.-D.). (29 3rd SCT 8338-8340.) She thought she could set

aside her personal feeling about the death penalty but also thought her views would "probably" prevent or substantially impair her ability to conscientiously consider both punishments (Questions 76 F., G.). (29 3rd SCT 8340.) Beatrice M. said she would *automatically* vote in favor of life imprisonment without parole in a felony murder situation where the killing was unintentional or accidental. (29 3rd SCT 8341.) Beatrice M. did not believe she could be fair and impartial to the parties given her views on the death penalty. (29 3rd SCT 8343.)

Prospective juror Pamela C. stated she "would have difficulty sentencing a person to death," and "would need to do much soul searching, and evidence could leave no room for doubt." She believed these feelings would make it difficult or impossible for her to be fair and impartial. (43 3rd SCT 12572, 12585, 12592.) She indicated it would be "very difficult" for her not to *automatically* vote for life imprisonment or *automatically* refuse to vote for the death penalty (Question 76 C.). (43 3rd SCT 12589.) When asked if she could set aside her personal feelings on capital punishment and follow the law, she said she would have to, but was still unsure whether her views would prevent or substantially impair her ability to conscientiously consider both penalties (Questions 76 F., G.). (43 3rd SCT 12590.) Pamela C. did indicate, however, that she would *automatically* vote in favor of life imprisonment without parole in a felony murder situation where the killing was unintentional or accidental (Question 79C). (43 3rd SCT 12591.)

Prospective juror Brian S., when asked to give his feelings on the death penalty, indicated that becoming a venireperson on this case had sparked an "inner conflict" regarding his views on the death penalty and therefore he preferred not to serve. (24 3rd SCT 6750.) He stated:

> Generally, I am pro death penalty - however when it was announced that this case was a possible death penalty situation - I felt very

> uncomfortable with my position, i.e., let other juries have that decision. "Lord - let this cup pass unto me."

(24 3rd SCT 6743.)

He also stated he had not "reflected" on his capital punishment views "heretofore, or sufficiently." (24 3rd SCT 6750.) Brian S. believed the death penalty was used too seldom "at least if I am not involved as a sentencing juror." (24 3rd SCT 6743.) He said he would *automatically* vote in favor of life in prison without the possibility of parole in a felony murder situation where the killing was unintentional or accidental. (24 3rd SCT 6749.) In fact, he disagreed with felony-murder death-eligibility so strongly that he wanted to know the law and precedent supporting it. (24 3rd SCT 6749.) In addition to his death penalty views, Brian S. also revealed some potential bias against defendants because one of the charges involved the attempted murder of a police officer. Brian S. believed "the killing of a police officer is on a slightly different plan than other killings. . . ." (24 3rd SCT 6752.) Brian S. also said he would give the judge's instructions "added weight," but did not necessarily say he would follow those instructions if they conflicted with his own opinions (Question 64). (24 3rd SCT 6741.)

Prospective juror Michael H. declined to fill out much of the questionnaire, including the capital punishment questions, and many answers were unintelligible or bizarre. (34 3rd SCT 9741-9778.) However, when asked if he belonged to a group that advocates the increased use or the abolition of the death penalty, Michael H. responded in the affirmative, saying the group was "Killers." (34 3rd SCT 9766.) He said he "maybe" shared this group's views, and held those views strongly. (34 3rd SCT 9766.) Michael H. also said his views on capital punishment would substantially impair or prevent him from conscientiously considering both penalties. (34 3rd SCT 9770.) In addition,

Michael H. said the fact that the defendants were brothers would influence his decision-making because "It's the law." (34 3rd SCT 9759.)

Each and every one of these prospective jurors indicated an inability set aside their own beliefs and follow the law, an inability to conscientiously consider all sentencing alternatives, or were undecided on their ability to do so. (*See People v. Cunningham, supra,* 25 Cal.4th at p. 926.) All of the prospective jurors except Michel H. unequivocally stated that they would *automatically* vote in favor of life in prison without the possibility of parole in a felony murder situation where the killing was unintentional or accidental, and Joshua V. indicated other situations where he would automatically vote for life imprisonment. Although Michael H. did not indicate he would automatically vote for one punishment or another, he gave bizarre answers about a group to which he belonged called "Killers" that advocated in favor or against the death penalty, and said his views on capital punishment would prevent or substantially impair his ability to conscientiously consider both punishments. Since these prospective jurors answered questions in a manner which demonstrated they would "automatically" vote in ways precluding the death penalty, they were clearly disqualified under *Witt*. (See *People v. Avila, supra*, 38 Cal.4th at p. 531.)

In sum, even if this Court nullifies Self's stipulations to these prospective jurors, there was no error in dismissing them for cause based on their death-penalty views. They gave answers that were clear, unequivocal and internally consistent demonstrating their unwillingness to impose the death penalty under certain circumstances. The prospective jurors were properly dismissed because their questionnaires, viewed as a whole, reflected that their views on capital punishment would prevent or substantially impair them from performing their duties in accordance with their oath and the instructions. (See *People v. Avila, supra*, 38 Cal.4th at 531-533.)

III.

SELF WAIVED HIS CLAIMS OF PROSECUTORIAL MISCONDUCT, AND IN ANY EVENT, HIS CLAIMS LACK MERIT

Self contends the prosecutor committed prejudicial misconduct during voir dire by improperly targeting Hispanic jurors and by misleading the jury with regard to the nature of mitigating evidence. (SAOB 198-208, 216-225.) Self also contends the prosecutor committed prejudicial misconduct, both in his guilt-phase opening statement and closing argument, by repeatedly vouching for the credibility of prosecution witness Jose Munoz. (SAOB 208-215.) Self claims that the alleged misconduct deprived him of due process, a fair trial, and a reliable determination of guilt and penalty, and thus compels reversal of both the guilt and death judgments.[47] (SAOB 226-235.) By failing to object and request admonishment at trial, Self waived his claims of prosecutorial misconduct. In any event, the prosecutor committed no misconduct.

The standard to review claims of prosecutorial misconduct is well-settled. As this Court set forth in *People v. Carter, supra,* 36 Cal.4th at p. 1215:

> The applicable federal and state standards regarding prosecutorial misconduct are well established. A prosecutor's . . . intemperate behavior violates the Federal Constitution when it comprises a pattern

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47. Self asserts that the prosecutor's alleged misconduct denied him his constitutional right to effective assistance of counsel (SAOB 234), but he does not develop this bare assertion with any legal argument or citation to authority. "'Every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' [Citations.]" *(People v. Stanley, supra,* 10 Cal.4th 764, 793; see also *People v. Ramirez, supra,* 39 Cal.4th at p. 441, fn.8; Cal. Rules of Court, Rule 8.204(a)(1)(B).) Because Self "perfunctorily asserts [this claim], without development and, indeed, without a clear indication that [it is] intended to be [a] discrete contention[], [it is] not properly made, and [should be] rejected on that basis." (*People v. Turner, supra,* 8 Cal.4th at p. 137, fn. 19; see also *People v. Smith, supra,* 30 Cal.4th 581, 616, fn. 8.)

> of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety. Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.

(*Id.* at pp. 1263-1264, internal citations and quotations omitted, bracketed material in the original.)

In the instant case, Self failed to object to any of his current claims of misconduct in the trial court, nor did he request admonishment. Self thereby waived all of his allegations of prosecutorial misconduct, and they should not be considered on appeal. In any event, there was no misconduct.

A. The Prosecutor Did Not Improperly Target Hispanic Jurors During Voir Dire

Self claims that during voir dire the prosecutor "improperly and repeatedly focused on [Hispanic prospective jurors] . . . [with] tactics tantamount to exclusion based on race." (SAOB 199.) He further alleges: "The prosecutor's goal in focusing on Hispanic prospective jurors during voir dire was clear – the elimination of all eligible, qualified Hispanic prospective jurors from the final jury pool. These tactics proved successful. . . . No regular

or alternate Hispanic jurors were selected."[48] (SAOB 199.) Self's claim is without merit.

First, as demonstrated in Argument II, Self never lodged any objections to the race and ethnicity question. (10 RT 2051-2054, 2060-2068, 2071.) Nor did Self ever raise a claim of racial bias, claim that Riverside County's jury selection criteria was infirm with respect to race and ethnicity, claim that his jury was not drawn from a representative cross-section of the community, or claim that the prosecutor improperly targeted or dismissed prospective jurors based on race or ethnicity. Accordingly, having failed to make specific and timely objections on these grounds in the trial court, he is now barred from asserting such claims on appeal. (*People v. Abilez, supra,* 41 Cal.4th at p. 493 [failure to object to alleged improper questioning or alleged prosecutorial misconduct during voir dire waives such claims on appeal]; *People v. Thornton, supra,* 41 Cal.4th at p. 462 [defendant barred from raising *Batson-Wheeler* challenge for first time on appeal]; *People v. Rogers, supra,* 39 Cal.4th at p. 858 [defendant barred from raising fair cross-section claim on appeal for failure to object at trial]; *People v. Seaton, supra,* 26 Cal.4th at p. 700 [defendant failed to object to jury panel on the ground that certain racial or ethnic groups were underrepresented, and he is thus precluded on appeal from raising a claim that the panel was racially or ethnically unbalanced].)

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48. Self contends there were no Hispanics on his jury, either seated or alternates. (SAOB 198.) However, as discussed in Argument II, Alternate No. 2 (who later became Juror No. 14 when she replaced a seated juror on the first day of trial) identified herself as Black/Belizean in her jury questionnaire. (3 SCT [Redacted Jury Questionnaires] 669; 31 RT 4861-4862, 4866.) Based on this response, Juror No. 14 could be classified as "Hispanic."

Second, Self's claim of race-based targeting is completely unsupported by the record. Citing the questioning of a mere six Hispanic jurors[49], Self leaps to the conclusion that these examples reflect a "pattern [that] was repeated over and over during voir dire." (SAOB 201.) This is simply false, and Self ignores two important realities: (1) the questioning of these Hispanic jurors was warranted by their responses and information contained in their questionnaire; and (2) the prosecutor also asked numerous and probing questions of non-Hispanic jurors, which was again dependent upon their responses and the information contained in their questionnaire.

For example, with regard to prospective juror Samuel G., most of the prosecutor's questions focused on two of Samuel G.'s responses in his questionnaire, namely, his statement that he would not change his vote in deliberations even if he was shown that his initial conclusion was wrong and his indication that he would automatically vote for life without parole in a non-shooter-liability situation. (23 RT 3781-3783; 19 3rd SCT 5461-5497.) And the "19 detailed and specific questions" (SAOB 201) posed to Samuel G. were immediately preceded by 31 detailed and specific questions asked of a Caucasian prospective juror, Julia R. (23 RT 3766-3772, 3778-3779; 19 3rd SCT 5389.)

With regard to prospective juror Frank M., again the prosecutor's questions properly focused on Frank M.'s questionnaire responses, namely, his dislike of the death penalty and his preference for life in prison. The prosecutor's questions are most fairly interpreted as attempts to rehabilitate Frank M. and evaluate his ability to serve. (23 RT 3819-3820, 3830-3833,

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49. Self highlights the questioning of Samuel G. (23 RT 3780-3783), Frank M. (23 RT 3830-3832, 3840, 3842, 3856), Deborah P. (25 RT 4129-4135, 4147-4150), Isabel R. (25 RT 4151-4153), Rose A. (23 RT 3838-3840, 3849-3851), and Richard Z. (24 RT 3983-3985, 3996, 4000-4001.) (SAOB 200-205.)

3840-3843, 3856; 31 3rd SCT 8830-8866.) Likewise, the prosecutor's questions to Rose A. centered around responses she gave during voir dire. Rose A. expressed her support of the death penalty, but said "some people have questioned me for that because of my religion." (23 RT 3850.) Based on this response and her invocation of religion, the prosecutor understandably asked Rose A. about her religious background and whether it would impact her ability to serve as a juror. (23 RT 3850-3851.) On the panel with Frank M. and Rose A. was Linda L., a Caucasian, whom the prosecutor asked approximately 27 detailed questions. (23 RT 3835-3838, 3844-3846, 3849, 3856; 31 3rd SCT 8980.)

With regard to prospective juror Richard Z., he indicated in his questionnaire and during voir dire that he was unsure if he could impose the death penalty based on circumstantial evidence or without proof "far beyond reasonable doubt." (24 RT 3984-3985, 3996-4001 26 3rd SCT 7423-7459.) The prosecutor understandably explored this topic with Richard Z., and the defense ultimately challenged Richard Z. for cause, removing him from the jury pool. (24 RT 4003.) Prospective juror Patricia B., a Caucasian, was on the same panel as Richard Z. While the prosecutor asked Richard Z. approximately 19 questions, the prosecutor asked Patricia B. approximately 29 questions. (24 RT 3979-3983, 3985-3986; 20 3rd SCT 5686.)

Prospective jurors Isabel R. and Deborah P. appeared on the same panel. The "15 questions" (SAOB 202) posed to Isabel R. stemmed from her expressed difficulty to vote for the death penalty for a non-shooter. (25 RT 4151-4153; 22 3rd SCT 6313-6349.) Similarly, the "38 questions" (SAOB 202) posed to Deborah P. centered around two responses she gave in her questionnaire, namely, that her first husband was murdered and that the death penalty "scares" her. (25 RT 4129-4135; 23 3rd SCT 6424-6430.) The prosecutor properly explored these areas with Isabel R. and Deborah P. in order

to determine their capacity to serve as jurors. Prospective juror Burma M., an African-American, appeared on the same panel as Isabel R. and Deborah P. The prosecutor posed approximately 45 questions to Burma M.. (25 RT 4135-4145; 22 3rd SCT 6352.)

As is evident from a close review of the record, the prosecutor in no way unfairly targeted Hispanic jurors for questioning. The prosecutor explored the prospective jurors' capacity to serve as jurors on a capital case, as his is right and responsibility. Self's claim of race-based targeting is completely unfounded.

Third, Self fails to show the prosecutor's questioning resulted in the improper exclusion of Hispanic jurors. All of the prospective jurors cited by Self either were not challenged for cause by either side and remained in the jury pool (Samuel G., Frank M., Rose A., Deborah P., Isabel R.), or were challenged for cause by the defense (Richard Z.). (23 RT 3790-3793; 24 3860-3861, 4003; 26 RT 4155-4158.) As discussed in Argument II, by random chance, no Hispanics made it into the jury box during selection of the regular jury, and Self accepted the panel as constituted. (29 RT 4649; 30 RT 4744-4745, 4747, 4753, 4756-4762; 33 3rd SCT 9522; 40 3rd SCT 11595; 41 3rd SCT 11965; (3 SCT [Redacted Juror Questionnaires] 632, 706, 743, 780, 817, 4 SCT [Redacted Juror Questionnaires] 891, 928, 965, 1002, 1113; 5 SCT [Redacted Juror Questionnaires] 1150, 1185.) During the selection of alternates, a random selection was used as well, and only one Hispanic juror made it into the jury box. The prosecutor used a peremptory challenge to excuse this juror, Isabel R., and Self did not object or otherwise allege that the prosecutor used the peremptory based on race.[50] (30 RT 4762-4776.) After each side used four

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50. As previously discussed in Argument II, it is clear the prosecutor's challenge was based on information Isabel R. disclosed during voir dire rather than her race. Isabel R.'s husband was a Los Angeles County Deputy Sheriff, and she worked for the Los Angeles County Sheriff's Department as well, as

peremptory challenges, Self accepted the panel as constituted, again not raising any race-based objection. (30 RT 4762-4776.) Clearly, the alleged underrepresentation of Hispanics on Self's jury was the result of chance and valid dismissals, rather than any systematic excusal of Hispanics as a group. Self has utterly failed to set forth any evidence to the contrary.

Finally, Self fails to show how the prosecutor's valid questioning of prospective Hispanic jurors resulted in a biased jury. (SAOB 206, 208.) As demonstrated in Respondent's Argument X, infra, Self's jury was not biased, and Self was in fact was afforded his right to a fair and impartial jury. Further, there is no reasonable likelihood that a seated juror construed or applied any of the complained-of voir dire questions in an objectionable fashion as posited by Self. In sum, there was no misconduct, and this Court should reject Self's claim.

B. The Prosecutor Did Not Mislead The Jury On The Nature Of Mitigating Evidence

Self contends that during voir dire the prosecutor "repeatedly misrepresented the nature of mitigation evidence, improperly insinuated that appellant bore a burden of proof as to mitigation, and insinuated that the absence of mitigating evidence of the sort described by the prosecutor might amount to aggravation." (SAOB 216.) In support of this claim, Self cites to several instances where the prosecutor gave prospective jurors abstract illustrations of evidence in mitigation, e.g.:

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a data entry clerk. In her questionnaire, Isabel R. indicated she would automatically vote for life without parole for an unintended felony murder, and equivocated on this point in oral voir dire. Her questionnaire also indicated that she believed her views on capital punishment ("an eye for an eye") would prevent or substantially impair her conscientious imposition of either punishment. (22 3rd SCT 6315-6317, 6336-6343; 25 RT 4151-4153).

> You may hear evidence in mitigation, things, perhaps the defendant was a war hero. Perhaps he saved his platoon in the Persian Gulf and received a Silver Star. Perhaps he once pulled a family from a burning car. Perhaps he once gave bone marrow in a transplant so that a child could survive. Perhaps you may hear evidence that would make you have sympathy for him, all of which you can consider in making your [penalty] decisions.

(23 RT 3765-3766.)

or

> You can also hear evidence of a mitigating nature about the defendant. Perhaps one time he pulled a family out of a burning car; perhaps he once was a bone marrow donor; maybe he was a war hero; maybe he was a soccer coach and a Scout leader and had a positive effect on young people.

(23 RT 3903; see also 25 RT 4047, 4126; 26 RT 4210; 27 RT 4402; 28 RT 4541-4542; 29 RT 4612.)

Self acknowledges that this Court rejected identical misconduct claims in *People v. Seaton, supra,* 26 Cal.4th at p. 598 and *People v. Medina* (1995) 11 Cal.4th 694, both of which involved remarks by a prosecutor strikingly similar to the prosecutor's remarks in the instant case, but asks this Court to reexamine these decisions. (SAOB 225-226.) Self offers no persuasive reasons to do so, and accordingly, this Court should reject Self's contentions.

In *People v. Seaton, supra*, 26 Cal.4th at p. 598, the prosecutor, in conducting voir dire and to illustrate mitigating evidence, "often mentioned a hypothetical defendant who had received the Congressional Medal of Honor, was a war hero, had saved someone's life[.]" (*Id.* at p. 635.) Similarly, in *People v. Medina, supra,* 11 Cal.4th at p. 694, 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." (*Id.* at 741.) In both cases, this Court held:

> The prosecutor's statements, though somewhat simplistic, were not legally erroneous, and defendant had ample opportunity to correct,

> clarify, or amplify the prosecutor's remarks through his own voir dire questions and comments.
>
> Moreover, 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." [Citation.]

(*People v. Medina, supra*, 11 Cal.4th at p. 741; accord *People v. Seaton, supra*, 26 Cal.4th at p. 636.)

Notably, defense counsel did in fact amplify the prosecutor's illustrations of mitigating evidence, in a few instances telling the jury:

> [W]e would present mitigating factors, things that we would want you to consider in terms of making this decision, and those mitigating factors can be anything. There has been previous examples given by [the prosecutor] of , you know, doing a heroic act, for example, or saving somebody from a burning car, a burning building, providing a bone marrow transplant.
>
> What I am telling you is, I don't want you to have any preconceived notion as to what mitigating factor might be present. If the only people that deserve life without parole would be heroes, nobody would probably receive it. Do you follow me?

(26 RT 4176; see similar remarks at 25 RT 4100, 4116; 26 RT 4187; 28 RT 4451, 4519.)

Defense counsel also discussed mitigating evidence in more general terms or gave the jury its own illustrations of mitigating evidence. (23 RT 3743, 3746, 3812, 3822; 25 RT 4096; 29 RT 4591.) Indeed, the defense not only had "ample opportunity to correct, clarify, or amplify the prosecutor's remarks through his own voir dire questions and comments"; it actually did so. (*People v. Seaton, supra*, 26 Cal.4th at p. 636; *People v. Medina, supra,* 11 Cal.4th at p. 741.) Finally, after the conclusion of the penalty phase, the court instructed Self's jury with multiple instructions concerning the nature and scope

of mitigating evidence, including special instructions crafted by the defense. (9 CT 2057-2058, 2061-2064, 2068, 2081-2082; 54 RT 8145-8147, 8152-8154, 8158-8160.)

In sum, the prosecutor's remarks concerning mitigating evidence were proper, and there is no reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.

C. The Prosecutor Did Not Impermissibly Vouch For The Credibility Of Jose Munoz

Self asserts that the prosecutor "repeatedly vouched for the credibility and truthfulness of accomplice Jose Munoz" and cites to several passages in the prosecutor's opening statement and closing argument in support of his assertion. (SAOB 208-215.) A fair reading of the record, however, demonstrates no misconduct. The prosecutor's statements here did not constitute vouching, but were instead permissible assurances of witness honesty and reliability based on reasonable inferences from the record.

Impermissible vouching occurs "'where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony.'" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1167, quoting *People v. Fierro* (1991) 1 Cal.4th 173, 211.) However, "'so long as a prosecutor's assurances . . . are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," [his] comments cannot be characterized as improper vouching.'" (*People v. Zambrano, supra,* 41 Cal.4th at p. 1167, quoting *People v. Frye, supra,* 18 Cal.4th 894, 971, and citing *People v. Medina, supra,* 11 Cal.4th at p. 757.) All of the prosecution statements cited by Self amount to

legitimate, reasonable inferences drawn from the record, and do not constitute vouching.

With regard to Self's two citations to the prosecutor's opening statement (SAOB 208-210), it is clear the prosecutor was simply telling the jury what he expected the evidence to establish, namely that: Munoz was an "eyewitness" who "agreed to testify truthfully in exchange for a deal"(31 RT 4925); Munoz "understands that his deal . . . is only good if he testifies truthfully" (31 RT 4925); Munoz has demonstrated his truthfulness by disclosing his commission of a crime previously unknown to the prosecution prior to the plea deal ("Because he was afraid that we would find out about that independently of him and revoke his deal, he brought it up on his own")(31 RT 4925-4926); and Munoz's testimony would align with the facts as described by the prosecutor ("He told [the police] essentially what I have been telling you")(31 RT 4923). The prosecutor's description of this anticipated evidence was wholly proper and did not amount to vouching.

With regard to Self's numerous criticisms of the prosecutor's closing argument (SAOB 210-211), it is again clear the prosecutor was simply urging the jury to accept Munoz's testimony as truthful and arguing the veracity of Munoz's testimony based on reasonable inferences from the record. In discussing the Mills-Ewy shooting, the prosecutor argued that Munoz's spontaneous admissions to this crime about which the police were previously unaware, coupled with Munoz's specificity and insistence about Self firing the shotgun over the car roof, demonstrated his trustworthiness. The prosecutor argued:

> From the very beginning he said that's what happened. . . . Why would he make up some story like somebody leaning out the window and shooting over the car? . . . If he were inclined to lie . . . he would have just said that was Chris Self sitting in that seat with the shotgun. He would have blamed Chris. He would have switched places. . . . One final point about this. Munoz is the first person to ever mention this

> incident. When he was being interviewed, the officers didn't . . . even know about this incident. . . . And I would submit he did because he knew he wasn't the one that had fired the shotgun.

(45 RT 6723-6725.)

In discussing Munoz's testimony as a whole, the prosecutor reminded the jurors of Munoz's demeanor and attitude during direct and cross-examination, and argued Munoz was "frank and straightforward" in his testimony. The prosecutor also argued that Munoz's testimony was "consistent with what the other evidence is showing you, and with things that he has said before." (45 RT 6738-6739.) In accounting for Munoz's initial denials to the police, the prosecutor argued that after the police continually exhorted Munoz to tell the truth ("they wanted the truth" and "made him no promises or deals"), Munoz finally "broke." (45 RT 6742.) The prosecutor contended that Munoz's statements to the police recounting appellants' crimes were trustworthy because Munoz was "too scared" and "talking too fast" to be "making up lies so convincingly that later fit so well with all the other facts." (45 RT 6742.) At the end of his argument, the prosecutor reminded jurors that because of Munoz's statements to police, appellants' crime spree came to an end ("Thank God for Munoz. His talking when he did put an end to the killing and the robbing."), and because of Munoz's trial testimony, they had a full accounting of Self's participation and guilt to the crimes charged. (45 RT 6750.) In sum, the prosecutor asked the jury to believe Munoz's testimony, based on common sense and reasonable inferences from the record. This is a wholly proper argument, and there is no reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.

In conclusion, each of Self's misconduct claims fails to find support in the record or in precedent. The prosecutor here committed no misconduct, much less that of a Constitutional dimension. Accordingly, this Court should

reject Self's prosecutorial misconduct claims and affirm the judgment in its entirety.

IV.

TESTIMONY REGARDING THE FELTENBERGER ROBBERY-SHOOTING WAS PROPERLY ADMITTED AS RELEVANT EVIDENCE ESTABLISHING ROMERO'S GUILT TO THE RECEIVING STOLEN PROPERTY CHARGE AND SUPPORTING THE CREDIBILITY OF JOSE MUNOZ

Romero contends the trial court erred when it allowed his jury to hear testimony concerning the circumstances of the Feltenberger robbery and shooting, a robbery-shooting in which only Self and Munoz participated. (RAOB 301-313.) Romero insinuates that the prosecution only charged him with receiving Feltenberger's stolen property (Count XX) in order to inflame the jury with a "gruesome" account of the circumstances surrounding the robbery-shooting, and the trial court then improperly allowed the prosecution to elicit irrelevant and admissible testimony to prove up the "innocuous" charge. (RAOB 301-302, 305-309.) Romero asks this Court to reverse his judgment of death because the admission of the testimony violated his rights to due process of law and a fair and reliable penalty determination. (RAOB 302, 309-313.) As previously demonstrated, Romero's receiving stolen property charge (Count XX) was properly joined, and in order to establish that charge, the prosecution needed to prove that Feltenberger's property was stolen, Romero possessed the stolen property, and Romero knew the property was stolen. Feltenberger's testimony was crucial to establishing these elements and proving Count XX. Also, because Feltenberger's testimony concerning the robbery-shooting matched Munoz's account of the crime, the evidence was highly probative of Munoz's credibility with regard to the other charges. By contrast, there was little risk of undue prejudice, as the circumstances surrounding the Feltenberger shooting were no more graphic or gruesome than

the circumstances surrounding the other charges. Finally, even assuming error, there is no reasonable possibility Romero would have received a more favorable result had the evidence not been admitted.

Prior to trial, Romero moved to exclude evidence of the Feltenberger robbery-shooting, arguing the particular circumstances surrounding the crime were not relevant to establishing the receiving stolen property charge and would be more prejudicial than probative (Evid. Code, § 352). Romero contended the prosecution wanted to inflame his jury with evidence of "an attempted murder of a police officer . . . which [Romero] had nothing to do with." (30 RT 4700-4701.) Romero argued admission of the evidence would not only inflame the jury during the guilt phase, but also as to penalty. (30 RT 4701.)

The prosecutor countered that Feltenberger's testimony was crucial to establishing: (1) the property was in fact stolen, and (2) Romero knew it was stolen when he possessed it. (30 RT 4697.) He stated: "It is essential . . . to hear from the victim from whom it was stolen, who can identify . . . the property, and indicate the manner in which it left his possession." (30 RT 4698.) The prosecution noted that although Munoz would also testify to the circumstances of the Feltenberger robbery-shooting, his accomplice testimony required corroboration, which would be supplied by Feltenberger. (30 RT 4712-4713.) Additionally, the prosecution argued the evidence was both cross-admissible and highly probative of Munoz's credibility, considering the entire defense case centered around attacking Munoz's credibility and this was the only crime where Munoz's account was supported by another eyewitness. The prosecution stated:

> Jose Munoz will testify that he was present at the scene of the Feltenberger incident. That he waited in the car, and that Christopher Self shot Mr. Feltenberger with a 20-gauge shotgun, which later was found out to be containing a Sabot round.

> The credibility of Jose Munoz is going to be essential to both the People and the defense. The defense, including Mr. Romero, is going to be trying to attack the credibility of Mr. Munoz in many ways.
>
> Mr. Munoz says Gene Romero shot and murdered Joe Mans at the Lake Mathews hillside. He said that Gene Romero ran down the hill with Christopher Self after the second victim, Timothy Jones. Jose Munoz says that Christopher Self shot numerous times at Jose Aragon. He says that he didn't shoot anybody. Munoz says that he did not shoot anybody at either the Lake Mathews scene or the Aragon scene. He says that he didn't shoot the victim, Mr. Mills, who lost his eye.
>
> The testimony of Munoz is very important and his credibility is very important, and I would submit that the defense is going to try everything they can to cast doubt on his credibility to make him the shooter instead of themselves.
>
> And so we have the Feltenberger incident in which his testimony is completely corroborated by the only surviving victim who can I.D. his shooter.
>
> Jose Munoz's testimony is almost completely corroborated by Mr. Feltenberger. Mr. Feltenberger at the preliminary hearing and the photo lineup identified his shooter as Mr. Self. And that has tremendous implications as to Jose Munoz's credibility, when Jose Munoz says he was not the shooter at Aragon, and when we know that the same kind of shotgun round was used to shoot Aragon that was used to shoot Feltenberger. It becomes critical for the jury to know what happened in the Feltenberger matter.

(30 RT 4702-4703.)

The prosecution argued that by not admitting evidence of the Feltenberger robbery, Romero's defense could more easily attack Munoz's credibility, freely imply that Munoz was the actual shooter at all of the crime scenes, and ignore evidence that the same shotgun was used in both the Feltenberger shooting and the Aragon murder. (30 RT 4703-4704.) Finally, the prosecution noted that for purposes of Evidence Code section 352, the evidence of the Feltenberger shooting was no more gruesome or violent than

any of the incidents in which Romero was involved[51], and thus there was little risk of prejudice. (30 RT 4715.)

The trial court ruled the evidence admissible as part of the prosecution's "burden of proof" with regard to the receiving stolen property charge (Count XX), and offered to admonish the jury at the outset that " there is not evidence whatsoever that [Romero] was at the scene or . . . was involved in the actual commission of the crime against Mr. Feltenberger. You may only consider this evidence as it relates to Mr. Romero in terms of Count 20, the receiving stolen property." (30 RT 4706, 4716-4717.) While discussing the issue with counsel, the court noted the evidence was critical to establishing Count XX and thus it did not believe an explicit Evidence Code section 352 analysis was necessary, but nonetheless, the court indicated that even applying a section 352 analysis, it would find the evidence more probative than prejudicial. (30 RT 4705-4706.) The court also admonished the prosecutor not to take the Feltenberger evidence out of context as it relates to Romero and "not in any way infer or suggest that Mr. Romero was involved in the shooting of Mr. Feltenberger. . . ." (30 RT 4717-4718.)

Before Feltenberger testified, the court admonished Romero's jury as follows:

> You are about to hear evidence in the form of testimony from John Feltenberger. This evidence is not being offered to show that the defendant Orlando Romero is involved in the alleged robbery and attempted murder of Mr. Feltenberger.

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51. The prosecutor stated: "The jury is going to hear how Mr. Romero was present when Jose Aragon was shot approximately 11 times, asked him how it felt, and then he went to lunch at Coco's. . . . [T]here will be evidence that he actually shot another individual in the back; that he talked about killing people on the way up; that he helped run down another individual; that he was the driver in the Kenny Mills shooting in which a man had his face shot with a shotgun and then Mr. Romero was the wheel man that chased him as they tried to catch him. . . ." (30 RT 4715.)

> On the contrary, there will be no evidence provided that Mr. Romero . . . was involved in this incident. Instead, this evidence is being offered as it relates to Count XX, receiving stolen property.
>
> You are to consider it solely as it relates, one, whether the property was in fact stolen, and two, whether Mr. Romero had knowledge that the property was stolen.

(32 RT 4944.) Feltenberger then testified to the circumstances of the robbery-shooting, as set forth in the Statement of Facts. (32 RT 4944-4970.)

After Feltenberger's testimony, the defense renewed their motion, this time with regard to other witnesses who would testify to the Feltenberger crime scene and investigation, including the collection of sabot round fragments (similar to those used in the Aragon murder) and the recovery of Feltenberger's vehicle within a few blocks of Romero's residence. (32 RT 4971-4973.) The prosecution argued the evidence tended to show Romero knew the property was stolen and further linked appellants with the Aragon murder, while creating little risk for prejudice. (30 RT 4971-4972.) The trial court ruled the evidence relevant to establishing Count XX, not "very prejudicial" to Romero in light of the admonishment given to the jury, and not confusing, misleading, or requiring an undue consumption of time. (32 RT 4973.)

Jose Munoz later testified to the circumstances of the Feltenberger robbery-shooting, which closely matched Feltenberger's testimony. In addition, Munoz described Romero's receipt of Feltenberger's ammunition pouch and Romero's expressed desire to "take out" Feltenberger when he learned he was alive at the hospital. (39 RT 6012-6024.) The prosecution also presented evidence of Romero's statement to police wherein he admitted to knowingly receiving Feltenberger's stolen ammunition pouch. (2 3rd SCT 323-324.)

Romero claims the trial court erred when it admitted this evidence because "the evidence had no probative value at all"[52] and was "grossly prejudicial." (RAOB 305-308.) However, he does not contend that the alleged error was prejudicial to the guilt phase (RAOB 309); he only claims he was prejudiced with regard to the penalty determination. (RAOB 309-313.) There was no error, and in any event, Romero was not prejudiced.

"Only relevant evidence is admissible, and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute." (*People v. Scheid* (1997) 16 Cal.4th 1, 13, citing Evid. Code, §§ 350, 351; *People v. Crittenden* (1994) 9 Cal.4th 83, 132.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1117 [internal quotations and citation omitted]; *People v. Heard, supra,* 31Cal.4th at p. 946.) Evidence may be relevant and admissible for one purpose even though it is inadmissible for another purpose. (See Evid. Code, § 355; *People v. Guerra, supra*, 37 Cal.4th at p. 1117.)

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admissions will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "Evidence is substantially more prejudicial than probative under

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52. However, Romero later admits that "perhaps it would have been within the court's discretion" to permit some testimony "corroborating Feltenberger's identification of Self" and "Munoz's identity as the other perpetrator." (RAOB 307.)

Evidence Code section 352 if it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Guerra, supra*, 37 Cal.4th at p. 1114 [internal quotations and citations omitted].) "In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Instead, the "prejudice" referred to in Evidence Code section 352 is that which "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Garceau* (1993) 6 Cal.4th at 140, 178.) There is no requirement that the record expressly reflect the trial court's weighing or even the decision to weigh under section 352. (*People v. Crittenden, supra,* 9 Cal.4th at p. 83.)

The application of the ordinary rules of evidence generally does not impermissibly infringe upon a capital defendant's constitutional rights. (*People v. Prince* (2007) 40 Cal.4th 1179, 1229.) The trial court has broad discretion in deciding the admissibility of evidence, and its evidentiary rulings will not be disturbed on appeal absent a showing of abuse of discretion. (*People v. Smithey* (1999) 20 Cal.4th 936, 973; *People v. Scheid, supra*, 16 Cal.4th at p. 13.) Under this deferential standard, there is no error and reversal is not required unless the defendant shows that the court exercised its discretion in an "arbitrary, capricious, or patently absurd manner" which resulted in a "manifest miscarriage of justice." (Evid. Code, § 353, subd. (b) [verdict shall not be set aside based on the erroneous admission of evidence unless the error resulted in a miscarriage of justice]; *People v. Guerra, supra*, 31 Cal.4th at p. 1113; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

The trial court did not abuse its discretion in admitting testimony concerning the circumstances of the Feltenberger robbery-shooting. In order to establish Count XX, receiving stolen property, the prosecution needed to

prove: (1) Feltenberger's property was stolen; (2) Romero possessed Feltenberger's stolen property; and (3) Romero knew Feltenberger's property was stolen at the time of his possession. (See Pen. Code, § 496; *People v. Martin* (1973) 9 Cal.3d 687, 695; *In re Anthony J.* (2004) 117 Cal.App.4th 718, 728; 7 CT 1650.) Although the prosecution presented Romero's admission to possessing Feltenberger's stolen property and Munoz's testimony concerning Romero's initial receipt of the stolen property, both of these forms of testimony required corroboration. (See Pen. Code, § 1111 [conviction supported by accomplice testimony must be corroborated by other evidence]; *People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1171 [discussing corpus delecti rule, i.e., the prosecution cannot satisfy its burden by relying exclusively upon the extrajudicial statements, confessions, or admissions of the defendant].) Moreover, Romero's admission to knowingly possessing Feltenberger's ammunition pouch did not prove the pouch was in fact stolen from Feltenberger. The only way to prove the pouch was stolen was through Feltenberger's testimony (either alone or as corroborating Munoz's testimony), in which he identified the pouch and described the robbery. Accordingly, Feltenberger's testimony identifying the property and describing the robbery was highly relevant to establishing Count XX.

Additionally, the evidence was highly probative of Munoz's credibility. The defense's primary goal was to paint Munoz as a self-serving liar who was a more active participant in the crimes than he described. The fact that Munoz's description of the Feltenberger robbery-shooting (in which he was not the shooter) matched the victim's testimony of the crime significantly boosted Munoz's credibility. (Evid. Code, § 210 [relevant evidence includes that relevant to the credibility of a witness].) As noted by the prosecutor, the Feltenberger incident was the only crime in which the surviving victim could identify his shooter and in which Munoz's identification of the shooter was

completely corroborated. Further, the particular circumstances of the Feltenberger crime (the sabot rounds and the use of the shotgun) tended to support appellants' guilt in the Aragon murder, as the same shotgun and shells were used in that crime. If Feltenberger had not been allowed to testify, and thus not lend support to Munoz's testimony, the defense would have been able to more easily attack Munoz's credibility, freely imply that Munoz was the actual shooter in all of the murders, and ignore evidence that the same shotgun and shells were used in both the Feltenberger shooting and the Aragon murder.

By contrast, the evidence provided little potential for undue prejudice.[53/] The court offered to instruct, and ultimately instructed, the jury that there was "no evidence" that Romero was involved in the Feltenberger robbery-shooting, the testimony was "not being offered to show" Romero was involved in that crime, and there were only to consider it as it relates to proving Count XX. (32 RT 4944.) The jury heard this instruction immediately before Feltenberger's testimony, and at the conclusion of the guilt phase before deliberations. (46 RT 7050; 7 CT 1567.) Moreover, the testimony concerning the Feltenberger robbery-shooting was no more graphic, and was in fact less graphic and gruesome, than the evidence presented with regard to the other crimes. The jury heard how Romero, after luring Mans into a false sense of security and telling him "everything was going to be all right," shot Mans in the back and then chased a fleeing Jones down the hill. They also heard how Romero

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53. Although the trial court did not expressly analyze the potential for prejudice under Evidence Code section 352, the court heard argument from counsel on this subject and indicated that even with an express section 352 analysis, it would find the evidence more probative than prejudicial. (30 RT 4700-4701, 4705-4706, 4715; *People v. Crittenden, supra,* 9 Cal.4th at p. 135 [no requirement that the record expressly reflect the trial court's weighing or even the decision to weigh under section 352].) In its later ruling on the investigative evidence, the court made an express section 352 finding. (32 RT 4973.)

feigned interest in Aragon's motorcycle racing to gain his trust, asked a wounded Aragon how it felt to be shot and whether it burned, left Aragon to die in his truck bed with ten shots to his body and a two-inch gaping neck wound from the sabot round, and then sat down for lunch at Coco's using Aragon's money. Clearly, the circumstances of the Feltenberger robbery-shooting pale in comparison to the evidence of Romero's vicious criminal conduct, and thus there was little to no potential for undue prejudice.

In sum, given the high probative value of the Feltenberger testimony, the admonishment given to the jury, and the little potential for prejudice in light of the other evidence, the trial court did not abuse its discretion. In any event, any error was harmless under the most exacting standard. (*People v. Prince, supra,* 40 Cal.4th at 1299 [admission of evidence at guilt phase harmless beyond reasonable doubt at guilt and penalty phases].) With regard to the guilt phase, Romero concedes any error in admitting the Feltenberger testimony "could not have affected [the jury's] determination" as to Count XX. (RAOB 309.) This is not surprising. As previously demonstrated in the Statement of Facts, each and every crime, including Count XX's receiving stolen property charge, was supported by overwhelming evidence establishing Romero's guilt, and the jury was properly instructed to make separate findings on the charges and not to consider the Feltenberger testimony for anything other than Count XX. (46 RT 7050, 7087, 7091-7092; 7 CT 1567, 1652, 1663.) Indeed, Romero's jury clearly was not unduly inflamed by the Feltenberger testimony and evidently considered each charge separately, as it ultimately acquitted Romero of the Steenblock robbery-kidnaping charges (Counts XIII & XIV). (8 CT 1724-1732, 1786-1835.)

With regard to the penalty phase, there is no reasonable possibility the jury would have returned a more favorable sentence absent the Feltenberger testimony. (*People v. Prince, supra*, 40 Cal.4th at 1299 [evidentiary rulings at

guilt phase harmless at penalty phase if no reasonable possibility jury would have returned a more favorable verdict; this standard of review is the same as the federal "harmless beyond a reasonable doubt" standard]] *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11 [same].) Throughout the course of the trial, the jury learned of Romero's affinity for brutality: how he hunted his victims like prey, lured them into a false sense of security, and then violently attacked them without remorse. They learned how he continued his violence in pretrial confinement, attempted to escape, and showed complete disregard for human life. Romero's case in mitigation offered little by comparison. While he presented evidence of childhood abuse and neglect, the evidence also showed: Romero was guided by a devoted stepfather, loving grandparents, and other extended family members; his mother taught him right from wrong and the value of manners and a good education; close friends gave him opportunities to better his life which he squandered away; and his brothers raised in the same household achieved success in the military and rejected the criminal path chosen by their siblings. It is inconceivable that evidence concerning the Feltenberger robbery-shooting, yet another robbery-shooting in the long list of appellants' crimes, somehow tipped the scales in favor of a death verdict. Thus, even assuming error, there was no prejudice.

V.

SUBSTANTIAL EVIDENCE SUPPORTS SELF'S CONVICTIONS FOR ROBBERY IN COUNT XV (KNOEFFLER) AND ATTEMPTED MURDER, ATTEMPTED ROBBERY, AND MAYHEM IN COUNTS V THROUGH VII (MILLS-EWY)

Self contends there was insufficient evidence to support his convictions for robbery in Count XV (Knoeffler) and attempted murder, attempted robbery, and mayhem in Counts V through VII (Mills-Ewy). (SAOB 259-277.) With

regard to Count XV, Self argues the evidence did not establish he aided and abetted Romero and Munoz in robbing Albert Knoeffler. (SAOB 259-267.) Specifically, Self asserts the evidence failed to prove he "was even in the car or otherwise present" at the Knoeffler robbery or "that he in any manner aided, assisted, encouraged, or facilitated the robbery." (SAOB 265-266.) With regard to Counts V through VII, Self contends there was no evidence corroborating Munoz's testimony or otherwise establishing Self's presence or participation in the Mills-Ewy shooting. (SAOB 268-277.)

Self's claims lack merit, and he minimizes or ignores the persuasive and substantial evidence supporting his convictions in Counts V, VI, VII, and XV. With regard to his robbery conviction in Count XV (Knoeffler), substantial evidence establishes that Self, along with his usual cohorts and using their usual tactics, understood and consented to the plan to rob Knoeffler, encouraged and facilitated the robbery by acting as a lookout in Alvarez's Colt, and further assisted in the robbery by participating in the getaway and disposal of Knoeffler's property. Self aided and abetted the Knoeffler robbery, and accordingly, his conviction in Count XV must be upheld.

With regard to his convictions in Counts V through VII (Mills-Ewy), substantial evidence, in the form of physical damage to Mills and Ewy's vehicle and other circumstantial evidence, corroborated Munoz's testimony that Self leaned out the rear driver's side window of the Colt and fired his shotgun over the Colt's roof, blasting a hole through the top of Mills' driver's window and hitting him in the face. Accordingly, Self's convictions in Counts V through VII must be affirmed.

Well-established and straightforward legal standards govern appellate review of sufficiency of evidence issues. In considering a claim of insufficiency of evidence, a reviewing court applies a "substantial evidence" test and must determine "whether, after viewing the evidence in the light most

favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781; 61 L.Ed.2d 560], original italics; *People v. Cuevas* (1995) 12 Cal.4th 252, 260; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) "The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on " 'isolated bits of evidence.'" [Citation.]" (*People v. Cuevas, supra,* 12 Cal.4th at p. 260 [original italics].) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The court does not perform the function of re-weighing the evidence; rather, the court must presume in support of the judgment all inferences that the trier of fact could reasonable deduce from the evidence. (*People v. Bloyd* (1987) 43 Cal.3d 333, 346-347; *People v. Redmond* (1969) 71 Cal.2d 745, 755.) An appellate court will not reverse a trial court's findings "merely because the circumstances might also be reasonably reconciled with a contrary finding." (*People v. Redmond*, *supra*, 71 Cal.2d at p. 755.) To warrant rejection of a witness's testimony believed by the trial court, "there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions." (*People v. Mayberry* (1975) 15 Cal.3d 143, 150.)

The same standard of review applies to cases in which the prosecution primarily relied on circumstantial evidence. (*People v. Stanley, supra,* 10 Cal.4th at p. 792.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible to two interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable

doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*People v. Rodriguez, supra,* 20 Cal.4th at p. 11, internal citations and quotations omitted; *People v. Bean, supra* 46 Cal.3d at p. 919, internal citations and quotations omitted.)

In reviewing a case involving the testimony of an accomplice, the reviewing court must also ask whether there was sufficient corroborating evidence to support the conviction. Penal Code section 1111 provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." "Corroborating evidence must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged." (*People v. Zapien* (1993) 4 Cal.4th 929, 982 [internal citations and quotations omitted]; see also *People v. Avila, supra,* 38 Cal.4th at p. 563.) Evidence sufficient to corroborate accomplice testimony need only be slight, such that it may be entitled to little consideration if standing alone. (*People v. Avila, supra*, 38 Cal.4th at p. 563; *People v. Sanders* (1995) 11 Cal.4th 475, 534-535.) Sufficient corroborative evidence tends to connect the defendant with the crime in a way that may reasonably satisfy a jury that the accomplice is telling the truth, and it may be entirely circumstantial. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271; *People v. Williams* (1997) 16 Cal.4th 153, 246.) In evaluating the sufficiency of corroborating evidence, an appellate court again applies the substantial evidence test, viewing the evidence in a light most favorable to the verdict and upholding the trial court's disposition if, on

the basis of the evidence presented, the jury's determination is reasonable. (*People v. Garrison* (1989) 47 Cal.3d 746, 774.)

A. Substantial Evidence Establishes Self Was Present At The Knoeffler Robbery, Knew Of And Encouraged The Plan To Rob Knoeffler, And Intentionally Assisted The Robbery By Acting As A Lookout And Facilitating The Getaway And Disposal Of Knoeffler's Property

In Argument IV of his opening brief, Self contends the evidence is insufficient to support his robbery conviction as an aider and abettor in Count XV. Specifically, he contends there was insufficient corroborating evidence of Munoz's testimony placing him at the scene of the Knoeffler robbery, as well as insufficient evidence of his knowing and intentional participation in the robbery. (SAOB 265-266.) Self is mistaken.

Robbery is defined by Penal Code section 211 as "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." "[T]he crime of robbery continues until the perpetrators have reached a place of safety." (*People v. Jones* (2003) 30 Cal.4th 1084, 1112; see *People v. Cooper* (1991) 53 Cal.3d 1158, 1164-1165.)

In Count XV, the People prosecuted Romero as a direct perpetrator of the Knoeffler robbery, while Self was prosecuted under an aiding or abetting theory. (45 RT 6731-6732.) "A person aids and abets the commission of a crime when he or she, (1) with knowledge of the unlawful purpose of the perpetrator, (2) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (3) by act or advice, aids, promotes, encourages or instigates the commission of the crime.' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 851; see *People v. Avila, supra*, 38 Cal.4th 491, 564.) Self's jury was instructed with this definition of aiding and abetting.

(CALJIC No. 3.01 [Aiding and Abetting - Defined]; 6 CT 1414; 45 RT 6819-6820.) "Presence at the scene of the crime, while insufficient of itself to make one an aider and abettor, is one factor which tends to show intent. Other factors which may be considered include the defendant's failure to take steps to prevent the commission of the crime, companionship, and conduct before and after the crime. [Citation.]" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 893; see also *In re Juan G.* (2003) 112 Cal.App.4th 1, 5; *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1294; *People v. Mitchell* (1986) 183 Cal.App.3d 325, 330; *People v. Moore* (1953) 120 Cal.App.2d 303, 306.) Furthermore, where knowledge is an issue on the question of guilt, as in the case of an aider or abettor, evidence of participation in a prior similar offense is relevant. (*People v. Jones* (1969) 274 Cal.App.2d 614, 622, citing Wigmore on Evidence (3d ed.) §§ 300-301, pp. 192-194.)

Here, "virtually all of the probative factors relative to aiding and abetting are present -- presence at the scene of the crime, companionship and conduct before and after the offense, including flight. [Citations.]" (*People v. Mitchell, supra,* 183 Cal.App.3d at p. 330.) Munoz testified that he, Self, Romero, and Chavez drove around in Alvarez's Colt on November 20, 1992, intending "to go . . . stealing again." (39 RT 5957.) At this point in time, the group, in various combinations, had robbed, attempted to rob, and/or murdered seven people on five separate occasions, and Self participated in all of these crimes, either using his own car or joining his brother in the Colt. (See Respondent's Statement of Facts, *ante.*) When the group saw Knoeffler near his bee boxes, they agreed upon a robbery plan, namely, for Romero to approach Knoeffler and see "what [he] had worth taking," while the rest of the group stayed in the Colt. The group was armed with the 20-gauge shotgun Self admitted to acquiring a few weeks earlier, and "maybe" the Remington Self bought in San Diego. (39 RT 5927-5928, 5958-5960; 40 RT 6174-6177; 45 3rd SCT 13078-

13080.) Romero approached Knoeffler with Self's shotgun as planned, Munoz joined him later, and the two made off with Knoeffler's cash and truck. (34 RT 5341-5345; 39 RT 5960-5964.) Romero and Munoz then drove the truck over to Self and Chavez, who were still waiting inside the Colt. Self and Chavez followed Romero and Munoz to a remote location, where Romero disposed of Knoeffler's truck by letting it roll down a hill. Thereafter, Romero and Munoz made their getaway with Self and Chavez in the Colt, and the group jointly spent Knoeffler's money on snacks, beer, and cigarettes. (39 RT 5964-5966.)

In sum, Self participated in formulating a robbery plan with his regular cohorts, brought along at least one weapon if not both weapons belonging to him, followed through with the plan by remaining in the getaway vehicle during the robbery, accompanied his cohorts as they made off with and disposed of the truck, and then jointly consumed the robbery proceeds. This conduct clearly shows Self knowingly and intentionally instigated, encouraged, and aided the robbery of Albert Knoeffler.

Self argues he was simply a passenger in the Colt, and there was "no evidence" he knowingly and intentionally participated in the robbery. (SAOB 265-266.) This argument strains credulity, especially given Self's criminal history with his cohorts, his admission to being "addicted" to robbing people (37 RT 5593-5599), and his active participation in several prior, similar robberies involving the same accomplices and the same criminal tactics, i.e., one and or two accomplices approaching the vehicle while another accomplice (or accomplices) stays and follows behind in the getaway vehicle. (See Respondent's Statement of Facts, Meredith and Steenblock robberies, *ante*.) Indeed, this Court has recognized that a passenger in a getaway vehicle may be an accomplice if, as here, the evidence shows the passenger participated in the robbery or the asportation of the robbery proceeds. (*People v. Jones, supra,* 30 Cal.4th at pp. 1112-1113; see also *People v. Jones, supra,* 274 Cal.App.2d at p.

622.) Based on the group's history as well as Self's presence at every stage of the Knoeffler robbery (planning, escape, and disposal of the proceeds), the jury could reasonably infer that Self was not an unwitting bystander, but an active, knowing, and intelligent participant.

Self also claims that Munoz's testimony placing him inside the Colt and at the scene of the robbery is uncorroborated. (SAOB 265.) Self is wrong. Again, corroborative evidence may be slight and need not be sufficient in itself to establish every element of the offense charged. (*People v. Avila, supra*, 38 Cal.4th at p. 563.) Here, Munoz's account of the crime was largely corroborated by Knoeffler's testimony; specifically, that Romero, armed with a shotgun, and Munoz, arriving a bit later, robbed him of his cash and fled in his truck. (34 RT 5341-5345; 39 RT 5960-5964.) Munoz's testimony concerning the presence of accomplices in a getaway car was corroborated by the crime's rural and remote location (the jury could infer Romero and Munoz did not simply walk to Knoeffler's location), as well as the use of identical tactics in the commission of the group's prior crimes (namely, the Meredith and Steenblock robberies in Counts IV, XIII, & XIV), wherein the group, which always included Self, also used accomplices in a getaway car to facilitate the robberies. (39 RT 5957-5958, 5964-5966; see Respondent's Statement of Facts, Meredith and Steenblock robberies, *ante*.) Most importantly, Knoeffler's testimony describing Romero's use of a shotgun matched Munoz's testimony that Romero used Self's shotgun to effectuate the robbery. (34 RT 5341-5342; 39 RT 5959, 5960.) Romero's use of Self's shotgun strongly suggests Self was present and participated in the Knoeffler robbery.

Finally, in addition to the corroborating evidence for this particular crime, the jury was entitled to consider Munoz's overall credibility and trustworthiness as a witness in assessing Self's guilt or innocence of the charged crime. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 491, 497

[accomplice's credibility is for the jury to determine "under all the circumstances"; accomplice's testimony, if believed by jury, was solid evidence of defendant's guilt in charged crimes, along with independent evidence connecting defendant with crimes]; *People v. Davis* (1954) 43 Cal.2d 661, 673 [once accomplice testimony meets corroboration requirement, the accomplice's testimony and credibility may be considered for the purpose of conviction].) As a whole, Munoz's accounts of appellants' crimes aligned with victim, law enforcement, and forensic testimony, and his admission to committing previously unsolved crimes served to further bolster his credibility.

In sum, based on the foregoing, substantial evidence supports the jury's determination that Self aided and abetted the robbery of Albert Knoeffler. Accordingly, Self's robbery conviction in Count XV must be affirmed.

B. Substantial Evidence Corroborates Munoz's Testimony That Self Leaned Out The Left Rear Window Of The Colt, Aimed His Shotgun Over The Roof, And Shot Mills In The Face

In Argument V of his opening brief, Self contends the evidence is insufficient to support his attempted murder, attempted robbery, and mayhem convictions in Counts V through VII because there was no evidence corroborating Munoz's testimony or otherwise establishing his presence or participation in the Mills-Ewy shooting. (SAOB 268-277.) Self's contention is wholly without merit, as he overlooks the powerful physical and circumstantial evidence supporting his conviction, namely, the weapon used matched the description of Self's shotgun and the damage to the Mills-Ewy vehicle corroborated Munoz's account of Self firing the shotgun over the Colt's roof.

Munoz testified that he, Romero, and Self pulled alongside Mills and Ewy's vehicle on the night of October 22, 1992, armed with Self's .20-gauge shotgun and the .22 caliber single-shot rifle. (39 RT 5926-5931, 5935.) In his

statement to police, Self admitted the shotgun belonged to him and that he obtained the shotgun around the end of October. (45 3rd SCT 13078-13080.) Munoz testified he pointed the single-shot out of the front passenger window but did not fire, while Self leaned out of the rear driver's side window and fired his shotgun across the Colt's roof, blasting out the victims' driver's window. (39 RT 5931-5934.) Mills testified he saw at least two people in the Colt (a driver and a passenger), and he saw the passenger aiming a weapon toward him. He then saw a muzzle flash, heard a pop, and felt the shotgun blast hit him across the face. Mills could not identify or describe his attackers. (33 RT 5195-5201.)

Police collected .20-gauge Remington-brand shotgun wadding from the floorboard of Ewy's car, as well as lead shotgun pellet fragments from the passenger door and passenger floor. There were pellet strike marks on the upholstery of the passenger door, but no strike marks on the head liner or inside roof. The driver's side window was shattered, with a hole in the top of the window where the shot entered the vehicle. The shot exited through the lower part of the passenger window, near the door frame and towards the front. Although Mills pushed out the shattered passenger window after he stopped the vehicle on the golf cart path, he testified that there was a hole in the passenger window about two or three inches up from the door frame and about two-thirds forward. (33 RT 5207-5210; 5219-5224; 38 RT 5825-5826.) A later search of Alvarez's Colt uncovered shotgun pellets in the rear seat, and a briefcase in the trunk containing several shotgun shells. (34 RT 5324-5325; 37 RT 5687-5697.) The inside of another briefcase in the trunk contained Self's first name "Chris" written in block-letter graffiti. (37 RT 5687-5688.)

Although Self contends there was "no" corroboration of Munoz's testimony, the evidence shows otherwise. (SAOB 276.) From the .20-gauge shotgun wadding found inside Ewy's vehicle, the jury could infer the shotgun

blast came from the .20-gauge shotgun Self recently acquired. The fact Self's shotgun was used in the shooting strongly supports Munoz's testimony identifying Self as the shooter.

Furthermore, the damage to Ewy's vehicle windows indicated the shotgun blast entered high (through the top of the driver's window) and exited low (through the lower part of the passenger window), with a rear-to-front trajectory (the shotgun blast exited toward the front of the passenger window). Although there were pellet strike marks on the lower part of the passenger door and floor, there were no pellet strike marks on the inside roof of Ewy's vehicle, thus supplying further evidence of downward trajectory. A high-to-low, rear-to-front trajectory matches perfectly with Munoz's description of Self firing the shotgun from the rear and over the roof of the Colt. The trajectory does not comport with someone firing from the front passenger seat. Mills testified he saw the Colt's front passenger (Munoz) aiming a weapon at him, but the evidence clearly corroborated Munoz's testimony that shotgun blast in fact came from Self firing his shotgun from the rear and across the top of the Colt.

Finally, the jury was entitled to consider Munoz's overall credibility and trustworthiness as a witness in assessing Self's guilt or innocence of the crime charged. (See *People v. Hillhouse, supra,* 27 Cal.4th at pp. 491, 497 [accomplice's credibility is for the jury to determine "under all the circumstances"; accomplice's testimony, if believed by jury, was solid evidence of defendant's guilt in charged crimes, along with independent evidence connecting defendant with crimes].) Munoz told the police about the Mills-Ewy shooting before the police knew he was involved and without prompting, and Munoz even stuck to his account of Self shooting across the roof despite the officers expressing their doubts. (45 3rd SCT 12992, 13010-13025.) The physical evidence ultimately corroborated Munoz's account of the crime, and Munoz's testimony largely matched the victim's testimony at trial. As a whole,

Munoz's description of all of appellants' crimes aligned with victim, law enforcement, and forensic testimony, and the jury was entitled to trust his version of the Mills-Ewy shooting with even the slightest of corroborating evidence.

In sum, Munoz's testimony concerning the Mills-Ewy shooting was sufficiently corroborated, and substantial evidence supports Self's convictions for attempted murder, attempted robbery, and mayhem. Accordingly, the jury's verdicts in Counts V through VII must be affirmed.

VI.

THE SPECIAL CIRCUMSTANCES WERE LAWFULLY ENACTED BY PROPOSITION 115

Romero contends the special circumstances (Pen. Code, § 190.2, subds. (a)(3), (a)(17); 8 CT 1724-1726) must be reversed because they were not based on a validly enacted statute. Specifically, Romero argues that while Proposition 115 "purported" to expand the death-eligible provisions of Penal Code section 190.2 to include aiders and abettors of felony murders acting with reckless indifference, the electorate also enacted Proposition 114 at the same time with more votes, and since the two propositions were allegedly in conflict, the expanded felony-murder special circumstance in Proposition 115 was not validly enacted. (RAOB 547-554; SAOB 492.) This contention is without merit and has previously been rejected by this Court. Accordingly, Romero's claim fails.

Proposition 114 expanded the special circumstance for murdering a peace officer by expanding the definition of a peace officer. (See *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 982-984 ["*Yoshisato*"].) Proposition 115 was a wide-ranging measure making comprehensive reforms to the criminal justice system. One of the changes was the expansion of the death-eligible

provisions of Penal Code section 190.2 to include aiders and abettors of felony murder who "with reckless indifference to human life and as a major participant" aid and abet in the commission of an enumerated felony (such as robbery) that results in death. (See *id.* at pp. 984-987; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 342-346.)

Romero argues that because Proposition 114 garnered more " yes" votes than Proposition 115, and because Proposition 114 did not include an expansion of special circumstances to include aiders and abettors of felony murder acting with reckless indifference, the propositions were in conflict, thus the special circumstances at issue were not properly enacted.[54] (RAOB 547.) In a related note, Romero also contends there was no "societal consensus" supporting the enactment of the expanded special circumstances in Proposition 115. (AOB 553-554.) However, as Romero recognizes, his argument has been rejected by this Court in *Yoshisato*. (RAOB 548.) Romero's contention that *Yoshisato* is not controlling because it allegedly "did not discuss any of the constitutional implications arising from the nature of the statute at issue," should be rejected. (RAOB 548.) Similarly, Romero's reliance on the dissent in *Yoshisato* (RAOB 551-552, 554) is not authority to support his arguments. As this Court recently noted, *Yoshisato* "settled this issue. . . ." (*People v. Hoyos* (2007) 41 Cal.4th 872, 890.)

As this Court explained in *Yoshisato*, Propositions 114 and 115 were not conflicting measures, as Romero argues. "[T]he propositions at issue here were not expressly or even impliedly presented to voters as competing or alternative measures." (*Yoshisato, supra*, 2 Cal.4th at p. 989.) Proposition 114 was a narrow measure that expanded the definition of peace officers for the purpose

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54. It would appear that based on Romero's logic much of the rest of Proposition 115 is invalid as well, but the instant argument is limited to the special circumstances at issue here.

of the murdering a peace officer special circumstance. Proposition 115 was more broad and enacted, in part, an expansion of the death-eligibility provisions of Penal Code section 190.2, including elimination of the intent-to-kill requirement for aiders and abettors of felony murder, which the jury was instructed on in the instant case. (7 CT 1449-1450, 1629-1630.). As this Court noted in *Yoshisato*, Propositions 114 and 115 were complimentary or supplementary measures. (*Yoshisato, supra*, 2 Cal.4th at p. 989; see also *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744, 765.) "It is clear the voters intended merely to amend section 190.2 in the various discrete ways set out [in the propositions]." (*Yoshisato, supra*, 2 Cal.4th at p. 990.) The fact that Proposition 114 did not similarly expand Penal Code section 190.2 to include aiders and abettors acting with reckless indifference does not place the two propositions in conflict as Romero claims.

Romero also argues that to comply with constitutional requirements a capital sentencing scheme must narrow the class of persons eligible for the death penalty, thus Penal Code section 190.2 must be construed to circumscribe the class of persons so eligible. (RAOB 552-553.) Despite Romero's contention otherwise, the fact that this Court in *Yoshisato* found Proposition 115 properly enacted, thus properly expanding the death eligibility provisions of section 190.2, does not mean the capital scheme set forth in section 190.2 is hence no longer constitutionally narrow. (See *People v. Arias, supra*, 13 Cal.4th at p. 187.)

Finally, Romero argues there was no "societal consensus" to support the enactment or expansion of the special circumstances set forth in Proposition 115. (RAOB 553-554.) Romero is incorrect. A majority of voters enacted Proposition 115, which set forth the expansion of special circumstances to include aiders and abettors of felony murder acting with reckless indifference. This majority vote evinces a societal consensus. The fact that the voters also

approved Proposition 114, which expanded the definition of "peace officer" for the murder of a peace officer special circumstance, does not undercut the consensus for the special circumstances set forth in Proposition 115. As noted above, it is obvious that the voters intended to amend section 190.2 in the manners set out in the two propositions. (See *Yoshisato, supra,* at pp. 989-990.)

In sum, the reasoning set forth in *Yoshisato* is both solid and applicable. The expansion of the special circumstances to include aiders and abettors of felony murder acting with reckless indifference was properly enacted by Proposition 115. Romero's constitutional rights were not violated and the special circumstance findings should be upheld.

VII.

THE INSTRUCTIONS CONSIDERED IN PART AND IN WHOLE DID NOT LESSEN THE PROSECUTOR'S BURDEN OF PROVING APPELLANTS GUILTY BEYOND A REASONABLE DOUBT

Appellants claim their convictions should be reversed because CALJIC No. 2.90 [Presumption of Innocence - Reasonable Doubt - Burden of Proof] (1994 Revision), as given in this case, was constitutionally defective for the following reasons: (1) it inadequately defined the level of certainty required for conviction; (2) the 1994 revision gave a lower burden of proof than the instructions that were in effect at the time appellants committed their crimes, and thus, its application violated the proscription against ex post facto laws and the correlative right to due process; (3) it erroneously implied that the jurors were required to articulate a reason for their doubt; (4) it unconstitutionally admonished the jury that a possible doubt is not a reasonable doubt; (5) it failed to instruct that the defense had no obligation to present or refute evidence, and other instructions erroneously suggested such an obligation existed; (6) it failed to inform the jury that the presumption of innocence continues throughout the

entire trial, including deliberations; and (7) it failed to advise the jurors that a conflict in evidence or lack of evidence could leave them with a reasonable doubt as to guilt. (SAOB 305-326, 492; RAOB 543-546, 596.) As appellants recognize, this Court and others have repeatedly rejected their claims, but appellants urge this Court to reconsider them. (RAOB 543, 596; SAOB 321-324, 492.) Because appellants fail to present persuasive arguments to revisit these decisions, this Court should decline to do so.

At appellants' request, their juries were read the following version of CALJIC No. 2.90:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People [the Deputy District Attorney Mr. West] the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(6 CT 1409; 7 CT 1590; 9 CT 1991, 2059; 45 RT 6817; 46 RT 7058.) At the penalty phase, a similar instruction was given as part of CALJIC No. 8.87. This was also given at appellants' request. (9 CT 1991, 2059; 54 RT 8065, 8151-8152.)

First, because appellants requested instruction with the modified version of CALJIC No. 2.90, their claims on appeal are barred under the invited error doctrine. (*People v. Hinton* (2006) 37 Cal.4th 839, 868, fn. 10; *People v. Davis* (2005) 36 Cal.4th 510, 567; 6 CT 1409; 7 CT 1590; 44 RT 6632.)

Second, CALJIC No. 2.90 adequately instructed the jury on reasonable doubt. Appellants claim the instruction failed to tell jurors "*how* convinced" they must be to return a conviction. (RAOB 543, 545, italics in original; SAOB

492.) They also contend that the instruction unconstitutionally admonished the jury that a possible doubt is not a reasonable doubt. (SAOB 309-311; RAOB 596.) Every court which has considered these claims have rejected them and instead upheld the instruction as an adequate definition of reasonable doubt. (See, e.g., *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286-1287 [listing numerous cases rejecting claims against constitutionality of CALJIC No. 2.90].)

In *Victor v. Nebraska* (1994) 511 U.S. 1, [114 S.Ct. 1239, 127 L.Ed.2d 583] the defendant objected to the language in CALJIC No. 2.90 stating that reasonable doubt is "not a mere possible doubt." The Supreme Court held this language was adequate. (*Id.* at pp.13, 17.) The High Court expressly stated, "An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof. [Citation.]" (*Id.* at pp. 14-15.) This Court has also rejected appellants' claims. In *People v. Freeman* (1994) 8 Cal.4th 450, this Court revisited the then-existing version of CALJIC No. 2.90, following the federal High Court's decision in *Victor v. Nebraska*. Based on *Victor*, this Court recommended that trial courts use the same definition of reasonable doubt which the trial court used in the instant case, including the language to which appellant now objects. (*People v. Freeman, supra*, 8 Cal.4th at p. 504.) Indeed, this Court specified that, other than deleting the "moral evidence" and "moral certainty" language from the former CALJIC No. 2.90, no other changes should be made. (*Id.* at p. 505.) Hence, CALJIC No. 2.90 properly sets forth the definition of reasonable doubt and the juries in this case were adequately instructed. Appellants' claims contradict rulings by the United States Supreme Court and this Court, and therefore, their claims must be rejected.

Third, contrary to appellants' assertion, the 1994 revision to CALJIC No. 2.90, as given in this case, did not give a lower burden of proof than the instruction that was in effect at the time appellants committed their crimes, and

the use of the revised instruction did not violate their due process rights or the proscription against ex post facto laws. (RAOB 546; SAOB 492.) Indeed, this Court specifically rejected appellants' argument in *People v. Brown* (2004) 33 Cal.4th 382, 391-392, which held that CALJIC instructions do not constitute legislative or decisional law and thus cannot implicate ex post facto concerns or due process. The *Brown* Court also approved the revised version of CALJIC No. 2.90 of which appellants now complain. Appellants' due process rights were not violated.

Fourth, CALJIC No. 2.90 did not require jurors to articulate a reason for their doubt. Appellants argue that, although "the jurors were not expressly instructed that they must articulate reason and logic for their doubt," the instructional language of CALJIC No. 2.90 so implies. (SAOB 306-309; RAOB 596.) Respondent agrees that a jury is not required to articulate doubt. (See *People v. Hill, supra,* 17 Cal.4th at p. 800.) However, CALJIC No. 2.90 cannot reasonably be interpreted to require any articulation of doubt, expressly or impliedly. Indeed, there is simply no basis for appellants' strained interpretation of the instruction. CALJIC No. 2.90, as discussed throughout this argument, properly instructed the jury on reasonable doubt.

Fifth, CALJIC No. 2.90, alone and combined with other instructions, adequately explained that the burden of proof rested with the prosecution. Appellants contend CALJIC No. 2.90 was deficient and misleading because it did not affirmatively state that the defense had no obligation to present or refute evidence. (SAOB 311-318; RAOB 596.) They further contend, in light of other instructions given (CALJIC Nos. 1.00, 2.01, 2.11, 2.21.2, 2.22, 2.27, 2.60 & 2.61), "it is reasonably likely that jurors concluded that appellant had the burden of producing sufficient evidence to raise a reasonable doubt of his guilt." (SAOB 313; RAOB 596.) Appellants' arguments are without merit.

CALJIC No. 2.90 clearly advised the jury that the prosecution, not the defense, had "the burden of proving [appellant] guilty beyond a reasonable doubt" and that the defense had no obligation to present evidence. (6 CT 1409; 7 CT 1590; 45 RT 6817; 46 RT 7058.) It cloaked appellant in the presumption of innocence and squarely placed on the prosecution the burden of proving otherwise. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1134 [instruction that defendant need not prove his innocence or another's guilt properly refused in light of CALJIC No. 2.90], citing *People v. Martinez* (1987) 191 Cal.App.3d 1372, 1378-1379 [CALJIC No. 2.90 cautioned jurors that People must prove defendant's guilt rather than defendant's having to prove his innocence or guilt of another].) The prosecution's burden was reiterated in CALJIC No. 2.91, which clearly told jurors "[t]he burden is on the People." (6 CT 1410; 7 CT 1591; 45 RT 6817; 46 RT 7058-7059.) No reasonable juror would have believed that appellants were required to present evidence to establish a reasonable doubt.

Similarly, appellants' claim that a list of jury instructions (CALJIC Nos. 1.00, 2.01, 2.11, 2.21.2, 2.22, 2.27, 2.60 & 2.61) further undermined the prosecutor's burden of proof also must be rejected. (RAOB 596; SAOB 305-326.) With regard to CALJIC No. 1.00, this Court has addressed and rejected appellants' attack on that instruction. (SAOB 314; RAOB 596.) Specifically, this Court held,

> CALJIC No. 1.00, which directs the jury not to "infer or assume" that defendant "was more likely to be guilty than not guilty" merely because he had been arrested, charged, or brought to trial, does not undercut the burden of proof. [Citation.]

(*People v. Jurado* (2006) 38 Cal.4th 72, 127; see also *People v. Guerra, supra,* 37 Cal.4th at p. 1067.) This Court in *Jurado* and *Guerra* also rejected appellants' arguments (SAOB 315-317; RAOB 596) attacking instructions addressing sufficiency of circumstantial evidence generally (CALJIC No. 2.01),

willfully false witnesses (CALJIC No. 2.21.2), and weighing conflicting testimony (CALJIC No. 2.22). (*People v. Jurado*, *supra*, 38 Cal.4th at pp. 126-127; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1138- 1139; see also *People v. Robinson* (2005) 37 Cal.4th 592, 637; *People v. Millwee* (1998) 18 Cal.4th 96, 158-159.

As for CALJIC No. 2.11 [Production of all Available Evidence Not Required] this Court has rejected appellants' argument that "the instruction suggested that the production of some evidence by both sides was required." (SAOB 315; RAOB 596.) In *People v. Daniels* (1991) 52 Cal.3d 815, this Court approved of CALJIC No. 2.11 and labeled appellants' interpretation of the instruction as "quite strained." (*People v. Daniels, supra,* 52 Cal.3d at p. 815, citing *People v. Orozco* (1981) 114 Cal.App.3d 435, 448.) Regarding CALJIC No. 2.27 [Sufficiency of Testimony of Single Witness] (1991 Revision), appellants argue the instruction "impermissibly suggested by implication that some facts were required to be proven by the defense." (SAOB 317; RAOB 596.) This argument also has been rejected. (See *People v. Gammage* (1992) 2 Cal.4th 693, 702, fn. 5 [upholding CALJIC No. 2.27 and noting the 1991 revised version of CALJIC No. 2.27 complied with Supreme Court recommendations on improving the instruction]; *People v. Turner* (1990) 50 Cal.3d 668, 696-698 [concluding the jury was not misled because it received full instructions on the burden of proof, and stating "We cannot imagine that the generalized reference to 'proof' of 'facts' in CALJIC No. 2.27 would be construed by a reasonable jury to undermine these much-stressed principles."]; *People v. Wade* (1995) 39 Cal.App.4th 1487, 1496-1497.)

With regard to CALJIC Nos. 2.60 and 2.61, these instructions told the jury to draw no inference from or discuss appellants' failure to testify on their own behalf, and CALJIC No. 2.61 reiterated to jurors that the People bore the burden of proof. The purpose of these instructions are to protect the defendant,

and trial courts are in fact required to give these instructions if requested by the defendant. (See *Carter v. Kentucky* (1981) 450 U.S. 288, 300, 305 [101 S.Ct. 1112, 67 L.Ed.2d 241]; *People v. Roberts* (1992) 2 Cal.4th 271, 314-15.) Here, appellants requested instruction with CALJIC Nos. 2.60 and 2.61, and the trial court so instructed. (6 CT 1400-1401; 7 CT 1580-1581; 44 RT 6623; 45 RT 6813-6814; 46 RT 7054.) Absent appellants' strained interpretation, these instructions in no way diluted the burden of proof. In fact, these instructions, as exemplified by appellants' request for them at trial, protected appellants and served to "minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." (*Carter v. Kentucky, supra*, 450 U.S. at p. 305.) In sum, CALJIC No. 2.90, in whole and in combination with the other instructions, properly instructed the jury that the burden of proof rested with the prosecution.

Sixth, CALJIC No. 2.90 informed the jury that the presumption of innocence continues through to a verdict. Appellants posit that CALJIC No. 2.90 was deficient because "it did not assure that the jury would not shift the burden to the defense at some point prior to completing its deliberations." (SAOB 320.) Specifically, appellants argue the portion of CALJIC No. 2.90 which instructed the jury that a defendant "is presumed to be innocent until the contrary is proved," undermined the prosecution's burden of proof. They contend the word "until" should be replaced by the word "unless" in order to indicate that sufficient proof might never be presented. (SAOB 318-320.) This Court has rejected this contention. (*People v. Lewis* (2001) 25 Cal.4th 610, 651-652.) In *Lewis*, this Court concluded as follows:

> [T]here is no reasonable likelihood that the jury in defendant's case would understand the instruction to mean that to convict defendant, the state could sustain its burden without proving his guilt beyond a reasonable doubt. Here, the instruction first informed the jury that "a defendant in a criminal action is presumed to be innocent until the contrary is proved" and that if there is a reasonable doubt as to his guilt,

> he must be acquitted. The next sentence stated that the just- described presumption of innocence "places upon the People the burden of proving him guilty beyond a reasonable doubt." The jury was then provided a definition of reasonable doubt. Contrary to defendant's argument, there is no reasonable likelihood that the jury understood the disputed language to mean it should view defendant's guilt as a foregone conclusion.

(Id. at p. 652.)

Furthermore, as acknowledged by the Court of Appeal in *People v. Goldberg* (1984) 161 Cal.App.3d 170:

> Once an otherwise properly instructed jury is told that the presumption of innocence obtains until guilt is proven, it is obvious that the jury cannot find the defendant guilty until and unless they, as the fact-finding body, conclude guilt was proven beyond a reasonable doubt.

(*People v. Goldberg, supra*, 161 Cal.App.3d at pp. 189-190.) Since such a conclusion could not be reached prior to deliberation and unanimous agreement, the *Goldberg* court held CALJIC No. 2.90 effectively preserved the presumption up and until an unanimous agreement is reached. (*Id.* at p. 190.) In sum, nothing in CALJIC No. 2.90 could be construed to permit burden-shifting before the conclusion of deliberations, and appellant offer no persuasive reason for this Court to depart from its decision in *Lewis*.

Seventh, appellants appear to contend that CALJIC No. 2.90 was incomplete and misleading because it failed to instruct the jury that "when the evidence is in equipoise, 'the party with the burden of proof loses.'" (SAOB 321; RAOB 596.) Such a modification to CALJIC No. 2.90 would have been inappropriate, as it may have confused the instruction and potentially implied that appellants "would prevail only if the evidence were closely balanced ("tied"), but would lose, despite a reasonable doubt, if the prosecution's case slightly out-weighed the defense." (*People v. Anderson* (1990) 52 Cal.3d 453, 472 [defendant claimed the prosecutor lowered the burden of proof when he

told the jury that, if the evidence is tied, the benefit goes to the defendant].) In fact, had the trial court modified CALJIC No. 2.90 in the manner now suggested by appellants, it is likely appellants would now complain of error. (See *People v. Anderson, supra,* 52 Cal.3d at p. 472 [prosecutor's comment that, if the evidence is tied, the benefit goes to the defendant did not lessen the burden of proof in light of proper instruction pursuant to CALJIC No. 2.90 and defense counsel's explanation of burden of proof].) CALJIC 2.90 set forth the correct burden of proof, and no modification was necessary.

Accordingly, based upon the foregoing, appellants arguments must be rejected. Under the totality of the instructions given in this case, there was no reasonable likelihood the jury misconstrued or misapplied the words of CALJIC No. 2.90. (*People v. Snow* (2003) 30 Cal.4th 43, 97-98; *People v. Frye, supra,* 18 Cal.4th at p. 957.) After listing the numerous courts which have rejected similar claims to CALJIC No. 2.90, the Court of Appeal determined that the issue is "conclusively settled adversely to defendant's position" and urged appellate attorneys "to take this frivolous contention off their menus." (*People v. Hearon, supra,* 72 Cal.App.4th at pp. 1286-1287.) Indeed, a full and fair reading of the instructions clearly establishes that the jury could not have believed appellants had the burden of establishing their innocence or that the prosecution's burden of proof was something less than showing appellants' guilt beyond a reasonable doubt.

VIII.

CALJIC NO. 3.02 PROPERLY INSTRUCTED THE JURY ON AIDER AND ABETTOR LIABILITY UNDER THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE

At the conclusion of the guilt phase, the trial court instructed the jury with a modified version of CALJIC No. 3.02, which set forth the natural and

probable consequences doctrine of aider and abettor liability, as well as the required elements for each crime charged. (6 CT 1414-1417; 7 CT 1596-1598; 45 RT 6819-6822; 46 RT 7061-7064.) Using CALJIC No. 3.01, the trial court further defined aiding and abetting and, pursuant to CALJIC Nos. 8.80.1 and 8.81.17, informed the jury that, in order to return a true finding on any special circumstance allegation, the jury had to find that appellants had the specific intent to kill or to aid another in the killing of a human being. (7 CT 1449-1450, 1452, 1595, 1629-1630; 45 RT 6819, 6834-6835; 46 RT 7060-7061, 7074-7077.) Although Self did not believe CALJIC No. 3.02 was "appropriate" in his case, Romero specifically requested instruction with CALJIC No. 3.02. (4 RT 6633-6636; 6 CT 1415-1417; 7 CT 1596-1598.) Appellants also requested instruction with CALJIC Nos. 3.01, and voiced no objections to CALJIC Nos. 8.80.1 and 8.81.17. (4 CT 6633, 6659-6665; 6 CT 1414; 7 CT 1449-1450, 1452, 1595, 1629-1630.)

On appeal, however, Romero contends the instruction he requested on natural and probable consequences (CALJIC 3.02) was prejudicially defective by permitting the jury to convict him of murder without sufficient evidence of the required mental state. (RAOB 537-542.) Specifically, Romero asserts that CALJIC No. 3.02 created a unconstitutional mandatory presumption of intent to commit murder, if the jury found murder to be a natural and probable consequence of robbery, in violation of his due process rights. (RAOB 537-542.) Self joins in Romero's argument. (SAOB 492.) There is no merit in appellants' claim of error, and the juries were properly instructed.

As recognized by Romero, this Court specifically rejected his contention in *People v. Coffman & Marlow, supra,* 34 Cal.4th 1 at pp. 106-108, and found that "CALJIC No. 3.02 correctly instructs the jury on the natural and probable consequences doctrine." (*People v. Coffman & Marlow, supra*, 34 Cal.4th 1 at p. 107.) As the jury was instructed in the instant case, "[a]n aider and abettor

'is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets.' [Citations.]" (*Id.* at pp. 106-107.) The Court in *Coffman & Marlow* found that CALJIC No. 3.02 correctly instructed the jury on the natural and probable consequences doctrine and did not unconstitutionally substitute proof of the required mental state. (*Id.* at p. 107.) In so holding, the Court further reasoned: "Notably, the jury here was also instructed with CALJIC No. 3.01, advising that an aider and abettor must act with the intent of committing, encouraging or facilitating the commission of the target crime, as well as CALJIC No. 8.81.17, which required, for a true finding on the special circumstance allegations, that defendants had the specific intent to kill the victim. These concepts fully informed the jury of applicable principles of vicarious liability in this context." (*Id.* at p. 107.)

Appellants attempt to distinguish *Coffman & Marlow* by arguing that their juries were not instructed with the version of CALJIC No. 8.81.17 given to the *Coffman & Marlow* juries, and thus their juries were not told that, in order to return a true finding on the special circumstance allegations, they had to find that appellants specifically intended to kill the victims. (RAOB 540-541; SAOB 492.) They assert: "Only one of the two instructions that saved the *Coffman and Marlow* verdict was given here, and the case is therefore not controlling." (RAOB 541; SAOB 492.)

Appellants fail in their attempt to distinguish *Coffman & Marlow*. First, contrary to appellants' gross misinterpretation, CALJIC No. 8.81.17 was not the lynchpin of this Court's decision in *Coffman & Marlow*, i.e., it did not "save" the *Coffman & Marlow* verdict as appellants' suggest. Rather, the Court plainly held that CALJIC No. 3.02, with or without reference to other instructions, did not create an unconstitutional presumptive mental state and correctly instructed on vicarious liability. The Court then further reasoned that "also" instructing

the jury with CALJIC Nos. 3.01 and 8.81.17 fully informed jurors of the applicable principles of vicarious liability. (*Coffman & Marlow, supra,* 34 Cal.4th at p. 107.) Second, appellants' juries were in fact instructed similarly to the *Coffman & Marlow* juries. In the instant case, CALJIC No. 8.80.1 was given to both juries, which instructed that, in order to return a true finding on the special circumstance allegations, they had to find that appellants specifically intended to kill the victims. (7 CT 1449-1450, 1629-1630; 45 RT 6834-6835; 46 RT 7074-7077.) Lastly, by returning true findings on the special circumstance allegations against both appellants, the juries in this case necessarily found they possessed the intent to kill. (8 CT1715-1717, 1724-1726, 1733-1747, 1786-1801.)

In sum, CALJIC No. 3.02, as given by the trial court, properly instructed the juries on aider and abettor liability under the natural and probable consequences doctrine, and this Court should deny appellants' claim of error.

IX.

APPELLANTS WAIVED THEIR CLAIM OF ERROR REGARDING THE ACCOMPLICE INSTRUCTIONS; IN ANY EVENT, THE TRIAL COURT PROPERLY INSTRUCTED THE JURIES ON ACCOMPLICE CORROBORATION AND APPELLANTS WERE NOT PREJUDICED

Appellants contend the trial court failed to adequately instruct the jury on accomplice corroboration in violation of their rights to a fair trial, unanimous verdict, due process of law, and a reliable determination of guilt and penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Federal Constitution and analogous provisions of the California Constitution. (SAOB 278-304; RAOB 596.) Specifically, appellants contend the court's use of CALJIC Nos. 3.10, 3.11, 3.12, 3.16, 3.18, and 17.02, which set forth the

requirements for accomplice corroboration and to decide each count separately, "failed to inform the jury that evidence corroborating Jose Munoz' accomplice testimony was required for each specific count and each incident-related count," and potentially led the jury to believe "that accomplice corroboration as to a single count satisfied the accomplice corroboration requirement as to all counts." (SAOB 283.) By failing to raise these concerns at trial or otherwise request amplification of the standard instructions, appellants have waived their claim of error. In any event, the instructions given by the trial court adequately informed the jury that each and every charge based upon accomplice testimony required corroboration, and indeed, all of the charges in this case were so corroborated. Appellants' claim fails.

A conviction cannot stand on the uncorroborated testimony of an accomplice. (Pen. Code, § 1111.) When an accomplice is called to testify on behalf of the prosecution, a trial court must instruct the jury on the corroboration requirement and to view the accomplice's testimony with caution. (Pen. Code, § 1111; *People v. Boyer* (2006) 38 Cal.4th 412, 466-467.) In this instant case, Jose Munoz, an accomplice to appellants' crimes, testified on behalf of the prosecution. Accordingly, at appellants' request and/or concurrence, the trial court instructed the juries on accomplice credibility and the corroboration requirement found in CALJIC Nos. 3.10, 3.11, 3.12, 3.16, and 3.18. (6 CT 1419-1420; 7 CT 1422-1424, 1600-1601, 1603-1605; 44 RT 6636-6642.) These instructions told the jury, in relevant part:

> A defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense. . . .
>
> To corroborate the testimony of an accomplice, there must be evidence of some act or fact related to the crime which, if believed, by itself and without aid, interpretation, or direction from the testimony of

the accomplice, tends to connect the defendant with the commission of the crime charged.

However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged or that it corroborate every fact to which the accomplice testifies.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime.

If there is not such independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated. If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

If the crimes charged in the Information except counts XI-XIV, XVI, XVII, XX-XXIII were committed by anyone, the witness Jose Munoz was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration.

The testimony of an accomplice out to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and caution and in light of all the evidence in the case.

(6 CT 1419-1420; 7 CT 1422-1424, 1600-1601, 1603-1605; 45 RT 6823-6824; 46 RT 7064-7065.)

The court also instructed the juries, at appellants' request, with CALJIC No. 17.02, which told the juries:

Each count charges a distinct crime. You must decide each count separately. The defendant may be found guilty or not guilty of any or all of the crimes charged. Your finding as to each count must be stated in a separate verdict.

(7 CT 1473, 1652; 44 RT 6675; 45 RT 6859; 46 RT 7087.)

Despite the fact appellants either specifically requested or expressly approved of these instructions, they now complain the instructions were deficient and required amplification. Appellants argue their requested instructions "failed to inform the jury that evidence corroborating Jose Munoz' accomplice testimony was required for each specific count and each incident-related count." (SAOB 283; RAOB 596.) However, by expressly assenting to the giving of these instructions and failing to request clarification at trial, appellants have invited, or at the very least waived, their claims of error.

"The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a conscious and deliberate tactical choice to request the instruction." (*People v. Thornton, supra,* 41 Cal.4th at p. 391, internal citations and quotations omitted.) Likewise, a defendant who does not request amplification or explanation of standard instructions at trial is precluded from complaining on appeal. (*People v. Lewis, supra,* 26 Cal.4th at p. 334.) "'Generally, "a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." [Citation.]'" (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) Because appellants did not raise their complaints in the trial court, they may not now be heard on appeal.

In any event, the trial court properly instructed the juries regarding accomplice corroboration and their duty to decide each count separately. In reviewing purportedly erroneous instructions, this Court will "'inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.'" (*People v. Frye, supra,* 18 Cal.4th at p. 894, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 482, 116 L.Ed.2d 385].) In assessing whether the jury instructions given were erroneous, the reviewing court "must consider the instructions as a

whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." (*People v. Guerra, supra,* 37 Cal.4th at p. 1067, internal citations and quotations omitted; see Cal. Const., art. VI, § 13; see also *People v. Frye, supra*, 18 Cal.4th at p. 957, quoting *Boyde v. California, supra,* 494 U.S. at p. 370 ["'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'"].) Casting aside appellants' "technical hairsplitting," a common sense evaluation of the instructions as a whole establishes that the instructions given required no further clarification. (*People v. Huggins* (2006) 38 Cal.4th 175, quoting *Boyde v. California, supra,* 494 U.S. at p. 381 ["[A] commonsense understanding of the instruction in light of all that has taken place at the trial is likely to prevail over technical hairsplitting."].)

Read as a whole, the instructions adequately informed the juries that each count supported by Munoz's testimony required corroborating evidence. The trial court identified the specific counts as to which the accomplice corroboration requirement applied, designated Munoz as an accomplice as a matter of law to those counts, and cautioned the juries to view Munoz's testimony with distrust. The instructions pointedly told the juries that to corroborate Munoz's testimony, "there must be evidence of some act or fact *related to the crime* which, if believed, *by itself* and without aid, interpretation, or direction from the testimony of the accomplice, tends to connect the defendant with the commission of *the crime charged*." (6 CT 1419-1420; 7 CT 1422-1424, 1600-1601, 1603-1605; 45 RT 6823-6824; 46 RT 7064-7065 [emphasis added].) In other words, the juries were told the corroborating evidence needed to be directly related to the charged crime they were considering, and the corroboration could not come from an unrelated charge.

But most importantly, the instructions told the juries how to determine corroboration as to each charge, i.e., by removing Munoz's testimony from the

case entirely and then determining "whether there is any *remaining* evidence" connecting the defendant with the crime charged. The juries were specifically told, "If there is not such independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated." By telling the juries to remove Munoz's testimony entirely and to look for only "independent evidence," the instruction effectively prohibited the juries from using Munoz's corroborated testimony as to one count to satisfy the corroboration requirement as to other counts. (6 CT 1419-1420; 7 CT 1422-1424, 1600-1601, 1603-1605; 45 RT 6823-6824; 46 RT 7064-7065.) Further emphasizing this point, the trial court also instructed the juries that "[e]ach count charges a distinct crime" and they "must decide each count separately." (CALJIC No. 17.02; 7 CT 1473, 1652; 44 RT 6675; 45 RT 6859; 46 RT 7087.)

Despite the clear language of these legally-correct instructions[55], appellants argue the trial court violated their constitutional rights by failing to further inform jurors "they could not use evidence pertaining to a particular crime or each group of incident-related counts to corroborate Jose Munoz' accomplice testimony or to prove appellant's guilt on other counts or in respect to other charged crimes." (SAOB 283; RAOB 596.) To this end, appellants suggest the trial court should have altered CALJIC No. 17.02 "to inform the jury that it should decide each count separately on the law and the evidence applicable to it, including accomplice corroboration." (SAOB 292.) However, as previously demonstrated, the trial court's charge to the juries effectively gave the jurors this very instruction. Because appellants' proposed instruction is duplicative of the instructions given at trial, the trial court did not err. (*People*

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55. Appellants do not appear to dispute that these instructions were a correct statement of the law on accomplice corroboration. (SAOB 278-304; *People v. Sanders, supra,* 11 Cal.4th at p. 475, [noting standard accomplice instructions were correct statement of the law].)

v. Moon (2005) 37 Cal.4th 1 [A trial court may refuse a pinpoint instruction if it is an incorrect statement of the law, argumentative, duplicative, potentially confusing, or if it is unsupported by substantial evidence.].) As the juries were properly instructed on accomplice corroboration and their duty to consider each count separately, the prosecution's burden of proof was not lessened[56/] and appellants' constitutional rights were not violated. Appellants do not cite any authority holding otherwise.

In support of their argument, appellants cite a litany of cases where either: the trial court gave an instruction similar to the one appellants now propose (albeit not in the context of accomplice corroboration), and the appellate court found the instruction proper[57/]; or where an appellate court discussed the need for cautionary or limiting instructions as to certain types of evidence (particularly other-crimes evidence).[58/] But as appellants recognize, this Court has held a trial court has no sua sponte duty to instruct pursuant to CALJIC No. 17.02, nor does it have a duty to instruct the jury with a clarifying instruction along the lines proposed by appellants. (*People v. Geier* (2007) 41

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56. Appellants contend the court's accomplice instructions, coupled with the reasonable doubt instruction (CALJIC No. 2.90) impermissibly lowered the burden of proof. (RAOB 299-301.) As demonstrated in Respondent's Argument VII, the trial court properly instructed on reasonable doubt and the prosecution's burden of proof, and as demonstrated herein, the trial court properly instructed on accomplice corroboration. Thus, appellants' rights were not violated.

57. SAOB 293-298, discussing *People v. Hollbrook* (1959) 45 Cal.2d 228 [instruction that jury "must consider the evidence applicable to each offense as though it were the only accusation" proper]; *People v. Bias, supra,* 170 Cal.App.2d at p. 502 [same].

58. SAOB 286-287, and cases cited therein; e.g., *People v. Garceau, supra,* 6 Cal.4th at p. 186; [other-crimes evidence]; *People v. Alcala* (1984) 36 Cal.3d 604, 631 [same]; *People v. Key* (1984) 153 Cal.App.3d 888, 898-899 [same]; *People v. Gibson* (1976) 56 Cal.App.3d 119, 129 [same].

Cal.4th 555, [rejecting defendant's argument that CALJIC No. 17.02 should have been clarified to tell the jury it could not use evidence of one crime to convict him of other crimes, and finding proposed instruction duplicative of CALJIC No. 17.02]; *People v. Cook, supra,* 39 Cal.4th at p. 566 [no sua sponte duty to give CALJIC No. 17.02]; *People v. Catlin* (2001) 26 Cal.4th 81, 153 [rejecting as duplicative of CALJIC No. 17.02 defendant's proposed instruction stating "Evidence applicable to each offense charged must be considered as if it were the only accusation before the jury."].) Further, with regard to appellants' citations to cases referencing a trial court's duty to give cautionary or limiting instructions for certain types of evidence, the trial court here in fact gave the appropriate cautionary instructions on accomplice testimony and the corroboration requirement. No more was needed.

Assuming arguendo the trial court erred by not amplifying the accomplice instructions, any such error was harmless. "Even where accomplice instructions were required, [this Court has] found no prejudice where, in fact, the witness's testimony was sufficiently corroborated."[59] (*People v. Boyer, supra*, 38 Cal.4th at p. 467; *People v. Cook, supra,* 39 Cal.4th 566, 601 ["Not giving such instructions, however, is harmless, even if erroneous, when there is 'ample evidence corroborating the witness's testimony.' [Citation.]"].)

> Such [corroborative] evidence may be slight and entitled to little consideration when standing alone. Corroborating evidence must tend

59. Appellants assert the allegedly defective accomplice instructions lowered the burden of proof and constituted a structural defect, resulting in prejudice per se and requiring automatic reversal of the judgments. (SAOB 302-303.) In the alternative, appellants ask this Court to use the harmless beyond a reasonable doubt test articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) This Court should reject appellants' requests and apply the appropriate standard as articulated by this Court, i.e., "Not giving [accomplice] instructions . . . is harmless, even if erroneous, when there is 'ample evidence corroborating the witness's testimony.' [Citation.]" (*People v. Cook, supra,* 39 Cal.4th at p. 601.)

> to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that [such] evidence be sufficient in itself to establish every element of the offense charged.

(*People v. Boyer, supra*, 38 Cal.4th at p. 467, internal citations and quotations omitted.) Sufficient corroborative evidence tends to connect the defendant with the crime in a way that may reasonably satisfy a jury that the accomplice is telling the truth, and it may be entirely circumstantial. (*People v. Hayes, supra,* 21 Cal.4th at p. 1211.) Munoz's testimony in the instant case was sufficiently corroborated.

With regard to the Mills-Ewy crimes (Counts V through VII), Self claims those crimes were not sufficiently corroborated. (SAOB 288-289.) As previously demonstrated in Respondent's Argument V, Munoz's testimony and identification of Self as the shooter was corroborated by: the recovery of shotgun wadding from Ewy's vehicle which matched the caliber of a shotgun recently acquired by Self; the recovery of shotgun shells from the rear of Alvarez's Colt (where Munoz described Self as sitting during the Mills-Ewy shooting); and the forensic analysis of the damage to Ewy's vehicle, which indicated the shotgun blast had a high-to-low, rear-to-front trajectory which perfectly matched Munoz's description of Self firing the shotgun from the rear and over the roof of the Colt (rather than from the front passenger where Munoz was sitting). Self's jury did not simply adopt Munoz's testimony regarding the Mills-Ewy shooting without looking to the other evidence, as during deliberations, his jury requested to see the police reports from the Mills-Ewy shooting, indicating they were carefully examining the evidence. (6 CT 1367.)

With regard to the Mans-Jones (Counts I & II) and Aragon murders (Count III), Self claims Munoz's testimony was "crucial" in proving his presence, intent, and special circumstance liability, and was also "crucially

important" in the jury's determination of the appropriate penalty. However, Self does not claim Munoz's testimony as to these counts was uncorroborated. (SAOB 289.) This is not surprising, as Munoz's testimony was amply corroborated. Regarding the Mans and Jones murders (Counts I & II), Munoz's testimony was corroborated by the physical evidence gathered from the crime scene (including shoe prints consistent with Self's British Knights tennis shoes, tire impressions consistent with Alvarez's Colt, the recovery of items tossed out the car window after the murder, and the placement of the bodies) and the autopsies of the victims (describing the number and nature of their wounds). (See Statement of Facts, Murders of Joey Mans and Timothy Jones.) As to the Aragon murder (Count III), Munoz's testimony was corroborated by, among other things: ballistics tests showing several of the casings found at the crime scene came from weapons stolen by Self and Romero in earlier robberies; autopsy results which aligned with Munoz's description of the crime; and the recovery of plastic sabot pieces from Aragon's neck which were consistent with the sabot shells recently purchased by Self and later used by him in the Feltenberger shooting. (See Statement of Facts, Murder of Jose Aragon.)

Indeed, as set forth in the Statement of Facts and with regard to all of the crimes charged, Munoz's testimony was amply corroborated by direct or circumstantial evidence of appellants' guilt, including credible eyewitness identifications, considerable physical evidence obtained from both the crime scenes and from searches of appellants' homes and vehicles, ballistics tests and autopsy results, other forensic evidence matching appellants' vehicles or shoes, and/or appellants' damaging police interviews. Given the sufficient corroboration in this case, appellants cannot and have not demonstrated any prejudice.[60]

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60. Romero merely adopts Self's argument as to the accomplice instructions (RAOB 596) and does not raise any specific assertions of

X.

SELF FORFEITED HIS JUROR BIAS CLAIM, AND IN ANY EVENT, BECAUSE THE JURORS INDICATED THEY WOULD FAITHFULLY AND IMPARTIALLY PERFORM THEIR DUTIES, SELF'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND IMPARTIAL JURY WERE NOT ABRIDGED

Self argues this Court must reverse his conviction and sentence because eight of the jurors who decided his case (Juror Nos. 1, 2, 4, 6, 8, 9, 11, & 14) were biased in favor of the death penalty, in violation of his rights to a fair trial and impartial jury under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, section 16, of the California Constitution. (SAOB 327-342.) Although Self failed to challenge all but one of these jurors for cause, and did not use available peremptory challenges to remove any of them, Self argues he has not forfeited his claim of error. Self contends he should be relieved of the consequences of his inaction because either: (1) trial counsel committed ineffective assistance in not removing the biased jurors; or (2) the right to an impartial jury is a fundamental personal right which cannot be waived. (SAOB 334-342.) Self's claim must be rejected. First, by failing to challenge these jurors for cause or exercise available peremptory challenges, the defense indicated its satisfaction with and approval of the seated jurors, and thus Self may not now reasonably claim error on appeal. Second, because the jurors' statements did not demonstrate that their views on capital punishment would substantially impair the performance of

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insufficient corroboration. But, as discussed herein and set forth in the Statement of Facts, all of the charges supported by Munoz's testimony were sufficiently corroborated. And as previously discussed, the fact that Romero's jury acquitted him of the Steenblock robbery-kidnaping, proves they considered each count separately and did not simply adopt Munoz's testimony in toto. (8 CT 1724-1732, 1786-1835.)

their duties as jurors, there was no error, no ineffective assistance of counsel, and no violation of Self's constitutional rights.

To preserve a claim of juror bias for appellate review, this Court requires a defendant to challenge the juror for cause and use available peremptory challenges in the trial court. (*People v. Bonilla* (2007) 41 Cal.4th 313, 339; *People v. Hinton, supra,* 37 Cal.4th at. p. 839; *People v. Coffman & Marlow, supra,* 34 Cal.4th at p. 1) The theory behind such a rule is evident: "[A] party's failure to exercise available peremptory challenges indicates relative satisfaction with the unchallenged jurors . . . and [thus] a defendant cannot reasonably claim error." (*People v. Morris* (1991) 53 Cal.3d 152, 184, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830.) In the instant case, Self only challenged one seated juror for cause (Juror No. 8), but did not thereafter exercise a peremptory challenge to remove Juror No.8. (24 RT 3935; 30 RT 4752-4776.) Indeed, although Self now claims three-fourths of his jury was biased, he did not exercise even one peremptory challenge in selecting the regular jurors, he had one peremptory challenge remaining after the selection of alternates, and he ultimately accepted the panel as constituted. (30 RT 4758-4776.) If Self believed these jurors threatened his right to a fair and impartial jury, he should have used his peremptories to preserve that right or otherwise expressed dissatisfaction with his jury. He did not, and he may not now complain.

Self contends that his right to challenge a violation of his right to a fair and impartial jury could not be waived. (SAOB 334-342.) In support of his argument, Self cites to Supreme Court dicta and a number of federal cases, none of which are controlling authority upon this Court.[61] (SAOB 335, 341.) In

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61. See, e.g., *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 316 [120 S.Ct. 774; 145 L.Ed.2d 792][suggesting in dictum that a defendant could choose to let a biased juror remain on his jury and then claim Sixth Amendment error on appeal]; *Hughes v. United States* (6th Cir. 2001) 258 F.3d

fact, the Supreme Court dicta cited by Self is contradicted by other Supreme Court dicta on the same subject.[62] (See *Ross v. Oklahoma* (1988) 487 U.S. 81,

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453, 463-464; *United States v. Quintero-Barraza* (9th Cir. 1995) 78 F.3d 1314, 1353-1354 (Dis. opn. of Tang, J.); *Johnson v. Armontrout* (8th Cir. 1992) 961 F.2d 748, 754; *McCollough v. Bennett* (N.D.N.Y. 2003) 317 F.Supp.2d 112, 119.

62. The United States Supreme Court has never had the occasion to directly address this issue of waiver, and thus there is no controlling United States Supreme Court precedent. In his concurrence in the judgment in *United States v. Martinez-Salazar, supra*, Justice Scalia criticized the dictum now cited by Self:

> I do not join the opinion of the Court because it unnecessarily pronounces upon the question whether, had respondent not expended his peremptory challenge, he would have been able to complain about the seating of the biased juror. . . . Since he did expend the challenge, that issue is simply not before us.
>
> I am far from certain, moreover, that the Court's suggested resolution of the issue is correct. It is easy enough to agree that we have no warrant "to read into [Federal Rule of Criminal Procedure] Rule 24" . . . a requirement that peremptories be used to remove veniremen properly challenged for cause. The difficult question, however, is not whether Federal Rule of Criminal Procedure 24(b) requires exercise of the peremptory, but whether normal principles of waiver (not to say the even more fundamental principle of *volenti non fit injuria*) disable a defendant from objecting on appeal to the seating of a juror he was entirely able to prevent. I would not find it easy to overturn a conviction where, to take an extreme example, a defendant had plenty of peremptories left but chose instead to allow to be placed upon the jury a person to whom he had registered an objection for cause, and whose presence he believed would nullify any conviction.
>
> The resolution of juror-bias questions is never clear cut, and it may well be regarded as one of the very purposes of peremptory challenges to enable the defendant to correct judicial error on the point. Indeed, that must have been one of their purposes in earlier years, when there was no appeal from a criminal conviction, [citation] so that if the defendant did not

85 [108 S.Ct. 2273, 101 L.Ed.2d 80] ["Had [the challenged juror] sat on the jury that ultimately sentenced petitioner to death, and had petitioner *properly preserved his right to challenge* the trial court's failure to remove [the challenged juror] for cause, the sentence would have to be overturned."], emphasis added, citing *Adams v. Texas* (1980) 448 U.S. 38, 45 [100 S.Ct. 2521, 65 L.Ed.2d 581]; see also *Thompson v. Altheimer & Gray* (7th Cir. 2001) 248 F.3d 621, 623 [describing the *Martinez-Salazar* dictum as a "heads-I-win-tails-you-lose position: if he wins a jury verdict, he can pocket his victory, and if he loses, he can get a new trial."].) In sum, Self offers nothing to contravene this Court's clear and established precedent requiring a defendant to express dissatisfaction with his jury in order to preserve the claim for appeal.

Further, this case perfectly illustrates two justifications for the waiver doctrine. First, by electing not to exercise his four unused peremptory challenges, Self effectively chose to have the jurors he now criticizes sit on his jury. Self should not be permitted to change tactics now that the trial is over. Second, had Self exercised a peremptory challenge against these jurors or alerted the trial court that he was dissatisfied, the issue could have been resolved at trial. Accordingly, Self is precluded from raising this issue on appeal.

In another effort to avoid forfeiture of his claim, Self suggests his trial

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> correct the error by using one of his peremptories, the error would not be corrected at all. It is certainly not clear to me that the institution of appeals exempted defendants from using peremptories for this original purpose, thereby giving them (in effect) additional challenges.
>
> Because the question is not presented (and hence cannot be authoritatively resolved), I would leave it unaddressed.

(*United States v. Martinez-Salazar, supra*, 528 U.S. at pp. 318-319 [Scalia, J., conc. judg.].)

counsel committed ineffective assistance in not removing the biased jurors. (SAOB 334-342.) Whether this Court examines the merits of Self's claim under the rubric of ineffective assistance of counsel or otherwise, this Court must answer the same question: Did these jurors demonstrate actual penalty bias that would substantially impair the performance of their duties? Clearly, upon examination of the record, the answer is no, and Self's claim fails on the merits.

In reviewing challenges for cause, the applicable law is settled:

> The state and federal constitutional guarantees of a trial by an impartial jury include the right in a capital case to a jury whose members will not automatically impose the death penalty for all murders, but will instead consider and weigh the mitigating evidence in determining the appropriate sentence. [Citation.] '[A] juror may be challenged for cause based upon his or her views concerning capital punishment only if those views would "prevent or substantially impair" the performance of the juror's duties as defined by the court's instructions and the juror's oath.' [Citations.] If the death penalty is imposed by a jurycontaining even one juror who would vote automatically for the death penalty without considering the mitigating evidence, 'the State is disentitled to execute the sentence.' [Citation.]
>
> Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation.] The trial court must determine whether the prospective juror will be 'unable to faithfully and impartially apply the law in the case.' [Citation.] A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether to remove the juror for cause. The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence. [Citation.] '[W]here equivocal or conflicting responses are elicited regarding a prospective juror's ability to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court. [Citations.]' [Citation.]"

(*People v. Boyette* (2002) 29 Cal.4th 381, 416, quoting *People v. Weaver* (2001) 26 Cal.4th 876, 910; *Morgan v. Illinois* (1992) 504 U.S. 719, 729 [112 S.Ct. 2222, 119 L.Ed.2d 492,]; *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].)

In the context of an ineffective assistance of counsel claim, this Court asks whether any of the challenged jurors "would have been properly excused under this standard [of challenging jurors for cause]"; if not, the ineffective assistance claim fails. (*People v. Coffman & Marlow, supra,* 34 Cal.4th at pp. 47-48, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674] [claims of ineffective assistance of counsel entail deficient performance assessed under an objective standard of professional reasonableness and prejudice measured by a reasonable probability of a more favorable outcome in the absence of the deficient performance] and *People v. Ledesma* (1987) 43 Cal.3d 171, 216–218.) Appellants face a high hurdle when raising a claim of ineffective assistance of counsel on direct appeal with respect to peremptory challenges. "' "Because the use of peremptory challenges is inherently subjective and intuitive, an appellate record will rarely disclose reversible incompetence in this process."' [Citations.]" (*People v. Coffman & Marlow, supra*, 34 Cal.4th at p. 48.)

After examination of the record, it is apparent that the jurors' statements did not demonstrate their views on capital punishment would substantially impair the performance of their duties as jurors. Juror No. 1 expressed approval of the death penalty, believed the punishment was not carried out frequently enough[63], and was unsure if a defendant's background or life experiences was relevant to the determination of penalty. (3 SCT [Redacted Juror Questionnaires[64]] 653, 659; 25 RT 4030.) Juror No. 1 indicated, however, that she "would have to be very sure of the evidence to vote for [the death penalty]," she understood the death penalty was not required, she would be able to put

63. Juror No. 1 did not express a belief that too few defendants were sentenced to death; rather, she believed that "there are so many that are on death row that are there for 20, 30 years and nothing happens." (25 RT 4030.)

64. Hereinafter "RJQ."

aside her personal views concerning the death penalty during deliberations, and those views would not substantially impair her ability to conduct the required weighing process. (3 SCT [RJQ] 653, 656, 658; 25 RT 4030-4031, 4054-4055.) She indicated that she would "consider" and weigh the evidence, "would follow the instructions and the laws," would be able to vote in favor of life imprisonment without the possibility of parole if that were the appropriate penalty in light of the evidence introduced at the penalty phase[65/], and would not automatically vote in favor of the death penalty if the defendant were found guilty of first degree murder with special circumstances present. (3 SCT [RJQ] 656-658.)

Juror No. 2 also approved of the death penalty, believed the punishment was not carried out frequently enough ("a lot of people are given that sentence but are still alive"), and was unsure if a defendant's background or life experiences was relevant to the determination of penalty. (5 SCT [RJQ] 1208, 1214; 23 RT 3821.) Juror No. 2 indicated, however, that she was "open" to both the death penalty and life without parole, she would be able to put aside her personal views concerning the death penalty during deliberations, and those views would not substantially impair her ability to conduct the required weighing process. (5 SCT [RJQ] 1213; 23 RT 3822-3823.) She indicated that she would "not automatically vote for anything," her decision "would depend

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65. Self asserts that "Juror No. 1 indicated that she would only vote for life imprisonment without the possibility of parole if the killing had been accidental or unintentional and the defendant did not 'fit the normal criminal mode." (SAOB 329-330.) This assertion is a blatant mischaracterization of Juror No. 1's statements. Juror No. 1 actually said she would *automatically* vote for life imprisonment without parole instead of the death penalty if the killing was unintentional or accidental because of an absence of intent to kill and the defendant not fitting the "normal criminal mode." She never said this was the "only" time she would vote for life without parole, just that this was one circumstance where she would automatically vote for life in prison without the possibility of parole. (3 SCT [RJQ] 659-660.)

on the judge's instructions and the evidence," she would be able to vote in favor of life imprisonment without the possibility of parole if that were the appropriate penalty in light of the evidence introduced at the penalty phase, and she would not automatically vote in favor of the death penalty if the defendant were found guilty of first degree murder with special circumstances present.[66] (3 SCT [RJQ] 1211-1215.)

Juror No. 4 expressed approval of the death penalty, believed the punishment was not imposed frequently enough and could be a deterrent to crime, and signified her beliefs were consistent with the Biblical doctrine of "eye for an eye." (3 SCT [RJQ] 764-765.) Juror No. 4 indicated, however, that she believed a defendant's background was "probably" relevant to the determination of penalty, she considered sentencing an "individual thing," she would be able to put aside her personal views concerning the death penalty during deliberations, and those views would not substantially impair her ability to conduct the required weighing process. (3 SCT [RJQ] 769-770; 26 RT 4249-4250.) She also appeared to take jury service quite seriously, indicating she had given a lot of thought to her responsibilities and stating, "if I was on trial I would want people that were concerned about it, like myself, to be there."

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66. Self complains that Juror No. 2 "equated reckless indifference with intent to kill." (SAOB 330.) Juror No. 2's primary point was that she would consider the death penalty within the felony-murder context, i.e., "somebody who's a non-shooter but who either shared the intent to kill or was a major participant with reckless disregard." (23 RT 3855-3856.) As recognized by this Court:

> In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected by the nature of the questions posed.

(*People v. Fudge* (1994) 7 Cal.4th 1075, 1094.)

(26 RT 4252, 4287.) Juror No. 4 indicated that she would weigh the evidence and follow the law, would be able to vote in favor of life imprisonment without the possibility of parole if that were the appropriate penalty in light of the evidence introduced at the penalty phase, and she would not automatically vote in favor of the death penalty if the defendant were found guilty of first degree murder with special circumstances present. (3 SCT [RJQ] 767-771.)

Juror No. 6 believed in the death penalty, thought the punishment was not used "often in this state [and] takes years to happen," signified that a defendant's background was "possibly" relevant to the determination of penalty, and did not believe people were arrested without "some reasonable cause to arrest [them]."[67] (3 SCT [RJQ] 834, 838, 844.) And while Juror No. 6's brother was killed in a "triple murder" by "two brothers" and she had a "law enforcement background," she gave no indication that she would not or could not follow the law based upon these experiences. In fact, Juror No. 6 explained, "I have seen all sides. As an educator, I deal with children from all walks of life. I feel I have the ability to be fair, but I am not a person who can be easily swayed if I feel there is adequate justification for my decision." (3 SCT [RJQ] 822, 832, 847.) She also expressly stated that she would be able to put aside her personal views concerning the death penalty during deliberations, and those views would not substantially impair her ability to conduct the required weighing process. (3 SCT [RJQ] 843.) Juror No. 6 indicated that she would weigh the evidence and follow the law, would be able to vote in favor of life imprisonment without the possibility of parole if that were the

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67. Juror No. 6 never stated that she believed Self was "probably guilty because he had been arrested and was in custody," as Self asserts in his opening brief. (SAOB 331.) She only stated that she believed that "with the laws we have," people aren't arrested without "some reasonable cause." (3 SCT [RJQ] 834.) She also expressly stated that she would not find a defendant guilty simply because he was charged with murder. (3 SCT [RJQ] 834.)

appropriate penalty in light of the evidence introduced at the penalty phase, and she would not automatically vote in favor of the death penalty if the defendant were found guilty of first degree murder with special circumstances present. (3 SCT [RJQ] 841-845.)

Juror No. 8 approved of the death penalty as a form of punishment, initially appeared to favor the death penalty for all intentional killings, and was unsure if a defendant's background was relevant to the penalty determination. (4 SCT [RJQ] 949, 955; 24 RT 3898.) She also initially appeared to have some conflict in her answers, but Juror No. 8 ultimately clarified that she was "open" to both the death penalty and life in prison without parole, "would have to look at both mitigating and aggravating" circumstances before making her decision on penalty, and "would not automatically do anything without looking at all the facts and considering everything." (4 SCT [RJQ] 956; 24 RT 3924-3925.) She indicated she had previously served on a jury and "did well . . . in the deliberation and all of the facts were brought out, talking about it." (24 RT 3896-3897.) Juror No. 8 did not believe the death penalty was used neither too seldom nor too often, and she stated that she would be able to put aside her personal views concerning the death penalty during deliberations, and those views would not substantially impair her ability to conduct the required weighing process. (4 SCT [RJQ] 949, 954.) Finally, Juror No. 8 indicated that she would weigh the evidence and follow the law, would be able to vote in favor of life imprisonment without the possibility of parole if that were the appropriate penalty in light of the evidence introduced at the penalty phase, and she would not automatically vote in favor of the death penalty if the defendant were found guilty of first degree murder with special circumstances present. (4 SCT [RJQ] 952-956.)

After the defense challenged Juror No. 8 for cause, the trial court found that although Juror No. 8 initially indicated "she would impose the death

penalty if the defendants were convicted of murder," she later clarified her answer that she would consider both aggravating and mitigating factors before determining the proper punishment and would consider both forms of punishments as a "reasonable possibility." The court thereupon denied Self's challenge for cause and ruled Juror No. 8's views would "not prevent or substantially inhibit her duty in accordance with the law and her oath." (24 RT 3935-3936.)

Juror No. 9 approved of the death penalty for first degree murders, thought a defendant's background would be "possibly" relevant to the penalty determination if the defendant were a first-offender, and believed life without the possibility of parole could be "as effective as the death penalty as long as there is no parole." (4 SCT [RJQ] 986, 992.) Juror No. 9 indicated, however, that his belief in the death penalty was "not a strong one," he would be able to put aside her personal views concerning the death penalty during deliberations, and his views on the death penalty would not substantially impair his ability to conduct the required weighing process. (4 SCT [RJQ] 991; 24 RT 3969.) He stated he would "have to look at all of the evidence" in making his penalty determination, he would weigh the evidence and follow the law, he would be able to vote in favor of life imprisonment without the possibility of parole if that were the appropriate penalty in light of the evidence introduced at the penalty phase, and he would not automatically vote in favor of the death penalty if the defendant were found guilty of first degree murder with special circumstances present. (4 SCT [RJQ] 989-993; 24 RT 3969-3970.)

Juror No. 11, a correctional officer, supported the death penalty, believed that life in prison without the possibility of parole was "a waste to the taxpayers," and thought current laws favored criminals. (4 SCT [RJQ] 1004-1005, 1008, 1023.) She also believed the death penalty was used too seldom and that a defendant's background or life experiences were "possibly" relevant

to the penalty determination if it involved his past criminal activities. (4 SCT [RJQ] 1023, 1029.) Juror No. 11 indicated, however, that she would be able to put aside her personal views concerning the death penalty during deliberations, her views would not substantially impair her ability to conduct the required weighing process, and she would weigh the evidence and follow the law. (4 SCT [RJQ] 1026-1030; 23 RT 3822-3823.) She also indicated that she would automatically vote for life without parole for an accidental or unintentional killing, she would "have to know the reasons behind the crime and the evidence against the defendant" in deciding on penalty in a felony-murder situation, she would be able to vote in favor of life imprisonment without the possibility of parole if that were the appropriate penalty in light of the evidence introduced at the penalty phase, and she would not automatically vote in favor of the death penalty if the defendant were found guilty of first degree murder with special circumstances present. (4 SCT [RJQ] 1026-1030.)

As recognized by trial defense counsel, Juror No. 11 appeared to give serious thought to the questions posed in voir dire. (25 RT 4105-4107.) She confirmed during voir dire that she was open to both the death penalty and life in prison without the possibility of parole, her job as a correctional officer would not inhibit her ability to be fair and impartial, and she would not consider the financial aspects of punishment when making her decision. (25 RT 4106-4108.) When asked by the prosecutor if she could return a verdict of death, Juror No. 11 replied, "I think so," further stating "[i]t would be hard . . . [to] find[] someone guilty and say[] they deserve to die."[68] (25 RT 4135-4136.)

Juror No. 14 believed "certain circumstances . . . require" the death penalty, but said it "would not be my first choice of punishment." She also

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68. Juror No. 11 was the mother of four children, two of whom were unemployed adult males living at home, while another was a drug-addicted adult female living on the streets. (4 SCT [RJQ] 1002.)

believed life imprisonment without the possibility of parole was "necessary for certain crimes," and that a defendant's background information was "possibly" relevant "as it pertains to the case." (3 SCT [RJQ] 690, 696.) Juror No. 14 indicated, however, that she would be able to put aside her personal views concerning the death penalty during deliberations, that she "would not assume that a person should be put to death based on the crime alone," that her views on the death penalty would not substantially impair her ability to conduct the required weighing process, and that she understood the requirements to "deliberate" and "go over all the evidence." (3 SCT [RJQ] 695; 24 RT 3880, 3911.) She also stated that she would weigh the evidence and follow the law, she would be able to vote in favor of life imprisonment without the possibility of parole if that were the appropriate penalty in light of the evidence introduced at the penalty phase, and she would not automatically vote in favor of the death penalty if the defendant were found guilty of first degree murder with special circumstances present. (3 SCT [RJQ] 1211-1215.) She said "depending on the circumstances" and "what was presented," she could render either penalty. (24 RT 3911.)

Self argues that Juror Nos. 1, 2, 4, 6, 8, 9, 11, and 14 gave answers strikingly similar to those given by a prospective juror in *People v. Boyette, supra,* 29 Cal.4th at p. 381, whom this Court held should have been excluded for cause. Contrary to Self's assertions, there are significant differences that distinguish the answers of *Boyette* juror from the jurors in this case. The juror in *Boyette* indicated that he was "strongly in favor" of the death penalty and "somewhat pro-death" (*id.* at p. 417); Self's jurors did not indicate a strong preference for the death penalty. The juror in *Boyette* indicated he would apply a higher standard ("I would probably have to be convinced") to a life sentence than to one of death and equivocated when asked whether he would exclude consideration of a life term (*ibid.*); Self's jurors did not and instead agreed to

weigh the evidence and remain open to both penalties. Perhaps most important, however, were the serious doubts the juror in *Boyette* expressed about the very possibility of life imprisonment without possibility of parole; he simply did not believe there was such a thing. The *Boyette* juror admitted he would *not* follow an instruction to assume that a sentence of life in prison with no possibility of parole meant the prisoner would never be released. (*Id.* at pp. 417-418.) In contrast, Self's jurors all indicated a willingness to follow the court's instructions and never expressed such a strong and unshakeable preference for the death penalty. In sum, Self's jurors, unlike the prospective juror in *Boyette*, did not demonstrate views that would prevent or substantially impair the performance of their duties as jurors.

The answers given by Self's jurors more closely resemble the answers and rulings examined and upheld by this Court in *People v. Ledesma, supra,* 39 Cal.4th at p. 641, and *People v. Crittenden, supra,* 9 Cal.4th at p. 83. For example, one prospective juror in *Ledesma* "stated several times that he definitely would vote for the death penalty if a deliberate, premeditated murder were proved" and was not inclined to give weight to the defendant's background in reaching his decision. (*People v. Ledesma, supra*, 39 Cal.4th at p. 672.) However, like Self's jurors, this *Ledesma* prospective juror agreed, if instructed, to consider mitigation and the possibility of life imprisonment without the possibility of parole. (*Id.* at p. 672.) Similarly, another prospective juror in *Ledesma* stated that someone who commits murder should get the death penalty and that he would automatically vote for the death penalty if he were convinced an intentional murder had been committed. But this prospective juror also stated this was only his opinion, that he would keep an open mind as to both penalties and that he would follow the law. (*Id.* at pp. 672-673.) The trial court declined to excuse these two prospective because, although death

inclined, each juror agreed he would follow the law and consider both penalties. This Court upheld the trial court's ruling. (*Ibid.*)

Similarly, in *People v. Crittenden, supra*, 9 Cal.4th 83, one prospective juror initially indicated he believed that if a defendant had committed deliberate, first degree murder, he or she should receive the death penalty, that the death penalty was not imposed frequently enough, and a defendant's background or life experiences would not affect his decision to impose the death penalty. The juror also indicated, however, that he would be able to put aside his personal views concerning the death penalty, weigh the evidence, follow the law, and not automatically vote for death. (*Id.* at p. 122.) A second prospective juror in *Crittenden* initially equivocated on whether he would automatically vote in favor of the death penalty and expressed a belief in the death penalty as a deterrent to crime. But when later asked directly whether he would vote in favor of the death penalty regardless of what evidence was presented as to a defendant's background, the juror responded that he "could go either way" and would not vote automatically in favor of the death penalty. The juror further stated that he would follow the guidelines provided by the court and could be neutral at the inception of the penalty phase. (*Id.* at pp. 122-123.) This Court upheld the trial court's denial of the defense challenges of cause, as neither juror "expressed views indicative of an unalterable preference in favor of the death penalty,"and each juror indicated he would consider the facts and follow the law. (*Id.* at p. 123.)

This Court's rulings in *Ledesma* and *Crittenden* apply equally here. None of Self's jurors expressed an "unalterable preference in favor of the death penalty," and instead all of Self's jurors assured the court they could follow the law, weigh the evidence, and consider both penalties. (*People v. Crittenden, supra*, 9 Cal.4th at p. 123.) Accordingly, because the instant jurors did not demonstrate views that would prevent or substantially impair the performance

of their duties as jurors, there was no error by the court or by counsel, and thus no violation of Self's rights to a fair trial and an impartial jury. Self's argument must fail.

XI.

APPELLANTS WERE NOT PREJUDICED BY TECHNICAL CHARGING ERROR ALLEGING DUPLICATE MULTIPLE MURDER SPECIAL CIRCUMSTANCES

Appellants contend they were prejudiced by the charging of duplicate multiple-murder special circumstances and asks this Court to reverse their death sentences. (RAOB 520-525; SAOB 496.) Appellants reason that the "gross repetition" of the duplicate allegations had a "subliminal effect" upon the juries and provided "greater aggravation than the simple fact of being guilty of one murder." (RAOB 524-525; SAOB 496.) Appellants' speculative claim of prejudice should be rejected. While the information incorrectly alleged duplicate multiple-murder allegations, the juries were keenly aware of the number of murder victims, and neither the arguments or instructions gave the impression that the multiple murders were worse just because more than one multiple-murder special circumstance was alleged. In short, there was no prejudice.

When there are multiple murders alleged in the same capital case, the prosecution should not allege the multiple-murder special circumstance as to each murder count; instead, the prosecution should allege it once, separately from the murder counts. (*People v. Avena* (1996) 13 Cal.4th 394, 425; *People v. Allen* (1986) 42 Cal.3d 1222, 1273.) The rationale for this rule is that " 'alleging two special circumstances for a double murder improperly inflates the risk that the jury will arbitrarily impose the death penalty. . . .'" (*People v.*

Allen, supra, 42 Cal.3d at p. 1273, quoting *People v. Harris* (1984) 36 Cal.3d 36, 67.)

When the prosecution nonetheless has charged this special circumstance as to more than one murder count, and when the jury has found it true as to more than one count, this Court usually has stricken all but one of these special circumstances but not reversed the judgment. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 422; *People v. Avena, supra*, 13 Cal.4th at p. 425; *People v. Diaz* (1992) 3 Cal.4th 495, 565; *People v. Jones* (1991) 53 Cal.3d 1115, 1149; *People v. Gallego* (1990) 52 Cal.3d 115, 201; *People v. Andrews* (1989) 49 Cal.3d 200, 224; *People v. Garrison* (1989) 47 Cal.3d 746, 793; *People v. Odle* (1988) 45 Cal.3d 386, 409-410; *People v. Allen, supra*, 42 Cal.3d at p. 1273.) In other cases, this Court has noted the error but nonetheless affirmed the sentence without striking the additional multiple-murder special circumstance findings. (*People v. Daniels* (1991) 52 Cal.3d 815, 876, 893; *People v. Lucky* (1988) 45 Cal.3d 259, 270, 301, 304; *People v. Ruiz* (1988) 44 Cal.3d 589, 599, 620-621, 625; *People v. Rodriguez* (1986) 42 Cal.3d 730, 788, 794-795.)

When considering the effect on the jury's penalty determination of having charged the multiple-murder special circumstance as to each murder count rather than only once, this Court has found the error harmless because it was not reasonably possible that the error affected the death verdicts. (*People v. Halvorsen, supra,* 42 Cal.4th at p. 379; *People v. Avena, supra*, 13 Cal.4th at p. 425; *People v. Jones, supra*, 53 Cal.3d at p. 1149; *People v. Daniels, supra*, 52 Cal.3d at p. 876; *People v. Gallego, supra,* 52 Cal.3d at p. 201; *People v. Miller* (1990) 50 Cal.3d 1002; *People v. Rich, supra*, 45 Cal.3d at p. 1114; *People v. Lucky, supra*, 45 Cal.3d at p. 301; *People v. Dyer* (1988) 45 Cal.3d 69; *People v. Ruiz, supra*, 44 Cal.3d at pp. 620-621; *People v. Allen, supra*, 42 Cal.3d at pp. 1281-1283; *People v. Rodriguez, supra*, 42 Cal.3d at p. 788.) Specifically, this Court has found no prejudice from this error in a

double-murder case where, like here, each special-circumstance allegation named the victim in the other murder count. (*People v. Avena, supra*, 13 Cal.4th at p. 425.) In reaching this conclusion, this Court has explained that "there is little potential impact upon a jury from duplicative multiple-murder special circumstances." (*People v. Ruiz, supra*, 44 Cal.3d at p. 620.) There is no prejudice where the jury was aware of the number of victims and murders alleged (*People v. Avena, supra*, 13 Cal.4th at p. 425; *People v. Daniels, supra*, 52 Cal.3d at p. 876; *People v. Miller, supra*, 50 Cal.3d at p. 1002; *People v. Rich, supra*, 45 Cal.3d at p. 1114; *People v. Lucky, supra*, 45 Cal.3d at p. 301; *People v. Dyer, supra*, 45 Cal.3d at p. 69; *People v. Ruiz, supra*, 44 Cal.3d at p. 620; *People v. Allen, supra*, 42 Cal.3d at pp. 1281-1282; *People v. Rodriguez, supra*, 42 Cal.3d at p. 788), and no arguments or instructions gave the impression that the multiple murders were worse just because more than one multiple-murder special circumstance had been charged. (*People v. Daniels, supra*, 52 Cal.3d at p. 876; *People v. Gallego, supra*, 52 Cal.3d at p. 201; *People v. Miller, supra*, 50 Cal.3d at p. 1002; *People v. Lucky, supra*, 45 Cal.3d at p. 301; *People v. Dyer, supra*, 45 Cal.3d at p. 69; *People v. Ruiz, supra*, 44 Cal.3d at pp. 620-621; *People v. Allen, supra*, 42 Cal.3d at pp. 1282-1283; *People v. Rodriguez, supra*, 42 Cal.3d at p. 788.)

In this case, instead of charging one multiple-murder special circumstance for all three murders, the prosecution charged two multiple-murder special circumstances as to each of the three murder counts. (4 CT 821-834.) The juries subsequently found the special circumstances true as to all counts. (8 CT 1715-1717, 1724-1726, 1733-1747, 1786-1801.) This charging decision was technical error and not prejudicial. Contrary to appellants' speculation of a "subliminal effect" upon the juries, the charging decision did not affect the juries' death determination because the juries were keenly aware of the number of victims and murders alleged. This was

especially so because each special-circumstance allegation in the information and on the jury verdict forms named the victims in the other murder counts. (4 CT 821-834; 8 CT 1715-1717, 1724-1726, 1733-1747, 1786-1801.) Additionally, there were no arguments or instructions giving an impression that the multiple murders were worse just because more than one multiple-murder special circumstance had been charged. (54 RT 8003-8030, 8082-8116.) In fact, the instructions referred only generally to "special circumstances found to be true" and not specifically to the multiple-murder special circumstances, and at the very outset of closing argument, the prosecutor pointedly told the jurors that their weighing process was not "mechanical," "mathematical," or "just count[ing] up the factors." (54 RT 8004, 8052-8053, 8063, 8073, 8083, 8136, 8145, 8160; 9 CT 1964, 1989, 1999, 2013-2014, 2033, 2057, 2066, 2083-2084.) In sum, appellants' claim of prejudice is pure speculation and wholly without merit. Under these circumstances, it is not reasonably possible that the juries would have reached a different result if only one multiple-murder special circumstance had been alleged. (*People v. Avena, supra*, 13 Cal.4th at p. 425; see also *Brown v. Sanders* (2006) 546 U.S. 212, 220–221 [126 S.Ct. 884, 163 L.Ed.2d 723, 733,] [invalidated special circumstance produces constitutional error only when the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor].)

XII.

THE TRIAL COURT'S ADMISSION OF VICTIM IMPACT EVIDENCE DID NOT ABRIDGE APPELLANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE PENALTY DETERMINATION, NOR DID THE PROSECUTOR COMMIT MISCONDUCT IN OFFERING AND ARGUING VICTIM IMPACT EVIDENCE

Appellants contend that their Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution to due process and a fair and reliable penalty determination were violated when the trial court admitted and the prosecutor argued evidence concerning the character of murder victims Aragon, Mans, and Jones, and the impact of their murders upon their families, friends, and society. Appellants make broad attacks on victim impact evidence in general, arguing for a categorical ban on victim impact evidence or at least severe limitations on its use, in addition to specific attacks on the particular evidence admitted in this case. (SAOB 343-382, 492; RAOB 130-286, 596.) Appellants have waived many of their challenges to such evidence on appeal, and in any event, because the victim impact evidence admitted in this case was well within the statutory and constitutional guidelines for such evidence, there was no error whatsoever, let alone error of a constitutional magnitude. Moreover, even assuming error, appellants were not prejudiced by the relatively brief victim impact evidence, given the weight of the other evidence in aggravation, the instructions given, and the overall scope of the penalty proceedings.

Before the penalty phase, Self filed a motion to exclude victim impact evidence. (8 CT 1836-1860.) Romero later joined in Self's motion to exclude. (8 CT 1877, 1880; 48 CT 7173-7176.) During the hearing on the defense motion, the prosecutor indicated that the victim impact evidence would be limited to the testimony of the victims' family members and one friend. (48 RT

7175.) The trial court denied the defense motion to exclude the evidence and allowed the prosecution to present testimony from family members and a friend of the three victims. (48 RT 7173-7176.)

As outlined in the Statement of Facts, the prosecution presented the following testimony from the victims' family and friends: Jose Aragon's stepmother Lydia Roybal-Aragon, friend Leighette Hopkins, and sister Stephanie Aragon; Joey Mans' mother Catherine Mans and his sister Angela Mans; and Timothy Jones' father James Jones. These witnesses testified to the victims' unique personalities, as well as the impact of the murders upon themselves and the community. (49 RT 7276-7372). The testimony from these witnesses took place over one day of trial and lasted a total of less than four hours. (8 CT 1885.) The prosecution then presented the testimony of approximately a dozen witnesses to each of the juries (a total of nearly 24 witnesses over three days) to document appellants' continuing violent conduct in jail. (8 CT 1887- 1895, 1921; 50 RT 7374-7464; 51 RT 7484-7683.) In mitigation, the defense presented nearly two days worth of testimony from several witnesses, recounting appellants' difficult upbringing, dysfunctional family dynamics, and positive behaviors (including Self's artwork and Romero's expressed desire to change). (8 CT 1922-1932, 1954A; 52 RT 7697-7853; 53 RT 7859-7926.)

As an initial matter, appellants have waived any specific challenges to the substance of the victim impact testimony admitted and argued in this case. (See, e.g., RAOB 212-214, 242, 245-251, 596; SAOB 345-351, 357-358, 360, 363, 368, 370-376, 492.) In their motions to exclude such evidence, appellants made only broad attacks on victim impact evidence in general. (8 CT 1836-1860; 48 RT 7173-7176.) At no time prior to or during the penalty phase did appellants lodge any specific objections to the particular evidence sought to be admitted by the prosecutor nor did they object to the prosecutor arguing this

evidence. (*People v. Wilson* (2005) 36 Cal.4th 309, 357 [defendant forfeited challenge to witness's testimony by failing to object as exceeding scope of proper victim impact evidence].) Appellants now complain they did not "dare[] object" to the testimony or argument because such objections would have been "obnoxious-seeming" and resulted in "intense juror backlash." (RAOB 212-216.) But as noted by this Court, the failure to make a timely objection (Evid. Code, § 353) "may not be excused on the ground that [it] would be inconvenient or because of concerns about how jurors might perceive the objection." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1181.)

As for appellants' broad attacks on victim impact evidence in general, they have preserved only one of those claims: that victim impact evidence must be limited to those facts or circumstances known to the defendant at the time he committed his crime and relevant to establishing his mens rea or criminal activity (8 CT 1845, 1851, 1856; RAOB 274; SAOB 353). Appellants' other broad claims, that victim impact evidence should be banned altogether (RAOB 256-270) or at least severely limited (RAOB 270-278; SAOB 352-356) to written statements (RAOB 275), a single witness (RAOB 275; SAOB 352-353), and to only those family members who were personally present at the scene during or immediately after the murders (RAOB 273; SAOB 353), have been waived by their failure to raise such contentions below. Finally, although appellants noted in their motions below that it would be a violation of due process to admit unduly inflammatory or prejudicial victim impact evidence (8 CT 1856, 1858, 1860), they made no attempts to argue why the specific evidence sought to be admitted by the prosecution was improper or prejudicial, nor did they object to the testimony as prejudicial at the time it was introduced. These claims have therefore also been waived on appeal. (RAOB 230-256, 278-286; SAOB 357-382; *People v. Roldan* (2005) 35 Cal.4th 646, 732.)

Even if appellants' claims have not been waived they lack merit. Prior to 1991, evidence of a murder's impact on a victim and the victim's family and friends was not admissible in the penalty phase of a capital trial. (*Booth v. Maryland* (1987) 482 U.S. 496, 501-502 [107 S.Ct. 2529, 96 L.Ed.2d 440].) However, in *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720], the United States Supreme Court held that "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question," and is thus admissible evidence. Likewise, "under California law, a court may permit victim-impact evidence and argument in appropriate cases at the penalty phase of a capital trial to show the circumstances of the crime." (*People v. Navarette* (2003) 30 Cal.4th 458, 515; *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

The admission of victim-impact evidence, however, is not without limits. "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." (*Payne*, *supra*, 501 U.S. at p. 836.) Moreover, victim-impact evidence cannot be "so unduly prejudicial that it renders the trial fundamentally unfair" in contravention of a defendant's right to due process under the Fourteenth Amendment. (*Id.*, at p. 825; *People v. Brown, supra,* 33 Cal.4th at p. 382; *People v. Edwards*, *supra*, 54 Cal.3d at p. 835.)

Appellants contend that: the High Court's decision in *Payne* was wrong, the limitations set forth in *Payne* and its progeny are not sufficient, this Court has failed to set appropriate boundaries for victim impact evidence, and accordingly, victim impact evidence should either be banned or severely limited. (RAOB 256-278; SAOB 352-356.) Appellants propose, inter alia, that victim impact evidence be limited to: (1) the impact of the murder on only those family members who were personally present at the scene during or immediately after the murder; (2) only those circumstances known or

reasonably foreseeable to the defendant at the time of the murder; (3) written statements; and/or (4) the brief and unemotional testimony of a single witness. (RAOB 256-278; SAOB 352-356.)

This Court has consistently expressed its approval of *Payne* and rejected any bright-line limitations on victim impact testimony. (*People v. Lewis* (2006) 39 Cal.4th 970, 1056-1057; *People v. Pollock, supra,* 32 Cal.4th at p. 1183; *People v. Raley* (1992) 2 Cal. 4th 870, 915 [rejecting defendant's request to declare victim impact evidence and argument improper under the federal Constitution].) As this Court has held:

> Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a).

(*People v. Lewis, supra,* 39 Cal.4th at pp. 1056-1057.) In so holding, this Court recognizes that the prosecution has a legitimate interest in rebutting the mitigating evidence that the defendant is entitled to introduce by introducing aggravating evidence of the harm caused by the crime, "'reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'" (*People v. Prince, supra,* 40 Cal.4th at p. 1179, quoting *Payne v. Tennessee, supra*, 501 U.S. at p. 825.) Appellants offer no persuasive reasons for this Court to revisit or deviate from its sound, well-established precedent, and this Court should thus reject appellants' claims to ban or severely limit victim impact evidence.

Beyond their more general assertions, appellants also complain that the victim impact evidence admitted in this case violated the limitations set forth in *Payne* and California precedent. Specifically, appellants claim: (1) the victim impact witnesses offered irrelevant, excessive, and inflammatory accounts of their loved ones' personalities and achievements, thereby creating the risk of

arbitrary and irrelevant comparisons between the victims and appellants, which was further exacerbated by improper comparison arguments by the prosecutor (SAOB 360-372, 492; RAOB 211-216, 596); (2) the victim impact witnesses' emotionally-charged testimony of their grief and loss, including their descriptions of visits to grave sites and celebrations of holidays, had little probative value, and was unduly voluminous and highly inflammatory (SAOB 363, 373-378, 492; RAOB 138-139, 188-210, 213-214, 230-252, 596); and (3) Lydia Aragon, Stephanie Aragon, Catherine Mans, Angela Mans, and James Jones offered irrelevant and inflammatory opinion evidence about appellants and their crimes (SAOB 357-359, 492; RAOB 244-247, 596). Appellants conclude that the victim impact evidence caused the juries' emotion to overcome reason, denying them reasoned penalty-phase determinations. (SAOB 378-382, 492; RAOB 252-256, 278-286, 596.) Appellants are incorrect. Nothing in the victim-impact testimony from the five family members and one friend abridged appellants' constitutional rights.

First, although appellants frequently label the victim impact testimony as excessive and voluminous, that is simply not true. For the three murder victims in this case, the trial court allowed a reasonable six witnesses - five family members and one friend - to testify regarding the victims' unique personalities and the harm caused by appellants' senseless murders of three young men. This Court has approved of multiple witnesses testifying to victim impact. (See, *e.g.*, *People v. Huggins, supra,* 38 Cal.4th at p. 175 [no due process violation where seven to eight witnesses testify as to victim impact]; *People v. Panah* (2005) 35 Cal.4th 385, 416, 494-495 [no due process violation where five members of victim's family testified regarding the victim and their loss]. *People v. Boyette*, *supra,* 29 Cal.4th at p. 381; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172; see John H. Blume, "Ten Years of *Payne*: Victim Impact Evidence in Capital Cases," 88 Cornell L. Rev. 257, 270 (2003) [most

states allowing victim impact evidence place no limit on the number of witnesses].) As long as victim impact evidence is not unduly prejudicial pursuant to Evidence Code Section 352, the trial court should have discretion to admit any number of witnesses. (See *People v. Box* (2001) 23 Cal.4th 1153, 1200-1201.)

Second, it is well established that evidence of a victim's character is admissible during the penalty phase of a capital trial as a circumstance of a defendant's offense. (Pen. Code, § 190.3, subd. (a); see *People v. Huggins, supra,* 38 Cal.4th at pp. 238-239 *People v. Robinson, supra,* 37 Cal.4th at p. 592, 650; *People v. Roldan, supra*, 35 Cal.4th at pp. 730-732; *People v. Panah, supra,* 35 Cal.4th at pp. 494-495; *People v. Boyette, supra*, 29 Cal.4th at p. 445; *People v. Hardy* (1992) 2 Cal.4th 86, 200.) Despite this well-established precedent, appellants argue that the victim impact witnesses in this case offered irrelevant, excessive, and inflammatory accounts of their loved ones' personalities and achievements, thereby creating the risk of arbitrary and irrelevant comparisons between the victims and appellants, which was further exacerbated by improper comparison arguments by the prosecutor. (SAOB 360-372, 492; RAOB 211-216, 596.) Appellants also claim that: the witnesses' descriptions of their loved ones involved "inherent distortions of the truth" and provided only idealized or sanitized portraits of the victims[69], thus

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69. This Court should not consider the extraneous materials appellants ask this Court to consider. Appellants ask this Court to take judicial notice of two newspaper articles and the trial record in an unrelated case on appeal. (RAOB 178, fn. 97, 212, fn. 113, 236, fn. 120; SAOB 492.) These requested items were never before the trial court in this case and are irrelevant to resolution of this case. (*People v. Massie* (1998) 19 Cal.4th 550, 566, fn.4; *People v. Peevy* (1998)17 Cal.4th 1184, 1206-1208; *People v. Ramos* (1997) 15 Cal. 4th 1133, 1167; *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1065.) Moreover, the contents of newspaper articles are generally an improper matter for judicial notice. (*People v. Ramos, supra,* 15 Cal. 4th 1133, 1167.) Accordingly, their request for judicial notice be denied.

making their testimony irrelevant and unreliable (RAOB 212-213; SAOB 368, 492); and through this testimony, the prosecution sought not only "to humanize the victims . . . but to deify them and in so doing, to convince the jury that their virtues – compared to the defendants who took their lives – justified imposition of a sentence of death" (SAOB 368; RAOB 596). Appellants' assertions are meritless.

This Court has explained that evidence concerning a victim's unique personality, including his "zest for life," "compassion, loyalty, and extroversion," and the effect of his death on his family and friends is, "well within the boundaries" of permissible victim impact evidence under *Payne* and *Edwards*. (*People v. Huggins*, *supra*, 38 Cal.4th at pp. 236-238; *People v. Montiel* (1993) 5 Cal.4th at 877, 935.) This Court has approved of evidence concerning a victim's life history, employment, penchant for hard work, community activism, charitable contributions, and religious activities, among other things. (*People v. Lewis* (2006) 39 Cal.4th 970, 1057; *People v. Huggins, supra*, 38 Cal.4th at pp. 236-238; *People v. Roldan*, *supra*, 35 Cal.4th at pp. 722, 730-732; *People v. Pollack*, *supra*, 32 Cal.4th at pp. 1180-1181.) Likewise, this Court has held that specific examples or stories concerning a victim's life are wholly permissible as relevant victim impact evidence (*People v. Roldan, supra*, 35 Cal.4th at pp. 722, 730-732), as are photographs of the victim. (*People v. Stitely*, *supra*, 35 Cal.4th at pp. 564-565; *People v. Boyette*, *supra*, 29 Cal.4th at p. 444; *People v. Carpenter* (1997) 15 Cal.4th 312, 401; *People v. Cox* (1991) 53 Cal.3d 618, 688.) In describing the character of a victim, witnesses may also testify to the "the psychological effects of [a victim's] death on other individuals and the community." (*People v. Huggins*, *supra*, 38 Cal.4th at pp. 236-238.) A defendant's "rights are not infringed by evidence or argument showing that the victim was a unique and valuable human being." (*People v. Clark* (1993) 5 Cal.4th 950, 1033-1034.)

The testimony in the instant case concerning the victims' characters, including their kind and compassionate personalities, helpful and hardworking ethics, relationships with other people, and their status as "unique and valuable human being[s]," was standard victim impact testimony and did not violate appellant's right to due process. (49 RT 7277-7284, 7303-7307, 7316, 7319, 7333-7337, 7344, 7346-7347, 7355, 7361-7364, 7371; *People v. Clark*, *supra*, 5 Cal.4th at pp. 1033-1034; see also *People v. Lewis*, *supra*, 39 Cal.4th at p. 1057; *People v. Huggins*, *supra*, 38 Cal.4th at pp. 236-238; *People v. Robinson*, *supra*, 37 Cal.4th at p. 650; *People v. Roldan*, *supra*, 35 Cal.4th at pp. 730-732; *People v. Panah*, *supra*, 35 Cal.4th at pp. 494-495; *People v. Pollack*, *supra*, 32 Cal.4th at pp. 1180-1181; *People v. Boyette*, *supra*, 29 Cal.4th at p. 445; *People v. Hardy*, *supra*, 2 Cal.4th at p. 201.) Further, it was proper for the prosecutor to urge jurors to remember the victim and the life that the victim lived, and to argue that death is the only appropriate means for redressing the loss of that individual. (*People v. Montiel, supra,* 5 Cal.4th at p. 935; *People v. Clark, supra,* 5 Cal.4th at p. 950.)

Appellants contend that idealized or sanitized portraits of the victims prejudiced them. (RAOB 212-213; SAOB 368-492.) For example, appellants complain, "No one asked, for example, if Aragon, who had a charming habit of keeping his things 'all nicely lined up, all clean, always dusted' . . . had an annoying obsessive-compulsive side." (RAOB 212; SAOB 492.) And appellants posit that based on information in various newspaper articles, "Jones and Mans were more like appellant[s] than one would have thought from the trial testimony. They had been characterized outside of court by friends and relatives as 'drifters who sometimes dabbled in drugs.'" (RAOB 212; SAOB 368, 492.) Appellants also imply that Mans' and Jones' love lives or lack thereof were intentionally kept from the juries, apparently hiding some sort of "flaw." (RAOB 212; SAOB 492.) First, appellants had the opportunity to

cross-examine the victim impact witnesses at trial on these matters; however, they chose not to do so and may not now complain. Second, contrary to appellants' assertions, the fact that family members and friends described the victims in a positive light does not establish prejudice. As this Court noted in *People v. Boyette, supra,* "testimony from the victims' family members was relevant to show how the killings affected *them*, not whether they were *justified* in their feelings due to the victims' good nature and sterling character. Accordingly, defendant was not entitled to disparage the character of the victims on cross-examination." (*People v. Boyette, supra,* 29 Cal.4th at p. 445, original italics; *People v. Harris* (2005) 37 Cal.4th 310, 353.) Finally, none of the evidence concerning the victims' characters, considered individually or cumulatively, would have diverted "the jury's attention from its proper role" or invited "an irrational, purely subjective response" on the penalty phase verdict (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836), "untethered to the facts of the case." (*People v. Pollack*, *supra*, 32 Cal.4th at p. 1180.)

Likewise, the prosecutor did nothing improper when he urged the jury to remember the victims' unique personalities and argued that the impact of their deaths upon their families and friends justified imposition of the death penalty. Leaving aside the gross distortions and speculative assertions levied by appellants in their opening briefs.[70] (SAOB 366, 370-372; RAOB 596), the record reflects a prosecutor who appropriately emphasized the unique lives led by the victims, appellants' callous and brutal crime spree, the pain and suffering caused by victims' murders, and appellants' direct culpability for this resulting harm. (54 RT 8003-8030; 8082-8116.) In short, the prosecutor's argument was nothing out of the ordinary and was entirely proper. Appellants' rights

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70. For instance, Self strains credulity when he speculates that the prosecutor's reference to Aragon's habit of spray-painting his shoes was a veiled comparison to appellants' spray-painting of Magnolia Interiors.

were not infringed by the prosecutor arguing this evidence as a basis for imposition of the death penalty. (*People v. Clark, supra,* 5 Cal.4th at pp. 1033-1034.)

Furthermore, the jury in the instant case heard an abundance of testimony concerning appellants' upbringing, including numerous moving stories about their dysfunctional household, exposures to violence and drugs, impoverished early years, strained relationships with their mother and father, and physical and emotional abuse. (52 RT 7697-7800, 7817-7853; 53 RT 7893-7925.) The jury also learned about Self's artistic abilities and interests, and Romero's attempts to better his life. (53 RT 7859-7865, 7871-7890 .) Given that jurors learned about appellants' life history, character, and prospects, the fact that jurors also learned about the life history, character, and prospects of appellants' victims did not offend appellants' rights to due process. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) As the United States Supreme Court noted in approving victim impact evidence in *Payne*: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." (*Ibid*; see also *People v. Clark*, *supra*, 5 Cal.4th at pp. 1033-1034.) The People's victim impact evidence and argument regarding Aragon, Mans, and Jones showed nothing more than their "uniqueness as . . . individual human being[s]," and the trial court's admission of such evidence did not constitute an abuse of discretion, nor did it violate appellants' federal constitutional right to due process. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 823.)

Next, appellants argue that the victim impact witnesses' emotionally-charged testimony of their grief and loss, including their descriptions of visits to grave sites, celebrations of holidays, and dreams of the deceased, had little probative value, and was unduly voluminous and highly inflammatory. (SAOB 363, 373-378, 492; RAOB 138-139, 188-210, 213-214, 230-252, 596.)

Appellants are incorrect. Testimony by the victims' parents, siblings, and friend regarding the immediate and lasting effects of their loved ones senseless murders was well within the parameters for appropriate victim-impact evidence.

It is well-established that testimony by family members about the various ways their lives were adversely affected by a victim's death is proper. (*People v. Huggins*, *supra*, 38 Cal.4th at pp. 236-238; *People v. Panah*, *supra*, 35 Cal.4th at pp. 494-495; *People v. Benavides*, *supra*, 35 Cal.4th at p. 107; *People v. Stitely*, *supra*, 35 Cal.4th at p. 564; *People v. Pollack*, *supra*, 32 Cal.4th at pp. 1182-1183; *People v. Boyette*, *supra*, 29 Cal.4th at p. 444; *People v. Taylor, supra,* 26 Cal.4th at p. 1155; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017.) That families are aggrieved is an "obvious truism" and an "obvious and predictable" consequence of murder. (*People v. Sanders* (1995) 11 Cal.4th 475, 550.) While victim-impact evidence is obviously emotional, it is not surprising or shocking. (*Id.*)

Such evidence need not come from blood relatives of a victim, but may come from the victim's personal friends and neighbors as well. (*People v. Williams* (2006) 40 Cal.4th 287, 306, fn. 4; *People v. Huggins*, *supra*, 38 Cal.4th at p. 236-238; *People v. Pollack*, *supra*, 32 Cal.4th at p. 1183; *People v. Benavides*, *supra*, 35 Cal.4th at p. 107; *People v. Brown*, *supra*, 31 Cal.4th at p. 573; *People v. Marks*, *supra*, 31 Cal.4th at pp. 236-237.) Likewise, the law does not require that a witness restrict their testimony to the impact upon themselves, omitting any mention of the impact upon other family members. (*People v. Panah, supra,* 35 Cal.4th at p. 395.) Evaluating victim impact testimony under *Payne* and *Edwards*, this Court has permitted descriptions of what the victim's family saw when they viewed the victim at the mortuary, visits to gravesites, changes in holiday celebrations, resulting drug abuse or mental disease, and other physical or mental manifestations of psychological impact from the victims' murders. (*People v. Jurado, supra,* 38 Cal.4th at p. 72,

[trauma from death of a child, gravesite visits, holidays changed, and impact on children of victim, including nightmares]; *People v. Harris, supra,* 37 Cal.4th 310, 351-352 [descriptions of victim at mortuary and photos of gravesite]; *People v. Panah*, *supra*, 35 Cal.4th 494-495 [testimony that family member used drugs and became suicidal as a result of offense proper]; *People v. Brown* (2004) 33 Cal.4th 382, 397-398 ["manifestations of psychological impact" and "understandable human reactions" experienced by family and friends is admissible]; *People v. Pollack*, *supra*, 32 Cal.4th at p. 1183 [family member decided to sell home where murder occurred because he could not stand the memory of the crime]; *People v. Benavides*, *supra*, 35 Cal.4th at p. 107 [journal entries or letters written by witness]; *People v. Brown*, *supra*, 31 Cal.4th at p. 573 [victim's loved ones still afraid to go outside of the house three years after offense]; *People v. Marks*, *supra*, 31 Cal.4th at pp. 236-237 [deterioration of physical condition and loss of job as a result of victim's death]; *People v. Boyette, supra*, 29 Cal.4th at pp. 440, 444 [severe impact on victim's children].)

The testimony admitted in the instant case was well within the scope of *Payne* and *Edwards,* and echoed much of the evidence approved by this Court in the previously cited cases. The victims' loved ones testified to their last memories of their loved ones (49 RT 7285, 7307-7308, 7337, 7366), the extent of their shock and pain upon learning of their loved ones' murders (49 RT 7287-7288, 7292, 7309, 7320, 7337, 7366), descriptions of their loved ones at the mortuary or morgue (49 RT 7291, 7292, 7314, 7348-7349, 7367), funeral arrangements and funeral services (49 RT 7292-7293, 7322, 7368), the difficulty in knowing how their loved ones died (49 RT 7300, 7322-7324, 7344, 7353, 7370-7371), the impact upon other individuals (family, friends, society) (49 RT 7282, 7290-7291, 7294-7300, 7310, 7350, 7353-7355, 7368-7369), their frequent thoughts and dreams of their deceased loved ones (49 RT 7316, 7339-7340, 7350, 7352), gravesite visits (49 RT 7327-7328, 7371),

lingering fear for their own safety (49 RT 7315, 7325, 7351-7352), alcohol abuse and depression (49 RT 7326-7327, 7350), and their ongoing grief and difficulties in adjusting to life without their loved ones (including the celebration of holidays and family dynamics) (49 RT 7294-7300, 7310-7313, 7325-7328, 7339-7341, 7346, 7369-7371). In sum, the testimony revealed the immediate and lasting effects of the victims' murders upon their surviving family member and friends, as well as the "understandable human reactions" that accompanied learning of a son or brother's brutal and senseless murder. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 397-398; see also *People v. Wilson, supra,* 36 Cal.4th at p. 357.) The witnesses' testimony, although emotional, was not surprising, shocking, or inflammatory. Instead, it was a tragically obvious and predictable consequence of appellants' murders of three young men. (*People v. Sanders*, *supra*, 11 Cal.4th at p. 550.)

Lastly, appellants argue that Lydia Aragon, Stephanie Aragon, Catherine Mans, Angela Mans, and James Jones offered irrelevant and inflammatory opinion evidence about appellants, their crimes, and the appropriate punishment. (SAOB 357-359, 492; RAOB 242, 244-247, 596.) Appellants' characterizations of the witnesses' testimony are entirely false. The witnesses did not give opinions about the crimes, appellants, or the appropriate punishment; rather, their testimony encompassed their immediate and lasting reactions to their loved ones' brutal murders.

Lydia Aragon testified to: her reaction to receiving Jose's truck from the police with his blood still covering the truck bed (49 RT 7292); her recurring and disturbing thoughts about the last minutes of Jose's life (49 RT 7301); her immediate reaction to Jose's murder and her lasting difficulty in grappling with the "senseless" murder of her son (49 RT 7289); her desire to "cradle him, hold him, say that [she] loved him," in the last minutes of his life, even though she recognized that she could not save him given the mortal wounds that appellants

intentionally inflicted upon him (49 RT 7301); and her sympathy for the little boy who discovered Jose's mutilated and lifeless body in the back of the truck and the effects Jose's murder had upon the boy (49 RT 7301). Stephanie Aragon testified that it felt like someone had taken Jose away like they owned him. (49 RT 7324.)

Catherine Mans testified to dreams about her son, Joey Mans. In those dreams, Joey tells her it "hurts me back here," but that he's "okay" now. (49 RT 7339.) Catherine, like Lydia, testified to her recurring and disturbing thoughts about the last minutes of her son's life, including how she imagines his pain and struggle to breathe. (49 RT 7344.) Angela Mans testified to seeing her brother in his casket at the funeral home. Angela believed her brother had a "scared" expression on his face in the casket, and she believed he was scared in his final moments of his life. (49 RT 7348-7349.)

James Jones testified to his difficulties in attending appellants' trial because he did not want to know too much about how his son Timmy died. James recounted how, as a father, he can not stand the thought of his son suffering and knowing he was going to die. He also expressed his lasting difficulty in grappling with why someone would want to kill his kind and generous son. Describing his visits to his son's gravesite, Jones testified that he tells his son they will meet again someday and that everything will be okay. (49 RT 7370-7371.)

This Court has approved of testimony similar to that given in the instant case. In *People v. Wilson, supra*, 36 Cal.4th 309, a sister testified that she could not understand why anyone would kill her brother, and was "angry" that someone would kill her brother for money. This Court held that the sister's statements "permissibly concerned the 'immediate effects of the murder' and her 'understandable human reactions' on hearing someone had killed her brother for money." (*Id.* at p. 357.)

Likewise, in *People v. Pollock, supra*, 32 Cal.4th at p. 1153, witnesses described how their loved ones were "brutally murdered" and their lasting thoughts about the crime. (*Id.* at p. 1182.) The victims' son testified how he "cleaned the bloodstains from his parents' house" and that he decided to sell the house because "'it was such a savage act, I just couldn't have the memory of their murder that close to me.'" (*Ibid.*) He also testified that "'the major problem I have is the savageness of this murder'" and how "he knew his parents must have suffered greatly during the last 15 minutes of their lives." (*Ibid.*) In holding the evidence admissible, this Court stated:

> The witnesses did not testify merely to their personal opinions about the murders. Rather, their testimony was limited to how the crimes had directly affected them. [One witness] testified that she was intensely shocked not only by the fact of the [victims'] deaths, but also by the brutal manner in which they died. [The victims' son] testified that the circumstances of his parents' deaths made it impossible for him to remember his parents, or his own childhood, without in some manner imagining the suffering of their final minutes. This was proper and admissible victim impact evidence. As in *Payne v. Tennessee, supra*, 501 U.S. 808, the testimony "illustrated quite poignantly some of the harm that [defendant's] killing[s] had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant.

(*Id.* at p. 826.) (*People v. Pollock, supra*, 32 Cal.4th at p. 1182.)

The testimony in the instant case was no different than the testimony approved in *Pollock* and *Wilson*. The witnesses poignantly expressed their reactions to the murders of their loved ones, which included normal and expected imaginings of their family members' last moments of life, difficulty in grappling with appellants' brutal and senseless murders of their loved ones, and intense reactions to their loss. In other words, their testimony permissibly concerned the "immediate effects of the murder[s]" and their "understandable human reactions" to dealing with such a tremendous loss. (*People v. Wilson*,

supra, 36 Cal.4th at p. 357; *People v. Brown*, *supra*, 33 Cal.4th at pp. 397-398.) There was no error.

Regardless, assuming arguendo there was any error in the admission of victim impact evidence, reversal is not required. Erroneous admission of victim-impact evidence is subject to a harmless-error analysis. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1058; *People v. Johnson*, *supra*, 3 Cal.4th at p. 1246.) There is no reasonable probability that appellants would have enjoyed a more favorable outcome, absent the victim impact evidence. (*People v. Jones, supra,* 29 Cal.4th at p. 1229, fn.11.) Moreover, any federal constitutional error would also be harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 18.)

First, the entire presentation by the six victim impact witnesses spanned less than a hundred pages of testimony in the penalty phase (49 RT 7276-7372) and was only about four hours in length (8 CT 1885), while the prosecution's remaining case in aggravation (recounting appellants' other violent conduct) consumed approximately 300 pages. (50 RT 7374-7494; 51 RT 7495-7683; 8 CT 1887-11895, 1921). In contrast, appellants' evidence in mitigation consumed nearly 200 pages, twice the length of the victim impact testimony.[71] (52 RT 7697-7920; 8 CT 1922-1932.)

Second, the victim impact evidence "paled in comparison to other evidence in aggravation," i.e., the horrific and uniformly horrible circumstances

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71. Most of the witnesses called by appellants appeared before both juries and thus their testimony was considered by both juries. However, there were a few witnesses that only appeared before one jury; John Bianco and Margaret Joe Louie appeared only before the Self jury, and Christine Arrabito and Janice Babish appeared only before the Romero jury. The total case in mitigation was 223 pages, with Self's individual witnesses, Bianco and Louie, consuming only about 20 pages of the record. (52 RT 7802-7816; 53 RT 7859-7865.) Romero's individual witnesses, Arrabito and Babish, also consumed only about 20 pages of record. (53 RT 7871-7891.)

of the capital crimes, appellants' vicious and prolific crime spree, and appellants' continuing violent and disturbing conduct while in county jail. (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 970.) Further, as previously discussed, while appellants's case in mitigation presented a moving account of their early childhood, the evidence also showed they had the benefit of a caring extended family even in the worst of times, a devoted stepfather and stable home life by the time they were five (Self) and eight (Romero), and siblings who demonstrated an ability to succeed and avoid the criminal path. In sum, "[t]he challenged evidence could not have tipped the balance in favor of death." (*People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 1058.)

Finally, the trial court instructed the jury not to be swayed by bias or prejudice against appellants. (9 CT 1965, 2034; 54 RT 8053, 8136 [CALJIC No. 8.84.1].) The trial court also instructed the jury they were "free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider." (9 CT 2011-2012, 2081-2082; 54 RT 8071-8073, 8158-5160 [CALJIC No. 8.88].) The jury is presumed to have followed these instructions. (*People v. Rich* (1988) 45 Cal.3d 1036.)

In light of the relative brevity of the victim impact evidence, the considerable evidence in aggravation, and the instructions given, it is clear the admission of the victim impact testimony did not undermine the fundamental fairness of the penalty determination. Even if the victim impact evidence had been excluded, the outcome would have remained the same. Appellants' death sentences do not rest with unduly prejudicial victim impact evidence; rather, the sentences rest squarely with the evidence in aggravation, including the circumstances of their senseless and brutal crimes.

XIII.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF ROMERO'S ESCAPE ATTEMPT, SHANK POSSESSIONS, AND MULTIPLE ASSAULTS UPON FELLOW INMATE TYREID HODGES

Romero claims his federal and state rights to trial by jury, a reliable penalty determination, and due process were violated because the trial court erred in admitting evidence of his escape attempt, shank possessions, and multiple assaults upon fellow inmate Tyreid Hodges. (RAOB 342-383, 517-519.) Regarding the escape attempt, Romero claims: (1) his "escape preparations had not ripened into an attempt and therefore did not constitute an actual or attempted crime of violence under Penal Code section 190.3, factor (b)"; (2) because the escape evidence was inadmissible as to penalty and highly prejudicial, the trial court erred when it admitted the evidence as showing consciousness of guilt during the guilt phase; (3) his counsel was ineffective for failing to articulate proper grounds for its exclusion; and (4) the trial court's instructions on attempt were prejudicially flawed. (RAOB 342-370.) With regard to all three forms of evidence (escape attempts, shanks, and assaults), Romero claims that none rose to the level of criminal activity involving force of violence as contemplated by Penal Code section 190.3, factor (b). (RAOB 370-383, 517-519.) First, Romero forfeited many of these claims by failing to raise them at trial. Second, Romero's arguments are wholly without merit. Romero did not merely make preparations to escape; he made an actual attempt to escape by obtaining weapons to subdue the guards and completely sawing through his cell bars. And, casting aside the gross distortions offered by Romero, it is clear that all of the challenged evidence demonstrated criminal activity involving force or violence, as contemplated by factor (b) and this Court's precedent.

A. Romero's Escape Attempt Constituted "Criminal Activity" And Was Properly Admitted Under Penal Code Section 190.3, Subdivision (b); It Was Also Properly Admitted At The Guilt Phase As Evidence Of Consciousness Of Guilt

Prior to trial, Romero's counsel moved to exclude evidence of his escape attempt pursuant to Evidence Code section 352. (6 CT 1224-1226; 30 RT 4735-4736.) Later, before the evidence was presented, counsel raised questions about the credibility and qualifications of the primary witness to the escape attempt, fellow inmate Arthur Dicken. (30 RT 4735-4739; 42 RT 6389-6392.) After holding a hearing under Evidence Code section 402, the trial court admitted the testimony and ultimately denied Romero's motion to exclude the escape evidence. (42 RT 6391-6397, 6488-6489.)

As outlined in the Statement of Facts, Dicken testified that during the first few weeks of April 1994, he saw Romero and his cell mate use hacksaw blades to cut on the bottom bars of their cell door. After Dicken reported Romero's conduct, officers searched Romero's cell and uncovered his handiwork. Romero and his cell mate disguised their efforts by using scotch tape to hold the cell bars in place and toothpaste mixed with paint chips to cover the damage to the bars. The cut bars could be removed, which exposed a gap large enough for someone to crawl through. Romero obtained the hacksaw blades by having his visitors hide the blades in the rigid portion of legal pads which were then mailed to the jail in attorney-mail envelopes. In order to escape from the jail, inmates need to pass through a number of locked doors or gates, either using a key obtained from a deputy or getting a deputy to open them. Romero told Dicken they planned to escape by waiting until the night shift, slipping through the gap in their cell door, grabbing the deputy doing the head count, and holding him hostage with makeshift shanks until they completed their escape. Romero's shank was made from a four-to-six inch sharpened piece of metal, while his cell mate had a small metal spear attached

to tightly rolled up newspaper. (42 RT 6418-6425, 6425-6427, 6450-6461, 6472-6477, 6479-6482.)

Prior to the penalty phase, counsel sought to exclude Romero's statement to Dicken regarding his plan to overpower a guard during his escape attempt. (48 RT 7201-7206.) The trial court ruled the statement was admissible because it was relevant to establishing the intent element of attempted escape. (48 RT 7205.) The prosecution then used the escape attempt, including Romero's statements to Dicken, as evidence in aggravation. The trial court instructed the jury that unadjudicated criminal activity involving force or violence may be considered as a factor in aggravation (CALJIC No. 8.85), that such activity needed to be proven by a reasonable doubt (CALJIC No. 8.86), and the law of attempt crimes (CALJIC Nos. 6.00-6.02). (9 CT 1986-1991; 54 RT 8062-8065.)

In determining whether to impose the death penalty, the jury may consider as an aggravating factor "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." (Pen. Code, § 190.3, factor (b).) A trial court's decision to admit evidence under factor (b) is reviewed for abuse of discretion. (*People v. Lancaster* (2007) 41 Cal.4th 50, 93.) Factor (b) "criminal activity" is conduct that "demonstrates the commission of an actual crime, specifically, the violation of a penal statute . . . ." (*Ibid.*, internal citations and quotations omitted; *People v. Combs* (2004) 34 Cal.4th 821, 859.)

Romero argues he only engaged in "escape preparations" and his conduct did not amount to the crime of attempted escape (Pen. Code, § 4532, subd. (b)). (RAOB 347-353.) Minimizing his conduct and misconstruing the law on attempt crimes, Romero asserts he "only prepared for a departure, [but] he had not started going anywhere," and thus his conduct of sawing through his

cell bars and hiding weapons to be used on guards did not amount to "putting his . . . plan into action." (RAOB 349-350.) This is utterly false.

"An attempt to commit a crime requires a specific intent to commit the crime and a direct but ineffectual act done toward its commission." (*People v. Kipp* (1998) 18 Cal.4th 349, 376.) "The act must go beyond mere preparation, and it must show that the perpetrator is putting his or her plan into action, but the act need not be the last proximate or ultimate step toward commission of the substantive crime." (*Ibid.*) Attempted escape requires a "'direct, unequivocal act to effect that purpose.'" (*People v. Lancaster, supra*, 41 Cal.4th at p. 94, quoting *People v. Gallegos* (1974) 39 Cal.App.3d 512, 517.)

This Court has recognized an attempted escape from far less evidence than in this case. (See, e.g., *People v. Mason* (1991) 52 Cal.3d 909, 954-956 [cuts through screen in cell window but guards discovered cuts before defendant could leave]; *People v. Gallego* (1990) 15 Cal.3d 115, 155, 196 [note outlining escape plan, torn bed sheets, and a shank]; *People v. Boyde* (1988) 46 Cal.3d 212, 248-250 [defendant solicited another inmate to help him escape from the jail roof and the plan involved the other inmate leaving a gun on the roof for the defendant's use in subduing a guard if necessary]; compare *People v. Lancaster, supra*, 41 Cal.4th at p. 94 [handcuff keys alone without any other evidence does not rise to the level of attempted escape].) Here, Romero did not just prepare or plan, he actually put his plan into action and took a "direct, unequivocal act" toward escaping by obtaining hacksaw blades, using the blades to saw through his cell bars to create a hole big enough to crawl through, and concealing weapons to use in subduing the guards. In essence, Romero did everything but actually escape from his cell. The trial court did not err when it allowed the escape attempt to be presented to the jury as a matter in aggravation.

Likewise, because Romero cannot demonstrate that his counsel's motion to exclude the evidence on this ground "would have been meritorious," his ineffective assistance of counsel claim fails as well. (*People v. Mattson* (1990) 50 Cal.3d 826, 876 ["[A] claim of ineffective assistance of counsel based on a trial attorney's failure to make a motion or objection must demonstrate not only the absence of a tactical reason for the omission [citation], but also that the motion or objection would have been meritorious. . . ."], overruled by statute on another ground as stated in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13.)

The trial court also did not err when it admitted the escape attempt as evidence of consciousness of guilt during the guilt phase. As recognized by Romero, "ordinarily an attempt or plan to escape from jail pending trial is relevant to establish consciousness of guilt." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1126; *People v. Box, supra,* 23 Cal.4th 1153, 1205; *People v. Morris, supra,* 53 Cal.3d at p. 196, disapproved on another ground in *People v. Stansbury, supra,* 9 Cal.4th at p. 824, fn. 1; *People v. Terry* (1970) 2 Cal.3d 362, 395.) Romero argues, however, the evidence should have been excluded from the guilt phase under Evidence Code 352 because "[its] minimal probative value on guilty was clearly outweighed by its tremendous potential for prejudice in the later penalty determination." (RAOB 353-357.) He is incorrect.

First, the escape attempt was probative at the guilt phase of Romero's consciousness that he was guilty of three capital murders and would be facing the death penalty or at a minimum life in prison. (*People v. Kipp, supra,* 26 Cal.4th at p. 1126.) Second, balanced against this probative value, there was little risk of undue prejudice at the guilt phase, considering the volume and considerable strength of the other evidence presented to the jury. To further reduce the risk of prejudice, the trial court instructed the jury that, if they found that Romero attempted to escape from custody, "such conduct is not sufficient

by itself to prove guilt and its weight and significance, if any, are matters for your consideration." (7 CT 1565; 46 RT 7049-7050; *People v. Box, supra*, 23 Cal.4th at p. 1205.) Third, as just established, because the escape attempt was also admissible at the penalty phase as evidence in aggravation, Romero's prejudice argument fails. Finally, as discussed below, the jury was properly instructed on its consideration of the escape attempt during the penalty phase, and in light of the evidence presented, Romero cannot demonstrate prejudice.[72]

Additionally, Romero faults the trial court for its instructions on attempt given to the jury, claiming the instructions told the jury to treat preparations as an attempt. (RAOB 357-361.) The instructions did no such thing. In accordance with CALJIC Nos. 6.00, 6.01, and 6.02, Romero's jury was instructed:

> An attempt to commit a crime consists of two elements, namely, a *specific intent to commit the crime* and a *direct but ineffectual act done towards its commission.*
>
> In determining whether or not such an act was done, it is necessary to *distinguish between mere preparation*, on the one hand, and the actual commencement of the doing of the criminal deed, on the other. *Mere preparation which may . . . consist of planning the offense or of devising or obtaining or arranging the means for its commission, is not sufficient to constitute an attempt.* However, acts of a person who intends to commit a crime will constitute an attempt where those acts clearly

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72. Romero recognizes that his counsel did make an objection to the evidence at the guilt phase under Evidence Code section 352, but he asserts that counsel then "abandoned" the effort or did not adequately articulate his objection. (RAOB 351, 353.) Again, because Romero cannot demonstrate that his counsel's motion to exclude the evidence on this ground "would have been meritorious," his ineffective assistance of counsel claim fails. (*People v. Mattson, surpa*, 50 Cal.3d at p. 876 ["[A] claim of ineffective assistance of counsel based on a trial attorney's failure to make a motion or objection must demonstrate not only the absence of a tactical reason for the omission [citation], but also that the motion or objection would have been meritorious. . . ."], overruled by statute on another ground as stated in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13.)

> indicate a certain, unambiguous intent to commit that specific crime. Such acts must be an *immediate step in the present execution of the criminal design*, the progress of which would be completed unless interrupted by some circumstance not intended in the original design.
>
> A person who has once committed acts which constitute an attempt to commit a crime is liable for the crime of attempted escape by force or violence even though he does not proceed further with the intent to commit the crime, with by reason of voluntarily abandoning his purpose or because he was prevented or interfered with in completing the crime.
>
> If a person intends to commit a crime but, *before committing an act toward the ultimate commission of the crime*, freely and voluntarily abandons the original intent and makes no effort to accomplish it, such person has not attempted to commit the crime.

(Emphasis added; 54 RT 8062-8063; 9 CT 1986-1988.)

The wording of these instructions stem directly from this Court's case law setting forth the law on attempt crimes. (See, e.g., *People v. Lancaster, supra*, 41 Cal.4th at p. 94 ["direct, unequivocal act to effect" the purpose of the attempted crime]; *People v. Toledo* (2001) 26 Cal.4th 221, 230 ["'When it is established that the defendant intended to commit a specific crime and that in carrying out this intention he committed an act that caused harm or sufficient danger of harm, it is immaterial that for some collateral reason he could not complete the intended crime.'"]; *People v. Kipp, supra,* 18 Cal.4th at p. 376 ["specific intent to commit the crime and a direct but ineffectual act done toward its commission," "act must go beyond mere preparation," "must show that the perpetrator is putting his or her plan into action but the act need not be the last proximate or ultimate step toward commission of the substantive crime."].) And this Court has held that CALJIC Nos. 6.00 and 6.01 "accurately state th[e] law." (*People v. Dillon* (1983) 34 Cal.3d 441, 453.) As CALJIC No. 6.02 simply states the converse of CALJIC No. 6.01 and reiterates the requirements for both specific intent and a direct act towards the commission

of the underlying crime. Accordingly, the trial court's instructions accurately stated the law.

Assuming arguendo any error, Romero was not prejudiced under even the most stringent standard. (*Chapman v. California, supra,* 386 U.S. at p. 18; *People v. Lancaster, supra*, 41 Cal.4th at pp. 94-95; *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11; *People v. Kipp, supra*, 26 Cal.4th at p. 1127; *People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) Even if the escape attempt was excluded at the guilt phase, it is not reasonably probable that the jury would have returned guilt verdicts more favorable to Romero. The prosecution presented overwhelming evidence establishing Romero's guilt, including credible eyewitness identifications, considerable physical evidence obtained from both the crime scenes and from searches of appellants' homes and vehicles, appellants' damaging police interviews, and Munoz's corroborated accomplice testimony. Given the strength of the prosecution's case, and the absence of any affirmative defense evidence of innocence, the jury's knowledge of the attempted escape would not have contributed in any significant way to the guilt verdicts.

Likewise, even assuming error in its admission at the penalty phase, there is no reasonable possibility it affected the verdict. Although the prosecutor argued the escape attempt as a matter in aggravation, he never suggested that the death penalty was the "only means of protecting the public from a defendant who poses a significant escape risk." (*People v. Lancaster, supra*, 41 Cal.4th at p. 95; *People v. Jackson, supra*, 13 Cal.4th at pp. 1232–1233.) The prosecutor primarily argued the escape attempt as evidence of Romero's sophisticated, scheming nature, and his propensity to violence in or out of prison. (54 RT 8026-8030.) He also argued that the escape attempt, if successful, would likely have led to "someone [getting] hurt or killed." (54

RT 8026-8027, 8030.) This argument was wholly proper.[73] (*People v. Champion* (1995) 9 Cal.4th 879, 940 [if supported by the evidence, the prosecution may comment on the possibility that if the defendant is not executed he will remain a danger to others].)

Moreover, the evidence of the escape attempt paled in comparison to the other evidence presented. (*People v. Combs, supra,* 34 Cal.4th at pp. 860-861; *People v. Tuilaepa, supra*, 4 Cal.4th at p. 591.) The jury knew Romero callously murdered three young men and demonstrated a cavalier attitude toward extinguishing human lives. The circumstances of the crimes were uniformly horrible, cruel, and senseless, and Romero continued his violent behavior in jail with assaults on four fellow prisoners (Medeiros, Jutras, Thibedeau, Hodges) and numerous shank possessions. In sum, given the comparative impact of the escape attempt evidence, the minimal role it played in the prosecutor's argument, and the other compelling evidence presented during the penalty phase, any error was harmless beyond a reasonable doubt.

B. Romero's Shank Possessions, Assaults On Tyreid Hodges, And Escape Attempt Involved The Threat Of Violence And Were Properly Admitted Under Penal Code Section 190.3, Subdivision (b)

In addition to the escape attempts, Romero claims that his assaults on Tyreid Hodges and multiple shank possessions did not rise to the level of criminal activity involving force of violence as contemplated by Penal Code section 190.3, factor (b). (RAOB 370-383, 476-490, 517-519.) This is untrue.

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73. Romero suggests these arguments made by the prosecutor were improper. (RAOB 367.) Because Romero failed to object to this line of argument at trial, he has forfeited any claim of prosecutorial misconduct. (*People v. Lewis & Oliver, supra*, 39 Cal.4th at p. 1060.) Further, as demonstrated, the arguments were wholly proper in light of the evidence presented.

Romero moved to exclude evidence of his assaults upon Tyreid Hodges as not amounting to crimes of force or violence under factor (b). Romero alleged factor (b) contemplated more violent assaults than those he perpetrated against Hodges. (6 CT 1337, 1343; 48 RT 7211-7212; 51 RT 7500.) The trial court denied the motion and allowed Hodges to testify. (51 RT 7501.) Romero did not seek to exclude evidence of his shank possessions, and thus, that claim is waived. (6 CT 1337-1344; *People v. Lewis & Oliver, supra,* 39 Cal.4th at p. 970.) Likewise, Romero made no attempt to exclude the escape attempt on this basis, and therefore this claim is also waived. (6 CT 1337-1344; *People v. Lewis & Oliver, supra*, 39 Cal.4th at p. 1052.) At any rate, his claims lack support.

As outlined in the Statement of Facts, Hodges testified that from September 1994 through March 1995, Romero assaulted him with various toiletry items and bodily fluids while they were housed in the same unit at the Riverside County Jail. In a six to seven month time frame, Romero threw hot urine at Hodges as he walked down the hallway, squirted hot urine and feces at Hodges through Hodges' cell door, and hit Hodges with a shampoo bottle, hair brush, and soap. In doing so, Romero often made references to Hodges being a child molester and that people like Hodges did not have any rights in the day room. Romero said he would "take [Hodges] out" if it was up to him. (51 RT 7502-7511, 7514.)

The evidence also established several instances where Romero possessed handmade weapons in his cell. All of the weapons were capable of slashing, stabbing, or cutting people. The shanks included a toothbrush that was sharpened to a point on the handle end, a hairbrush that was cracked and sharpened to form a point at the handle, a pencil with a razor blade embedded near the lead tip, and a sophisticated toothbrush-shank with two razor blades

melted into the handle and formed into a point along with a handle made of plastic wrap. (51 RT 7416-7421, 7484-7489, 7495-7499.)

With regard to the shank possessions and escape attempt, Romero argues that because these criminal acts did not involve a *communicated* threat of violence, they were improperly admitted under factor (b). (RAOB 481-490, 517-519.) Romero's argument is virtually identical to the one rejected by this Court in *People v. Martinez* (2003) 31 Cal.4th 673, 693. In *Martinez*, the defendant attacked the "implied threat" language, arguing that "no ' "implied threat" can exist unless the defendant has committed an act or spoken words directed at an individual or group of persons who can infer that the defendant has made a threat. In other words, the term "implied threat" necessarily connotes some form of communication. . . .'" This Court found that defendant's argument "meritless." (*People v. Martinez, supra,* 31 Cal.4th at p. 693.) This Court should do so again here.

Both the shank possessions and escape attempt were properly admitted under factor (b). This Court has repeatedly held that the possession of shanks[74] qualifies as a crime involving the implied threat of violence. (*People v. Lewis & Oliver, supra*, 39 Cal.4th at p. 1053; *People v. Combs, supra*, 34 Cal.4th at p. 860; *People v. Hughes* (2002) 27 Cal.4th 287, 382-383; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589.) Here, all of Romero's weapons were capable of slashing, stabbing, or cutting, and clearly involved the threat of violence. Thus, they were properly admitted.

This Court also has squarely held that an escape attempt in which no force was actually used is admissible if, on its facts, it presented a "threat" of violence. (*People v. Mason, supra*, 52 Cal.3d at pp. 954-956; accord *People*

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74. Penal Code section 4502 criminalizes the possession or manufacture of weapons while confined in a penal institution. Penal Code section 4574 criminalizes the possession of deadly weapon while in prison. (See *People v. Hughes, supra*, 27 Cal.4th at pp. 383-384.)

v. Lancaster, supra, 41 Cal.4th at p. 93, fn.15; see also *People v. Jackson, supra*, 13 Cal.4th at pp. 1260-1262 (conc. opn., Baxter, J.) ["Escape from a jail or prison is a desperate, risky act. It implies a reckless and defiant attitude of resistance to official restraint, which resistance carries the promise of violent consequences to those who interfere.") In *Mason,* the defendant, while awaiting trial, twice cut through the screen on his cell window, but each time, the cut was discovered before the defendant could actually escape. There was no evidence the defendant was armed or intended violent resistance, but the prosecution showed that the defendant's intended escape route, as well as any feasible alternative plan, would "almost certainly" have involved a confrontation with a guard. Under these circumstances, this Court found there were sufficient indicia of potential violence to allow consideration of the attempted escape under factor (b). (*Ibid.*)

Here, Romero's attempt did not just "almost certainly" involve a confrontation with the guard; Romero actually anticipated such a confrontation and even obtained a dangerous weapon to use in subduing the guard during his escape. Furthermore, the evidence showed his escape would have involved numerous confrontations with prison personnel and a clear potential for violence. Thus, the trial court properly admitted the escape attempts under factor (b).

Finally, Romero classifies his repeated assaults upon Tyreid Hodges as nothing more than "immature . . . pranks" (RAOB 375-376) and claims they did not involve the level of violence contemplated by Penal Code section 190.3, subd. (b). (RAOB 371-383.) Romero is mistaken. As correctly recognized by the trial court, Romero's conduct involved assaultive behavior toward Tyreid Hodges, in violation of Penal Code section 240. (51 RT 7501.) Romero also appears to acknowledge that his conduct constituted an assault under Penal Code section 240. (RAOB 374, citing *People v. Colantuono* (1994) 7 Cal.4th

206, 214.) He just complains it was not violent enough for factor (b) consideration. (RAOB 376-377.)

Although Romero may view assaults with hot feces and urine as childish pranks (or just "poop on a shoe"), the law views them as criminal acts of violence. (RAOB 377.) In *People v. Lewis & Oliver, supra*, this Court rejected a claim similar to Romero's. In that case, the defendant threw hot coffee and milk at a guard, but missed. This Court held that the trial court properly admitted the evidence because the defendant's act violated penal law (Pen. Code, § 240) and involved the implied threat of violence. (*People v. Lewis & Oliver, supra,* 39 Cal.4th at p. 1053; see also *People v. Pinholster* (1992) 1 Cal.4th 865, 961 [upholding admission of incident where defendant threw urine at a deputy's face].) Likewise, in the instant case, Romero threw hot feces, urine, and various toiletry items at Hodges, but he did not miss his target. And further, he expressly threatened to "take [Hodges] out" if it was up to him. (51 RT 7502-7511, 7514.) Romero's conduct was assaultive, criminal, and involved the threat of violence. Thus, it was properly admitted.

Even assuming error in admitting the challenged evidence, Romero cannot establish prejudice. (*People v. Combs, supra,* 34 Cal.4th at pp. 860-861; *People v. Tuilaepa, supra*, 4 Cal.4th at p. 591.) As previously discussed, the horrible circumstances of the murders, Romero's cavalier extinguishment of human lives, and his multiple episodes of violence against other prisoners (Medeiros, Jutras, Thibedeau) overshadowed the other evidence presented and established "a pattern of nonconforming and violent behavior." (*Id.* at p. 860.) The jury learned with great specificity how Romero hunted three young men like prey, killed them without any apparent remorse, and continued to satiate his appetite for violence while awaiting trial. The challenged evidence pales in comparison to the other evidence before the jury, and thus any error was harmless beyond a reasonable doubt

XIV.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN SEEKING ADMISSION OF ROMERO'S STATEMENTS CONCERNING THE THIBEDEAU ATTACK, NOR DID HE COMMIT MISCONDUCT IN ARGUING ROMERO'S FUTURE DANGEROUSNESS BASED UPON THE ATTACK AND THE ADMITTED STATEMENTS

Romero argues the prosecutor committed misconduct in seeking admission of Romero's statements concerning the Thibedeau attack. Specifically, Romero alleges the prosecutor: (1) knew the statement was not probative of Thibedeau's credibility or to prove Romero's identity as the attacker; (2) misled and deceived the trial court into improperly admitting the statement; and (3) later used the statement to argue Romero's future dangerousness, which he again claims is an improper subject for argument. (RAOB 422-431.) Romero's claim of error fails. First, he has waived this claim by failing to make an appropriate objection in the trial court. Second, his claim lacks merit because the statement directly supported Thibedeau's testimony and was highly probative of Thibedeau's credibility.

As previously discussed in the Statement of Facts, the prosecution presented evidence of Romero's attack on fellow inmate Olen Thibedeau. Thibedeau testified that in June 1994, he was transferred to Romero's cell block while awaiting trial on child molestation charges. At 9 p.m. on his first day in the cell block, Thibedeau left his cell to take a shower and have his half-hour of solo day room time. The rest of the inmates were housed in their cells. As Thibedeau walked past Romero's cell, Romero asked Thibedeau "real politely" to get him some hot water for coffee. Thinking Romero was friendly and not knowing Romero, Thibedeau retrieved the water. (50 RT 7427-7429, 7437-7444.)

After Thibedeau put the water through the slot in Romero's door, Romero called Thibedeau back and tried to hand him peanuts through a crack in the floor. When Thibedeau was close enough, Romero lunged at him with a makeshift spear, hitting him on the stomach. The spear, which was a little over four feet long, was made out of tightly rolled newspaper with a sharpened toothbrush handle at the end. The spear came apart when Romero lunged at Thibedeau and thus only caused a scratch on Thibedeau's stomach. Romero seemed angry that the spear came apart and because he had not drawn blood. Romero said, "Son of a bitch," and the inmate next door told Thibedeau, "We're going to get you wherever you go." Romero tossed the spear out of the cell, and Thibedeau then reported the incident and turned over the spear to deputies. (50 RT 7429-7432, 7446-7453, 7458-7460.)

On cross-examination, the defense extensively and aggressively questioned Thibedeau on his child molestation convictions and prior history of other violent or sexual offenses. (50 RT 7438-7444.) Although the prosecution had already established that Thibedeau was a child molester, the defense spent four full pages of testimony documenting Thibedeau's sordid history for the jury. (50 RT 7438-7442.) Through one line of questioning, the defense also suggested Thibedeau might be seeking favorable treatment as a result of his accusations against Romero. Thibedeau denied the accusations. (50 RT 7442-7444.)

After the defense sought to impeach Thibedeau's credibility with his prior convictions, the prosecution sought admission of a statement Romero made to his girlfriend Stephanie Stinson eight months after the Thibedeau attack. Romero told Stinson that if authorities housed him with a child molester, they should expect an assault. He described a method of attack which was nearly identical to his attack on Thibedeau. (51 RT 7517-7519, 7522-7523; Exh. 435-A.) Romero stated:

> I don't like violence. I try to avoid it. But when they stick a child molester next door to me - expect me not to do something, I'll be his friend, talk to him real nice, bring him close to the door, and then make a little spear about this long, about this skinny, that's real hard and won't bend. You put a pencil at the end of it and strips of wood. . . . Stick him in his neck.

(Exh. 435-A.)

In seeking admission of this statement, the prosecutor argued that given its striking similarity to Thibedeau's account of Romero's attack, Romero's statement to Stinson was "essentially an admission or confession." Given that defense counsel "made quite an effort to impugn Mr. Thibedeau's credibility," he argued the statement was probative of Thibedeau's credibility, i.e., "whether or not the testimony of that child molester can be relied upon." (50 RT 7467, 7469.) The defense argued the statement was "at best a threat of a future assault" and inadmissible under Penal Code 190.3. (50 RT 7468.) The defense also asserted that "the crux" of its questioning was to show that attacks on child molesters are common in the state penitentiary and it was "not necessarily attacking Mr. Thibedeau's credibility." (50 RT 7477-7478.)

In admitting the taped conversation, the trial court ruled that the defense impeached Thibedeau with his prior convictions, his credibility was attacked by the defense based upon the "numerous" questions asked during cross-examination, and the prosecution could rehabilitate Thibedeau with the taped conversation. (51 RT 7476-7478.) The court noted that although the defense may choose not to argue Thibedeau's credibility in closing argument, their cross-examination of him allowed the "logical inference" that "because he is a child molester you cannot believe him." (51 RT 7478.) The court stated:

> And in that regard, it appears to me that because Mr. Romero's statement during the taped conversation so closely resembles the facts and circumstances underlying the attack on Mr. Thibedeau that it amounts to either an admission or a confession, but that would be up to

> the jury to determine, that is whether it is an admission or confession, and if so, what weight, if any to give to it.

(51 RT 7477.)

On appeal, Romero does not claim the trial court erred in admitting the evidence; rather, he makes the unfounded claim that the prosecutor deceived the court by giving false reasons for its admission. Romero alleges the prosecutor did not need or seek the statement in order to rehabilitate Thibedeau, but instead sought its admission so he could argue it as evidence of future dangerousness in closing argument, which Romero again claims is an improper subject of argument. (RAOB 426-431.)

Romero has waived this claim of error by failing to raise a misconduct claim in the trial court or otherwise object to the prosecutor's use of this evidence at closing argument. (*People v. Zambrano, supra,* 41 Cal.4th at p. 1082; *People v. Davenport* (1995) 11 Cal.4th 1171, 1209, 1223.) In any event, his claim is without merit. In order to establish a federal constitutional violation based on conduct of the prosecution, Romero must prove the conduct was so egregious so as to infect the trial with such unfairness as to make the resulting conviction a denial of due process. (*People v. Jones* (1997) 15 Cal.4th 119, 187.) Misconduct implies the use of deception or reprehensible methods to persuade the court or jury. (*People v. Padilla* (1995) 11 Cal.4th 891, 939.) There was no misconduct in this case, much less misconduct amounting to a federal constitutional violation.

Although he now attempts to minimize his counsel's vigorous cross-examination of Thibedeau, the transcript reads quite clearly. While the prosecution had already established Thibedeau's status as a convicted child molester, the defense chose to spend four full transcript pages aggressively questioning Thibedeau on his immoral past. (50 RT 7437-7442.) If all Romero wanted to do was demonstrate that child molesters receive unfavorable treatment while incarcerated, he merely needed to ask Thibedeau the four or

five questions defense counsel asked at the tail end of cross-examination, e.g., "Mr. Thibedeau, persons who are in prison for child molesting they are treated as if they are at the lower end of the pecking order, aren't they, by the other inmates?" and "Physical harm can come to you by the other inmates?" (50 RT 7443-7444.) Instead, he spent twenty-some questions impeaching Thibedeau's credibility based upon his status as a child molester. (50 RT 7438-7442.)

Accordingly, based upon the vigorous cross-examination by defense counsel, the prosecution had every reason to seek rehabilitation of their only eyewitness to the attack. In the taped conversation, although Romero did not mention Thibedeau by name, his description of the attack was nearly identical to Thibedeau's testimony, and thus, it could be considered an admission or confession of Thibedeau's allegations which directly supported his credibility. (Evid. Code, § 1101, subd. (c) [evidence of specific instances of conduct admissible to support or attack credibility of a witness], § 210 [relevant evidence includes that relating to the credibility of a witness].) Thus, the prosecution's argument to the trial court in this regard was understandable, reasonable, and supported by the rules of evidence.

In addition to the prosecutor's argument seeking admission of the taped conversation, the trial court heard from defense counsel, whose argument characterized the evidence and questioning much like Romero does on appeal. After hearing from both sides, the trial court took the matter under submission, and in an appropriate exercise of its discretion, admitted the evidence over defense objection. (*People v. Guerra, supra*, 37 Cal.4th at p. 1113, citing *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10 [on appellate review, a trial court's ruling on the admissibility of evidence will not be disturbed unless the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice].) The ruling was entirely reasonable given the defense's impeachment of Thibedeau's credibility,

the fact that Thibedeau was the prosecution's only eyewitness to the attack, and the lack of undue prejudice, in light of the other evidence presented at trial. (Evid. Code, § 352). The trial court was not misled by the prosecutor, as insinuated by Romero. Additionally, the trial court instructed the jury on how it was to properly consider Romero's admission to Stinson as evidence of the criminal act alleged. (9 CT 1982-1983, 2000; 54 RT 8061.)

In closing argument, the prosecutor asked the jury to infer from Romero's numerous crimes, including his attack on Thibedeau and the admitted statement, that he was inherently dangerous, enjoyed violence, and was unlikely to change if incarcerated for the rest of his natural life. (54 RT 8026-8030.) As discussed in Respondent's Argument XVI, *infra,* a prosecutor may argue that a defendant will be dangerous in the future based upon evidence of his prior violent conduct. (*People v. Zambrano, supra*, 41 Cal.4th at p. 1179; *People v. Michaels, surpa,* 28 Cal.4th at pp. 540–541.) Because Romero's statement was properly admitted as evidence of his attack on Thibedeau, the prosecutor could argue on the basis of this evidence that Romero deserved the death penalty under the statutory scheme. (See *People v. Millwee, supra,* 18 Cal.4th at p. 153; *People v. Ray, supra,* 13 Cal.4th at p. 353; *People v. Pinholster, supra,* 1 Cal.4th at pp. 963-964.) In sum, the prosecutor's argument to the court in admitting the evidence and argument to the jury based on this evidence did not amount to misconduct.

Regardless, the admission and argument of this evidence was harmless under even the most exacting standard of review. (*People v. Prince, supra*, 40 Cal.4th at p. 1299; *People v. Gonzalez* (2006) 38 Cal.4th 932, 960-961.) It is virtually inconceivable that Romero's admission to his girlfriend somehow tipped the scales in favor of the death penalty. Romero's jury was confronted by his active participation in a brutal crime spree, continuing violence in pretrial confinement, escape attempt, and utter disregard for human life. The evidence

showed Romero hunted his victims like prey, lived off of the proceeds of his crimes, and thoroughly enjoyed killing or harming people. It was Romero who asked a wounded and dying Aragon how it felt to be shot, and immediately thereafter used Aragon's money to enjoy a meal at Coco's restaurant. (35 RT 5468-5471; 39 RT 5988-6003.)

Appellants' mitigation evidence simply could not compare with the strong evidence in aggravation. While appellants presented evidence of childhood neglect and abuse early in their lives, the same evidence also showed: they had the benefit of loving grandparents and other extended family members even during the worst of times; they had the influence of a devoted stepfather and stable family life by the time they were five (Self) and eight (Romero) years old; their mother taught them right from wrong and the value of manners and a good education; they were intelligent and did well in school when they made the effort; and their brothers raised in the same household achieved success in the military and rejected the criminal path chosen by appellants.

Clearly, given the state of the evidence, there is no reasonable possibility that the jury would have returned a more favorable sentence had the statement not been admitted.

XV.

THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF APPELLANTS' MOTHER'S CHILDHOOD HISTORY OF INCEST

Appellants claim the trial court committed prejudicial error at the penalty phase by excluding alleged mitigating evidence that their mother was raped by her brothers during her childhood. Appellants ask this Court to reverse the death judgment, arguing that exclusion of this evidence deprived them of their rights to due process, presentation of a defense, and to a reliable determination

of penalty under the Sixth, Eighth, and Fourteenth Amendments.[75] (RAOB 384-407; SAOB 492.) The trial court properly excluded this evidence from the penalty phase. Maria Self's childhood history of incest was irrelevant to the penalty determination and improper mitigation evidence. In any event, any error in excluding the proferred evidence was harmless.

During Maria Self's testimony at the penalty phase, appellants sought to elicit evidence that Maria's brothers Joe and Ernie raped her on multiple occasions between her six and thirteenth years. The prosecution objected to the evidence as irrelevant and more prejudicial than probative under Evidence Code section 352. Appellants argued the evidence was relevant to: (1) give the jury a "better understanding of who she is and why she is doing certain things to her own sons"; (2) support her credibility and rebut an anticipated prosecutorial argument that the abuse and neglect to which she testified was exaggerated; and (3) allow the jury to know Maria left her children in the care of uncles she knew to be violent. (52 RT 7730-7735.)

The trial court ruled the evidence of the childhood rapes was not relevant or a proper matter for mitigation. The trial court reasoned that the reasons

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75. Appellants waived their federal and state constitutional claims pursuant to the United States and California Constitutions because they failed to raise them at trial. (*People v. Sanders* (1995) 11 Cal.4th at 475, 510, fn. 3; *People v. Davis* (1995) 10 Cal.4th 463, 501, fn. 1; *People v. Price* (1991) 1 Cal.4th 324, 430 ["Defendant may not challenge on appeal the admission of evidence on grounds not urged in the trial court"]; *People v. Ashmus* (1991) 54 Cal.3d 932, 972 [the general rule is that "questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal"].) And, "[their] assertion that the trial court's ruling would not have been different had defense counsel expressly cited the constitutional provisions is merely speculative." (*People v. Sanders, supra*, 11 Cal.4th at p. 51, fn. 3; RAOB 398-399, fn. 238.) In any event, their constitutional claims are premised on the assertion that the trial court erred in excluding the specified evidence and that the error was prejudicial. For the reasons detailed herein, there was no error. Hence the constitutional claims also fail.

behind Maria's treatment of her sons was not relevant to the jury's penalty determination, and further, the evidence tended to invoke sympathy for Maria and not for appellants. The trial court believed the evidence was "highly prejudicial," would confuse and mislead the jury, and excluded it under Evidence Code section 352. However, the trial court ruled that Maria could testify to her personal observations of interactions between appellants and her brothers, as such evidence would be relevant to show whether appellants were or were not impacted by their uncles. Finally, the trial court offered to reconsider its ruling if the prosecution opened the door on cross-examination. (52 RT 7735-7736.)

Maria testified she was afraid of her brothers, and her sons were exposed to Joe and Ernie on several occasions during their childhood. She testified that Joe and Ernie told her they threatened her sons, and after that, she never let them see each other again. (52 RT 7730, 7736-7739.)

At the penalty phase, a defendant must be permitted to offer any relevant potentially mitigating evidence, i.e., evidence relevant to the circumstances of the offense or the defendant's character and record. (Pen Code, § 190.3; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-8 [106 S.Ct. 1669, 90 L.Ed.2d 1]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112-116 [102 S.Ct. 869, 71 L.Ed.2d 1]; *People v. Marlow* (2004) 34 Cal.4th 131, 152; *In re Gay* (1998) 19 Cal.4th 771, 814; *People v. Mickey, supra,* 54 Cal.3d at p. 612.) However, the rule allowing all relevant mitigating evidence has not " abrogated the California Evidence Code." (*People v. Phillips* (2000) 22 Cal.4th 226, 238; *People v. Edwards, supra,* 54 Cal.3d at p. 787.) "'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.'" (*People v. Prince, supra,* 40 Cal.4th at p. 1179; *People v. Phillips, supra*, 22 Cal.4th at p. 238, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834.)

"The trial court determines relevancy of mitigating evidence and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury." (*People v. Guerra, supra,* 37 Cal.4th at p. 1067; *People v. Box, supra,* 23 Cal.4th at p. 1153; *People v. Karis* (1988) 46 Cal.3d 612, 641-642, fn. 21.) On appellate review, a trial court's ruling on the admissibility of evidence will not be disturbed unless the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. *(People v. Guerra, supra*, 37 Cal.4th at p. 1113, citing *People v. Rodriguez, supra,* 20 Cal.4th 1, 9- 10.)

In general, while a defendant may offer evidence of his upbringing or relationships with family members, sympathy for a defendant's family members is not a proper matter in mitigation, as it does not relate to the circumstances of the crime or background of the accused. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 32; *People v. Bemore* (2000) 22 Cal.4th 809, 856; *People v. Ochoa* (1998) 19 Cal.4th 353, 456.) Likewise, "the background of the *defendant's family* is of no consequence in and of itself. That is because under both California law [citation] and the United States Constitution [citation], the determination of punishment in a capital case turns on the defendant's personal moral culpability. It is the '*defendant's* character or record' that 'the sentencer . . . [may] not be precluded from considering'--not *his family's*. [Citations.]" (*People v. Rowland* (2002) 4 Cal.4th 238, 279, original italics.)

Appellants claim they should have been permitted to introduce evidence of their mother's rape by her brothers because it was probative of her credibility (i.e., it would explain her abusiveness toward appellants and make her accounts more believable), the extent of her neglect as a parent (i.e., the neglectful act of leaving her children with her abusive brothers), and the nature of the family system in which appellants were raised. (RAOB 393-399.) Put another way,

appellants wanted the jury to consider an improper and irrelevant matter in mitigation, i.e., their mother's background and character in an attempt to create sympathy for her. Admitting the evidence would have confused the issues and misled the jury as to whose character and record they were considering - the appellants' or their family's. Accordingly, the trial court's ruling was correct.

This Court's opinion in *People v. Holloway* (2004) 33 Cal.4th 96, 148-149, further supports the trial court's ruling. In that case, the defendant's mother, Dorothea Holloway, testified she left her parents' family when she was 17 years old to go with the defendant's father, Walter Holloway, to Oakland, where defendant was born. Defense sought to ask Dorothea about her parents' reaction to her "going with Walter Holloway," but the prosecution objected on hearsay grounds. Defense counsel represented that Dorothea would testify her parents had disowned her, leaving her to raise her children without any help from an extended family while Walter was "out floundering." Counsel argued the evidence, offered for the non-hearsay purpose of showing Dorothea's knowledge of her own situation, would illuminate defendant's family life as well as his mother's character. The trial court observed that the evidence would be viewed as an implied opinion of Dorothea's parents on Walter's character and excluded the offered testimony on the grounds that the "probative value of [defense counsel's articulated] non-hearsay purpose, if there is such a value, ... is outweighed by the substantial danger of prejudice that is going to be misused by the jury." (*Id.* at 148.)

Reviewing the trial court's ruling for an abuse of discretion, this Court found no error:

> Though Walter Holloway's deficiencies as a father and role model for defendant were relevant subjects for proof in mitigation, Walter Holloway's character itself was not at issue. The defense penalty case, which rested heavily on proof of the deleterious effects of Walter's behavior on defendant, created a substantial danger the jury's attention and deliberations would incorrectly focus on Walter's character, a danger

> the court sought to reduce by excluding what could be taken as opinion on that subject. On the probative value side of the scale, the reaction of defendant's maternal grandparents to their daughter's relationship with Walter was of only indirect and remote relevance to defendant's character and experience.
>
> Nor was the proposed testimony needed in order to illuminate the family environment of defendant's childhood, for Dorothea or other members of defendant's nuclear family could have testified that she received no emotional or financial support from her parents in raising her family, without elaborating on the cause of this circumstance. The court did not abuse its discretion, much less deprive defendant of his Eighth Amendment right to present evidence in mitigation [citation], by excluding this marginally relevant testimony because of its potential for prejudice and distraction.

(*People v. Holloway, supra*, 33 Cal.4th at pp. 148-149.)

Similarly, in the instant case, Maria Self's deficiencies as a mother and role model for appellants were relevant subjects for proof in mitigation, but Maria's own character was not at issue. In other words, while Maria's drug use, psychological problems, and abusiveness were relevant to show the conditions under which appellants lived as children, the root causes of Maria's deficiencies (i.e., her own childhood trauma or background) were irrelevant to the jury's consideration of appellants' character and background. As recognized by this Court in *Holloway*, the admission of this type of evidence creates a substantial danger the jury's attention and deliberations will incorrectly focus on the family's character and not the defendant's character.

Further, just like in *Holloway*, Maria's proposed testimony was not necessary to illuminate the family environment of appellants' childhood, as Maria testified she was afraid of her brothers, her brothers threatened her children, and she did not want her brothers to interact with her sons. She also testified to her psychological issues. (52 RT 7730, 7736-7739, 7703, 7711, 7751.) Other members of appellants' family testified that Maria's family was violent and that Maria had psychological problems. (52 RT 7788, 7843-7845;

53 RT 7899-7904.) And there was vast amounts of testimony recounting Maria's neglectful parenting. There was no need to elaborate on the bases for her psychological problems or neglect of her children, considering the substantial danger of confusing the issues, misleading the jury, and injecting inappropriate sympathy for the defendant's family.

Appellants argue that the "history of family members" is a long-accepted matter of mitigation, and cite to several cases in support of this notion. (RAOB 395-397.) However, most of the cases cited by appellants do not involve an actual holding or finding that such evidence is admissible; they are simply cases where such evidence was admitted at trial without objection or with no review on appeal. (RAOB 395-397, citing *People v. Michaels* (2002) 28 Cal.4th 486, 506; *People v. Rowland, supra,* 4 Cal.4th at p. 255; *People v. Wharton* (1991) 53 Cal.3d 522, 545.) The fact that such evidence has been admitted in other cases does not make the trial court's ruling in appellants' case incorrect or negate the clear precedent supporting it. (See *People v. Holloway, supra*, 33 Cal.4th at pp. 148-149; *People v. Rowland, supra*, 4 Cal.4th at p. 279.) Further, many of the cases involve evidence of the defendant's parents' *own* alcohol abuse, which is obviously relevant to the living conditions of the defendants during their formative years. (RAOB 395-396, citing *Wiggins v. Smith* (2003) 539 U.S. 510 [123 S.Ct. 2527, 156 L.Ed.2d 471; *People v. Michaels, supra,* 28 Cal.4th at p. 506.) In contrast, the parents' upbringing with their own alcoholic parents or siblings, or other childhood trauma, would generally not be relevant.

In sum, the proferred evidence of Maria's own childhood trauma was not relevant, created a substantial danger of confusing the issues, and would have injected inappropriate sympathy for the defendant's family. The trial court properly excluded the evidence.

Assuming arguendo the trial court erred in its evidentiary ruling, there was no reasonable possibility that the jury would have returned a different

sentence had the evidence been admitted. (*People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 1058; *People v. Jones, supra*, 29 Cal.4th at p. 1264, fn. 11; *People v. Jackson, supra,* 13 Cal.4th at p. 1164.) As previously explained, the jury received ample information about appellants' dysfunctional childhood, from Maria and several other family members. Maria and other family members explained in detail the extent of Maria's parental neglect and abuse, and the jury knew Maria was afraid of her brothers but still chose to leave appellants in their care. Furthermore, Maria's accounts of her parental neglect were supported mostly by the consistent accounts of other family members and appellants' brother Anthony. Her own assertions about her own childhood trauma would not have made her testimony any more credible. In light of the evidence presented to the jury and the weakness of any probative value of the proferred evidence, there is no reasonable possibility that the jury would have returned a different sentence even had the trial court ruled in appellants' favor. Therefore, any error was harmless.

XVI.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN ARGUING APPELLANTS' POTENTIAL FOR FUTURE VIOLENT CONDUCT

Appellants allege the prosecutor committed misconduct by arguing appellants' future dangerousness during closing argument, in violation of their state and federal rights to due process and a reliable penalty determination. (RAOB 408-421; SAOB 492.) Appellants contend that because future dangerousness is not listed as a statutory aggravating circumstance under Penal Code section 190.3, the prosecutor erred when he used evidence of appellants'

prior violent conduct to argue that they had the potential for future violent conduct. (RAOB 410-417; SAOB 492.) Appellants waived their claim of error, and in any event, no misconduct occurred. This Court has consistently permitted prosecutorial argument regarding a defendant's potential for future violence when, as here, it is based on evidence of the defendant's past conduct.

During his penalty phase argument, the prosecutor recounted appellants' past criminal conduct, including their violence in jail and attempts to escape. The prosecutor argued Romero's past conduct showed he is "not done hurting people," and that by being given life without parole, Romero would have constant contact with prison personnel and inmates as his potential victims. (54 RT 8026-8030.) Without objection, the prosecutor stated:

> Look at how he acted in the jail when he had this trial pending and he had something to lose.
>
> How is he going to act when he has nothing left to lose, when he has got LWOP and they can't do anything else to him? It's an American Express card for violence. . . .
>
> And what we know about him is that he likes to hurt people. The best predictor of the future is the past. He has 30, 40, 50 years of victims ahead of him if he has an LWOP . . . He will hurt people in the future. . . .
>
> He has no conscience. He can't be fixed. You can't transplant a conscience into somebody. If there was going to be a change in him, you would think that it would have occurred after he got arrested and realized, "Oh my gosh." But his behavior has continued, and there is every reason to believe it will continue.

(54 RT 8028-8029.) The prosecutor made essentially the same remarks to Self's jury, also without objection. (54 RT 8112-8116.)

First, by failing to object at trial, appellants waived their claim of error regarding the prosecutor's argument on future dangerousness. (*People v.*

Zambrano, supra, 41 Cal.4th at p. 1082; *People v. Davenport, supra,* 11 Cal.4th 1171, 1223.) Second, similar claims have been considered and rejected by this Court. Open, far-ranging, and colorful argument at the penalty phase is permissible as long as it is based upon admissible evidence or inferences drawn from that evidence. (See *People v. Zambrano, supra,* 41 Cal.4th 1082 at p. 1179; *People v. Bell* (1989) 49 Cal.3d 502, 549; *People v. Davenport, supra,* 41 Cal.3d at p. 247.) Although "the prosecutor may not present expert evidence of future dangerousness as an aggravating factor, . . . he may argue from the defendant's past conduct, as indicated in the record, that the defendant will be a danger in prison." (*People v. Zambrano, supra,* 41 Cal.4th at p. 1179; *People v. Boyette, supra,* 29 Cal.4th at p. 381 [also noting that future dangerousness is not barred by the United States Constitution (*Barefoot v. Estelle* (1983) 463 U.S. 880, 896-903 [103 S.Ct. 3383, 77 L.Ed.2d 1090]) and therefore summarily rejecting defendant's claims that the prosecutor's argument denied him due process or his right to a reliable penalty determination under the Eighth Amendment to the United States Constitution]; *People v. Michaels, supra,* 28 Cal.4th 486, 540–541.)

In *People v. Michaels, supra*, 28 Cal.4th 486, 540-541, this Court, in rejecting the exact contention presented in the instant case, stated:

> Defendant contends that because future dangerousness is not a listed aggravating factor, the prosecutor can argue that point only to rebut defense argument or evidence. We disagree. This court has "repeatedly declined to find error or misconduct where argument concerning a defendant's future dangerousness in custody is based on evidence of his past violent crimes admitted under one of the specific aggravating categories of section 190.3." (*People v. Ray* (1996) 13 Cal.4th 313, 353.) Likewise, in *People v. Champion, supra,* 9 Cal.4th at p. 879 a case in which the defendant introduced no penalty phase evidence, we said: "Although we have held that at the penalty phase of a capital case the prosecutor may not introduce expert testimony forecasting that, if sentenced to life without the possibility of parole, a defendant will commit violent acts in prison (*People v. Murtishaw* (1981) 29 Cal. 3d 733, 779), we have never held that in closing argument a prosecutor may

> not comment on the possibility that if the defendant is not executed he or she will remain a danger to others. Rather, we have concluded that the prosecutor may make such comments when they are supported by the evidence.

Despite the clear rejection of their position in *Michaels*, appellants argue that this Court "never actually addressed the contention that future dangerousness is not an authorized circumstance in aggravation." (RAOB 411; SAOB 492.) This is untrue. The Court's language clearly addressed this contention. *Michaels* explicitly held that where there is evidence of prior violent crimes (i.e., properly admitted evidence of an authorized circumstance in aggravation under Penal Code section 190.3), a prosecutor may argue that this evidence shows the defendant will remain a danger to others if not given the death penalty. In other words, *Michaels* stands for the unsurprising proposition that the prosecution may make reasonable inferences from properly admitted evidence to argue for imposition of the death penalty.

Here, there was ample evidence of appellants' violent past, including shank possessions, assaults on fellow inmates, and escape attempts while incarcerated awaiting trial, and all of this evidence was properly admitted as aggravating circumstances under Penal Code section 190.3. The prosecutor asked the jury to infer from appellants' numerous crimes of violence that they were inherently dangerous and unlikely to change if incarcerated for the rest of their natural lives. In other words, the prosecutor clearly was arguing on the basis of properly admitted aggravating evidence that appellants deserved the death penalty under the statutory scheme. (See *People v. Millwee* (1998) 18 Cal.4th 96, 153; *People v. Ray, supra,* 13 Cal.4th at p. 353; *People v. Pinholster, supra,* 1 Cal.4th at p. 865.) Thus, the prosecutor's argument regarding appellants' future dangerousness, based on this history of violence

and properly admitted evidence in aggravation, was not misconduct. (See *People v. Welch* (1999) 20 Cal.4th 701, 761.)

XVII.

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURIES WITH APPELLANTS' PROPOSED PENALTY PHASE INSTRUCTIONS

Appellants claim the trial court erred when it failed to instruct the jury with special pinpoint instructions that would have told the jury: (1) it need not unanimously agree on any matter offered in mitigation (RAOB 432-438); (2) victim impact evidence should be viewed with caution (RAOB 287-300, 596; SAOB 383-392, 492); and (3) an accomplice's (i.e., Munoz's) sentence could be a basis for leniency (RAOB 439-451; SAOB 492). Appellants assert that these alleged errors were prejudicial and violated their state and federal constitutional rights. (RAOB 287-300, 432-451; SAOB 492.) Appellants are incorrect. First, while Self requested and the trial court read his jury a non-unanimity instruction on mitigation, Romero failed to request a non-unanimity instruction on mitigation evidence and thus has waived any claim in that regard; further, such an instruction was unnecessary. Second, the trial court properly declined the other proposed instructions as either incorrect statements of the law, argumentative, or duplicative.

While both appellants requested pinpoint instructions on the use of victim impact evidence and Munoz's sentence as a basis for leniency (9 CT 2016, 2020, 2086; 53 RT 7975-7979, 7983-7988), Romero never requested a non-unanimity instruction for mitigation evidence.[76] Self requested such an

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76. Although Romero requested an instruction reiterating the jury's duty to "individually decide the case," Romero never specifically requested a non-unanimity instruction with regard to mitigation evidence. (9 CT 2015; 53 RT 7974, 7994-7995.) To the extent Romero argues the trial court erred in failing

instruction, and it was read by the trial court to his jury. (9 CT 1991, 2059; 53 RT 7994-7995; 54 RT 8065-8066, 8152.) The trial court refused to give the requested limiting instruction on victim impact evidence because it was an inaccurate statement of the law, misleading, argumentative, and otherwise duplicated other instructions. (53 RT 7975-7979.) The trial court refused to give the requested pinpoint instruction on the use of accomplice testimony as a basis for leniency because it was an incorrect statement of the law and an improper subject for the jury to consider in its deliberations. The court further instructed the defense not to make such an argument during closing statements. (53 RT 7983-7988.)

This Court has explained:

> [T]he standard CALJIC penalty phase instructions "are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards." [Citation.] Moreover, the general rule is that a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative. [Citation.] Instructions should also be refused if they might confuse the jury. [Citation.]

(*People v. Gurule, supra,* 28 Cal.4th at p. 557; accord *People v. Cook* (2007) 40 Cal.4th 1334, 1362.) "Although instructions pinpointing the theory of the defense might be appropriate, a defendant is not entitled to instructions that simply recite facts favorable to him. [Citation.]" (*People v. Gutierrez, supra,* 28 Cal.4th at p. 1083, original italics omitted.)

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to give his proposed "Individual Juror Determination" instruction, this argument must also fail. (RAOB 434.) The "Individual Juror Determination" instruction crafted by Romero simply duplicated the language already given to the jury in CALJIC No. 17.40 [Individual Opinion Required - Duty to Deliberate], which states, "The People and the defendant are entitled to the individual opinion of each juror," and "Each of you must decide the case for yourself." (9 CT 2008; 54 RT 8070.) Because Romero's proposed instruction was duplicative of the standard instructions, the trial court properly refused the proposed instruction. (*People v. Gurule* (2002) 28 Cal.4th 557, 659.)

A. Romero Never Requested A Non-unanimity Instruction For Mitigating Factors, And In Any Event, No Such Instruction Was Necessary

This Court should reject Romero's claim that the trial court erred when it failed to instruct the jury with a non-unanimity instruction on mitigating evidence. (RAOB 432-438.) Romero argues that giving a non-unanimity instruction with regard to unadjudicated offenses (9 CT 1991; 54 RT 8065-8066) but not giving a non-unanimity instruction with regard to mitigation evidence was "unfairly one-sided," unconstitutionally implied a need for unanimity on mitigation, and violated his due process rights, right to trial by a properly instructed jury, and equal protection of the laws. (RAOB 432-438.) First and foremost, Romero has forfeited this claim by failing to request such an instruction from the trial court. (*People v. Marks* (2003) 31 Cal.4th 197, 236-237 [when a defendant believes the standard jury instructions are deficient, he must request amplification; otherwise, he forfeits his claim on appeal *People v. Arias, supra,* 13 Cal.4th 92, 1]; *People v. Coddington, supra,* 23 Cal.4th 529, 584; 70-171.) While Self requested a non-unanimity mitigation instruction which was ultimately read to his jury, Romero never requested one and thus he may not now complain on appeal. (9 CT 1991, 2059; 53 RT 7994-7995; 54 RT 8065-8066, 8152.)

Second, the trial court was not required to instruct on non-unanimity with regard to mitigation evidence. This Court rejected a challenge similar to Romero's in *People v. Breaux* (1991) 1 Cal.4th 281, 314-315 (*Breaux*). In that case, the defendant claimed the trial court improperly rejected his proposed jury instruction that unanimity was not required for consideration of mitigating evidence. (*Breaux, supra*, 1 Cal.4th at p. 314.) This Court disagreed, explaining:

> There is no indication that the jury was misled in any respect. There was nothing in the instructions to limit the consideration of mitigating evidence and nothing to suggest that any particular number of jurors was

> required to find a mitigating circumstance. The only requirement of unanimity was for the verdict itself. [Citation .]
>
> The instructions that were given in this case unmistakably told the jury that each member must *individually* decide each question involved in the penalty decision. They were told to consider *all* the evidence, specifically including any circumstance in mitigation offered by defendant. We find no error in the court's refusal to give defendant's proposed instruction.

(*Id.* at p. 315, italics in original.) This Court has repeatedly affirmed its decision in *Breaux* and should continue to do so here. (*People v. Cook, supra,* 40 Cal.4th at p. 1365; *People v. Smith* (2003) 30 Cal.4th 581, 639.)

Here, as in *Breaux*, there was nothing in the given instructions that limited the jurors' consideration of mitigating evidence, misled the jurors, or suggested that "any particular number of jurors was required to find a mitigating circumstance." (See *Breaux, supra*, 1 Cal. 4th at p. 315.) Similar to the instructions in *Breaux*, the jurors were instructed with CALJIC No. 8.88 (1989 rev.), which told them that "[i]n order to make a determination as to the penalty, all twelve jurors must agree," but in order "[t]o return a judgment of death, *each* of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (9 CT 2011-2012, italics added; 54 RT 8072-8073.) Further, the trial court read the jury several defense-requested instructions regarding mitigation that further clarified the role of mitigating evidence, such as, "*[a] juror* may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is" and "*[a] juror* is permitted to use mercy, sympathy and/or sentiment in deciding what weight to give each mitigating factor." (9 CT 1993-1998; 54 RT 8066-8067.) These instructions reiterated that it was up to each individual juror to decide the weight and relevancy of mitigating factors. Accordingly, the jury

was adequately instructed on its duties and the trial court was not required to give a *sua sponte* non-unanimity instruction on mitigation evidence.

B. The Trial Court Properly Refused Appellants' Cautionary And Limiting Instruction Regarding Victim Impact Evidence

The trial court gave the jury standard penalty phase jury instructions, including CALJIC No. 8.84 [Penalty Trial-Introductory], CALJIC No. 8.84.1 [Duty of Jury-Penalty Proceeding], CALJIC No. 8.85 [Penalty Trial-Factors for Consideration], and CALJIC No. 8.88 [Penalty Trial-Concluding Instruction]. (9 CT 1964-1965, 1989-1990, 2011-2012, 2033-2034, 2057-2058, 2081-2082; 54 RT 8052-8053, 8063-8065, 8071-8073, 8136, 8145-8147, 8158-8160.) The trial court declined appellants' requests to give the jury the following special instruction:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impost the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(9 CT 2016, 2086; 53 RT 7975-7979.) The trial court rejected the proposed instruction as argumentative, misleading, an inaccurate statement of the law, and otherwise covered by other instructions. (53 RT 7979.)

Appellants contend the trial court had a duty to provide a limiting instruction that explained to the jurors how they were to consider the victim-impact evidence and cautioned them not to base their decision on emotion. Appellants contend that the failure to provide such an instruction prejudicially violated their rights to a properly-instructed jury, due process of

law, equal protection, and a fair and reliable penalty determination. (RAOB 287-300; SAOB 383-392.) Appellants' contentions are without merit.

As this Court made clear, "the standard CALJIC penalty phase instructions 'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.'" (*People v. Gurule, supra,* 28 Cal.4th at p. 659.) In *People v. Ashmus, supra,* 54 Cal.3d 932, 993, fn. 20, this Court held that the trial court has no duty to give an instruction on the limited use of victim impact evidence. In that case, the defendant argued the trial court erred in failing to instruct the jury that in determining the penalty they could not consider "the victim's personal characteristics, the emotional impact of the crime on the victim's family, and the opinions of family members about the crime and the criminal -- or more specifically, that they should not take into account any evidence or argument bearing on these topics." (*Id.* at pp. 991-992, fn. 20.) This Court rejected the claim because there was no requirement under either state or federal law to give such an instruction, and further, the trial court instructed the jury that "the listed aggravating circumstances -- which did not include the foregoing matters -- were exclusive." (*Ibid.*)

Later, in *People v. Ochoa, supra,* 26 Cal.4th 398, this Court refused to find error in the trial court's refusal to give the defendant's special instruction concerning the evaluation of the evidence of harm caused by his crimes. The proposed instruction in *Ochoa,* which was essentially identical to appellants' proposed instruction in this case, read as follows:

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

> evidence and argument on emotion though relevant subjects may provide legitimate reasons for the Jury to show mercy to the Defendant.

(*People v. Ochoa, supra*, 26 Cal.4th at p. 455.) This Court concluded that the trial court properly refused the instruction, since "[t]he proposed instruction would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1[.]" (*Ibid.*; see also *People v. Harris, supra,* 37 Cal.4th 310, 358-359 [rejecting same proposed instruction as confusing].) And, in *People v. Brown* (2003) 31 Cal.4th 518, 573, this Court rejected the claim that the trial court erred in not instructing the jury on how to consider victim impact evidence, where, as here, the court instructed the jury with standard CALJIC No. 8.85. Finally, this Court in *People v. Harris, supra,* 37 Cal.4th 310, 358-359, labeled an instruction essentially the same as appellants' proposed instruction "confusing" and "unclear."

Given the foregoing case law, appellants' claims must fail. First, as stated in *Ashmus*, there is no state or federal requirement to give a limiting instruction on victim impact evidence. Second, given that appellants' requested instruction was nearly identical to the one this Court rejected in *Ochoa* (9 CT 2016, 2086), the trial court properly denied it. Third, to the extent appellants contend that the trial court should have fashioned its own instruction cautioning jurors not to base their decision on emotion and instructing them on how to consider victim impact evidence, their claim fails for the same reason, i.e., CALJIC Nos. 8.84.1 and 8.85 adequately addressed the matter. CALJIC No. 8.85 informs the jurors as to the appropriate aggravating factors they may consider in their deliberations, and CALJIC No. 8.84.1 states, in pertinent part: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feeling." (9 CT 1965, 1989-1990, 2034, 2057-2058; 54 RT 8053, 8063-8065, 8136, 8145-8147.)

In sum, a long line of precedent dictates rejection of appellants' claim, and they have provided no reason for this Court to revisit the issue. The juries in the instant case were properly instructed.

C. The Trial Court Properly Refused Appellants' Proposed Instruction Regarding The Use Of An Accomplice's Sentence As A Basis For Leniency, And Properly Restricted Argument On This Subject

Appellants claim that the trial court erred when it refused their proposed instruction on the use of accomplice testimony as a basis for leniency and then restricted argument on this subject. (RAOB 439-451; SAOB 492.) The trial court properly found that appellants' proposed instruction was an incorrect statement of the law and an improper subject for the jury to consider in its deliberations. Likewise, the trial court properly ordered the defense not to make such an argument during closing statements. (8 CT 1944C-1944D; 9 CT 2020; 53 RT 7983-7988.)

Appellants requested that the jury be instructed with the following: "You may consider the fact that defendant's accomplice[s] received a more lenient sentence as a mitigating factor." (8 CT 1944C-1944D; 9 CT 2020.) Time and time again, this Court has found the relative culpability of accomplices to be an improper subject for the jury to consider in its deliberations. Indeed, this Court has "repeatedly rejected" appellants' claim and the authorities upon which it rests. (*People v. Bemore, supra,* 22 Cal.4th at p. 809; *People v. Hines* (1997) 15 Cal.4th 997, 1068; *People v. Jackson, supra,* 13 Cal.4th at p. 1164; *People v. Rodrigues, supra,* 8 Cal.4th 1060, 1188-1189; *People v. Mincey* (1992) 2 Cal.4th 408, 479-480; *People v. Danielson* (1992) 3 Cal.4th 691, 718; *People v. Morris, supra,* 53 Cal.3d at p. 152 [trial court not obligated to instruct that accomplice's plea bargain constitutes mitigation].) As stated by this Court in *People v. Bemore, supra*, "[t]he sentence received by an

accomplice is not constitutionally or statutorily relevant as a factor in mitigation. Such information does not bear on the circumstances of the capital crime or on the defendant's own character and record." (*People v. Bemore, supra*, 22 Cal.4th at p. 858.)

Despite appellants' argument to the contrary, the Supreme Court's opinion in *Parker v. Dugger* (1991) 498 U.S. 308 [111 S.Ct. 731, 112 L.Ed.2d 812], does not change this result.

> *Parker* did not hold that information about an accomplice's sentence must be introduced in mitigation, or that a comparison of sentences meted out for the capital crime is necessary. "The *Parker* court merely concluded a Florida trial judge, in sentencing the defendant to death, had in fact considered the nonstatutory mitigating evidence of the accomplice's sentence, as under Florida law he was entitled to do. [Citation.] *Parker* does not state or imply the Florida rule is constitutionally required, and California law is to the contrary." [Citations.]

(*People v. Bemore, supra*, 22 Cal.4th at p. 858; see also *People v. Rodrigues, supra*, 8 Cal.4th at pp. 1188-1189; *People v. Mincey, supra,* 2 Cal.4th at pp. 479-480.)

Appellants ask this Court to reconsider this long line of precedent, but offer no persuasive reasons for doing so. Accordingly, in light of the foregoing, the trial court clearly made the correct ruling in declining to instruct the jury regarding Munoz's sentence as a basis for leniency and likewise curtailing argument on the subject.

D. Assuming Arguendo The Trial Court Erroneously Refused Any Of Appellants' Proposed Instructions, The Alleged Error Was Harmless

Because the Constitution does not require instruction with appellants' proposed instructions, this Court should apply state harmless error analysis in determining the effect of their omission. In other words, this Court should affirm the death verdicts unless appellants demonstrate a reasonable possibility

that the foregoing instruction affected the verdicts. (*People v. Rogers, supra,* 39 Cal.4th at pp. 826, 901; *People v. Brown* (1988) 46 Cal.3d 432, 446-447.) The "reasonable possibility" standard is "'the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California, supra,* 386 U.S. at p. 18].'" (*People v. Rogers, supra*, 39 Cal.4th at p. 901, quoting *People v. Jones, supra,* 29 Cal.4th at pp. 1229, 1264, fn. 11, italics omitted.) Appellants have not made this showing, nor can they.

Appellants' death sentences are attributable to the circumstances in aggravation, not the absence of the defense requested instruction. The circumstances of the crimes were uniformly horrible, involving unprovoked, brutal attacks by appellants on several unsuspecting, innocent victims. Appellants continued their violence in jail, assaulting fellow prisoners, fashioning shanks out of the most basic items, and planning an escape. Appellants most dramatically displayed their utter disregard for human life when, after shooting Aragon nearly a dozen times and leaving a two-inch gaping wound in his neck, actually had an appetite and sat down for lunch at Coco's restaurant. While appellants presented evidence of childhood neglect and abuse early in their lives, the evidence also showed: they had the benefit of loving grandparents and other extended family members even during the worst of times; they had the influence of a devoted stepfather and stable family life by the time they were five (Self) and eight (Romero) years old; their mother taught them right from wrong and the value of manners and a good education; they were intelligent and did well in school when they made the effort; and their brothers who were raised in the same household achieved success in the military and rejected the criminal path chosen by appellants. On this record, no reasonable possibility exists that appellants would have received anything other than a death sentence absent any alleged instructional error. (*People v. Rogers, supra*, 39 Cal.4th a p. 901.)

XVIII

THIS COURT HAS CONSIDERED AND REJECTED APPELLANTS' VARIOUS CHALLENGES TO THE CONSTITUTIONALITY OF CALIFORNIA'S DEATH PENALTY LAW AND IMPLEMENTING INSTRUCTIONS

Appellants challenge the constitutionality of California's death penalty law and implementing instructions on a variety of grounds. (RAOB 452-516, 555-595; SAOB 393-486.) These same claims have been presented to, and rejected by, this Court. Appellants fail to raise anything new or significant which would cause this Court to depart from its earlier holdings.. (*People v. Schmeck* (2005) 37 Cal.4th 240, 303-304; *People v. Welch, supra,* 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.) Accordingly, this Court should reject appellants' challenges to California's death penalty statute and the standard jury instructions implementing the statute.

Appellants contend that factor (a), the circumstances of the crime, is overly broad, permitting contradictory and generic facts to be found aggravating. (RAOB 580-582; SAOB 405-415.) Factor (a) is not unconstitutionally overbroad. (*People v. Morrison* (2004) 34 Cal.4th 698, 729, citing *People v. Lewis, supra,* 26 Cal.4th at pp. 334, 394; see also *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750].) Further, this Court has consistently held that CALJIC No. 8.85 is not unconstitutionally vague and that it does not allow the penalty process to proceed arbitrarily or capriciously. (*People v. Perry* (2006) 38 Cal.4th 302, 319; *People v. Farnam* (2002) 28 Cal.4th107, 191-192; *People v. Lucero* (2000) 23 Cal. 4th 692, 728; *People v. Earp* (1999) 20 Cal.4th 826, 899.) Likewise, this Court has rejected Romero's claim regarding the deletion of inapplicable factors in CALJIC No. 8.85. (RAOB 582-586.) CALJIC No. 8.85 is not unconstitutional for failing to delete inapplicable factors or for failing to inform the jury that the absence

of a mitigating factor cannot be considered an aggravating factor. (*People v. Perry, supra*, 38 Cal.4th at p. 319; *People v. Moon, supra,* 37 Cal.4th at pp. 1, 42.)

Appellants claim that reliance on previously unadjudicated criminal activity under Penal Code section 190.3, factor (b), both as written and as applied in this case, violates the constitution. (SAOB 415-424, 492; RAOB 452-516, 596.) This Court has repeatedly upheld the admission of unadjudicated criminal activity as evidence in aggravation. (*People v. Hinton, supra,* 37 Cal.4th at p. 839; *People v. Dunkle* (2005) 36 Cal.4th 940; *People v. Brown* (2004) 33 Cal.4th 383, 402; *People v. Avena, supra,* 13 Cal.4th at p. 394, 428; *People v. Hawthorne* (1992) 4 Cal.4th 43, 76-77; *People v. Balderas* (1985) 41 Cal.3d 144, 201; see also *Tuilatepa v. California, supra,* 512 U.S. at p. 967.) There is no requirement that the jury unanimously agree on the unadjudicated criminal activity (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1061) and contrary to appellants' arguments (SAOB 420; RAOB 505-508), *Ring v. Arizona* (2002) 536 U.S. 584 [122 S. Ct. 2428, 153 L. Ed.2d 556] and its progeny do not affect this holding because *Ring* "[has] no application to the penalty phase procedures of this state." (*People v. Martinez* (2003) 31 Cal.4th 673, 700; *People v. Cox* (2003) 30 Cal.4th 916, 971-972.)

Appellants also claim that the factor (b) implementing instruction, CALJIC No. 8.87, improperly told the jury that each listed instance of unadjudicated criminal activity actually involved force or violence, thus removing the issue from the jury's consideration and constituting a directed verdict on an essential element of the factor (b) finding. (RAOB 452-476; SAOB 492; 54 RT 8065, 8068, 8151, 8154.) Again, this Court has repeatedly rejected appellants' claim, and should continue to do so in the instant case. (*People v. Gray* (2005) 37 Cal.4th 168, 235; *People v. Monterroso* (2004) 34 Cal.4th 743, 793; *People v. Nakahara* (2003) 30 Cal.4th 705, 720; *People v.*

Prieto (2003) 30 Cal.4th 226, 265; *People v. Ochoa, supra,* 26 Cal.4th at pp. 398, 452-454.)[77]

This Court has also rejected appellants' labored critique of CALJIC No. 8.87's phraseology. (RAOB 476-490; SAOB 492.) The defendant in *People v. Prieto, supra,* 30 Cal.4th 262, mounted a similar attack against the instruction's use of the phrase "express or implied use of force or violence or the threat of force or violence." (*People v. Prieto, supra*, 30 Cal.4th at p. 265.) This Court held: "Although section 190.3, factor (b) uses a slightly different phraseology - "use or attempted use of force or violence or the express or implied threat to use force or violence" - we see no practical difference between the instruction's and statute's language. Indeed, the instruction's language is arguably narrower than the statute's language because it may not encompass the attempted use of force or violence. In any event, we do not see how the jury could have misconstrued this instructional language to defendant's detriment." (*Ibid.*) Similarly, the defendant in *People v. Martinez, supra,* 31 Cal.4th at p. 673, 693, attacked the "implied threat" language, arguing that "no ' "implied threat" can exist unless the defendant has committed an act or spoken words directed at an individual or group of persons who can infer that the defendant has made a threat. In other words, the term "implied threat" necessarily connotes some form of communication. . . .'" This Court found that defendant's argument "meritless." (*People v. Martinez, supra,* 31 Cal.4th at

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77. Appellants requested a pinpoint instruction further defining the scope of the jury's consideration of factor (b) evidence (9 CT 2024; 53 RT 7990-7991), but the trial court rejected the pinpoint instruction as duplicative of CALJIC No. 8.87. (53 RT 7990-7991.) Because this Court has repeatedly found that CALJIC No. 8.87 adequately informs the jury, the trial court properly refused to give appellants' duplicative instruction to the jury. (*People v. Gurule, supra,* 28 Cal.4th at pp. 557, 659.)

p. 693.) Based on these decisions, this Court should also reject appellants' challenges to CALJIC No. 8.87.[78]

With regard to instruction on mitigation evidence, appellants claim the use of restrictive adjectives in several of the mitigation factors imposed an unconstitutional barrier to the jury's consideration of relevant mitigating evidence. (RAOB 586; SAOB 424-425.) This same complaint has been repeatedly rejected by this Court. (*People v. Moon, supra,* 37 Cal.4th at p. 42; *People v. Dunkle, supra,* 36 Cal.4th at p. 939, citing *People v. Monterroso* (2004) 34 Cal.4th 743, 796.) Appellants also contend the trial court failed to advise the jury that mitigating factors could only be considered mitigating and therefore violated the constitution. (SAOB 492; RAOB 580.) This Court has repeatedly found no error in this regard. (*People v. Moon, supra,* 37 Cal.4th at p. 42, citing *People v. Morrison, supra,* 34 Cal.4th at p. 730.) Moreover, the trial court here instructed the jury that the absence of any mitigating circumstance could not be considered aggravating. (9 CT 1996, 2064; 54 RT 8067, 8153.)

Appellants assert that the trial court's instructions defining the scope of the jury's sentencing discretion and the nature of its deliberative process, as set forth in CALJIC No. 8.88, violated their constitutional rights in several respects. (RAOB 572-579; SAOB 467-479.) Specifically, they claim the instruction: (1) used the phrase "so substantial" which is an impermissibly vague term that failed to provide the jury with adequate guidance and discretion; (2) failed to inform the jurors that the central determination is whether the death penalty is the appropriate punishment, not simply an authorized one; and (3) failed to inform the jurors that they were required to

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78. Respondent addresses Romero's claims relating to the reasonable doubt definition (RAOB 510-512) and admissibility of particular aggravating circumstances (RAOB 342-383, 517-519) in Arguments VII and XIII, respectively.

impose life without the possibility of parole if they determined that mitigation outweighed aggravation. Appellants' claims should be rejected as this Court has previously rejected identical claims concerning this jury instruction. This Court has found CALJIC No. 8.88 gives the jury adequate instruction on how to return a life sentence (*People v. Taylor, supra,* 26 Cal.4th 1155, 1181; *People v. Kipp, supra,* 26 Cal.4th at p. 1138; *People v. Frye, supra,* 18 Cal.4th at pp. 1023-1024) and the standard instruction has been consistently upheld. (*People v. Smith, supra*, 35 Cal.4th at p. 370; *People v. Medina*, *supra*, 11 Cal.4th at pp. 781-782; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) CALJIC No. 8.88 is not unconstitutionally vague for using the phase "so substantial" and adequately guides the jury's sentencing discretion. (*People v. Moon, supra,* 37 Cal.4th at p. 43; *People v. Smith, supra,* 35 Cal.4th at p. 369; *People v. Young* (2005) 34 Cal.4th 1149, 1227; *People v. Carter* (2003) 30 Cal.4th 1166, 1226.) CALJIC No. 8.88 is also not unconstitutional in using the term "warrants," as "the instruction clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty." (*People v. Smith, supra*, 35 Cal.4th at p. 370 citing *People v. Arias, supra*,13 Cal.4th at p. 171; see also *People v. Moon, supra*, 37 Cal.4th at p. 43; *People v. Boyette, supra,* 29 Cal.4th 381, 465.) Likewise, the trial court need not expressly instruct the jury that a sentence of life imprisonment without parole is mandatory if the aggravating circumstances do not outweigh those in mitigation. (*People v. Moon, supra*, 37 Cal.4th at p. 43; *People v. Kipp, supra*, 18 Cal.4th 349, 381; *People v. Duncan, supra,* 53 Cal. 3d at pp. 955, 978.) The instruction in the instant case was proper.

In addition, appellants argue California's death penalty statute and its implementing jury instructions are constitutionally deficient for failing to require: (1) aggravating factors be proven beyond a reasonable doubt; (2) aggravation be proven to outweigh mitigation beyond a reasonable doubt; (3)

death be found to be the appropriate penalty beyond a reasonable doubt; (4) that the jury make those findings unanimously. (RAOB 490-510, 558-571; SAOB 431-466.) However, neither jury unanimity nor proof beyond a reasonable doubt apply to those determinations. (*People v. Dunkle, supra,* 36 Cal.4th at p. 939; *People v. Stitely, supra,* 35 Cal.4th at p. 573; *People v. Panah, supra,* 35 Cal.4th 395, 499; *People v. Monterroso*, supra, 34 Cal.4th 743, 796; *People v. Morrison, supra*, Cal.4th at p. 730; *People v. Welch, supra*, 20 Cal.4th 701, 767-768.) Moreover, the decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] and its progeny, do not change that conclusion. (*People v. Stitely, supra*, 35 Cal.4th at p. 573 [*Blakely,*[79] *Ring,*[80] and *Apprendi* "do not require reconsideration or modification of our long-standing conclusions in this regard"]; *People v. Gray, supra,* 37 Cal.4th at p. 237; *People v. Morrison, supra*, 34 Cal.4th at pp. 730-731; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263, 271-272; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; see *People v. Smith* (2003) 30 Cal.4th 581, 642.) Likewise, because of the individual and normative nature of the jury's sentencing determination, the trial court need not instruct that the prosecution has the burden of persuasion on the issue of penalty. (*People v. Combs, supra,* 34 Cal. 4th at p. 821; *People v. Lenard* (2004) 32 Cal.4th 1107, 1135-1136; *People v. Steele* (2002) 27 Cal.4th 1230, 1259; *People v. Bemore, supra,* 22 Cal.4th at p. 809.)

This Court has also repeatedly rejected appellants' contentions (RAOB 570-571; SAOB 465-466) that the trial court was constitutionally required to instruct the jury that there is a presumption favoring a sentence of life in prison. (See, e.g., *People v. Young, supra,* 34 Cal.4th at p. 1149, 1233; *People v.*

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79. *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403].

80. *Ring v. Arizona, supra,* 536 U.S. 584.

Combs, supra, 34 Cal.4th at p. 868; *People v. Pollock* (2004) 32 Cal.4th 1153, 1196; *People v. Lenart, supra*, 32 Cal.4th at p.1137; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064; *People v. Arias, supra*, 13 Cal.4th at p. 190.) Because appellants provide no compelling reason for reconsideration, their claims should be rejected.

Appellants claim California's capital sentencing scheme violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution because it does not require a jury to render written findings as to the aggravating circumstances it has relied upon, nor does it require any reasons for the choice of sentence. (RAOB 586-589; SAOB 425-430.) This Court has held, and should continue to hold, that the jury need not make written findings disclosing the reasons for its penalty determination. (*People v. Dunkle, supra,* 36 Cal.4th at p. 939; *People v. Young, supra,* 34 Cal.4th at p. 1149; *People v. Maury* (2003) 30 Cal.4th 342, 440; *People v. Hughes* (2002) 27 Cal.4th 287, 405; *People v. Welch, supra.* 20 Cal.4th at p. 701; *People v. Ochoa* (1998) 19 Cal.4th 353, 479; *People v. Frye, supra,* 18 Cal.4th at p. 894.) The above decisions are consistent with the United States Supreme Court's pronouncement that the Federal Constitution "does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746, 750 [110 S.Ct. 1441, 108 L.Ed.2d 725], citing *Hildwin v. Florida* (1989) 490 U.S. 638 [109 S.Ct. 2055, 104 L.Ed.2d 728].)

Appellants contend lack of intercase proportionality review violates the right to a fair trial, due process, equal protection, and protection from the arbitrary and capricious imposition of capital punishment guaranteed by the Fifth, Eighth, and Fourteenth Amendments. (RAOB 555-557; SAOB 393-404.) To the contrary, intercase proportionality review is not constitutionally required and this Court has consistently declined to undertake it. (*Pulley v.*

Harris (1984) 465 U.S. 37, 50-54 [104 S.Ct. 871, 79 L.Ed.2d 29] [California's death penalty statute not rendered unconstitutional by the absence of a provision for comparative proportionality review]; *People v. Dunkle, supra,* 36 Cal.4th at p. 940, citing *People v. Horning* (2004) 34 Cal.4th 871, 913, and *People v. Morrison, supra,* 34 Cal.4th at p. 731.) Nor does equal protection require that capital defendants be afforded the same sentence review afforded other felons under the determinate sentencing law. (*People v. Dunkle, supra,* 36 Cal.4th at p. 940; *People v. Cox, supra,* 53 Cal.3d at p. 618; *People v. Allen, supra,* 42 Cal.3d at p. 1222.)

Appellants further claim California's death penalty law denies equal protection under the Fourteenth Amendment. (RAOB 588-589; SAOB 428-430.) As this Court has repeatedly held, California's capital sentencing scheme does not deny equal protection because it uses a different method of determining penalty than is used in non-capital cases. (*People v. Elliot* (2005) 37 Cal.4th at p. 488; *People v. Smith* (2005) 35 Cal.4th 334, 374.) Accordingly, appellants' equal protections claims should be denied.

Finally, appellants contend the use of the death penalty violates international law, evolving international norms, and the Eighth Amendment. (RAOB 590-595; SAOB 480-486.) This Court has repeatedly rejected this claim and should continue to do so. (*People v. Perry, supra*, 38 Cal.4th at p. 322; *People v. Dunkle, supra,* 36 Cal.4th at p. 940, citing *People v. Brown* (2004) 33 Cal.4th 382, 403-404.) Furthermore, for the reasons explained throughout Respondent's Brief, death is the appropriate punishment for appellants' murders of three young men. (See *Enmund v. Florida* (1982) 458 U.S. 782, 797-801 [102 S.Ct. 3368, 73 L.Ed.2d 1140].)

XIX.

THERE WAS NO CUMULATIVE ERROR

Appellants contend their judgments of guilt and sentences of death must be reversed based upon cumulative error. (RAOB 526-536; SAOB 487-492.) While appellants assert numerous guilt- and penalty-phase errors or other "troubling occurrences" (RAOB 532-536; SAOB 489-492), the record demonstrates appellants received a fair trial and there is no basis upon which to reverse their judgments based on error, individually or cumulatively.

Even a capital defendant is entitled to only a fair trial, not a perfect one. (*People v. Stewart* (2004) 33 Cal.4th 425, 522; *People v. Box, supra,* 23 Cal.4th 1153, 1214; see also *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96] ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial."]; *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340].) Since every claim of error raised by appellants was either not error, invited, forfeited, or harmless, there is no prejudice to appellants, and thus no cumulative effect. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1141.)

With regard to the "troubling occurrences" cited by appellant Romero (RAOB 532-536; SAOB 492), he does not treat them as assignments of error and neither should this Court. "It is the duty of the defendants to show error, and that means defendants are under an affirmative duty in that respect. It is not proper to attempt to shift that burden upon the court or respondent." (*People v. Goodall, supra,* 104 Cal.App.2d 242, 249; *People v. Clay, supra,* 227 Cal.App.2d at pp. 87, 100.) To this end, "'every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without

consideration. [Citations.]' [Citations.]" (*People v. Stanley, supra,* 10 Cal.4th at p. 764; see also *People v. Ramirez, supra,* 39 Cal.4th at p. 398, fn.8; Cal. Rules of Court, Rule 8.204(a)(1)(B).) Further, to the extent Romeo "perfunctorily asserts other claims, without development and, indeed, without a clear indication that they are intended to be discrete contentions, they are not properly made, and [should be] rejected on that basis." (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19; see also *People v. Smith* (2003) 30 Cal.4th 581, 616, fn. 8.) As Romero provides little more than perfunctory assertions and citations to the record for this Court's consideration, his "troubling occurrences" should not be considered claims of error and should be rejected. Moreover, even assuming any of Romero's "troubling occurrences" have any validity, they cannot amount to cumulative error. "[A]ny number of 'almost errors,' if not 'errors' cannot constitute error." (*Hammond v. United States* (9th Cir. 1966) 356 F.2d 931, 933; *United States v. Haili* (9th Cir. 1971) 443 F.2d 1295, 1299.)

Further, assuming arguendo error, even viewed cumulatively, it is not reasonably probable that appellants would have received more beneficial verdicts. (*People v. Avila, supra,* 38 Cal.4th 491, 615.) Review of the record without the speculation or interpretation offered by appellants shows the evidence against them was formidable and that they were fairly tried and convicted. The Constitution requires no more. Accordingly, the judgments and sentences of death should be affirmed in their entirety. (*People v. Cunningham, supra,* 25 Cal.4th 926, 1038.)

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court affirm appellants' convictions and death sentences in their entirety.

Dated: February 25, 2008

Respectfully submitted,

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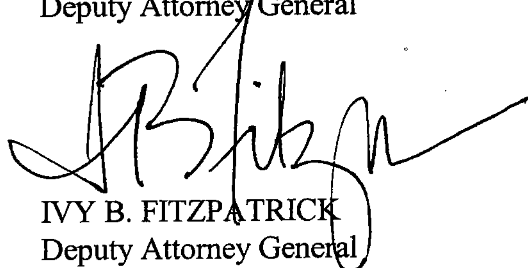

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SD1996XS0009

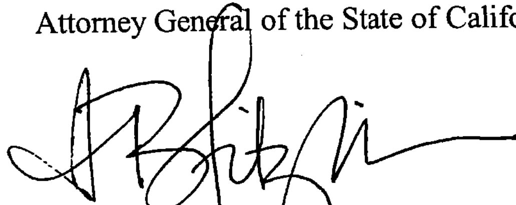
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 87175 words.

Dated: February 25, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Orlando Gene Romero and Christopher Self***

No.: **S055856**

I declare:

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

On February 26, 2008, I served the attached ***RESPONDENT'S BRIEF*** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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(2 copies)

DECLARATION OF SERVICE BY U.S. MAIL - Page 2

The Honorable Robert L. Taylor, Judge
Riverside County Superior Court
4100 Main St.
Riverside, CA 92501

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 26, 2008, at San Diego, California.

Terri Garza	Terri Garza
Declarant	Signature

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