In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JUSTIN HEATH THOMAS,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S161781

Riverside County Superior Court Case No. RIF086792
The Honorable Terrence R. Boren, Judge Presiding

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On July 19, 2001, the Riverside County District Attorney filed an information charging Justin Heath Thomas with the murder of Rafael Noriega in violation of Penal Code[1] section 187 (count 1). The information alleged as special circumstances that Thomas was previously convicted of murder within the meaning of section 190.2, subdivision (a)(2), and the murder was committed during the commission of, attempted commission of or immediate flight after a robbery within the meaning of section 190.2, subdivision (a), subsection (17).[2] The information further alleged Thomas personally used a firearm in the commission of the murder within the meaning of sections 12022.5, subdivision (a), and 1192.7, subdivision (c)(8).[3] (1 CT[4] 81-82.)

On December 7, 2001, the prosecution noticed the trial court and Thomas of its intent to seek the death penalty. (1 CT 90.) On October 23, 2007, a jury was sworn to try the case. (16 Supp. CT 4100-4101; 5 RT 1672, 1725.)

On December 6, 2007, the jury found Thomas guilty of murder as charged in count 1 of the information, fixed the murder in the first degree, and found the robbery-murder special circumstance and firearm use

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[1] All further statutory references are to the Penal Code, unless noted otherwise.

[2] The prior-murder special circumstance allegation was bifurcated for purposes of trial. (2 RT 1061.)

[3] An allegation that Thomas was previously convicted of a serious felony within the meaning of section 667, subdivision (a), was stricken by delineation on the motion of the prosecutor on October 10, 2007. On the same date, the spelling of the Noriega's last name was corrected by delineation. (1 CT 81-82; 1 Supp. CT 130; 2 RT 1055-1056.)

[4] "CT" refers to the three-volume Clerk's Transcript of Preliminary Proceedings and "Supp. CT" refers to the 18-volume Clerk's Supplemental Transcript on Appeal.

enhancement true. (17 Supp. CT 4367-4371; 14 RT 3021-3024.) Thereafter, in a bifurcated proceeding, the jury found the prior-murder special circumstance true. (17 Supp. CT 4377, 4404; 14 RT 3087-3089.)

On December 11, 2007, the penalty phase commenced. (17 Supp. CT 4406.) On January 3, 2008, the jury rendered a verdict finding death to be the appropriate penalty. (18 Supp. CT 4517; 18 RT 3723-3724.)

On March 7, 2008, the trial court considered and denied an automatic motion to modify the verdict pursuant to section 190.4, subdivision (e). (18 Supp. CT 4572-4579; 19 RT 3737-3750.) On the same date, the trial court sentenced Thomas to death for the murder of Rafael Noriega.[5] (18 Supp. CT 4579, 4582-4584, 4593-4595, 4587-4588; 19 RT 3751-3753.)

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

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution Evidence

a. The Murder of Rafael Noriega

In the summer of 1992, Dorothy Lee Brown[6] sold methamphetamine in Moreno Valley.[7] (6 RT 1905, 1932-1933.) Thomas was her supplier. (6

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[5] On March 12, 2008, the trial court modified the judgment to add four years for the section 12022.5, subdivision (a), firearm use enhancement. (18 Supp. CT 4586, 4589-4590; 19 RT 3756-3759.)

[6] On March 26, 2004, Brown attempted to evade police officers in Fountain Valley during a traffic stop. (13 RT 2865.) After crashing into another car, Brown exited her vehicle and told officers that she had a gun while reaching towards her waistband. (13 RT 2865.) The officer who heard the statement fired three shots at Brown, striking and killing her. (13 RT 2865.) No weapons were found on Brown. (13 RT 2865-2866.)

As discussed in Argument II, *infra*, Brown previously testified at the punishment hearing of Thomas's 1996 trial for the murder of Regina Hartwell in Travis County, Texas; and that prior testimony was read to the jury in the instant case. (6 RT 1904-1905.) This included sworn testimony (continued...)

RT 1905-1906, 1933.) Thomas obtained his methamphetamine from Rafael Noriega.[8] (6 RT 1934-1935.) Noriega lived with the Barajas family and Robert Manzano in Moreno Valley. (6 RT 1866-1867, 1874, 1888-1889; 7 RT 2042.)

Thomas and Brown engaged in methamphetamine transactions about every other day. (6 RT 1907.) Thomas would sometimes "front" Brown the drugs and she would pay him back after she sold them. (6 RT 1907, 1934.) Thomas kept his supply of methamphetamine at the MacNally chicken ranch – managed by Thomas's uncle Andy Anchondo – in the hills outside Moreno Valley. (6 RT 1907-1909, 1934; 7 RT 1969-1970, 2000-2001, 2006.) Thomas also stayed at the ranch from time to time. (7 RT 1969, 2001-2002, 2008.)

On the evening of September 14, 1992, between 8:00 and 10:00 p.m., Noriega was at home when he received a call on his personal pager. (6 RT 1869-1871, 1882, 1889-1900; 7 RT 2042; 9 RT 2351.) Noriega called back the number. (7 RT 2048.) Thereafter, Noriega had a discussion with Manzano who warned him not to deal with the person who had paged him and suggested that Noriega take his silver revolver for protection.[9] (6 RT

(...continued)
during voir dire examination outside the presence of the Texas jury. (6 RT 1905-1932.)

[7] Brown was previously convicted of felony possession of methamphetamine three times, possession of methamphetamine for sale twice, possession of a firearm, auto theft twice, and several misdemeanors. (6 RT 1906, 1933, 1947, 1960; 13 RT 2866.) At the time of her prior testimony, Brown's period of parole was due to end in two weeks. (6 RT 1906, 1946.)

[8] Thomas referred to Noriega as Raphael or "Rafi," and conversed with him in Spanish. (6 RT 1907, 1934-1935.)

[9] Noriega previously told Jennifer Barajas that he kept a gun hidden on the inside panel of his driver's side door when he went to the chicken ranch. (6 RT 1893, 1890-1891.)

1868-1871, 1878; 9 RT 2351.) Michelle Barajas also tried to stop Noriega from leaving. (7 RT 2042; 9 RT 2351.) Noriega said he would be right back and left in his gray or silver Nissan. (6 RT 1869-1872, 1889-1901; 7 RT 2042, 2047-2048; 9 RT 2351.)

Around 3:00 a.m. the following morning, Thomas and Brown went to the foothills outside Moreno Valley to purchase drugs from Noriega. (6 RT 1907-1910, 1934-1936.) Before leaving, Thomas made a phone call, and Brown gave Thomas money she owed him. (6 RT 1909-1910.) Thomas drove there in his truck with one of his friends.[10] (6 RT 1910, 1936-1937.) Thomas asked Brown to follow him in her own vehicle to act as a lookout and make sure he was not ambushed.[11] (6 RT 1910, 1936.) Thomas told Brown that they were going to meet "Rafi" or Rafael. (6 RT 1910, 1926-1927, 1935.)

On a trail near the MacNally ranch and some houses, Thomas directed Brown to park and wait while he drove around a bend further into the foothill. (6 RT 1910-1911, 1935-1937.) While waiting for Thomas, Brown was approached by an older couple who told her that it was dangerous for her to be there alone. (6 RT 1911, 1937.) Brown said she was with her boyfriend who had gone to the bathroom and they would be leaving soon. (6 RT 1911, 1937.)

After the couple left, Brown exited her vehicle and ran to Thomas's location which was one-and-a-half to two blocks away. (6 RT 1911, 1937, 1940.) The area was illuminated by the headlights of Thomas's truck which was pointed at the rear of Noriega's car. (6 RT 1912, 1937.) Brown

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[10] Brown described Thomas's companion as a very young man whom she had seen around the neighborhood. (6 RT 1915.)

[11] Brown was driving a stolen Toyota truck and high on drugs at the time. (6 RT 1911, 1936.)

observed from a distance of about two car lengths, and Thomas was unaware of her presence. (6 RT 1911, 1939.)

Thomas got out of his truck and yelled something to Noriega in Spanish. (6 RT 1912, 1937-1938.) Noriega walked to the back of his car, opened the trunk and removed a green-colored bag while Thomas stood next to his truck with the door open. (6 RT 1912-1913, 1938.) Thomas then picked up a handgun from the seat of his truck and "opened fire" at Noriega. (6 RT 1913, 1938.) Thomas fired more than three shots in rapid succession which struck Noriega.[12] (6 RT 1913, 1938-1939.)

After Noriega fell to the ground and the gun went silent, Brown ran back to her vehicle and sat in it with the radio playing loudly. (6 RT 1914, 1939-1940.) Shortly thereafter, Thomas approached on foot and asked Brown if she heard "[t]he gunshots." (6 RT 1914, 1939-1940.) Brown replied, "Yeah," or, "Vaguely." (6 RT 1914, 1940.) Thomas told Brown that he needed her to get out of her vehicle and follow him. (6 RT 1914, 1939-1940.) Brown walked back to the shooting scene with Thomas. (6 RT 1940.) As they arrived, Brown observed the taillights of Noriega's car being driven away and Noriega lying on the ground. (6 RT 1914-1915, 1940.)

Thomas told Brown to get in his truck. (6 RT 1914-1916, 1940.) Thomas then picked up Noriega's body and threw it in the back of the truck.[13] (6 RT 1914-1916, 1940.) The green bag which Brown had seen earlier was also in the back of the truck. (6 RT 1916, 1941.) Thomas directed Brown to drive in what seemed to be a giant circle. (6 RT 1916,

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[12] Brown identified Thomas in court as the person who shot Noriega. (6 RT 1919-1920, 1946.)

[13] In July 1994, Thomas's truck was located in Hawaii. (6 RT 1819-1821.) At that time, the bed of the truck was checked for blood and none was found. (6 RT 1821.)

1940-1941.) When they stopped, Thomas told Brown that her vehicle was right down the trail. (6 RT 1916-1917, 1941.) Brown ran back to her truck and drove home. (6 RT 1917, 1941.) It was daylight by then. (6 RT 1917, 1941.)

Approximately two hours later, Thomas arrived at Brown's home, showered and clean-shaven. (6 RT 1917, 1943-1944.) Thomas tried to return a shovel he had taken from Brown's backyard without her knowledge. (6 RT 1917, 1943.) The shovel was broken. (6 RT 1943.) Although Brown said she did not want it, he threw the shovel in the backyard. (6 RT 1917.) Thomas gave Brown a large amount of methamphetamine and said he was going to have to leave town.[14] (6 RT 1918, 1944.)

Later that day, Ryan Goodwin and two friends found Noriega's car in the flats area of Reche Canyon near the chicken ranch. (6 RT 1830-1833, 1850-1853.) Both doors of the car were open. (6 RT 1830, 1834.) There was a pile of burnt debris on the driver's side floorboard and a .22-caliber

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[14] Brown spoke to Detective Wilson following her arrest for methamphetamine sales on June 3, 1994. (6 RT 1918-1921, 1944-1945.) Brown testified that she was high on methamphetamine during the interview and initially lied about, and embellished, some details because she was afraid of Thomas, did not want to be charged for the stolen truck and was trying to help herself on the pending drug charges. (6 RT 1919, 1928-1929, 1945, 1948, 1956.) Brown initially told Detective Wilson that she was in the same vehicle as Thomas, she had seen Noriega on a prior occasion, Thomas usually dealt drugs with a man named Alfredo, the weapon used in the shooting was a "Glock" nine-millimeter gun, a large quantity of methamphetamine and about $5,000 was taken from Noriega, Thomas buried Noriega under two to three feet of sand, and Thomas drove her back home without mentioning that there was another person with Thomas. (6 RT 1945, 1949-1956.) However, Brown affirmed that her testimony at Thomas's trial was "the honest truth of it all." (6 RT 1929.)

semiautomatic handgun under the driver's seat.[15] (6 RT 1824, 1835-1836, 1848-1849.) The gun had a fully loaded magazine and a chambered bullet.[16] (6 RT 1836-1837.) No blood was observed in or near the car. (6 RT 1854.)

Within three weeks of the murder, Thomas suddenly left town without telling his longtime friend and roommate, Curtis Barger. (7 RT 1966-1971, 2002-2003; 9 RT 2352-2353.) Thomas had not previously discussed leaving, and Barger did not know where he went. (7 RT 1971.)

On October 17, 1992, Ronald Jones and Carol Fender discovered Noriega's body while horseback riding with some friends in the Reche Valley foothills – not far from the location where Noriega's car had been found. (6 RT 1775-1778, 1782, 1817.) The body was buried face-down in the dirt under a wooden pallet in a semi-circle area near a turnout and some coops belonging to the MacNally Ranch. (6 RT 1777-1786, 1800-1801.) Jones and his friends contacted the Sheriff's Department and led deputies to the body. (6 RT 1780, 1783.)

Sheriff's Investigator Gary Thompson, Detective Dan Wilson and forensic technicians responded to the scene. (6 RT 1794-1799.) Noriega's body, which was in a state of decomposition with a very foul odor, appeared to have been there longer than a month. (6 RT 1805.) It appeared

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[15] Goodwin noticed the gun after checking underneath the car for fluids. (6 RT 1844.) Goodwin testified that the gun was visible under the driver's seat "at a particular angle" from outside the car "if looking underneath the seat" from a kneeling or bending position. (6 RT 1842-1844.) He also testified that the gun was visible from an upright position. (6 RT 1844.)

[16] In August 1996, the gun was destroyed because no one had claimed it and authorities were unaware that it was connected to a homicide. (6 RT 1858-1860.)

that the wooden pallet had been moved from a nearby pile of dirt where there was another pallet. (6 RT 1802-1804.)

Noriega was wearing some jewelry, a watch and a jacket containing four one-ounce baggies of methamphetamine. (6 RT 1806, 1816-1817; 8 RT 2315.) Using shovels and dirt sifters, the technicians found a .45-caliber brass casing under the body. (6 RT 1808, 1815-1817, 1826.) Investigator Thompson did not believe the casing had anything to do with Noriega's death since it was common for people to fire guns in the area.[17] (6 RT 1826-1828.)

Three days later, Dr. Robert Ditraglia, a forensic pathologist, performed an autopsy. (8 RT 2291-2295.) Noriega's body was "[s]everely decomposed" and "partially skeletonized" with essentially no soft tissue.[18] (8 RT 2295-2299.) The only recognizable internal organ which remained was the liver. (8 RT 2305.)

Noriega's body was clothed in a t-shirt, a leather jacket with the sleeves inside-out, boxer shorts, long pants with a belt and low-tie shoes without socks. (8 RT 2300.) The t-shirt had two holes in it – one on the front side of the right shoulder and the other approximately in the center of the chest. (8 RT 2301.) There was an apparent burn on the back of the leather jacket. (8 RT 2300, 2317.) The autopsy revealed a circular hole in the center of Noriega's sternum, multiple holes in the remaining soft tissue on the front of his chest, two fractured ribs behind his right armpit and fractures of his sacrum and coccyx, which were all consistent with gunshot wounds. (8 RT 2302-2304.)

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[17] Investigator Thompson testified that there was no way to tell how long the casing had been there. (6 RT 1828.)

[18] Explaining that postmortem dating was "a very inexact science," Dr. Ditraglia was not able to determine how long Noriega had been dead. (8 RT 2297-2298.)

Dr. Ditraglia recovered what appeared to be spent bullets from the left sleeve of Noriega's jacket, his right plural cavity where the right lung would have been, his thorax where the left lung would have been and his left buttock, as well as bullet fragments from his pelvis between the hips and the right midline area of his chest.[19] (8 RT 2306-2310.) The projectiles appeared to be medium caliber ammunition, such as nine-millimeter, .32-caliber or .38-caliber bullets. (8 RT 2316.) The bullet from the right plural cavity had mushroomed.[20] (8 RT 2307-2308.)

Due to the decomposed state of Noriega's body, it was not possible to determine the trajectories of the bullets or body position at the time of the shooting. (8 RT 2301, 2310-2311.) However, the t-shirt holes and injuries were consistent with Noriega being shot from the front. (8 RT 2314.)

Dr. Ditraglia testified that the primary mechanism of death for bullet wounds to the chest is damage to the internal organs and blood loss, starting with a loss of consciousness. (8 RT 2312-2313.) The bullet wound to the sternum would have been potentially fatal in itself since it could have damaged the heart, aorta, and portions of the lungs, resulting in severe and rapid bleeding. (8 RT 2305-2306.)

Paul Sham, a criminalist with the California Department of Justice Riverside laboratory, had training and expertise in firearms identification and bullet comparison. (12 RT 2715-2718.) He analyzed the projectiles removed from Noriega's body and clothing, which were damaged to varying degrees with corrosion, as well as the split bullet jackets and damaged lead cores. (12 RT 2718-2723.) Sham believed they represented

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[19] Given the possibility that the fragments may have come off the larger projectiles, Dr. Ditraglia could not conclude that Noriega was shot seven times. (8 RT 2310.)

[20] Dr. Ditraglia explained how bullets are designed to mushroom when they hit a human body. (8 RT 2307-2308.)

at least five separate bullets. (12 RT 2723.) The caliber of the bullets was "[n]ominal" or "generic" .38 which could be either .38-special, .357-magnum or 9-millimeter ammunition. (12 RT 2724.)

Based on the "class characteristic" consisting of lands and groves on the bullets acquired from the barrel of the weapon, Sham determined that they were all fired from a gun with a .05 to .055-inch land width with a right-hand twist. (12 RT 2724-2729.) Such weapons include 9-millimeter Intratec TEC-9, .357-magnum and .38-special handguns. (12 RT 2730-2732.) Due to their damaged condition and the lack of detailed impressions for comparison, it was not possible to determine whether or not the bullets were fired from the same weapon. (12 RT 2732-2735.)

In January 1993, the investigation into Noriega's murder was suspended because there were no suspects. (6 RT 1817-1818.) On February 2, 1993, Thomas enlisted in the Army. (7 RT 1996-1999.) He was discharged from the Army on September 21, 1994, and returned to the chicken ranch. (7 RT 1973, 1995-1996; 9 RT 2353.)

In May or June 1995, Thomas told Kimberley Reeder[21] in Austin, Texas that he killed a man named "Rafa" in California. (7 RT 2021-2022, 2143; 8 RT 2252-2253.) Thomas explained that he killed Rafa "[b]ecause he was a narc," but did not articulate how he killed him. (7 RT 2021-2022, 2143-2144; 8 RT 2276.) Thomas said he put the body in the back of his truck, hid it in or near some caves, and told coworkers that he had gone deer hunting when asked about blood in the back of his truck. (7 RT 2022, 2143-2144; 8 RT 2253-2254, 2271-2272.) There were, in fact, three caves nearby the location where Noriega's body was discovered, which were about eight tenths of a mile up a slightly windy dirt road and 120 yards off

[21] In 1995, Kimberley Reeder's last name was LeBlanc. (7 RT 2016.).

the road. (6 RT 1783-1784, 1787-1789.) Thomas never claimed he killed in self-defense. (7 RT 2144.)

In the summer of 1995, John Sams knew Thomas in passing through Reeder and Regina Hartwell.[22] (9 RT 2364-2365.) Sams occasionally saw Thomas in Austin bars, once as part of a group riding in a limousine and once at party in Hartwell's apartment. (9 RT 2365-2367.) In Sams' presence, Thomas said that he was from California where "we kill people for things like" "[g]etting out of line, money, drugs, things of that nature." (9 RT 2368-2369.) Either during the occasion in the limousine or at Hartwell's party, Thomas mentioned something in Sams' presence about shooting someone in California for drugs and taking a bag of speed from the person. (9 RT 2369-2370, 2381.) Thomas appeared to be bragging or trying to impress. (9 RT 2370-2371.) Again, Thomas never mentioned self-defense. (9 RT 2371.)

In January 2000, Investigator Martin Silva of the District Attorney's Office interviewed Thomas in Texas.[23] (9 RT 2355.) At the beginning of the interview, Silva introduced himself and advised Thomas of his constitutional rights which he indicated he understood and waived. (16 Supp. CT 4154-4155.) Silva told Thomas that he believed Thomas killed Noriega and his office was considering charging him with the murder, confronted Thomas with Brown's and Reeder's statements, and used a ruse that Thomas's wife and his apparent companion at the time of the murder – Kelly Smith – had implicated him as well. (16 Supp. CT 4156-4157, 4161,

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[22] Sams was previously convicted of two misdemeanor assaults in Texas and previously arrested for aggravated robbery but later released with no charges. (9 RT 2372-2372.) Sams' brother supplied Hartwell with cocaine for drug deals. (9 RT 2374-2376.)

[23] A redacted recording of the interview was played for the jury which received corresponding redacted transcripts. (9 RT 2355-2360.)

4178, 4181, 4185-4190, 4194, 4205, 4208-4213, 4216; 9 RT 2345-2347.) Silva also suggested to Thomas that he might have shot Noriega in self-defense, that the murder was not planned or that it was a drug "rip-off" that went awry. (16 Supp. CT 4185-4186, 4202-4204, 4211.)

Thomas admitted that he engaged in methamphetamine and firearm transactions with Noriega, but claimed he had left Moreno Valley by the time of the murder.[24] (16 Supp. CT 4157-4163, 4172-4174, 4179, 4183, 4191.) Thomas referred to Noriega as "Rafa" and said they spoke to each other in Spanish. (16 Supp. CT 4175, 4192-4193.)

However, Thomas subsequently asked Silva if the District Attorney's Office thought he was present during Noriega's murder, said he was he was getting nervous, stated that "when [he] had left [he] thought that shit was dead," and asked "how involved" Silva reported he was. (16 Supp. CT 4186, 4188, 4193-4195.) Thomas then told Silva that his relatives and former boss could confirm an alibi of his being in Texas at the time of the murder. (16 Supp. CT 4198-4199, 4201)

When Silva indicated that his office was seeking extradition, Thomas said, "See and in order for that, that means you shit you guys pretty much know that I did this," and asked whether the others involved would be charged and if Smith "ever sa[id] he got something out of it." (16 Supp. CT 4207-4210.) Thomas asked Silva whether he had evidence of a gun being used, he had looked into the possibility that someone else shot Noriega, or whether Brown and Smith said the murder was planned.[25] (16 Sup. CT 4211-4213.)

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[24] Thomas volunteered that he and Noriega always met in public places and never at night. (16 Supp. Ct 4178-4179, 4181, 4189.)

[25] Thomas claimed Brown and Smith would have been too afraid to go out to the location of the murder at night due to all the killings and rapes which occurred there. (16 Sup. Ct 4213.)

Silva again suggested that Thomas killed Noriega in self-defense or because he was high on drugs. (16 Sup. Ct. 4214.) However, Thomas insisted that he knew nothing about Noriega's murder, said Brown and Smith were lying about his involvement, and asked Silva to talk to his family to verify that he was not in or around Moreno Valley at the time of the killing. (16 Sup. CT 4215, 4218-4220.)

b. Other Crimes Evidence

(1) The Murder of Regina Hartwell

In July 1994, while a freshman at the University of Texas in Austin, Kimberley Reeder met Regina Hartwell at a gay nightclub and began dating her. (7 RT 2016-2018, 2022-2023, 2026.) Hartwell had inherited a lot of money, and treated Reeder and her other friends to dinners and vacations. (7 RT 2024, 2072.) Hartwell bought Reeder diamond and emerald rings, allowed Reeder to withdraw cash daily from her bank account, and gave Reeder at least $10,000 during the time they knew each other. (7 RT 2024-2025; 10 RT 2437.)

Hartwell and Reeder used a lot of drugs together – primarily Ecstasy at first and then progressing to cocaine and crystal methamphetamine. (7 RT 2026-2027.) Hartwell provided the drugs. (7 RT 2027-2028.)

Around January 1, 1995,[26] Reeder decided that she was not a lesbian and told Hartwell that she just wanted to be friends. (7 RT 2027, 2034, 2067; 8 RT 2195-2200.) Hartwell was disappointed but maintained the friendship, spending most evenings with Reeder. (7 RT 2027.) Hartwell continued to provide Reeder with drugs which they used together, buy her clothing and gifts, take her on trips and allow her access to the bank account. (7 RT 2028, 2038-2039, 2067; 8 RT 2207-2208.)

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[26] All further date references within this portion of the Statement of Facts occurred in 1995, unless noted otherwise.

Later that January, Reeder moved to an apartment in south Austin, and Hartwell paid the rent.[27] (7 RT 2029, 2037.) In early May, Reeder met Thomas at the World Gym in Austin where they both worked, and they started dating. (7 RT 2067-2068; 8 RT 2183-2184; 8 RT 2274-2275.) At that time, Thomas lived in an apartment with his father and other relatives in south Austin. (7 RT 2068-2069.)

Reeder used drugs with Thomas, and would drive him around to various homes while he was armed with a bat.[28] (7 RT 2068-2069.) A week or two after they started dating, Thomas told Reeder that he was selling drugs. (7 RT 2070.) Thomas said he had crystal methamphetamine sent to him from California and showed her some which had arrived that day. (7 RT 2070-2071.)

Thomas and his family moved to a house in Del Valle, which was a 50 to 60- minute drive from Austin. (7 RT 2072-2074.) Reeder and Thomas spent most of their time together in Del Valle. (7 RT 2073.) Occasionally, Thomas stayed the night at Reeder's apartment. (7 RT 2074.) Thomas received his drug shipments at the Del Valle residence. (7 RT 2079-2080.) However, the shipments stopped at some point because Thomas thought it was too dangerous and he was having difficulty fronting money for the drugs. (7 RT 2081-2082.)

Reeder continued to visit Hartwell at her apartment on a daily basis, leaving at 8:00 or 9:00 in the evening to be with Thomas. (7 RT 2071.) Reeder got her methamphetamine from Thomas and her cocaine from Hartwell. (7 RT 2078-2079.)

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[27] Hartwell lived in an apartment in west Austin, about 20 minutes away by car. (7 RT 2029, 2037-2038.)

[28] Thomas did not have his own vehicle. (7 RT 2074.)

Reeder informed Hartwell that she was dating Thomas. (7 RT 2072.) Hartwell was very jealous of Thomas and wanted to stay involved with Reeder as much as possible.[29] (7 RT 2076; 8 RT 2219-2220; 10 RT 2411-2412.) Reeder characterized the relationship between Hartwell and Thomas as "[o]dd" and "different." (7 RT 2076.) They seemed to get along. (7 RT 2076.) Yet, at the same time, they were very competitive with each other in terms of power and knowledge about weapons and drugs. (7 RT 2076-2077.) Reeder thought Thomas and Hartwell did not like each other very much. (7 RT 2077.)

It was common for Hartwell to tell Thomas to do something and then get upset with him when he did it. (7 RT 2083-2084.) On one occasion, Thomas had drugs shipped to Hartwell's apartment. (7 RT 2080-2081.) Hartwell was angry with Thomas, but had previously told him that it was okay to use her address. (7 RT 2080-2081.) Another time, Hartwell asked Thomas to bring guns to her apartment so they could talk about them, but got angry when he did. (7 RT 2084.) One of the guns was a "TEC-9."[30] (7 RT 2084-2085.)

Hartwell approached Thomas with the proposition of selling drugs in the gay community through her. (7 RT 2075.) Initially, Thomas was not interested in selling directly to individuals, but eventually warmed up to the idea since it was an opportunity to make more money.[31] (7 RT 2075.) Thomas went with Hartwell and Reeder once or twice to gay clubs to sell drugs, but was not comfortable with it. (7 RT 2081.)

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[29] In May 1995, Hartwell took a trip to Cancun with Reeder and Marie Leal for a few days, and let Thomas stay in her apartment. (7 RT 2077-2078; 8 RT 2191, 2282-2283; 10 RT 2410, 2471-2473.)

[30] Thomas referred to the gun as a TEC-9. (7 RT 2084.)

[31] Up until then, Thomas only sold drugs to dealers because "[h]e didn't want people to know his face." (7 RT 2075-2076.)

On June 28, Hartwell and Reeder had an argument at Hartwell's apartment. (7 RT 2087-2088; 10 RT 2427.) Hartwell was upset about Reeder's plans to move back home with her parents, threatened to stop her financial support of Reeder, and essentially presented Reeder an ultimatum of choosing between her and Thomas.[32] (7 RT 2088; 10 RT 2428-2829.) Reeder left and drove back to her own apartment. (7 RT 2088-2090.)

Thereafter, Hartwell spoke to her friend and neighbor, Jeremy Barnes.[33] (10 RT 2475-2476.) Hartwell was very upset about the argument with Reeder and confused about their relationship because Reeder said she still loved her. (10 RT 2475-2476.) Hartwell told Barnes that she wanted to get away from drugs and bad influences and rebuild her life, asked about getting Thomas out of her life by turning him in to the police on drug charges, and said she was expecting a drug shipment for Thomas at her apartment. (10 RT 2476-2477, 2509-2511, 2524, 2527.)

That evening, Hartwell called Reeder at her apartment.[34] (7 RT 2090.) At the time of the call, Thomas was sitting on a nearby futon, rapping about being a gangster. (7 RT 2091.) Hartwell was upset, and argued with Reeder about her moving back home. (7 RT 2090; 8 RT 2218-2219.) Hartwell asked Reeder to come over and be with her like she did every evening. (8 RT 2219.) Reeder refused, which made Hartwell angry. (8 RT 2220.)

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[32] Hartwell was also angry with Reeder because she took Thomas to the home of Hartwell's drug supplier. (10 RT 2427-2428.)

[33] Some time after Barnes met Thomas, Hartwell showed Barnes an "Uzi type" firearm and a small handgun in her apartment. (10 RT 2470-2471.) Hartwell told Leal that she feared Thomas, knew he had been involved in a murder and dealt firearms, and bought the firearms from Thomas to keep Reeder safe. (10 RT 2446.)

[34] At the time, Reeder was high on methamphetamine, which she was then using on a daily basis, and possibly used cocaine that day as well. (7 RT 2092-2096.)

Hartwell heard Thomas in the background and told Reeder that she wanted to talk to him. (7 RT 2091; 8 RT 2219.) Reeder handed the phone to Thomas. (7 RT 2091; 8 RT 2218.) Thomas listened while Hartwell spoke to him. (7 RT 2091.) Reeder could not hear Hartwell's words, but knew Hartwell was upset because her voice was elevated. (7 RT 2091; 8 RT 2221.) After no more than a couple minutes, Thomas either hung up the phone or handed it back to Reeder to hang up. (7 RT 2091; 8 RT 2221-2222.)

Thomas "seemed very seriously upset" and told Reeder that "he wasn't going to let anybody send him to prison." (7 RT 2091-2093; 8 RT 2222.) Thomas said Hartwell threatened to turn him in to the police for selling drugs and that she had a contact in the police force named Marie in whom she was going to confide. (7 RT 2019.)

Thomas told Reeder that he needed to get some things in Del Valle. (7 RT 2093-2094, 2100; 8 RT 2224.) At one point, Thomas asked Reeder whether she "could handle it." (7 RT 2093-2094, 2100-2101.) Reeder said yes, understanding that he meant killing Hartwell. (7 RT 2101.) Reeder only cared about obtaining more drugs and getting high. (7 RT 2101.)

Hartwell called Leal.[35] (10 RT 2412-2415.) Hartwell sounded furious and had "a stressful, frightened tone to her voice." (10 RT 2412-2414.) Hartwell said she wanted to "bust" Thomas, explained that that he was about to receive a methamphetamine shipment from California and asked Leal to get in contact with a narcotics investigator from the Austin Police Department. (10 RT 2415-2416, 2429.) Leal, who was working there as a college intern, said she would get a contact number for Hartwell and get back to her. (10 RT 2402-2405, 2416-2417.) Hartwell told Leal

[35] Hartwell frequently called Leal to ask for advice and talk about things which upset her. (10 RT 2407-2408.)

that there was more she needed to say in person and would page her the next day. (10 RT 2417-2418.)

Meanwhile, Reeder drove Thomas to his home in Del Valle, where he retrieved a trench coat and a something inside a small bag. (7 RT 2093-2094, 2100; 8 RT 2223-2224.) Thomas seemed very angry and focused. (8 RT 2225.)

Thomas called his friend Mike Mihills and asked to meet at a restaurant in Oak Hill where they usually saw each other. (12 RT 2744-2745.) Thomas told Reeder that he was going to meet some friends and directed her to the restaurant. (7 RT 2094-2095.) Reeder drove there, dropped Thomas off and picked him up about an hour later. (7 RT 2095, 2098-2099; 8 RT 2225-2226; 12 RT 2746.)

At the restaurant, Thomas had dinner with Mihills and two other friends. (12 RT 2745-2745.) During the meal, Thomas said Hartwell was going to turn him in for selling drugs and he was being forced to leave his home. (12 RT 2746-2752.) On the way back to Austin, Thomas told Reeder that his friends did not take him seriously. (7 RT 2100.)

Upon their return, Reeder took as many as three Valium tablets and went to bed in her apartment. (7 RT 2101-2102, 2226.) She did not know what Thomas did or whether he got in bed with her that night. (7 RT 2102; 8 RT 2226.) The next thing Reeder remembered was a knock on the front door the following morning, June 29.[36] (7 RT 2102-2103; 8 RT 2227, 2230, 2241-2244, 2264-2265.)

Thomas was at the door. (7 RT 2103; 8 RT 2222, 2230, 2242-2244.) He "seemed upset, disturbed, anxious" and was bleeding a lot from a

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[36] Reeder previously testified in Texas that they both woke up in the morning, she saw Thomas get dressed and she fell back asleep. (8 RT 2226-2227, 2235; 8 RT 2242.)

serious laceration between the thumb and index finger of one of his hands. (7 RT 2103-2104, 2108; 8 RT 2235-2236, 2242.) Thomas requested some salt and asked whether Hartwell really had AIDS as she had previously told them. (7 RT 2104.) Reeder said she did not know and got the salt. (7 RT 2104.) After Thomas undressed, put his clothes in a garbage bag and showered, Reeder noticed Hartwell's wallet in the apartment. (7 RT 2104-2105.)

Thomas told Reeder that he received the cut on his hand during a struggle with Hartwell who was a lot stronger than he had thought.[37] (7 RT 2105; 8 RT 2238.) However, Thomas instructed Reeder to say he received the cut from a hammer if anyone asked.[38] (8 RT 2266.)

Thomas explained that the fight occurred when he walked into Hartwell's apartment and she called him "J."[39] (7 RT 2105.) Thomas said he stabbed Hartwell on the couch after she fought back, there was a lot of blood, he dragged Hartwell to the bathtub where he wrapped her in a comforter which he carried downstairs and placed in the back of Hartwell's Jeep which he drove to Reeder's apartment.[40] (7 RT 2105-2108, 2018-

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[37] Thomas was six feet, three inches tall and weighed between 215 and 220 pounds. (11 RT 2598; 16 RT 3307-3308.) Hartwell was between five feet, one inch and five feet, four inches tall and weighed between 121 and 140 pounds. (7 RT 2023; 11 RT 2586-2587.)

[38] Reeder thought Thomas meant the hammer of a gun, which is what she told detectives. (8 RT 2266-2267.)

[39] Reeder testified that Hartwell never locked her front door. (7 RT 2032.)

[40] Earlier that morning, Hartwell left a voicemail message for Barnes in which she expressed excitement about moving on with her life and asked Barnes to clean her apartment by the following Monday for a Fourth of July party. (10 RT 2477-2479, 2511.) Leal received a page from Hartwell's phone number around 11:15 that morning. (10 RT 2418.) Leal did not respond to the page until 3:00 in the afternoon and left a message on Hartwell's answering machine. (10 RT 2418-2419.)

2020; 8 RT 2222-2223, 2245.) Reeder went to the parking lot, where she observed Hartwell's Jeep with the comforter and body in it. (8 RT 2230.)

Thomas spoke about cutting Hartwell's body into pieces and purchasing cement, chains and garbage cans to sink the body parts in a river. (7 RT 2109.) Reeder drove Thomas to a Builders Square store, where they bought a 30-gallon garbage can, cement and a chain and padlock with Hartwell's ATM card. (7 RT 2111-2112; 8 RT 2239.)

Subsequently, Thomas drove to his Del Valle residence in Hartwell's Jeep and directed Reeder to follow him in her own car. (7 RT 2020, 2108-2109, 2112; 8 RT 2231.) There, Reeder went into the house to use drugs while Thomas remained outside. (7 RT 2112- 2113.) After what "felt like a long time," Thomas came inside the house. (7 RT 2113.) He was paranoid, stating that he could not cut up Hartwell's body and put in the garbage can as planned because there were people in the woods who could see him.[41] (7 RT 2113-2114.)

Meanwhile, Thomas's father came home and wanted Hartwell's Jeep off his property. (7 RT 2113.) Thomas drove Hartwell's Jeep – with Reeder following behind again in her car – to a rural area near the town of Bastrop and parked off the road in some weeds amongst the trees.[42] (7 RT 2020, 2115-2116; 8 RT 2241, 2247.) They then drove to a gas station in Reeder's car, where Thomas filled the car and a container with gasoline. (7 RT 2115-2116; 8 RT 2241.)

After getting the gasoline, they drove back to where Thomas had left Hartwell's Jeep. (7 RT 2117.) Reeder parked some distance away and Thomas walked to the Jeep carrying the gas can. (7 RT 2117-2118.)

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[41] There was a river near the house. (7 RT 2114.)

[42] The location was approximately 20 miles outside Austin and ten miles from Del Valle. (10 RT 2544-2545.)

Thomas poured gasoline on the Jeep and lit it on fire, while Reeder waited in her car. (7 RT 2020, 2117-2118.) The fire caused huge, twenty-foot high flames. (7 RT 2117-2118.) Thomas ran back to Reeder's car, and they drove to a hotel in Austin where Reeder checked into the hotel under a former name. (7 RT 2118-2119; 11 RT 2575-2578.)

At approximately 9:45 p.m. that evening, Fire Marshall Terry Duval[43] and other firefighters responded to the vehicle fire. (10 RT 2528-2531.) An orange glow and a very large thermal column – which traps smoke and debris – was visible from the road. (10 RT 2531.) Hartwell's burning jeep was located 170 feet off the road in a field of brush. (10 RT 2532-2534.) It was a "[v]ery hot and very intense" fire and the firefighters had to use breathing equipment while extinguishing it. (10 RT 2534-2535.)

The Jeep was completely burned. (10 RT 2535, 2539-2542, 2548.) Hartwell's remains – burned beyond recognition and in a fetal position – were lying in the back seat of the Jeep.[44] (10 RT 2540-2541, 2549; 11 RT 2583.) A folding lock-blade knife wrapped in a blue cloth was found near the body. (11 RT 2584.)

There was a very strong smell from an accelerant which saturated the ground and a "burn trail" from gasoline poured on the ground away from the vehicle to a safe distance to start fire. (10 RT 2335-2537; 11 RT 2584-2585.) The gas can was found near the burn trail. (10 RT 2537-2539.)

On June 30, Dr. Roberto Bayardo, the Chief Medical Examiner for Travis County, performed an autopsy on Hartwell's remains. (11 RT

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[43] Fire Marshall Duval was also trained in arson investigation. (10 RT 2529.)

[44] Hartwell's body was subsequently identified through dental records. (11 RT 2575, 2623.) The Jeep was identified through the vehicle identification number on the frame as well as the license plate which was found nearby the next day. (10 RT 2550-2551; 11 RT 2585-2586.)

2618-2621.) Her body was "partially cremated" with large portions completely burned to ash. (11 RT 2622.) All of the facial flesh was missing with her eyes shrunken to the bottom of the eye sockets and her teeth exposed. (11 RT 2623.) The left side of her chest was severely burned and the right side of the abdominal wall was missing. (11 RT 2623-2624.) Her arms and legs were reduced to charred stumps with only portions of the extremities remaining. (11 RT 2624.) The internal organs were preserved except for the hepa sac and organs on the left side of her body. (11 RT 2624.) Some clothing remnants remained on the body. (11 RT 2622.)

Based on his internal examination, Bayardo was able to locate a fatal stab wound just above Hartwell's right collarbone. (11 RT 2624-2628.) The stabbing instrument completely perforated the upper portion of her right lung, extending into her back just to the right of the spinal column and severing a large vein and artery. (11 RT 2625-2626, 2629.)

The trajectory of the stab wound was from front to back at a 30-degree downward angle. (11 RT 2626-2627.) The wound was five to six inches deep and one inch in width. (11 RT 2625, 2632.) In the lung, the width of the injury was three quarters of an inch. (11 RT 2628.) The knife found near Hartwell's body in the Jeep was capable of inflicting such a wound. (11 RT 2632-2634.) There was an 80 percent chance Hartwell was in a seated position when she was stabbed. (11 RT 2640-2641.)

The injuries to the lung and blood vessels caused Hartwell to bleed to death, completely filling the right side of her chest cavity with blood. (11 RT 2626, 2635.) Dr. Bayardo would not expect there to have been a lot of external bleeding – less than an ounce of blood with very minimal splatter. (11 RT 2636, 2643-2644.)

Hartwell would have remained conscious and capable of movement for up to three minutes after the stab wound was inflicted. (11 RT 2625.)

Due to the absence of soot or smoke in Hartwell's airways and the absence of carbon monoxide in her blood, Dr. Bayardo concluded that she was not breathing and already dead prior to the fire. (11 RT 2628.) A toxicology analysis of Hartwell's blood and tissues indicated that she drank alcohol a few hours prior to death, took Valium within several hours of death and ingested cocaine more than six hours before death. (11 RT 2630-2631.)

In the hotel room after the burning of Hartwell's body, Thomas dyed his hair from light brown to black and cut it shorter. (7 RT 2120-2121.) Thomas told Reeder that he was going back to California and she should stay in Austin and send him money. (7 RT 2121.) They checked out of the hotel on July 1 and returned to Del Valle. (7 RT 2122; 11 RT 2578.)

Reeder continued to use Hartwell's ATM card daily to withdraw cash, most of which she gave to Thomas. (7 RT 2122-2126.) Thomas continued to change his hairstyle, shaving it down to a Mohawk and then a small patch of hair on the back of his head. (7 RT 2135.)

Two days after the murder, Leal still had not heard from Hartwell and decided to check on her. (10 RT 2420.) Leal and her roommate entered Hartwell's apartment either through the front door that was usually left unlocked or a window near the door that was usually left open for Hartwell's pets. (10 RT 2420-2421, 2450-2451, 2491-2492, 2519.)

Leal first looked for Hartwell's dog, which she found sitting in the corner of the bedroom acting scared. (10 RT 2421.) Leal then observed bloody tissues on the floor between the bedroom and bathroom, which was unusual since Hartwell was always very meticulous. (10 RT 2421.) Leal also noticed a bag of cosmetics and other items that Hartwell always carried with her was still in the apartment. (10 RT 2422.) Leal tried to call Reeder several times, but the number was always busy. (10 RT 2423-2424.) Leal returned home. (10 RT 2425.)

Barnes also went to Hartwell's apartment that day for the prearranged cleaning. (10 RT 2480.) There was a lot of trash strewn about, the furniture had been moved somewhat, and Hartwell's makeup was not on the bathroom counter where it usually was. (10 RT 2480, 2484, 2523.) Barnes observed the bloody tissues, small amounts of blood spatter on the bathroom and living room walls, a very large blood stain on the living room carpet, and some blood on a small statuette on the coffee table. (10 RT 2480-2481, 2484-2485, 2493-2494.) Barnes cleaned the apartment and tried to get the stain out of the carpet. (10 RT 2486-2487, 2492.)

On July 4, Leal called Reeder and Barnes to discuss her concerns, and they all agreed to meet at Hartwell's apartment. (7 RT 2126-2127; 8 RT 2244-2246; 10 RT 2425-2428, 2495.) Reeder was high on drugs and the first to arrive. (7 RT 2127, 2131.)

Reeder expected to see a lot of blood and wanted to hide evidence to protect herself and Thomas. (7 RT 2127; 8 RT 2245-2246.) She checked the bathroom and began scrubbing some rust under the soap dish that she thought was blood. (7 RT 2127; 8 RT 2246.) Meanwhile, Barnes climbed through the open window and heard Reeder crying and screaming "Regina, are you okay." (7 RT 2128-2130, 10 RT 2497.) Barnes entered the bathroom and asked Reeder what she was doing. (10 RT 2497-2498.) Reeder said, "I'm trying to get the blood off," fell into a fetal position, and began screaming that she should have called and taken care of Hartwell, and that she loved her. (10 RT 2498.) Meanwhile, Leal arrived. (10 RT 2498-2431.)

Barnes and Leal decided to call the police to file a missing person report, but first got rid of any drugs and paraphernalia in the apartment so as not to get Hartwell in trouble. (7 RT 2130-2132; 10 RT 2432-2433, 2499.) When the officer arrived, Reeder was still crying hysterically, shaking and saying, "Regina, are you okay," and "I should have called

her."[45] (10 RT 2433-2435, 2497, 2500.) Reeder lied to the officer and told him that she did not know where Hartwell was. (7 RT 2132-2133.)

After the officer left, Reeder drove to Del Valle, where she spoke to Thomas. (7 RT 2133.) Reeder told Thomas what happened with the police officer and that he was going to be a suspect, which upset him. (7 RT 2134.) Reeder also told Thomas that there was no blood in the apartment, which surprised him. (7 RT 2134.)

On the morning of July 5, Thomas and Reeder were contacted by officers in Del Valle and transported to the Austin police station. (7 RT 2128-2129, 2136; 8 RT 2236, 2244; 11 RT 2572-2573, 2587-2589.) The laceration between the first finger and thumb of Thomas's right hand was photographed. (11 RT 2573-2574.) It was a "[f]airly serious" cut, but no longer bleeding and just beginning to heal. (11 RT 2574, 2597-2598.) Thomas was not pleased that the officers were photographing his hand. (11 RT 2575.) Thomas was subsequently arrested for Hartwell's murder. (11 RT 2598.)

At the station, Reeder gave a sworn statement to detectives under oath. (7 RT 2136-2138; 8 RT 2248-2249.) Reeder had used drugs about 12 hours earlier, was either high or experiencing withdrawals, and was confused.[46] (7 RT 2138; 8 RT 2237, 2250-2252, 2257-2259.) Reeder implicated herself and said, "I'm caught."[47] (8 RT 2260, 2270.) However,

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[45] Leal and Barnes disagreed whether the officer was told about the blood in the apartment. (10 RT 2434-2435; 10 RT 2501.)

[46] Reeder testified that this was the last time she used drugs. (7 RT 2128-2129, 2134-2135.) She entered a residential treatment facility, returned to college to finish her degree, joined the army and became a cancer research scientist. (7 RT 2129.)

[47] At the conclusion of the interview, Reeder was allowed to leave with her parents. (7 RT 2139.) Reeder was subsequently indicted and charged with Hartwell's murder. (7 RT 2139.) The charges against Reeder

(continued...)

Reeder withheld some details and lied about many things to protect Thomas. (8 RT 2237, 2250-2252, 2257-2259.)

The Del Valle residence and grounds were searched the following day. (11 RT 2594, 2599.) There, officers found shoes, boots, Thomas's and Reeder's identifications, a Builder's Square receipt, the hotel receipt, Hartwell's ATM card, a chain and a trash can. (11 RT 2600-2603.)

Blood samples were collected from various locations in Hartwell's apartment and compared to known DNA profiles derived from Hartwell's remains and a blood sample obtained from Thomas following his arrest.[48] (11 RT 2607-2609, 2629-2630, 2653, 2663-2664, 2669-2670.) The results were as follows:

Samples from two kitchen floor tiles tested presumptively positive for blood. (11 RT 2665.) However, no profiles were obtained because it was either not human blood, there was insufficient DNA or it was contaminated. (11 RT 2666-2667.)

(...continued)
were eventually dropped due to a violation of *Miranda v. Arizona* (1966) 384 U.S. 436. (7 RT 2141; 8 RT 2255-2256, 2280-2281.) In the summer of 1996, Reeder testified at Thomas's trial for the murder under a grant of immunity. (7 RT 2020-2021, 2139-2140; 8 RT 2270.) Reeder was also granted immunity from Texas authorities for her testimony in the instant case. (7 RT 2141.) The immunity agreement compelled her to tell the truth, but did not require her to testify to any particular facts or consistent with any prior statement or testimony. (7 RT 2142-2143.)

[48] Gary Molina and Jill Hill, forensic scientists with the Texas Department of Public Safety, collected the samples with the assistance of another criminalist. (11 RT 2647-2648, 2651-2652, 2663-2664.) Each individual test performed in their lab is read by another analyst. (11 RT 2656.) At the conclusion of the testing, the entire case file is peer-reviewed by another analyst and then administratively reviewed. (11 RT 2656.) Hill performed the original DNA analysis, but left the department in 1996. (11 RT 2651-2652, 2655.) Using the same department protocol, Molina performed his own independent review of the testing and, based on his own analysis, reached the same conclusions as Hill. (11 RT 2656-2658.)

In the living room, blood near the armrest of the recliner was consistent with Thomas's DNA profile, while blood near the footrest was consistent with Hartwell's profile. (11 RT 2667-2671.) Two streaks of blood on a small cube table facing the recliner were consistent with Hartwell's profile. (11 RT 2671-2674.) A blood stain on the statuette on the coffee table was consistent with Thomas's profile. (11 RT 2674-2675.) A blood stain on the carpet near the sofa and cube table was consistent with Hartwell's profile, while another carpet stain near the windows was consistent with Thomas's profile.[49] (11 RT 2677- 2678.)

In the bathroom, blood spatter on the wall matched both Hartwell's and Thomas's DNA profiles. (11 RT 2675-2677.) A blood stain on the shower curtain rod was consistent with Thomas's profile, while a stain on the shower curtain did not yield any results. (11 RT 2678-2680.)

Molina, Hill and other criminalists also collected evidence from Reeder's apartment. (11 RT 2682-2683.) A piece of bloody tissue or toilet paper in the bathroom trash can was consistent with Thomas's DNA profile, while another was consistent with Reeder's profile. (11 RT 2683-2685.)

A blood stain near the interior passenger door handle of Reeder's jeep was consistent with Thomas's DNA profile. (11 RT 2685-2686.) Blood on the handle of the folding knife found in Hartwell's vehicle presumptively tested positive for blood, but was of insufficient quality for DNA typing or to confirm that it was human blood. (11 RT 2605, 2686-2688.)

The population frequency of the known DNA profile obtained from Thomas was one in 342 Caucasians, 5,321 African-Americans or 864

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[49] A discolored area of carpet padding near the recliner was of insufficient quality to analyze due to Barnes having cleaned the carpet or other factors. (11 RT 2680-2682.)

Hispanics. (11 RT 2688-2690.) The DNA profile obtained for Hartwell was approximately one in 119 Caucasians, 198 Hispanics or 1301 African-Americans. (11 RT 2689.) Molina explained that DNA typing has significantly improved since that used in the mid 1990's for Hartwell's case with frequencies now stated in the trillions or quadrillions. (11 RT 2689-2690.)

(2) The Threat to Kill Mike Aguon and His Girlfriend

In 1991, Thomas was residing with Maximillian Garcia, Mike Aguon and a woman named Christine in Norco. (9 RT 2334.) One day, when Thomas became paranoid that that Aguon and Christina were going to turn him in to the police, he placed a shotgun behind the front door of the residence, and indicated to Garcia that he was going to shoot them when they came home.[50] (9 RT 2334, 2339-2340.) Garcia found Aguon and Christine and told them to stay away until things calmed down. (9 RT 2334, 2340.) Eventually, Thomas "mellowed out" and nothing happened.[51] (9 RT 2335, 2340.)

(3) The Norco Shotgun Incident

During his interview with Investigator Silva in Texas, Thomas discussed another prior incident in Norco involving a shotgun. (16 Supp.

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[50] Garcia told Investigator Michael McDonagh of the District Attorney's office that drugs made Thomas increasingly paranoid and believing that friends and acquaintances would turn him in to the police. (9 RT 2334.)

[51] Garcia was a convicted felon currently serving a prison sentence. (9 RT 2329-2330.) At trial, Garcia denied or claimed not to recall his prior statement in which he described the incident to Investigator McDonagh. (7 RT 2328-2329, 2333.) Garcia previously told Investigator Nicholas LaBella of the District Attorney's office that he was reluctant to testify in court because he was a state prisoner and afraid of being labeled a snitch. (7 RT 2025.)

CT 4165.) Thomas told Silva that he previously argued[52] with his ex-wife Dawn Bothof after coming home drunk, and Bothof grabbed the phone and said she was going to call the police. Thomas said, "I got something for them" and went into the bedroom to retrieve and load his shotgun. The gun went off after his cousin tried to get it away from him, and a shotgun slug fired through the dresser and a wall into the bathroom. (16 Supp. CT 4165-4168.) Thomas said Bothof took the child and left, and then he showered. Police officers arrived and asked if there was a problem or a gunshot. Thomas said "no." The officers indicated that Bothof wanted him to leave but was not going to press charges, and he gathered his belongings and left. (16 Supp. CT 4167-4168.)

2. Defense Evidence

Investigator Silva interviewed Reeder about three years after the Texas trial. (13 RT 2867-2678, 2874.) Reeder told Silva that her statement to the Texas authorities had been videotaped, she flirted with and asked Thomas out on a date, she was very greedy, Hartwell set up a college fund for her which she did not know about, and Thomas told her that he had hidden "Rafa" in some caves. (13 RT 2867-2870, 2874.) Reeder never said Thomas threatened, hit or forced her to do anything. (13 RT 2869.)

In 1998, Silva interviewed Brown in state prison. (13 RT 2870.) Brown told Silva that she was addicted to and using a lot of methamphetamine around the time of the Noriega murder, she was heavily intoxicated on methamphetamine for days prior to and at the time of the shooting, she did not know if she heard gunshots before exiting her vehicle

[52] Thomas explained that he argued with Bothof after noticing a flower and note from another man on her car's windshield. (16 Supp. CT 4166.)

and walking to the shooting scene,[53] Thomas had used speed with her prior to the shooting, Thomas did not need money at the time, Thomas and Noriega had a heated exchange in Spanish, she was not certain what was in the green bag, Thomas used a 9-millimeter Glock[54] (which she helped purchase) to shoot Noriega, and she lied to Detective Wilson because she was strung out on drugs. (13 RT 2871-2873.)

B. Penalty Phase

1. Prosecution Evidence

In addition to relying on the facts and circumstances of the Noriega murder, the Hartwell murder and the Norco shotgun incident presented in the guilt phase, the prosecution presented the following evidence in aggravation.[55]

a. Victim Impact Testimony

Noriega's youngest sister, Armida R., testified that she and Noriega lived in the same residence until she was about ten years old. (15 RT 3170-3171.) Armida had a marvelous relationship with Noriega, whom she considered "the best of [her] brothers." (15 RT 3171.) Noriega gave Armida lots of affection, bought her things and "practically took care of

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[53] Brown immediately corrected herself and told Silva that she walked up to Thomas's location, looked over and saw headlights from two parked vehicles facing each other, and then described the shooting. (13 RT 2875.)

[54] Brown told Silva that Thomas brought a Glock 9-millimeter gun over to her apartment the morning after the shooting. (13 RT 2877.) Silva clarified that Brown never expressly stated the Glock was used in the shooting. (13 RT 2877-2878.) Rather, it was Silva's impression that was what Brown meant in discussing the gun. (13 RT 2880.)

[55] The jury was instructed not to consider the incident with Aguon and Christine as an aggravating factor in the penalty phase. (17 Supp. CT 4490.)

[her]." (15 RT 3171-3172.) Noriega told Armida that he loved her very much. (15 RT 3172.)

Armida was 13 or 14 years old when Noriega was murdered. (15 RT 3170-3171.) She was with her parents and other siblings when relatives called to inform them about Noriega's death. (15 RT 3172.) When asked how they reacted to the news, Armida testified that she felt "terribly," her parents "were in very bad shape," and her "mother suffered very much." (15 RT 3172.) Armida still misses her brother a lot and thinks about him all the time, especially at night and on his birthday. (15 RT 3172-3173.)

b. Prior Acts and Threats of Violence

On September 20, 2005, Correctional Deputy Dirk Webb searched Thomas's cell in the Presley Detention Center. (15 RT 3224-3226.) Thomas's cell, which he shared with another inmate, was in the administrative segregation section because his was a high profile case and he was serving a life sentence out of Texas. (15 RT 3225-3227.)

During the search, Deputy Webb found a small metal shank in a legal-sized accordion folder in the cell's shelving area. (15 RT 3227.) The shank was approximately four inches long, sharpened to a point and resembled a knife. (15 RT 3227.) The accordion file contained materials pertaining to Thomas, Noriega and Brown. (15 RT 3230.) Deputy Webb testified that the shank was capable of cutting people in a "pretty brutal" manner, and that he had seen people seriously injured with such weapons in the jail.[56] (15 RT 3228.)

On December 12, 2006, Correctional Deputy Thomas Montez and another deputy removed Thomas from his cell at the Presley Detention

[56] Deputy Webb knew of two incidents where Thomas was stabbed, but was unaware of Thomas ever stabbing anyone in the jail. (15 RT 3231-3232.)

Center for a search. (15 RT 3151-3154.) Thomas and his cellmate were handcuffed, taken to the day room and patted down prior to the search of the cell. (15 RT 3155.) Thomas was wearing boxer shorts and sandals. (15 RT 3156.) During the patdown, Deputy Montez felt a hard object in the fly area of Thomas's boxers. (15 RT 3156.) When Montez asked what it was, Thomas said, "Be careful, guys. It will cut you." (15 RT 3156.) Montez removed the object which was a broken plastic toothbrush with two razor blades attached to the tip. (15 RT 3156-3157.) Montez testified that it was a weapon designed to cut and hurt people, and that he had seen such shanks cause large wounds. (15 RT 3157-3158.)

Bothof met Thomas in high school and married him in 1990. (15 RT 3175-3176.) They had a child together later that year, and divorced in 1998. (15 RT 3176, 3179-3180.) Bothof described the marriage as "on and off," "volatile," and "violent." (15 RT 3176.) They mostly argued about Thomas's drinking and drug use. (15 RT 3177-3178, 3181-3182) Whenever they discussed Thomas's violence after the fact, he would say he did not remember doing it. (15 RT 3195.) Bothof feared Thomas, but usually did not report the domestic violence. (15 RT 3180-3182.)

Bothof described the March 1992 shotgun incident, explaining that Thomas came home intoxicated on drugs, alcohol or both with his cousin Brian Anchondo. (15 RT 3182-3184; 16 Supp. CT 4168.) In front of their child, Thomas argued with Bothof, pushed her against the wall, slapped her in the face, brandished a rifle and told Bothof that he was going to make her "pay." (15 RT 3182-3185, 3193.) Brian Anchondo said, "You're crazy. Don't do it," and wrestled for the rifle which went off and fired a bullet past Bothof and the child through some walls. (15 RT 3183.)

Either before or after the firing of the rifle, Bothof tried to call the police and Thomas pulled the phone cord out of the wall. (15 RT 3185-3187.) However, the call had already gone through. (15 RT 3185-3186.)

Bothof grabbed the child and ran outside to wait for the police. (15 RT 3187.) A Riverside County Sheriff's deputy responded to the call. (15 RT 3252-3253.)

Several months later in Grand Terrace, Thomas got into a confrontation with a bouncer who expelled him from a restaurant and bar. (15 RT 3188-3189.) Later that evening, Thomas left home with his rifle or shotgun saying he that he was going to kill the bouncer. (15 RT 3189-3190.) Thomas was very drunk. (15 RT 3190.)

When he returned the following morning, Thomas was still drunk and began arguing with Bothof while she was lying in bed. (15 RT 3190-3192.) Thomas got on top of Bothof and started choking her with one hand. (15 RT 3190-3192.) Bothof tried to push and kick Thomas away. (15 RT 3192.) Bothof could barely breath, was blacking out and felt like she was going to die. (15 RT 3190-3193.) Bothof's sister came into the bedroom and yelled at Thomas to stop. (15 RT 3190, 3193.) Thomas released Bothof, and she ran with her sister to a friend's house. (15 RT 3193.)

When Bothof and her sister returned, Thomas was calmly sitting on the toilet holding the gun against his head. (15 RT 3193.) They took the gun from Thomas, put him in the back of a truck and drove him out to Anchondo's home in Reche Canyon. (15 RT 3194.) Along the way, Thomas jumped out of the truck, said people were watching and after him, and fled into the hills. (15 RT 3194-3195.) Bothof and her sister stayed the night with Anchondo because they were afraid of Thomas. (15 RT 3195.)

Bothof recalled Thomas leaving town suddenly in 1992 and going to Texas for two weeks to a month. (15 RT 3196-3197.) When he returned from Texas, Thomas told Bothof that he knew how to kill people and where to dump their bodies where nobody would find them, that he would show her where he dumped them, the hills off Moreno Beach Drive was such a place, there were "tons of bodies out there," he had killed before, and he

could kill her. (15 RT 3197-3198.) However, after making such comments, Thomas would tell Bothof that he was just trying to scare her. (15 RT 3197.)

Thomas told Bothof that a man named Kelly murdered somebody. (15 RT 3221.) However, Thomas would sometimes say he did it. (15 RT 3221.)

By the end of 1992, Thomas was heavily using drugs and dealing methamphetamine. (15 RT 3199-3201.) He and Bothof separated. (15 RT 3201.) Thomas's behavior became erratic, he thought his phone was tapped and people were after him, and he asked to leave his gun at Bothof's house. (15 RT 3200.)

After Thomas joined the Army in 1993, he seemed better and Bothof moved with him to Hawaii. (15 RT 3201-3203.) However, Thomas started getting violent and using drugs again, and seemed like he was losing control. (15 RT 3203-3205.)

On one occasion in Hawaii, Thomas took Bothof's keys and drove her car while intoxicated on drugs or alcohol. (15 RT 3206.) Bothof and some friends followed and tried to stop him. (15 RT 3206-3207.) Thomas finally stopped, and they asked him to give Bothof her car and let one of the friends drive him. (15 RT 3207.) When Thomas refused, Bothof tried to grab the keys out of her car. (15 RT 3207.) Thomas wrested the keys from Bothof's hand, twisted and threw her to the ground, and drove off. (15 RT 3207-3208.) Bothof's neck and back hurt for a few days, but she did not seek medical attention. (15 RT 3207-3208.)

In the summer of 1994, Thomas and Bothof had an argument in the condominium they were renting in Hawaii. (15 RT 3209.) When Bothof said she was going to leave him, Thomas became "hysterical" and got a knife. (15 RT 3209.) Bothof locked herself and the child inside the

bathroom (15 RT 3209.) Thomas stabbed the door with the knife until the door broke. (15 RT 3209-3210.)

Thomas forced Bothof to stay in the condominium for three days and made her remain on the couch, while he sat in a nearby chair holding her at knife point and not allowing her to receive phone calls. (15 RT 3209-3213.) Whenever Bothof asked to leave and got up from the couch, Thomas pushed her down, threatened to kill her, ordered her not to move, and said she was not going to take their son away from him. (15 RT 3212.) Bothof did not see Thomas sleep at all during those three days. (15 RT 3212.)

On the third day, Thomas's father called and Thomas told him what was happening. (15 RT 3210, 3213.) Thomas allowed Bothof to talk to his father, who told her to dial 911 and act like she was still talking to him. (15 RT 3210, 3213.) Bothof followed the father's instructions. (15 RT 3213.) When Bothof told Thomas that she had called the police, Thomas came at her with the knife. (15 RT 3213.) However, Thomas began stabbing his own foot which was in a cast. (15 RT 3210, 3213.) A police officer arrived while Thomas was stabbing his foot and gave Thomas orders through the window, which ended the incident. (15 RT 3214.)

While Bothof was pregnant with their second child, Thomas kicked her in the stomach and threw her to the ground. (15 RT 3215-3217.) When they left Hawaii, Bothof moved back to Moreno Valley and Thomas went to Texas.[57] (15 RT 3218.)

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[57] Bothof was previously arrested for domestic violence for slapping her current husband after he trapped her in a room, but no charges were filed. (15 RT 3223.)

2. Defense Evidence

Thomas testified on his own behalf.[58] (16 RT 3285-3286.) He was born in 1971 and was 36 years old at the time of trial. (16 RT 3287.) His parents separated when he was three years old. (16 RT 3288.) He grew up on the MacNally Ranch with his mother, grandparents, uncle, aunt and cousins, and generally visited his father during the summers. (16 RT 3287-3289.) Thomas's family took good care of him financially and gave him everything he wanted.[59] (16 RT 3423.) His father spanked him when he misbehaved. (16 RT 3289.)

Thomas began drinking wine when he was three years old. (16 RT 3311.) Thereafter, Thomas was allowed to drink beer and other alcohol during fishing trips with his father and at family get-togethers. (16 RT 3312-3315.) Thomas's mother was a social drinker during his early years. (16 RT 3356.)

When Thomas was seven years old, his father taught him how to roll and smoke marijuana. (16 RT 3292-3293, 3299.) Subsequently, Thomas's father showed him how to snort and inject methamphetamine. (16 RT 3290-3292, 3299-3301.) Thomas's father supplied him with marijuana and methamphetamine. (16 RT 3304.) By the time Thomas was 13 years old, he had also tried cocaine and LSD, his drug use escalated, and he began using drugs with friends. (16 RT 3294-3295, 3299, 3305, 3311.)

Thomas was not addicted to drugs or alcohol, and they did not mentally or physically impair him in school. (16 RT 3309, 3327.) His grades were good enough for college, but he did not go to college because

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[58] After being advised of his rights, Thomas chose to testify against the advice of trial counsel. (16 RT 3281-3283, 3295.)

[59] Thomas previously told author Susie Spencer, who interviewed him and wrote a book about the Hartwell murder, that he considered himself to be "a spoiled kid." (16 RT 3423.)

Bothof was pregnant. (16 RT 3334-3335.) Thomas stopped using drugs when he was 16 years old and started playing high school football. (16 RT 3327-3332.) However, he continued to sell marijuana, methamphetamine and LSD to classmates. (16 RT 3335, 3423.)

After high school, Thomas played semi-professional football. (16 RT 3336.) In his second year, Thomas began using methamphetamine again to give himself an advantage in the sport. (16 RT 3336-3338.) By the time he was 20, Thomas was addicted to methamphetamine and gave up on football. (16 RT 3319, 3326, 3336, 3340-3342.)

Whenever Thomas was high on drugs, he fought and got physical with Bothof. (16 RT 3337.) Thomas testified that he manhandled Bothof during arguments in order to get her off of him and possibly slapped her once or twice, but never harmed her because he was able to control his actions despite the drugs or alcohol. (16 RT 3420-3422.) Thomas admitted the 1992 Norco shotgun incident. (16 RT 3419.)

Thomas testified that he met Noriega through the drug trade in the Riverside area, but declined to answer whether Noriega was a drug dealer. (16 RT 3344-3345.) Thomas denied any involvement in Noriega's death, but subsequently clarified that he did not "physically commit" the Noriega murder. (16 RT 3286-3287, 3345, 3354-3355.) Thomas explained that he and Brown had trafficked a lot of methamphetamine together, and he agreed to facilitate one more drug transaction for her before leaving Moreno Valley. (16 RT 3355-3357, 3415.) However, Thomas later denied setting up a final transaction between Brown and Noriega. (16 RT 3406-3407.)

Three days after Noriega disappeared, Thomas was already in Texas where he received a traffic citation. (16 RT 3413-3414.) When interviewed by Spencer about his movement of Hartwell's dead body,

Thomas said, "I mean, this stuff, it can't be going on again." (16 RT 3430-3431.)

Thomas previously testified that he enlisted in the Army prior to the Noriega murder in 1992 and that his unit was dispatched to Hawaii to assist with Hurricane Iniki relief in September of that year. (16 RT 3342-3343, 3410-3411.) Thomas also signed a court document in 2007, stating that he was assisting with hurricane relief in Hawaii in September of 1992. (16 RT 3408-3409.) Subsequently, Thomas admitted that his "recollection was misplaced," and he actually began serving in the Army in February 1993, five months after Noriega's murder. (16 RT 3410-3411.)

Thomas was discharged from the Army for failure to rehabilitate. (16 RT 3343.) After his discharge, Thomas returned to the Riverside area where he resumed selling methamphetamine, cocaine and marijuana. (16 RT 3343-3344.) In the fall of 1994, Thomas moved to Austin to live with his father. (16 RT 3350.) After working a number of months as a personal trainer, Thomas began selling (but not using) drugs in Austin because he needed money to pay child support.[60] (16 RT 3350-3352, 3401.)

Thomas testified that he was involved in Hartwell's murder, but did not kill her. (16 RT 3286, 3553.) He claimed that others were involved and he did not know who murdered Hartwell because he was not present. (16 RT 3353-3354.) However, Thomas admitted that Hartwell threatened to turn him in to the police during a phone call the night before the murder and that he told her to leave him and Reeder alone. (16 RT 3399-3400,

[60] Thomas previously testified that he did not sell drugs in Texas. (16 RT 3393, 3395.)

3425.) Thomas previously testified that the presence of his blood in Hartwell's apartment was due to a scooter accident.[61] (16 RT 3426-3428.)

Thomas testified that he got rid of Hartwell's body by burning it, explaining how he poured gasoline on the body while it was in the back of the jeep which he set on fire through a starter trail. (16 RT 3353, 3425-3426.) Thomas denied telling Reeder, Sams or Bothof that he had killed someone in California. (16 RT 3417-3418.) However, Thomas admitted that he "probably" had a TEC-9 gun in Texas. (16 RT 3416, 3424.)

Thomas testified that he had shanks in his court papers and in his boxer shorts in the Presley Detention Center for protection only. (16 RT 3361-3363.) According to Thomas, he had received 17 stab wounds and 12 lacerations on four different occasions, but never stabbed anyone while in custody. (16 RT 3360-3361.)

Thomas read a statement to the jury that he had chosen the path for himself during the past 13 years in custody, describing the spirit of "a warrior" who "embraces death as part of the struggle" and laughs at those that hate him. (16 RT 3365.) He became "a practitioner" of the warrior spirit philosophy in custody. (16 RT 3373.) In Texas, prison inmates paid Thomas for protection. (16 RT 3380.) Thomas was involved in a lot of fights with other inmates, which he claimed were all self-defense even though he may have instigated them. (16 RT 3380-3382.)

Thomas testified that he made his own choices in life, which had nothing to do with drugs, alcohol or predisposition. (16 RT 3357, 3365-

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[61] Thomas had an accident with Hartwell's scooter a couple days before the Cancun trip. (10 RT 2474-2475.) It was a minor accident, and the scooter was barely damaged. (10 RT 2475.) Barnes saw Thomas after the accident and observed no injuries to Thomas's hands or anywhere else. (10 RT 2475.) About a week before the Hartwell murder, Thomas also skinned his knee while riding a moped. (8 RT 2272-2273.)

3366, 3370.) He was no longer addicted to drugs by the time he went into custody and could have stopped using drugs at any time except when he was about 20 years old. (16 RT 3325-3326, 3366-3369.)

Thomas refused trial counsels' requests to have an MRI because he did not feel he was brain damaged or predisposed to use drugs. (16 RT 3356-3357.) Thomas also refused to submit to a mental health evaluation because previous doctors said he was "fine" and did not suffer from any learning deficiencies or other problems, and he did not agree with one doctor who opined that he had an addictive personality or predisposition to use drugs due to his parents or how he was raised. (16 RT 3357-3359.) Thomas told the jury, "I chose the path that I lived and I'm here because of it." (16 RT 3357.)

Thomas's guilt phase strategy was to be acquitted, whereas his penalty phase strategy was to receive a death verdict. (16 RT 3324-3325.) Thomas complained about "prejudicial, biased rulings, lack of funds" and counsel not following his strategy. (16 RT 3323-3324.) Although Thomas wanted the jury to return a death verdict, he did not want to receive the death penalty. (16 RT 3315, 3297, 3372.) He was not suicidal and did not want to die, but believed a death sentence would be in his best interest. (16 RT 3321-3322.) Thomas explained that a death judgment "enriches and enhances certain areas of post-conviction remedies that I'm definitely seeking." (16 RT 3372.)

Thomas maintained that he was framed for the Noriega and Hartwell murders, but was not manipulating the jury. (16 RT 3316, 3372.) He was reluctant to answer questions about drug use because it might make the jury think he deserved a life sentence. (16 RT 3297.) Thomas did not want any mitigation evidence presented or witnesses called on his behalf in the penalty phase. (16 RT 3316-3318, 3442-3443.) He testified to allow the jurors to stand in his shoes and see things from his viewpoint, and insisted

on being the first witness against the wishes of trial counsel. (16 RT 3321-3323, 3442.)

Anchondo was the brother of Thomas's mother. (17 RT 3465.) Thomas lived at the ranch periodically with Anchondo and wife, Cynthia.[62] (17 RT 3463-3464, 3477-3478.) Anchondo did not have much contact with Thomas's mother when she was pregnant with him. (17 RT 3465.) Although Thomas's mother drank wine during the pregnancy, she was never "stumbling or falling down" drunk. (17 RT 3466-3467.) Although Anchondo did not observe any drug use, Thomas's mother told him that she used drugs during the pregnancy. (17 RT 3471.)

Anchondo noticed that Thomas's mother had bruises while she was pregnant. (17 RT 3468-3469.) Thomas told Anchondo that his mother had boyfriends who were abusive to them. (17 RT 3472-3473, 3485.) Cynthia had also heard that Thomas's mother's boyfriends were abusive. (17 RT 3485.) Thomas's mother tried to commit suicide four times.[63] (17 RT 3473.)

Anchondo testified that Thomas was given a sip of beer by his father when he was nine years old, but he did not see Thomas drink any other alcohol until he was 18 years of age. (17 RT 3467-3468.) Anchondo was suspicious of, but never saw, Thomas using drugs. (17 RT 3468.) Anchondo believed Thomas had a difficult life as a child due to his parents' drug and alcohol use and his mother's suicide attempts. (17 RT 3475.)

Cynthia did not know Thomas until he was 19 or 20 years old. (17 RT 3479.) She never saw Thomas engage in drug use or violence, and thought he was a very happy person. (17 RT 3477-3478.) Cynthia felt

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[62] To avoid confusion, Cynthia Anchondo will hereafter be her first name.

[63] Anchondo did not think Thomas knew about the suicide attempts. (17 RT 3474.)

Thomas's mother was not a positive figure for him because she was emotionally unstable and blamed him for her personal problems. (17 RT 3480.) However, Thomas had a close relationship with his grandparents who loved him very much and instilled good values in him. (17 RT 3479-3480, 3483.)

Dr. Alex Stalcup, a drug and alcohol addiction specialist, explained the science of addiction and its effect on decision-making and other behaviors. (17 RT 3487-3460.) He testified that methamphetamine in particular can affect decision-making functions and permanently damage a developing brain. (17 RT 3491.) Childhood use of alcohol can have a further damaging effect. (17 RT 3493-3495.)

Dr. Stalcup interviewed Thomas at the Presley Detention Center for an hour and a half to two hours in August 2004. (17 RT 3497, 3548.) He reviewed police reports about the Noriega murder, mitigation specialist reports, some military records and domestic violence reports, but no medical records or anything pertaining to the Hartwell murder. (17 RT 3545-3547.) Dr. Stalcup did not talk to Thomas about Hartwell and knew "[v]ery little" about the facts or circumstances of that case, which he did not consider important in understanding Thomas. (17 RT 3547, 3573.)

Thomas told Dr. Stalcup that his mother drank and smoked marijuana daily while pregnant and his father gave him, and taught him how to use, drugs as a child.[64] (17 RT 3498-3499.) Thomas presented one of the worst cases for genetic predisposition to addiction that Dr. Stalcup had ever seen. (17 RT 3500-3501, 3517.) However, Dr. Stalcup's opinion depended on the accuracy of Thomas's statements. (17 RT 3548-3549.)

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[64] The parties stipulated that Thomas's parents were using drugs at the time of his birth. (18 RT 3623.)

Thomas reported using seven to 14 grams of methamphetamine a day, which is very heavy use. (17 RT 3510.) Thomas also told Dr. Stalcup that he had hallucinations and paranoia, which is typical of methamphetamine-induced psychosis. (17 RT 3508-3512.) Dr. Stalcup opined that Thomas was "a late-stage addict by the age of 14" which damaged his decision-making abilities. (17 RT 3502-35004.) Again, Dr. Stalcup's opinion was primarily based on what Thomas told him. (17 RT 3514-3515.)

Based on the interview, Dr. Stalcup believed Thomas suffered "hypofrontality" damage to his brain which affected the decision-making process, and had the brain of an 80-year-old as a teenager. (17 RT 3513-3514, 3564.) However, Dr. Stalcup conceded that a functional MRI and psychological tests, which Thomas refused, were the best way to test brain function and diagnose decision-making impairment. (17 RT 3515-3518, 3553, 3559.) Dr. Stalcup could not give an opinion as to whether Thomas suffered from fetal alcohol syndrome, but found significant risk factors and believed Thomas exhibited behaviors consistent with fetal alcohol syndrome and brain damage. (17 RT 3515, 3518.)

Dr. Stalcup was aware that Thomas had substantial periods of sobriety and had remained sober since his arrest despite the ability of inmates to obtain methamphetamine in custody. (17 RT 3549-3550.) He believed Thomas's involvement in sports had a "protective effect," but the addiction resurfaced later. (17 RT 3506-3507.) It was common for addicts to sell drugs, steal or engage in prostitution to support their habit, which Dr. Stalcup viewed as "[p]art of the disease process driven by craving" rather than a choice. (17 RT 3507-3508, 3538-3540.)

Thomas told Dr. Stalcup that Noriega was a major drug dealer with access to methamphetamine, Noriega used him as a distributor and he owed Noriega money. (17 RT 3511.) Although Thomas denied killing Noriega or being present at the murder, he refused to discuss the incident with Dr.

Stalcup. (17 RT 3511, 3572.) Thomas never told Dr. Stalcup that he wanted the death penalty. (17 RT 3553.)

3. Rebuttal Evidence

On March 9, 2004, Deputy Jesus Galindo was delivering mail at the Presley Detention Center and stopped by Thomas's cell to give him a magazine. (17 RT 3587-3589.) When Thomas asked where his other magazines were, Deputy Galindo told him that they are scanned for offensive content before being placed in his property. (17 RT 3588-3589.) Thomas responded, "Don't you know who I am? I'm running things" – "I'm Russo. I'm running things here, and that's no secret." (17 RT 3589.)

ARGUMENT

I. THOMAS FAILS TO SHOW THE ADMISSION OF EVIDENCE CONCERNING THE HARTWELL MURDER AND AGUON INCIDENT WAS AN ABUSE OF DISCRETION

Thomas claims the uncharged conduct concerning the Hartwell murder and the threats regarding Aguon and his girlfriend were erroneously admitted in violation of Evidence Code sections 350, 352 and 1101, and his rights to due process and a jury trial as well as the cruel and unusual punishment clauses of the state and federal constitutions. (AOB 58-77.) He claims the error was so prejudicial that it requires reversal of the guilt judgment. (AOB 77-83.)

Thomas forfeited his claim insofar as the Aguon incident by failing to object to its admission in the trial court. In any event, both the Hartwell murder and the Aguon incidents were highly probative of Thomas's motive to kill Noriega who, like Thomas's other victims, had threatened to turn him in to the police. In turn, the evidence of motive was relevant to the issues of premeditation, deliberation and Brown's credibility as a witness. The probative value of this evidence was not outweighed by any undue prejudice. Thus, there was no abuse of discretion, the other-crimes

evidence was properly admitted and its admission did not violate Thomas's constitutional rights. Moreover, any alleged error was harmless in light of Thomas's admissions to two different individuals about the Noriega murder and other evidence corroborating Brown's testimony and proving motive. Accordingly, the guilt judgment should be affirmed.

A. Relevant Proceedings

Prior to trial, the prosecutor filed a motion to admit evidence of the Hartwell murder, a March 1992 plan to kill police officers in Norco,[65] a 1991 plot to kill two acquaintances,[66] and Thomas's history of drug and gun dealing in California and Texas[67] pursuant to Evidence Code section 1101, subdivision (b), to demonstrate intent, premeditation and deliberation, motive, common plan or scheme, lack of self-defense and lack of accident for the Noriega murder. (1 CT 271-286.) The motion explained that the evidence would show: Thomas killed Hartwell because she threatened to turn him in to the police for dealing drugs; Thomas threatened to kill Aguon and "Christina" because he thought they were snitches and going to turn him in; Thomas said he had "something waiting for them" and obtained a loaded shotgun when Bothof told him she was going to call the police in March of 1992; and Thomas told Reeder in Texas that he had

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[65] Thomas discussed the March 1992 shotgun incident in his interview with Investigator Silva which was introduced in the guilt phase. (9 RT 16 Supp. CT 4165-4168 [Peo. Exhibit No. 149B].) Bothof further testified about the incident in the penalty phase. (15 RT 3182-3187, 3193.) The prosecutor discussed the incident in both the guilt and penalty phase closing arguments. (13 RT 2920; 18 RT 3653.) Thomas does not contest the admission of this evidence on appeal. (See AOB 58-83.)

[66] The motion stated that the Aguon incident occurred in Moreno Valley. (1 CT 271.) However, the testimony at trial showed the incident occurred in Norco. (9 RT 2334.)

[67] Beyond that related to the Hartwell murder, Thomas does not contest on appeal evidence of his history of drug and gun dealing. (See AOB 58-83.)

killed a man named "Rafa" in California for being a "narc." (1 CT 272-277.)

While Thomas was representing himself with standby counsel, Superior Court Judge Roger A. Luebs ruled on various pretrial matters including the prosecutor's Evidence Code section 1101, subdivision (b), motion which was granted. (2 CT 514; 2 RT 1004-1005.) Superior Court Judge Terrence R. Boren, who eventually presided over Thomas's trial, did not view the prior rulings while Thomas acted in pro per as binding and, out of an abundance of caution, permitted those matters to be reargued with the benefit of trial counsel who had subsequently been reappointed to represent Thomas. (1 Supp. CT 128; 2 RT 1004-1007.)

Through counsel, Thomas only objected to the admission of evidence pertaining to the Hartwell murder.[68] (2 RT 1005.) The objection was based

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[68] Lead trial counsel, Peter Scalisi, told the trial court, "But our position is going to be that we're going to – we're going to object to the introduction of that prior murder, the Texas murder, on the government's proffered theory of 1101(b)." (2 RT 1006.) When the court asked for argument, co-counsel, Darryl Exum, stated: "Your Honor, I'll just submit on our motion that was previously filed. It's more important at this point that we do this again than I necessarily make the exact same arguments that were made before for purposes of the record. I submit on the motion that's been filed and the arguments that were previously made by Mr. Scalisi earlier today." (2 RT 1022.)

The relevant minute order refers to "Defense Motions filed this date." (1 Supp. CT 128 [Oct. 10, 2007].) However, none of the motions pertain to the section 1101, subdivision (b), evidence. (See 1 Supp. CT 132-197.) Moreover, no objection was previously filed by Thomas when he was in pro per status with standby counsel at the time of Judge Luebs' ruling. (2 CT 514.)

On October 25, 2007, after the jury was selected, the trial court entertained additional motions, including the prosecutor's request to admit records of the Texas conviction pursuant to Evidence Code section 452.5. (16 Supp. CT 4105.) At that time, Mr. Exum filed a "A MOTION TO PROHIBIT ALLEGED CRIMINAL CONDUCT," which objected to the

(continued...)

on Evidence Code section 1101, subdivision (b), as well as state and federal constitutional grounds. (2 RT 1005.) The trial court overruled the objection and granted the prosecutor's motion as follows:

> It seems to me that there is a sufficient basis under 1101(b) for that to come in . It goes – it seems to me it has relevance to, and is probative on, the issue of the defendant's state of mind, his intent, and that the – under [Evidence Code section] 352 the negative factors simply do not outweigh that probative value. So I would allow the 1101(b) evidence in.

(2 RT 1022-1023; 2 Supp. CT 129.) Over a defense objection, the trial court admitted certified Texas court records of the Hartwell indictment and verdict pursuant to Evidence Code section 452.5, subdivision (b), to prove the prior conviction. (6 RT 1736-1739; 16 Supp. CT 4105.)

B. Forfeiture

In order to preserve a challenge to the admission of trial evidence for appeal purposes, a party must comply with Evidence Code section 353. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171.) That section states:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so

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(...continued)
introduction of "evidence alleging that Defendant committed acts of misconduct other than those for which he was charged in this case," and stating, "The prosecution argues that such facts are admissible under Evidence Code section 452.5 as proof of Defendant's motive, intent, absence of mistake, or scheme with respect to the alleged current charges." (16 Supp. CT 4107-4109.) Mr. Exum stated the motion was argued but not filed at the time of the court's section 1101, subdivision (b), ruling, and requested that it be included in the record as part of his prior objection without revisiting the issue. (16 RT 1735-1736.)

> stated as to make clear the specific ground of the objection or motion;[69] and
>
> (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

(Evid. Code, § 353.)

This Court has "consistently held that the 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable" on appeal. (*People v. Seijas* (2005) 36 Cal.4th 291, 302, quoting *People v. Green* (1980) 27 Cal.3d 1, 22.)

> "Although no 'particular form of objection' is required, the objection must 'fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling.' [Citation.]"

(*People v. Valdez* (2012) 55 Cal.4th 82, 130, quoting *People v. Zamudio* (2008) 43 Cal.4th 327, 354.)

In the trial court, Thomas only objected to the Hartwell murder amongst the various Evidence Code section 1101, subdivision (b), evidence proffered by the prosecutor. (2 RT 1005.) The related written motion filed by the defense specifically referenced Evidence Code section 452.5 (admission of computer-generated court records and official records of conviction), which exclusively pertained to the Hartwell murder as it was the only uncharged act resulting in a conviction and court records. (16 Supp. CT 4105, 4107-4109.) Accordingly, any claim that the Aguon incident was inadmissible has been forfeited and is not cognizable on

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[69] This may be done through a "properly directed motion in limine" in which the party obtains an "express ruling" from the trial court. (*People v. Ramos, supra,* 15 Cal.4th at p. 1171.)

appeal. (See *People v. Chatman* (2006) 38 Cal.4th 344, 397 [defendant "did not object on that basis at trial, and he may not make that argument on appeal"].)

C. The Uncharged Acts Were Properly Admitted to Prove Motive

Unless required by law, relevant evidence may not be excluded in criminal cases. (Cal. Const., art. 1, § 28, subd. (d).) "Relevant evidence is broadly defined as that having a 'tendency in reason to prove or disprove any disputed fact that is of consequence' to resolving the case." (*People v. Bryant, Smith, and Wheeler* (2014) 60 Cal.4th 335, 405 (*Bryant*), quoting Evid. Code, § 210; *People v. Alexander* (2010) 49 Cal.4th 846, 903.) Thus, evidence which " ' "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent or motive" ' " is relevant. (*People v. Jones* (2013) 57 Cal.4th 899, 947, quoting *People v. Bivert* (2011) 52 Cal.4th 96, 116-117.)

Evidence Code section 1101, subdivision (b), provides for the admission of other-crimes evidence when it is "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than [the person's] disposition to commit such an act."[70] "The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence." (*People v. Carpenter* (1997) 15 Cal.4th 312, 378, overruled on another ground in *People v. Diaz* (2015) 60 Cal.4th 1176, 1189-1192.)

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[70] The categories of facts provided in Evidence Code section 1101, subdivision (b), which may proved by other-crimes evidence is not exclusive. (*People v. Catlin* (2001) 26 Cal.4th 81, 146.)

In general, the charged and uncharged acts must be sufficiently similar to support a rational inference of the fact sought to be proved." (See *People v. Lucas* (2014) 60 Cal.4th 153, 283, disapproved on another point in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19; *People v. Edwards* (2013) 57 Cal.4th 658, 711; *People v. Rogers* (2013) 57 Cal.4th 296, 326.) The least degree of similarity is required to prove intent, whereas a greater degree of similarity is required to prove common design or plan, and the most similarity is required to prove identity. (*People v. Leon* (2015) 61 Cal.4th 569, 598, citing *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403; *People v. Rogers, supra,* 57 Cal.4th at p. 326.)

To be admissible under Evidence Code section 1101, subdivision (b), the uncharged conduct need not have resulted in a criminal prosecution or conviction, and may either predate or occur subsequent to the charged offenses. (*People v. Leon, supra,* 61 Cal.4th at p. 597 [explaining that shorthand references to prior offense or bad acts are imprecise]; see, e.g. *People v. Scott* (2015) 61 Cal.4th 363, 398-399 [subsequent burglaries relevant to prove intent]; *People v. Balcom* (1994) 7 Cal.4th 414, 425 [uncharged crime occurring after charged offense relevant to prove common design or plan]; *People v. Griffin* (1967) 66 Cal.2d 459, 464-465 [subsequent attack by defendant relevant to prove lack of accident].) "As with other circumstantial evidence, its admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence or absence of some other rule requiring exclusion." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 203.)

The admission of other-crimes evidence remains subject to Evidence Code section 352. (*Bryant, supra,* 60 Cal.4th at pp. 406-407; *People v. Ewoldt, supra,* 7 Cal.4th at p. 404.) That provision allows trial courts to "exclude evidence if its probative value is substantially outweighed by the probability that its admission 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.) The "trial court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169; see *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056; *People v. Mendoza* (2000) 24 Cal.4th 130, 178.)

Determining the relevance of evidence lies within the broad discretion of the trial court. (*People v. Merriman* (2014) 60 Cal.4th 1, 74; *People v. Benavides* (2005) 35 Cal.4th 69, 90; *People v. Waidla* (2000) 22 Cal.4th 690, 717-718; *People v. Scheid* (1997) 16 Cal.4th 1, 14.) Likewise, the admission and balancing of evidence under Evidence Code sections 1101, subdivision (b), and 352 are reviewed for abuse of discretion. (*Bryant, supra,* 60 Cal.4th at p. 405; *People v. Rogers, supra,* 57 Cal.4th at p. 326; *People v. Foster* (2010) 50 Cal.4th 1301, 1328; *People v. Mungia* (2008) 44 Cal.4th 1101, 1130; *People v. Lewis* (2001) 25 Cal.4th 610, 637.)

Abuse of discretion is a deferential standard of review. (*People v. Trujeque* (2015) 61 Cal.4th 227, 278; *People v. Jablonski* (2006) 37 Cal.4th 774, 821; *People v. Pollock* (2004) 32 Cal.4th 1153, 1171; *People v. Williams* (1998) 17 Cal.4th 148, 162.) When reviewed for abuse of discretion, " ' "a trial court's ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' " (*People v. Foster, supra,* 50 Cal.4th at pp. 1328-1329, quoting *People v. Hovarter* (2008) 44 Cal.4th 983, 1004; see also *People v. Rogers, supra,* 57 Cal.4th at p. 326.) The evidence is viewed "in the light most favorable to the trial court's ruling." (*People v.*

Edwards, supra, 57 Cal.4th at p. 711, citing *People v. Kipp* (1998) 18 Cal.4th 349, 369-370.)

Thomas fails to show any such abuse of discretion here. The prosecutor moved to admit the Hartwell murder, the Aguon threat and other uncharged acts in the guilt phase as evidence of intent, premeditation and deliberation, motive, common plan or scheme, lack of self-defense and lack of accident. (1 CT 271-286.) However, the offer of proof was that the other-crimes evidence would be probative of Thomas's preoccupation and steadfast resolve against being turned in to the police, and thus relevant to prove his motive in killing Noriega for being a "narc."[71] (See 1 CT 272-277)

"[T]he probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 15; accord *People v. McCurdy* (2014) 59 Cal.4th 1063, 1097; *People v. Letner and Tobin* (2010) 50

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[71] Respondent recognizes that the trial stated in its ruling that the other-crimes evidence was probative of Thomas's state of mind and intent. (2 RT 2 RT 1022-1023.) However,

> " '[n]o rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]"

(*People v. Zapien* (1993) 4 Cal.4th 929, 976, quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; see also *People v. Jones* (2012) 54 Cal.4th 1, 50; *People v. Smithey* (1999) 20 Cal.4th 936, 971-972.)

Cal.4th 99, 191.) Here, there was a direct logical nexus between the uncharged acts and the Noriega murder.

The evidence established that Thomas murdered Hartwell because she threatened to turn him in to the police (7 RT 2019, 2091-2093; 8 RT 2222; 10 RT 2415-2416, 2429, 2476-2477, 2509-2511, 2524, 2527; 12 RT 2476-2752), Thomas threatened to shoot Aguon and his girlfriend because he thought they were going to turn him in to the police (9 RT 2334, 2339-2340), and Thomas threatened to have a firearm waiting for the police to avoid arrest following the Norco shotgun incident (16 Supp. CT 4165-4168). Thomas told Reeder that he killed Noriega "[b]ecause he was a narc." (7 RT 2021-2022, 2143-2144; 8 RT 2276.) Accordingly, there was a direct logical nexus between the Noriega murder and uncharged acts probative of motive, which qualified the Hartwell murder as well as the Aguon and the Norco shotgun incidents for admission under Evidence Code section 1101, subdivision (b). There was no need for any similarities between the Noriega murder and uncharged conduct. (*People v. Demetrulias, supra,* 39 Cal.4th at p. 15; compare *People v. Jones, supra,* 57 Cal.4th at pp. 925-926 [where motive part of common and distinctive modus operandi].)

Other-crimes evidence may be material to prove an intermediate fact from which an ultimate fact can be inferred. (*People v. Catlin, supra,* 26 Cal.4th at p. 146; see *People v. Davis* (2009) 46 Cal.4th 539, 604 [absence of apparent motive may render proof of essential elements less persuasive].) One such intermediate fact is the credibility of a material witness. (See *People v. Carpenter* (1999) 21 Cal.4th 1016, 1049; *People v. Hawkins* (1995) 10 Cal.4th 920, 951-952, overruled on another point in *People v. Blakeley* (2000) 23 Cal.4th 82, 89-91.) Here, Brown was a material witness because she observed the murder and identified Thomas as Noriega's killer. (6 RT 1919-1920, 1946.) As on appeal, Thomas attacked Brown's

credibility on several fronts during her prior testimony. (See 6 RT 1920-1932, 1947-1961; AOB 62-63.) The evidence of Thomas's motive to kill Noriega was relevant to support and rehabilitate Brown's credibility.

Motive established through other-crimes evidence is also relevant to the issues of premeditation and deliberation which the prosecutor was required to prove. (See *People v. Rogers* (2006) 39 Cal.4th 826, 862; *People v. Cummings* (1993) 4 Cal.4th 1233, 1289.) In sum, the other-crimes was properly admitted in the guilt phase to prove Thomas's motive in killing Noriega, which in turn was relevant to Brown's credibility and probative of the elements of premeditation and deliberation for the murder charge. Against this substantial probative value, there was no countervailing risk of undue prejudice.

" ' "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." ' " (*People v. Williams* (2013) 58 Cal.4th 197, 270, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 320.) " ' "In applying section 352, 'prejudicial' is not synonymous with 'damaging.' [Citation.]' " (*People v. Virgil* (2011) 51 Cal.4th 1210, 1249, quoting *People v. Karis* (1988) 46 Cal.3d 612, 638.)

> " 'Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. Unless the dangers of undue prejudice, confusion, or time consumption ' "substantially outweigh" ' the probative value of relevant evidence, a section 352 objection should fail. [Citation.]

(*People v. Doolin* (2009) 45 Cal.4th 390, 438-439, quoting *Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-1009 [emphasis in original].)

Here, the other-crimes evidence certainly undermined the defense and shored up the prosecution's theory of the case by proving Thomas's motive to kill Noriega. That is precisely what made the evidence relevant as opposed to having very little effect on the issues. (See, e.g., *People v. Booker* (2011) 51 Cal.4th 141, 188 [although evidence "likely was damaging to defendant, he fails to demonstrate how it was *unduly prejudicial*"]; *People v. Lopez* (2013) 56 Cal.4th 1028, 1059 [evidence "was undoubtedly damaging to" defendant but not unduly prejudicial]; *People v. Crew* (2003) 31 Cal.4th 822, 842 [evidence "while damaging to defendant's case, was not unduly prejudicial"].) Accordingly, there was no undue prejudice within the meaning of Evidence Code section 352, and the trial court properly exercised its discretion in admitting the uncharged offenses.

There are two fundamental flaws in Thomas's argument to contrary. First, Thomas completely ignores the deferential abuse of discretion standard of review, simply arguing that the trial court's ruling was erroneous. (See AOB 58-59, 68-76.) "When an appellant fails to apply the appropriate standard of review, the argument lacks legal force." (*People v. Foss* (2007) 155 Cal.App.4th 113, 126; see also *Aurora S.A. v. Poizner* (2011) 198 Cal.App.4th 1437, 1446 [rejecting "argument because it fails to take into account the applicable standard of review"]; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1207-1208 ["argument founders because it is premised on the wrong standard of review"]; *People v. Bell* (1998) 61 Cal.App.4th 282, 288 [rejecting arguments which "completely overlook the applicable [abuse of discretion] standard of review"].) Like the appellants in *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281, "[t]he biggest flaw in [Thomas's] argument is [his] failure to offer any analysis that articulates

[his] evidentiary claims within the context of the applicable standard of review."

The second fundamental flaw in Thomas's argument is that it overlooks motive as the intermediate fact proved by the other-crimes evidence, focusing solely on intent. (See AOB 68-73, 76.) As Thomas concedes, there was no question that the person who shot Noriega did so with the specific intent to kill. (AOB 69.) Instead, the intermediate fact proved by the uncharged offenses was the motive for the Noriega shooting, which was in turn relevant to the issues of premeditation and deliberation as well as Brown's credibility. Accordingly, Thomas's argument that the Hartwell murder and Aguon incident were not similar enough to the Noriega murder to show intent is "entirely off the mark." (See *People v. Letner and Tobin, supra,* 50 Cal.4th at p. 191 [defendant argued intent, identity and common design or plan when other-crimes evidence was admitted to prove motive or facilitation of flight].)

Even if Thomas were correct that the uncharged offenses were admitted to simply prove intent for the Noriega murder, his argument would still fail. Thomas entered a not guilty plea, which placed all elements of the charged murder – including intent – in issue. (See *People v. Catlin, supra,* 26 Cal.4th at p. 146, citing *People v. Balcom, supra,* 7 Cal.4th at p. 422.) Moreover, the least degree of similarity between the charged and uncharged acts is required to prove intent under Evidence Code section 1101, subdivision (b). (*People v. Leon, supra,* 61 Cal.4th at p. 598; *People v. Rogers, supra,* 57 Cal.4th at p. 326; *People v. Ewoldt, supra,* 7 Cal.4th at pp. 402-403.)

> "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense to support the inference that the defendant probably acted with the same intent in each instance." [Citation.] " 'The inference to be drawn is not that the actor is disposed to commit such acts;

> instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution.' "

(*People v. Scott, supra,* 61 Cal.4th at p. 398, quoting *People v. Lindberg* (2008) 45 Cal.4th 1, 23, and *People v. Gallego* (1990) 52 Cal.3d 115, 171.)

The evidence established that Thomas killed Hartwell after she threatened to turn him in to the police, he threatened to kill Aguon and his girlfriend because he was convinced that they were going to report him to the police, and he armed himself with a loaded shotgun after learning that Bothof had reported him to the police. Thomas similarly shot Noriega because he believed Noriega was a "narc." Reeder explained that a "narc" is "[l]ike a tattle tale, someone who tells on you, someone who I guess goes to the police and tells – tells on you." (7 RT 2022.) Thus, there was sufficient similarity between the Noriega murder and uncharged offenses to support the inference that Thomas " 'probably acted with the same intent in each instance.' " (*People v. Scott, supra,* 61 Cal.4th at p. 398.)

Thomas criticizes the trial court's rulings as "contradictory" because the court stated that it would admit the other-crimes evidence to prove intent but declined to give "requested instructions for self-defense, voluntary manslaughter based on sudden quarrel or heat of passion, and voluntary manslaughter based on imperfect self-defense." (AOB 70, fn. 19.) Thomas confuses affirmative defenses with elements of the crime. "An affirmative defense is one which does not negate an essential element of a cause of action or charged crime, but instead presents new matter to excuse or justify conduct that would otherwise lead to liability." (*People v. Noble* (2002) 100 Cal.App.4th 184, 189, citing *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1601.) Since the affirmative defenses cited by Thomas did not negate the requisite intent to kill for the murder charge, there was nothing contradictory in the trial court's rulings.

Thomas further argues the Hartwell murder and Aguon incident were irrelevant, unduly prejudicial and inadmissible because the fundamental issue in dispute for the Noriega murder was identity. (AOB 68-72,76.) Similar arguments were rejected by this Court in *Bryant, supra,* 60 Cal.4th at p. 407, *People v. McCurdy, supra,* 59 Cal.4th at p. 1097, and *People v. Rogers, supra,* 57 Cal.4th at pp. 330-331. As this Court explained in *McCurdy*, "The admission of evidence of the perpetrator's intent requires neither the defendant to concede identity nor the trial court to assume that the defendant committed both sets of acts." (*People v. McCurdy, supra,* 59 Cal.4th at p. 1097.)

Furthermore, as previously discussed, motive as it pertained to Brown's credibility and the issues of premeditation and deliberation was in dispute. Accordingly, Thomas's reliance on *People v. Lopez* (2011) 198 Cal.App.4th 698, 715 [prior offenses admitted to prove intent which was beyond dispute], *People v. King* (2010) 183 Cal.App.4th 1281, 1303 [charged and uncharged acts too dissimilar to prove intent], and *Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 924-926 [charged and uncharged acts too dissimilar to establish common design or plan], is misplaced. (See AOB 70-72.)

Thomas next argues the Hartwell murder was inadmissible under Evidence Code section 1101, subdivision (b), because it was "a single incident which occurred almost three years after Noriega's death," thus failing to establish a sufficient pattern of activity to infer intent. (AOB 72-73.) Again, Thomas ignores motive which requires no similarity or pattern. (See *People v. McCurdy, supra,* 59 Cal.4th at p. 1097; *People v. Letner and Tobin, supra,* 50 Cal.4th at p. 191; *People v. Demetrulias, supra,* 39 Cal.4th at p. 15.)

Moreover, Thomas unfairly considers the Hartwell murder in a vacuum by portraying it as a single incident. The Hartwell murder was

admitted in conjunction with the Aguon and Norco shotgun incidents in the guilt phase under Evidence Code section 1101, subdivision (b).

In addition, Thomas is mistaken that uncharged conduct occurring subsequent to the charged offense is only admissible when offered to prove common design or plan. (See AOB 73.) There is no such limitation. (See *People v. Leon, supra,* 61 Cal.4th at p. 597 [holding conduct occurring after charged events is admissible in context of general discussion of evidence to prove something other than defendant's character]; *People v. Scott, supra,* 61 Cal.4th at pp. 398-399 [subsequent burglaries admissible to prove intent]; *People v. Griffin, supra,* 66 Cal.2d at pp. 464-465 [subsequent attack by defendant admissible to disprove accident].)

Thomas's complaint that the Hartwell and Noriega killings occurred nearly three years apart is of no moment. "No specific time limit exists as to when an uncharged crime is so remote as to be excludable." (*People v. McCurdy, supra,* 59 Cal.4th at p. 1099.) Time periods equal to or greater than that in Thomas's case have been found to be not so remote as to warrant exclusion of the uncharged acts. (See, e.g., *id.* at pp. 1099-1100 [molestations occurring 17 to 30 years before charged offenses]; *People v. Davis, supra,* 46 Cal.4th at p. 602 [prior acts 17 years before charged offenses where defendant remained free from incarceration for three years during the intervening period]; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1388-1389 [uncharged acts occurring eight to 28 years prior to charged murder].)

In the alternative, Thomas argues evidence of the Hartwell murder "should have been excluded because it required lengthy and prejudicial testimony," comparing the number of witnesses who testified about the Noriega and Hartwell killings and citing the length of Reeder's testimony. (AOB 74-75.) However, the application of Evidence Code section 352 is not simply a matter of adding up and comparing the number of witnesses or

pages of reporter's transcript for the uncharged and charged offenses. Rather, trial courts must consider if the proffered evidence would "necessitate *undue* consumption of time" much like the question of undue prejudice. (§ 352 [emphasis added].)

Whether the amount of time consumed is undue depends on the relevance of the proffered evidence regardless of the actual amount of court time taken to present it. (See, e.g., *People v. Williams, supra,* 58 Cal.4th at p. 267 ["point that was, at best, of marginal relevance" would have been unduly time consuming]; *People v. Carter* (2005) 36 Cal.4th 1215, 1259, fn. 30 [same]; *People v. Panah* (2005) 35 Cal.4th 395, 482 [same]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125 [undue consumption of time where evidence "had little, if any significance to the vital issues in the case"].) As previously discussed, the other-crimes evidence was highly relevant to the critical issue of motive for the Noriega murder. Although lengthy, the testimony concerning the Hartwell murder as well as the Aguon and Norco shotgun incidents was tailored to fully and fairly present those offenses in a meaningful way to prove motive.

A thorough presentation of the facts in the Hartwell case was also necessary to establish the circumstances and relationships which gave context to Thomas's admissions in Texas about the Noriega murder. Therefore, although presentation of the Hartwell evidence consumed a considerable amount of time, it did not consume an undue amount of time.

Likewise, Thomas's claim that the evidence concerning Hartwell's murder was inflammatory is unavailing. Since it was relevant to prove a significant disputed issue at trial, it was not unduly prejudicial.

Moreover, the details of the Hartwell killing were no more inflammatory than those pertaining to Noriega's murder. Thomas complains of photographs and testimony depicting Hartwell's stabbing and her charred and skeletonized remains, while ignoring similar evidence of

Noriega's murder, remains and autopsy. (See AOB 75.) Thomas gunned down Noriega with a flurry of gunshots. (6 RT 1913, 1938.) He then callously tossed Noriega into the back of his truck. (6 RT 1914-1916, 1940.) Thomas drove to a remote area where he buried Noriega face-down in the dirt concealed by a wooden pallet and left the body to rot until its discovery a month later. (6 RT 1777-1786, 1800-1801.) When Noriega's body was found, it was in a state of decomposition with a very foul odor. (6 RT 1805.)

Dr. Ditraglia described the body as "[s]everely decomposed" and "partially skeletonized" with essentially no soft tissue. (8 RT 2295-2299.) The autopsy showed Noriega bled to death as the result of multiple gunshots. (8 RT 2302-2306, 2312-2314.) Photographs of Noriega's body as found in the dirt and as viewed during the autopsy were admitted into evidence. (12 RT 2760; 16 Supp. CT 4267; Reporter's Transcript Index of Exhibits [Peo. Exs. 12-14,18, 22- 23].) In light of these details, Thomas's attempt to portray the Hartwell murder as inflammatory vis-a-vis the Noriega killing should be rejected.[72]

Thomas also seeks to avoid the constraints of Evidence Code section 352 by invoking the law of severance and arguing the Hartwell murder was a stronger case which bolstered the prosecution in the instant case. (AOB 75.) As shown above, that is not the standard for the exclusion of other-crimes evidence. Where otherwise admissible under Evidence Code section 1101, subdivision (b), only uncharged acts which are unduly prejudicial, unduly time consuming or present a substantial danger of confusing the issues or misleading the jury so as to substantially outweigh

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[72] Thomas's hyperbole that "the admission of prior criminal conduct increases exponentially when the prior crime was murder committed by stabbing" is unsupported by any citation to authority. (AOB 82.)

the relevance of the evidence are excludable. (Evid. Code,§ 352; *Bryant, supra,* 60 Cal.4th at pp. 406-407; *People v. Ewoldt, supra,* 7 Cal.4th at p. 404) Here, there was no undue prejudice or consumption of time to countervail the substantial relevance of the Hartwell murder and other uncharged acts.

In sum, under the deferential abuse of discretion standard, Thomas fails to show the admission of the other-crimes evidence was arbitrary, capricious or made in a patently absurd manner that resulted in a manifest miscarriage of justice. Accordingly, no abuse of discretion has been shown, and the trial court's ruling admitting the evidence should be affirmed on appeal. (See *People v. Edwards, supra,* 57 Cal.4th at p. 711; *People v. Rogers, supra,* 57 Cal.4th at p. 326; *People v. Foster, supra,* 50 Cal.4th at pp. 1328-1329; *People v. Hovarter, supra,* 44 Cal.4th at p. 1004; *People v. Kipp, supra,* 18 Cal.4th at pp. 369-370.)

D. There Was No Violation of Thomas's Constitutional Rights

This Court has "long observed that '[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights.' " (*People v. Lindberg, supra,* 45 Cal.4th at p. 26, quoting *People v. Kraft* (2000) 23 Cal.4th 978, 1035; see also *People v. Marks* (2003) 31 Cal.4th 197, 226-227 [referencing Evid. Code, § 352].) Evidentiary rulings violate due process only if they render the trial fundamentally unfair.[73] (*Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Partida* (2005) 37 Cal.4th 428, 439.) The protections of Evidence Code section 352 satisfy any due process concerns. (See *People v. Falsetta*

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[73] "The due process clauses under the federal and state constitutions are considered to be co-extensive and to have the same scope and purpose." (*American Liberty Bail Bonds, Inc. v. Garamendi* (2006) 141 Cal.App.4th 1044, 1057, fn. 11.)

(1999) 21 Cal.4th 903, 917 [application of section 352 precludes constitutional challenge to prior act evidence].)

As discussed above, the other-crimes evidence at Thomas's trial was properly admitted because it was relevant and highly probative of his motive to kill Noriega. Where evidence is properly admitted to prove a fact of consequence, there is no violation of the defendant's constitutional rights under the state and federal constitutions. (*People v. Fuiava* (2012) 53 Cal.4th 622, 670 [fair trial]; *People v. Foster, supra,* 50 Cal.4th at p. 1335 [due process, fair trial, reliable guilt determination by jury, right to present a defense]; *People v. Thornton* (2007) 41 Cal.4th 391, 464 [reliable penalty determination]; *People v. Griffin* (2004) 33 Cal.4th 536, 579, fn. 19, disapproved on another point in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32 [due process, impartial jury, confrontation, cruel and unusual punishment]; *People v. Burgener* (2003) 29 Cal.4th 833, 873 [due process]; *People v. Hart* (1999) 20 Cal.4th 546, 617, fn. 19 [due process, fair trial, reliable guilt and penalty determinations]; *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1402-1403, citing *People v. Catlin, supra,* 26 Cal.4th at pp. 122-123 [due process is not implicated where the evidence is relevant and admissible to prove intent, motive, identity, knowledge or other material facts under Evid. Code, § 1101, subd. (b)].)

"To the extent any constitutional claim is merely a gloss on the objection raised at trial, it is preserved but is without merit because the trial court did not abuse its discretion in admitting the evidence." (*People v. Riggs* (2008) 44 Cal.4th 248, 292.) Accordingly, the admission of the Hartwell, Aguon and Norco shotgun incidents in Thomas's trial did not violate his rights to due process, a fair trial or a reliable penalty determination; and Thomas's "attempt to inflate garden-variety evidentiary questions into constitutional ones is unpersuasive." (See *People v. Boyette* (2002) 29 Cal.4th 381, 427.)

E. The Alleged Error Was Harmless

In addition to not constituting error in the first instance, any evidentiary error alleged by Thomas was harmless. The erroneous admission of other-crimes evidence is subject to the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Thomas* (2011) 52 Cal.4th 336, 356, fn. 20, citing *People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Welch* (1999) 20 Cal.4th 701, 749-750; *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 755 ["It is well settled that claims of error in the admission of prior crimes evidence are evaluated under the standard of *People v. Watson*"].) Evidence Code section 352 claims of error are also reviewed for harmless error by applying the *Watson* test. (*People v. Marks, supra,* 31 Cal.4th at p. 227.)

Under *Watson*, reversal is unwarranted unless " 'an examination of the entire cause, including the evidence' " shows "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."[74] (*People v. Watson, supra*, 46 Cal.2d at p.

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[74] Whereas *People v. Watson* provides the harmless error standard for state law errors, *Chapman v. California* (1967) 386 U.S. 18, provides the applicable test for errors of federal constitutional dimension. (*People v. Boyette* (2002) 29 Cal.4th 381, 428, citing *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Under *Chapman*, reversal is required unless the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Thomas argues the trial court's ruling was an error of federal constitutional dimension and invokes the *Chapman* standard. (AOB 31-32.) However, "[a]bsent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test...." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) As shown above, there was no fundamental unfairness in admitting the other-crimes evidence in Thomas's case. Accordingly, *Watson* applies to his claim.

836.) No such prejudice could have resulted from admission of the other-crimes evidence in Thomas's trial.

Foremost, Thomas admitted his involvement in Noriega's murder to two different individuals. Thomas told Reeder that he killed a man named "Rafa" in California "[b]ecause he was a narc," placed the body in the back of his truck and hid it in or near some caves. (7 RT 2021-2022, 2143-2144; 8 RT 2252-2254, 2271-2272.) This admission was made under particularly reliable circumstances since Thomas was dating Reeder at the time. Thomas's trust and confidence in Reeder was exemplified by his reliance on her following the Hartwell murder. "[T]he circumstance most indicative of reliability is where an incriminating conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures." (*People v. Tran* (2013) 215 Cal.App.4th 1207, 1220, citing *People v. Greenberger* (1997) 58 Cal.App.4th 298, 335.)

In Sams' presence, Thomas talked about people in California being killed for "getting out of line, money, drugs, things of that nature," and admitted that he had shot and taken drugs from someone in California. (9 RT 2368-2370, 2381.) This admission likewise had heightened reliability since Thomas was boasting about his prior conduct in California in a noncoercive social setting.[75] (See *People v. Duarte* (2000) 24 Cal.4th 603, 614 [trustworthiness of statement against penal interest requires " ' "a deep acquaintance with the ways human beings actually conduct themselves in the circumstances under the exception" ' "].)

These admissions to Reeder and Sams demonstrated Thomas's motive for killing Noriega independent of the other-crimes evidence. In turn, the

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[75] Thomas made additional admissions to Bothof and author Suzie Spencer regarding the Noriega murder, which were only admitted in the penalty phase. (15 RT 3221; 16 RT 3430-3431.)

admissions provided proof of deliberation and premeditation, and corroborated Brown's testimony about Noriega's murder. In addition to proving Thomas guilty of first degree murder, the admissions proved the robbery-murder special circumstance.

To the extent Thomas complains that the other-crimes evidence was used to identify him as Noriega's killer, it paled in comparison with his admissions that he killed "Rafa" for being a narc and that he had previously killed someone in California for drugs. Accordingly, it is not reasonably probable that Thomas would have received a more favorable verdict had the other-crimes evidence been excluded. (See *People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1060 [evidence of prior assaults on rivals harmless in light of defendant's consistent bragging about her participation in charged offenses].)

Moreover, the jury in the guilt phase was aware that Thomas had been convicted of the Hartwell murder – the most serious of the other-crimes evidence admitted. (12 RT 2762 [copy of Texas verdict admitted into evidence].) This served to reduce any potential prejudice "because 'the jury was not tempted to convict defendant of the charged offense[], regardless of his guilt, in order to assure that he would be punished for' " the uncharged murder. (*People v. Edwards, supra,* 57 Cal.4th at p. 722, quoting *People v. Balcom, supra,* 7 Cal.4th at p. 427.)

Furthermore, the trial court instructed the jury on the limited use of the uncharged acts through CALCRIM No. 4320, which contained the following admonishments:

> Do not consider this evidence for any other purpose.
>
> Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.
>
> If you conclude that the defendant committed any of the uncharged acts, that conclusion is only one factor to consider

> along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of murder or that the allegations of personal use of a firearm and murder in the course of robbery are true. The People must still prove each element of every charge and allegation beyond a reasonable doubt.

(17 Supp. CT 4320-4321.)

The court further instructed the jury with CALCRIM No. 303 which read: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." (17 Supp. CT 4303.)

"We presume the jurors followed the trial court's instructions" in this regard. (*People v. Scott, supra,* 61 Cal.4th at p. 399, citing *People v. Houston* (2012) 54 Cal.4th 1186, 1211; see *People v. Waidla, supra,* 22 Cal.4th at p. 725 ["The presumption is that limiting instructions are followed by the jury"]; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1171 [presumed that jurors are able to and do follow limiting instructions].) Thomas cites to nothing in the record to rebut this presumption. (See AOB 78-83.)

Thomas's prejudice argument primarily consists of attacking Brown's credibility as a convicted felon with a motive to lie. (AOB 79-81.) However, Thomas necessarily views Brown's criminal record and other impeachment evidence in a vacuum to support his argument. Brown's testimony about the shooting, the movements of Noriega's car and body, and Thomas's return of a broken shovel was entirely consistent with and corroborated by the other witnesses who described the location and condition of the body and vehicle.

The only detail in Brown's testimony that Thomas identifies as "wrong" is her alleged certainty that Thomas shot Noriega with a Glock firearm which the ballistics expert testified was not the murder weapon. (AOB 81, citing 6 RT 1923, 1951 [Brown's prior statement to Detective

Wilson] and 12 RT 271 [testimony of Paul Sham].) Thomas further states that Brown told Investigator Silva that she was present when Thomas purchased the Glock. (AOB 81, citing 13 RT 2873.)

However, Thomas ignores the following testimony by Investigator Silva which undermines his allegation about Brown's credibility:

> Q Now, with respect to this 9mm Glock, she didn't actually say the 9mm Glock was used during the shooting during the interview, did she? She said he had the 9mm Glock at her house the next day; isn't that right?
>
> A Um, you'd have to refer me to the transcript.
>
> Q Okay. Well, I'll tell you what let's – your Honor, it would be the People's request under [Evidence Code section] 356 to play the interview.
>
> [¶] ... [¶] [objection by defense counsel to playing entire interview sustained]
>
> Q (BY [prosecutor] MR. HUGHES]) All right. Well, let's go to page 45. Are you on that page?
>
> A Yes, sir.
>
> Q Would you go ahead and read that to yourself.
>
> A (Witness reviewed document.)
>
> Okay.
>
> Q Have your read those two pages?
>
> A Yes, sir.
>
> Q Is that referring to the next day at Dorothy Brown's apartment?
>
> A Yes, sir.
>
> Q Mr. Thomas came over, brought donuts; is that right?
>
> A Yes, sir.

Q And he had a Glock 9mm with him that morning?

A Yes, sir.

Q She refers to it – you ask, "Do you remember what kind of gun that was?" And she says, "Yeah. I remember exactly what kind of gun." You ask, "What?" And she says, "A 9mm Glock." Is that right?

A Yes, sir.

Q And she goes on to describe on that page and the next page where he got it, the transaction counsel brought out in advance; isn't that right?

A Yes.

Q Now, do you recall whether there's any other express reference to a Glock 9mm as being used during the shooting?

A No, sir, I do not.

Q Okay. It was your impression from that interview that that's what she meant; is that right?

A That's correct.

(13 RT 2876-2877.)

Subsequently, Silva reaffirmed that the entry in his report that " 'Brown was the one who set up the buy of the [Glock] Thomas used in the murder' " was what he personally inferred from the interview, not what Brown expressly stated. (13 RT 2878-2879.) Thus, viewing the relevant testimony and prior statements in proper context, Thomas's allegation that Brown "was wrong about a major detail regarding" the Noriega murder is unpersuasive. (AOB 81 [bold type and capitalization omitted].)

Thomas is also mistaken when he argues there was no physical evidence connecting him to Noriega's murder. In Texas, Thomas was in possession of a gun which he referred to as a TEC-9. (7 RT 2084-2085.)

The ballistics expert testified that a TEC-9 was capable of firing the ammunition that killed Noriega. (12 RT 2730-2731.)

In addition, Thomas ostensibly overlooks the testimony of Curtis Barger and Andy Anchondo describing how he unexpectedly left the area after Noriega's murder without notice or telling anyone where he was going. (7 RT 1966-1971, 2002-2003; 9 RT 2352-2352.) "[E]vidence of defendant's flight shortly after the murder was committed 'supports an inference of consciousness of guilt and constitutes an implied admission which may properly be considered as corroborative of an accomplice's testimony. [Citation.]' " (*People v. Zapien, supra,* 4 Cal.4th at p. 983, quoting *People v. Garrison* (1989) 47 Cal.3d 746, 773.)

Thomas next attempts to discount his admissions regarding Noriega's murder because he may have told Reeder that he hid the body in, rather than near, a cave, Reeder had a motive to incriminate him "to enhance her own position with the authorities," and Sams thought Thomas "was 'full of bullshit.' " (AOB 81-82, citing 7 RT 2022 and 8 RT 2254, and quoting 9 RT 2384.) These assertions are unpersuasive.

Reeder clarified that Thomas "just called them the caves" and, "I don't remember if he said in the caves, near the caves, or – I thought the name just was under the caves." (8 RT 2254, 2272.) There were three caves approximately eight-tenths of a mile away from the location where Noriega's body was found, off a slightly windy dirt road. (6 RT 1783-1784, 1787-1789.)

In her statements to law enforcement officers, Reeder fully implicated herself and made no effort to minimize her active involvement in disposing of Hartwell's body. This further rendered her testimony trustworthy. (See *People v. Cervantes* (2004) 118 Cal.App.4th 162, 175-176; *People v. Greenberger, supra,* 58 Cal.App.4th at pp. 340-341.)

Thomas's citation to Sams' opinions about his admissions fares no better. "Lay opinion about the veracity of particular statements by another is inadmissible on that issue." (*People v. Melton* (1988) 44 Cal.3d 713, 744.) "Such an opinion has no 'tendency in reason' to disprove the veracity of the statements." (*Ibid.*, quoting and citing Evid. Code, §§ 210, 350.) Moreover, Sams only knew Thomas in passing "[n]ot more than probably a minute, minute and a half at a time" and "[n]o more than three times ever hearing him speak; no more than six times ever seeing him." (9 RT 2365-2366.) Thus, Sams' personal opinions about Thomas's veracity is of no significance.

Substantial and convincing evidence proving motive and corroborating Brown's testimony independent of the uncharged acts rendered any error in their admission harmless. Because it is not reasonably probable that Thomas would have received a more favorable verdict in the absence of the other-crimes evidence, the judgment should be affirmed. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

II. THOMAS FAILS TO SHOW THE ADMISSION OF DOROTHY BROWN'S PRIOR TESTIMONY WAS AN ABUSE OF DISCRETION

Thomas claims the trial court erroneously admitted Dorothy Brown's prior testimony from the Hartwell murder trial under Evidence Code section 1291 and in violation of his rights to due process and confrontation of witnesses and the prohibition against cruel and unusual punishment under the state and federal constitutions. (AOB 84-95.) He claims the error resulted in prejudice requiring reversal of the guilt judgment. (AOB 95-96.)

Thomas fails to show the trial court abused its discretion in admitting the prior testimony. Thomas was afforded a full opportunity to cross-examine Brown in the Texas proceedings with an interest and motive substantially similar, and essentially identical, to that in the current trial – to

attack Brown's credibility and discredit her account of the Noriega murder. Therefore, the prior testimony was properly admitted and there was no violation of Thomas's constitutional rights. Moreover, the alleged error was harmless in light of Thomas's admission to Reeder that he shot Noriega for being a "narc" and admission in Sams' presence that he previously shot and took drugs from someone in California. Accordingly, the guilt judgment should be affirmed.

A. Relevant Proceedings

Prior to trial, the prosecutor filed a motion to admit Brown's prior testimony from Thomas's 1996 trial for the murder of Regina Hartwell pursuant to Evidence Code section 1291. (2 CT 288-294.) The motion explained that the trial conducted in Travis County, Texas, was not a capital case. (2 CT 289.) However, there was a guilt phase followed by a penalty phase where the jury made a sentencing recommendation to the court. (2 CT 289.) The Noriega murder was presented by the Texas prosecutor as aggravating evidence in the penalty phase "to persuade the jury to select a life term as opposed to a term of years." (2 CT 289.) Brown testified under oath and was subject to cross-examination in the penalty proceedings. (2 CT 289.)

Several exhibits were attached to the motion. Exhibit 1 was a certified copy of the reporter's transcript of testimony from the "Punishment Hearing" in the Hartwell case, which included Brown's sworn testimony from an admissibility hearing and voir dire examination outside the jury's presence as well as her testimony before the jury on August 22 and 23, 1996. (2 CT 295.)

In those proceedings, defense counsel questioned Brown about her prior arrests, convictions and prison commitments. (2 CT 324-325, 386-387, 402.) He cross-examined Brown about her prior inconsistent statements to Detective Wilson and being under the influence of

methamphetamine at time of the interview. (2 CT 325-335, 388-400.) Defense counsel succeeded in eliciting from Brown admissions that she "lied to Detective Wilson to beef up the story enough for [her] to get out of jail," and she "conjured some of it up...." (2 CT 334, 336-337, 398.)

Exhibit 1 also included the court's instructions to the jury which read in relevant part:

> The defendant, Justin Thomas, has been found guilty by you of the offense of Murder. The punishment authorized for this offense is by confinement in the Institutional Division of the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than five years. In addition to such imprisonment, an individual adjudged guilty of said offense may be punished by a fine not to exceed $10,000.00.

(2 CT 427.)

The court further instructed the Texas jurors that Thomas had "filed, before trial, his sworn motion in which he prays that in the event he is convicted that he be granted probation;" if they assessed punishment of not more than ten years confinement, that they could recommend that the penitentiary time be probated for any term of years not to exceed ten years; and any recommendation of probation in the jury's verdict must be granted by the court. (2 CT 427-429.) The jurors were also instructed not to consider the uncharged offenses and bad acts presented in the punishment hearing unless they found beyond a reasonable doubt that Thomas committed them. (2 CT 431.)

In addition, Exhibit 1 included the punishment hearing closing arguments wherein the prosecutor observed that "defense counsel has tried to discredit Dorothy Brown ... [and] questioned her about her credibility, about her prior convictions" (2 CT 434) and defense counsel attacked Brown's credibility (2 CT 436-437). The jury's penalty verdict assessing a life sentence was also included. (2 CT 440.)

Exhibit 2 consisted of certified copies of the grand jury indictment, guilt and penalty phase jury instructions, guilt and penalty phase verdicts, and judgment of the court. (2 CT 444-466.) Exhibit 3 consisted of the certified death certificate and amendments issued by the Orange County Health Care Agency showing Brown died from an acute hemorrhage resulting from multiple gunshot wounds to her torso on March 26, 2004.[76] (2 CT 467-471.)

While Thomas was representing himself, Judge Luebs heard and granted the motion to admit Brown's prior testimony over a defense hearsay objection. (2 CT 515.) Judge Boren reconsidered the motion with the benefit of recently reappointed trial counsel, who objected on hearsay and constitutional grounds and argued Brown's prior testimony should be excluded because Thomas had dissimilar motives in cross-examining her in the Texas punishment hearing. (2 RT 1023-1026.)

The prosecutor responded that Brown was unavailable as a witness because she was deceased, and Thomas had the opportunity to examine her in the Texas proceedings with a very similar interest and motive to that in the current trial. (2 RT 1026.) The prosecutor explained that the defense motive in cross-examining Brown at the Texas punishment hearing was "to demonstrate that she was lying, that she was not credible, that Mr. Thomas did not commit a murder in California, and in so attempting to cross-examine her on that basis is to lesson [*sic*] the time he would spend in state prison." (2 RT 1027-1028.) The prosecutor further noted:

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[76] The death certificate and amendments were in the name of Dorothy Lugo. (2 CT 468-471.) Thomas stipulated that Dorothy Lugo was the same person as Dorothy Brown. (2 CT 515.) However, Thomas withdrew that stipulation after trial counsel were reappointed. (2 RT 1023-1024.) Ultimately, evidence at a subsequent hearing established that Lugo and Brown were the same person. (3 RT 1246-1247.)

As far as the nature of the cross-examination of Dorothy Brown, [the defense] brought out her felony convictions. They brought out her parole status. They brought out whether she'd ever offered testimony before. They brought out whether she had had an opportunity to review her statement that she had made some years earlier to law enforcement. They established inconsistencies.

[¶] ... [¶]

MR. HUGHES: They established inconsistencies between her testimony on the stand and her prior interview with law enforcement in California some years earlier. They established that she had been – either certainly was or was very likely to have been on drugs at the time she gave her statement to law enforcement in 1992.

They established with her that she was having difficulty remembering what she had said back in 1992. They, in fact, established that she had lied to Detective Wilson back in 1992. They brought out through her admission on the stand in front of the jury that she had beefed up her story to law enforcement in 1992, in an attempt to get herself out of jail and out of trouble at the time. They established her motive, therefore, to lie was to help herself.

They attempted to get her to say that she was only testifying in Texas to stay in good standing with law enforcement in California, although she did not admit that. They asked her whether she was subject to three strikes in California. They attempted to get her to say that law enforcement told her she had to come to Texas and tell the same story she had told previously although she denied that that was the case.

She admitted on the stand through cross-examination that she – at the time she made her statements in 1992 she had been arrested for sales and delivery of methamphetamine, and that her chief desire in talking to law enforcement was to benefit herself in getting herself out of jail. Although law enforcement didn't make her any promises in that – didn't make her any promises of that, Ms. Brown assumed that that would help her.

> So – and they also questioned her whether she had received any lenience or had any cases dismissed as a result of her earlier cases or testimony in court.
>
> So they did a thorough cross-examination on key issues going to her motivation to lie, all designed to demonstrate that Mr. Thomas was not guilty of what she accused him – of the murder she accused him of committing.

(2 RT 1028-1030.)

Defense co-counsel Exum conceded that "[e]verything Mr. Hughes said is correct," but argued it did not answer the question of similarity in motives in cross-examining Brown since the prior testimony was in another state, with different laws and pertained to a penalty rather than guilt phase. (2 RT 1030.) Mr. Exum further objected to the prior statement under *Crawford v. Washington* (2004) 541 U.S. 36.[77] (2 RT 1031.)

The trial court overruled the defense objections and granted the prosecutor's motion to admit Brown's prior testimony as follows:

> Having read [Evidence Code section 1291, subdivision (a)(2)], it's clear to me that the motive was actually more than similar. It seemed to me it was darn near identical to what is at issue here, that is, proving that – or at least indicating to the trier of fact there that this witness was not believable. As Mr. Hughes has summarized, there were many points that were made that would go on that side of the ledger.
>
> But it is clear to me that this falls within [Evidence Code section] 1291. It is a time-honored exception to the hearsay rule. And as was mentioned, *Crawford* principles are not offended by it. As a matter of fact, it is specifically excluded from its prohibition in that case.

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[77] In *Crawford v. Washington, supra*, 541 U.S. 36, the United States Supreme Court held the admission of out-of-court "testimonial" statements violates the Sixth Amendment unless the witness is unavailable to testify and the defendant was afforded a prior opportunity to cross-examine the witness. (*Id.* at pp. 59, 68, overruling the "adequate indicia of reliability" test of *Ohio v. Roberts* (1980) 448 U.S. 56.)

> So subject to the prove-up hearing [to establish that Dorothy Lugo and Dorothy Brown were the same person] that I mentioned, I would admit that testimony that is proffered under [section] 1291 of the Evidence Code.

(2 RT 1032; 16 Supp. CT 4087.)

Subsequently, former Riverside County Sheriff's Department Investigator Gary Thompson testified that he had an opportunity to meet Brown at the Texas trial, and identified Brown as the person depicted in People's Exhibit No. 114. (3 RT 1246-1247.) This exhibit was a certified copy of a California Department of Motor Vehicles photograph of Dorothy Lee Lugo. (3 RT 1246, 1256; 16 Supp. CT 4086.)

In addition to Exhibit No. 114, the prosecutor moved to admit into evidence a certified rap sheet for Brown, the certified death certificate, a certified copy of the reporter's transcript for the entire Texas trial, and certified court and prison records related to the Texas case. (3 RT 1256.) The transcript contained the punishment hearing testimony, instructions, closing arguments, verdict and other documents contained in the exhibits attached to the prosecutor's pretrial motion. (10 Supp. CT 2533-26719 [pages 1 to 147 of Texas punishment hearing transcript]; 12 Supp. CT 2845 [grand jury indictment], 2940-2949, 2957-2963, 2965-2968 [guilt and punishment phase instructions and verdicts].) Over a repeated defense "objection just to preserve any issues on the 1291," the trial court found sufficient foundation for and admitted the exhibits. (3 RT 1256-1257; 16 Supp. CT 4087.)

During the guilt phase, Brown's prior testimony from the admissibility hearing, voir dire and punishment phase of the Texas trial was read into the record. (6 RT 1905-1932.)

B. The Prior Testimony Was Properly Admitted Under Evidence Code Section 1291

Evidence Code Section 1291 provides:

> (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:
>
> (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or
>
> (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.
>
> (b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to:
>
> (1) Objections to the form of the question which were not made at the time the former testimony was given.
>
> (2) Objections based on competency or privilege which did not exist at the time the former testimony was given.

To be admissible, the motives for cross-examining the witness in the current and prior proceedings " 'need not be identical, only "similar." ' " (*People v. Harris* (2005) 37 Cal.4th 310, 333, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 850; *People v. Zapien, supra,* 4 Cal.4th at p. 975, citing *People v. Alcala* (1992) 4 Cal.4th 742, 784.)

The trial court's admission of prior testimony pursuant to Evidence Code section 1291 is reviewed for abuse of discretion. (*People v. Sanders* (1995) 11 Cal.4th 475, 525.) Thomas fails to show any abuse of discretion here.

The certified documents from the Orange County Health Care Agency and Department of Motor Vehicles photograph in conjunction with Investigator Thompson's testimony proved Brown was deceased at the time of the current trial. (3 RT 1246-1247, 1256; 2 CT 467-471; 16 Supp. CT 4086.) Brown's death rendered her unavailable within the meaning of Evidence Code section 1291. (*People v. Harris, supra,* 37 Cal.4th at pp. 332-333, citing Evid. Code, § 240, subd. (a)(3); *People v. Carter* (2005) 36 Cal.4th 1114, 1174.)

Thomas was a party against whom Brown's testimony was offered in the Texas punishment hearing. The stakes were very high at that hearing. The Texas jury had the option of assessing punishment for the Hartwell murder for a term of imprisonment as little as five years and as much as 99 years or life. (2 CT 427; 12 Supp. CT 2957.) The jury had the further option of recommending probation for any term of ten years or less, which the court would have been obligated to grant. (2 CT 427-429; 12 Supp. CT 2957-2959.) The prosecution was urging a life term, whereas Thomas was pleading for probation. (2 CT 427, 435-436; 10 Supp. CT 2672-2673; 12 Supp. CT 2957.)

The primary aggravating evidence upon which the Texas prosecutor relied was the Noriega murder. (2 CT 432-436; 10 Supp. CT 2669-2673.) Tellingly, Brown's testimony was the focus of the defense closing argument for the punishment phase. (2 CT 436-438; 10 Supp. CT 2673-2675.) Thus, as Judge Boren observed, Thomas's motive for cross-examining Brown in the Texas proceedings "was actually more than similar" and "darn near identical to what is at issue here" – to discredit Brown's account of the Noriega murder by attacking her credibility. (2 RT 1032.)

A common interest and motive to discredit the witness and his or her account of the crime in the prior proceeding is sufficiently similar for purposes of Evidence Code section 1291. (See *People v. Harris, supra,* 37

Cal.4th at p. 333 [similar motive to challenge witness's "credibility and discredit his account of the shooting"]; *People v. Carter, supra,* 36 Cal.4th at pp. 1173-1174 ["closely similar, if not identical to" motive to discredit prosecution theory]; *People v. Wharton* (1991) 53 Cal.3d 522, 590 [rape victim's preliminary hearing testimony from 1975 admissible in defendant's 1986 penalty phase based on sufficiently similar motive to discredit her account of the crime]; *People v. Zapien, supra,* 4 Cal.4th at p. 975 ["interest and motive in discrediting this testimony was identical at both proceedings"].)

Thomas was afforded a full opportunity to cross-examine Brown during the admissibility hearing, voir dire and formal testimony at the Texas punishment proceedings. (2 CT 324-337, 386-402; 10 Supp. CT 2561-2574, 2623-2639.) As noted by the prosecutor, trial counsel in Texas took full advantage of that opportunity by eliciting evidence of Brown's prior convictions, her involvement in drug trafficking, her parole status, her prior inconsistent statements and the fact that she was most likely under the influence of drugs at the time of her interview with Detective Wilson. Counsel also attempted to impeach Brown by asking about any promises of leniency or benefits received from law enforcement or whether she believed she had to testify consistent with her prior statements. (See 2 RT 1028-1030.) Trial counsel even succeeded in eliciting from Brown an admission that she lied to Detective Wilson to "beef up the story enough" to avoid jail and that she "conjured up some of" her prior statements. (2 CT 334, 398; 10 Supp. CT 2571, 2635.) All requirements for admission of Brown's prior testimony under Evidence Code section 1291 were satisfied.

Thomas's arguments to the contrary fail to apply the proper standard of review, overlook significant portions of the record and disregard relevant law. First, Thomas labors under the mistaken belief that de novo review applies to his claim. (AOB 87.) This Court has held abuse of discretion is

the appropriate standard of review for the admission of prior testimony under Evidence Code section 1291.[78] (*People v. Sanders, supra,* 11 Cal.4th at p. 525.) Failing to apply the proper standard of review, Thomas's claim should be summarily rejected. (See *Aurora S.A. v. Poizner, supra,* 198 Cal.App.4th at p. 1446; *Shaw v. County of Santa Cruz, supra,* 170 Cal.App.4th at p. 281; *People v. Foss, supra,* 155 Cal.App.4th at p. 126; *Bakersfield Citizens for Local Control v. City of Bakersfield, supra,* 124 Cal.App.4th at pp. 1207-1208; *People v. Bell, supra,* 61 Cal.App.4th at p. 288.)

Second, Thomas disregards significant portions of the record when he claims the prosecutor "failed to make any reference to the instruction given to the jury during the penalty phase of the Texas trial that the penalty range was from probation to life in prison," "there was no evidence suggesting the trial court was aware of this instruction to the Texas jury," and "the instruction could not have influenced the trial court's assessment under section 1291." (See AOB 88, fn. 26.) The Texas "CHARGE OF THE COURT ON PUNISHMENT" to the jury was twice presented to the trial court through the certified exhibits attached to the prosecutor's pretrial motion and those submitted at the time of the evidentiary hearing. (2 CT 456-460; 12 Supp. CT 2957-2961; 3 RT 1256-1257.) The instructions to the Texas jury regarding the penalty range were also twice placed before the trial court through the punishment hearing transcripts. (2 CT 426-432; 10 Supp. CT 2663-2673.) In the written motion as well as oral argument, the prosecutor referred to the penalty range available to the Texas jury. (2 CT 289 ["defendant's murder of Rafael Noriega was presented in the

[78] Thomas argues his claim simply requires an application of law to undisputed facts. (AOB 87.) He is wrong. Whether he had a similar interest and motive in examining Brown in the Texas punishment hearing was a significant factual dispute for the trial court to resolve.

penalty phase as aggravating evidence against him, to persuade the jury to select a life term as opposed to a term of years"]; 2 RT 1026 ["he could have gotten everything from probation to a life sentence in part depending upon what Dorothy Brown testified to"].) Thus, Thomas's contention that the prosecutor failed to present any evidence of or argue the sentencing impact of Brown's testimony in Texas (AOB 88) is belied by the record.

Thirdly, Thomas's characterization of defense counsel's cross-examination of Brown in Texas as "abbreviated" based simply on its length exalts form over substance. (See AOB 89-90.) Texas counsel aggressively and effectively cross-examined Brown on all issues relevant to her credibility and was able to accomplish everything he needed, culminating in Brown's admissions that she "lied to Detective Wilson to beef up the story enough for [her] to get out of jail," and that she "conjured some of it up...." (2 CT 334, 398; 10 Supp. CT 2571, 2635.)

In any event, "it is the opportunity and motive to cross-examine that matters, not the actual cross-examination." (*People v. Smith* (2003) 30 Cal.4th 581, 611.) " 'As long as defendant was given the opportunity for effective cross-examination, the statutory requirements were satisfied; the admissibility of this evidence did not depend on whether defendant availed himself fully of that opportunity." (*Id.* at pp. 611-612, quoting *People v. Zapien, supra,* 4 Cal.4th at p. 975; see *People v. Wilson* (2005) 36 Cal.4th 309, 346.)

Likewise, a defendant's right to confront witnesses is not violated " 'simply because the defendant did not conduct a particular form of cross-examination that in hindsight might have been more effective.' " (*People v. Carter, supra,* 36 Cal.4th at pp. 1173-1174, quoting *People v. Samayoa, supra,* 15 Cal.4th at p. 851.) "[T]he federal Constitution guarantees an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer." (*Id.* at p. 1172.)

Thomas's attempts to minimize his motive to cross-examine Brown at the Texas punishment hearing should also be rejected. (See AOB 89-91.) Thomas was facing a maximum sentence of 99 years or life in prison (which he received) with the opportunity to convince the jury to recommend a probated sentence as little as five years. The stakes were extremely high and the motive of defense counsel to discredit Brown was paramount at the punishment hearing.

Thomas thus fails to show the trial court's admission of Brown's prior testimony was arbitrary, capricious or made in a patently absurd manner that resulted in a manifest miscarriage of justice. Accordingly, no abuse of discretion has been shown and the trial court's ruling should be affirmed on appeal. (See *People v. Edwards, supra,* 57 Cal.4th at p. 711; *People v. Rogers, supra,* 57 Cal.4th at p. 326; *People v. Foster, supra,* 50 Cal.4th at pp. 1328-1329; *People v. Hovarter, supra,* 44 Cal.4th at p. 1004; *People v. Kipp, supra,* 18 Cal.4th at pp. 369-370.)

C. There Was No Violation of Thomas's Constitutional Rights

As previously stated, " '[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights' " (*People v. Lindberg, supra,* 45 Cal.4th at p. 26, quoting *People v. Kraft, supra,* 23 Cal.4th at p. 1035), and evidentiary rulings violate due process only if they render the trial fundamentally unfair (*Estelle v. McGuire, supra,* 502 U.S. at p. 70; *People v. Partida, supra,* 37 Cal.4th 428, 439). Since Brown's prior testimony was properly admitted, there was no violation of Thomas's rights to due process, fair trial or a reliable penalty determination. (See *People v. Fuiava, supra,* 53 Cal.4th at p. 670; *People v. Foster, supra,* 50 Cal.4th at p. 1335; *People v. Riggs, supra,* 44 Cal.4th at p. 292; *People v. Thornton, supra,* 41 Cal.4th at p. 464; *People v. Griffin, supra,* 33 Cal.4th at p. 579, fn. 19; *People v. Burgener,*

supra, 29 Cal.4th at p. 873; *People v. Hart, supra,* 20 Cal.4th at p. 617, fn. 19.)

Thomas's confrontation clause claim fares no better.

> " 'The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const. art. I, § 15.) That right is not absolute, however. An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination.' "

(*People v. Fuiava, supra,* 53 Cal.4th at pp. 674-675, quoting *People v. Bunyard* (2009) 45 Cal.4th 836, 848-849; see also *People v. Valencia* (2008) 43 Cal.4th 268, 291, citing *People v. Smith, supra,* 30 Cal.4th at p. 609; *People v. Harris, supra,* 37 Cal.4th at p. 332, citing *People v. Cromer* (2001) 24 Cal.4th 889, 892.) In *Crawford v. Washington, supra,* 541 U.S. at p. 59, the United States Supreme Court "reaffirmed [this] long-standing exception" to the confrontation clause, which is codified in Evidence Code section 1291. (*People v. Wilson, supra,* 36 Cal.4th at p. 340.)

In addition to his meritless claim of dissimilar motives for cross-examining Brown in the two trials, Thomas argues Brown's character, criminal history, drug use and motive to lie required that the jurors personally see and hear her live testimony. (AOB 94.) However, "*Crawford v. Washington* made clear that reliability is not part of the inquiry under the confrontation clause[.]" (*People v. Wilson, supra,* 36 Cal.4th at p. 343 [rejecting confrontation clause argument that jailhouse informant's prior testimony was unreliable]; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 742, disapproved on another ground in *People v. Scott, supra,* 61 Cal.4th at p. 390, fn. 2 ["right of confrontation does not protect against 'testimony that is marred by forgetfulness, confusion, or evasion' "].) The admission of Brown's prior testimony did not violate any of Thomas's constitutional rights.

D. The Alleged Error Was Harmless

In addition to not amounting to error, even if Brown's testimony was improperly admitted, the error was harmless. " ' "Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]." [Citation.] We ask whether it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error.' " (*People v. Livingston* (2012) 53 Cal.4th 1145, 1159, quoting *People v. Loy* (2011) 52 Cal.4th 46, 69–70; see also *Bryant, supra,* 60 Cal.4th at p. 295.)

Thomas admitted his commission of the Noriega murder to two different individuals under particularly reliable circumstances in Texas. Thomas told Reeder that he killed "Rafa" in California for "being a narc." (7 RT 2021-2022, 2143-2144; 8 RT 2252-2254, 2271-2272.) In Sams' presence, Thomas boasted that he was from California where "we kill people for things like" "[g]etting out of line, money, drugs, things of that nature," and admitted that he shot and took a bag of speed from someone in California. (9 RT 2369-2370.) As discussed in Argument I (E), *ante*, these admissions not only identified Thomas as Noriega's killer but also established motive which in turn proved premeditation and deliberation for the first degree murder and intent for the robbery-murder special circumstance.

In *People v. Davis, supra,* 46 Cal.4th 539, this Court found an assumed confrontation clause violation in admitting hearsay statements about three prior robberies in the penalty phase harmless in light of evidence that the defendant confessed to each of the robberies. (*Id.* at p. 620.) Similarly, Thomas's admissions in Texas rendered any error in admitting Brown's prior testimony harmless beyond a reasonable doubt. The guilt phase judgment should be affirmed.

III. THOMAS'S CONVICTION FOR THE MURDER OF REGINA HARTWELL QUALIFIED AS A PRIOR CONVICTION FOR PURPOSES OF THE PENAL CODE SECTION 190.2, SUBDIVISION (A)(2), SPECIAL CIRCUMSTANCE

Thomas claims the jury's true finding on the prior-murder special circumstance must be reversed because his Texas conviction for the murder of Regina Hartwell did not meet the requirements of section 190.2, subdivision (a)(2), and the court erroneously admitted hearsay in support of the special circumstance in violation of his due process rights and the prohibitions against cruel and unusual punishment under the state and federal constitutions. (AOB 97-117.) This Court's decisions in *People v. Martinez* (2003) 31 Cal.4th 673 (*Martinez*), *People v. Woodell* (1998) 17 Cal.4th 448 and *People v. Reed* (1996) 13 Cal.4th 217, readily dispose of Thomas's claims. The true finding on the prior-murder special circumstance should be affirmed.

A. Relevant Proceedings

Prior to trial, the prosecutor filed a brief regarding the qualification of the Texas murder conviction under section 190.2, subdivision (a)(2). (1 Supp. CT 2-13.) Attached to the motion were the unpublished opinion by the Court of Appeals of Texas affirming the judgment of conviction (Exhibit 1); a certified copy of the Travis County Grand Jury indictment (Exhibit 2); a certified copy of the jury instructions for the guilt phase (Exhibit 3); certified copies of the used and unused jury verdicts (Exhibit 4); and an appendix consisting of copies of the Texas Penal Code's statutes defining murder, manslaughter, culpable mental states and general terms, and six published cases of the Texas appellate courts applying those statutes. (1 Supp. CT 14-127.) After the jury was sworn, the trial court admitted certified Texas court records of the Hartwell indictment and

verdict pursuant to Evidence Code section 452.5, subdivision (b), to prove the prior conviction.[79] (6 RT 1736-1739; 16 Supp. CT 4105.)

The trial court also conducted a hearing on the section 190.2, subdivision (a)(2), special circumstance after the prosecution rested its guilt phase case-in-chief subject to the admission of exhibits. (12 RT 2767-2770.) The court stated that it had reviewed the prosecutor's written motion and attached exhibits. (12 RT 2767.) Thereafter, the prosecutor introduced the certified court records pertaining to the Texas trial (People's Exhibits 107 through 112), a certified abstract of the judgment (with Thomas's photograph) and prison records pertaining to the Texas

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[79] Evidence Code section 452.5 states:

> (a) The official acts and records specified in subdivisions (c) and (d) of Section 452 include any computer-generated official court records, as specified by the Judicial Council which relate to criminal convictions, when the record is certified by a clerk of the superior court pursuant to Section 69844.5 of the Government Code at the time of computer entry.
>
> (b)(1) An official record of conviction certified in accordance with subdivision (a) of Section 1530, or an electronically digitized copy thereof, is admissible under Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.
>
> (2) For purposes of this subdivision, "electronically digitized copy" means a copy that is made by scanning, photographing, or otherwise exactly reproducing a document, is stored or maintained in a digitized format, and bears an electronic signature or watermark unique to the entity responsible for certifying the document.

Thomas does not address the admissibility of the documents under the hearsay exception of Evidence Code section 452.5. (See AOB 101-106.)

conviction (People's Exhibit 113); and the entire certified clerk's and reporter's transcripts of the Texas proceedings (Exhibits 106-1 – 106-11; 12 RT 2767-2768; 6 Supp. CT 1582-12 Supp. CT 2985.) The prosecutor asked the trial court to take judicial notice of the testimony of a witness who identified Thomas in the Texas trial as well as the unpublished opinion of the Texas Court of Appeals affirming the judgment. (12 RT 2768.) Defense counsel objected to the exhibits on hearsay and constitutional grounds. (12 RT 2768.)

Thereafter, the trial court overruled the defense objections and found the Texas conviction qualified as a prior murder within the meaning of section 190.2, subdivision (a)(2) as follows:

> I did read carefully the brief of the People and the attachments. I also read carefully the main cases that were cited, People vs. Martinez, 2003 case at 31 Cal.4th 673; People vs. Trevino, a 2001 case found at 26 Cal.4th 237; and People v. Knoller, a 2007 case found at 41 Cal.4th 139.
>
> And also looking at Evidence Code Section 452 subdivision (d) the Court may take judicial notice of the records of and COURT of any state of the United States if they are properly put before the Court, and I believe they are. And so I would grant the People's request.
>
> It does appear to me that the elements of the Texas murder statute include all of the elements of the California murder statute. And also it appears to me that the analysis of the record of the defendant's Texas conviction demonstrates that the defendant's conduct, had it occurred in California, was punishable as first- or second-degree murder in California as well.
>
> So I would admit the exhibits that have been requested, People's 107 through 112, on that basis, as well as People's 113, and the certified copies of the transcript which have been marked as 106-1 through 106-11. It would be admissible the Court having taken judicial notice. I will also take judicial notice of the appellate opinion that is appended to the People's brief.

(12 RT 2769-2770; 16 Supp. CT 4268.)

After the jury returned its guilt phase verdicts on the murder charge, firearm enhancement and robbery-murder special circumstance, the trial court admitted the prosecution exhibits at a bifurcated jury trial on the prior-murder special circumstance over a renewed defense objection. (14 RT 3037-3038; 17 Supp. CT 4375-4376.) At the bifurcated trial, the prosecutor referenced the jurors to the exhibits before resting, and the defense presented no evidence. (14 RT 3050- 3053; 17 Supp. CT 4376.) Thereafter, the trial court instructed the jury, the prosecutor and defense counsel made closing arguments, and the jury returned a true finding on the prior-murder special circumstance. (14 RT 3053-3064, 3087-3089; 17 Supp. CT 4376-4377, 4404.)

B. The Hartwell Murder Qualified as a Prior Murder Conviction for Purposes of the Special Circumstance

Section 190.2, subdivision (a)(2), authorizes a sentence of death or life without possibility of parole for first degree murder convictions where "[t]he defendant was convicted previously of murder in the first or second degree." For purposes of this special circumstance, "an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree."[80] (§ 190.2, subd. (a)(2).) The special circumstance does not require an intent to kill. (*People v. Gurule, supra,* 28 Cal.4th at pp. 633-634.)

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[80] Although commonly cited as the prior-murder special circumstance, section 190.2, subdivision (a)(2), refers to prior murder convictions. Thus, " '[t]he order of the commission of the homicides is immaterial," and the other murder may postdate the current offense. (*People v. Gurule* (2002) 28 Cal.4th 557, 635, quoting *People v. Hendricks* (1987) 43 Cal.3d 584, 596; see also *People v. Hinton* (2006) 37 Cal.4th 839, 879.)

"In considering a foreign murder conviction under section 190.2, subdivision (a)(2), we analyze both the elements of the crime of murder under which the defendant was charged and the facts shown in defendant's indictment." (*People v. Bacon* (2010) 50 Cal.4th 1082, 1117, citing *Martinez, supra*, 31 Cal.4th at p. 688 [least adjudicated elements test].) In the alternative, a court may consider the underlying facts and circumstances of the foreign murder in determining whether it satisfies section 190.2, subdivision (a)(2). (See *Martinez, supra,* 31 Cal.4th at p. 688, citing *People v. Trevino* (2001) 26 Cal.4th 237, 241, *People v. Andrews* (1989) 49 Cal.3d 200, 223, and *People v. Guerrero* (1988) 44 Cal.3d 343, 345 [record of the prior conviction].) Both methods were satisfied in Thomas's case.

The *Martinez* Court addressed the same Texas murder statute at issue here – Tex.Pen.Code, § 19.02. (Compare *Martinez, supra,* 31 Cal.4th at p. 686, with 2 Supp. CT 15, 34.) That statute reads:

§ 19.02. Murder

(a) In this section:

(1) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

(2) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(b) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.[81]

(c) Except as provided by Subsection (d), an offense under this section is a felony of the first degree.

(d) At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.

As applied in its murder statute, "Texas substantially adopted the Model Penal Code to simplify the criminal statutes *without changing the substantive law*, by discarding former references to mens rea and malice, and substituting language defining murder as " 'intentionally or knowingly caus[ing] the death of an individual.' " (*Martinez, supra,* 31 Cal.4th at p. 686, quoting Tex. Pen.Code, § 19.02, subd. (b)(1) [emphasis in original].) "Consciously intending to shoot or kill someone, with knowledge that death is reasonably certain to occur, seems an *even more culpable act* than merely shooting someone with a conscious disregard for his life, an act that would be sufficient to constitute implied malice in California." (*Id.* at p. 687, citing *People v. Rios* (2000) 23 Cal.4th 450, 460 [emphasis in original].) Accordingly, a conviction under subdivision (b)(1) of the Texas murder statute at least equates to implied malice second degree murder under California law. (*Id.* at pp. 684, 687-688.)

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[81] Thomas's jury was only instructed pursuant to subdivisions (b)(1) and (b)(2). (1 Supp. CT 22.)

In his Opening Brief, Thomas repeats the issue previously resolved in *Martinez* – whether the Texas murder statute requires express or implied malice. (Compare *Martinez, supra,* 31 Cal.4th at pp. 683-684 with AOB 106-109.) Thomas also attempts to distinguish *Martinez* on the basis that the defendant in that case was convicted of the Texas murder by guilty plea rather than jury verdict. (AOB 112.) This is a distinction without a difference. A verdict is the " 'legal equivalent' " of a guilty plea. (*People v. Statum* (2002) 28 Cal.4th 682, 688, fn. 2, quoting *People v. Valladoli* (1996) 13 Cal.4th 590, 601.) Moreover, contrary to Thomas's reading of the case, *Martinez* relied "on the wording of the Texas indictment to determine what crime defendant committed[.]" (*Martinez, supra,* 31 Cal.4th at p. 688.)

Here, like in *Martinez*, the Texas indictment alleged Thomas "intentionally and knowingly cause[d] the death of an individual," and the jury found him "guilty of Murder as alleged in the indictment." (1 Supp. CT 20, 32.) Thus, an awareness " 'that his conduct [was] reasonably certain to cause' death" was an element of the offense for which Thomas was convicted. (*Martinez, supra,* 31 Cal.4th at p. 687.) It follows that the Texas murder conviction "included, and possibly exceeded, all the elements required by California to constitute implied malice and second degree murder" and qualified as a prior murder conviction under section 190.2, subdivision (a)(2). (*Id.* at p. 688.)

Respondent recognizes that the jury was also instructed pursuant to Texas Penal Code, section 19.02, subdivision (b)(2). (1 Supp. CT 22.) If Thomas was convicted under that murder theory, the result would be the same.

In addition to the definition discussed above, implied malice murder can be a killing " ' "which results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately

performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." ' " (*Martinez, supra,* 31 Cal.4th at p. 684, quoting *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217.) "In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another – no more, and no less." (*People v. Knoller* (2007) 41 Cal.4th 139, 143.) Thus, implied malice second degree murder cannot be based simply on a conscious disregard of the risk of serious bodily injury. (*Id.* at p. 156.)

Subdivision (b)(2) of Texas Penal Code section 19.02 satisfies this definition of implied malice. A conviction under that provision does not merely depend upon conscious disregard of the risk of serious bodily injury. Rather, it requires that the defendant "intends to cause serious bodily injury *and commits an act clearly dangerous to human life* that causes the death of an individual." (See Tex.Pen.Code, § 19.02, subd. (b)(2) [emphasis added]; 1 Supp. CT 22.) A conviction under this theory of murder requires proof "that : (1) [the defendant] committed an act with intent to cause serious bodily injury; (2) this act was 'objectively clearly dangerous to human life'; and (3) this act caused [the victim's] death." *Nickerson v. State* (Tex.Ct.App. 2002) 69 S.W.3d 661, 666, quoting *Lugo-Lugo v. State* (Tex.Ct.App. 1983) 650 S.W.2d 72, 81, and citing *Jones v. State* (Tex.Ct.App. 1986) 716 S.W.2d 142, 155-156.) Accordingly, a conviction under subdivision (b)(2) of the Texas murder statute necessarily constitutes implied malice second degree murder under California law, and therefore, Thomas's conviction for murdering Hartwell satisfied the least adjudicated elements test.[82]

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[82] This Court did not need to reach this question in *Martinez*, since the defendant pled guilty to intentionally and knowingly killing the victim (continued...)

The Texas murder also qualified for the special circumstance based on the record of the prior conviction. "[I]n determining the truth of a prior conviction allegation, the trier of fact may 'look to the entire record of the conviction' [citation] 'but *no further*' " (*People v. Trujillo* (2006) 40 Cal.4th 165, 177, quoting *People v. Woodell, supra,* 17 Cal.4th at p. 355 [emphasis in original].) Documents comprising the record of conviction remain subject to the normal rules of hearsay and must be admissible before being considered by the trier of fact. (*People v. Woodell, supra,* 17 Cal.4th at p. 458.)

The record of conviction is "technically" equivalent to the appellate record; "or more narrowly, as referring only to those record documents reliably reflecting the facts of the offense for which the defendant was convicted." (*People v. Reed, supra,* 13 Cal.4th at p. 223.) However, the parameters of the prior conviction record have yet to be defined. (See *People v. Trujillo, supra,* 40 Cal.4th at p. 177; *People v. Woodell, supra,* 17 Cal.4th at p. 454.)

Reporter's transcripts of the preliminary hearing are part of the prior conviction record. (*People v. Reed, supra,* 13 Cal.4th at p. 223.)

> The transcript falls within even the narrower definition because the procedural protections afforded the defendant during a preliminary hearing tend to ensure the reliability of such evidence. Those protections include the right to confront and cross-examine witnesses and the requirement those witnesses testify under oath, coupled with the accuracy afforded by the court reporter's verbatim reporting of the proceedings.

(*Ibid.*)

(...continued)
pursuant to subdivision (b)(1) of the Texas murder statute. (See *Martinez, supra,* 31 Cal.4th at p. 687.)

The same procedural protections would apply to the reporter's transcript of the actual trial in which the defendant was convicted. The certified reporter's transcript from the Texas guilt phase was presented to the court as well as the jury in Thomas's case. (12 RT 2767-2768; 14 RT 3037-3038; 6 Supp. CT 1582-1680; 7 Supp. CT 1681-1920; 8 Supp. CT 1921-2169; 9 Supp. CT 2170-2434.) Those transcripts were admitted into evidence pursuant to Evidence Code section 452.5. (6 RT 1736-1739; 14 RT 3037-3038; 16 Supp. CT 4105; 17 Supp. CT 4375-4376.) "Evidence Code section 452.5, subdivision (b) creates a hearsay exception allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.)

Thomas complains that "[t]he record fails to establish that the trial court read the transcripts from the Texas trial." (AOB 105, citing 12 RT 2767-2770.) However, those transcripts, which contain the sworn testimony proving murder with malice aforethought, are before this Court as part of the appellate record. Thus, the Texas transcripts are properly considered in resolving Thomas's claim regardless of whether the trial court read them. (See *People v. Jones, supra,* 54 Cal.4th at p. 50; *People v. Smithey, supra,* 20 Cal.4th at pp. 971-972; *People v. Zapien, supra,* 4 Cal.4th at p. 976.)

The record of the prior conviction "also includes *appellate* court documents at least up to finality of the judgment." (*Woodell, supra,* 17 Cal.4th at p. 455 [emphasis in original].) " 'Noticing the appellate opinion for the limited purpose of proving the existence of the ... convictions certainly does not require consideration of facts beyond those necessarily adjudicated in the prior proceedings.' " (*Id.* at p. 456, quoting with approval *People v. Harbolt* (1997) 61 Cal.App.4th 123, 127-128, review granted Oct. 15, 1997 (S063658); opn. ordered partially pub. Feb. 11,

1998.) Accordingly, "appellate opinions, in general, are part of the record of conviction that the trier of fact may consider in determining whether a conviction qualifies under the sentencing scheme at issue." (*Id.* at p. 457.)

The opinion of the Texas Court of Appeals affirming Thomas's murder conviction was presented to the trial court. (1 Supp. CT 14-18.) That opinion summarizes the facts presented at trial which, like the trial transcripts, show Thomas personally stabbed Hartwell to death because she threatened to turn him in to the police. (1 Supp. CT 15-16.) "If the appellate court did state the pertinent facts, a trier of fact is entitled to find that those statements accurately reflect the trial record." (*People v. Woodell, supra,* 17 Cal.4th at p. 457.)

Therefore, the Texas Court of Appeals' opinion was admissible and properly considered by the trial court. "[T]he appellate opinion itself, representing the action of a court, clearly comes within the exception to the hearsay rule for official records" and "a court may judicially notice the existence of judicial opinions." (*People v. Woodell, supra,* 17 Cal.4th 458, citing Evid. Code, §§ 1280 and 452, subd. (d), and *People v. Harbolt, supra,* 61 Cal.App.4th at pp. 126, fn. 3, 127-128.)

Nevertheless, Thomas complains that the Texas Court of Appeals' description of the facts within its opinion constitutes a second level of inadmissible hearsay. (AOB 103-104.) An identical argument to that made by Thomas was raised and rejected in *Woodell.* Finding the appellate opinion admissible for a nonhearsay purpose, this Court explained:

> [B]ecause the ultimate question is, of what crime was the defendant convicted, another way to decide this question is to look to a court ruling, including an appellate opinion, for the nonhearsay purpose of determining the basis of the conviction. Specifically, in this case, the trier of fact could look to the opinion to determine whether the basis for the conviction was personal use of the weapon or vicarious liability for someone else who personally used the weapon. In *People v. Reed, supra,*

> 13 Cal.4th at pages 230-231, the probation officer's report did not necessarily speak for the court, so hearsay statements within that report had to meet an exception to the hearsay rule to be admissible. By contrast, an appellate opinion is a judicial statement and can help determine the nature of the crime of which the defendant had been convicted.

(*People v. Woodell, supra,* 17 Cal.4th at pp. 458-459.) Accordingly, the Texas Court of Appeals' description of the facts proved at trial was not hearsay.

Since that opinion showed Thomas personally stabbed Hartwell to death because she threatened to turn him in to the police, the record of conviction established that it was a knowing and intentional murder. As such, the record shows Thomas was convicted of murder with malice aforethought. (See *Martinez, supra,* 31 Cal.4th at p. 687.)

In sum, Thomas's Texas murder conviction satisfied the requirements of section 190.2, subdivision (a)(2), through both the least adjudicated elements test and the record of the prior conviction, and there was no evidentiary error. The true finding on the prior-murder special circumstance should thus be affirmed.

C. Neither *Apprendi v. New Jersey* (2000) 530 U.S. 466, nor *Descamps v. United States* (2013) __U.S.__, 133 S.Ct. 2276, Bars a Trial Court from Resolving Questions of Law for Prior Convictions

Thomas contends that *Apprendi v. New Jersey, supra,* 530 U.S. 466 (*Apprendi*), as applied in *Descamps v. United States, supra,* 133 S.Ct. 2276 (*Descamps*) required the jury to determine whether his Texas conviction contained all elements of murder as defined under California law. (AOB 113-116.) Thomas misreads *Descamps*, which applies to *factual determinations* concerning a prior conviction rather than *legal questions* such as that at issue in Thomas's case.

In *Apprendi*, the United States Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra,* 530 U.S. at p. 490.) This is because the defendant already received the constitutional safeguards of the rights to a jury trial and proof beyond a reasonable doubt in the prior proceeding. (*Id.* at p. 496.)

In *Descamps*, the High Court addressed the "modified categorical approach" to defining a prior conviction under an "indivisible statute" for purposes of the Armed Career Criminal Act (ACCA). (*Descamps, supra,* 133 S.Ct. at p. 2281.) There, the issue was whether a prior burglary in California met the requirements of the "generic crime" of burglary for purposes of enhancing a sentence under the ACCA. (*Id.* at p. 2282.) Generic burglary "requires an unlawful entry along the lines of breaking and entering." (*Id.* at p. 2285.)

However, the Court observed that California's definition of burglary was much broader than the generic offense.

> Whereas burglary statutes generally demand breaking and entering or similar conduct, California's does not: It covers, for example, a shoplifter who enters a store, like any customer, during normal business hours. [Citation.] In sweeping so widely, the state law goes beyond the normal, "generic" definition of burglary.

(*Descamps, supra,* 133 S.Ct. at p. 2282.) "Descamps may (or may not) have broken and entered, and so committed generic burglary," which was a factual determination which the District Court could not make without offending *Apprendi.* (*Id.* at pp. 2288, 2293.)

In contrast to the *factual dispute* in *Descamps*, Thomas's prior conviction presented a *legal question* concerning the definition of malice. It was indisputable that Thomas was convicted of murder in Texas. The

qualification of the Texas conviction under the least adjudicated elements test turned on whether "intentionally or knowingly caus[ing] the death of an individual or "intend[ing] to cause serious bodily injury and commit[ting] an act clearly dangerous to human life that causes the death of an individual" were legal equivalents of express or implied malice in California – a purely legal question. (See 1 Supp. CT 6-11.) "[L]egal questions of a kind typically decided by judges" do not offend the prior conviction exception recognized by the United States Supreme Court. (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1018, fn. 9.) Accordingly, *Decamps* is inapposite, the prior conviction exception of *Apprendi* controls, and there was no violation of Thomas's constitutional rights.[83] Thomas exercised his statutory right to a jury trial to decide the existence of the prior conviction and whether he was the person convicted. Nothing more was required. (See *People v. Epps* (2001) 25 Cal.4th 19, 25-29.)

D. Harmless Error

Even assuming for purposes of argument that the trial court considered inadmissible documents as part of the record of conviction, the error would be harmless because, as discussed above, the Texas conviction also qualified under the least adjudicated elements test which required no

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[83] In *People v. Wilson* (2013) 219 Cal.App.4th 500, the qualification of a prior vehicular manslaughter as a serious felony depended upon whether the defendant "personally inflicted" the injuries causing death. (*Id.* at p. 504.) Since the conviction was by plea, the trial court conducted a sentencing hearing where witnesses offered testimony "evidencing, at times, competing versions of key facts" including whether the defendant's girlfriend (who was the front passenger) grabbed the steering wheel prior to the accident. (*Id.* at p. 515.) The Court of Appeal held *Descamps* barred the trial court from resolving the personal infliction issue without a jury because it required the weighing of witness credibility and a determination of disputed facts. (*Id.* at pp. 515-516.) Thus, like *Descamps*, the *Wilson* case is inapposite since it involved a factual rather than legal determination by the trial court.

reference to those documents. (See *People v. Martinez, supra,* 31 Cal.4th at p. 688 [court may either look to record of conviction or presume conviction was for least offense punishable under other state's law]; *People v. Guerrero, supra,* 44 Cal.3d at p. 352 [same].) Moreover, even if the prior-murder special circumstance were reversed, there would be no change in judgment since the jury also found the robbery-murder special circumstance true. (See, e.g., *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1157 [no change in judgment where lying-in-wait special circumstance reversed but torture-murder special circumstance affirmed]; *People v. Ledesma* (2006) 39 Cal.4th 641, 716-717 [death verdict supported by witness-killing special circumstance where robbery-special circumstance reversed].)

IV. VIEWING THE FACTS IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION AND DRAWING ALL REASONABLE INFERENCES FROM THE FACTS IN SUPPORT OF THE JUDGMENT, SUBSTANTIAL EVIDENCE SUPPORTED THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE

Thomas claims the evidence was insufficient for the jury's true finding on the robbery-murder special circumstance. Thomas argues the prosecutor's theory that he killed Noriega because he thought Noriega was going to report him to the police showed the robbery was incidental to the murder. (AOB 118-133.) However, the evidence also demonstrated an independent felonious purpose to rob Noriega of the bag of drugs. Thomas fails to assess the evidence under the applicable standard of review, insisting on viewing the facts in the light most favorable to himself and refusing to draw any reasonable inferences from the facts in support of the judgment. Under the proper standard of review, the robbery-murder special

circumstance true finding was supported by substantial evidence showing an independent felonious purpose to rob Noriega.[84]

A. Substantial Evidence Supported the True Finding on the Robbery-Murder Special Circumstance

The standard for reviewing the sufficiency of the evidence in criminal cases is well-established. (*People v. Jennings, supra*, 50 Cal.4th at p. 638.)

> "When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]"

(*People v. D'Arcy* (2010) 48 Cal.4th 257, 293, quoting *People v. Lindberg, supra,* 45 Cal.4th at p. 27.) The standard is the same under the federal Constitution. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

When assessing a sufficiency-of-the-evidence claim, the reviewing court has a limited role. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) It does " 'not retry the case' " on appeal. (*Tecklenburg v. Appellate Division* (2009) 169 Cal.App.4th 1402, 1412, quoting *People v. Sanchez* (2003) 113 Cal.App.4th 325, 330; see also *People v. Veale* (2008) 160 Cal.App.4th 40, 46.) It "neither reweigh[s] the evidence nor reevaluate[s] the credibility of witnesses." (*People v. Lindberg, supra,* 45 Cal.4th at p. 27; see also *Jackson v. Virginia, supra,* 443 U.S. at p. 324.)

"[I]t is the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139 [emphasis in original].) "Therefore, an appellate court

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[84] Thomas argues the special circumstance had to be proved beyond a reasonable doubt. (AOB 122-124.) Respondent agrees. (See § 190.4, subd. (a); *People v. Boyce* (2014) 59 Cal.4th 672, 691; *People v. Jennings* (2010) 50 Cal.4th 616, 638.)

may not substitute its judgment for that of the jury" (*ibid*) and must defer to the jury's resolution of factual conflicts (*Cavazos v. Smith* (2011) __ U.S. __ , 132 S.Ct. 2, 6 (*per curiam*); *Jackson v. Virginia, supra,* 443 U.S. at p. 326; *People v. Ochoa, supra*, 6 Cal.4th at p. 1206).

"[E]vidence is sufficient to support a conviction so long as '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.' " (*Cavazos v. Smith, supra,* 132 S.Ct. at p. 6, quoting *Jackson v. Virginia, supra,* 443 U.S. at p. 319 [emphasis in original].) Thus, the reviewing court "must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Jones* (1990) 51 Cal.3d 294, 314; see also *Jackson v. Virginia, supra,* 443 U.S. at p. 326; *People v. Ochoa, supra,* 6 Cal.4th at p. 1206.)

Convictions may rest primarily on circumstantial evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124; *People v. Bean* (1988) 46 Cal.3d 919, 932.)

> Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt.

(*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

Thus, a conviction may not be reversed merely because circumstances might support or be reconciled with a contrary finding. (*People v. Kraft, supra*, 23 Cal.4th at p. 1054; *People v. Ceja, supra,* 4 Cal.4th at pp. 1138-1139.) Reversal is only warranted where it clearly appears that " 'upon no hypothesis whatever is there sufficient substantial evidence to support' " the verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.) The same standard of review

applies to sufficiency-of-the-evidence claims for special circumstance findings. (*People v. Booker* (2011) 51 Cal.4th 141, 172; *People v. Jennings, supra,* 50 Cal.4th at p. 638; *People v. Lindberg, supra,* 45 Cal.4th 1, 27.)

For a robbery-murder special circumstance, the prosecutor must prove " [t]he murder was committed while the defendant was engaged in ... the commission of, attempted commission of, or the immediate flight after committing, or attempt to commit... [¶] ... Robbery in violation of Section 211 or 212.5." (§ 190.2, sub. (a)(17)(A).) This "special circumstance applies to a murder in the commission of a robbery, not to a robbery committed in the course of a murder." (*People v. Marshall* (1997) 15 Cal.4th 1, 41.) "The robbery must not be 'merely incidental' to the commission of the murder." (*People v. Clark* (2011) 52 Cal.4th 856, 947, quoting *People v. Green* (1980) 27 Cal.3d 1, 61.) Thus, taking the murder victim's clothing to hinder her identification or taking a letter from the victim as a token of the crime are not murders in the course of a robbery. (*People v. Abilez* (2007) 41 Cal.4th 472, 511, citing *People v. Green, supra,* 61 Cal.3d at p. 61, and *People v. Marshall, supra,* 15 Cal.4th at p. 41.) The robbery-murder special circumstance requires an independent felonious purpose for the robbery. (*People v. Moore* (2011) 51 Cal.4th 386, 408; *People v. Davis* (2009) 46 Cal.4th 539, 609.) The intent to rob the victim must be formed prior to or at the time of the murder. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1263; *People v. Sakarias* (2000) 22 Cal.4th 596, 620.) Accordingly, "if a defendant harbored the intent to kill at the outset, a concurrent intent to commit [robbery] will support the special circumstance allegation." (*People v. Davis, supra,* 46 Cal.4th at p. 609, citing *People v. Raley* (1992) 2 Cal.4th 870, 903, and *People v. Abilez, supra,* 41 Cal.4th at p. 511.)

In Thomas's case, there was substantial evidence of an independent felonious purpose to commit robbery at the time of the murder. Prior to the killing, Thomas yelled something in Spanish which caused Noriega to walk to the back of his car, open the trunk and remove the green bag. (6 RT 1912-1913, 1938.) Thereafter, Thomas retrieved the handgun from his truck and shot Noriega multiple times. (6 RT 1913, 1938-1939.) By the time Thomas returned to the shooting scene with Brown, he had already placed the green bag in the back of his truck. (6 RT 1916, 1941.) Several years later, Thomas bragged about shooting and taking a bag of "speed" from someone in California. (9 RT 2369-2371, 2381.) This evidence established that Thomas had an independent felonious purpose to rob Noriega at the time of the murder.

The evidence also showed Thomas intended to kill Noriega for being a "narc." (7 RT 2021-2022, 2143-2144; 8 RT 2276.) The fact that Thomas had Noriega produce the bag of drugs *before* the shooting manifested a concurrent intent to rob Noriega at the time of the murder even if Thomas harbored the intent to kill at the outset. Accordingly, the robbery-murder special circumstance was supported by substantial evidence. (See *People v. Davis, supra,* 46 Cal.4th at p. 609; *People v. Abilez, supra,* 41 Cal.4th at p. 511; *People v. Raley, supra,* 2 Cal.4th at p. 903.)

Thomas's arguments to the contrary are unpersuasive. Foremost, Thomas ignores Brown's testimony describing how he had Noriega produce the bag of drugs before the shooting. (See AOB 124-127.) In order to prevail on a sufficiency claim, the defendant must set forth all of the material facts in the case in his or her opening brief in the light most favorable to the prosecution, and persuade the reviewing court that such evidence cannot reasonably support the verdict. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574.)

> If the defendant fails to present [the reviewing court] with all the relevant evidence, or fails to present that evidence in the light most favorable to the People, then he cannot carry his burden of showing the evidence was insufficient because support for the jury's verdict may lie in the evidence he ignores.

(*Ibid.* [noting that such failure is "often the case in criminal appeals"].)

Thomas cites *People v. Thompson* (1980) 27 Cal.3d 303, as support for his claim. (See AOB 126.) In that case, the defendant demanded money but declined all cash and jewelry tendered by the victims, and the defendant demanded and stole a car which this Court found "was simply to effect his getaway from the shootings he intended" rather than "make off with a vehicle." (*Id.* at pp. 323-324.) Unlike Thomas's robbery of Noriega, the defendant in *Thompson* did not have his victims produce the property which was eventually stolen and that property was taken solely to effect the defendant's getaway. Accordingly, *Thompson* is inapposite.

Thomas attempts to distinguish *People v. Michaels* (2002) 28 Cal.4th 486, 517-518, a case in which this Court found independent and concurrent felonious purposes to burglarize, rob and murder the victim. (AOB 127-128.) As explained above, evidence that Thomas directed Noriega to produce the bag of drugs prior to the shooting, the actual theft of the bag after the murder and Thomas's subsequent statements about shooting someone in California for drugs and shooting Noriega for being a "narc" showed independent and concurrent felonious intents to rob and kill Noriega. Thus, *People v. Michaels, supra,* 28 Cal.4th 486, does not assist Thomas's claim.[85]

Thomas attempts to discount evidence "contrary" to his claim that there was no motive to rob Noriega – specifically his bragging in front of

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[85] Thomas labors under the mistaken belief that the motives to kill and to rob are mutually exclusive, failing to recognize that concurrent intents will satisfy the special circumstance. (See AOB 125-126.)

Sams about having shot someone for drugs in California – by arguing that he failed to appreciate the differences between incidental robberies and independent felonious purposes. (AOB 125-126.) Thomas's argument fails to apply the appropriate standard of review.

> We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.]

(*People v. Jennings, supra,* 50 Cal.4th at pp. 638-639, citing *People v. Lindberg, supra,* 45 Cal.4th at p. 27; see also *People v. Thompson* (2010) 49 Cal.4th 79, 126.)

Viewing the facts in the light most favorable to the People and drawing all reasonable inferences from them in support of the judgment, there was substantial evidence proving the robbery-murder special circumstance. Thomas cannot show " 'upon no hypothesis whatever is there sufficient substantial evidence to support' " the verdict. (See *People v. Bolin, supra,* 18 Cal.4th at p. 331, *People v. Redmond, supra,* 71 Cal.2d at p. 755.) Accordingly, the jury's true finding on the robbery-murder special circumstance should be affirmed.

B. The Judgment is Unaffected by the Validity of the Robbery-Murder Special Circumstance

Citing *Brown v. Sanders* (2006) 546 U.S. 212, Thomas contends that, if this Court were to reverse the robbery-murder special circumstance, his death judgment would have to be reversed as well because the jury's consideration of the Noriega robbery would have prejudiced its penalty verdict. (AOB 127-133.) Similar arguments were rejected by this Court in *People v. Carrasco* (2014) 59 Cal.4th 924, 970, *People v. DeBose* (2014)

59 Cal.4th 177, 196, *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1186, *People v. Maciel* (2013) 57 Cal.4th 482, 521, *People v. Castaneda* (2011) 51 Cal.4th 1292, 1354, *People v. Farley* (2009) 46 Cal.4th 1053, 1116, fn. 22, *People v. Lewis* (2008) 43 Cal.4th 415, 520, disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919-920, *People v. Morgan* (2007) 42 Cal.4th 593, 628, *People v. Halvorsen* (2007) 42 Cal.4th 379, 422, *People v. Bonilla* (2007) 41 Cal.4th 313, 333, and *People v. Ledesma, supra,* 39 Cal.4th at pp. 716-717.

In *Brown v. Sanders*, the United States Supreme Court recognized that "the invalidation of a special circumstance does not require reversal for the death sentence under California's statutory scheme if 'one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.' " (*People v. Hajek and Vo, supra,* 58 Cal.4th at p. 1186, quoting *Brown v. Sanders, supra,* 546 U.S. at p. 220.) Amongst the various sentencing factors, juries in the penalty phase are required to consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding" in addition to any special circumstances found true. (§ 190.3, factor (a).)

Irrespective of the validity of the robbery-murder special circumstance, Thomas's jury was required to consider all the facts and circumstances of the Noriega murder including the forcible taking of the bag of drugs. Therefore, even if the robbery-murder special circumstance were reversed, it would " 'not alter the universe of facts and circumstances to which the jury could accord ... weight' [citation], and ...'[t]here is no likelihood that the jury's consideration of the mere existence of the ... special circumstance tipped the balance toward death' [citation] . . . ." (*People v. Hajek and Vo, supra,* 58 Cal.4th at pp. 1186-1887, quoting *People v. Bonilla, supra,* 41 Cal.4th at p. 334, and *People v. Mungia, supra,* 44 Cal.4th at p. 1139.)

As discussed in Argument III, *ante*, the jury also found true a prior-murder special circumstance which should be affirmed. Because the robbery-murder special circumstance did "not change the underlying facts available for the jury to consider when it returned a death verdict at the penalty phase," the death judgment can thus be affirmed regardless of the validity of the robbery-murder special circumstance. (*People v. Carrasco, supra,* 59 Cal.4th at p. 970 [§ 190.2, subd. (a)(14), special circumstance vacated]; see also *People v. Farley, supra,* 46 Cal.4th at p. 1116, fn. 22 ["jury would have heard the same evidence" regardless of burglary-murder special circumstance].)

V. THE JURY WAS PROPERLY INSTRUCTED ON SECOND DEGREE EXPRESS MALICE MURDER

Thomas claims his first degree murder conviction must be reversed and his rights to due process and a jury determination of the facts and the prohibitions against cruel and unusual punishment under the state and federal constitutions were violated because the trial court failed to fully and properly instruct the jury on the lesser included offense of second degree murder – specifically that an intentional killing could constitute second degree murder. (AOB 134-149.) Thomas's claim is forfeited, there was no instructional or constitutional error, and the alleged error was harmless. Accordingly, Thomas's conviction for first degree murder should be affirmed.

A. Relevant Background

The prosecutor submitted to the trial court a modified version of CALCRIM No. 520, defining murder with malice aforethought. The instruction omitted standard language concerning implied malice because the prosecutor was only relying on the theory that the murder was an intentional killing. Defense counsel raised no objection to the modified instruction. (13 RT 2818.)

As given, CALCRIM No. 520 read:

520. Murder with Malice Aforethought

(Modified)

The defendant is charged with murder in violation of Penal Code section 187.

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant committed an act that caused the death of another person.

AND

2. When the defendant acted, he had a state of mind called express malice aforethought.

The defendant acted with *express malice* if he unlawfully intended to kill.

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.

(17 Supp. CT 4324 [emphasis in original]; 13 RT 2895.)

The prosecutor also submitted a modified version of CALCRIM No. 521, defining the degrees of murder. The instruction omitted inapplicable theories of first degree murder and changed the standard language, "All other murders are of the second degree," to, "All other murders except felony murder are of the second degree," since the prosecution was proceeding on both felony-murder and deliberate premeditated murder theories of first degree murder. (13 RT 2818-2819.) Thomas neither objected nor proposed any modification to the instruction. (13 RT 2819.)

CALCRIM NO. 521 (June 2007 rev.) as given by the trial court thus read:

521 Murder: Degrees

(*Modified*)

If you decide that the defendant has committed murder, you must decide whether it is murder of the first or second degree.

The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before completing the act that caused death.

The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.

All other murders except felony murder are of the second degree.

The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder.

(17 Supp. CT 4326 [emphasis in original]; 13 RT 2896-2897.)

B. Forfeiture

On appeal, Thomas does not claim the trial court's murder instructions misstate the law. Rather, he contends they are incomplete because they do not inform the jury that an intentional killing without premeditation and deliberation can be second degree murder. (See AOB 134, 140-143.) However, Thomas did not request any such addition or

modification to CALCRIM Nos. 520 and 521 in the trial court.[86] (See 13 RT 2818-2819.)

"A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503; see, e.g., *People v. Lee* (2011) 51 Cal.4th 620, 638 [consent instruction]; *People v. Richardson* (2008) 43 Cal.4th 959, 1188 [aiding and abetting instruction]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1134 [motive instruction].) A "defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions." (*People v. Daya* (1994) 29 Cal.App.4th 697, 714.) Accordingly, Thomas's claim that the jury was not fully and properly instructed on second degree express malice murder is forfeited.

C. The Jury Was Properly Instructed

"[I]n the absence of a request, the court need only instruct on general principles of law closely and openly connected to the facts and necessary for the jury's understanding of the case." (*People v. Boyce, supra,* 59 Cal.4th at p. 715.) " 'A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]' " (*People v. Solomon* (2010) 49 Cal.4th 792, 822, quoting *People v. Cross* (2008) 45 Cal.4th 58, 67-68.) " ' "[T]he correctness of jury instructions is to be determined from the

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[86] In contrast to his acceptance of the instructions defining first and second degree murder, Thomas raised an objection to the felony-murder instruction which was overruled by the court. (13 RT 2819-2820.) Thomas also made requests for manslaughter and self-defense instructions which were denied. (13 RT 2814- 2817.)

entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." [Citations.]' " (*Ibid.*, quoting *People v. Carrington* (2009) 47 Cal.4th 145, 192.) Jury instruction claims are subject to de novo review. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

"Murder is an 'unlawful killing of a human being ... with malice aforethought.' " (*People v. Romero* (2008) 44 Cal.4th 386, 402, quoting § 187, subd. (a).) Willful, deliberate and premeditated murder, murder committed in the course of certain specified felonies (felony murder), and murder committed under other circumstances not pertinent here are murders of the first degree.[87] (*Ibid.*, citing § 189.) " 'All other murders are of the second degree.' " (*Ibid.*, quoting § 189.)

Accordingly, second degree murder is the unlawful killing of a human being with express or implied malice without the additional elements required for first degree murder. (*People v. Taylor* (2010) 48 Cal.4th 574, citing *People v. Hansen* (1994) 9 Cal.4th 300, 307, and *People v. Lasko* (2000) 23 Cal.4th 101, 107.) "Express malice is an intent to kill." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653, citing *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.)

Thomas's jury was properly instructed on second degree express malice murder.[88] CALCRIM No. 520 stated that the People had to prove an intent to kill for *all* murders. (17 Supp. CT 4324.) The only exception to this rule stated in the instructions was for felony murder. (17 Supp. CT 4325; 13 RT 2895-2896.)

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[87] The jury was instructed, "The defendant has been prosecuted for murder under two theories: (1) malice aforethought, and (2) felony murder." (17 Supp. CT 4323 13 RT 2895.)

[88] As previously noted, the trial court did not instruct on implied malice murder. (13 RT 2818.)

CALCRIM No. 521 stated that willful, premeditated and deliberate killings were first degree murder and "[a]ll other murders except felony murder are of the second degree." (17 Supp. CT 4326.) Thus, the jury was instructed that an intentional killing which is not premeditated and deliberate murder or felony murder was murder in the second degree. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

In *People v. Rogers, supra,* 39 Cal.4th 826, the trial court instructed the jury on implied malice second degree murder. (*Id.* at p. 866.) "It did not, however, instruct the jury that second degree murder also occurs when 'there is manifested an intention unlawfully to kill a human being but the evidence is insufficient to establish deliberation and premeditation.' " (*Ibid.*, quoting CALJIC No. 8.30.) Accordingly, this Court found "the trial court erred by omitting an instruction that second degree murder includes an intentional but unpremeditated murder." (*Ibid.*)

As discussed above, Thomas's jury was instructed that an intentional but unpremeditated murder is second degree murder through CALCRIM Nos. 520 and 521. Significantly, no implied malice murder instructions were given. Therefore, the "obvious gap in the instructions" in *Rogers* did not occur in Thomas's case. (See *People v. Rogers, supra,* 39 Cal.4th at pp. 866-867 [discussing CALJIC No 8.30 in context of CALJIC Nos. 8.10, 8.11, 8.20 and 8.31].)

Thomas's argument to the contrary relies on an unreasonable reading and artificial parsing of the instructions in contravention of the applicable standard of review. Thomas argues CALCRIM No. 520 "did not tell the jury that express malice aforethought and an intentional killing could also be second degree murder." (AOB 141.) Thomas is wrong. CALCRIM

No. 520 as given to the jury applied to *all* murders without reference to degree. (17 Supp. CT 4324.)

Thomas further argues CALCRIM No. 520 "did not state whether express malice applied to first degree murder, second degree murder, or both." (AOB 141.) Thomas again fails to recognize that the instruction applied to all degrees of intentional murder. (17 Supp. CT 4324.)

Thomas next views CALCRIM No. 521 completely out of context of the other instructions by arguing it "did not tell the jury that second degree murder could involve an intentional killing." (AOB 141.) Again, CALCRIM No. 520 instructed the jury that all murders regardless of degree required express malice which it defined as an intentional killing. (17 Supp. CT 4324.)

Thomas also ostensibly ignores the remainder of the instruction which solely distinguishes first degree murder as premeditated and deliberate murder or felony murder, and states that all other murders are of the second degree. (17 Supp. CT 4326.) In conjunction with CALCRIM No. 520 stating that all murders require express malice, CALCRIM No. 521 thus informed the jurors that an intentional killing without deliberation and premeditation and not constituting felony murder was second degree murder.

Thomas appears to prefer that the concept of express malice second degree murder be stated in a single instruction such as former CALJIC No. 8.30. (See AOB 142-143.) "When the jury is properly instructed as to pertinent legal principles, the court need not restate those principles merely in another way." (*People v. Anderson* (1966) 64 Cal.2d 633, 641; see *People v. Fiu* (2008) 165 Cal.App.4th 360, 370 [although court is required to give complete and correct instructions on the law, "no particular form is required"]; *People v. Andrade* (2000) 85 Cal.App.4th 579, 585 [same]; *People v. Tatman* (1993) 20 Cal.App.4th 1, 10.)

Since the jury was properly instructed on the lesser offense of second degree express malice murder, Thomas's conviction for first degree murder should be affirmed. It follows that Thomas's derivative constitutional claims of due process and cruel and unusual punishment violations (AOB 143-146) must be rejected. (See *People v. DeHoyos* (2013) 57 Cal.4th 79, 147; *People v. Prince* (2007) 40 Cal.4th 1179, 1293, fn. 30; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135.)

D. The Alleged Error Was Harmless

Absent a violation of the due process right to present a complete defense or a federal constitutional violation rising to the level of an unreliable capital verdict, failure to properly instruct on a lesser included offense is subject to harmless error review under the standard set forth in *People v. Watson, supra,* 46 Cal.2d 818. (*People v. Rogers, supra,* 39 Cal.4th at pp. 867-868 & fn. 16.) Accordingly, reversal is only required if " 'an examination of the entire cause, including the evidence' " shows "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

Thomas claims he was prejudiced because the jury was deprived of the option of finding him guilty of second degree express malice murder. (AOB 145-149.)

> In determining whether a failure to instruct on a lesser included offense was prejudicial, an appellate court may consider "whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result."

(*People v. Rogers, supra,* 39 Cal.4th at p. 870, quoting *People v. Breverman* (1998) 19 Cal.4th 142, 177, and citing *People v. Sakarias* (2000) 22 Cal.4th 596, 621 [emphasis in original].)

In *People v. Rogers, supra,* 39 Cal.4th 826, this Court found "it unlikely the jury concluded the killing was intentional but not premeditated" where, as here, the evidence showed the defendant committed the murder to prevent his victim from turning him in to the police and had time to contemplate his course of action. (*Id.* at p. 870.) Despite an argument and physical altercation prior to the shooting, the confessed motive "was strong evidence demonstrating that the killing was not impulsive or emotional, but rather a calculated decision made only after [the victim] threatened to make a report and defendant had adequate time to contemplate the consequences of allowing her to live and be able to report him." (*Id.* at p. 870.) Since the defense evidence to the contrary was "comparatively weak," it was not "reasonably probable that had the jury been accurately instructed, it would have concluded defendant intended to kill [the victim] but did not premeditate or deliberate."[89] (*Id.* at p. 871.)

Whereas Thomas confessed his predetermined motive to Reeder, Rogers made his confession to the police. (7 RT 2021-2022, 2143-2144; 8 RT 2276; *People v. Rogers, supra,* 39 Cal.4th at p. 839) Moreover,

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[89] The *Rogers* Court also found the instructional error harmless because the jury had the option of convicting the defendant of second degree implied malice murder but still convicted him of first degree murder. (*People v. Rogers, supra,* 39 Cal.4th at pp. 868-869.) Thomas's jury was not instructed on implied malice second degree murder. (13 RT 2818.) This has no bearing on application of the prejudice analysis in *Rogers* to Thomas's case because the implied malice argument was one of two independent reasons for finding the instructional error harmless. (See *id.* at p. 868.)

Thomas bragged to others about killing people for "[g]etting out of line, money, drugs, things of that nature." (9 RT 2368-2369.)

In addition, there was evidence of planning. Thomas brought a companion with him whose sole purpose was to drive away Noriega's car after the murder, and he equipped himself with a shovel to bury the body. (6 RT 1910, 1914-1917, 1936-1937, 1940, 1943.) Thus, the evidence of premeditation and deliberation was even stronger than that in *Rogers*.

In contrast to Brown's statement to Investigator Silva that there was "some kind of heated argument in Spanish" prior to the shooting, Rogers described a physical altercation over money which led to the victim yelling, kicking and swinging at him, an accidental shooting which did not stop the victim from screaming at him, pushing the victim out of his truck, and the victim " 'going crazy' " and threatening to report him prior to the fatal shots. (Compare 13 RT 2872 with *People v. Rogers, supra,* 39 Cal.4th at p. 839.) Also, Thomas repeatedly denied any involvement in the Noriega shooting when interviewed by Investigator Silva, rather than claim reduced culpability for the murder. (16 Supp. CT 4157-4163, 4172-4174, 4179, 4183, 4191, 4198-4199, 4201, 4215, 4218-4218.) The defense evidence suggesting lack of premeditation and deliberation in Thomas's case was thus even weaker than that in *Rogers*.

In light of the relative strength of the evidence proving premeditation and deliberation and weakness of the minimal evidence to the contrary, it is not reasonably probable that the jury would have concluded Thomas intended to kill Noriega but did not premeditate or deliberate. Accordingly, it is not reasonably probable that the jury would have found Thomas guilty of second degree express malice murder instead of first degree murder in the absence of the alleged instructional error, and any such error was harmless. (See *People v. Rogers, supra,* 39 Cal.4th at p. 870; *People v.*

Sakarias, supra, 22 Cal.4th at p. 621; *People v. Breverman, supra,* 19 Cal.4th at p. 177.)

Even if a first degree murder conviction based on premeditation and deliberation were barred due to instructional error, the verdict should nonetheless be affirmed under the felony-murder theory of first degree murder which, as discussed in Argument IX, *infra*, was supported by substantial evidence and proper instructions. (See, e.g., *People v. Hajek and Vo, supra,* 58 Cal.4th at p. 1187, fn. 14 [unnecessary to address sufficiency of evidence supporting lying-in-wait theory of first degree murder since verdicts could be affirmed on torture-murder and premeditated deliberate killing theories of first degree murder].) Since Thomas was allowed to present the defense of his choice with the first and second degree murder instructions he agreed to, there was no violation of his rights to present a complete defense and a reliable verdict. (*See People v. Rogers, supra,* 39 Cal.4th at p. 868, fn. 16, 872.) Thomas's conviction for first degree murder should therefore be affirmed.

VI. THE TRIAL COURT HAD NO DUTY TO GIVE A PINPOINT INSTRUCTION ON PROVOCATION FOR THE MURDER DEGREE

Thomas claims his first degree murder conviction must be reversed because the trial court failed to instruct the jury on provocation bearing on the question of premeditation and deliberation in violation of his rights to due process and a jury determination of the facts and the prohibitions against cruel and unusual punishment under the state and federal constitutions. (AOB 150-163.) The trial court was not required to give such a pinpoint instruction on its own motion.[90] Thus, there was no

[90] Since the claim is that the trial court had a sua sponte duty to give the instruction, forfeiture does not apply and Thomas's waiver argument (AOB 159-160) need not be addressed. (See *People v. Tate* (2010) 49 Cal.4th 635, 698, fn. 34.)

instructional or constitutional error. Moreover, the alleged error was harmless. Accordingly, Thomas's conviction for first degree murder should be affirmed.

A. The Jury Was Properly Instructed

Former CALJIC No. 8.73 explains "that provocation inadequate to reduce a killing from murder to manslaughter nonetheless may suffice to negate premeditation and deliberation, thus reducing the crime to second degree murder." (*People v. Rogers, supra,* 39 Cal.4th at pp. 877-878.) This concept is currently stated in CALCRIM No. 522.[91]

CALJIC No. 8.73 is a "pinpoint instruction." (*People v. Rogers, supra,* 39 Cal.4th at pp. 878-879; *People v. Mayfield, supra,* 14 Cal.4th at p. 778, disapproved on another ground in *People v. Scott, supra,* 61 Cal.4th at p. 390, fn. 2.) Its equivalent, CALCRIM No. 522, is therefore a pinpoint instruction as well.[92] " 'Such instructions relate particular facts to a legal issue in the case or "pinpoint" the crux of a defendant's case.' " (*People v. Rogers, supra,* 39 Cal.4th at p. 878, quoting *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) " 'They are required to be given upon request when

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[91] CALCRIM No. 522 states:

> Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide.
>
> If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]
>
> [Provocation does not apply to a prosecution under a theory of felony murder.]

[92] Thomas agrees that CALCRIM No. 522 is the equivalent of CALJIC No. 8.73. (AOB 159, fn. 42.)

there is evidence supportive of the theory, but they are not required to be given sua sponte.' " (*Ibid.*, quoting *People v. Saille, supra,* 54 Cal.3d at p. 1119.)

Thomas did not request CALCRIM No. 522 or CALJIC No. 8.73 in the trial court. (16 Supp. CT 4284 [defense requested jury instructions]; 13 RT 2814-2820 [discussions regarding murder instructions].) In the absence of a request, the court had no duty to give such an instruction on its own motion.[93] (*People v. Rogers, supra,* 39 Cal.4th at p. 879; *People v. Mayfield, supra,* 14 Cal.4th at p. 778.)

CALCRIM No. 521 already informed the jury that a willful, deliberate and premeditated killing is first degree murder and "[a]ll other murders except felony murder are of the second degree." (17 Supp. CT No. 4326.) Clearly a provoked killing is not one resulting from premeditation and deliberation. The two concepts are mutually exclusive. (See *People v. Wickersham* (1982) 32 Cal.3d 307, 330, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201 ["jury could have found that appellant did not premeditate but rather acted upon a 'sudden and unconsidered impulse[]' "].) Because the jury was already "told that premeditation and deliberation is the factor distinguishing first and second degree murder," there was no need for an instruction defining a provoked killing as murder in the second degree. (See *People v. Rogers, supra,* 39 Cal.4th at p. 880.)

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[93] Thomas cites a comment by trial counsel that one possible interpretation of Brown's testimony could be that there was some provocation. (AOB 151-152, citing 13 RT 2815.) However, this comment was made in the context of trial counsel's request for voluntary manslaughter instructions based on heat of passion and imperfect self defense. (See 13 RT 2814-2817.)

Moreover, provocation was not "the crux" of Thomas's defense. The defense theory – consistent with Thomas's denials to Investigator Silva – was that someone else killed Noriega. (See 13 RT 2943-2958 [defense guilt phase closing argument attacking Brown's, Reeder's and Sams' credibility and discounting evidence of Thomas's admissions].) Indeed, when discussing the robbery-murder special circumstance, trial counsel stated:

> If any of you think that Justin Thomas is the killer, he shot Noriega, in order to find – *and I don't suggest that you ever think that*, but in order to find that it was a special circumstance that it was a murder during the course of a robbery, the robbery, the idea to commit the robbery cannot have occurred after the murder, after the shooting.

(13 RT 2958 [emphasis added].) Thus, no pinpoint instruction on provoked second degree murder was required. (See *People v. Rogers, supra,* 39 Cal.4th at p. 878; *People v. Saille, supra,* 54 Cal.3d at p. 1119.)

Furthermore, there was no evidence supportive of a theory of provoked second degree murder. Brown told Investigator Silva that there was "some kind of heated argument in Spanish" prior to the shooting. (13 RT 2872.) However, there was no evidence that the shooting was "a 'sudden and unconsidered impulse[].' " (See *People v. Wickersham, supra,* 32 Cal.3d at p. 333, quoting *People v. Fields* (1950) 99 Cal.App.2d 10, 13.) Between the yelling and the shooting, Noriega walked to the back of his car, opened the trunk and removed the green-colored bag while Thomas stood waiting next to his truck. (6 RT 1912-1913, 1937-1938.) After Noriega produced the bag of drugs, Thomas then retrieved the gun from the truck and shot him. (6 RT 1913, 1938.) The yelling thus induced the production of the green bag, not the shooting. Only after he was satisfied that Noriega had brought the bag of drugs with him, Thomas proceeded

with the murder. There was no evidence supporting a pinpoint instruction on provocation.

Citing evidence that a loaded .22 caliber semi-automatic gun was found under the driver's seat of Noriega's car, Thomas argues Investigator Silva told him "that Kelly said he perhaps saw two people shooting at each other." (AOB 151, citing 6 RT 1836-1837, and 16 Supp. CT 4187 [footnote omitted].) Thomas fails to recognize that this was a ruse designed to elicit an incriminating response, not a true statement.

The gun found in Noriega's car was loaded with a full magazine and a chambered bullet. (6 RT 1836-1837.) In other words, the evidence showed none of the ammunition in Noriega's gun had been fired.

As Investigator Silva testified:

> A Once they're done telling me about it, and then if I feel it's not the truth, then I give them a little bit of information. A lot of times I might give them information that may or may not be true as well just to get them to tell me what their involvement was.
>
> Q So you might exaggerate the evidence?
>
> A Absolutely, yes.
>
> Q Bluff a little bit?
>
> A Sometimes.
>
> Q Let's puts it straight, you lie to them?
>
> A I lie to them, yes.
>
> Q To see what?
>
> A Well, just to get them to – get them to tell me the truth. Sometimes I'll tell them facts that I know for a fact or I believe they're true based on the investigation and/or the interviews that I've conducted. So I'll know that when they're telling me something, I'll know whether it's the truth or not.

And, you know, sometimes you use some techniques to get them to think that you know more than you really do. Because we're not really at the crime scene at the time it occurs. You've got to – and the potential suspect usually is. You try to pretend you know a lot more than you do even though you really don't.

Q Do you sometimes tell people you're interviewing that you believe certain things?

A Yes, sir.

Q Does that mean that you actually believe those things?

A No, sir.

Q It's just one of the techniques you're describing?

A Yes, sir.

(9 RT 2346-2347.) There was no evidence of provocation.

Thomas argues *People v. Valentine* (1946) 28 Cal.2d 121, "held that the jury instructions similar to the instructions given [his] jury failed to present the issue of provocation to the jury." (AOB 158-159.) A similar argument was rejected in *People v. Rogers, supra,* 39 Cal.4th at pp. 879-880.

In *Rogers*, this Court explained that the trial court in *Valentine* "also had instructed the jury erroneously that: (a) if the defendant possessed the specific intent to kill, the killing was first degree murder (thus blurring the distinction between first and second degree murder); and (b) the defendant bore the burden of raising a reasonable doubt as to the degree of the murder." (*People v. Rogers, supra,* 39 Cal.4th at p. 880, citing *People v. Valentine, supra,* 28 Cal.2d at pp. 130-134.) Since the *Rogers* jury was instructed "that premeditation and deliberation is the factor distinguishing first and second degree murder," the instructional error in *Valentine* did not occur in Rogers' case, and no pinpoint instruction was required. (*Ibid.*)

Similarly, Thomas's jury was instructed through CALCRIM No. 521 that a willful, deliberate and premeditated killing is first degree murder, "[a]ll other murders except felony murder are of the second degree," and "[t]he People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime." (17 Supp. CT No. 4326.) Accordingly, Thomas's reliance on *Valentine* is misplaced.

Thomas also attempts to rely on *Mullaney v. Wilbur* (1975) 421 U.S. 684, for his claim of instructional error. In that case, the United States Supreme Court held "[t]he prosecution must 'prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.' " (*People v. Bloyd* (1987) 43 Cal.3d 333, 349, quoting *Mullaney v. Wilbur, supra,* 421 U.S. at p. 704.) CALCRIM No. 521 told the jurors that the People had the burden to prove first degree murder beyond a reasonable doubt, and a first degree murder required proof that Thomas "acted willfully, deliberately, and with premeditation." (17 Supp. Ct 4326.) The jury was further instructed that the People had to "prove each element of every charge and allegation beyond a reasonable doubt." (17 Supp. CT 4321 [CALCRIM No. 375.)

As discussed above, the concepts of a provoked killing and a murder brought about through premeditation and deliberation are mutually exclusive. (See *People v. Wickersham, supra,* 32 Cal.3d at p. 330.) Thus, the jurors were effectively instructed that the prosecutor had to prove beyond a reasonable doubt that the murder was not the result of provocation, and *Mullaney v. Wilbur* does not assist Thomas in his claim.

The jury was fully and properly instructed, and there was no sua sponte duty to give a pinpoint instruction on provocation. Thomas's derivative claim of violations of his rights to due process and an accurate jury determination and the prohibition against cruel and unusual punishment (AOB 160-162) likewise fail. (See *People v. DeHoyos, supra,*

57 Cal.4th at p. 147; *People v. Prince, supra,* 40 Cal.4th at p. 1293, fn. 30; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1135.) Accordingly, Thomas's conviction for first degree murder should be affirmed.

B. The Alleged Error Was Harmless

As previously stated, failure to properly instruct on a lesser included offense which does not rise to the level of federal constitutional error is subject to harmless error review under the standard set forth in *People v. Watson, supra,* 46 Cal.2d 818, and requires a comparison of the evidence supporting the greater and lesser offenses. (*People v. Rogers, supra,* 39 Cal.4th at pp. 867-870 & fn. 16.) Applying these principles, any error in failing to give a pinpoint provocation instruction was harmless.

As discussed in Argument V(D), *ante*, Thomas confessed a predetermined motive to kill Noriega to two different people (7 RT 2021-2022, 2143-2144; 8 RT 2276; 9 RT 2368-2369), there was additional evidence of planning which proved premeditation and deliberation (6 RT 1910, 1914-1917, 1936-1937, 1940, 1943), and the defense evidence suggesting otherwise was weak (13 RT 2872). Weighing the relative strength of the evidence proving premeditation and deliberation against the weakness of the minimal defense evidence to the contrary, it is not reasonably probable that the jury would have concluded the murder was the result of provocation even if given a pinpoint instruction on provocation. Therefore, the claimed instructional error was harmless. (See *People v. Rogers, supra,* 39 Cal.4th at p. 870; *People v. Sakarias, supra,* 22 Cal.4th at p. 621; *People v. Breverman, supra,* 19 Cal.4th at p. 177.)

Also, "[i]t is well established that '[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.' " (*People v. Lancaster* (2007) 41 Cal.4th 50, 85, quoting *People v. Lewis* (2001) 25 Cal.4th 610,

546; accord *People v. Beames* (2007) 40 Cal.4th 907, 928; *People v. Chatman, supra,* 38 Cal.4th at p. 392; *People v. Horning* (2004) 34 Cal.4th 871, 906.) Under CALCRIM No. 521, the jury necessarily found Thomas "carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill" and "decided to kill before committing the act that caused death" in order to return a first degree murder verdict. (16 Supp. CT 4326.) The jury's finding that the murder was willful, deliberate and premeditated thus rendered any error in failing to give a pinpoint instruction on provocation harmless. (See *People v. Wharton, supra*, 53 Cal.3d at pp. 571-572; *People v. Peau* (2015) 236 Cal.App.4th 823, 830-832.)

In *People v. Berry* (1976) 18 Cal.3d 509, this Court declined to find instructional error on provocation harmless in light of other given instructions. (*Id.* at p. 512; see also *People v. Ramirez* (2010) 189 Cal.App.4th 1483, 1487-1488 [holding *Berry* precluded harmless error finding as matter of law].) Acknowledging "some tension" between *Wharton* and *Barry*, the Court of Appeal in *People v. Peau, supra,* 236 Cal.App.4th 823, recently explained:

> [W]e believe they can be reconciled and that *Wharton* 's more recent reasoning is directly on point in this case. The jury here was instructed that it could not return a verdict of first degree murder unless it found that Peau "carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill." We agree that such a finding "is manifestly inconsistent with having acted under the heat of passion." *(Wharton*, at p. 572, 280 Cal.Rptr. 631, 809 P.2d 290.) Although *Berry* refused to find an error in omitting a heat-of-passion instruction harmless, it did not even mention that first degree murder must be willful, deliberate, and premeditated. Instead, it focused only on the fact that the instruction distinguishing between first and second degree murder in that case "made passing reference to heat of passion and provocation for the purpose of distinguishing between" the two types of murder. (*Berry*, at p. 518, 134 Cal.Rptr. 415, 556 P.2d 777.)

> We think this strongly suggests that the sole issue considered in *Berry* was whether the error was harmless because the jury received some instruction on the concepts of heat of passion and provocation, not whether the error was harmless because the jury found the murder was willful, deliberate, and premeditated and such a finding was inconsistent with a finding that the defendant acted in a heat of passion. As a result, we disagree with the conclusion reached in *People v. Ramirez, supra*, 189 Cal.App.4th 1483, 117 Cal.Rptr.3d 783 that *Berry* forecloses a determination that such an error is harmless for the latter reason. (*Ramirez*, at pp. 1487–1488, 117 Cal.Rptr.3d 783; see *People v. Brown* (2012) 54 Cal.4th 314, 330, 142 Cal.Rptr.3d 824, 278 P.3d 1182 ["cases are not authority for propositions not considered"].)

(*People v. Peau, supra,* 236 Cal.App.4th at pp. 831-832.) The court's reasoning in *Peau* is sound, and accordingly, the jury's finding of willful, deliberate and premeditated murder rendered any instructional error on provocation harmless.

Thomas was allowed to present the defense of his choice with the first and second degree murder instructions he agreed to. Thus, there was no violation of his constitutional rights which would require a higher standard of review. (*See People v. Rogers, supra,* 39 Cal.4th at p. 868, fn. 16, 872.)

Furthermore, as previously discussed, even if a first degree murder conviction based on premeditation and deliberation were barred due to instructional error, the verdict could still be affirmed under the felony-murder theory of first degree murder which, as discussed in Argument IX, *infra*, was supported by substantial evidence and proper instructions. (See *People v. Hajek and Vo, supra,* 58 Cal.4th at p. 1187, fn. 14.) Thomas's conviction for first degree murder should be affirmed.

VII. THE TRIAL COURT PROPERLY REFUSED THOMAS'S REQUEST FOR JURY INSTRUCTIONS ON PERFECT SELF-DEFENSE AND VOLUNTARY MANSLAUGHTER UNDER HEAT OF PASSION AND IMPERFECT SELF-DEFENSE THEORIES BECAUSE THE INSTRUCTIONS WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Thomas claims his first degree murder conviction must be reversed because the trial court failed to instruct the jury on self-defense and voluntary manslaughter based on heat of passion and imperfect self-defense, which violated his rights to due process and a jury determination of the facts and the prohibition against cruel and usual punishment under the state and federal constitutions. (AOB 165-184.)

Such instructions were not supported by substantial evidence. Thus, there was no instructional or constitutional error. Moreover, the claimed error was harmless. Accordingly, Thomas's conviction for first degree murder should be affirmed.

A. The Jury Was Properly Instructed

In his written request for jury instructions, Thomas asked the trial court to instruct the jury on voluntary manslaughter based on heat of passion (CALCRIM No. 570) and imperfect self-defense (CALCRIM No. 571). (16 Supp. CT 4284.) In court, trial counsel also requested CALCRIM No. 505, defining self-defense. (13 RT 2817.)

When asked what evidence supported the manslaughter instructions, trial counsel responded:

> One possible interpretation in Dorothy Brown's testimony could be sort of that there was some provocation, there was, Mr. Rafael Noriega, either a drug deal gone bad, or he pulled a firearm, something like that. There's an insinuation of the statements of Mr. Thomas and Mr. Silva. They're primarily from Mr. Silva, obviously. And I don't know if Mr. Thomas is going to testify. You, and I, and Mr. Exum have ex parte talked about some issues. I don't know which way the wind's going to blow, but –

(13 RT 2815.)

The trial court found there was insufficient evidence to warrant self-defense or voluntary manslaughter instructions. (13 RT 285-2817.) The trial court was correct.

A killing in self-defense is a justifiable homicide. (*People v. Randle* (2005) 35 Cal.4th 987, 994, overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) "For perfect self-defense, one must actually *and* reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury." (*Ibid.*, citing *People v. Flannel* (1979) 25 Cal.3d 668, 674 [emphasis in original].) The belief must be objectively reasonable from the viewpoint of a reasonable person in the defendant's position. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1982.)

"One acting in imperfect self-defense also actually believes he must defend himself from imminent danger of death or great bodily injury; however, his belief is unreasonable." (*People v. Randle, supra,* 35 Cal.4th at p. 994, citing *In re Christian S.* (1994) 7 Cal.4th 768, 771, and *People v. Flannel, supra,* 25 Cal.3d at p. 674.) Imperfect self-defense mitigates a killing by negating malice, reducing a homicide to voluntary manslaughter. (*Ibid.*) Voluntary manslaughter is thus a lesser included offense of murder. (*People v. Duff* (2014) 58 Cal.4th 527, 561.)

Also, "[m]alice is presumptively absent when a defendant kills 'upon a sudden quarrel or heat of passion' [citation], provided that the provocation is sufficient to cause an ordinarily reasonable person to act rashly and without deliberation, and from passion rather than judgment." (*People v. Cruz* (2008) 44 Cal.4th 636, 664, quoting § 192, subd. (a); see *People v. Verdugo* (2010) 50 Cal.4th 263, 295 [provocation must be caused or reasonably believed to by caused by victim]; *People v. Manriquez* (2005) 37 Cal.4th 547, 583 [same]; *People v. Rich* (1988) 45 Cal.3d 1036, 1112

["defendant's subjective response is immaterial].) Such a homicide therefore constitutes voluntary manslaughter as well. (*Ibid.*)

Whether or not requested by the defense, trial courts are only obligated to instruct on heat of passion or imperfect self-defense where those theories of voluntary manslaughter are supported by substantial evidence. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1048-1049; *People v. Duff, supra,* 58 Cal.4th at p 562; *People v. Cruz, supra,* 44 Cal.4th at p. 664; *People v. Manriquez, supra,* 37 Cal.4th at p. 584; *People v. Stitely* (2005) 35 Cal.4th 514, 551; *People v. Benavides, supra,* 35 Cal.4th at p. 102; *In re Christian S., supra,* 7 Cal.4th at p. 783.) The substantial evidence standard applies to perfect self-defense instructions as well. (*People v. Nguyen, supra,* 61 Cal.4th at p. 1049; *People v. Stitely, supra,* 35 Cal.4th at p. 551; *In re Christian S., supra*, 7 Cal.4th at p. 783.)

Substantial evidence "is not merely '*any* evidence ... no matter how weak' [citation][.]" (*People v. Cruz, supra,* 44 Cal.4th at p. 664, quoting *People v. Flannel, supra,* 25 Cal.3d at p. 684 [emphasis in original]; see *People v. Lewis* (2001) 26 Cal.4th 334, 369 [" ' not "whenever *any* evidence is presented, no matter how weak" ' "].) " ' "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." [Citation.]' " (*People v. Heard* (2003) 31 Cal.4th 946, 981, quoting *People v. Lewis, supra,* 25 Cal.4th at p. 645.) A de novo standard of review of the evidence is applied on appeal. (*People v. Manriquez, supra,* 37 Cal.4th at p. 581, citing *People v. Waidla, supra,* 22 Cal.4th at p. 733.)

There was no such evidence of heat of passion, imperfect self-defense or perfect self-defense in Thomas's case to warrant instruction on those theories. As in the trial court, Thomas relies on Brown's prior statement about a heated exchange and Investigator Silva's statement about a supposed mutual gunfight during the interview for the evidence supporting

voluntary manslaughter and self-defense instructions. (AOB 168-169, 177, 179; 13 RT 2815.) Neither constitutes substantial evidence in support of the instructions.

Brown told Silva that there was "some kind of heated argument in Spanish" prior to the shooting. (13 RT 2872.) However, as discussed previously, Brown's testimony showed that whatever was said during the argument induced Noriega to produce the bag of drugs, not the shooting. (6 RT 1912-1913, 1937-1938.) It was the assurance that Noriega had brought the drugs with him which satisfied Thomas that he could proceed with the murder. Thus, the argument did not provoke Thomas to "act rashly or without due deliberation and reflection' " to support a heat of passion theory of voluntary manslaughter. (*People v. Lee* (1999) 20 Cal.4th 47, 59; see *People v. Beltran* (2013) 56 Cal.4th 935, 957; *People v. Cruz, supra,* 44 Cal.4th at p. 664; *People v. Manriquez, supra,* 37 Cal.4th at p. 583.)

Similarly, Thomas's conduct did not evidence a belief, whether reasonable or unreasonable, that he needed to defend himself from imminent danger of death or great bodily injury due to the argument. Rather, Thomas waited by his truck while Noriega walked to the back of his car, opened the trunk and removed the bag of drugs before Thomas even reached for the gun inside his truck. (6 RT 1912-1913, 1937-1938.) Thus, Brown's statement about the argument did not provide evidence supportive of perfect or imperfect theories of self-defense. (See *People v. Randle, supra,* 35 Cal.4th at p. 994; *In re Christian S., supra,* 7 Cal.4th at p. 771; *People v. Flannel, supra,* 25 Cal.3d at p. 674.)

As discussed in Argument VI(A), *ante*, Investigator Silva's statement to Thomas "that Kelly said he perhaps saw two people shooting at each other" was a ruse – an interview technique designed to elicit an incriminating response from Thomas rather than a true statement. (See 9 RT 2346-2347; 16 Supp. CT 4187.) Thus, the statement did not provide

any evidence probative of heat of passion, imperfect self-defense or perfect self-defense.

The most weight defense counsel could assign to Brown's statement was a "possible interpretation" which "could be sort of that there was some provocation." (13 RT 2815.) Defense counsel similarly characterized Silva's statement about a gunfight as "an insinuation" which was "primarily from Mr. Silva, obviously." (13 RT 2815.) Thomas's offer of proof, even taken at face value, merely consisted of speculative inferences from two statements in conflict with the balance of the evidence.[94] Some evidence, " 'no matter how weak,' " was not substantial evidence warranting the requested instructions. (*People v. Cruz, supra,* 44 Cal.4th at p. 664; *People v. Lewis, supra,* 26 Cal.4th at p. 369; *People v. Flannel, supra,* 25 Cal.3d at p. 684.) There was no instructional error.

B. The Claimed Error Was Harmless

Given the lack of substantial evidence supporting perfect self-defense or heat of passion and imperfect self-defense theories of voluntary manslaughter, it is not reasonably probable that Thomas would have received a more favorable verdict had the trial court given such instructions. Moreover, as previously discussed, Thomas's primary defense was that someone else shot Noriega, not that he killed Noriega with a reduced level of culpability. Accordingly, " 'an examination of the entire cause, including the evidence' " shows the alleged instructional error was harmless. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

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[94] Thomas concedes that the purported evidence supporting manslaughter instructions in his case "does not establish what happened prior to the shooting with the same precision as the record in *People v. Barton* ," *supra*, 12 Cal.4th 186, 202, where such instructions were warranted. (AOB 178.)

Likewise, there was no constitutional violation requiring application of the *Chapman* standard. "[T]he constitutional requirement that capital juries be instructed on lesser included offenses extends only to those lesser included offenses supported by substantial evidence." (*People v. Duff, supra,* 58 Cal.4th at p. 562, citing *Schad v. Arizona* (1991) 501 U.S. 624, 648, and *Beck v. Alabama* (1980) 447 U.S. 625, 627; see also *People v. Verdugo, supra,* 50 Cal.4th at pp. 294-295; *People v. Benavides, supra,* 35 Cal.4th at pp. 103-104.)

The claimed error regarding voluntary manslaughter instructions was also harmless since the jury found the robbery-murder special circumstance true, which "dictated a finding of first degree felony murder under section 189 and the corresponding felony-murder instruction, which was properly given." (*People v. Demetrulias, supra,* 39 Cal.4th at p. 25 [where jury instructed on imperfect self-defense but not heat of passion]; see *People v. Cruz, supra,* 44 Cal.4th at p. 665 [lying-in-wait and escape-murder special circumstances negated possibility that defendant was prejudiced where jury was not instructed on either heat of passion or imperfect self defense].) Thomas's first degree murder conviction should be affirmed.

VIII. BECAUSE THOMAS WAS NOT DENIED REASONABLY NECESSARY FUNDING FOR HIS DEFENSE IN PRO PER, HE WAS NOT FORCED TO GIVE UP HIS RIGHT TO SELF-REPRESENTATION

Thomas claims he was forced to waive his pro per status prior to the guilt phase because the Superior Court denied him adequate funding for his defense in violation of state and federal rights to self-representation and prohibitions against cruel and unusual punishment, thus requiring reversal of the guilt judgment. (AOB 185-193.) Thomas received funding for all services for which he demonstrated a need, and was only denied funds for those services which were not shown to be reasonably necessary. As Thomas fails to demonstrate any abuse of discretion in regards to his

requests for ancillary services, his derivative claim that he was forced to give up his pro per status due to a denial of adequate funds for his defense must also fail.

A. Relevant Proceedings

On December 18, 2006, Thomas filed a request to be authorized to act as co-counsel to his appointed trial attorneys, Mr. Scalisi and Mr. Exum. (1 CT 178-185.) The request was granted on December 22, 2006. (1 CT 186.)

On January 12, 2007, Thomas requested as co-counsel "[a]pproximately $300" for various office supplies.[95] (1 CT 190-191.) The Superior Court ordered the Sheriff to provide the requested supplies to Thomas and trial counsel. (1 CT 188.)

On February 21, Thomas filed a motion to proceed in pro per.[96] (1 CT 194-198.) On February 23, following advisal and a waiver of the right to counsel, the trial court granted Thomas pro per status and appointed Mr. Scalisi and Mr. Exum stand-by counsel. (1 CT 202-203.)

On March 9, after consulting with Thomas about investigation needs, the trial court ordered that defense investigator Mike Robitzer remain assigned to the case and ordered the Sheriff to allow Robitzer to deliver to Thomas any discovery or materials related to the case, and ordered the Sheriff to permit Robitzer or Monahan Investigations to place money in Thomas's trust account for phone card use. (1 CT 220.) On the same date, Thomas submitted a motion for funds which was referred to a panel of judges. (1 CT 220-221.) On March 21, the court signed an order granting

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[95] All further date references within this statement of relevant proceedings occurred in 2007, unless noted otherwise.

[96] On the same date, Thomas filed a motion to substitute appointed counsel, which was subsequently withdrawn. (1 CT 194, 201.)

Thomas's request to use audio and video equipment in the jail. (1 CT 243, 245-246.)

On April 2, Thomas moved for a continuance with an attached declaration stating in part that he lacked money for various investigative services. (1 CT 260-266.) On April 16, Thomas filed a request for $18,000 in additional funds. (Sealed 2-A RT 267.)[97]

On April 30, Thomas's request for $18,000 in additional funds was considered by a panel of three judges. (Sealed 2-A RT 267; 2 CT 541.) To date, the court had already approved $23,536 for defense experts and $59,790 for defense investigative services.[98] (Sealed 2-A RT 267.) Thomas stated there were "several witnesses that have to be interviewed and a lot of them that need to be subp[o]enaed that are out of state and out of the country," "about 40 hours' worth of video and audiotape that needs to be gone over and processed," and related travel costs. (Sealed 2-A RT 267-268.) Thomas's investigator subsequently clarified that "[t]he motion . . . called for approximately 50 additional witnesses." (Sealed 2-A RT 268.)

The court told Thomas that he needed to make a specific written request identifying the particular witnesses and explaining their relevance, importance or necessity for the defense in the guilt or penalty phase before additional funds would be approved. (Sealed 2-A RT 269-270.) Thomas indicated that it would take him about a week to supply the court with a list

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[97] Pursuant to this Court's order of December 1, 2015, these transcripts "remain under seal but may be discussed in publicly filed briefs. . . ."

[98] The court records indicated that $9,000 of the expert witness funds had been expended and $57,691.61 of the funds for investigative services had been expended to date. (Sealed 2-A RT 267.) Thomas's investigator, Jerry Monahan, stated that there was less than $700 remaining in the investigative services account and that he had "used up probably most of that back and forth to the D.A.'s Office, to the courts and with Mr. Thomas." (Sealed 2-A RT 278.)

of witnesses with the necessary information. (Sealed 2-A RT 277.) The court approved $2,000 of additional investigative funds in the interim and indicated that it would consider the remainder of the requested funds once it received the witness list from Thomas. (Sealed 2-A RT 279.) The balance of the hearing concerned Thomas's request that funds be placed in his inmate trust account for the purchase of phone cards to communicate with his investigators. (Sealed 2-A RT 270-278; 2 CT 541.)

On May 10, the three-judge panel reconvened to consider Thomas's funding request. (Sealed 2-B RT 281; 2 CT 546.) When the court expressed a concern about duplicating prior investigation, Mr. Monahan represented that he had previously conducted witness interviews, which included some out-of-state, under the direction of Mr. Scalisi. (Sealed 2-B RT 281.) However, Thomas felt it was necessary to investigate "many more witness" "many of whom were in the Army" for purposes of an alibi that he was in Hawaii at the time of the Noriega murder. (Sealed 2-B RT 281.) The court observed that Thomas could simply order his military records to prove where he was on a certain date, although he may desire witnesses in addition. (Sealed 2-B RT 286.)

Thomas had provided the court with a list of witnesses for whom Mr. Monahan "to a certain extent" through a letter to stand-by counsel explained their relevance and importance to the defense case. (Sealed 2-B RT 289.) The list included 18 to 20 high school teachers and football coaches, a number of correctional officers in Texas and additional witnesses in Hawaii. (Sealed 2-B RT 290.) However, the documents submitted to the court did not specify how each witness would assist the defense, whether the witness related to the guilt or penalty phase or which witnesses required personal contact. (Sealed 2-B RT 290.) The court also expressed concerns about duplicative or cumulative witnesses on the same subject, whether the witnesses could first be interviewed by phone before

money was allocated for further investigation, and Thomas's failure to indicate the nature of the expected testimony. (Sealed 2-B RT 290-291.)

Thomas argued that the witnesses were relevant to the guilt phase since he was in constant contact with them until he went into the military and also relevant to the penalty phase. (Sealed 2-B RT 291.) However, Thomas had simply listed the witnesses' names rather than provide the court with the necessary information to justify travel and personal interviews. (Sealed 2-B RT 292, 295.)

The court then discussed Thomas's request for a $100 phone card to be resolved after confirming the procedure with the jail. (Sealed 2-B RT 295-299.) Thomas also requested funds for legal books. (Sealed 2-B RT 299.) The court denied Thomas's request for a law dictionary and "cite book," but approved his request for a book on California criminal procedure. (Sealed 2-B RT 299-300.) Finally, the court addressed the issue of reproducing and redacting videotapes (for which Thomas had requested $2,500) as more properly addressed to the District Attorney's Office rather than done at the defense's expense. (Sealed 2-B RT 301-306.)

Thomas and stand-by counsel explained that investigative funds were also being requested to collaterally attack the prior murder conviction in Texas based on the trial judge's certification and "appellate issues that were being heard at the time" as it related to the prior-murder special circumstance. (Sealed 2-B RT 282-288.) The court indicated that it had and would continue to deny ancillary funds for this purpose.[99] (Sealed 2-B RT 289.)

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[99] In addition, Thomas requested of the trial court the appointment of advisory counsel licensed in both Texas and California to collaterally attack the prior murder conviction. (Sealed 2-B RT 288-289; Sealed 2-C RT 317-324.) On May 25, the trial court appointed advisory counsel for Thomas. (2-D RT Sealed 342; 3 CT 643.)

On May 11, the trial court ordered the Sheriff to allow Thomas to make phone calls to his investigators. (2 CT 549.)

On July 13, Thomas filed a motion to withdraw his waiver of the right to counsel and requested appointed counsel. (3 CT 682-687.) The stated grounds for the motion were "that outside interference within the 987 Judge panel with regard(s) to his defense Investigator receiving appropriate monies to prepare the defendant(s) death penalty case for trial," and that "defendant does[] not have the appropriate resource(s) to fight adequately for his constitutional right(s) at this time." (3 CT 683.) On the same date, the motion was heard and granted, and trial counsel were reappointed to represent Thomas. (3 CT 677.)

B. Thomas Failed to Demonstrate that the Requested Funds Were Reasonably Necessary

Indigent defendants have a statutory and constitutional right to ancillary services which are reasonably necessary for the preparation of their defense. (*People v. Hajek and Vo, supra,* 58 Cal.4th at p. 1255, citing *People v. Guerra* (2006) 37 Cal.4th 1067, 1085.) The disbursement of such funds are governed by section 987.9, which provides in relevant part:

> The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

(§ 987.9, subd. (a).)

Accordingly, the defendant bears the burden of demonstrating the need for the funds requested. (*People v. Hajek and Vo, supra,* 58 Cal.4th at pp. 1255, 1256; *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 286; *People v. Guerra, supra,* 37 Cal.4th at p. 1085.) " 'The trial court should view a motion for assistance with considerable liberality, but it should also order the requested services only upon a showing they are reasonably necessary.' " (*People v. Hajek and Vo, supra,* 58 Cal.4th at p. 1255, quoting *People v. Guerra, supra,* 37 Cal.4th at p. 1085, and citing § 987.9, subd. (a).)

The court's ruling on a request for funds for ancillary services is reviewed for abuse of discretion. (*People v. Hajek & Vo, supra,* 58 Cal.4th at p. 1255; *People v. Guerra, supra,* 37 Cal.4th at p. 1085.) As previously stated, abuse of discretion is a deferential standard of review. (*People v. Trujeque, supra*, 61 Cal.4th at p. 278; *People v. Jablonski, supra,* 37 Cal.4th at p. 821; *People v. Pollock, supra,* 32 Cal.4th at p. 1171; *People v. Williams, supra,* 17 Cal.4th at p. 162.)

Thomas failed to show the requisite reasonable necessity for his request. When Thomas requested $18,000 in additional funds[100] on April 16, the defense had already been appropriated more than $83,000 pursuant to section 987.9 – $23,536 for defense experts and $59,790 for investigative services. (Sealed 2-A RT 26.) Most of those investigative services funds had been used. (Sealed 2-A RT 278.)[101] Although Thomas listed approximately 50 witnesses – consisting of multiple high school teachers and coaches in California, correctional officials in Texas and Army personnel in Hawaii, he failed to apprise the court of their expected

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[100] Thomas breaks down the $18,000 into specific amounts for different ancillary services. (See AOB 186-188.)

[101] Thomas's assertion of a "denial of any funds for investigator Monahan" is thus belied by the record. (See AOB 191.)

testimony, materiality or necessity, explain why they were not cumulative, or justify travel expenses for personal interviews. (Sealed 2-A RT 269-279; 2-B RT 281, 290-292, 295.)

For example, Thomas sought interviews of Army personnel in Hawaii for purposes of establishing an alibi for the Noriega murder. (Sealed 2-B RT 281.) However, he had not even attempted phone interviews and could not explain why his official military records would be inadequate to prove his military service on a certain date. (Sealed 2-B RT 286,290-291.) Nonetheless, the court still granted Thomas $2,000 for additional investigation.[102]

On appeal, Thomas concedes that his motion for additional funds "does not specifically state the purpose of contacting former coaches and teachers," but argues, "Presumably , they would have been mitigation witnesses." (AOB 187, fn. 46.) It was, however, Thomas's burden to make a sufficient showing of necessity to the section 987.9 panel of judges, not their panel's burden to speculate as to the reasons for Thomas's requests.

As previously noted, Thomas argued the witnesses were relevant to both the guilt and penalty phases. (Sealed 2-B RT 291.) Moreover, given Thomas's longstanding opposition to the presentation of mitigation evidence in the penalty phase, it would be unreasonable to "presume" that the requested investigation funds were solely for mitigation purposes. (See Sealed 2-E RT 386; 10-A Sealed RT 2566-2568; 13-A Sealed RT 2843-2847; Sealed 14-C RT 3105-3139; Sealed 14-B RT 3074-3086; Sealed 15-A RT 3131-3135.)

In lieu of a $100 phone card, the trial court ordered the Sheriff to permit Thomas phone calls to his investigators. (Sealed 2-B RT 295-299; 2

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[102] Again, Thomas's assertion of a "denial of any funds for investigator Monahan" is belied by the record. (See AOB 191.)

CT 549.) The court denied Thomas's request for a law dictionary and "cite book" which stand-by counsel had never even heard of, but granted Thomas's request for a book on California criminal procedure. (Sealed 2-B 299-300.) In lieu of the $2,500 Thomas requested for video and audiotape services, the court directed Thomas to request those services from the District Attorney's Office at their expense. (Sealed 2-A RT 267; 2-B Sealed RT 301-306.) Although Thomas's request for funds to collaterally attack the Texas conviction was denied, the trial court appointed Thomas advisory counsel for this purpose. (Sealed 2-B RT 289; 2-D RT Sealed 342; 3 CT 643.)

Because Thomas failed to show a reasonable *necessity* for the remainder of the requested section 987.9 funds, they were properly denied. (See *People v. Hajek and Vo, supra,* 58 Cal.4th at p. 1255; *People v. Gonzales and Soliz, supra,* 52 Cal.4th at p. 286; *People v. Guerra, supra,* 37 Cal.4th at p. 1985.) "It is certainly true that a defendant who is representing himself or herself may not be placed in the position of presenting a defense without access to a telephone, law library, runner, investigator, advisory counsel, or any other means of developing a defense [citation], but this general proposition does not dictate the resources that must be available to defendants." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1040.) "[T]he crucial question underlying all of defendant's constitutional claims is whether he had reasonable access to the ancillary services that were reasonably necessary for his defense." (*People v. Blair* (2005) 36 Cal.4th 686, 734.) The record in Thomas's case answers this question in the affirmative.

Since there was no violation of Thomas's rights to ancillary services, there is no basis for his claim that he was forced to relinquish his pro per status due to a denial of such services. A defendant should not be permitted to condition the exercise of a constitutional right on his or her demands of

the trial court, no matter how exorbitant or unreasonable. "To be entitled to a reversal, a defendant must show both error and resulting prejudice." (*People v. James* (2011) 202 Cal.App.4th 323, 335, citing *People v. Blair, supra,* 36 Cal.4th at p. 736.) Thomas has shown neither. The judgment should therefore be affirmed.

IX. THE DUTY TO INSTRUCT ON LESSER INCLUDED OFFENSES DOES NOT APPLY TO FELONY MURDER AND SPECIAL CIRCUMSTANCES

Thomas claims his murder conviction and the robbery-murder special circumstance true finding must be reversed because the trial court failed to instruct on grand theft as a lesser included offense of robbery in violation of his state and federal rights to due process and prohibitions against cruel and unusual punishment.[103] (AOB 194-219.) This Court has repeatedly rejected similar claims, and should do so again here. Moreover, the alleged instructional error was harmless. Accordingly, the guilt judgment should be affirmed in its entirety.

A. The Jury Was Properly Instructed

Although a robbery-murder special circumstance was alleged, Thomas was not charged with robbery as a substantive offense. (1 CT 81-82.) Also, the murder charge was prosecuted under alternative theories of felony-murder and premeditated, deliberate murder. (17 Supp. CT 4323-4326; 13 RT 2911-2919.) Thomas did not request any theft instructions in the trial court. (See 16 Supp. CT 4284; 13 RT 2782-2839.)

"Although a trial court on its own initiative must instruct the jury on lesser included offenses of *charged* offenses, this duty does not extend to *uncharged* offenses relevant only as predicate offenses under the felony-

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[103] In *People v. Ortega* (1998) 19 Cal.4th 686, this Court held grand theft is a lesser included offense of robbery. (*Id.* at pp. 694-699, overruled on other grounds in *People v. Reed* (2006) 38 Cal.4th 1224, 1228-1229.)

murder doctrine." (*People v. Silva* (2001) 25 Cal.4th 345, 371 [emphasis in original].) Thus, " 'when robbery is not a charged offense but merely forms the basis for a felony-murder charge and a special circumstance allegation, a trial court does not have a sua sponte duty to instruct the jury on theft.' " (*People v. Kelly* (2007) 42 Cal.4th 763, 792, quoting *People v. Valdez* (2004) 32 Cal.4th 73, 110-11; accord *People v. Combs* (2004) 34 Cal.4th 821, 856; *People v. Cash* (2002) 28 Cal.4th 703, 737; *People v. Seaton* (2001) 26 Cal.4th 598, 670; *People v. Silva, supra* 25 Cal.4th at p. 371.)

As this Court explained in *Cash*, a defendant who is not charged with robbery can neither be convicted of robbery nor theft as a necessarily included offense of robbery. (*People v. Cash, supra,* 28 Cal.4th at p. 737.) If the defendant committed a theft rather than a robbery, there is no lesser special circumstance or theory of felony murder -- the robbery special circumstance and first degree murder theory are simply not proven.

Thomas acknowledges, but asks this Court to revisit and reverse, its prior rulings on the issue, citing the general duty to instruct on lesser included offenses of *charged offenses* in capital prosecutions and criticizing the reasoning in *Silva* which this Court has continued to follow in subsequent cases. (AOB 200- 206.) As in *Valdez*, this Court should "reject defendant's assertion that *Silva* rests on faulty reasoning and decline his invitation to revisit the issue." (*People v. Valdez, supra,* 32 Cal.4th at p. 111.)

To the extent Thomas argues theft instructions were needed to guide the jury on after-formed intent, his claim fails as well. The trial court gave a defense pinpoint instruction on after-formed intent. (17 Supp. CT 4333; 13 RT 2900.) Moreover, the "standard jury instructions on felony-murder and robbery 'adequately cover the issue of the time of the formation of the intent to steal.' " (*People v. Silva, supra,* 25 Cal.4th at p. 371, quoting

People v. Hendricks (1988) 44 Cal.3d 635, 643 [CALJIC Nos. 8.21 and 9.10].) Here, the court gave the standard instructions defining robbery (CALCRIM No. 1600) and felony murder (CALCRIM No. 540A). (17 Supp. CT 4325, 4334; 13 RT 2895-2896, 2900-2901.) After-formed intent was also covered in the robbery-murder special circumstance instruction. (17 Supp. CT 4332 [CALCRIM No. 730]; 13 RT 2899-2901.)

Thomas's citations to *Apprendi v. New Jersey, supra,* 530 U.S. 466, *Jones v. United States* (1999) 526 U.S. 227, and their progeny for the proposition that all elements of a special circumstance must be proved beyond a reasonable doubt to a jury (AOB 206-215) do not assist his claim. In Thomas's trial, all elements of the robbery-murder special circumstance were submitted to and found true by the jury beyond a reasonable doubt. (17 Supp. CT 4332, 4371; 13 RT 2899-2901; 14 RT 3022-3024.)

Lastly, Thomas argues the absence of theft instructions violated his equal protection rights because noncapital defendants are entitled to instructions on all lesser included offenses. (AOB 215-216.) This precise argument was rejected by this Court in *People v. Cash, supra,* 28 Cal.4th at p. 738.

> California requires a sua sponte instruction on lesser included *charged offenses* regardless of whether the case is a capital, or a noncapital, one. Therefore, the unavailability of a lesser included offense instruction to an *uncharged crime* does not operate to weight the outcome in favor of death for defendants facing capital charges.

(*Ibid.* [emphasis in original].)

B. The Alleged Error Was Harmless

Because there was no violation of Thomas's due process right to present a complete defense or a federal constitutional violation rising to the level of an unreliable capital verdict, the alleged failure to instruct on theft as a lesser included offense of robbery is subject to harmless error review

under the standard set forth in *People v. Watson, supra,* 46 Cal.2d 818. (*People v. Rogers, supra,* 39 Cal.4th at pp. 867-868 & fn. 16.) Reversal is only required if " 'an examination of the entire cause, including the evidence' " shows "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

According to Brown, the only eyewitness to the incident, Thomas formed the intent to steal the bag of drugs from Noriega well before the shooting. Thomas yelled at Noriega, which caused Noriega to walk to the back of his car, remove the bag from the trunk and show it to Thomas prior to the shooting or Thomas even reaching for the gun. (6 RT 1912-1913, 1937-1938.) There was no evidence whatsoever of Thomas abandoning that intent to steal at any time. Moreover, the jury was specifically instructed on after-formed intent, which they necessarily rejected in finding the robbery-murder special circumstance true.

Accordingly, it is not reasonably probable that Thomas would have received more favorable verdicts had theft instructions been given, and the alleged error was harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) For the same reasons, this Court can be satisfied beyond a reasonable doubt that the absence of theft instructions did not contribute to the verdict under the stricter standard of *Chapman v. California, supra*, 386 U.S. at p. 24.

Furthermore, even if a first degree murder conviction based on felony murder were barred due to instructional error, the verdict could still be affirmed under the theory of premeditated and deliberate first degree murder which, as discussed in Argument VI, *ante*, was supported by substantial evidence and proper instructions. (See *People v. Hajek and Vo, supra,* 58 Cal.4th at p. 1187, fn. 14.) Even if the robbery-murder special circumstance were reversed, there would be no change in judgment since the jury also found the prior-murder special circumstance true. (*Id.* at p.

1157; *People v. Ledesma, supra,* 39 Cal.4th at pp. 716-717.) The guilt judgment should be affirmed in its entirety.

X. CALCRIM NO. 334 DID NOT LOWER THE PROSECUTOR'S BURDEN OF PROOF BY REQUIRING SLIGHT CORROBORATION OF AN ACCOMPLICE'S TESTIMONY BEFORE IT CAN BE CONSIDERED BY THE JURY

Thomas claims CALCRIM No. 334 as given by the trial court lowered the prosecution's burden of proof by instructing the jurors that an accomplice's testimony required slight corroboration before being considered as evidence, in turn violating his rights to due process and a jury determination of the facts and the prohibitions against the imposition of cruel and unusual punishment under the state and federal constitutions. (AOB 220-232.) A similar claim was raised and rejected in *Bryant, supra,* 60 Cal.4th at p. 434, and should be rejected again here. Moreover, the claimed error was harmless.

A. CALCRIM No. 334 Did Not Lower the Prosecutor's Burden of Proof

The trial court instructed the jury with CALCRIM No. 334 as follows:

334. Accomplice Testimony Must Be Corroborated

(*Modified*)

Before you may consider the testimony of Dorothy Brown as evidence against the defendant regarding the crime of murder and the special circumstance of robbery murder, you must decide whether Dorothy Brown was an accomplice to that crime and special circumstance. A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime.

The burden is on the defendant to prove that it is more likely than not that Dorothy Brown was an accomplice.

An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime will be committed or is being committed and does nothing to stop it.

A person who lacks criminal intent but who pretends to join in a crime only to detect or prosecute those who commit that crime is not an accomplice.

If you decide that Dorothy Brown was not an accomplice, then supporting evidence is not required and you should evaluate her testimony as you would that of any other witness.

If you decide that Dorothy Brown was an accomplice, then you may not convict the defendant of murder or the special circumstance based on her testimony alone. You may use the testimony of an accomplice to convict the defendant only if:

1. The accomplice's testimony is supported by other evidence that you believe;

2 . That supporting evidence is independent of the accomplice's testimony;

AND

3. That supporting evidence tends to connect the defendant to the commission of the crime.

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

> Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.

(17 Supp. CT 4310-4311; 13 RT 2890-2891 [emphasis in original].)

Trial counsel objected to the slight corroboration language on constitutional grounds and requested language to the effect that corroboration for accomplice testimony be beyond a reasonable doubt. (13 RT 2799.) Implicitly overruling the objection, the trial court observed that "[CALCRIM No.] 220 makes it clear that the jury must be convinced beyond a reasonable doubt that the defendant is guilty, and I think this simply goes to their evaluation of a particular witness' testimony, what is the process of that evaluation." (13 RT 2799-2800.) The trial court was correct.

In *Bryant, supra,* 60 Cal.4th 335, the trial court instructed the jury that evidence corroborating accomplice testimony " 'is sufficient if it tends to connect the defendant with the crime even though it is slight and entitled, when standing alone, to little consideration.' " (*Id.* at p. 434.) As here, the defendants claimed the instruction nullified the prosecutor's burden of proof beyond a reasonable doubt in violation of the rights to due process. (*Ibid.*) This Court rejected the claim as follows:

> Section 1111 reflects a legislative determination of how accomplice testimony must be treated. It does not create a new element of any criminal offense, nor does it involve "an issue bearing on the substantive guilt or innocence of the defendant." [Citation.] Defendants' reliance on the decisions of the federal courts of appeals concerning proof of a defendant's participation in a conspiracy is inapt. Contrary to defendants' arguments, the instruction did not convey to the jury that it "could convict if there was slight corroboration." Instead, the instruction properly explained the corroboration requirement as it related to the jury's consideration of accomplice testimony. The challenged instruction in no way lowered the prosecution's burden of proof.

(*Id.* at p. 434, quoting *People v. Frye*[104] (1998) 18 Cal.4th 894, 968; see also *People v. Seumanu* (2015) 61 Cal.4th 1293, 192 Cal.Rptr.3d 195, 245 [rejecting argument that slight corroboration requirement for recently stolen property instruction lowered prosecution's burden of proof]; *People v. Capistrano* (2014) 59 Cal.4th 830, 877 [same]; *People v. Moore* (2011) 51 Cal.4th 1104, 1133 [same].)

The penultimate paragraph of CALCRIM No. 334, which is the equivalent to the approved instruction in *Bryant*, thus did not lower the prosecutor's burden of proof in violation of any of Thomas's constitutional rights. As Thomas presents no persuasive reason to revisit or reconsider the issue, the guilt judgment should be affirmed.

B. The Alleged Error Was Harmless

In *People v. Moore, supra,* 51 Cal.4th 1104, this Court held that error in giving the recent possession of stolen property instruction – with its slight corroboration language – as to non-theft charges was not an error of federal constitutional magnitude. (*Id.* at p. 1130.) Accordingly, this Court applied *Watson, supra,* 46 Cal.2d at p. 836, in finding the instructional error harmless. (*Id.* at pp. 1130-1131.) The same is true here.

> Like the recently stolen property instruction at issue in *Moore*, the reference to slight corroboration did not unconstitutionally lower the prosecution's burden of proving each element of the crimes beyond a reasonable doubt: the instruction "did not directly or indirectly address the burden of proof, and nothing in the instruction absolved the prosecution of its burden of establishing guilt beyond a reasonable doubt." [Citation.] Other instructions also properly informed the jury of its duty to weigh the evidence, what evidence it may consider, how to weigh that evidence, and the burden of proof.

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[104] *People v. Frye, supra,* 18 Cal.4th 894, was disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.

(*People v. Moore, supra,* 51 Cal.4th at p. 1133, quoting *People v. Prieto* (2003) 30 Cal.4th 226, 248.)

Moreover, there was no evidence that Brown was an accomplice within the meaning of section 1111 and CALCRIM No. 334. Brown's testimony showed she did not aid Thomas with knowledge of his criminal purposes, and no evidence was presented showing otherwise. Accordingly, Brown was not an accomplice, the jurors were to "evaluate her testimony as [they] would that of any other witness," and the slight corroboration requirement was irrelevant. (See 17 Supp. CT 4310.)

Furthermore, as explained in Argument II(D), *ante*, Thomas admitted his commission of the Noriega murder to two different individuals under particularly reliable circumstances in Texas. Thomas told Reeder that he killed "Rafa" in California for "being a narc." (7 RT 2021-2022, 2143-2144; 8 RT 2252-2254, 2271-2272.) In Sams' presence, Thomas boasted that he was from California where "we kill people for things like" "[g]etting out of line, money, drugs, things of that nature," and admitted that he shot, and took a bag of speed from, someone in California. (9 RT 2369-2370.) These admissions provided powerful corroboration of Brown's testimony.

Accordingly, it is not reasonably probable that the jury would have returned more favorable verdicts had they been instructed on a higher level of corroboration for accomplice testimony, the alleged error was harmless, and the guilt phase judgment should be affirmed.

XI. THE JURY WAS PROPERLY INSTRUCTED ON BROWN'S EXTRA-JUDICIAL STATEMENTS

Thomas claims the trial court erroneously instructed the jurors' on how to evaluate Brown's prior testimony and statements to Investigator Silva in violation of his rights to due process and a jury determination of the facts and the prohibitions against cruel and unusual punishment of the state and federal constitutions. Thomas contends that CALCRIM No. 318

was a one-sided instruction which forced the jurors to accept Brown's prior testimony as true, and CALCRIM No. 319 prevented the jurors from considering Brown's statements to Investigator Silva about a heated exchange in Spanish prior to the shooting for the truth of the matter asserted. (AOB 233-242.) Thomas argues the instructional error requires reversal of the guilt judgment. (AOB 242-244.)

Thomas forfeited his claim by failing to object to or offer any modification to CALCRIM No. 318 or CALCRIM No. 319 in the trial court. In any event, these instructions as given by the trial court were correct and proper. Moreover, the claimed error was harmless.

A. Relevant Proceedings

With the concurrence of defense counsel, the trial court added the phrase "except as otherwise instructed" to the second sentence of CALCRIM No. 318. (13 RT 2793-2794.) As modified, trial counsel had no objection and requested no further modifications to CALCRIM No. 318. (13 RT 2794.) The instruction as given to the jury thus read:

> **318. Prior Statements as Evidence**
>
> (*Modified*)
>
> You have heard evidence of statements that a witness made before the trial. Except as otherwise instructed, if you decide that the witness made those statements, you may use those statements in two ways:
>
> 1. To evaluate whether the witness's testimony in court is believable;
>
> AND
>
> 2. As evidence that the information in those earlier statements is true.

(17 Supp. CT 4306 [emphasis in original]; 13 RT 2888.)

The trial court next discussed CALCRIM No. 319 to address Brown's out-of-court statements (which either the court or court reporter mistakenly referred to as CALCRIM No. 318). (13 RT 2794.) Trial counsel agreed to specify Investigator Silva in CALCRIM No. 319, and responded, "Okay," when asked about the remainder of the instruction which included the limited use of and prohibition against the use of " 'those other statements as proof that the information contained in them is true.' "[105] (13 RT 2795.) The instruction as given to the jury thus read:

> **319. Prior Statements of Unavailable Witness**
>
> (*Modified*)
>
> Dorothy Brown did not testify in this trial, but her testimony, taken at another time, was read for you. In addition to this testimony, you have heard evidence that Dorothy Brown made other statements. I am referring to the statements about which Martin Silva testified.
>
> If you conclude that Dorothy Brown made those other statements, you may only consider them in a limited way. You may only use them in deciding whether to believe the testimony of Dorothy Brown that was read here at trial.
>
> You may not use those other statements as proof that the information contained in them is true, nor may you use them for any other reason.

(17 Supp. CT 4307; 13 RT 2888.)

B. Forfeiture

Thomas does not identify anything that is incorrect in CALCRIM No. 318 as given at his trial. Rather, Thomas argues the instruction was incomplete by stating that the jurors may use prior statements as evidence

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[105] Thomas concedes that "defense counsel did not object to the giving of CALCRIM No. 318 or CALCRIM No. 319," but argues the lack of an objection does not forfeit appellate review of his claim. (AOB 237.)

of the truth of the matters asserted without stating the obvious converse principle that the jurors could disbelieve such statements. (See AOB 233-234.)

As previously discussed, "[a] party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." (*People v. Hillhouse, supra,* 27 Cal.4th at p. 503; see also *People v. Lee, supra,* 51 Cal.4th at p. 638; *People v. Richardson, supra,* 43 Cal.4th at p. 1188; *People v. Guerra, supra,* 37 Cal.4th at p. 1134.) A "defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions." (*People v. Daya, supra,* 29 Cal.App.4th at p. 714.) Accordingly, Thomas's challenge to CALCRIM No. 318 on appeal has been forfeited. (See *People v. Mackey* (2015) 233 Cal.App.4th 32, 117; *People v. Tuggles* (2009) 178 Cal.App.4th 1106, 364-365; but see *People v. Hudson* (2009) 175 Cal.App.4th 1025, 1028.)

In contrast to CALCRIM No. 318, Thomas argues CALCRIM No. 319 was erroneous because it barred the jurors from considering Brown's statement to Silva about the heated argument prior to the shooting as true. (AOB 234.) Section 1259 authorizes appellate courts to "review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259.) As explained below, Brown's prior testimony and her statement to Silva were entirely consistent in describing an argument prior to the shooting. CALCRIM No. 319 permitted the jury to use Brown's statement to Silva to corroborate that prior testimony, which benefitted Thomas. Therefore, the instruction could not have affected any substantial rights, and the lack of an objection in the trial court forfeited the issue on appeal.

C. The Jury Was Properly Instructed

Thomas's challenge to CALCRIM No. 318 is that it "instructed the jury that it could use Brown's prior statements as evidence that the statements were true" but "failed to tell the jury that it was free to disbelieve Brown's prior statements." (AOB 233-234.) However, CALCRIM No. 318 did not even pertain to Brown. The trial court excluded Brown from CALCRIM No. 318 by inserting the "Except as otherwise instructed" language in the second sentence. (17 Supp. CT 4306; 13 RT 2793-2794.) As the prosecutor explained in suggesting the modification, "The only thing I might suggest is adding at the very beginning, 'except as otherwise instructed,' *because the next instruction is going to give different information concerning Dorothy Brown.*"[106] (13 RT 2793 [emphasis added].) Indeed, the very next instruction read to the jury, CALCRIM No. 319, was the instruction which specifically addressed Brown's prior statements. (17 Supp. CT 4307; 13 RT 2888.) Thus, Thomas's complaint about CALCRIM No. 318 can readily be dismissed.

Moreover, in *People v. Friend* (2009) 47 Cal.4th 1, this Court rejected a challenge to similar language in CALJIC No. 2.13 (Prior Consistent or Inconsistent Statements as Evidence), where the defendant "complain[ed] that only telling the jurors that they could consider prior inconsistent statements for their 'truth,' but not telling them they could also consider them for their 'falsity,' unfairly skewed the jury's credibility determinations in the prosecutor' favor." (*Id.* at p. 41.) This Court found the instruction did not in any way direct the jurors to accept prior statements as true. (*Id.* at pp.

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[106] As previously noted, the court and parties subsequently agreed that it was better to place the "except as otherwise instructed" language at the beginning of the second sentence of CALCRIM No. 318. (13 RT 2793-2794.).

41-42, citing *People v. Harris* (2008) 43 Cal.4th 1269, 1293; accord *Bryant, supra,* 60 Cal.4th at p. 438.)

An identical claim to that raised by Thomas was also rejected in *People v. Hudson, supra,* 175 Cal.App.4th 1025, where the defendant argued "that CALCRIM No. 318 disallows the jury from using 'the evidence of a prior out-of-court statement as evidence the information in that statement is false.' " (*Id.* at p. 1028.)

The *Hudson* court explained:

> In considering this argument, we heed the well established rule that the "correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Anderson* (2007) 152 Cal.App.4th 919, 928–929, 61 Cal.Rptr.3d 903, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 538–539, 224 Cal.Rptr. 112, 714 P.2d 1251.) Here, the trial court gave additional instructions that properly informed the jury of its prerogative to ignore any evidence found to be untrustworthy.
>
> As the Attorney General points out, the jury received CALCRIM No. 226, which provides in relevant part: "You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are[:] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?" CALCRIM No. 226 informed the jury that it could accept or reject any testimony, and in making that determination could also consider past inconsistent statements. CALCRIM No. 226 negates the possibility, imagined by defendant, that the jury would believe itself bound to rely on out-of-court statements that it found noncredible.

(*People v. Hudson, supra,* 175 Cal.App.4th at pp. 1028-1029.)

Thomas's jurors were likewise given CALCRIM No. 226 which instructed them how to evaluate the testimony of all witnesses. (17 Supp.

CT 4298-4299; 13 RT 2884-2886.) In addition, the trial court gave CALCRIM No. 317 (Former Testimony of Unavailable Witness) which stated: "The testimony that Dorothy Brown has given under oath was read to you because she is not available. You must evaluate this testimony by *the same standards* that you apply to a witness who testified here in court." (17 Supp. CT 4305; 13 RT 2887-2888 [emphasis added].)

Thus, as in *Hudson*, Thomas fails to " 'demonstrate a reasonable likelihood that the jury understood' " CALCRIM No. 318 in the erroneous manner he claims on appeal. (See *People v. Solomon, supra,* 49 Cal.4th at p. 822, quoting *People v. Cross, supra,* 45 Cal.4th at pp. 67-68.) CALCRIM No. 318 is a proper instruction.

CALCRIM No. 319 as given by the trial court is also a legally correct and proper instruction. Evidence Code sections 1235 and 1236 create an exception to the hearsay rule for prior statements of a witness when "offered in compliance with [Evidence Code] Section 770." (Evid. Code, §§ 1235, 1236.) Such statements are admissible to prove the truth of the matters asserted. (*People v. Jennings* (1988) 46 Cal.3d 963, 983 [Evid. Code, § 1236]; *People v. Lucky* (1988) 45 Cal.3d 259, 289 [Evid. Code, § 1235]; *People v. Williams* (1976) 16 Cal.3d 663, 668-669 [Evid. Code, § 1235].)

Evidence Code section 770 provides:

> Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:
>
> (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
>
> (b) The witness has not been excused from giving further testimony in the action.

(Evid. Code, § 770.) Thus, prior statements are only admitted for the truth of the matters asserted where the witness has the opportunity to explain or deny them in court or the witness has not been excused from giving further testimony in the current proceeding.

Investigator Silva interviewed Brown in September of 1998, and Brown was killed in 2004. (13 RT 2865, 2870.) Accordingly, Brown could not have been confronted with her statements in the 1996 Texas punishment hearing or the 2007 Noriega murder trial. For the same reasons, she could not have been subject to recall to address the interview statements in either proceeding. Since the requirements of Evidence Code section 770 could not have been satisfied, Brown's statements to Silva were not admissible for their truth under Evidence Code section 1235 or 1236.[107] (See *People v. Williams, supra,* 16 Cal.3d at p. 669 [Evid. Code, § 1235 requires that declarant testify at the hearing where his or her prior inconsistent statement is sought to be admitted]; *People v. Hitchings* (1997) 59 Cal.App.4th 915, 922 [same regarding Evid. Code, § 1236].)

Instead, Evidence Code section 1202 "governs the impeachment of hearsay statements by a declarant who does not testify at trial." (*People v. Blacksher* (2011) 52 Cal.4th 769, 806.) Evidence Code section 1202

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[107] In response to *People v. Williams, supra,* 16 Cal.3d 663, the Legislature enacted Evidence Code section 1294. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 408.) This provision expands Evidence Code section 1235 to allow the admission of prior inconsistent statements for unavailable, former-testimony witnesses where a videotaped recording of the statement was "introduced at a preliminary hearing or prior proceeding concerning the same criminal matter" and there is a "[a] transcript, containing the statements, of the preliminary hearing or prior proceeding concerning the same criminal matter." (Evid. Code, § 1294, subd. (a).) Since Brown's out-of-court statement was introduced in the current proceeding and presented through the oral testimony of Investigator Silva rather than a videotaped recording, Evidence Code section 1294 is inapplicable.

permits the admission of prior inconsistent statements "for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct." (§ 1202; see *People v. Corella* (2004) 122 Cal.App.4th 461, 471.) Under Evidence Code section 1202, prior inconsistent statements of declarants who do not testify at trial can only be offered for impeachment purposes and are not admissible for their truth. (*People v. Blacksher, supra,* 52 Cal.4th at p. 808, citing *People v. Williams, supra,* 16 Cal.3d at p. 669.) Therefore, CALCRIM No. 819 as given by the trial court correctly told the jury that Brown's statements to Silva could be considered in judging the credibility of her former testimony but not for the truth of the information contained in them.

Since there was no instructional error, Thomas's related claim of constitutional error must fail as well. (See *People v. Modiri* (2006) 39 Cal.4th 481, 493; *People v. Avila* (2006) 38 Cal.4th 491, 596; *People v. Welch, supra,* 20 Cal.4th at p. 770.) The guilt judgment should be affirmed.

D. The Claimed Error Was Harmless

"Mere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution." (*People v. Carpenter, supra,* 15 Cal.4th at p. 393, overruled on another ground in *People v. Diaz, supra,* 60 Cal.4th at pp. 1189-1192; accord *People v. Dickey* (2005) 35 Cal.4th 884, 905.) Accordingly, instructional error concerning prior statements is reviewed for harmlessness under the reasonable probability test of *People v. Watson, supra,* 46 Cal.2d at p. 836. (See *People v. Wilson* (2008) 43 Cal.4th 1, 21 [CALJIC No. 2.13].) The instructional error claimed by Thomas was harmless.

As previously discussed, the trial court excluded Brown from CALCRIM No. 318 by inserting the "Except as otherwise instructed"

language. (17 Supp. CT 4306; 13 RT 2793-2794.) Any alleged error in CALCRIM No. 318 could not have affected the jury's consideration of Brown's prior statements because the instruction only applied to the prior statements of other witnesses.[108] (See *People v. Sanchez, supra,* 26 Cal.4th at p. 852 [jurors presumed able to understand and correlate instructions].)

Thomas complains that "CALCRIM No. 319 erroneously precluded the jury from considering as true Brown's statement to Silva that a heated argument preceded the shooting." (AOB 234.) Although her prior testimony and out-of-court statement to Silva might have differed in other particulars, Brown's statement to Silva that "Mr. Thomas and Mr. Noriega were arguing back and forth in some kind of heated argument in the language of Spanish" (13 RT 2872) was entirely consistent with her former testimony that Thomas "yelled something over to" Noriega and "[t]hey exchanged words in Spanish" prior to the shooting (6 RT 1912, 1938). It thus benefitted Thomas to have the jury believe Brown's prior testimony on that point. CALCRIM No. 319 permitted the jury to consider Brown's statement to Silva to corroborate her prior testimony describing an argument.

Accordingly, Thomas could not have been prejudiced by either CALCRIM No. 318 or CALCRIM No. 319 as given by the trial court. Since it is not reasonably probable that Thomas would have received a more favorable verdict in the absence of the claimed error, the guilt judgment should be affirmed. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

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[108] Thomas fails to consider the "except as otherwise instructed" language and sequence of instructions in claiming "CALCRIM No. 319 directly contradicted CALCRIM No. 318." (See AOB 238-239.)

XII. THOMAS FAILS TO SHOW THE ADMISSION OF PHOTOGRAPHIC EVIDENCE IN THE GUILT PHASE WAS AN ABUSE OF DISCRETION

Thomas claims the guilt judgment must be reversed because the trial court erroneously admitted inflammatory and prejudicial photographs of Hartwell's and Noriega's bodies in violation of his rights to due process and a jury determination of the facts and the prohibitions against cruel and unusual punishment under the state and federal constitutions. (AOB 245-255.) Thomas further contends the photographs affected and require reversal of the penalty judgment. (AOB 255.)

Thomas fails to show the trial court's admission of the photographs was an abuse of discretion since they were relevant and not unduly inflammatory. Accordingly, there was no evidentiary error or violation of Thomas's constitutional rights. Furthermore, any alleged error was harmless. The guilt and penalty judgments should be affirmed.

A. Relevant Proceedings

During in limine motions, the trial court addressed the photographs the prosecution intended to admit in the guilt phase. (3 RT 1279.) Defense counsel objected to all photographs from the Hartwell case even though "many of those are simply benign photographs or photographs of an apartment or furniture or things of that nature" in conformity with the defense position that no evidence of the Hartwell murder should be admitted in the guilt phase. (3 RT 1280.) The court then discussed specific photos concerning both murders to which the defense objected as inflammatory. (2 RT 1281.)

People's Exhibit[109] Nos. 8 and 9 were views of the ground depicting the wooden pallet under which Noriega's body was found from different angles. (3 RT 1281-1282.) Exhibit No. 10 was a closer view showing what appeared to be Noriega's shoe protruding from the lower right corner of the pallet. (3 RT 1282.) Exhibit No. 11 was another close-up view which more clearly showed the shoe protruding beyond the pallet. (3 RT 1282.) Based on the prosecutor's offer of proof that this image depicted how the body was found and observing nothing inflammatory about the photographs, the court admitted them over defense objection. (3 RT 1282-1283.)

Exhibit Nos. 12 and 13 showed the back of Noriega's clothed body in the dirt with the pallet removed from different angles. (3 RT 1283.) Based on the offer of proof that these images also depicted the condition of the body as it was found, the court admitted the photographs over defense objection. (3 RT 1283.)

Exhibit No. 14 showed Noriega's body "in a substantial condition of decay" after it was removed from the depression in the soil and placed on top of a coroner's body bag. (3 RT 1283.) Based on the offer of proof that it depicted the condition of the body when it was found as well as the area beneath the body which was sifted for evidence, the court found the photograph relevant and not substantially outweighed by the risk of undue prejudice. (3 RT 1284.) Thus, despite the unpleasant nature of the photograph, the court admitted it over defense objection. (3 RT 1284.)

Exhibit No. 15 was a close-up view of a human skull with a piece of the lower jaw separated from it and an investigator's hand holding a color scale and ruler just above it. (3 RT 1284.) The prosecutor argued the

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[109] All further references to exhibits are the People's exhibits unless noted otherwise.

photograph conclusively demonstrated that the remains were human. (3 RT 1284.) Following defense counsel's comment that there was no issue that Noriega was a deceased human being, the prosecutor pointed out that the photograph also showed the black-and-white striped shirt on the torso which Noriega was reported to be wearing at the time he disappeared. (3 RT 1285.) Defense counsel asked if the photograph could be sanitized in some fashion to cover the skull, which would have still left the separated jaw above the shirted torso visible. (3 RT 1285-1286.) Finding the significant probative value in identifying Noriega's remains was not outweighed by any prejudicial effect which would distract or inflame the jurors, the court admitted the photograph over defense objection. (3 RT 1286.) However, the photograph was not used or admitted into evidence. (16 Supp. CT 4280.)

Exhibit Nos. 18 and 19 depicted Noriega's clothed skeletonized remains lying on the body bag in a laboratory setting from two different angles. (3 RT 1286-1287.) The prosecutor explained that the photographs were "fairly standard autopsy shots" to assist the jury in understanding the autopsy process. (3 RT 1287.) Finding both photographs served the same purpose, the court indicated that it would admit only one of them. (3 RT 1287.) The prosecutor chose Exhibit No. 18, which the court admitted over defense objection. (3 RT 1288-1289.) The court then sustained the defense objection to Exhibit No. 19 as cumulative. (3 RT 1288.)

Exhibit Nos. 21 and 22 were photographs of Noriega's remains lying on their backside with the clothing removed from two different angles. (3 RT 1288.) The court found them relevant to show that the body had gone through a process of decomposition, but did not see the need for two photographs. (3 RT 1288.) The prosecutor selected Exhibit No. 22, which the court admitted over defense objection. (3 RT 1289.) The court then sustained the defense objection to Exhibit No. 21 as cumulative and

unnecessarily graphic since (unlike the Exhibit No. 22) it showed the skull separated by a metal bar. (3 RT 1289.)

Exhibit No. 23 depicted the sternum of Noriega's remains with an apparent hole in it. (3 RT 1289.) The prosecutor indicated his belief that the photograph would be used to show the bullet trajectory but needed to confirm that with the pathologist. (3 RT 1289.) Accordingly, the court deferred a final ruling on the photograph. (3 RT 1289-1290.)

Exhibit No. 31 consisted of three in-life photographs of Noriega. (3 RT 1290.) Defense counsel specifically objected to one of the photos which showed Noriega building a snowman. (3 RT 1290.) The court agreed and indicated that only one of the two other photos was necessary for witnesses to identify Noriega. (3 RT 1290.) The prosecutor selected one photograph which was admitted as Exhibit No. 31 and the remaining photographs were excluded as Exhibit No. 31-A. (3 RT 1290.)

Exhibit No. 32 was a photograph of Hartwell talking on the telephone. (3 RT 1291.) Conceding "[t]here's nothing over the top, if you will, or highly emotional about it," defense counsel objected so as not to waive his general objection to evidence from the Texas case. (3 RT 1291.) Finding the photograph relevant to identify Hartwell, the court admitted Exhibit No. 32 over defense objection. (3 RT 1291.)

Exhibit Nos. 35 and 36 depicted Hartwell's burned Jeep.[110] (3 RT 1291.) The defense objection being only that they pertained to the Texas case, the court admitted the photographs. (3 RT 1291.)

Exhibit No. 43 was another view of the Jeep which depicted Hartwell's burned remains. (3 RT 1291-1292.) The prosecutor explained

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[110] Noting their poor quality, the prosecutor explained that the photographs from the Hartwell case were actually photographs of the original exhibits admitted at trial which "weren't stored under the greatest of conditions" and were somewhat moldy. (3 RT 1292.)

that the photograph was relevant to show how Hartwell's body was burned beyond recognition as it related to identity, but stated that he would not need the exhibit if the defense did not contest her identity. (3 RT 1292-1293.) After defense counsel represented that there would be no issue concerning Hartwell's identity, the court tentatively sustained the objection to Exhibit No. 43. (3 RT 1293.)

Exhibit Nos. 44, 45, 46, 47 and 48 were photographs of Hartwell's autopsy depicting various parts of her remains. (3 RT 1293.) Exhibit No. 44 was a photograph of Hartwell's lungs and bronchial airway. (3 RT 1296.) Exhibit Nos. 45 and 46 showed a probe in the apparent stab wound in Hartwell's torso. (3 RT 1294.) Exhibit Nos. 47 and 48 showed Hartwell's lower teeth and jaw. (3 RT 1295.)

The prosecutor explained that the photographs would corroborate the pathologist's findings. (3 RT 1294, 1296.) Because the photograph of the lungs only had probative value if it showed an injury, the court deferred ruling on Exhibit No. 44. (3 RT 1296.) The court found Exhibit Nos. 45 and 46 had substantial probative value in depicting the stab wound which was not outweighed by any undue prejudicial impact, and admitted them over defense objection. (3 RT 1295.) Because Exhibit Nos. 47 and 48 only related to identity, the court deferred ruling on them. (3 RT 1295.)

During trial, Gary Thompson identified Exhibit Nos. 8 through 13 as the location and conditions in which Noriega's body was found, and Exhibit No. 14 as the body after it had been removed from the ground. (6 RT 1802-1806.) Heather Kelley (formerly Barajas) identified Exhibit No. 31 as Noriega. (6 RT 1867.) Reeder identified Exhibit No. 32 as Hartwell. (7 RT 2023.) Dr. Ditraglia identified Exhibit Nos. 18 and 22 as Noriega's body prior to the autopsy with and without clothing, and Exhibit No. 23 as depicting a hole in the center of Noriega's breastbone which was consistent with a gunshot wound. (8 RT 2295-2297, 2302-2303.) Bluebonnet Fire

Department Chief Terry Duval identified Exhibit Nos. 35 and 36 as the condition of Hartwell's Jeep after the fire was extinguished, noting what appeared to be bones in the back of the vehicle which were not clearly visible in Exhibit No. 36. (10 RT 2539-2542.)

Prior to Dr. Bayardo's testimony, the prosecutor informed the court and defense counsel that he still wanted to introduce Exhibit Nos. 45 and 46 to show the nature of Hartwell's stab wound. (11 RT 2612-2613.) Defense counsel reiterated his general objection to all evidence from the Texas case under Evidence Code section 1101, subdivision (b). (11 RT 2613-2616.) The court reaffirmed its prior ruling admitting the two exhibits. (11 RT 2316.) Subsequently, Dr. Bayardo identified Exhibit Nos. 45 and 46 as demonstrating the path of the stab wound with a metal probe. (11 RT 2626-2628.)

At the conclusion of his guilt phase case-in-chief, the prosecutor filed a motion to admit, in relevant part, Exhibit Nos. 1 through 14, 16 through 18, 22 through 31, 32 through 37, 45 and 46. (16 Supp. CT 4280-4281.) Defense counsel renewed his objections, which were overruled. (12 RT 2759-2760; 16 Supp. CT 4267.)

B. The Photographs Were Properly Admitted

In a murder trial, autopsy photographs are always relevant to show how the crime occurred as well as to prove malice. (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 471, citing *People v. Carey* (2007) 41 Cal.4th 109, 127.) "Autopsy photographs are routinely admitted to establish the nature and placement of the victim's wounds and to clarify the testimony of prosecution witnesses regarding the crime scene and the autopsy, even if other evidence may serve the same purposes." (*People v. Howard* (2010) 51 Cal.4th 15, 33.)

> "The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are

> unduly gruesome or inflammatory. [Citations.] The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. [Citations.]"

(*People v. Carter, supra,* 36 Cal.4th at p. 1167, quoting *People v. Crittenden* (1994) 9 Cal.4th 83, 133-134; *People v. Heard, supra*, 31 Cal.4th at pp. 975-976; see Evid. Code, § 352.)

It also lies in the broad discretion of the trial court to admit photographs of victims of uncharged crimes under Evidence Code section 1101, subdivision (b). (See *People v. Carpenter, supra,* 15 Cal.4th at p. 385, overruled on another ground in *People v. Diaz, supra,* 60 Cal.4th at pp. 1189-1192; [photos of uncharged crime victims relevant to show similarity to charged crimes, intent to kill and premeditation]; see also *People v. Memro* (1995) 11 Cal.4th 786, 864-865 [magazines and photos of unclothed youths admissible to show defendant's sexual interest in and intent to molest young boys].) "A court's ruling admitting such photographs will not be disturbed on appeal unless the court exercised its discretion in an arbitrary, capricious, or patently absurd manner." (*People v. Mills* (2010) 48 Cal.4th 158, 191-192.)

There was no abuse of discretion here. The record shows the trial court carefully reviewed all photographs, considered the arguments of counsel and weighed the probative value against the risk of undue prejudice for each photograph at issue. Whereas the trial court found 17 photographs admissible (Exhibit Nos. 8-15, 18, 22, 23, 31, 32, 35, 36, 45, 46), it excluded or deferred ruling on eight others (Exhibit Nos. 19, 21, 31-A (consisting of two photos), 43, 44, 47, 48). Thus, the trial court exercised its discretion to exclude approximately one-third of the proffered photographs as either duplicative, irrelevant or unduly prejudicial. (3 RT 1279-1295.) Ultimately, the prosecutor only introduced 16 of the photographs in the guilt phase. (16 Supp. CT 4280-4281.)

A single in-life photograph for each victim (Ex. Nos. 31, 32) was admissible to identify Noriega and Hartwell. (*People v. Tully* (2012) 54 Cal.4th 952, 1020; *People v. Martinez, supra,* 31 Cal.4th at p. 692; *People v. Mendoza, supra,* 24 Cal.4th at p. 171; *People v. Osband* (1996) 13 Cal.4th 622, 677; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1230.) The crime scene photographs of the victims were also "relevant in establishing the fact that a murder had occurred." (*People v. Scheid, supra,* 16 Cal.4th at p. 15.)

The seven photographs of Noriega's body as found under the wooden pallet and removed from the shallow grave (Exhibit Nos. 8-14) and Hartwell's burned Jeep (Exhibit Nos. 35, 36) were relevant to illustrate the testimony and support the credibility of the prosecution witnesses who discovered and observed the recovery of the bodies. (*People v. Heard, supra,* 31 Cal.4th at pp. 973-974, citing *People v. Scheid, supra*, 16 Cal.4th at p. 15 ["images illustrated the testimony of various prosecution witnesses who encountered the victim and viewed the crime scene"]; accord *People v. Carter, supra,* 36 Cal.4th at p. 1168.)

The limited number of autopsy photographs for Noriega (Exhibit Nos. 18, 22, 23) and Hartwell (Exhibit Nos. 45, 46) were relevant to prove the manner and circumstances of death, support the prosecution's theories of deliberate and premeditated murder, and assist the jury in understanding the testimony and findings of Drs. Ditraglia and Bayardo. (See *People v. Montes* (2014) 58 Cal.4th 809, 862 [photos assisted jury to understand pathologist's testimony]; *People v. Cowan* (2010) 50 Cal.4th 401, 475 [photos relevant to establish premeditation and deliberation]; *People v. Heard, supra,* 31 Cal.4th at p. 974 [photos supported prosecution theory of defendant's capacity for premeditation and deliberation]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1215-1216 [photos used in direct examination of pathologist regarding cause and circumstances of death]; *People v. Wilson*

(1992) 3 Cal.4th 926, 938 [photos supported prosecution theory that victim was deliberately shot in his sleep without a struggle]; *People v. Crittenden, supra,* 9 Cal.4th at pp. 132-133 [photos probative of premeditation and deliberation].)

The probative value of these photographs was not substantially outweighed by any risk of undue prejudice. "[V]ictim photographs and other graphic items of evidence in murder cases always are disturbing." (*People v. Carter, supra,* 36 Cal.4th at p. 1168.) As found by the trial court, the photographs were unpleasant but not unduly gruesome or inflammatory.

More graphic post-mortem photographs than those in Thomas's case have been held admissible. In *Heard*, this Court found 14 photographs of the crime scene and the child victim who had been subjected to a violent sexual assault, 11 photographs of the child's wounded face wrapped in a bloody garment as well as unwrapped, and 11 photographs of the child's head and chest injuries were not unduly prejudicial. (*People v. Heard, supra,* 31 Cal.4th at pp. 953, 972, 975 [victim found with an empty bottle of rubbing alcohol in her mouth, bite marks on her chest, a shoeprint on her chest, a baseball bat protruding from her vagina and another bat stained with blood and feces on the floor between her legs]; see also *People v. Montes, supra,* 58 Cal.4th at p. 861 [several photographs where victim's "eyes are open in a 'death stare' "]; *People v. Weaver* (2001) 26 Cal.4th 876, 933 [photo depicting victim's fractured skull with scalp removed]; *People v. Mendoza, supra,* 24 Cal.4th at pp. 170-171 [photo of victim's charred body]; *People v. Jackson, supra,* 13 Cal.4th at pp. 1215-1216 [photos of victim's "corpse and the remains of a large mass of brain matter beside her arm, which had been expelled from her skull by the force of the shotgun blast that killed her"]; *People v. Crittenden, supra,* 9 Cal.4th at p. 131 [photo of knife protruding from victim's partially unclothed body].)

At trial, the prosecution witnesses gave graphic testimony describing the killings, the disposal of Noriega's and Hartwell's bodies and the discovery of their remains. "The jurors having heard that testimony, the photographic images taken of the victims once their bodies had been taken to the coroner's facility were unlikely to have elicited an improper response from the jurors." (*People v. Carter, supra,* 36 Cal.4th at p. 1169.) Since the probative value of the photographs was not substantially outweighed by the risk of undue prejudice, they were properly admitted. (Evid. Code, § 352; *People v. Carter, supra,* 36 Cal.4th at p. 1167; *People v. Heard, supra,* 31 Cal.4th at pp. 975-976; *People v. Crittenden, supra,* 9 Cal.4th at pp. 133-134.)

Thomas premises his claim on the argument that "[t]here was no dispute Noriega was shot and killed," and "[t]here was no dispute Hartwell was stabbed and killed." (AOB 245.) However, Thomas's plea of not guilty placed in issue all of the elements of the charged murder, including elements conceded by the defense, which the prosecutor had to prove. (*People v. Cowan, supra,* 50 Cal.4th at p. 476.) This Court has "made clear that the absence of a defense challenge to particular aspects of the prosecution's case or its witnesses does not render victim photographs irrelevant." (*People v. Lewis, supra,* 25 Cal.4th at p. 641, citing *People v. Smithey, supra,* 20 Cal.4th at pp. 973-974, *People v. Scheid, supra,* 16 Cal.4th at p. 17, and *People v. Crittenden, supra,* 9 Cal.4th at pp. 132-133; see also *People v. Weaver, supra,* 26 Cal.4th at p. 933 [autopsy photo need not be excluded as cumulative simply because pathologist's testimony was not challenged].)

Similarly, the prosecutor had to prove the truth of the Hartwell murder by a preponderance of the evidence in order for the jury to consider it under Evidence Code section 1101, subdivision (b), regardless of any defense concessions. (See 17 Supp. CT 4320-4321 [CALCRIM No. 375].) Like

the defendant in *Sattiewhite*, Thomas did not testify or admit that he killed Hartwell in the guilt phase. (See *People v. Sattiewhite, supra,* 59 Cal.4th at p. 471.) Thomas is simply wrong that the prior conviction prohibited him from disputing evidence related to the Hartwell murder. (See AOB 252.)

Thomas argues Dr. Ditraglia was able to show the location of Noriega's injuries with a diagram and Dr. Bayardo was able to explain his opinions about Hartwell's cause of death without having to show the autopsy photographs. (AOB 251, 252.) "That the challenged photographs may not have been strictly necessary to prove the People's case does not require that we find the trial court abused its discretion in admitting them." (*People v. Mills, supra,* 48 Cal.4th at p. 191.)

This Court has " 'often rejected the argument that photographs of a murder victim should be excluded as cumulative if the facts for which the photographs are offered have been established by testimony.' " (*People v. Wilson, supra,* 3 Cal.4th at p. 938, quoting *People v. Price* (1991) 1 Cal.4th 324, 441.) " ' "[T]he prosecution was not obliged to prove these details solely from the testimony of live witnesses, and the jury was entitled to see how the physical details of the scene and body supported the prosecution theory." ' " (*People v. Jackson, supra,* 13 Cal.4th at p. 1216, quoting *People v. Raley* (1992) 2 Cal.4th 870, 897; see also *People v. Montes, supra,* 58 Cal.4th at p. 862 [photos not inadmissible because motive, intent and cause of death provable through other evidence]; *People v. Heard, supra,* 31 Cal.4th at p. 975 [immaterial for determining relevance that fact can be established by other evidence]; *People v. Crittenden, supra,* 9 Cal.4th at p. 133 [prosecutor not required " 'to accept antiseptic stipulations in lieu of photographic evidence' "].)

Thomas summarily mentions the abuse of discretion standard but then fails to apply it, simply arguing that the trial court erred. (See AOB 245, 249, 252.) As previously stated, "When an appellant fails to apply the

appropriate standard of review, the argument lacks legal force." (*People v. Foss, supra,* 155 Cal.App.4th at p. 126; see also *Aurora S.A. v. Poizner, supra,* 198 Cal.App.4th at p. 1446; *Shaw v. County of Santa Cruz, supra,* 170 Cal.App.4th at p. 281.)

Thomas fails to show the trial court's admission of the photographs was arbitrary, capricious or patently absurd. Accordingly, no abuse of discretion has been shown, and the trial court's rulings should be affirmed. (*People v. Mills, supra,* 48 Cal.4th at pp. 191-192.)

Since the photographs were properly admitted, there was no violation of Thomas's rights to due process, fair trial, a reliable jury determination of the facts or the prohibitions against cruel and unusual punishment under the state and federal constitution. (*People v. Fuiava, supra,* 53 Cal.4th at p. 670; *People v. Foster, supra,* 50 Cal.4th at p. 1335; *People v. Thornton, supra,* 41 Cal.4th at p. 464; *People v. Griffin, supra,* 33 Cal.4th at p. 579, fn. 19; *People v. Burgener, supra,* 29 Cal.4th at p. 873; *People v. Hart, supra,* 20 Cal.4th at p. 617, fn. 19; *People v. Arauz, supra,* 210 Cal.App.4th at pp. 1402-1403.) The protections of Evidence Code section 352 in particular alleviated any due process concerns. (See *People v. Falsetta, supra,* 21 Cal.4th at p. 917.)

C. The Claimed Error Was Harmless

Notwithstanding the propriety of the trial court's rulings, any alleged error in admitting the photographs was harmless. The erroneous admission of photographic evidence in the guilt phase is reviewed for harmless error under the *Watson* standard. (*People v. Carter, supra,* 36 Cal.4th at pp. 1170-1171; *People v Heard, supra,* 31 Cal.4th at p. 978; *People v. Scheid, supra,* 16 Cal.4th at p. 21.)

As in *Heard*,

> The photographs at issue did not disclose to the jury any information that was not presented in detail through the

> testimony of witnesses. Although the photographs were unpleasant, they were not unusually disturbing or unduly gruesome, and were no more inflammatory than the graphic testimony provided by a number of the prosecution's witnesses.

(*People v. Heard, supra*, 31 Cal.4th at p. 978.) Since it is not reasonably probable that the jury would have reached a more favorable verdict in the absence of the photographs, the guilt phase judgment should be affirmed.[111] (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

For the same reason, there is no reasonable or realistic possibility that the alleged error in admitting the photographs affected the penalty verdict.[112] Moreover,

> the discretion to exclude photographs under Evidence Code section 352 is much narrower at the penalty phase than at the guilt phase. This is so because the prosecution has the right to establish the circumstances of the crime, including its gruesome consequences (§ 190.3, factor (a)), and because the risk of an

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[111] Thomas's hyperbole describing "photographs of Noriega's body as a tangled mess of decayed flesh and organs and Hartwell's body as dissected remains" (AOB 254) is not supported by the record. The few autopsy photographs which were admitted showed each victim in as complete a state as possible so as to depict the fatal wounds in their torsos in relation to the rest of the their bodies.

[112] State law error in the penalty phase is reviewed for harmlessness under the "reasonable possibility" standard articulated in *People v. Brown* (1988) 46 Cal.3d 432, 447. (*People v. Jackson, supra*, 13 Cal.4th at p. 1232.)

> [A] "mere" possibility that an error might have affected a verdict will not trigger reversal. Instead when faced with penalty phase error not amounting to a federal constitutional violation, we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred.

(*Ibid.*, quoting *People v. Brown, supra*, 46 Cal.3d at p. 448.) " '*Brown's* "reasonable possibility" standard and *Chapman's* "reasonable doubt" test ... are the same in substance and effect.' " (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961, quoting *People v. Ashmus* (1991) 54 Cal.3d 932, 990.)

> improper guilt finding based on visceral reactions is no longer present. [Citations.]

(*People v. Bonilla, supra,* 41 Cal.4th at pp. 353-354, citing *People v. Moon* (2005) 37 Cal.4th 1, 35, and, *People v. Anderson* (2001) 25 Cal.4th 543, 591-592.) Accordingly, the penalty judgment should also be affirmed. (*People v. Brown, supra,* 46 Cal.3d at p. 448.)

XIII. THOMAS FAILS TO SHOW THE TRIAL COURT'S DENIAL OF HIS UNTIMELY REQUEST FOR SELF-REPRESENTATION BEFORE THE PENALTY PHASE WAS AN ABUSE OF DISCRETION

Thomas claims the penalty judgment must be reversed because the trial court erroneously denied his request to waive counsel for the penalty phase in violation of his rights to self-representation and the prohibitions against cruel and unusual punishment under the state and federal constitutions. (AOB 256-268.) However, Thomas's midtrial motion for self-representation made after the jury rendered its guilt phase verdicts was untimely. Therefore, the granting or denial of the motion was within the sound discretion of the trial court. Thomas fails to show any abuse of discretion. Moreover, Thomas cannot show any prejudice since his stated purpose for self-representation – to obtain a death verdict – was satisfied in the penalty phase. Accordingly, the penalty judgment should be affirmed.

A. Relevant Proceedings

On November 6, 2006, the trial court received an "Affidavit/ Declaration of Complaints" from Thomas, which it deemed a motion for substitution of appointed counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. (1 CT 160, 163-164.) On December 18, 2006, the motion was withdrawn. (1 CT 169.) On the same date, Thomas filed a request to be authorized to act as co-counsel to his appointed trial attorneys, Mr. Scalisi and Mr. Exum. (1 CT 178-185.) That request was granted on December 22, 2006. (1 CT 186.)

On February 21, 2007, Thomas filed another *Marsden* motion as well as a motion to proceed in pro per. (1 CT 194-200.) On February 23, Thomas withdrew the *Marsden* motion. (Sealed 1-A RT 132-133; 1 CT 201.) On the same date, the trial court granted Thomas pro per status and appointed Mr. Scalisi and Mr. Exum stand-by counsel. (1 CT 202-203.)

On May 11, 2007, the trial court commented that "this all looks like just an effort of delay," while considering Thomas's request for advisory counsel. (Sealed 2-C RT 319.)

On July 13, 2007, Thomas filed a motion to withdraw his waiver of the right to counsel and requested appointed counsel. (3 CT 682-687.) On the same date, the motion was granted and trial counsel were reappointed. (3 CT 677.)

On September 12, 2007, Thomas made another *Marsden* motion, which the trial court heard and denied. (Sealed 2-E RT 384-388; 3 CT 695.) At the hearing, trial counsel explained that Thomas was placing them in the untenable position of presenting a false alibi defense and that Thomas preferred an attorney who was admitted to practice in Texas which they were not. (Sealed 2-E RT 386.)

On October 3, 2007, Thomas filed an affidavit and complaint against Mr. Scalisi, alleging irreconcilable differences and asking for his replacement. (3 CT 704-708.) At the hearing, Mr. Scalisi and Mr. Exum requested to withdraw as counsel due to Thomas's complaints and insistence that they proceed on an alibi defense which "would be a subordination of perjury and at a minimum fraud." (Sealed 2-F RT 397-400; 3 CT 703.) The motion to withdraw as counsel as well as the *Marsden* motion were denied. (Sealed 2-F RT 400-401; 3 CT 703.)

On November 7, 2007, trial counsel reported that Thomas was refusing to take an MRI test which was important for their penalty phase preparation. (Sealed 10A RT 2566-2568.)

On November 15, 2007, trial counsel informed the court that Thomas was instructing them not to argue for life without possibility of parole, Thomas intended to testify at the penalty phase in a manner which would undermine counsels' credibility in arguing for a life sentence, and that Thomas sought a death verdict for an "enriched" appellate process. (Sealed 13A RT 2442-2845.) Thomas confirmed counsel's representations. (Sealed 13-A RT 2845-2846.)

On November 27, 2007, prior to guilt phase closing arguments, Thomas made yet another *Marsden* motion, which the trial court heard and denied. (Sealed 13-B RT 2855-2859; 16 Supp. CT 4285-4286.) In the hearing, Thomas complained that trial counsel failed to interview potential alibi witnesses in the guilt phase and adequately attack the Texas conviction. (Sealed 13-B RT 2855-2856.)

On December 10, 2007, the date of the bifurcated hearing for the prior-murder special circumstance, Thomas refused to dress in civilian clothing as he had done throughout trial despite counsel's strong recommendation that he not appear before the jury in his jail jumpsuit. (14 RT 3029-3031; 17 Supp. CT 4375.) On the same date, Thomas threatened to ask for another *Marsden* hearing or a hearing for self-representation pursuant to *Faretta v. California* (1975) 422 U.S. 806, if appointed counsel did not file a motion for new trial after the penalty phase. (14 RT 3050.)

On the same date, trial counsel discussed with the court Thomas's request that the court order them not to present any mitigation witnesses and "that he be allowed to, basically, run his own penalty phase." (Sealed 14-B RT 3074-3075.) Thomas confirmed that he intended to request imposition of the death penalty to enhance his appellate opportunities. (Sealed 14-B RT 3077-3083.)

Following the jury's verdict in the bifurcated hearing, Thomas formally made a *Faretta* motion. (14 RT 3090; 17 Supp. CT 4377.) At the

court's request, Thomas completed a standard form to proceed in propria persona which described his education, his legal rights, the disadvantages of self-representation, his understanding of the charges and consequences, and the court's advice and recommendation against self-representation. (14 RT 3090-3092; 17 Supp. CT 4380-4385.)

During the hearing on the motion, the trial court cited *People v. Hardy* (1992) 2 Cal.4th 86, *People v. Hamilton* (1988) 45 Cal.3d 351, and *People v. Mayfield, supra,* 14 Cal.4th 668, for the applicable law regarding untimely midtrial *Faretta* requests in capital cases. (14 RT 3092-9094.) When asked the reasons for his motion, Thomas told the court that he wanted to represent himself for "the enrichment of appellate resources," he did not agree with appointed counsels' strategy in the penalty or guilt phases, he was seeking to serve his best interest in the penalty phase, he was not seeking any delays or continuances, and he previously withdrew his pro per status due to a lack of adequate funds to carry out his strategy. (14 RT 3095.)

The prosecutor took no position on Thomas's request, while observing that a defendant's opposition to mitigation evidence or intent to request the death penalty is not a factor to be considered and a court can condition a grant of self-representation on no further delays. (14 RT 3096-3097.) The prosecutor also commented that Thomas may not have access to unredacted discovery which had been provided to counsel, Thomas might be giving up certain appellate issues as his own counsel, Thomas may experience difficulties calling witnesses or obtaining funds at this point, the shackling of Thomas in court should remain the same, and Thomas would not be able to allude to facts not in evidence in closing argument. (14 RT 3097-3098.) The prosecutor further reminded the court of the difficulties Thomas experienced during his prior self-representation. (14 RT 3098-3099.) Thomas retorted that he already had ample time to

review all discovery, he was not seeking additional continuances, he only sought to keep the services of a paralegal, and he wanted "to simply alleviate some of the stress or burden on the hearts and minds of the jury to let them know [the penalty], it's not as severe as, you know, you think." (14 RT 3099-3100.)

Thereafter, the trial court denied the *Faretta* motion as follows:

> Okay, I did read the *Bloom*[113] and *Clark*[114] cases, and I agree with [the prosecutor's] recitation of those issues. And I would not deny the motion just because of a position that Mr. Thomas has taken.
>
> Looking at the factors that I am to consider in reminding all that the issue is not a constitutional one, but an exercise of the Court's discretion, first of all, the reasons for the defendant's request, he has stated those, and I understand them. I don't believe they are compelling. They are not irrational or aberrant, and I don't question – I don't have any reason to question Mr. Thomas's mental capacity to address this issue and ask for it, but I don't find the reasons for his request in my view to be overwhelming or clearly pivotal.
>
> Secondly, regarding the quality of counsel's representation of the defendant, obviously, these two attorneys, Mr. Scalisi and Mr. Exum, have been in the case since I was assigned to it, and their representation in my view has been excellent. They're both very skilled and articulate, and I would say ethical and devoted attorneys, so that quality is not something I think that is called into question here, nor do I have any qualms about the quality of that representation.
>
> The third factor to be considered is the defendant's prior proclivity to substitute counsel. And, obviously, there is agreed that there was only one time previous, but it did last for quite some time. And I think I either read the quote that [the prosecutor] said in one of the transcripts or it was quoted somewhere, because I did recall Judge Luebs saying something

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[113] *People v. Bloom* (1989) 48 Cal.3d 1194.
[114] *People v. Clark* (1992) 3 Cal.4th 41.

along the lines that [the prosecutor] said about if a request were made to go back to self-representation that the Court would be slow to grant that. But in any event, there is just the one.

Fourthly, the length or stage – and stage of the proceedings. It is estimated that the balance of the trial, the penalty phase of the trial, would be tomorrow through Friday or Monday. If not an overwhelming length, it's certainly a pivotal state of the proceedings as far as, obviously, the penalty that the jury will impose. And I understand very well Mr. Thomas's position on that and his desires in that respect. So I have considered that and the stage that we are at.

The fifth factor to be considered is the disruption or delay which might reasonably be expected to follow the granting of such a motion. On – in that respect, Mr. Thomas has stated he's not seeking a delay so that – and I would not be inclined to grant one if I were asked that by either side at this time in any event.

As to the disruption that might be occasioned by that, there is one aspect that is somewhat troubling, one of the cases that I read – and I don't recall which one it was now – the trial judge made some reference to the difficulty a restrained defendant would have if – trying to stand up and make motions and so forth. And while the court said that was not really an appropriate consideration to be made regarding this issue there is an aspect of it that is, I think, worthy of noting and that is as [the prosecutor] commented as well.

Mr. Thomas has comported himself in the courtroom appropriately throughout the trial. He has not been disruptive in any sense. But I also do not see a basis for the Court to change the security that the Court imposed and that was restraining him in his chair. I don't see a reason to change that, and that that does make somewhat of a disruption if he were to represent himself in that. For instance, exhibits would have to be handed to him for his examination or pointing out something. I think there would be difficulty if he wanted to use the device we refer to as the ELMO which has been used extensively throughout the trial. That would not be available.

I can see that there would be some if not major, minor disruption because of the inconvenience that would put on him as an attorney representing himself.

So that's just something I make by way of observation. It's not a huge concern, but it is something I observed when I read that case, and then [the prosecutor's] comments also suggested that.

(14 RT 3100-3102.)

After Thomas commented that he was not contesting or requesting any changes regarding restraints, not intending to use the ELMO or cross-examine the prosecution witnesses and simply wanted to address the jury and give a closing statement (14 RT 3102-3103), the court continued:

Well, I appreciate that information, Mr. Thomas.

As the form that Mr. Thomas reviewed and signed and initialed indicates, it is always my strong advice to virtually ever[y] defendant that I've ever had to address this issue with that it is ordinarily a mistake to represent one's self. I don't see any reason to depart from that advice as that was my advice that was in the form that he reviewed and initialed. But my advice is not necessarily compelling on somebody else.

However, looking at the factors that I've gone through and exercising my discretion, I do not think that it is appropriate at this time to grant the motion to represent himself. And it seems to me that, as I said, I'm not finding his reasons to be compelling or of great weight in this.

Secondly, the quality of his counsel's representation, as I said, is well above the norm. He had previously represented himself, not in any improper way.

The stage of the proceedings, I think, is an important consideration. And although there would not be a delay, there is the – notwithstanding what Mr. Thomas has said, there is the portent of some disruption simply because of where we are in the nature of the proceedings. So I'm going to deny the motion to represent himself.

(14 RT 3103; 17 Supp. CT 4379.)

B. Thomas's Untimely Request for Self-Representation Was Properly Denied

As correctly observed by the trial court, the relevant law for Thomas's motion was provided in *People v. Hardy, supra,* 2 Cal.4th 86.

> A criminal defendant has a federal constitutional right to represent himself without an attorney if he voluntarily and intelligently so chooses. [Citations.] In *People v. Windham* (1977) 19 Cal.3d 121, 137 Cal.Rptr. 8, 560 P.2d 1187, this court held that, "in order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial." [Citation.] "However, once a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court." [Citations.] A motion for self-representation made during the guilt phase deliberations in a capital trial is untimely. [Citation.] It follows a fortiori that Hardy's motion, made *after* the guilt phase verdicts had been returned, was also untimely.

(*Id.* at pp. 193-194, citing *Faretta v. California, supra,* 422 U.S. 806, *People v. Moore* (1988) 47 Cal.3d 63, 79, *People v. Bloom, supra,* 48 Cal.3d at p. 1220, and *People v. Hamilton, supra,* 45 Cal.3d at p. 369 ["the penalty phase has no separate formal existence but is merely a stage in a unitary capital trial"]; accord *People v. Roldan* (2005) 35 Cal.4th 646, 685-686, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22; *People v. Bradford* (1997) 15 Cal.4th 1229, 1365; *People v. Mayfield, supra,* 14 Cal.4th at p. 810.)

Like the defendant in *Clark*, Thomas's motion for self-representation was made after the jury returned all of its guilt phase verdicts and the penalty phase was soon to commence. Accordingly, Thomas's motion was untimely, and the trial court's ruling is reviewed for abuse of discretion. (*People v. Bradford, supra,* 15 Cal.4th at p. 1365; *People v. Hardy, supra,* 2 Cal.4th at pp. 195-197.)

When assessing such untimely, midtrial requests for self-representation, "the trial court should inquire into the defendant's reasons for the requests" and consider " 'the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.' " (*People v. Hardy, supra,* 2 Cal.4th at p. 195, quoting *People v. Windham, supra,* 19 Cal.3d at p. 128; accord *People v. Bradford, supra,* 15 Cal.4th at p. 1365.) The trial court considered all of these factors before ruling on Thomas's request. (14 RT 3092-3103.)

The court found Thomas's reasons for self-representation were not "compelling," that appointed counsels' representation of Thomas was "well above the norm," that the stage of the proceedings was "important," and "the portent of some disruption" given the nature of the current proceedings. (14 RT 3103.) Like *People v. Mayfield, supra,* 14 Cal.4th 668, "Because two of these factors – the quality of counsel's representation and the disruption that granting the motion would cause – weighed strongly against the granting of the motion, denial of the motion was not an abuse of the trial court's discretion." (*Id.* at p. 810.)

Thomas seeks to escape the abuse of discretion standard by arguing his *Faretta* motion was timely under *Silagy v. Peters* (7th Cir. 1990) 905 F.2d 986. (AOB 260.) In *Hardy*, this Court observed that *Silagy* merely stood for the proposition that a trial court retains discretion to grant post-guilt phase *Faretta* motions in capital cases, which is consistent with California's jurisprudence on untimely motions. (*People v. Hardy, supra,* 2 Cal.4th at p. 197.) Thomas's definition of timeliness as "a reasonable time in advance of the hearing or proceeding such that the request occasions no delay" conflates the timeliness requirement with the factors to be considered in ruling on untimely motions. (See AOB 263.) Under this

Court's longstanding precedents dating back to *Windham*, Thomas's midtrial motion for self-representation was untimely.

Thomas fails to analyze all relevant factors as he argues he "had not demonstrated a proclivity to request self-representation," while minimizing the potential for disruption and totally ignoring the quality of appointed counsels' representation and the length and stage of the proceedings. (AOB 263-264.) Moreover, the factor to be considered by the trial court is " 'the defendant's prior proclivity to substitute counsel,' " not a proclivity for requesting self-representation. (See *People v. Hardy, supra,* 2 Cal.4th at p. 195.) In light of Thomas's *Marsden* motions on November 6, 2006 and February 21, 2007, which were subsequently withdrawn (1 CT 160, 163-164, 169, 178-185, 194-201; Sealed 1-A RT 123-133), his *Marsden* motions on September 12, October 3 and November 27, 2007, which were denied (3 CT 695, 703-707; 16 Supp. CT 4285-4286; Sealed 2-E RT 384-388; Sealed 2-F RT 397-400; 13-B RT 2855-2859), and his threat to ask for yet another *Marsden* hearing on December 10, 2007 (14 RT 3050), Thomas's proclivity to substitute counsel weighed heavily against granting the untimely *Faretta* motion.

Lastly, Thomas argues his limitations due to shackling was not a legitimate basis to deny his motion. (AOB 264.) However, that was "not a huge concern" of the trial court. (14 RT 3102.) Moreover, the consideration of irrelevant factors does not undermine an otherwise proper exercise of discretion in denying an untimely *Faretta* motion. (See *People v. Hamilton, supra,* 45 Cal.3d at p. 369.)

As previously stated, abuse of discretion is a deferential standard of review. (*People v. Trujeque, supra*, 61 Cal.4th at p. 278; *People v. Jablonski, supra,* 37 Cal.4th at p. 821; *People v. Pollock, supra,* 32 Cal.4th at p. 1171; *People v. Williams, supra,* 17 Cal.4th at p. 162.) "A court abuses its discretion if it acts 'in an arbitrary, capricious, or patently absurd

manner' " (*People v. Boyce, supra,* 59 Cal.4th at p. 687, quoting *People v. Thomas* (2012) 53 Cal.4th 771, 806) or "when its ruling 'falls outside the bounds of reason' " (*People v. Osband, supra,* 13 Cal.4th at p. 666, quoting *People v. DeSantis, supra,* 2 Cal.4th at p. 1226). Although Thomas obviously disagrees with the trial court's ruling, he cannot show any such abuse of discretion.

C. The Denial of the Untimely *Faretta* Motion Did Not Prejudice Thomas

In addition to Thomas's failure to show an abuse of discretion, any error in the denial of his *Faretta* motion was harmless. As discussed above, Thomas's post-guilt phase request for self-representation was untimely. Unlike a timely *Faretta* motion, an untimely request for self-representation is not a matter of constitutional magnitude. (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 594.) Thus, whereas the erroneous denial of a timely *Faretta* motion is reversible per se, any error in the denial of an untimely *Faretta* motion is reviewed for harmless error under *People v. Watson, supra,* 46 Cal.2d 818. (*People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058; *People v. Nicholson, supra,* 24 Cal.App.4th at p. 594; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050.)

Under *Watson*, reversal is unwarranted unless " 'an examination of the entire cause, including the evidence' " shows "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d at p. 836.) No such prejudice resulted from the denial of Thomas's *Faretta* motion.

For purposes of such prejudice analysis, it is "proper to evaluate the error in the light of the *subsequent* proceedings." (*People v. Rivers, supra,* 20 Cal.App.4th at p. 1052 [emphasis in original].) Thomas's stated reason for representing himself was to obtain a death verdict for its "enrichment of appellate resources" rather than trial counsels' strategy to secure a life

without possibility of parole penalty verdict. (14 RT 3095.) The jury returned a death verdict. (18 Supp. CT 4517; 18 RT 3723-3724.) Thus, Thomas's sole purpose for the *Faretta* motion was satisfied despite the trial court's ruling.[115]

Even if Thomas were now to change his position to preferring a life sentence, it is not reasonably probable that he would have received such a verdict if the *Faretta* motion had been granted because as his own counsel he would not have presented any mitigation evidence, he would have declined to cross-examine the prosecution's penalty phase witnesses and he would have asked the jury to impose the death penalty. (14 RT 3095, 3099-3100, 3102-3103.) Accordingly, any error in the denial of Thomas's untimely *Faretta* motion was harmless, and the penalty judgment should be affirmed.

XIV. THE TRIAL COURT DID NOT COERCE A PENALTY VERDICT

Thomas claims the trial court coerced a verdict in the penalty phase in violation of section 1140 as well as his rights to due process and a fair, reliable verdict and the prohibitions against cruel and unusual punishment under the state and federal constitutions by forcing the jurors to continue deliberations after declaring a deadlock. (AOB 269-284.) Thomas's claim is meritless.

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[115] In *People v. Nicholson, supra,* 24 Cal.App.4th 584, the court found the erroneous denial of an untimely motion was not harmless because it might have been to the defendants' advantage to conduct their own voir dire and address the jury in opening statements and closing arguments without being subject to cross-examination. (*Id.* at p. 594.) Here in contrast, there were no voir dire considerations since the same jury selected for the guilt phase heard the penalty phase. (14 RT 3089; 1 Supp. CT 4377, 4406.) Moreover, and Thomas had the opportunity to have his complete "warrior" statement read to the jury in addition to his direct testimony and cross-examination. (16 RT 3365.)

A. Relevant Proceedings

On December 19, 2007, the jury retired to commence penalty phase deliberations at 2:29 p.m. (17 Supp. CT 4463; 18 RT 3702.) At 3:01 p.m., the jurors requested readback of Dr. Stalcup's direct examination and a re-reading of Thomas's personally written statement. The jurors also asked to recess for the day and start "fresh" the next morning, indicating that they felt "overwhelmed" either "today" or "total." (18 RT 3705; 17 Supp. CT 4463; 18 Supp. CT 4511.) The trial court excused the jury for the day. (18 RT 3706; 17 Supp. CT 4463.) Thereafter, the court and counsel agreed to have the court reporter reread to the jury Dr. Stalcup's direct examination and the portion of Thomas's direct examination where defense counsel read the "Warrior" statement.[116] (18 RT 3707-3708; 17 Supp. CT 4463.) Defense counsel noted that Dr. Stalcup's testimony was more than two hours long. (18 RT 3707.)

At 10:00 a.m. on December 20, 2007, the jury resumed deliberations and the court reporter provided the requested readback of testimony. (18 Supp. CT 4512.) At 11:16 a.m., the jurors sent a note to the court which stated that Juror No. 11 was not feeling well and requested an early recess. (18 Supp. CT 4512, 4513.) At 12:05 p.m., the court permitted the jury to recess for the day. (18 Supp. CT 4512, 4514.)

At 9:30 a.m. on December 21, 2007, the jury resumed deliberations. (18 Supp. CT 4515.) At 12:00 p.m., the jurors submitted a note to the court which read, "We are deadlocked 11 to 1. What do we do from here?" (18 Sup. CT 4515; 18 RT 3709.) The court informed counsel that, as the foreperson handed the note to the bailiff, he "said something to the effect that if they were directed to come back and further deliberate this afternoon,

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[116] Thomas waived his right to be present during the readbacks in the deliberation room. (18 RT 3706-3707; 17 Supp. CT 4463.)

that they would prefer to end deliberations for today as they are, I think, exhausted or words to that effect, something along those lines." (18 RT 309.)

The trial court indicated that it would bring the jurors in, ask how many ballots they have taken and perhaps ask the numerical breakdown of the votes without reference to the verdicts they represent. (18 RT 3709.) The court recalled its promise to the jurors not to be in session over Christmas and New Years, indicating that they would have the option to reconvene before the holidays if ordered to deliberate further. (18 RT 3709-3710.) The court also noted that Juror No. 4 had rescheduled a medical appointment for January 7, 2008. (18 RT 3710.)

When defense counsel asked if it intended to ask the jurors whether they thought further deliberations would be beneficial, the court stated it had some reluctance because the jurors had not been deliberating very long due to two jurors not feeling well. (18 RT 3710-3711.) However, the court agreed to inquire of the jurors as requested by counsel, observing that it "is not as meaningful as it is after they've deliberated a long time." (18 RT 3711.)

Subsequently, the jurors were brought into the courtroom and asked about their note. (18 RT 3712; 18 Supp. CT 4515.) Upon inquiry of the court, the foreperson stated that the jurors had taken three or four ballots. (18 RT 3712-3713.) Three ballots taken the previous day were "6 – 6/4 and then 2."[117] (18 RT 3713.) A fourth ballot taken that day was "11 to 1." (18 RT 3713.) As requested by the court, the foreperson did not indicate which verdict was represented by any votes. (18 RT 3713.)

The court then engaged in the following colloquy with the foreperson:

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[117] It appears that the foreperson was describing a series of votes of 6-6, 8-4 and 10-2.

THE COURT: Okay. Do you have a – an opinion as the foreperson, (TJ09), whether or not further deliberations could be productive, that is, whether it could result in a unanimous verdict?

JUROR NO. 9: Your Honor, it's so thick and heated in that room right now. And we've all came together as mature adults here and tried to, you know, work it out and weigh the evidence. I really don't think so, your Honor. I don't think –

THE COURT: Okay.

JUROR NO. 9: I don't think further negotiations will help us at this point in time.

JUROR NO. 9:[118] Okay.

THE COURT: I think I received word when I got the note that the feeling was that if I asked or directed the jury to deliberate further that because of the fatigue and perhaps some frustration the jury would like to go home and come back sometime other than today to continue? Is that a general feeling from your perspective, (TJ09)?

JUROR NO. 9: Your Honor, I think the jury's, kind of, frustrated, tired. We're – I think a lot of people are ready to go back to work and just, kind of, end this, and I don't think people would like to come back next year, to be honest.

THE COURT: Okay. What I'm going to do is ask each of you by saying juror number, juror number 2, and so forth. The question is do you believe that further deliberations would be productive? In other words, is there a reasonable probability that further deliberations would end in a verdict?

(18 RT 3714.)

Jurors No. 1, 2, 3, 4 and 5 answered, "No." (18 RT 3714.) Juror No. 6 answered, "Absolutely not." (18 RT 3715.) Juror No. 7 responded, "Can I reserve my answer until after I've heard all the answers?" (18 RT 3715.)

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[118] It appears that the transcript here erroneously attributes a comment by the trial court to the foreperson.

Juror No. 8 answered, "Probably not." (18 RT 3715.) After the court noted that Juror No. 9, the foreperson, had already expressed his view, Juror No. 10 answered, "I'd also say probably not – probably not." (18 RT 3715.) Juror No. 11 answered, "Maybe." (18 RT 3715.) Juror No. 12 answered, "Probably not." (18 RT 3715.)

The trial court asked the jurors to consider when they would like to return if directed to deliberate further. (18 RT 3715-3716.) The court then asked for Juror No. 7's thoughts having heard the other jurors' responses to the earlier question. (17 RT 3716.) Juror No. 7 stated: "Um, I would say no. But I have one question, if it's proper to ask. If we don't make a determination, what happens?" (17 RT 3716.) The court replied that it was "nothing you should be concerned about at this point. (17 RT 3716.)

Thereafter, the court excused the jurors from the courtroom and discussed the matter with counsel. (18 RT 3716; 18 Supp. CT 4515-4516.) Defense counsel requested a mistrial, arguing there were "at least eight very strong no's, a couple of equivocal maybe's," and said that "it doesn't look good." (18 RT 3716.) The court observed that three or four of the jurors were equivocal, but it was unknown whether or not they were in the majority or minority. (18 RT 3716-3717.) The prosecutor asked that deliberations continue in light of "one juror saying maybe and two or three saying probably not, but not it can't happen" after the equivalent of only one day of deliberations. (18 RT 3717.)

The court denied the mistrial motion as follows:

> Well, my thought is because they haven't – I don't think the number of hours is such that – and that's not necessarily the sole barometer of what should be done, but I don't think they've put in sufficient time that I feel comfortable telling them to quit trying to decide the case. They did spend about a week's time deliberating previously, in the guilt phase, which means to me that they were looking at it carefully and thoroughly and they took that time. And so I think I'm going to ask them to devote

some more time to it. And so I'll find out from them what will work best as far as scheduling that.

So I'll deny the motion for a mistrial at this time absent some further information that makes me think I should reconsider that. We'll have the jury come back in and I'll discuss their deliberations a little further.

(18 RT 3718-3719; 18 Supp. CT 4516.)

When the jurors returned to the courtroom, the court engaged in the following colloquy with several of them:

THE COURT: Ladies and gentlemen, I want to thank you for your service so far. I'm going to direct that you continue to deliberate. If you don't reach a verdict today, what date would work best for all of you to come back?

JUROR NO. 9: The 3rd, your Honor.

THE COURT: Okay. Then what I'm going to do is direct you go deliberate. And when you finish for today, then I'll direct that you return for further deliberations on January 3rd at 9:30, okay.

JUROR NO. 9: Got it.

THE COURT [*sic*]: Thank you very much, your Honor.

JUROR NO. 11: We're done. No more today. I'm done.

JUROR NO. 7: I'll be honest with you not speaking about him, but tensions are really high. We discussed it when we went back that rather than – there's a lot of pressure being put on people, and we all agreed that we would let what we discussed sink in and come back with how our hearts truly felt on the 3rd.

THE COURT: So you've reached – you've reached as far as you can go today?

(Collectively answered in the affirmative.)

THE COURT: Is there anybody that doesn't feel that way? No hands are raised.

> I'm going to direct, folks, that you go home, conclude for today and come back on January 3rd, then, at 9:30, okay. Take care of yourselves.

(18 RT 3719-3720.) After the jury was excused the court stated that the jurors appeared very tired. (18 RT 3720.)

On January 3, 2008, the jurors resumed deliberations at 11:58 a.m., recessed between 1:15 and 1:36 p.m., and reached a penalty verdict at 2:17 p.m. (18 Supp. CT 4517.) When polled, each juror stated that the verdict form fixing the penalty at death reflected his or her individual verdict. (18 RT 3722-3724; 18 Supp. CT 4517.)

B. Thomas Fails to Show the Trial Court's Response to the Jury Deadlock Was an Abuse of Discretion

The applicable legal principles for addressing a report of jury deadlock are well established. (*People v. Sheldon* (1989) 48 Cal.3d 935, 959.) Section 1140 states:

> Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

Under section 1140,

> "[t]he determination whether there is reasonable probability of agreement rests in the sound discretion of the trial court. [Citation.] The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' [Citation.]"

(*Ibid.*, quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 775; see also *People v. Sandoval* (1992) 4 Cal.4th 155, 195; *People v. Miller* (1990) 50 Cal.3d 954, 994.)

As previously stated, "[a] court abuses its discretion if it acts 'in an arbitrary, capricious, or patently absurd manner' " (*People v. Boyce, supra,* 59 Cal.4th at p. 687, quoting *People v. Thomas, supra,* 53 Cal.4th at p. 806) or "when its ruling 'falls outside the bounds of reason' " (*People v. Osband, supra,* 13 Cal.4th at p. 666, quoting *People v. DeSantis, supra,* 2 Cal.4th at p. 1226). Thomas shows no such abuse of discretion here.

It is proper for a trial court responding to a jury's declaration of deadlock "to ascertain the ballots taken and the numerical division (without indication of direction) and to instruct the jury to continue deliberations." (See *People v. Rodriguez, supra,* 42 Cal.3d at pp. 774-775.) Like *People v. Miller, supra,* 50 Cal.3d at p. 994, "Nothing in the record suggests the jury was coerced in any way. The court did no more than inquire as to the 'reasonable probability' of agreement, as it is authorized to determine under section 1140." (See 18 RT 3712-3716.) Considering that the jury had to reconsider all the guilt phase evidence concerning the Noriega and Hartwell murders in addition to the prosecution and defense evidence – including the testimony of Thomas and his expert – presented in the penalty phase and make the weightiest of decisions,

> "the trial judge could reasonably conclude that his direction of further deliberations would be perceived as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered."

(*Ibid.*, quoting *People v. Rodriguez, supra,* 42 Cal.3d at p. 775.)

Thomas's jury deliberated only five hours and seven minutes before reporting a deadlock. (17 Supp. CT 4463 [2:29 p.m. to 3:01 p.m. on Dec. 19]; 18 Supp. CT 4512-4514 [10:00 a.m. to 12:05 p.m. on Dec. 20], 4515 [9:30 a.m. to 12:00 p.m. on Dec. 21].) Given that the two hours and five minutes of jury time on December 20 was primarily consumed by the readback of Dr. Stalcup's testimony and re-reading of Thomas's "Warrior"

statement, the amount of time the jurors expended in actual deliberations before reporting a deadlock was closer to three hours.[119] As the trial court and prosecutor correctly observed, this was not a sufficient amount of time to declare a mistrial. (See, e.g., *People v. Sandoval, supra,* 4 Cal.4th at pp. 194-197 [no coercion or abuse of discretion in ordering penalty deliberations to continue where jurors reported deadlock after deliberating 14 ¼ hours]; *People v. Sheldon, supra,* 48 Cal.3d at pp. 958-959 [no abuse of discretion in denying mistrial motion and ordering resumption of deliberations where jurors declared an eleven-to-one deadlock after two days of deliberations]; *People v. Rodriguez, supra,* 42 Cal.3d at pp. 774-777 [no abuse or coercion where jurors reported they were "hopelessly deadlocked" after 18 days of deliberations and four other expressions of impasse].)

Moreover, the jury was making considerable progress by moving from a 6/6 split to 8/4, 10/2 and 11/1. (Compare 18 RT 3712-3713 with *Bryant, supra,* 60 Cal.4th at p. 459 ["results had 'gone from six [to] six through just about every number to eleven to one' " after at least eight ballots].) The trial court's decision is even more reasonable in light of Juror No. 11 having indicated that further deliberations might be helpful and Jurors Nos. 8, 10 and 12 qualifying their answers as "probably not." (18 RT 3715; see *People v. Sandoval, supra,* 4 Cal.4th at p. 195 [no abuse of discretion where each juror answered, "No," when asked whether there was a reasonable probability that further deliberations would result in a verdict]; *People v. Sheldon, supra,* 48 Cal.3d at p. 959 [court properly exercised its discretion where several jurors indicated that reinstruction might produce a verdict].) The fact that the jury reached a penalty verdict

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[119] As previously stated, Dr. Stalcup's testimony was more than two hours long. (18 RT 3707.)

after resuming deliberations bore out the trial court's conclusion that additional deliberations would be productive. (See *People v. Rodriguez, supra,* 42 Cal.3d at pp. 775-776.)

Once again, Thomas fails to apply the appropriate standard of review. Citing *Jiminez v. Myers* (9th Cir. 1993) 40 F.3d 976, 979, Thomas believes his claim presents "a mixed question of law and fact requiring the application of legal principles to the historical facts" and de novo appellate review. (AOB 274.) Thomas is mistaken. It is well-established that a trial court's decision whether or not to declare a mistrial under section 1140 is reviewed for abuse of discretion. (*People v. Sandoval, supra,* 4 Cal.4th at p. 195; *People v. Miller, supra,* 50 Cal.3d at p. 994; *People v. Sheldon, supra,* 48 Cal.3d at p. 959; *People v. Rodriguez, supra,* 42 Cal.3d at p. 775.) "When an appellant fails to apply the appropriate standard of review, the argument lacks legal force." (*People v. Foss, supra,* 155 Cal.App.4th at p. 126; see also *Aurora S.A. v. Poizner, supra,* 198 Cal.App.4th at p. 1446; *Shaw v. County of Santa Cruz, supra,* 170 Cal.App.4th at p. 281.)

Thomas attempts to make much of the jurors "frustration level" in support of his claim. (See AOB 275.) In *Bryant*, the foreperson indicated that the jury "had 'reached a point of exasperation' " in its penalty deliberations for codefendant Smith. (*Bryant, supra,* 60 Cal.4th at p. 459.) Yet, no jury coercion was found. (*Id.* at pp. 460-461.)

Citing *Jimenez v. Myers, supra,* 40 F.3d 976, and *Brasfield v. United States* (1926) 272 U.S. 448, Thomas argues the trial court's inquiry into the numerical division of the jurors also amounted to coercion. (AOB 276-279.) This argument was previously rejected in *Bryant*, where this Court explained:

> We are not persuaded by the court's view in *Jiminez v. Myers* (9th Cir.1993) 40 F.3d 976, 980, upon which defendants rely, that similar circumstances "amounted to giving the jury a de facto *Allen* charge [*Allen v. United States* (1896) 164 U.S.

> 492, 17 S.Ct. 154, 41 L.Ed. 528]," improperly coercing a verdict. (*Jiminez*, at pp. 980–981.) A trial court faced with a reportedly deadlocked jury is permitted to declare a mistrial if, "at the expiration of such time as the court may deem proper, it *satisfactorily appears* that there is *no reasonable probability* that the jury can agree." (§ 1140, italics added.) A court must be permitted to undertake some inquiry about the state of deliberations to determine if, despite the report of a stalemate, there is a reasonable probability of future agreement. We have consistently rejected the federal rule that inquiries into the numerical division of the jurors are inherently coercive. (*People v. Homick* (2012) 55 Cal.4th 816, 901, 150 Cal.Rptr.3d 1, 289 P.3d 791 (Homick); see *Brasfield v. United States* (1926) 272 U.S. 448, 450, 47 S.Ct. 135, 71 L.Ed. 345.) The trial court's mention of the jury's progress explained the court's direction to continue deliberations. It did not encourage any juror to reevaluate a position or push for any verdict.

(*Bryant, supra,* 60 Cal.4th at pp. 462-463; see *People v. Rodriguez, supra,* 42 Cal.3d at p. 776, fn. 14 ["*Brasfield* is a rule of procedure not binding on the states"].)

The trial court's decision to order further penalty deliberations and deny Thomas's request for a mistrial was not arbitrary, capricious, patently absurd or outside the bounds of reason. To the contrary, the trial court's response in this case provides a model for other courts to follow in dealing with juries declaring deadlock. Accordingly, Thomas fails to show an abuse of discretion.

Since there was no abuse of discretion or jury coercion, Thomas's rights to due process, fair trial, trial by jury and a reliable verdict and the prohibitions against cruel and unusual punishment under the state and federal constitution were not violated. (*People v. Fuiava, supra,* 53 Cal.4th at p. 670; *People v. Foster, supra,* 50 Cal.4th at p. 1335; *People v. Thornton, supra,* 41 Cal.4th at p. 464; *People v. Griffin, supra,* 33 Cal.4th at p. 579, fn. 19; *People v. Burgener, supra,* 29 Cal.4th at p. 873; *People v.*

Hart, supra, 20 Cal.4th at p. 617, fn. 19; *People v. Arauz, supra,* 210 Cal.App.4th at pp. 1402-1403.) The penalty judgment should be affirmed.

XV. THE TRIAL COURT'S INQUIRY INTO THE JURY'S NUMERICAL DIVISION IN DECIDING WHETHER TO ORDER FURTHER PENALTY DELIBERATIONS DID NOT VIOLATE SECTION 1140 OR THOMAS'S CONSTITUTIONAL RIGHTS

Thomas claims that the trial court's inquiry into the numerical split of the jurors before deciding whether to declare a mistrial violated section 1140 as well as his rights to due process and jury trial and the prohibition against cruel and unusual punishment under the state and federal constitutions. (AOB 285-291.) The claim is forfeited and meritless.

A. Forfeiture

In deciding whether to declare a mistrial or order further penalty deliberations, the trial court inquired into the balloting and numerical division of the jurors without having them reveal which penalty the votes represented. (18 RT 3709, 3712-3716.) Thomas did not object to this procedure in the trial court. (18 RT 3709-3720.) Accordingly, Thomas's claims of statutory and constitutional error based on the inquiry were forfeited. (See *People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 1038 [failure to object to trial court's scheduling comments to jury forfeited claims])

Thomas contends that it would have been futile to have objected to the court's inquiry into the jury's numerical division because the practice was approved at the time. (AOB 285-286, citing *People v. Carter* (1968) 68 Cal.2d 810.) However, the law has never *required* such inquiry by a trial court. (*People v. Lucas, supra,* 60 Cal.4th at p. 328, disapproved on another point in *People v. Romero and Self, supra,* 62 Cal.4th at p. 53, fn. 19; ["Although the court may make such an inquiry [citation], it is not required to do so."]; *People v. Debose, supra,* 59 Cal.4th at p. 210

["Although we have expressly approved of inquiring into a jury's numerical division in the event of a deadlock [citation], we have never held this to be mandatory."].) Thus, Thomas could have objected and convinced the trial court not to commit the error he alleges for the first time on appeal. Because an objection was not futile, Thomas's claims have been forfeited.

B. The Trial Court's Inquiry Was Proper

Notwithstanding forfeiture, Thomas's claims of statutory and constitutional error fail on the merits.

> The practice of inquiring into the jury's numerical division was expressly approved in *People v. Carter, supra*, 68 Cal.2d 810, and, despite a contrary rule of procedure in federal courts, has been expressly approved in *People v. Rodriguez, supra*, 42 Cal.3d at page 776, footnote 14. Any question that a different rule might apply at a penalty phase impasse was resolved by our decision in *People v. Sheldon, supra*, 48 Cal.3d at pages 958-960, where we rejected defendant's claim that it was "inherently coercive" to ask for a resumption of deliberations after learning of the jury's 11-1 vote in favor of death. In assessing the *effect* of the information on the trial court's handling of the jury impasse, it is not significant that, in *Sheldon*, the jury volunteered the information on numerical division before the court could request it.

(*People v. Breaux* (1991) 1 Cal.4th 281, 319, footnote omitted.) The federal rule to the contrary is "based solely on the high court's supervisory powers over the federal courts and not on constitutional provision." (*Id.* at p. 319, fn. 16.)

Thomas invites this Court to reconsider its holding in *Carter, supra,* 68 Cal.2d 810, in light of *Brasfield v. United States, supra,* 272 U.S. 448, and adopt the federal rule barring inquiries into a jury's numerical division upon a reported deadlock. (AOB 285-291.) This Court previously rejected similar invitations in *Bryant, supra,* 60 Cal.4th at pp. 462-463, *People v. Homick, supra,* 55 Cal.4th at p. 901, *People v. Valdez, supra,* 55 Cal.4th at p. 160, *People v. Howard* (2008) 42 Cal.4th 1000, 1030-1031, *People v.*

Proctor (1992) 4 Cal.4th 499, 539, *People v. Johnson* (1992) 3 Cal.4th 1183, 1254, and *People v. Rodriguez, supra,* 42 Cal.3d at p. 776, fn. 14.

As in *Valdez*, Thomas's recycled arguments provide no basis for reexamining this Court's precedents. (See *People v. Valdez, supra,* 55 Cal.4th at p. 160.) The penalty judgment should be affirmed.

XVI. SINCE ITS TRUE FINDINGS ON THE SPECIAL CIRCUMSTANCES MADE THOMAS ELIGIBLE FOR THE DEATH PENALTY, THE JURY WAS NOT REQUIRED TO FIND BEYOND A REASONABLE DOUBT THAT THE FACTORS IN AGGRAVATION OUTWEIGH THOSE IN MITIGATION IN ORDER TO IMPOSE THAT PENALTY

Thomas claims his rights to due process and an accurate jury determination of the facts and the prohibitions against cruel and unusual punishment in the state and federal constitutions were violated because the trial court failed to require the jury to find beyond a reasonable doubt that the factors in aggravation outweighed those in mitigation in order to impose the death penalty. Thomas argues that *Apprendi, supra,* 530 U.S. 270, and its progeny including *Ring v. Arizona* (2002) 536 U.S. 584, require such a burden of proof for the weighing of aggravating and mitigating factors in the penalty phase, and asks this Court to "change its path" of decisions holding otherwise. (AOB 292-306.) Because this Court's reasoning for repeatedly rejecting this *Apprendi* argument is constitutionally sound, Thomas's invitation to revisit the issue should be declined.

During discussions regarding penalty phase instructions, defense counsel objected to CALCRIM No. 766 ["Death Penalty: Weighing Process] in its standard form and requested that it be modified to require the jury to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors in order to return a death verdict, citing *Apprendi* as authority. (17 RT 3613-3614.) The trial court found *Apprendi* was not implicated because the jury's true finding on the special circumstances beyond a reasonable doubt rendered Thomas eligible for the

death penalty, and the factors in aggravation and the weighing of them did not increase the penalty. (17 RT 3614-3615.) Accordingly, the defense request to modify CALCRIM No. 766 was denied. (17 RT 3615.) The trial court was correct.

> In *Apprendi*, the court held that the Fourteenth Amendment's due process clause requires the state to submit to a jury, and prove beyond a reasonable doubt to the jury's unanimous satisfaction, every fact, other than a prior conviction, that increases the punishment for a crime beyond the maximum otherwise prescribed under state law. In *Ring*, the court held that *Apprendi* operates in the capital context.
>
> Contrary to defendant's assertion, as we recently made plain in *People v. Prieto* (2003) 30 Cal.4th 226, 262–263, 133 Cal.Rptr.2d 18, 66 P.3d 1123, *Ring* and *Apprendi* are inapplicable to the determination of penalty in a capital case under California law. Under the law of this state, all of the facts that increase the punishment for murder of the first degree – beyond the otherwise prescribed maximum of life imprisonment with possibility of parole to either life imprisonment without possibility of parole or death – already have been submitted to a jury (and proved beyond a reasonable doubt to the jury's unanimous satisfaction) in connection with at least one special circumstance, prior to the commencement of the penalty phase. (See § 190.2.) Therefore, at the penalty phase itself no further facts need to be proved in order to increase the punishment to either death or life imprisonment without possibility of parole, because both now are prescribed as potential penalties. It is true that at the penalty phase, the choice between death and life imprisonment without possibility of parole depends on a determination as to which of the two penalties is appropriate, which in turn depends on a determination whether the evidence in aggravation substantially outweighs that in mitigation. [Citations.] But as explained, the ultimate determination of the appropriateness of the penalty and the subordinate determination of the balance of evidence of aggravation and mitigation do not entail the finding of facts that can increase the punishment for murder of the first degree beyond the maximum otherwise prescribed. Moreover, those determinations do not amount to the finding of facts, but rather constitute a single fundamentally

> normative assessment [citations] that is outside the scope of *Ring* and *Apprendi*. [Citations.]

(*People v. Griffin, supra,* 33 Cal.4th at p. 595, disapproved on another point in *People v. Riccardi, supra,* 54 Cal.4th at p. 824, fn. 32; accord *People v. Duff, supra,* 58 Cal.4th at p. 569; *People v. Lightsey* (2012) 54 Cal.4th 668, 731; *People v. McDowell* (2012) 54 Cal.4th 395, 443; *People v. Jones, supra*, 54 Cal.4th at p. 86; *People v. Abel* (2012) 53 Cal.4th 891, 942; *People v. Moore, supra,* 51 Cal.4th at pp. 415-416; *People v. Taylor* (2009) 47 Cal.4th 850, 899; *People v. Loker* (2008) 44 Cal.4th 691, 755; *People v. Ward* (2005) 36 Cal.4th 186, 221.)

Thomas provides no new arguments which would warrant this Court revisiting or reconsidering its prior holdings. The penalty judgment should be affirmed.

XVII. CALIFORNIA'S DEATH PENALTY STATUTE, INSTRUCTIONS AND SENTENCING SCHEME ARE CONSTITUTIONAL

Thomas claims California's death penalty statute, instructions and sentencing scheme as a matter of law violate capital defendants' rights to due process and jury trial and the prohibitions against cruel and unusual punishment under the state and federal constitutions, acknowledging that his claims have previously been rejected by this Court. (AOB 307-326.) As Thomas presents no new arguments or persuasive reasons to revisit these issues, respondent urges this Court to reaffirm its prior holdings finding California's death penalty statute, relevant instructions and sentencing scheme constitutional.[120]

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[120] *People v. Schmeck* (2005) 37 Cal.4th 240, abrogated on another ground as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638, provides for an abbreviated form to present "routine or generic claims that [this Court] repeatedly [has] rejected and are presented to this [C]ourt primarily to preserve them for review by the federal courts. . . . when the (continued...)

Thomas contends California's death penalty scheme is unconstitutional because section 190.2 fails to meaningfully narrow the types of first degree murderers eligible for the death penalty. (AOB 310-311.) This contention was previously rejected in *People v. Sattiewhite, supra,* 59 Cal.4th at p. 489, *People v. Myles* (2012) 53 Cal.4th 1181, 1224-1225, *People v. Cowan, supra,* 50 Cal.4th at p. 508, *People v. Verdugo, supra,* 50 Cal.4th at p. 304, and *People v. Williams, supra,* 49 Cal.4th at p. 469.

Thomas claims factor (a) of section 190.3 is impermissibly overbroad because it permits the jurors to consider "the circumstance of the crime" without limitation, thus allowing arbitrary and capricious imposition of the death penalty. (AOB 311-313.) Similar claims were rejected in *People v. Sattiewhite, supra,* 59 Cal.4th at p. 489, *People v. Foster, supra,* 50 Cal.4th at pp. 1362-1364, *People v. Russell* (2010) 50 Cal.4th 1228, 1274, *People v. Jennings, supra,* 50 Cal.4th at pp. 688-689, and *People v. Lomax* (2010) 49 Cal.4th 530, 593.

Thomas contends the phrase "so substantial" as used in CALCRIM No. 766 is impermissibly vague. (AOB 313-314.) Arguments regarding the identical use of the phrase in CALJIC No. 888 were rejected in *People v. Romero and Self, supra,* 62 Cal.4th at p. 56, *People v. Seumanu, supra,* 61 Cal.4th at p. 1357, *People v. Williams* (2015) 61 Cal.4th 1244, 1287-1288, *People v. Nguyen, supra,* 61 Cal.4th at pp. 1091-1092, and *People v. Scott, supra,* 61 Cal.4th at p. 407.

(...continued)
defendant does no more than (i) identify the claim in the context of the facts, (ii) note that [this Court] previously [has] rejected the same or a similar claim in a prior decision, and (iii) ask [this Court] to reconsider that decision." (*Id.* at p. 304.) Pursuant to *Schmeck*, Thomas presents his challenges to California's death penalty statute in abbreviated fashion. (See AOB 307-308.)

Thomas argues the use of adjectives in section 190.3, factors (d) and (g), such as "extreme" and "substantial," acts as barriers to the jury's meaningful consideration of mitigating factors. (AOB 314.) This argument was previously rejected in *People v. Nguyen, supra,* 61 Cal.4th at p. 1091, *People v. Scott, supra,* 61 Cal.4th at p. 408, *People v. Valdez* (2012) 55 Cal.4th 82, 180, *People v. Avila, supra,* 38 Cal.4th at p. 614-615, and *People v. Monterroso* (2004) 34 Cal.4th 743, 796.

Thomas contends that juries should be instructed to consider certain statutory factors only in mitigation. (AOB 314-316.) This contention was rejected in *People v. Romero and Self, supra,* 62 Cal.4th at p. 57, *People v. Scott, supra,* 61 Cal.4th at p. 407, *People v. Dement* (2011) 53 Cal.4th 1, 56-57, *People v. Verdugo, supra,* 50 Cal.4th at p. 305, and *People v. Valencia, supra,* 43 Cal.4th at p. 311.

Thomas claims juries should unanimously agree on which uncharged crimes were proved before considering them in aggravation. (AOB 317-319.) There is no constitutional requirement for juror unanimity on factors in aggravation. (*People v. Romero and Self, supra,* 62 Cal.4th at p. 56; *People v. Nguyen, supra,* 61 Cal.4th at pp. 1090-1091, *People v. Scott, supra,* 61 Cal.4th at p. 407; *People v. Verdugo, supra,* 50 Cal.4th at p. 304; *People v. Monterroso, supra,* 34 Cal.4th at p. 796.)

Thomas contends the jury instructions were unconstitutional because they did not inform the jurors to return a verdict of life without possibility of parole if they found the factors in mitigation outweighed those in aggravation. (AOB 319-320.) This contention was rejected in *People v. Capistrano, supra,* 59 Cal.4th at p. 882, *People v. Hajek and Vo, supra,* 58 Cal.4th 1144, 1247, *People v. Suff* (2014) 58 Cal.4th 1013, 1078, *People v. Rogers, supra,* 57 Cal.4th at p. 349, and *People v. Lopez, supra,* 56 Cal.4th at pp. 1083-1084.

Thomas claims California's death penalty statute is unconstitutional because it does not require written findings by the jury. (AOB 320-322.) This claim was previously rejected in *People v. Trinh* (2014) 59 Cal.4th 216, 254, *People v. Sattiewhite, supra,* 59 Cal.4th at p. 490, *People v. Howard, supra,* 51 Cal.4th at p. 39, *People v. Foster, supra,* 50 Cal.4th at pp. 1365-1366, and *People v. Russell, supra,* 50 Cal.4th at p. 1274.

Thomas argues California's capital sentencing scheme is unconstitutional because it does not allow for intercase proportionality review. (AOB 323-324.) This argument was rejected in *People v. Trinh, supra,* 59 Cal.4th at p. 255, *People v. Sattiewhite, supra,* 59 Cal.4th at p. 490, *People v. Howard, supra,* 51 Cal.4th at p. 39, *People v. Foster, supra,* 50 Cal.4th at p. 1368, and *People v. Russell, supra,* 50 Cal.4th at p. 1274.

Thomas claims California employs "regular" use of the death penalty which violates or falls short of international norms and evolving standards of decency. (AOB 325-326.) This claim was rejected in *People v. Adams* (2014) 60 Cal.4th 541, 581-582, *People v. McKinzie* (2012) 54 Cal.4th 1302, 1365, *People v. Booker, supra,* 51 Cal.4th at p. 197, *People v. Howard, supra,* 51 Cal.4th at pp. 39-40, and *People v. Foster, supra,* 50 Cal.4th at p. 1368.

Thomas further argues that the cumulative or collective effect of the alleged defects in California's death penalty scheme render it unconstitutional, which he believes "presents a new claim" yet to be considered by this Court. (AOB 308-310.) Thomas is mistaken. This Court considered and rejected such challenges to California's death penalty scheme in *People v. Debose, supra,* 59 Cal.4th at p. 214, *People v. Williams, supra,* 58 Cal.4th at p. 296, *People v. Homick, supra,* 55 Cal.4th at p. 904, and *People v. Garcia* (2011) 52 Cal.4th 706, 764-765, and recently again in *People v. Nguyen, supra,* 61 Cal.4th at p. 1092. Since "California's death penalty scheme is not faulty in any of the respects

described by defendant and none of the proposed safeguards for those alleged defects are constitutionally required, no constitutional violation appears even when the alleged defects are considered collectively." (*People v. Debose, supra,* 59 Cal.4th at p. 214.)

Thomas does not raise any new arguments which would justify reconsideration of these prior holdings. His sentence is constitutional, and the penalty judgment should be affirmed.

XVIII. THERE IS NO RIGHT TO A SPECIAL LINGERING DOUBT OR MERCY INSTRUCTION IN THE PENALTY PHASE

Thomas claims his rights to due process and the prohibitions against cruel and unusual punishment under the state and federal constitutions were violated because the trial court refused to give his proffered instructions regarding lingering doubt and mercy in the penalty phase. (AOB 327-336.) There is no right to special lingering doubt or mercy instructions in the penalty phase as the concepts are already adequately covered by the standard instructions. For the same reason, the alleged error is harmless. Accordingly, the penalty judgment should be affirmed.

A. Relevant Proceedings

Thomas requested the trial court give the jury the following special instructions on lingering doubt and mercy. (1 Supp. CT 132-136.) The proposed instructions read:

LINGERING DOUBT

> Each individual juror may consider as a mitigating factor residual or lingering doubt as to whether the defendant killed the victim. Lingering or residual doubt is defined as the state of mind between beyond a reasonable doubt and beyond all possible doubts.
>
> Thus if any individual juror has a lingering or residual doubt about whether the defendant killed the victim, he or she

must consider this as a mitigating factor and assign to it the weight you deem appropriate.

(1 Supp. CT 133.)

MERCY

In deciding the appropriate punishment, the jury may consider mercy for the defendant in weighing the factors in aggravation and mitigation.

(1 Supp. Ct 134.)

The prosecutor filed an opposition, arguing there was no right to a lingering or residual doubt instruction and the proposed mercy instruction was duplicative of the section 190.3, factor (k), instruction.[121] (17 Supp. CT 4460-4461.) The trial court rejected the defense-proffered instructions, finding both concepts fell under section 190.3, factor (k), and were adequately covered by the standard instruction. (17 RT 3615-3616.)

The trial court instructed the jury with CALCRIM No. 763, which provided eleven factors to consider in deciding penalty including:

(a) The circumstances of the crime that the defendant was convicted of in this case and any special circumstances that were found true.

[¶] . . . [¶]

(k) Any other circumstance, whether related to these charges or not, that lessens the gravity of the crime even though the circumstance is not a legal excuse or justification. These circumstances include sympathy or compassion for the defendant or anything you consider to be a mitigating factor, regardless of whether it is one of the factors listed above.

(17 Supp. 4501-4502; 18 RT 3644-3646.)

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[121] Section 190.3, factor (k), permits the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

B. There Was No Instructional Error

Thomas was not entitled to a lingering doubt instruction.

> Although it is proper for the penalty jury to consider lingering doubt, there is no constitutional right to instructions on lingering doubt. [Citations.] " 'Instructions to consider the circumstances of the crime (§ 190, factor (a)) and any other circumstance extenuating the gravity of the crime [citation], factor (k)), together with defense argument highlighting the question of lingering or residual doubt, suffice to properly put the question before the penalty jury.' "

(*People v. Streeter* (2012) 54 Cal.4th 205, 265-266, quoting *People v. Hamilton* (2009) 45 Cal.4th 863, 948, and citing *People v. Brown* (2003) 31 Cal.4th 518, 567; accord *People v. Williams, supra,* 61 Cal.4th at p. 1287; *People v. Scott, supra,* 61 Cal.4th at p. 408; *Bryant, supra,* 60 Cal.4th at p. 456; *People v. Boyce, supra,* 59 Cal.4th at p. 708; *People v. Linton* (2013) 56 Cal.4th 1146, 1198; *People v. DeSantis, supra*, 2 Cal.4th at pp. 1239-1240.)

Thomas nonetheless argues this Court's decision in *People v. Gay* (2008) 42 Cal.4th 1195, "established [his] right to have the jury instructed on his theory of lingering doubt." (AOB 331.) Thomas is mistaken.

> Unlike the trial court in this case, the court in *Gay* had instructed the penalty retrial jury on lingering doubt, but had limited the evidence the defense could offer and had informed the jury the defendant's responsibility for the shooting had been conclusively proven by the guilt phase verdicts and no evidence to the contrary would be presented. [Citation.] [This Court] reversed the judgment because "[t]he combination of the evidentiary and instructional errors present[ed] an intolerable risk that the jury did not consider all or a substantial portion of the penalty phase defense, which was lingering doubt." [Citation.] *Gay* is essentially the converse of the present case: In *Gay*, the trial court instructed the jury on lingering doubt, but precluded the defendant from presenting that defense; in the present case, the trial court allowed defendant[] to present and argue [his] lingering doubt defense[], but refused to specifically instruct on lingering doubt. As [this Court] stated in *Gay*, [its] holding

> there was not based on any state or federal constitutional right to a lingering doubt instruction; rather, it was based on California's death penalty statute, which authorizes the admission of evidence of innocence at a penalty retrial. [Citation.] *Gay* is consistent with [this Court's] prior holdings that a lingering doubt instruction is not required; indeed, *Gay* cites *People v. DeSantis, supra*, 2 Cal.4th 1198, 9 Cal.Rptr.2d 628, 831 P.2d 1210, with approval. [Citation.]

(*People v. Gonzales and Soliz, supra,* 52 Cal.4th at p. 326; accord *People v. Enraca* (2012) 53 Cal.4th 735, 768.) Therefore, Thomas's claim that the trial court erred in refusing his lingering doubt instruction should be rejected.

Thomas was not entitled to a special mercy instruction. This Court has

> held that " 'a jury told it may sympathetically consider all mitigating evidence need not also be expressly instructed it may exercise mercy.'[Citations.]' [Citation.] Because defendant's jury had been instructed in the language of section 190.3, factor (k), we must assume the jury already understood it could consider mercy and compassion; accordingly, the trial court did not err in refusing the proposed mercy instruction.

(*People v. Brown, supra,* 31 Cal.4th at p. 570, quoting *People v. Bolin, supra,* 18 Cal.4th at p. 344; accord *People v. Thomas, supra,* 53 Cal.4th at pp. 827-828; *People v. Wallace* (2008) 44 Cal.4th 1032, 1090; *People v. Hughes* (2002) 27 Cal.4th 287, 403.)

Thomas rests his claim on the argument that "sympathy" and "compassion" as used in CALCRIM No. 763 are distinct concepts from "mercy." (AOB 329.) An identical argument was rejected in *People v. Boyce, supra,* 59 Cal.4th 672, as follows:

> Defendant urges us to reconsider this authority because, in his view, reference to "sympathy" does not carry the same meaning as "compassion" or "mercy." We decline the invitation. The words "sympathy" and "compassion" are functional synonyms. [Citation.] Defendant fails to articulate a meaningful distinction

> between them. As for mercy, we repeatedly have cautioned against using that word in the penalty phase instructions, explaining, "[t]he unadorned use of the word 'mercy' implies an arbitrary or capricious exercise of power rather than reasoned discretion based on particular facts and circumstances." [Citations.] Moreover, the court did not foreclose defense counsel from urging the jury to show sympathy and mercy to defendant. [Citation.] No modified instruction was warranted.

(*Id.* at p. 707.)

The jury was properly instructed. Therefore, the penalty judgment should be affirmed.

C. The Alleged Error Was Harmless

Since the given instructions fully permitted defense counsel to argue lingering doubt and mercy (18 RT 3681-3684, 3693-3699), there is no reasonable possibility of a different penalty verdict had the jury received Thomas's special instructions. (See *People v. Hajek and Vo, supra,* 58 Cal.4th at p. 1245 [no prejudice where mercy instruction refused]; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1187 [no prejudice where lingering doubt instruction refused].) Accordingly, the alleged instructional error was harmless, and the penalty judgment should be affirmed.

CONCLUSION

For the reasons stated, respondent respectfully requests that the judgment be affirmed in its entirety.

Dated: January 16, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 59,034 words.

Dated: January 16, 2016

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Justin Heath Thomas** Case No.: **S161781**

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 January 19, 2016, 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 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document on **January 19, 2016**, to John L. Staley, Appellant's attorney's electronic service address by 5:00 p.m. on the close of business day at JohnLStaley@aol.com.

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 January 19, 2016, at San Diego, California.

L. Hernández
Declarant

L. Hernández
Signature