SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **DEMETRIUS CHARLES HOWARD,** Defendant and Appellant.	S050583 **CAPITAL CASE**

San Bernardino County Superior Court No. FSB03736
Honorable Stanley W. Hodge, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

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STATEMENT OF THE CASE

In an indictment filed on March 3, 1994, the Grand Jury of San Bernardino County charged appellant, Demetrius Charles Howard, and his then codefendant, Mitchell Lee Funches, in count one with the murder of Sherry Collins, in violation of Penal Code section 187, subdivision (a).[1/] It was further alleged that Funches personally used a firearm in the commission of the murder of Collins within the meaning of Penal Code section 1192.7, subdivision (c)(8). It was also alleged that Howard and Funches committed the murder when engaged in the commission or attempted commission of robbery within the meaning of Penal Code section 190.2, subdivision (a)(17). Count two charged Howard and Funches with attempted second degree robbery of Collins. (Pen. Code, §§ 664, 211.) (CT 1-5.) Howard entered a plea of not guilty and denied the allegations. (CT Supp. A 55.)[2/]

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1. Counts three, four and five, respectively, charged Howard's then codefendant, Funches, with attempted willful, deliberate premeditated murder of Edward Brock while personally using a firearm (Pen. Code, §§ 664, 187, subd. (a), & 1192.7, subd. (c)(8)), exhibiting deadly weapon to a police officer to prevent arrest (Pen. Code, § 417.8), and possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)). (1CT 2-4.)

2. Two volumes of Clerk's Transcripts are identified with the volume number prior to the CT, and the Supplemental Clerk's Transcripts are identified as CT Supp. followed by the letters A through E.

On August 12, 1994, the trial court heard and denied Howard's motions to bifurcate the special circumstance allegation from the first degree murder charge and dismiss the special circumstance allegation pursuant to Penal Code section 995. (1CT 60.) In April 1994, the prosecution provided Howard with notice of evidence to be introduced by the prosecution in aggravation in the penalty phase. (CT Supp. C 384-387; CT Supp. D 501-502.)

Funches was found to be mentally incompetent to stand trial and his case was severed from Howard's case on April 3, 1995.[3/] (1CT 98; CT Supp. C 334-335, 339.) The same day, Howard's motions for county-wide jury and to exclude use of his prior felony convictions for impeachment were denied, and his motion to exclude gang evidence was granted. (1CT 98.) On April 4, 1995, the trial court heard and denied Howard's motion not to be shackled and wear an electronic device during trial. The same day, the court granted the prosecution's motion to leave Funches' name in the indictment when read to the jury. (1CT 123.)

Jury selection commenced on April 4, 1995. (1CT 122.) On April 19, 1995, the trial court heard and denied Howard's motion to quash the jury panel. (1CT 180.) Jury trial commenced on April 20, 1995. (1CT 181.) Opening statements and the commencement of witness testimony occurred on April 25, 1995. (1CT 184-185.) The same day, the trial court held an Evidence Code section 402 hearing regarding a .357 handgun, found at University Village

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3. Funches was eventually found competent; on August 14, 1995, a jury convicted him of first degree murder with the personal use of a firearm, attempted first degree murder with the personal use of a firearm, use of a deadly weapon to prevent arrest, and felon in possession of a firearm. The jury was unable to reach a verdict on the special circumstance allegation that the murder was committed during the course of a robbery, and the attempted robbery charge. Thereafter, Funches pled guilty to attempted robbery and admitted the special circumstance. On October 27, 1995, Funches was sentenced to life without the possibility of parole to be served consecutively to a life sentence plus a determinate term of six years. (CT Supp. C 343-344, 346.)

Apartments, near apartment three where Howard loitered after the murder, that the prosecutor sought to admit. The trial court found the gun to be admissible. The trial court also denied Howard's motion to continue the trial for two to three weeks. (1CT 185.)

On May 2, 1995, the prosecution rested its case-in-chief. (1CT 197.) Two days later, on May 4, 1995, the defense rested its case, and after presenting rebuttal evidence, the prosecution rested that same day. (1CT 200.) The jury was instructed, heard closing arguments, and commenced deliberations on May 8, 1995. (1CT 202-203.)

On May 10, 1995, the jury found Howard guilty of first degree murder and attempted second degree robbery, and found true the special circumstance allegation that the murder was committed while Howard was engaged in the commission or attempted commission of robbery. (1CT 210-213a, 285-287.)

On May 22, 1995, Howard's motion for continuance to allow discovery regarding demographic study of jury and motion for retrial (mistrial) were denied. That same day, the penalty phase commenced. (1CT 298-299.) The next day, one of the jurors fell ill, and it was stipulated that the juror could be replaced by an alternate. Thereafter, both sides rested without the defense presenting any evidence; the jury was instructed, heard the argument of counsel, and commenced deliberations. (2CT 300-301.) On May 31, 1995, the jury returned a verdict of death. (CT Supp. C 354.)

On November 15, 1995, Howard moved for a new trial claiming new evidence which challenged the credibility of prosecution witness Cedric Torrance. The claimed new evidence was a declaration by former codefendant Funches who claimed Howard was not with him when the murder was committed, and affidavits from two inmates who were on a Sheriff's Department jail inmate transportation bus with Howard and Torrence on May 10, 1995, and claimed to have overheard Torrence allegedly say he had been

pressured to testified as he did by threats. (2CT 361-372.) The same day Howard filed a motion to reduce the penalty. (2CT 373-401.) The next day, the prosecution filed opposition to Howard's motions for new trial (2CT 402-441), and reduction of penalty (2CT 442-447). The trial court heard and denied Howard's motions on December 7, 1995. (2CT 456-462.)

On the same day, the trial court sentenced Howard to death for the murder of Sherry Collins and to a determinate term of eight months for attempted robbery. (2CT 452-456, 462-464.) A timely notice of appeal was filed on December 7, 1995. (CT Supp. D 508.)

STATEMENT OF FACTS

On Sunday, December 6, 1992, Howard and his cohort, Mitchell Funches, attempted to rob twenty-nine-year-old Sherry Collins in the garage at her apartment building near California State University San Bernardino. Funches shot Collins to death as she struggled in the front seat of her car with Howard, while her five-year-old daughter, Randy, watched from the front passenger seat.

The facts and circumstances surrounding Collins' murder are as follows:

Guilt Phase

On Sunday, December 6, 1992, the day Collins was shot to death, Howard was with Cedric Torrence.[4/] Howard stashed his black .357 gun at Torrence's house on North Flores Street. Later that day, Howard retrieved his black .357 gun and put it in his back belt area. Howard was dressed in a black

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4. In 1992, Torrence had known Howard for about four years. Torrance was the father of Howard's sister Delena's child. (7RT 1656, 1705-1706.)

T-shirt and black pants. (7RT 1655-1656, 1659, 1692-1693; Ex. 3 [Howard's gun].)

Howard put on a hooded light multi-colored, pancho-type pull-over sweater-shirt over his black pants and black shirt. Howard and Torrence went across the street to a friend's garage where they talked and drank. (7RT 1658-1660, 1672, 1694; 8RT 2072-2074; Ex. 2 [photograph shows clothes Howard was wearing night of murder].)

Howard's cohort, Mitchell Funches, was also at the garage. (7RT 1661; 8RT 2075.) While in the garage, Torrence overheard Howard and Funches planning a "jacking."[5/] Torrence misunderstood and thought they had asked him to take them some place to commit the crime. Torrence told them he did not want anything to do with it. Howard clarified, "Well, we wasn't talking to you." Torrence warned that they could get caught. Howard told Torrence he would not get caught and said he would go out shooting if he was caught. Funches indicated he was "down" with the idea, i.e. he was going along with it. Funches had a chrome .380 automatic gun. (7RT 1662-1663, 1729-1730; Ex. 4 [Funches' gun].) Howard and Funches left the garage together and walked down the street side by side. (9RT 2283.)

Twenty-nine-year-old Sherry Collins, picked up her five-year-old daughter, Randy Collins, from Collin's mother's house and drove home in her Hyundai. Randy sat in the front passenger seat. Collins drove into their darkened garage at the Acacia Park Apartments. The Acacia Park Apartments were a multi-unit, multi-garage apartment complex that was accessible off North Little Mountain Drive. The garages were built side-by-side with lift-type doors, and there were four garages in each building. Collins opened her car

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5. Torrence explained that "jacking" is a slang term that refers to robbing or stealing from someone, but not necessarily to steal a car, i.e. a carjacking. (7RT 1662-1663.)

door to start to get out of the car, and the inside car light came on. Before she could get out of the car, Howard holding a gun, confronted her. She fought with Howard while she was still seated in the driver's seat. Collins kicked at Howard. Funches stood on Randy's side of the car. As Collins struggled with Howard, Funches shot Collins in the head on the left side of her temple. Collins was rendered unconscious immediately upon being shot. (7RT 1733; 8RT 2053-2056.)

Randy crawled over her mother's body to get out of the car and ran to a neighbor's apartment. (7RT 1782-1788, 1804-1806, 1733, 1810.) Randy was crying and pleading for someone to open the door because some guys were chasing her. Randy said, "'my mommy got shot and she's bleeding from her nose." Frightened the neighbor turned off the lights and opened the door and found Randy crying. She saw flakes of shattered glass in Randy's hair. Little Randy told her there were two black guys and "'my mommy's dead.'" (7RT 1720-1721.)

One of Sherry Collins' neighbors heard a noise that sounded like gun shots, and he went to the dark garage and saw Collins' car. The passenger side window was broken, and Collins was in the car. He tried to turn on the light, but it was not working. He called for help. (8RT 1987-1989.)

Randy spoke with a San Bernardino police officer. She was extremely frightened, crying and sobbing. She said two men fought with her mom while she was in her car in the garage. Her mother fought with the men and screamed. The men shot her mom, Randy was frightened so she ran away. Randy described them as two black men, one wearing dark colored clothing and the other as wearing a white shirt and dark colored pants. This initial description from five-year-old Randy was broadcast on the police radio frequency. (7RT 1777-1778, 1780.)

Police found Collins in the driver's seat of her Hyundai. The driver's door was open, and she was laying across the front seats, with her buttocks in the driver's seat, her back across the center of the seats, and her head hanging off the right passenger seat. Her left leg was perpendicular to the ground and her foot was wedged between the seat and the doorpost. Her right leg was draped across the left edge of the driver's seat, the calf against the threshold of the driver's door, and her foot was hanging out the door, not touching the ground. Collins suffered a gunshot wound to the left side of her head, slightly in front of her ear, just up in the hairline. There was another wound, down lower, that had the breach end of a copper color bullet in it. There was an expended casing on the garage floor. (7RT 1733-1736.)

A citizen spotted two men matching the description. Steven Larsen, lived on Ranch Road near the Acacia Park Apartment complex. He was working in his garage and listening to the police scanner when he heard a call that a woman had been shot at the Acacia Park Apartment complex, and the dispatcher said two black males were heading west through the wash area which was directly behind Larsen's house. He went into his backyard and looked over the wall into the wash area. About eight to ten feet away, he saw two black males running and then walking along the wall, going towards University Avenue and coming toward him. One of the men had on a white top and dark pants, and the other was dressed in all dark clothing. Larsen hollered, "'Hey, stop'" and then ducked down. Next he heard the sound of feet running in the sand. (7RT 1835-1837.)

When Larsen looked back over, the two men were gone. Dogs in a neighbor's yard were barking. Larsen ran into his house and told his wife to call 9-1-1, and tell the police two men ran from the wash, over the wall, into a neighbor's yard. Larsen then ran out his front door and saw the same two men running down his street. Larsen again yelled for the men to stop. The man in

the lead was wearing a white shirt, Funches wore dark clothes. Both men stopped, turned and looked at Larsen. The man in the white shirt mumbled something to the other, and both men took off running. (7RT 1837-1839.) Minutes later, Larsen heard gunshots fired. (7RT 1844.)

Larsen later identified Funches and described him as wearing dark clothing, dark shoes, dark pants, and dark sweat-shirt type jacket, as a black male medium build, 5'8" or 5'9" around 150 pounds, and his hair in braids. He described the other man as dressed in dark shoes, dark pants and a long white shirt that hung down below his belt line. He described this man as smaller then Funches. (7RT 1840-1841, 1908.)

The only way out of area was to follow the streets to Kendall or over the wall of the apartment complex at University and Kendall. The back of this apartment complex wraps around the back side of the housing track that contains Larsen's home. (7RT 1840, 1843.) Theresa Brown was in her University Village apartment complex at Kendall and University at around 7:00 to 7:10 p.m. on December 6, 1992, when she heard the sound of helicopters circling above. Ms. Brown had an upstairs apartment and the sound of helicopters made her look out her window. She saw a man at the apartment door kitty-corner from hers. She described the man as a black male, wearing a dark jacket, dark pants and his hair in braids. The man turned and knocked on an apartment door. (7RT 1825-1829.) A few minutes later, Ms. Brown looked out her window again and saw the same man backed up as far as he get into a recessed area, with his back against a wall. Ms. Brown called the police and was told to look out another window, so she looked out to the lower walkway. She saw another man wearing a white pullover with a hood and dark baggy pants. (7RT 1831-1833.)

Ms. Brown's downstairs neighbors, Michael and Laurie Manzella, the residents of 1660 Kendall Drive, apartment two, in San Bernardino, were home

watching television when they heard a knock on the door. When Mr. and Mrs. Manzella opened the door, they saw Howard speaking with the people in the apartment across from theirs, apartment three. Howard had on a white shirt-like sweater, pullover with a hood, and a pocket in front, and dark pants.[6] (7RT 1848-1856, 1858, 1862; 8RT 1995-1997; Ex. 35 [photographic line-up, photo no. 3 chosen by Mrs. Manzella was Howard].)

James Chism left his apartment at University Village Apartments and saw Howard sitting on the stairs above his apartment. Howard told Chism his name was "Bald." Howard was wearing dark pants and a "Lopez jacket" - a pullover with a hood and a pocket in front. Howard asked Chism how to get out of the apartment complex, which Chism found strange since there was only one way to drive in and out of the complex. (7RT 1864, 1867-1871, 1874; 8RT 1995-1996; Ex. 35 [photograph no. 3, the one Chism chose, was Howard.)

Howard asked Chism for a ride home and Chism said no. Howard asked to use Chism's telephone and he agreed. During the telephone conversation, Howard handed the phone to Chism to give directions to someone who was coming from the Cajon High School area. Chism used El Pollo Loco as a reference point. Chism had the impression, Howard did not want to leave, so Chism got his jacket. Chism told Howard how to get to the El Pollo Loco and then left. As he was leaving, Chism's roommates walked up and told him something had happened outside the El Pollo Loco, that a police officer had been shot, and that someone had run into the apartment complex. (7RT 1865-1867, 1872.) Chism walked out with his roommates and Howard. Instead of heading toward the El Pollo Loco, Howard turned in the opposite direction than the one Chism had told him to go to get to El Pollo Loco. (7RT 1872-1873.)

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6. Howard's shirt caught Mrs. Manzella's attention because she had been searching for such a shirt and it was really hard to find. (7RT 1857.)

Torrence was the person Howard called from Chism's apartment. Howard told Torrence he was stranded, and he had his "strap" on, i.e. Howard had a gun. Howard wanted Torrence to pick him up at the El Pollo Loco at University and Kendall. Although Torrence did not want to get involved, he drove to the El Pollo Loco parking lot. When he arrived he saw lots of police and yellow police tape. Torrence left because he did not want to get involved. (7RT 1667-1668, 1702.)

The Shooting Of Officer Block And Funches' Capture

After Howard and Funches separated at the University Village apartment complex, Funches shot a California State University police officer. Edward Block was employed as a State Police Officer by California State University San Bernardino. He wore a full blue uniform, similar to officers in the San Bernardino Police Department, but the patches and badge were different. Officer Block wore a bulletproof vest under his uniform, a heavy jacket and a .357 gun. He drove a car marked California State University Police, equipped with spotlights and blue emergency light bar on top. (8RT 1911, 1913.)

Officer Block was on duty, monitoring the San Bernardino Police Department radio, when he heard there had been a shooting at the Acacia Park Apartments. He learned the victim was dead on arrival and two suspects had run towards the University's athletic field that was to the north of the Acacia Park Apartments. He drove to the athletic field area and saw a sheriff's helicopter overhead. When the helicopter left, Officer Block continued to search the university grounds. (8RT 1911-1912.)

Officer Block heard a broadcast the suspects were in the area of University Park Apartments, and he drove through a mini mall on his way there. At the mini mall, Officer Block saw a black male (Funches) with thick braids that were shoulder length. Although this individual did not match the initial

broadcast of the suspects' description, something just was not right about him. Officer Block stopped his car in front of Econo Lube, got out and called to Funches.[7] Funches said, "'who me?'" and complied with the officer's instruction to walk towards him with his palms up and out. The officer put his hand on his gun as Funches came towards him. (8RT 1913-1914.)

When Funches got to within ten feet, Officer Block removed his hand from his gun. Funches quick drew a gun from the small of his back, held the gun in a "combat stance" and immediately fired three times. Officer Block believed he had been hit by all three bullets because he was knocked to his right. The officer pulled his gun, but did not fire because there was a wall and if he fired and missed, the bullet would ricochet. Officer Block holstered his gun. Since he did not feel any pain, he thought his bulletproof vest had taken all three rounds. (8RT 1914-1917.) Funches ran back towards the alley and made a left turn behind the Econo Lube. (8RT 1919.)

Officer Block eventually realized he had been shot when he suddenly felt pain, a burning sensation, and there was a wet spot under his vest. Officer Block had been shot in the abdomen, near the belt-line, just below where his bulletproof vest ended, approximately two inches to the left of center. Officer Block had major surgery to remove the bullet and spent a week in the hospital. When shown a photographic lineup, Officer Block identified Funches as the shooter. (8RT 1915, 1918-1920, 1928; Ex. 1 [photograph no. 2 was Funches].)

San Bernardino Police Officer Rodney Reynolds had been dispatched to the apartment complex at 1616 Kendall Drive. He was between buildings one and two when he heard a volley of gunfire coming from directly south, across Kendall Drive, near the Econo Lube and El Pollo Loco. Officer Reynolds drew his gun and moved towards Kendall Drive, into a bush area.

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7. The Econo Lube was in the same mini mall complex as the El Pollo Loco. (8RT 1923; Exs. 35, 36 & 39.)

Officer Reynolds saw Funches running northward towards him, away from the Econo Lube. Funches had a gun in his hand as he came over the fence towards the officer. Once over the fence, Funches fell to the ground on his hands and knees, with the gun still in his hand. Officer Reynolds stepped out of the shadows and ordered Funches to drop the gun. When Funches pointed the gun at him, Officer Reynolds fired his gun three to four times at Funches, who fell to the ground. (8RT 1943-1947.)

Officer Reynolds believed Funches had been shot and started to go towards Funches. Another officer also approached from behind Officer Reynolds. Funches jumped up and took off running. As he ran, Funches threw a shiny object from his hand. The officers saw this and figured he had thrown away a gun. Funches fell again and attempted to get back up. An officer came over to him and told him not to move; Funches complied. The officers handcuffed him, put him into a police car, and went to look for the silvery object he had thrown. A gun was recovered. (8RT 1947-1949, 1953-1954; Exs. 1 [photo line-up, Funches no. 2], 48 [gun].)

Howard's Capture

Another California State University San Bernardino police officer was patrolling the area in a marked California State University police car on December 6, 1992, looking for a suspect described as a black male, wearing a pancho-type gray-colored jacket and dark colored pants. The officer was aware that Officer Block had been shot. Around 10:00 p.m., at 395 Kendall Drive, east of Little Mountain Drive, the officer saw Howard who matched the description standing in front of a 7-11 store talking on the telephone. He noted that Howard matched the description being broadcast in connection with the shooting death earlier that evening. (8RT 2023-2025.)

The California State University police officer pulled his car into the 7-11 parking lot and made eye contact with Howard, who then looked down and tapped his foot. Howard appeared nervous, so the officer drew his gun and ordered Howard to stay in place, keep his hands in his pockets, slowly turn around, and drop to a kneeling position. Howard complied. He did not have any weapons. When asked for his name and birth date, Howard told the officer he was Shauntik Wilcox and his date of birth was January 19, 1967. The officer arrested Howard. At the time of his arrest, Howard was wearing black Levi pants and a gray pancho-type jacket with a hood and a pocket in front. (8RT 2023-2030; Exs. 2, 32 [pants] & 33 [jacket].)

Subsequent Investigation

Sherry Collins' blue 1986 Hyundai was processed for evidence at the crime scene. Funches' fingerprint was found on the passenger side door handle of her Hyundai. The Hyundai's exterior was wet because it was raining that night. On December 9, 1992, the Hyundai was further processed for evidence. No additional useable prints were found. Water can wash off fingerprints, so it was unlikely any prints on the outside of the car would be found. (7RT 1734, 1810-1814; 8RT 2006-2007.)

Howard telephoned Torrence about two days after the murder and wanted to know if the police had contacted him, which they had not. Howard told Torrence that if the police contacted him, he was to tell them he dropped Howard off at the El Pollo Loco at 9:00 p.m. (7RT 1668-1669.)

Days after the murder, seven-year-old Darin Greenwood was playing outside his University Village apartment when he kicked his ball into the ivy near apartment three. Greenwood went into the ivy to get the ball which had landed next to a black gun with a brown handle. Greenwood took the gun to

show his auntie and when his mother got home, she called the police. The gun was loaded with bullets. (8RT 1971-1973; Ex. 3 [gun].)

A San Bernardino County Coroner's Office forensic pathologist performed an autopsy of Sherry Collins on December 11, 1992. She suffered two wounds to the left side of her head, a number of smaller cuts in the skin close to the wounds, small cuts and scrapes on the back of her index and middle fingers on her left hand, and small scrapes on her right shin and right thigh. There was a lot of glass in her hair and several of the small cuts on the left side of her face in the temple and cheek areas were caused by glass. (8RT 2042-2048; Ex. 55 [autopsy report].)

An x-ray of Collins' skull showed several fragments of metal in the head area. The two wounds on the left side of her face were close to each other; one was just above the ear and slightly in front of it, more or less were the left ear connects to the scalp, and the other was just a little bit in front of the other by a couple of centimeters, basically in the temple area. The wound above the ear was irregular with a copper bullet jacket embedded in it. The jacket had impacted the skin, but did not penetrate the skull. The temple wound was the entrance wound for the bullet. The bullet and jacket separated prior to striking Collins. This is typical when a bullet goes through some thing. The core of the bullet passed into Collins' brain and broke apart into two fragments inside the skull. The bullet went through her brain, ricocheted off bony prominence inside the skull and bounced back somewhat to the left side. The bullet probably fragmented when it hit the bone inside because there was only one entrance wound and two bullet fragments found in her brain. (8RT 2049-2052.)

The injury caused irreversible damage to Collins' brain and immediately rendered her unconscious. Her heart may have continued to pump for a few more minutes, but brain death was immediate. All the other wounds were

superficial. The cause of death was gunshot to head. (8RT 2053-2056.) The bullet that killed Sherry Collins was fired from Mitchell Funches' gun. (8RT 2086-2095.)

San Bernardino County Sheriff's Crime Laboratory Criminalist Craig Ogino examined Howard's and Sherry Collins' clothing and shoes for trace evidence such as hair and fibers. (8RT 2113-2117.) Criminalist Ogino prepared a videotape, without audio, of his examination of the items that was played for the jury while he described the examination and results. (8RT 2130-2138; Ex. 74 [video of microscopic examination of fibers on shoes, gray shirt and black pants].) Fibers found in the bottom grooves of Collins' shoes were consistent with fibers from Howard's clothing. It is unlikely that the fibers adhered to her shoes from her walking around because the fibers were not flattened over. This indicates the fibers were probably deposited while the shoe was up in the air and never came down on any horizontal or vertical surface. (8RT 2118-2127, 2139-2142, 2165-2171.)

Defense

Five-year-old Randy Collins was shown a photographic line-up that contained Howard's picture [Ex. 35], she pointed to Howard and said, "'There is the white shirt, but I don't know if that's him.'" When asked if she saw the bad man in the photo line-up, she said no. (8RT 2103-2104.) Randy could not pick out the bad man's face, but she was able to identify Howard by the clothes he was wearing the night of the murder. (8RT 2105.)

No fingerprints were found on the .357 caliber revolver and live round of ammunition. (9RT 2183-2184.)

Howard testified and admitted he had a 1984 felony conviction for assault with a deadly weapon from San Diego County and a 1990 felony conviction for assault with a deadly weapon from San Bernardino County.

Howard was released from prison in June 1992. Howard claimed he and Cedric Torrence were not close friends and that he had met Torrence because he was the father of his sister's child, and had only known Torrence for a few years at the time of Collins' murder. (9RT 2185-2187.)

On December 6, 1992, Howard said he telephoned his ex-girlfriend Roxanne who lived in Los Angeles and arranged for her to come to San Bernardino to pick him up. (9RT 2188-2190.)

Howard said he had on Hoya shorts, a black shirt, gray and black pants and a gray pullover sweater the day of Collins' murder when he went to play football with Torrence. Howard denied ever seeing the .357 revolver [Ex. 3]. (9RT 2191-2194.)

Howard said he stood on the sidewalk near Torrence's house, but did not go into the garage and denied he had ever meet Funches until after his arrest. (9RT 2195- 2197.) Howard claimed he left by himself and walked to Earl's Market on State and Garvey to use the pay phone. He testified that Roxanne picked him up and they were suppose to go to Compton, but Howard needed to go to his aunt and uncle's [Bobby Wilcott and Willy Kelly] on Kendall Drive. Howard claimed he had never been there before, but he had the address. Howard claimed Roxanne was upset with him because while she was waiting for him she found out that another woman was pregnant with his child. (9RT 2199-2203, 2301-2303.)

Howard said he and Roxanne fought while driving to Howard's relative's place. By the time they neared the 7-11 on Kendall, Howard got out of the car at the 7-11 and Roxanne drove away. Howard waited, but she never returned. (9RT 2204-2205.)

Howard walked to his aunt's, an apartment complex on Kendall. As Howard walked up to the apartment complex across the street from El Pollo Loco, he saw police officers. As he sat on the stairs, Howard saw Chism leave

his apartment and introduced himself as "De." Howard said he told Chism he was stranded and asked for a ride. Chism said he was not leaving, his girlfriend was; Howard asked if she could give him a ride and Chism said no. Howard asked to use his phone and Chism let him. Howard called Cedric Torrence to come pick him up, and Chism gave Torrence directions. Howard denied he ever told Torrence he was carrying a gun, in slang or other terms. Chism told Torrence El Pollo Loco was across the street from the apartment complex, and Torrence said he would meet Howard there. (9RT 2206-2210.)

Howard saw a police officer inside the apartment complex and Howard walked out but turned in the opposite direction from the El Pollo Loco because he did not want to have anything to do with the police. Howard went back to the 7-11. Howard called relatives for a ride and one said they would come pick up Howard. As Howard was talking to his sister, a California State University police officer drove up and arrested him. Howard said he gave a false name because he was on parole and did not want to be involved with the police. Howard claimed the police automatically accused him because he was black and on parole. Howard denied any involvement in Sherry Collins' murder. (9RT 2212-2220.)

Roxanne Winn testified she lived in Los Angeles and Howard called her to come pick him up in San Bernardino on a Sunday, but she did not recall the date. When she arrived, Howard was not there. She spoke with a woman at the house where Howard lived who told Roxanne she was pregnant with Howard's child. After she had waited about an hour, Howard telephoned Roxanne and told her to come pick him up. Roxanne and Howard were suppose to return to Compton, however, she was angry and they got into a fight. The argument escalated and Roxanne dropped Howard off at a 7-11 and left. (9RT 2258-2263.)

Howard's cousin, Patricia Washington, testified that Howard was living with her in December 1992. Roxanne showed up on a Sunday, she was unsure which one, looking for Howard. Howard was not home. (9RT 2297-2299.)

Segonia Washington testified that Howard was her cousin and lived with her and her mother in December 1992, on Evans Street in San Bernardino. Howard was arrested the Sunday he went to play football with Cedric Torrence. She never saw Howard with a gun. Roxanne showed up and Howard was not there. Roxanne left to pick up Howard. Howard later telephoned and said Roxanne had kicked him out of the car and he was stranded. Segonia acknowledged that she had never told anyone about Roxanne showing up the day Howard went with Torrence until April 1995. (9RT 2301-2306.)

George Rivera testified that he lived on Flores Street near Cedric Torrence in December 1992. George, Danny, Torrence and Howard were on the sidewalk drinking when Funches came up and joined them. (9RT 2274-2279.) Part of the time they were in a garage. George did not see Howard with a gun or overhear Howard and Funches talk about "jacking" anyone or shooting their way out if they got caught. The last time he saw Howard and Funches, they were walking down the street side by side going towards Darby. (9RT 2280-2283.)

There was a stipulation regarding Howard's uncle. Willy Kelly was interviewed in April 1995. Kelly remembered Howard was arrested on a Sunday because he had attended a family function that day. Kelly claimed he had spoken with Howard the previous Wednesday or Thursday and offered Howard some cash so he could get a fresh start. Kelly was living at his sister's apartment on Kendall Drive. Kelly told Howard to come by the apartment around 6:30 or 7:00 p.m. However, the family function ran late and Kelly did not return to the apartment until approximately 8:00 p.m. and saw that the police had the area partially blocked off. Kelly admitted he had a felony

conviction for robbery from 1978 and he was sent to state prison. In 1986, he violated parole. Also in 1986, he was convicted of assault with a deadly weapon, a knife. Kelly also had 1991 and 1992 convictions for petty theft for which he was serving a prison sentence in Avanal State Prison.

Penalty Phase

Prosecution

On September 29, 1989, James Pearsall was standing in a cul-de-sac outside the Village Apartments in Fontana while attending a friend's bachelor party. There were about eight other guys with him, they were having a good time. A young black male approached the group riding a bicycle. He jumped off the bike and yelled and screamed profanity at the men. This went on for three to five minutes, and Pearsall and his group pretty much ignored him. While talking, Pearsall notice another black male walking up to his left. When he turned to look, Pearsall was knocked unconscious. He spent a month and two weeks in hospital and suffered neurological damage that effected his left thigh, left foot and left hand. Pearsall also suffered a crushed vertebra in the middle of his back, continued to have short-term memory problems, and a stiff neck all the time. Pearsall was hit in the jaw. As a result he has no sense of taste or smell, and his vision is a lot worse. Pearsall had been an iron worker, however, he could not do this work any more because of the injuries he had suffered. (10RT 2536-2539.)

Norman Gagnon was present on September 29, 1989, with Mr. Pearsall when Howard rode up on a bicycle. Gagnon and Pearsall were drinking beer. Howard asked why they made smart remarks to females and a heated argument followed. (10RT 2553.)

On December 19, 1983, Laura Carroll worked at the Orange Recreation Center in San Diego teaching classes to children such as sports, crafts and

nature. About 45 minutes before she was scheduled to leave, a group of boys, including Howard, walked past her office, then walked back. A few minutes later, Howard returned and said a little girl had been hurt and had a bloody nose out on the playground. Carroll and her boss started to walk to the lower playground with Howard. When the three were about half way there, her boss' phone rang and he went back to answer it. Carroll continued to try and find the girl accompanied by Howard. When no little girl was found on the playground, Carroll and Howard went to the bathroom to see if the little girl had gone there to clean up her bloody nose. (10RT 2542-2543, 2549.)

Upon entering the bathroom, Carroll tried to turn on the light, but Howard grabbed her from behind and forced her to the back of the bathroom where it was real dark. Carroll tried to maintain her balance. She felt Howard trying to get her down on the ground and she wrestled to maintain her balance so she would not go to the ground. She tried to force her way back to the door. Carroll looked into Howard's eyes and did not believe he was going to let her out of the bathroom. She punched him twice in the face, once in the nose in an effort to blind him. She thought if she stunned him she could run past him to the door. After she punched him she ran for the door a little bit, until he grabbed her from behind, dragged her back, and threw her towards the back wall. He had her around the shoulder area. Then he walked towards the door. She felt something hot on her neck. As he opened the door, sunlight came in. He turned and held up a knife. There was blood on the knife and then she realized she had been stabbed. Carroll screamed and he said, "Shut up, bitch," then walked out of the bathroom. (10RT 2543-2545, 2547-2548.)

People heard Carroll scream and came to her aid. She kept direct pressure on the wound as she had learned to do in first aid class. Although paramedics were called, Carroll did not want to wait because she was afraid she

would bleed to death. Another worker took her to a nearby hospital. (10RT 2545.)

The stab wound Carroll suffered was deep. A shunt was inserted to drain the wound, then she was sewn up. She was released a few hours later. Three days later the shunt was removed. She had stitches in her neck and it was very sore. She was immoble for approximately two weeks. Carroll then suffered atrophy in her shoulder from lack of use and it took doctors three months to diagnose that. It was very painful. She was unable to teach physical education after the stabbing. The nerves in her neck are still very sensitive. It took a couple of months of working on the atrophy for the pain to go away. (10RT 2545-2548.)

Carroll was unable to return to work because she was paranoid. She was diagnosed with post-traumatic stress syndrome. She could not leave her house, except to go to a psychiatrist for three months. She was fearful of men and could not go in public places where there were men because she thought every man who walked towards her was going to attack her. Years later, when she testified in the penalty phase, she still could not get on elevators and stairwells scared her. She would not use a public restroom unless her husband stands outside waiting for her. She still checks each stall to make sure nobody is in a public bathroom before going in. It has been a long recovery process, and she was still not yet there. (10RT 2548-2549.)

The parties stipulated to the record of Howard's felony conviction dated May 10, 1984, for assault with a deadly weapon, a knife, causing great bodily injury as an additional enhancement, and Howard's felony conviction dated January 19, 1990, for assault with a deadly weapon, brass knuckles, and infliction of great bodily injury. (10RT 2550.)

The jury was advised through a stipulation that when Randy Collins was asked if she thought about her mommy, she said, "'sometimes.'" When asked

if she missed her mommy, she said, "'yes.'" When asked how she felt about what happened to her mommy, she said, "'I don't know, sad.'" (10RT 2551.)

Defense

The defense did not present any evidence during the penalty phase.

ARGUMENT

I.

IT IS UNCLEAR FROM THE RECORD WHETHER HOWARD ACTUALLY WORE A STUN BELT DURING HIS TRIAL; IF HE DID, HE WAS NOT PREJUDICED AND THE JUDGMENT SHOULD BE AFFIRMED

Howard claims he was forced to wear a stun belt during his trial and the trial court abused its discretion because it did not make a record of manifest need for the restraint, did not consider less restrictive measures, and did not have good cause. Howard contends his rights to due process, equal protection, a fair and impartial trial, to testify in his own defense, and freedom from cruel and unusual punishment in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitition and article I, §§ 7, 15 and 17 of the California Constitution. (AOB 22-43.)

The record concerning restraints is scant. It is unclear that Howard was in any type of physical restraint during the trial, including a stun belt.[8/] Assuming Howard was forced to wear a stun belt, and to the extent the record is void that the trial court complied with the procedural requirements to order it, it was error. Any error, however, was harmless because the jury never

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8. Howard confirms this lack of clarity in the record concerning restraints, noting he is addressing only the issue of stun belt on direct appeal and reserving the issue of shackling for habeas. (AOB 23, fn. 24.)

observed the belt, Howard never complained of any adverse impact from the belt either physically or psychologically, the evidence of Howard's guilt was substantial, and there was nothing in the record that the belt had any impact on Howard's demeanor when he testified, his ability to assist in his defense or to confer with counsel. When Howard made a statement to the trial court at sentencing setting forth a list of complaints, he made no mention and did not include any mention of a stun belt. Howard was not prejudiced by the restraint, and the judgment must be affirmed.

At pretrial proceedings, it is in the record the trial court granted defense counsel's request Howard be unhandcuffed two times. (1RT 6-7; 2RT 456.) However, on another occasion Howard remained handcuffed. (2RT 480.) At a hearing prior to the jury being selected, Howard's counsel stated:

> The only thing, your Honor, is we discussed shackling before. I do still object to my client being shackled in the court room for the reason he never caused any outbursts. I understand the Court intends to put on him a (sic) electronic device that can be pressed and give him 50,000 volts if he does anything somebody doesn't like or runs or something like that. [¶] I would object to that for the same reason. He's never – in all of his court appearances through San Bernardino to here, he's never acted out in any manner whatsoever. He's never been disrespectful to the court or anybody else. I would object on those grounds.

(2RT 504-505.)

The trial court responded:

> Well, it's a prophylactic measure, and given the nature of the case, I believe it would – and given the nature of Mr. Howard's past – and it is – it can't be seen which is a nice thing about it – it insures everyone that nothing unfortunate is going to happen. And it can't be seen by jurors. So it doesn't reflect poorly upon Mr. Howard in their eyes. [¶] But your objections are noted.

(2RT 505.)

The only other mention in the record concerning restraints is in the Clerk's Transcript for the hearing date referenced above: "Defense objects to

Defendant's shackles and electronic device. Motion to have them removed is denied." (1CT 123.) Other than that, no mention of the restraints can be found in the record.

Howard's failure to make an adequate record as to the type of restraint, if any, was used, when a restraint was used, and whether or not the jury viewed the restraint waives the issue for appeal. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583, judgment affirmed by *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750]; *People v. Walker* (1988) 47 Cal.3d 605, 629, and cases cited therein.) Even assuming Howard's objection made in anticipation restraints would be used is sufficient to preserve the matter for appellate review, Howard's conviction should be affirmed because the record does not support his contention he was prejudiced.

This Court has established a defendant may not be physically restrained while in the jury's presence without a showing of "manifest need for such restraints." (*People v. Duran* (1976) 16 Cal.3d 282, 290-291.) The *Duran* "manifest need" requirement applies to a trial court's decision to compel a defendant to wear a stun belt at trial. (*People v. Mar* (2002) 28 Cal.4th 1201, 1219-1220, 1223.) The showing of "manifest need" is required because the possible effects the belt may have on the defendant, including psychological, demeanor, ability to focus on the court proceedings, confer with counsel, or otherwise assist in the defense at trial. (*Ibid.)*

"Manifest need" for physical restraints exists upon a showing of unruliness, an intention to escape, and nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process. (*People v. Combs* (2004) 34 Cal.4th 821, 837; *People v. Anderson* (2001) 25 Cal.4th 543, 595; *People v. Hill* (1998) 17 Cal.4th 800, 841; *People v. Cox* (1991) 53 Cal.3d 618, 651; *People v. Duran, supra*, 16 Cal.3d at p. 292, fn.11.) No formal hearing is mandated to fulfill the required findings under *Duran*, but

the need for restraints must appear as a matter of record. (*People v. Cox*, *supra*, at pp. 649-652; *People v. Duran*, *supra*, at pp. 291.)

A defendant's prior violent criminal record or the fact the he or she is a capital defendant cannot alone justify physical restraints. (*People v. Cunningham* (2001) 25 Cal.4th 926, 987; *People v. Hawkins* (1995) 10 Cal.4th 920, 944, overruled on another point in *People v. Lasko* (2000) 23 Cal.4th 101.) The decision of a trial court to restraint a defendant will be reviewed for an abuse of discretion on a case-by-case basis. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1218; *People v. Cunningham*, *supra*, at p. 987; *People v. Medina* (1995) 11 Cal.4th 694, 731; *People v. Pride* (1992) 3 Cal.4th 195, 231-232.) "When the record does not reflect 'violence or a threat of violence or other nonconforming conduct' by the defendant, a trial court's order imposing physical restraints will be deemed to constitute an abuse of discretion." (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 987, quoting *People v. Duran*, *supra*, 16 Cal.3d at p. 291; *People v. Jenkins* (2000) 22 Cal.4th 900, 995.) This Court in *Mar* declined to decide whether, in determining if the use of a stun belt was prejudicial, the *Watson* or *Chapman* standard of harmless error applied.[9] (*People v. Mar*, *supra*, 28 Cal.4th at p. 1225, fn. 7.) Given that the belt was not visible to the jury, respondent submits the *Watson* standard of harmless error should apply. In any event, under either standard, any error in this case was harmless.

In *Mar*, this Court found the trial court's order that the defendant wear a stun belt was prejudicial, because: (1) the evidence in the case was close; (2) the defendant's demeanor while testifying was crucial because the case turned on the jury's determination of the credibility of the witnesses; and (3) there was an indication in the record that the stun belt might have had some

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9. *People v. Watson* (1956) 46 Cal.2d 818; *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].

effect on the defendant's demeanor while testifying. (*People v. Mar*, *supra*, 28 Cal.4th at pp. 1224-1225.) Howard's case is distinguishable from *Mar* on each of these points.

Here, there was compelling evidence of Howard's guilt, and the evidence was not close. Howard and Funches were overheard planning the robbery shortly before leaving together to execute the crime. Both Howard and Funches had guns; Howard a black .357 magnum, and Funches had a chrome gun. (7RT 1656, 1662-1664.) Randy Collins described the men who killed her mother as two black men, the one who fought with her mother wore a white shirt and dark pants, and the one on her side of the car was dressed all in dark clothing. (7RT 1786, 1805-1806.) Sherry Collins' feet did not touch the ground after she fought with her assailant. Her body was laid out across the front seats of the car. (7RT 1733-1736.) Fibers found on the bottom of Sherry Collins' shoes came from the same manufacturer as the clothes Howard was wearing near the time of the murder. (8RT 2113-2142, 2165-2177.) Randy saw the man who struggled with her mother holding a gun in front of his stomach. She heard the shot fired that killed her mother. Sherry Collins was killed by a bullet fired from Funches' gun. (7RT 1733-1736; 8RT 2086-2095.) Two black men matching these same descriptions were seen by Steven Larsen fleeing from the murder scene. Larsen identified Funches and described the clothes Howard was wearing on the other man. Larsen saw the men head towards the University Village Apartments. Theresa Brown saw two men matching Howard's and Funches' description below her apartment. Mrs. Manzella positively identified Howard and saw him talking to the man who lived in apartment three. (7RT 1854-1857.) A black .357 gun was found in the bushes just outside apartment three. (8RT 1971-1973; Ex. 3.) Howard used James Chism's telephone to call Cedric Torrence to come pick him up. Chism gave Torrence directions how to get to the University Village Apartments, and

used the El Pollo Loco across the street as a landmark. (7RT 1865-1867, 1872.) Chism gave Howard directions to the El Pollo Loco. Howard was going to walk out of the apartment complex and across the street to meet Torrence at the El Pollo Loco. When Chism's roommates walked up and told he and Howard that something like an officer had been shot over at the El Pollo Loco, Howard walked toward the apartment complex exit and then turned in the opposite direction from the El Pollo Loco. (7RT 1872-1873.) When contacted by a police officer near the area where the murder occurred, Howard gave a false name. (8RT 2023-2030.) Two days after his arrest, Howard telephoned Torrence and asked him to provide the police with false information, that Torrence had dropped Howard off at the El Pollo Loco at 9:00 p.m. (7RT 1668-1669.) Howard also called his mother and asked her to get Torrence to provide him with an alibi. (9RT 2221.) All of this was compelling evidence of Howard's guilt.

For the most part, the defense evidence did not lessen the impact of the substantial evidence of Howard's guilt. Moreover, the defense evidence was impeached on several key points. Howard claimed he had never met Funches until after his arrest. (9RT 2195-2197.) However, in addition to the prosecution witnesses, defense witness George Rivera also saw Howard and Funches together at the garage on Torrence's street. He saw Howard and Funches leave the garage together and they walked down the street together. (9RT 2283.) When shown a photographic lineup, Randy picked Howard's picture, saying there is the white shirt, but she was unsure that Howard was the bad man who struggled with her mom. (8RT 2105.) Roxanne Winn said she picked up Howard on a Sunday in December, although she did not remember the date, and left him at a 7-11. Howard's cousin tried to tie this event to the day Howard played football, but she had never told anyone the information she

had until the month Howard's trial commenced, two and a half years after it allegedly occurred. (9RT 2258-2263.)

The evidence of Howard's guilt at trial was substantial. The defense evidence did not cast doubt on Howard's role in the murder and attempted robbery of Sherry Collins.

The belt did not have an adverse impact on Howard either physically or psychologically. The record is void Howard had any problems because of the belt. At sentencing, Howard made a detailed record of complaints he had regarding events during trial. Howard complained to the trial court that he had unwillingly taken antipsychotic medication and it had adversely effected him. Citing United States Supreme Court cases, Howard provided generic complaints regarding demeanor, lack of facial expression, credibility in front of the jury, and attorney/client relationship. Howard did not really personalize these problems but attributed them as having happened to him. Instead, he provided a legal argument to the trial court, complete with citations and argued the holdings of several United States Supreme Court cases.[10/] During this statement to the court, Howard never complained about nor even mentioned the stun belt. Since Howard stated his desire to make a record, it is logical if the stun belt had caused him physical or psychological difficulties, he would have mentioned it during his statement to the trial court. Howard's counsel did not have anything to add to Howard's statement when asked by the court. The record shows Howard's trial counsel to have been a diligent advocate. Clearly, if Howard had complained to his counsel, or told him there was any adverse reaction to the belt, counsel would have put that information on the record. The absence of any comment regarding the stun belt by Howard during his statement demonstrates that the belt did not adversely impact him.

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10. More specifics regarding Howard's statement to the trial court is set forth in Argument III.

Howard testified, it cannot be claimed that the belt prevented him from being a witness for the defense. While he initially acknowledged some nervousness (9RT 2185), this Court recognized in *Mar* that it is normal for witnesses to experience some nervousness while testifying (*People v. Mar*, *supra*, 28 Cal.4th at p. 1224). There is nothing else in the record about Howard being nervous, and there is nothing in the record that any nervousness was attributed to wearing the belt. A fair reading of the record shows that the only indication of nervousness was due to the new and unusual experience when he initially testified. Howard went on without any further comment and coherently and competently answered questions on direct, cross-examination and rebuttal. Howard's attempt to show confusion and trouble following questions (AOB 42, fn. 31 quoting 9RT 2228, 2231, 2239, 2242), which he attributes to the belt, is not supported by the record. The questions were all on cross-examination, so Howard did not have an opportunity to review them as he did with his counsel regarding the questions asked on direct. Additionally, when read in context, the questions were either poorly worded or truly confusing. Thus, Howard's reaction was appropriate as the questions were phrased.

In *Mar*, the defendant expressed on the record a number of times that he was nervous due to the belt, the device made it difficult for him to think clearly and caused him anxiety. (*People v. Mar*, *supra*, 28 Cal.4th 1210-1213, 1224-1225.) The record in this case is completely void that the belt had any similar type of impact on Howard.

Since the record is void that the belt had any adverse impact on Howard, it cannot be said that but for the belt it is reasonably probable Howard would have had a more favorable outcome. As shown by the substantial evidence of Howard's guilt, the lack of any prejudice caused by the belt, the void in the record the belt adversely impacted Howard, his coherent testimony, and his statement of complaint to the trial court which omitted any reference to the stub

belt, demonstrates the error was harmless beyond a reasonable doubt. The judgment should therefore be affirmed.

II.

THE TRIAL COURT PROPERLY DENIED HOWARD'S NEW TRIAL MOTION BECAUSE A DIFFERENT RESULT WAS NOT REASONABLY PROBABLE

Howard claims the trial court abused its discretion by denying his motion for new trial because he presented newly discovered evidence that allegedly established prosecution witness Cedric Torrence lied under oath. Howard asserts his additional newly discovered evidence, an affidavit from former codefendant Mitchell Funches that stating someone other than Howard participated in the murder of Sherry Collins with him, established his innocence. Howard alleges the denial of his new trial motion amounted to a due process violation and rendered his trial fundamentally unfair. Howard maintains his conviction must be reversed. (AOB 44-57.) The evidence presented by Howard was not new, material, or credible evidence. The trial court considered the evidence in connection with all of the evidence presented during Howard's trial and properly determined that it was not reasonably probable a different result would occur if a jury heard the newly submitted evidence. The trial court correctly determined the motion was without merit and properly exercised its discretion in denying Howard's new trial motion.

> The determination of a motion for new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.

(*People v. Staten* (2000) 24 Cal.4th 434, 466, quotation marks omitted; *People v. Seaton* (2001) 26 Cal.4th 598, 563, cert. den. *Seaton v. California* (2002) 535 U.S. 1036 [122 S.Ct. 1794, 152 L.Ed.2d 652] [A trial court has broad discretion to grant or deny a motion for new trial]; *People v. Delgado* (1993) 5 Cal.4th

312, 328.) This applies to motions for new trial based on newly discovered evidence. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1251-1252.) "'[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background.'" (*People v. Dyer* (1988) 45 Cal.3d 26, 52, quoting *People v. Hill* (1969) 70 Cal.2d 678, 698.)

The underlying basis for Howard's new trial motion was Penal Code section 1181, subdivision (8), which, in relevant part, states a new trial may be ordered, "When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence have discovered and produced at trial . . . ."

> In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: 1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these be shown by the best evidence of which the case admits.

(*People v. Turner* (1994) 8 Cal.4th 137, 212, overruled on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn.5, citing *People v. Sutton* (1887) 73 Cal. 243, 247-248 and *People v. Delgado, supra*, 5 Cal.4th at p. 328.)

Howard filed a motion for a new trial on November 15, 1995. (2CT 361-372.) The motion relied upon declarations by Howard, Mitchell Funches, and two other inmates, David James and Brandon Nunez. None of the declarations, individually or cumulatively, provided Howard with newly discovered evidence that rendered the verdict suspect or reasonably likely to produce a different result if introduced in another trial.

Howard submitted three self-serving declarations, from himself and two other inmates, dated some five months after the events were alleged to have occurred on a San Bernardino County Sheriff's Department inmate transport

bus. (2CT 367-368 [dated October 31, 1995].) According to Howard, on May 10, 1995, he was on the same transport bus as Cedric Torrence. Torrence had been arrested on a traffic warrant and driving on a suspended license. (2CT 367.) The inmates were shackled together, two to a bus seat. Each shackled to another inmate, Torrence was seated behind Howard; both in the aisle seat. Howard stated he asked Torrence why he had done this to him, and Torrence allegedly said he was pressured by the police, specifically Detective Blackwell, who allegedly accused Torrence of having been with Howard when he attempted to rob Sherry Collins that resulted in her murder. Howard repeatedly asked Torrence why he had "lied on" Howard. Torrence allegedly said that he did not want to, he was scared for his life and his "homies" were still out there. (2CT 367.)

Mitchell Funches' declaration signed November 2, 1995, stated that Funches spent the day of his arrest smoking PCP [phencyclidine]. Funches claimed his friend Kevin "Kimo" Allen joined him. Funches claimed not to remember how he got to where Sherry Collins was shot. Funches accused Collins of swiping him with her car and this caused "'Kimo'" to start fighting with her. Funches thought he shot Collins, but was "not certain." Funches remembered climbing over a wall and "possibly" walking down a wash. Funches claimed Howard was not with him, and he did not "remember" meeting Howard prior to his arrest. (2CT 372.)

David James signed a declaration some five months after riding the inmate transport bus next to Howard. James' declaration, dated October 31, 1995, stated he was in custody at the West Valley Detention Center in San Bernardino County. When he was transported to the Victorville Courthouse were he was being tried, he was shackled to Howard and sat next to Howard on the bus. According to James, Howard initiated the conversation with Torrence, and asked why he had said the stuff against him. Torrence allegedly responded

that he was being pressured by some people, possibly gang members according to James, to tell the story he told. James heard Howard and Torrence discuss a football game and a gun. Torrence said he was forced to say it. James made the unreasonable and unsupported conclusion "It was clear this person way (*sic*) saying he lied." James claimed he did not want to get involved because it might have been a "racial type situation." When they got off the bus, Howard asked him to remember the conversation because he was going to tell his attorney about it. (2CT 369-370.)

Brandon Nunez signed his declaration nearly six months after he rode on the inmate transport bus behind Howard. In Nunez's declaration, dated November 7, 1995, he does not provide much detail or information. He said Howard asked him to remember what he had overheard on the bus as they got off in Victorville. Nunez claimed that he heard Howard "accusing the other guy" of lying about him in his case regarding possessing a gun. "The other guy" made excuses about threats or "something like that." Nunez claimed he did not recall the "details." (2CT 371.)

The prosecution filed an opposition to Howard's new trial motion and argued that the declarations did not constitute new evidence, and they totally lacked credibility when considered in conjunction with the witnesses and physical evidence presented at trial. (2CT 401-441.)

When making the determination whether the evidence would render a different result reasonably probable, the trial court may consider the credibility as well as the materiality of the evidence. (*People v. Delgado*, *supra*, 5 Cal.4th at p. 329; *People v. Beyea* (1974) 38 Cal.App.3d 176, 202.) Thus, contrary to Howard's argument, the law allowed the trial court to consider the declarants' credibility, and did not require the court to blindly accept on face value alone the statements made in the declarations submitted by Howard. Here, the trial court correctly examined the credibility and materiality of Howard's evidence

in determining that a different result was not reasonably probable. Given this determination, the trial court properly denied Howard's new trial motion.

The prosecution maintained that Howard's "claimed new evidence" was merely impeaching and lacked credibility. Funches claimed he was at the murder scene with someone else, but also claimed he was so high on PCP that he could not remember how he got there or what transpired that resulted in Sherry Collins' murder. Although Funches claimed not to remember meeting Howard until they were both arrested and jailed for Collins' murder, Howard's own witness, George Rivera, testified that Funches and Howard left the garage together and were last seen walking down the street side by side. (2CT 405-406; see 9RT 2280-2283.)

James' declaration was filled with assumptions and speculation so it was highly questionable what, if any, of his testimony would be admissible. James described Howard confronting Torrence about testifying against him. However, James only remembered selected portions of the conversation. James recalled Torrence claimed he "had to say that" in reference to his testimony against Howard. This statement was entirely consistent with Torrence having told the truth when he testified. Attached to the opposition was a certified copy of James' criminal history report. This report showed James had multiple prior felony convictions which qualified as moral turpitude crimes, including burglary, receiving stolen property, and attempted burglary, and that he was then awaiting trial on a residential burglary charged as a third strike. (2CT 410-426.)

Nunez's declaration viewed even in the best light recalled that Howard accused the other guy about a gun and the other guy, presumably Torrence, gave excuses. (2CT 406.) Attached to the opposition, was a probation report for a July 1995 conviction Nunez sustained that included a terrorist threat count. Nunez also had a prior felony conviction for assault with a deadly weapon upon

a peace officer, a fire fighter, with a great bodily injury finding for which he served a prison sentence. (2CT 427-441.)

Finally, the prosecution correctly characterized Howard's declaration as "extremely self-serving" and not consistent with the other declarations. Most of the information set forth in Howard's declaration concerning the gun and his allegedly not being at the crime scene already had been put before the jury in extensive cross-examination of Torrence and Detective Blackwell regarding Torrence's pretrial statements. The prosecution urged the trial court to take into consideration how the meeting took place: Torrence was in custody on a traffic warrant sitting inches from a dangerous, violent individual, Howard, while Howard directly confronted Torrence regarding his testimony. (2CT 407.)

After listening to the arguments of counsel, the trial court noted it had read the moving and opposition papers, the cases cited by the parties and reviewed the evidence presented to the jury. The trial court considered the evidence presented to the jury and the evidence submitted by Howard in support of his motion to determine whether it was reasonably probable a different result would occur if a jury heard it. (11RT 2763.)

The trial court assessed Funches' declaration and determined he had major credibility problems. The trial court had observed Funches throughout the litigation, which occurred during the previous two years, and found that "Mr. Funches, it appears to me, says what is convenient at the time." (11RT 2763.) Funches claimed he heard voices, and substantial evidence had been presented that Funches was schizophrenic and brain damaged. (11RT 2763.) The trial court observed that once his matter was completed and he was no longer facing the death penalty, there was a noticeable change in Funches' appearance, affect and behavior. Assuming Funches testified in front of a jury, the trial court found "there would be serious serious problems in anyone believing what Mr. Funches had to say about this matter." (11CT 2764.)

The trial court found similar problems with James' and Nunez's declarations claiming to have overheard a conversation between Howard and Torrence given their criminal backgrounds. The trial court looked at the evidence presented to the jury and found that Torrence's testimony was corroborated in large measure, and that the evidence Howard presented was susceptible to being attacked by other evidence. Torrence was vigorously cross-examined by Howard's counsel, and his motivation to testify and truthfulness was examined through the testimony of Detective Blackwell.

Based on the trial court's experience, it was aware of the dangers of a criminal wearing a "snitch jacket."[11] (11RT 2764.) The court found Torrence's alleged comments on the bus were what one might expect given the situation in which he found himself. Torrence's testimony that Howard armed himself with a black .357 Magnum firearm the day of the murder was corroborated by the discovery of such a gun near the crime scene where Howard had been seen. (7RT 1656; 8RT 1971-1973.) Several witnesses testified regarding the clothing Howard was wearing on the night of the murder. Randy Collins said the man who attacked her mother was wearing dark pants and a white shirt. Theresa Brown saw a man in a white pullover with a hood and identified Howard who was wearing exactly what she described he was wearing. Steven Larsen described two men, one wearing a white shirt and dark pants. (7RT 1658-1660, 1777-1778, 1780, 1831-1833, 1835-1837, 1840-1841, 1860-1861, 1875, 1908.)

Although Howard claimed he had never met Funches before he was taken into custody, this was disputed by Torrence, George Rivera and Danny

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11. Contrary to Howard's argument, this threat of a "snitch jacket" did not increase the reliability or trustworthiness of Funches' statements. (AOB 49.) Indeed, Funches' refusal to accept responsibility for Sherry Collins' murder after his conviction for it and the overwhelming evidence of his guilt heard by the trial court clearly demonstrates Funches is both a killer and a liar.

Rivera. Danny Rivera saw Funches and Howard in the garage together and George Rivera saw them leave the garage together. (7RT 1661-1664; 8RT 2075-2079; 9RT 2197, 2279-2282.) The trial court found that Funches and Howard left the garage together and walked down the street side by side the most damming evidence to Howard's position at trial. Additionally, Criminalist Ogino's testimony that the fibers found on Sherry Collins' shoes came from the same manufacturer as the clothing worn by Howard on the night of the killing, which further corroborated Torrence's testimony. (11RT 2765-2767.)

In denying the new trial motion, the trial court found that although the evidence may qualify as newly discovered, it was not of a quality, when considered in connection with the other evidence presented in Howard's trial, it was reasonably probable there would be a different result if presented to a jury. (11RT 2767.)

On appeal, Howard challenges the trial court's consideration of Nunez's and James' criminal backgrounds asserting that they were irrelevant. (AOB 51-53.) Evidence is relevant if it has any tendency in reason to prove a disputed material fact. (Evid. Code, § 210.) Howard waived consideration of this aspect of the claim by failing to assert an objection before the trial court. It has long been "the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal." (*People v. Rogers* (1978) 21 Cal.3d 542, 548; *People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7.) The same is true regarding Howard's claim the trial court's ruling was error under the United States Constitution in addition to the California statutory violation. (AOB 45.) Even assuming no waiver, Howard's claim is without merit.

In ruling on the motion, the trial court properly considered the prosecution evidence presented in opposition to Howard's new trial motion. A

witness' criminal background that includes a crime involving moral turpitude can rightfully be considered in assessing the credibility of the witness. "Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach, subject to the court's discretion under Evidence Code section 352." (*People v. Harris* (2005) 37 Cal.4th 310, 337.) Nunez's and James' past criminal conduct was relevant to a credibility determination, which the trial court was entitled to make in connection with weighing the materiality of the evidence.

Howard makes a quantum, and unsubstantiated, leap in claiming the evidence he submitted was "exculpatory" and "completely exonerated" him. (AOB 46.) Rather than view the evidence in isolation as Howard does, the trial court properly considered the evidence in the context of all the evidence presented at trial and the evidence submitted by the prosecution in opposition to Howard's motion. Howard's evidence was not exculpatory, did not exonerate him, and did not establish perjury by Torrence. (See AOB 46.) Howard's declaration was self-serving. Moreover, key points such as challenging Torrence's credibility and motivation were already throughly examined during trial. The trial evidence also contradicted Howard's claim he had never met Funches. Funches' declaration was also contradicted by the trial evidence. In addition to Torrence, both George and Danny Rivera saw Funches and Howard together just prior to Sherry Collins' murder. This discredits Funches' claim that he did not "remember ever meeting Mr. Howard prior to" his arrest. (2CT 372.) Nunez's declaration does not identify or describe "the other guy" on the bus that Howard accused regarding a gun. James' declaration is full of speculation and unsubstantiated conclusions, none of which show Torrence lied or perjured himself, nor exonerate Howard.

Howard faults the trial court, and claims it was an abuse of discretion, not to hold a hearing for the court to observe Nunez, James, Funches, and

Howard testify so it could assess their credibility. (AOB 54.) Howard did not request the trial court conduct an evidentiary hearing on his new trial motion. Instead, Howard, though his counsel, asserted that the trial court should grant the motion based on the evidence presented in the declarations. Moreover, it is clear from the declarations that nothing more would be gained from a hearing. Nunez claimed he did not recall the "details," but heard Howard accuse Torrence of lying about a gun. (2CT 371.) Funches claimed he was so loaded on PCP he could only remember limited aspects of the night. (2CT 372.) The trial court had observed Funches numerous times in its courtroom over the previous two years. James' statements showed very little, if any, admissible evidence. (2CT 369-370.) He made unsubstantiated conclusions and speculated greatly. The trial court already had an opportunity to observe Howard under oath when he testified during trial. (9RT 2185-2255.) A hearing would have added nothing, and the trial court properly exercised its discretion in determining one was not necessary.

The cases cited by Howard are factually distinguishable. Torrence never recanted his trial testimony, therefore, all the witness recantation cases are inapplicable. (AOB 46-47.) The other cases relied upon by appellant, i.e. *People v. Williams* (1962) 57 Cal.2d 263, and *People v. Hairgrove* (1971) 18 Cal.App.3d 606, are dramatically different than Howard's case. In *Williams*, a witness who was present in an apartment where an alleged robbery occurred came forward and disputed every aspect of the complaining witness' testimony. (*People v. Williams*, *supra*, 57 Cal.2d 263.) Neither James nor Nunez was a similarly situated witness to the one in *Williams*, nor did they provide anything remotely similar to the showing provided by the witness in *Williams*. In *Hairgrove*, the defense presented a declaration from an individual who confessed he committed the crime for which the defendant was convicted, and declared under penalty of perjury that the defendant did not accompany him or

know anything about the crime. (*People v. Hairgrove, supra*, 18 Cal.App.3d at p. 609.) Here, there was no declaration from Kevin "Kimo" Allen, the person Funches indicates accompanied him when Collins was killed. Also, the actual shooter, Funches, claims in his declaration "I think that I shot her, but am not certain." (2CT 372.) When Funches signed his declaration he had been convicted of personally shooting and killing Collins. The absence of a confession from "Kimo" and Funches shows a stark contrast to the evidence presented in *Hairgrove*. Since it is established that each new trial motion must be reviewed based on the facts of the case, and the facts from *Williams* and *Hairgrove* are completely dissimilar to those in Howard's case, these cases provide no support for Howard's claim that the trial court erred.

The evidence submitted by Howard in support of his motion must be considered along with the weight of the other evidence of Howard's guilt, and the evidence presented by the prosecution in opposition to the motion. (*People v. Lewis* (2001) 26 Cal.4th 334, 364; *People v. Lagunas* (1994) 8 Cal.4th 1030, 1038.) The trial court considered it in this context and found it wholly lacking. The evidence did not show perjury by Torrence, nor did it show that Howard was exonerated, innocent or uninvolved in Collins' murder. The trial court properly considered the evidence along with all the other evidence presented during Howard's trial and correctly determined that a different result was not reasonably probable. Howard has not demonstrated a clear abuse of discretion by the trial court, nor has he shown a lack of process or fairness in his trial. Accordingly, the trial court properly exercised its discretion in denying Howard's meritless new trial motion.

III.

THE TRIAL COURT WAS NOT REQUIRED TO ORDER A HEARING SUA SPONTE BECAUSE HOWARD DID NOT PRESENT SUBSTANTIAL EVIDENCE OF INCOMPETENCE TO STAND TRIAL

Howard claims the trial court erred in not ordering a hearing into his mental competence after he personally spoke immediately prior to being sentenced. Relying solely on his statements to the trial court, Howard contends he raised a reasonable doubt as to his competence. Howard claims his mere mention he had allegedly been the unwilling recipient of an "antipsychotic medication" during trial provided substantial evidence of incompetence and obligated the trial court to sua sponte conduct a hearing to determine his competence. Howard asserts the failure to conduct a competence hearing denied him his rights to due process, fair trial, trial by jury, confrontation and cross-examination, effective assistance of counsel and equal protection under the state and federal Constitutions, and as a result, his conviction must be reversed. (AOB 58-68.) Howard's claim is meritless.

The record simply does not provide any support for Howard's claim. For the first time, just prior to being sentenced, Howard personally argued to the court, citing cases in support of his position, that during trial he had been prescribed and taken a medication that he described as antipsychotic. Rather than provide factual circumstances that raised a suspicion regarding competence, Howard argued the holdings of the cases. On this record, there is no evidence the trial court ever doubted Howard's mental competency, nor is there any evidence that provided any basis for reasonable doubt concerning Howard's competence. The trial court was not obligated to conduct any further inquiry regarding Howard's competency, and properly moved forward with sentencing.

More than six months after he had been convicted, on the day of sentencing, December 7, 1995, after the trial court had denied Howard's new trial motion, the trial court read a note it received from Howard that morning, "Good morning, Your Honor - - I would like the opportunity to address the Court this morning before you begin with sentencing." (11RT 2767.) Howard then informed the court for the first time that he had been prescribed what he described as an "antipsychotic medication" which he took during trial. Howard claimed he did not want to be on the medication. Howard acknowledged the matter had not previously been raised in court, and with his present "argument," Howard wanted to bring it to the court's attention. (11RT 2767-2768.)

Howard then launched into a legal argument. Howard cited *Taylor v. United States* (1973) 414 U.S. 17 [94 S.Ct. 194, 38 L.Ed.2d 174] arguing that he had a fundamental right to be present at trial under the Confrontation Clause. Howard then argued that under *Coy v. Iowa* (1988) 487 U.S. 1012 [108 S.Ct. 2798, 101 L.Ed.2d 857], his "facial expressions, or lack thereof, emotional responses, or lack of mannerisms, made an impression on the jury" and his "demeanor could've had a significant bearing on [his] credibility, persuasiveness, and on the degree to which [he] could have invoked sympathy." (11RT 2768.) Howard also relied on *Coy* as "important that my face-to-face encounter with [his] accuser not be hindered." Next, Howard cited *Massiah v. United States* (1964) 377 U.S. 201 [84 S.Ct. 1199, 12 L.Ed.2d 246], for the proposition that he had a right to counsel and "the right is impaired when the Defendant cannot cooperate in an active manner with his lawyer." Finally, Howard argued that under *Riggins v. Nevada* (1992) 504 U.S. 127 [112 S.Ct. 1810, 18 L.Ed.2d 479], "the side effects of antipsychotic drugs may alter demeanor in a way that will prejudice all facets of the defense. The Defendant must be able to provide needed information to his lawyer and to participate in the making of decisions on his own behalf. The side effects of antipsychotic

drugs can hamper the attorney/client relation, preventing effective communication and rendering the Defendant less able or willing to take part in his defense. . . ." (11RT 2767-2768.)

Howard recognized that his "argument" was different than the one made in *Riggins*, because Riggins brought up the issue of being medicated and the court ordered that he be forced to continue being medicated throughout the trial. On the other hand, Howard had made no mention of being medicated until just prior to sentencing. Howard also placed on the record that he had brought this to his counsel's attention, but it was never addressed to the court. Howard expressed his desire to place this information on the record and for the court to be aware of it. (11RT 2769.)

When asked by the trial court, Howard's counsel said, "I don't have anything to say about this motion, at all, at this point in time." (11RT 2769.) The trial court then inquired whether there was disagreement that the matter should be looked into immediately before proceeding further. The prosecutor expressed disagreement, and noted that Howard had sat through the entire trial with no indication of any mental competency issue. The prosecutor observed that while testifying, Howard had smiled from time to time, responded properly, and was very coherent. The prosecution wished to proceed to sentencing as scheduled. (11RT 2769-2770.) When asked again, Howard's counsel reiterated, "I don't have any comment on this motion, at this point in time." (11RT 2770.)

Howard then added that the argument in *Riggins v. Nevada*, was not based on whether the prosecutor could observe if Howard was coherent, which could not be determined because of the medication, but rather, whether Howard was mentally present because the antipsychotic medication causes drowsiness. Howard alleged "these rights" were infringed upon because of the medication,

no hearing was held to address the issue, and the United States Supreme Court cases say it is a serious issue. (11RT 2771.)

After learning that neither side had anything further to add, the trial court said it was familiar with the authorities cited by Howard because the same issue was raised by Funches and his counsel because Funches was on antipsychotic medication throughout the proceedings, and there were extensive discussions and testimony regarding this fact. The trial court expressed, "my perceptions of Mr. Howard throughout these proceedings has been that he was coherent and responsive, and in no way appeared to be impaired by virtue of any medication or anything else." The court stated Howard's counsel was "an outstanding attorney, and that the issue would not have been just left to fester, if in fact it was something that could be used to Mr. Howard's advantage." The court noted a hearing on the matter may be held sometime in the future in a habeas proceeding, and found "this is an issue that is raised, at this point, in bad faith by Mr. Howard as a way of creating another issue for appellate review, that is to say competence of counsel . . . . [¶] And I find that there are just too many coincidence with what Mr. Howard has related this morning to what Mr. Funches and his counsel had to say, and I am not willing to proceed with the issue further." (11RT 2772.)

It is undisputed that "the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." (*Medina v. California* (1992) 505 U.S. 437, 439 [112 S.Ct. 2572, 120 L.Ed. 2d 353], citing *Drope v. Missouri* (1975) 420 U.S. 162 [95 S.Ct. 896, 43 L.Ed.2d 103]; see also Pen. Code, § 1367.) "A defendant is mentally incompetent 'if as a result of mental disorder or development disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1110, quoting Pen.

Code, § 1367, subd. (a).) "A trial court is required to conduct a competence hearing, sua sponte if necessary, whenever there is substantial evidence of mental incompetence." (*People v. Howard* (1992) 1 Cal.4th 1132, 1163; *People v. Stankewitz* (1982) 32 Cal.3d 80, 93; *People v. Pennington* (1967) 66 Cal.2d 508, 518; see also *Pate v. Robinson* (1966) 383 U.S. 375, 385 [86 S.Ct. 836, 15 L.Ed.2d 815].) Substantial evidence of a defendant's mental incompetence is evidence that raises a reasonable doubt regarding a defendant's ability to comprehend the nature of the criminal proceedings or assist counsel in the defense in a rational manner. (*People v. Howard*, *supra*, 1 Cal.4th at p. 1163; *People v. Medina, supra,* 11 Cal.4th at p. 733; *People v. Danielson* (1992) 3 Cal.4th 691, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn.13.) Absent a reasonable doubt as to Howard's mental competence, the trial court had no obligation to pursue the matter further. (See *People v. Howard*, *supra*, 1 Cal.4th at p. 1164, fn.12; *People v. Jones* (1991) 53 Cal.3d 1115, 1152.)

Here, by Howard's own admission, he presented an "argument" to the trial court in his comments just prior to sentencing. (11RT 2769, 2771 [Howard used the phrase "my argument" twice, and the word "argument" to characterize his statement another time].) Most of Howard's argument was legally based. It was void of any evidence he was unable to understand the nature of the proceedings or cooperate with counsel in a rational manner. An examination of his trial testimony does not indicate any failure to cooperate with his counsel, nor does it show that Howard was unable to understand the nature of the proceedings. (See 9RT 2185-2255.) Howard's argument to the trial court immediately prior to sentencing shows that he was fully cognizant and appreciated the proceedings. From his argument, it is clear Howard read and understood the cases he cited. (See 11RT 2768-2769.) Howard asked for and received an opportunity to respond to the prosecutor's argument. Then

Howard argued the facts and holding in *Riggins v. Nevada*. (11RT 2771.) Moreover, Howard was fully aware he need only mention his medical needs to the trial court in order for them to be attended. Several times during trial Howard, through his counsel, sought trial court orders to assist Howard in having his medical needs met. (See e.g., 3RT 658-660; 5RT 1333-1334; 9RT 2185.)

The interpretation urged by Howard regarding the trial court's initial comments after he completed his statement as a tacit ruling the court had doubts about his competency (AOB 59-60), reads too much into the comments. The trial court simply inquired whether anyone disagreed the matter should be looked into prior to proceeding further. (11RT 2769.) There was no implicit or express ruling that sufficient evidence had been presented to hold a hearing into Howard's competency. Indeed, when the trial court heard the prosecutor's comments, and defense counsel decline to comment, the trial court found Howard was coherent and responsive throughout the proceeding, and in no way appeared to be impaired by virtue of any medication or anything else. (11RT 2772.) The trial court also found the timing, with Howard raising the nearly identical issue as his former codefendant Funches, demonstrated bad faith by Howard and an effort to create another issue for appellate review. (11RT 2772.)

Howard claims not much can be read into defense counsel declining to address the issue in open court. The inference that is properly drawn from the absence of defense counsel's comment or participation in the motion is that defense counsel clearly did not personally entertain any doubt as to Howard's competence, and had no evidence to provide to the court to support an assertion of mental incompetency. Moreover, given the remarkable similarity to the incompetency claim raised by Howard's cohort in crime, it is also reasonable to infer that defense trial counsel did not which to participate in any fraud upon

the court that Howard wished to pursue. The record fully supports the trial court's comments Howard was ably represented throughout trial.

This Court has rejected complaints for not ordering a competency hearing on substantially more evidence than presented on this record. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1060; *People v. Danielson*, *supra*, 3 Cal.4th at p. 691; *People v. Howard*, *supra*, 1 Cal.4th at p. 1132.) Howard did not meet his burden of presenting sufficient evidence to raise a question regarding his mental competence to warrant a hearing on the issue. There was no indication or evidence that Howard did not understand the nature of the proceeding or had difficulty or was unable to assist his counsel. To the contrary, the record demonstrates Howard was in full use of his faculties. He answered the lawyers' questions in a responsive manner, he was able to recall and relay to the jury his version of events on the night Sherry Collins was murdered, and he read and understood United States Supreme Court cases sufficiently to coherently argue them to the trial court. None of Howard's rights were violated by the trial court's handling of Howard's "argument," and its decision not to hold a hearing regarding Howard's mental competence.

IV.

IT WAS A PROPER EXERCISE OF DISCRETION TO ADMIT INTO EVIDENCE THE GUN RECOVERED FROM THE APARTMENT COMPLEX

Howard claims the trial court erred in admitting into evidence a gun found by a young child near the apartment where Howard was loitering just after the murder. Howard contends the court abused its discretion in admitting the gun. He also argues the gun could not be relevant evidence because it was not the gun used to shoot Collins. Howard argues there was insufficient foundation laid to show the gun introduced at trial was the gun in Howard's possession during the murder and robbery of Sherry Collins, and therefore, the

gun was not relevant. Howard argues that if even it was relevant, the probative value was outweighed by its prejudicial effect, and it should have been excluded pursuant to Evidence Code section 352. He contends the trial court failed to weigh the prejudice of the evidence under 352. He also claims error concerning the prosecutor's questioning during identification of the gun before the jury and in closing argument. Finally, Howard alleges the improper admission of the gun rendered his trial unfair, and deprived him of his federal constitutional rights to due process and a reliable penalty determination. (AOB 69-81.) Howard's contentions are meritless.

Howard objected to the admission of the gun on relevancy, foundational, and Evidence Code section 352. Evidence Code section 352 provides, "The court in its discretion may 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 the substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Howard requested a foundational hearing pursuant to Evidence Code section 402 regarding Torrence's identification of the gun he saw Howard possess. (6RT 1577-1582, 1595.) Evidence Code section 402, in relevant part, provides:

> (a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.
>
> (b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; . . .
>
> (c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.

At the hearing, Torrence was sworn, identified Howard, and explained how Howard had a black .357 gun in his possession on December 6, 1992. Torrence described it as a regular, average-sized gun. During cross-examination, Howard's counsel unsuccessfully attempted to show Torrence was

hesitant and unsure in his identification of the gun. Torrence went on to positively identify Exhibit 3 as the gun Howard had that day. (7RT 1601-1612.)

After listening to defense counsel's argument, the trial court found an adequate foundation had been laid, the evidence was sufficient, and the gun should be admitted into evidence. (7RT 1613.) The trial court's ruling was proper because it was reasonably to infer from the evidence that the black .357 gun Howard had just prior to the murder was the same .357 magnum found in the bushes next to apartment 3 at the University Village Apartments.

When Cedric Torrence picked up Howard the morning of Sunday, December 6, 1992, Howard had on a black t-shirt and black pants. Howard also had a black .357 handgun. Before going to play football, Howard put the gun in Torrence's house. When they returned to Torrence's house, Howard retrieved his gun. Howard put the gun in his belt, and put on a white poncho-type pull-over sweater shirt. (7RT 1655-1659, 1672.)

Howard met up with Funches in a garage on Torrence's street. Funches was dressed all in black. Howard and Funches were off talking by themselves. Torrence overheard them planning a "jacking." In response to Torrence telling them they could get caught, Howard said he could not get caught because he would go out shooting or something similar. Funches said he was "down" with it. He had a .380 chrome gun. (7RT 1660-1664; 9RT 2274-2279.) Near dark, Howard and Funches left the garage together and walked down the street. (9RT 2283.)

Randy Collins was in the front passenger seat next to her mom when confronted by two black men. The car dome light went on when Sherry Collins opened the driver's side door to step out. The shirt Howard had on looked white to Randy. Funches stood in black clothes on Randy's side of the car.

Randy saw the man dressed like Howard, and struggling with her mom, holding a gun by his stomach. (7RT 1721, 1781-1788, 1804-1806.)

After killing Sherry Collins, Howard and Funches fled the scene together. They headed west into a wash area that was behind Steven Larsen's house. Howard was in a white shirt, and Funches wore dark clothing.

Howard and Funches were next seen by Theresa Brown, who lived upstairs at University Village apartment complex at Kendall and University Parkway. (7RT 1826-1829.) Howard remained on the University Village Apartments grounds. Theresa Brown's downstairs neighbors in apartment two, Michael and Laurie Manzella, saw Howard talking to the person who lived across from them in apartment three. (7RT 1848-1858.)

James Chism was the next to encounter Howard at the University Village Apartments. When he left his apartment, Chism saw Howard sitting on the stairs. Howard asked for a ride home, and when Chism refused, he asked to use his phone. Chism let Howard use the phone and he called Cedric Torrence. During the conversation, Howard told Torrence he had his gun on him, and Chism gave Torrence directions using El Pollo Loco as a landmark. Although there was only one way to get in and out of the apartment complex from the street, Howard had to ask Chism for directions on how to get out of the complex. After Chism gave him directions out to El Pollo Loco, Chism's roommates came up and told them a police officer had been shot in front of El Pollo Loco. Instead of walking towards El Pollo Loco, Howard walked in the opposite direction. (7RT 1666-1668, 1864-1875.)

Less than a week after Sherry Collin's murder, on Saturday, December 12, 1992, a seven-year-old child playing ball at the University Village Apartments found a loaded black .357 magnum gun in the bushes next to apartment three. The gun was turned over to the police by the child's mother. This gun was admitted as Exhibit 3. (8RT 1894-1896.)

A. The Gun Admitted As Exhibit 3 Was Relevant Evidence, And More Probative Than Prejudicial

A reviewing court determines a challenge to a trial court's ruling on admissibility of evidence by determining

> "(1) whether the challenged evidence satisfied the 'relevancy' requirement set forth in an Evidence Code section 210, and (2) if the evidence is relevant, whether the trial court abused its discretion under Evidence Code section 352 in finding that the probative value of the [evidence] was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice." (*People v. Scheid* (1997) 16 Cal.4th 1, 13, 65 Cal.Rptr.2d 348, 939 P.2d 748.)

(*People v. Heard, supra*, 31 Cal.4th at p. 972.)

Evidence is relevant if it "'tends to "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, and motive.' (*People v. Garceau* (1993) 6 Cal.4th 140, 177, 24 Cal.Rptr.2d 664, 862 P.2d 664.)" (*People v. Benavides* (2005) 35 Cal.4th 69, 90.)

> Evidence is substantially more prejudicial than probative (see Evid. Code, §§ 352) if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" (*People v. Alvarez* [(1996) 14 Cal.4th [155], 204, fn.14, 58 Cal.Rptr.2d 385, 929 P.2d 365).

(*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

"Prejudice" under Evidence Code section 352 "is not synonymous with damaging." (*People v. Karis* (1988) 46 Cal.3d 612, 638, internal quotation marks omitted.) It is "not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*Ibid.*)

The trial court's ruling admitting evidence shall not be disturbed on appeal absent a finding the court abused its discretion. (*People v. Robinson* (2005) 37 Cal.4th 592, 626; *People v. Lewis, supra*, 26 Cal.4th at pp. 373-373.) The black .357 gun admitted as Exhibit 3 was relevant, sufficiently tied to

Howard, and more probative then prejudicial. Accordingly it was a proper exercise of the court's discretion to admit it into evidence.

On appeal, Howard renews his attack on Torrence's credibility. The trial court heard Torrence cross-examined about his identification of the gun found in the bushes just outside apartment three at the University Village Apartments. Torrence placed a black .357 gun in Howard's possession the morning of December 6, 1992, and later in the day. The trial court did not abuse its discretion in admitting the evidence in light of Torrence's testimony.

Moreover, the gun was highly relevant. Howard and Funches confirmed the other was armed with a gun before leaving the garage to rob someone. Randy Collins saw a gun in the hand of the man who was fighting with her mother. Her description of the clothing worn by the man matched Howard's. Fibers from Howard's clothes were found on the bottom of Sherry Collins' shoes. Mr. Larsen saw men matching Howard's and Funches' descriptions fleeing from the crime scene. Ms. Brown saw men matching Howard's and Funches' descriptions in the University Village Apartments. Mrs. Manzella positively identified Howard talking to the man in apartment three. A gun, exactly like the one Torrence described in Howard's possession before he left the garage to commit the robbery, was found in the bushes just next to the apartment where Howard was standing talking to the man in apartment three. The gun was relevant, more probative than prejudicial, and within the trial court's discretion to admit.

A majority of Howard's complaints, for example, the lack of fingerprints on the gun and ammunition, go to the weight of the evidence, not its admissibility. The trial court weighed the prejudicial nature of the gun against its probative value and properly exercised its discretion in admitting it into evidence.

Even assuming the trial court failed to make an adequate record as to its weighing process in admitting the gun, the error is not prejudicial.

> Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error.

(*People v. Partida, supra*, 37 Cal.4th at p. 439, citing *People v. Earp* (1999) 20 Cal.4th 826, 878, and *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The jury was clearly told the gun (Exhibit 3) was not the murder weapon, it was fully loaded without any bullets fired when found in a place Howard was hiding the night of the murder, and the exact type of gun Howard had in his possession earlier in the day. It is not reasonably probable Howard would have enjoyed a more favorable outcome if the gun had not been admitted.

Howard's claim of prosecutorial misconduct was not properly preserved below because he did not object to the prosecutor's questions or argument concerning the gun. His failure to raise any objection or request a curative admonishment waives the issue for review. (*People v. Cole* (2004) 33 Cal.4th 1158, 1201-1202; *People v. Dennis* (1998) 17 Cal.4th 468, 521; *People v. Hill, supra*, 17 Cal.4th at p. 820.)

Howard also did not raise a constitutional objection to the admission of the gun in the trial court, therefore, the issue has been waived on appeal. (*People v. Heard* (2003) 31 Cal.4th 946, 972, fn. 12; *People v. Anderson, supra,* at p. 592, fn. 17; *People v. Ramos* (1997) 15 Cal.4th 1133, 1170; Evid. Code, § 353.) Moreover, violations of state evidentiary rules do not generally rise to the level of federal constitutional error. (*People v. Benavides* (2005) 35 Cal.4th 69, 90, fn. 15, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 116 L.Ed.2d 385]; but see contra, *People v. Partida* (2005) 37 Cal.4th 428, 436-439 [absence of constitutionally- based objection does not

preclude reviewing court from addressing whether asserted error in trial court overruling Evidence Code section 352 objection is a due process violation].)

However, if the admission of evidence was erroneous under state law, it does not result in a due process violation unless it made the trial fundamentally unfair. (*People v. Partida*, *supra*, 37 Cal.4th at p. 439, citing *Estelle v. McGuire*, *supra*, 502 U.S. at p. 70, *Spencer v. Texas* (1967) 385 U.S. 554, 563-564 [87 S.Ct. 648, 17 L.Ed.2d 606], and *People v. Falsetta* (1999) 21 Cal.4th 903, 913; see also *Duncan v. Henry* (1995) 513 U.S. 364, 366 [115 S.Ct. 887, 130 L.Ed.2d 865 [due process and Evidence Code section 352 claims are not identical for federal exhaustion purposes].) Here, Howard received a fundamentally fair trial even with the admission of the gun.

V.

THE TRIAL COURT ADEQUATELY INSTRUCTED THE JURY ON ITS DUTY AND THE GUIDELINES TO RENDER A SENTENCE IN THE PENALTY PHASE

Howard claims the trial court erred when it instructed the jury with CALJIC No. 8.84.1 prior to deliberations at the conclusion of the penalty phase. Howard argues the trial court should have given the jury additional defense proposed instructions, and the failure to do so resulted in the jury having "no legal guidance in making key determinations." (AOB 82.) Howard also faults the trial court for failing to instruct with CALJIC Nos. 2.90 - prosecution's burden to prove elements of crime beyond a reasonable doubt, 2.20 - jurors exclusively judge witnesses' credibility and the standards for assessing it, 2.01 - sufficiency of circumstantial evidence, 1.01 - instructions must be considered as a whole, 1.03 - jurors are not to discuss case except with other jurors in deliberations, 1.05 - use of juror notes, and 17.30 - jurors refrain from taking cues from judge. Howard claims that the omission of these instructions in the penalty phase resulted in an unfair, arbitrary and unreliable determination of the

appropriate punishment in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and article I, sections 7, 15, and 17 of the California Constitution. (AOB 82-92.) Howard is simply wrong on the law and constitutional safeguards regarding what instructions are necessary during the penalty phase. The instructions Howard now complains were not given to the jury were not requested by him in the penalty phase. Accordingly, he has waived any claim that the jury needed to be further advised with additional CALJIC instructions. Even assuming no waiver, no error occurred.

In the guilt phase, the jury determined the prosecution met its burden and proved beyond a reasonable doubt that Howard was responsible for the murder of Sherry Collins and found beyond a reasonable doubt the special circumstance that Howard caused her murder during the commission or attempted commission of robbery. These verdicts narrowed Howard to be a death-eligible candidate. The jury was instructed it must be satisfied beyond a reasonable doubt Howard had prior convictions for assault with a deadly weapon and inflicted great bodily injury before it considered these crimes as aggravating factors. The court provided all necessary penalty phase instructions, and these standard instructions, in addition to the defense proposed instructions, were legally sufficient and furnished the jurors with the critical guidelines necessary to render their sentencing decision. If there was any error in the penalty phase instructions, it was harmless.

There is no dispute that a trial court has a duty to instruct sua sponte on the general principles of law relevant to the evidence The sentencing decision in a capital case is "inherently moral and normative, not factual" (*People v. Rodriguez* (1986) 42 Cal.3d 730, 779), "and, hence, not susceptible to burden of proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79; *People v. Brown* (1985) 40 Cal.3d 512, 540-545.) California's standard penalty phase

instructions are adequate to guide "the jury in carrying out their 'moral and normative' function." (*People v. Jenkins, supra,* 22 Cal.4th at p. 1053.) The United States Supreme Court has upheld California's statutory process and procedures for determining death eligibility, individualized sentencing and appellate overview. (See *Tuilaepa v. California, supra*, 512 U.S. at pp. 987-988; *Boyde v. California* (1990) 494 U.S. 370, 377 [110 S.Ct. 1190, 108 L.Ed.2d 316]; *California v. Ramos* (1983) 463 U.S. 992, 1008-1009 [103 S.Ct. 3446, 77 L.Ed.2d 1171]; see also, *Brown v. Payton* (2005) 544 U.S. 133 [125 S.Ct. 1432, 161 L.Ed.2d 334].) This Court has repeatedly approved the instructions given in the penalty phase of Howard's trial. (See e.g., *People v. Cornwell* (2005) 37 Cal.4th 50, 102-106; *People v. Harris*, *supra*, 37 Cal.4th at pp. 359-361; *People v. Davis* (2005) 36 Cal.4th 510, 573-575; *People v. Marshall* (1990) 50 Cal.3d 907, 935-947; *People v. Rodriguez*, *supra*, 42 Cal.3d at pp. 777-795.) Howard's jury was adequately advised of the critical guidelines to make its sentencing determination.

The trial court instructed the jury with the standard CALJIC penalty phase instructions: 8.84 Penalty Trial - Introductory; 8.84.1 Duty of Jury - Penalty Proceeding; 8.85 Penalty Trial - Factors For Consideration; 8.86 Penalty Trial - Conviction Of Other Crimes - Proof Beyond A Reasonable Doubt; 8.87 Penalty Trial - Other Criminal Activity - Proof Beyond a Reasonable Doubt; and 8.88 Penalty Trial - Concluding Instruction. (10RT 2594-2599, 2614-2616.)

If Howard wanted the jury to receive additional CALJIC instructions, he should have requested them. The court and counsel adequately reviewed, discussed and modified the penalty phase instructions. (10RT 2559-2592.) The trial court read some of the defense proposed instructions (10RT 2599-2600), and rejected others. Defense counsel was a diligent advocate in seeking to have the defense proposed instructions read. Never once in the record did Howard,

through his defense counsel, request some standard CALJIC instructions be re-read, or to clarify the language of the instructions given.

As this Court stated in *People v. Dennis* (1998) 17 Cal.4th 468, 514:

> If defendant believed the instructions were incomplete or needed elaboration, it was his obligation to request additional or clarifying instructions. (*People v. Carpenter* (1997) 15 Cal.4th 312, 391 [63 Cal.Rptr.2d 1, 935 P.2d 708].) His failure to do so waives the claim in this court. (*People v. Sully* (1991) 53 Cal.3d 1195, 1218 [283 Cal.Rptr. 144, 812 P.2d 163].)

And reiterated in *People v. Welsh* (1999) 20 Cal.4th 701, 757,

> Moreover, """"[i]f the court gives an instruction correct in law, but the party complains that it is too general, lacks clarity, or is incomplete, he must request the additional or qualifying instruction in order to have the error reviewed."""" (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1162, 74 Cal.Rptr.2d 510, italics in original.)

The failure to request clarification of the instructions waives appellate review of the issue. (See *People v. Arias* (1996) 13 Cal.4th 92, 171; *People v. Hart* (1999) 20 Cal.4th 546, 622; but see Pen. Code, § 1259; *People v. Benavides, supra*, 35 Cal.4th at p. 111 ["to the extent defendant asserts instructional error affected his substantial rights, he is not precluded from raising the claim on appeal even absent an objection in the trial court.]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 505-506; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.)

Even if the claim is addressed, it is without merit. The trial court instructed the jury with the standard CALJIC instructions for the penalty phase and some of the defense proposed instructions. These instructions accurately conveyed all of the necessary factors to assess the appropriate punishment.

In his brief, Howard quotes only a limited portion of the CALJIC No. 8.84.1 instruction. (AOB 82.) The limited quote must be read in conjunction with the language in the rest of the instruction, and all the other penalty phase instructions. CALJIC No. 8.84.1 as read to the jury provided:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial. [¶] You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given in other phases of this trial.
>
> You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

(10RT 2595-2596.)

The arguments of counsel also guided the jury regarding the imposition of punishment. The prosecutor reiterated the "absence of mitigating factors is not an aggravating factor. It's just not." The prosecutor explained to the jurors it was the force and effect of the evidence as it affected each one of them and it was a personal decision on how the factors affect each of them, and these were relevant to determining the appropriate punishment. (10RT 2601.) The prosecutor stated instruction CALJIC No. 8.85 was the road map to a decision, it contained the statutory aggravating and mitigating factors to be considered in rendering the sentencing decision, and then addressed every factor, a through k. (10RT 2604-2607.) As opposed to guilt phase instructions, the prosecutor emphasized how factor k instructed the jurors they could consider and use sympathy in reaching their decision. (10RT 2607.)

In defense counsel's penalty phase argument, he initially acknowledged the jury's verdicts. Defense counsel advocated that because Howard did not fire the fatal shot, it was not a death penalty case. Throughout his argument defense counsel repeatedly reiterated his belief Howard's crime was not one where the imposition of the death penalty was appropriate. (10RT 2610-2614.)

Additional instructions were not necessary because the instructions that were given to the jury were sufficient. The jury's sentencing choice in the

penalty phase is different from the guilt determination. "It is not simply a finding of facts which resolves the penalty decision, but . . . the jury's moral assessment of those facts as they reflect on whether defendant should be put to death." (*People v. Brown, supra*, 40 Cal.3d at p. 540 (internal citations and quotations omitted).)

> 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.]

(*People v. Griffin, supra,* 33 Cal.4th at p. 595; footnote omitted.)

Howard is also incorrect that he was entitled to have the jury instructed there was a presumption of innocence (AOB 87), merely because CALJIC Nos. 8.86 and 8.87 required each juror "must first be satisfied beyond a reasonable doubt" that Howard had been previously convicted of assault with a deadly weapon that caused great bodily injury before the conviction could be considered as an aggravating factor. (See 10RT 2598-2599.) No clarifying instruction regarding reasonable doubt was required. This contention has been rejected in the past "because 'the special rules governing the consideration of "other crimes" evidence in aggravation are "statutorily based" [citation] and "not constitutionally mandated" [citation].'" (*People v. Prieto* (2003) 30 Cal.4th 226, 262, quoting *People v. Benson, supra*, 52 Cal.3d at p. 810.)

Even assuming it was a mistake not to instruct the jury in the penalty phase with the omitted CALJIC instructions, no harm resulted. The jury heard the essential instructions which informed them of the critical principles to make

their sentencing decision. It is not reasonably probable another result would have occurred had the jury received the additional instructions Howard claims should have been provided. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

VI.

HOWARD WAS PROPERLY CHARGED AND CONVICTED WITH FIRST DEGREE MURDER AND A ROBBERY SPECIAL CIRCUMSTANCE

Howard claims the trial court did not have jurisdiction to try him for first degree murder because the indictment only charged him with second degree malice murder. Howard contends the indictment was not defective, instead an error occurred at trial when the jury received first degree felony murder instructions. Howard recognizes this Court has heard and rejected this argument but urges a re-examination of malice murder and felony murder holdings. Howard claims reversal is warranted because he was convicted of an uncharged crime. (AOB 93-100.) Howard is incorrect. The indictment provided him with adequate notice he faced first degree murder, a special circumstance of murder committed during a robbery or attempted robbery, a robbery count, and that he could receive the death penalty if convicted as charged. The jury was properly instructed on the charges Howard faced. His conviction and sentence should be affirmed.

Howard was charged in count one of the indictment with the murder of Sherry Collins in violation of Penal Code section 187, subdivision (a). The special circumstance that the murder was committed during a robbery within the meaning of Penal Code section 190.2, subdivision (a)(17), was also alleged. (1CT 1-2.) Penal Code section 189 defines first degree murder in relevant part, "murder . . . which is committed in the perpetration of, or attempt to perpetrate . . . robbery." Howard was indicted for first degree felony murder.

Howard's failure to demur on this basis to the indictment or object to the instructions waives the issue. (*People v. Cole, supra*, 33 Cal.4th at p. 1205; *People v. Holt* (1997) 15 Cal.4th 619, 672.) Even assuming no waiver, the indictment was sufficient. The notice required of an accusatory pleading must be adequate to provide meaningful opportunity to defend against the charges. (*People v. Seaton, supra*, 26 Cal.4th at p. 640, citing U.S. Const., 6th Amend., 14th Amend. and Cal. Const., art. I, § 15.) California's pleading rules make a general charge of murder sufficient to encompass first and second degree murder, voluntary and involuntary manslaughter, and felony murder. (*People v. Thomas* (1987) 43 Cal.3d 818, 824.) An indictment need not specify the theory of murder to be relied upon by the prosecution; an accused receives adequate notice of the prosecution's theory of the murder from the testimony presented at the preliminary hearing or indictment proceeding. (*People v. Gurule* (2002) 28 Cal.4th 557, 629; *People v. Diaz* (1992) 3 Cal.4th 495; *People v. Thomas*, *supra*, 43 Cal.3d at p. 829, fn.5.) Here, Howard received adequate notice from the indictment and the evidence presented to the grand jury that he faced first degree felony murder charges.

Howard was charged with first degree murder on a felony murder theory, notified that he faced a special circumstance that the murder was committed during a robbery or attempted robbery, and if he was convicted as charged, he could face the death penalty. Howard's complaints regarding the adequacy of the indictment and instructions regarding felony murder are without merit.

VII.

THE TRIAL COURT PROPERLY PROVIDED THE JURY WITH CAUTIONARY INSTRUCTIONS ON HOW TO VIEW HOWARD'S PRETRIAL STATEMENTS

Howard claims the trial court erred when it instructed the jury, over defense objection, with CALJIC Nos. 2.03 Consciousness of Guilt - Falsehood,

2.71 Admission - Defined, and 2.72 Corpus Delicti Must Be Proved Independent of Admission or Confession. Howard argues that CALJIC Nos. 2.03 and 2.71 were unnecessary, argumentative, made improper inference regarding his guilt, and lessened the prosecution's burden of proof. He claims CALJIC No. 2.72 did not cure the defect in 2.71 because it told the jury identity could be established by an admission when his defense was mistaken identity. Howard contends the error in giving these instructions was of a constitutional magnitude, and deprived him of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determination of his guilt, the special circumstance and penalty. (AOB 101-114.) Howard's claim is without merit.

A reviewing court evaluates a claim of instructional error by reviewing the appropriateness of the trial court's instructions de novo because it presents a question of law, involving a determination of applicable legal principles. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569-570.) It is well settled the trial court must instruct on the applicable principles of law relevant to the issues raised by the evidence.

> 'The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' (*People v. St. Martin* (1970) 1 Cal.3d 524, 531 [83 Cal.Rptr. 166, 463 P.2d 390].)

(*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

The challenged instructions must be considered in light of the trial court's instructions as a whole. (*People v. Price* (1991) 1 Cal.4th 324, 446.) There was a proper evidentiary basis for each instruction, therefore, Howard's claim must be rejected.

The court instructed the jury with CALJIC No. 2.03:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statements as a circumstance tending to prove a consciousness of guilt. However, such conduct is not

sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(9RT 2373.)

This Court has repeatedly rejected claims that CALJIC No. 2.03 is impermissibly argumentative and it lessens the prosecution's burden of proof. (E.g, *People v. Nakahara* (2003) 30 Cal.4th 705, 713; *People v. Kipp* (1998) 18 Cal.4th 349, 375; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Arias* (1996) 13 Cal.4th 92, 142; *People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1140-1141.) Although Howard urges reconsideration of this Court's decisions, he does not proved a reason for doing so.

Howard's reliance on *People v. Mincey* (1992) 2 Cal.4th 408, is misplaced. The rejected instruction at issue in *Mincey* did not address consciousness of guilt. This Court found it invited the jury to infer the existence of Mincey's version of events, rather than his theory of defense. (*Id.* at p. 437.) Additionally, Howard does not provide persuasive authority in his citations to another state's decision and Ninth Circuit Court of Appeals decisions for this Court to overrule a long line of decisions rejecting his argument. (*People v. Cahill* (1993) 5 Cal.4th 478, 545 [in determinations of California law, this Court is the final arbiter].) These decisions remain good law and need not be reconsidered.

As Howard acknowledges (AOB 102, fn. 53), in addition to giving the police a false name when he was first contacted at the 7-11 store after the murder, he also admitted he called his mother and asked her to get Cedric Torrence to provide an alibi for him. (8RT 2023-2030; 9RT 2219-2220.) Two days after he was arrested, Howard also called Torrence directly and told him if he was contacted by police, Torrence was to say he dropped Howard off at the El Pollo Loco at 9 p.m. (7RT 1668-1669.) Given this evidence, the trial court properly instructed the jury with CALJIC No. 2.03. (See 9RT 2317-2318, 2343-2344.)

The trial court correctly instructed the jury with CALJIC No. 2.71.[12/] (9RT 2322-2323, 2344-2348.) CALJIC No. 2.71 was given as follows:

> An admission is a statement made by the defendant other than at trial which does not by itself acknowledge his guilt or the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the testimony.
>
> You are the exclusive judges as to whether the defendant made an admission and, if so, whether such statement is true in whole or in part. If you should find that the defendant did not make the statement you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true.
>
> Evidence of an oral admission of the defendant should be viewed with caution.

(9RT 2373.)

When there is evidence that the defendant made oral admissions, the trial court ordinarily has a sua sponte duty to instruct that such evidence must be viewed with caution. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200.) An admission is an out-of-court statement which tends to prove guilt. (CALJIC No. 2.71.) The purpose of the cautionary instruction is to assist the jury in determining if in fact the statement was made. (*People v. Slaughter, supra*, 27 Cal.4th at p. 1200.) By its terms CALJIC No. 2.71 applies solely to those statements which tend to prove guilt, and not those which are exculpatory. (*Ibid.*) If the jury determines the out-of-court statement did not tend to prove guilt, it was not an admission. (*Ibid.*) To the extent an out-of-court statement is exculpatory, it is not an admission to be viewed with caution. (*Ibid.*)

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12. Howard is correct as written, the last word in the first paragraph should have been "evidence," not testimony. The trial court misspoke, it could have been cured had Howard brought it to the court's attention immediately. The jury had the instructions in written form in the deliberation room. (9RT 2363-2364.) It is unlikely the jury misapplied this instruction.

Cedric Torrence testified he overhead Howard and Mitchell Funches plan a "jacking." The jury heard that Howard said something to the effect that they did not need to worry about being caught because they would shoot their way out. To the extent Howard's out-of-court statements provided identification and admission of participation in the murder and attempted robbery of Sherry Collins, they were inculpatory. Howard was not prejudiced by an instruction the jury should view these statements with caution. (See *People v. Slaughter*, *supra*, 27 Cal.4th at p. 1200.)

Examining the trial court's instructions as a whole, the jury was instructed to determine the facts from the evidence it received; consider the instructions as a whole; weigh the credibility of witnesses, including prior consistent and inconsistent statements; discrepancies in testimony; how to determine the weight of a witness' testimony the jury found to be willfully false; and the prosecution's burden to prove the elements of the crimes beyond a reasonable doubt. (9RT 2364-2365, 2369, 2375-2378; CALJIC Nos. 1.00, 1.01, 2.13, 2.20, 2.90; see also, *People v. Price*, *supra*, 1 Cal.4th at p. 446.) The evidence showed that Howard was in the garage with Funches, and they both were armed with guns. They spoke together about a "jacking." Howard and Funches left the garage together. Two men attempted to rob Sherry Collins and the description of the two men fit Howard and Funches. Two men fitting the same description fled from the murder scene and were seen in the University Village Apartments. Howard was specifically identified as being there. Howard gave a false name when found by police. Funches shot an officer when contacted. It was for the jury to decide whether Howard's out-of-court statements were ever made, and if they were, whether they constituted an admission that did not by itself admit culpability, but which tended to prove guilt when considered with the rest of the evidence. (See *People v. Slaughter*, *supra*, 27 Cal.4th at p. 1200.) Contrary to Howard's argument, CALJIC No.

2.71 is not argumentative, nor does it favor the prosecution or violate a defendant's due process rights. The instruction is properly written and given in this case.

Moreover, even assuming error, Howard cannot show prejudice. Given the evidence at trial, there is no reasonable likelihood Howard would have obtained a more favorable result but for the trial court instructing the jury pursuant to CALJIC No. 2.71. (*Id.* at p. 1201; *People v. Frye* (1998) 18 Cal.4th 894, 960.)

Howard contends any error from the trial court instructing with CALJIC No. 2.71 could not be cured giving CALJIC No. 2.72. He argues the instruction exacerbated the error in giving CALJIC No. 2.71, and the instruction is prejudicially unfair itself. This claim is without merit.

The trial court instructed with CALJIC No. 2.72 which provided:

> No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any admission made by him outside of this trial.
>
> The identity of the person who was alleged to have committed the crime is not an element of the crime nor is it a degree of the crime. Such identity or degree of the crime may be established by an admission.

(9RT 2374.)

The corpus delicti rule is designed to ensure that "the accused is not admitting to a crime that never occurred." (*People v. Carpenter* (1997) 15 Cal.4th 312, 393-394; *People v. Jennings* (1991) 53 Cal.3d 334, 368.) The prosecutor need only make a "slight or prima facie showing" to satisfy the corpus delicti rule. (*Ibid.*) CALJIC No. 2.72 is a companion instruction to CALJIC No. 2.71. (*People v. Moreno* (1987) 188 Cal.App.3d 1179, 1187.) The instruction is a cautionary one that favors the defendant because it ensures the jury knows the crime has to be established independent of a defendant's statements concerning the crime. Given that Howard's statements were that he

and Funches were planning a "jacking" and they would not get caught because they would shoot their way out, it is logically possible that the jury could have found these to be admissions of culpability tending to prove guilt when considered with the rest of the evidence. The trial court was therefore obligated to instruct with CALJIC No. 2.72. (See *People v. Frye*, *supra*, 18 Cal.4th at p. 960.)

Given the evidence introduced at trial, the court properly instructed the jury pursuant to CALJIC Nos. 2.03, 2.71 and 2.72. Even if the court erred, it is not reasonably probable Howard would have obtained a more favorable result absent being provided these instructions. The judgment should be affirmed.

VIII.

THERE WAS NO STATUTORY, CONSTITUTIONAL OR FACTUAL BASIS FOR THE TRIAL COURT TO INSTRUCT ON LINGERING DOUBT, THEREFORE, IT PROPERLY REFUSED THE PROPOSED INSTRUCTION

Howard claims the trial court abridged rights under the Sixth, Eight and Fourteenth Amendments of the United States Constitution and California Constitution, article I, §§ 7, 15 and 17 to present a defense, fair trial, reliable penalty determination, due process and equal protection in not instructing the jury with a proposed defense instruction on lingering doubt. Specifically, Howard contends because he asserted his innocence throughout the guilt phase, and offered evidence to refuse prosecution witness Cedric Torrence in the guilt phase, the jury should have been instructed on lingering doubt in the penalty phase. Howard states that lingering doubt was a key mitigation for him and he was prejudiced by the lack of clear instruction to the jury to consider it. (AOB 115-123.) Howard's complaint is meritless.

During discussion on penalty phase instructions, Howard's counsel requested, among other instructions, that the trial court give the jury a lingering doubt instructions that stated:

> Although proof of guilty beyond a reasonable doubt has been found, you may find a greater degree of certainty for the imposition of the death penalty. The adjudication of guilt is not infallible and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that sometime in the future, facts may come to light that have not yet been discovered.

(10 RT 2571.)

The prosecutor objected to the instruction as worded. The trial court stated its understanding lingering doubt was proper for argument, but asked for authority that such an instruction was required. (10RT 2571-2572.) Defense counsel cited *People v. Thompson* (1988) 45 Cal.3d 86, 134, for the proposition that lingering doubt may be argued by the defense; however, he did not have any authority that a court should instruct on lingering doubt as phrased in the proposed instruction. (10RT 2572.) The court said it would look at it further and take the matter up again the next day. (10RT 2573.)

The next morning, defense counsel informed the court that it would rest without offering evidence in the penalty phase. (10RT 2581.) The court noted it had reviewed the holdings in *People v. Rodrigues* (1994) 8 Cal.4th 1060, and *People v. DeSantis* (1992) 2 Cal.4th 1198, and determined it was not required to give an instruction on lingering doubt although it was a proper subject for argument. The trial court ruled it would not give the defense proposed instruction on lingering doubt. (10RT 2583.)

A defendant "clearly has no federal or state constitutional right to have the penalty phase jury instructed to consider any residual doubt about defendant's guilt." (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1187, citing *People v. Johnson* (1992) 3 Cal.4th 1183, 1253 and *People v. Fauber* (1992)

2 Cal.4th 792, 864; *Franklin v. Lynaugh* (1988) 487 U.S. 164, 173-174 [108 S.Ct. 2320, 101 L.Ed.2d 155]; *People v. Cox, supra,* 53 Cal.3d at pp. 677-678.) A "defendant may urge his possible innocence to the jury as a factor in mitigation." (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1252; Pen. Code, § 190.3, factors (a), (k).) "[A]lthough it is proper for the jury to consider lingering doubt, there is no requirement that the court specifically instruct the jury that it may do so." (*People v. Brown* (2003) 31 Cal.4th 518, 567, citing *People v. Slaughter, supra,* 27 Cal.4th at p. 1219.)

Here, the defense did not even rely on lingering doubt in the penalty phase. Although during discussion regarding penalty phase instructions, defense counsel was told by the trial court he could argue lingering doubt, he chose not to do so. (10RT 2609-2614.) As this Court has noted, there are great pitfalls in making a lingering doubt argument. (*People v. Fauber*, *supra*, 2 Cal.4th at p. 864.) Indeed, lingering doubt arguments are "often unwise, for they risk antagonizing a jury that has already found defendant guilty." (*People v. Webster* (1991) 54 Cal.3d 411, 455.)

Howard argues that he presented evidence in the guilt phase that he was uninvolved in Sherry Collin's murder, testified he was not there, and presented witnesses who countered Cedric Torrence's testimony and this was sufficient to warrant the proposed instruction in the penalty phase. Howard's claim ignores the jury's guilty and special circumstance verdicts which were supported by substantial evidence.

Howard's proposed instruction goes further than merely addressing lingering doubt. The proposed instruction urged the jury to speculate about what, if anything, might be found in the future concerning the case. It was also argumentative. It implied that the jurors' weighing of aggravating and mitigating circumstances requires a particular degree of proof. No such burden of proof exists in the penalty phase. (*Tuilaepa v. California, supra*, 512 U.S.

at p. 967; *People v. Sanders* (1995) 11 Cal.4th 475, 564; *People v. Medina, supra*, 11 Cal.4th at p. 752. The trial court is not obligated to give argumentative or legally incorrect instructions. (*People v. Ashmus* (1991) 54 Cal.3d 932, 1004.) There was no evidence or legal basis for the proposed instruction and the trial court properly refused it.

Moreover, the jury was instructed it "shall consider, take into account and be guided by the following factors, if applicable: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true." (10RT 2596; CALJIC No. 8.85; Penal Code, § 190.3, factor (a).) The jury was further instructed to consider "Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. . . ." (10RT 2598; CALJIC No. 8.85(k); Penal Code, § 190.3, factor (k).) These instructions sufficiently encompassed the concept of lingering doubt and the trial court was under no duty to give a more specific instruction. (*People v. Gray* (2005) 37 Cal.4th 168, 232; *People v. Hines* (1997) 15 Cal.4th 997, 1068; *People v. Osband* (1996) 13 Cal.4th 622, 716.) No error occurred concerning the trial court's refusal to instruct the jury with the proposed lingering doubt instruction.

An instruction on lingering doubt in the penalty phase is not required under the United States or California Constitutions. While lingering doubt may be argued, there is no requirement that the trial court instruct the jury regarding it. The concept of lingering doubt was adequately covered by the other penalty phase instructions given to the jury. The trial court was not required to give the defense proposed instruction on lingering doubt.

IX.

THIS COURT HAS REPEATEDLY FOUND CALJIC NO. 8.85 CONSTITUTIONAL; APPELLANT PROVIDES NOTHING TO WARRANT REVISITING THOSE DECISIONS

Howard claims CALJIC No. 8.85 is constitutionally flawed because it fails to specify which circumstances are aggravating or mitigating, and fails to prohibit improper consideration of inapplicable factors that resulted in an unreliable death sentence. (AOB 125-130.) Howard objects to the instruction's use of adjectives "extreme" and "substantial," and claims they acted as a barrier to the consideration of mitigation in violation of the Sixth, Eighth and Fourteenth Amendments. (AOB 130-139.) Howard also claims the proposed instructions which could have cured the defects in CALJIC No. 8.85, and while the trial court gave some of them, it erroneously refused to give all of them. (AOB 132-139.) Howard does not provide a justifiable reason to revisit this Court's and United States Supreme Court decisions regarding CALJIC No. 8.85. (*People v. Farnam* (2002) 28 Cal.4th 107, 191-192; *People v. Earp, supra,* 20 Cal.4th at p. 899; *People v. Frye, supra*, 18 Cal.4th at p. 1029; See *Brown v. Payton, supra,* (2005) 544 U.S. 133 [125 S.Ct.1432, 161 L.Ed.2d 334]; *Boyde v. California* (1990) 494 U.S. 370 [110 S.Ct. 1190, 108 L.Ed.2 316]; see also *Lockett v. Ohio* (1978) 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973].) Reversal of Howard's penalty is not warranted due to instructional error.

As this Court held in *People v. Wilson* (2005) 36 Cal.4th 309, 360:

> Contrary to defendant's assertions, the instruction need not omit inapplicable sentencing factors (*People v. Earp* (1999) 20 Cal.4th 826, 899, 85 Cal.Rptr.2d 857, 978 P.2d 15); it need not advise which factors are relevant as mitigating circumstances and which factors are relevant as aggravating circumstances (*People v. Farnam*, *supra*, 28 Cal.4th at pp. 191-192, 121 Cal.Rptr.2d 106, 47 P.3d 988); the aggravating factors are not vague and ill-defined (*People v. Earp*, *supra*, 20 Cal.4th at p. 899, 85 Cal.Rptr.2d 857, 978 P.2d 15); the use of the words "extreme" and "substantial" to describe potential mitigating evidence is not

> impermissible (*People v. Frye*, *supra*, 18 Cal.4th at p. 1029, 77 Cal.Rptr.2d 25, 959 P.2d 183); and the jury need not determine the existence of the aggravating circumstances or the appropriateness of the death penalty beyond a reasonable doubt. (*People v. Earp*, *supra*, 20 Cal.4th at p. 899, 85 Cal.Rptr.2d 857, 978 P.2d 15.) "In short, CALJIC No. 8.85 is not unconstitutionally vague and does not allow the penalty process to proceed arbitrarily. . . . [Citations.]"

(*People v. Farnam*, *supra*, 28 Cal.4th at p. 192.)

As in *Wilson*, Howard rehashes arguments previously rejected by this Court and provides no basis to reconsider the holdings and issues previously resolved in prior decisions.

X.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING A PHOTOGRAPH SHOWING THE GUNSHOT WOUND SUFFERED BY THE VICTIM

Howard claims the trial court abused its discretion under Evidence Code section 352 in admitting into evidence Exhibit 59, a photograph of Sherry Collins showing the wounds she suffered from the bullet to her head. Howard asserts the photograph was irrelevant and inflammatory. Howard contends he was deprived of his rights to due process, a fair trial, a reliable guilt and penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the parallel provisions of the state Constitution. (AOB 141-150.) Howard failed to preserve this issue on appeal, and it is, in any event, meritless.

Howard did not raise an objection on constitutional grounds to the photograph in the trial court, and therefore, the issue has been waived on appeal. (*People v. Heard* (2003) 31 Cal.4th 946, 972, fn. 12; *People v. Anderson, supra*, 25 Cal.4th at p. 592, fn. 17; *People v. Ramos, supra*, 15 Cal.4th at p. 1170; but see contra, *People v. Partida, supra*, 37 Cal.4th at pp.

437-438.) Additionally, violations of state evidentiary rules do not generally rise to the level of federal constitutional error. (*People v. Benavides, supra*, 35 Cal.4th at p. 90, fn. 15, citing *Estelle v. McGuire, supra*, 502 U.S. at p. 70.)

As set forth in Argument IV, under Evidence Code section 352, the trial court has broad discretion in determining the relevance of evidence, and in weighing the prejudicial effect of the proffered evidence against its probative value. (*People v. Sanders, supra,* 11 Cal.4th at p. 512; *People v. Rodrigues, supra*, 8 Cal.4th at p. 1124.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The test for relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts, including identity, intent, or motive. [Citations.]" (*People v. Heard*, *supra*, 31 Cal.4th at p. 973.)

Evidence is unduly prejudicial under Evidence Code section 352 only if it "uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. [Citations.]" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118-1119, internal quotation marks omitted; *People v. Scheid* (1997) 16 Cal.4th 1, 19.)

> '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. Crittenden*, *supra*, 9 Cal.4th at pp. 133-134, 36 Cal.Rptr.2d 474, 885 P.2d 887.)

(*People v. Heard*, *supra*, 31 Cal.4th at p. 976.) The trial court's broad discretion in admitting evidence "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1124.)

Prior to the introduction of evidence, the prosecutor, Howard and his counsel met with the trial judge. The prosecutor sought to have 65 exhibits, that had been reviewed by Howard's counsel, marked. The court asked if assuming a proper foundation were laid, if the defense had any objections. Howard's counsel objected pursuant to Evidence Code section 352, to Exhibit 59, a "10 by 12 photo of the victim with a bullet in the head." (6RT 1592-1593.) The court clarified with Howard's counsel the basis of his objection was because the photograph was inflammatory and therefore should not be admitted under 352. The court then confirmed with the prosecutor that the photograph was being offered into evidence with the intent to show it to the pathologist to help describe the victim's wounds. The court observed the wounds were "rather unusual."

> There is glint of copper coming back through the hair which is the actual copper jacket that was around the head when it separated going through the glass. The lead portions actually go into the brain, the copper jacket just goes into the skin; therefore, there's two entrance wounds from one bullet.

(6RT 1593-1594.)

Howard's counsel argued the pathologist could talk about the wounds, use drawn diagrams of the bullet wound, do charts, and testify regarding these things without the photograph. Defense counsel agreed with the court's observation that the photograph was not especially gruesome, and counsel acknowledged he had seen worse, however, he claimed it raised passions in him, and he wanted to avoid that in this case. (6RT 1594.) The trial court ruled:

> Well, it is - - it's an unpleasant photograph with blood and some matting of the hair due to the blood. You can see the copper jacket. I think, though, in the scheme of things it is not extremely inflammatory or gruesome. So I don't think there will be much chance that a juror will become so offended by it that Mr. Howard will be prejudiced by it. It

is probative as to several issues in the case, including identity of the perpetrators. So the objection will be overruled.

(6RT 1594-1595.)

The photograph illustrated and corroborated the pathologist's explanation on the injuries suffered by Sherry Collins. It also displayed the separation of the jacket and bullet and how the two separated items struck the victim. (8RT 2050-2052.) All agreed the photograph was not especially gruesome. The prosecution had to prove the cause of Collins' death, and the identity of her assailants to meet its burden of proving murder. The single photograph of the separated jacket and bullet's impact to Collins' temple area assisted in this effort. Moreover, the photograph was not cumulative, nor were excessive photographs of Collins' wounds admitted. The photograph was clearly relevant, and it was a proper exercise of the court's discretion to admit it. Even assuming error, Howard was not prejudiced. The erroneous admission of evidence is assessed under the *Watson* standard. (Cal. Const. art. VI, § 13; Evid. Code, § 353; *People v. Prieto, supra*, 30 Cal.4th at p. 247; *People v. Watson, supra*, 46 Cal.2d at p. 836.) It is not reasonably probable Howard would have received a more favorable verdict absent the error. (*People v. Partida, supra*, 37 Cal.4th at p. 439; *People v. Earp, supra*, 20 Cal.4th at p. 878; *People v. Watson, supra*, 46 Cal.2d at p. 836.) The evidence of his guilt was overwhelming separate and apart from the photograph depicting the wound to the victim's head.

XI.

THE CALIFORNIA DEATH PENALTY STATUTES AND INSTRUCTIONS ARE CONSTITUTIONAL AND ADEQUATELY ADVISE THE JURY ON THE CRITICAL FACTORS TO ASSESS THE APPROPRIATE PENALTY

Howard claims the California death penalty statute fails to provide "any" safeguards against arbitrary imposition of death. Howard also contends the failure to instruct the jury that it must determine the aggravating factors and whether they outweigh the mitigating factors beyond a reasonable doubt violated his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB 151-185.) Howard is wrong.

As Howard acknowledges, his claims that the California death penalty statutes and procedures violate the United States and California Constitutions have been rejected by this Court. This Court has repeatedly rejected the claim that it is unconstitutional to impose a death sentence unless the aggravating circumstances outweigh the mitigating circumstances. (*People v. Rodriguez, supra*, 42 Cal.3d at pp. 777-779; *People v. Snow* (2003) 30 Cal.4th 43, 125-127; *People v. Cox* (2003) 30 Cal.4th 916, 971; *People v. Burgener*, (2003) 29 Cal.4th 833, 884, fn. 7; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1150-1151; *People v. Clair* (1992) 2 Cal.4th 629, 691; *People v. Jenkins, supra,* 22 Cal.4th at pp. 1053-1054.) This Court has also rejected the claims that the holdings in *Apprendi*, *Ring*, and *Blakely* compel a different result. (*People v. Stitely* (2005) 35 Cal.4th 514, 573; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731; *People v. Prieto, supra*, 30 Cal.4th at pp. 262-263; *People v. Anderson, supra*, 25 Cal.4th at p. 589.) Howard provides no persuasive reason to reexamine these decisions.[13/]

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13. Howard's reliance on *Johnson v. State* (Nev. 2002) 59 P.3d 450 (AOB 157, fn. 72) is misplaced. Contrary to Howard's assertion, the Nevada statute is unlike California's capital punishment statutes. Nevada law allowed

Howard contends this Court's decisions that the federal and state constitutions do not require the jury to find beyond a reasonable doubt the aggravating circumstances are proved and outweigh the mitigating circumstance have been "squarely rejected" by the United States Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]. While recognizing this Court's holdings that the California capital punishment statutes and procedures are constitutional, Howard claims these decisions are "simply no longer tenable" in light of the holdings in *Apprendi*, *Ring*, and *Blakely*, and that these three cases require the jury be instructed to find the aggravating factors and that these factors outweigh mitigating factors beyond a reasonable doubt.

As this Court aptly concluded, in *Apprendi*, the United States Supreme Court "found a constitutional requirement that any fact, other than a prior conviction, which increases the maximum penalty for a crime must be formally charged, submitted to the fact finder, treated as a criminal element, and proved beyond a reasonable doubt. [Citation.]" (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn.14.) This Court has already distinguished the New Jersey sentencing scheme at issue in *Apprendi* from the California capital sentencing process. In California, before the jury ever considers whether to impose death or life without the possibility of parole in the penalty phase, the maximum penalty of death has already been established by the jury's determination of substantive guilt of first degree murder and a special circumstance, proven

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a three judge panel to conduct a second penalty phase trial, over the objection of defendant, after the jury deadlocked at the end of the initial penalty phase. The three judge panel found aggravating circumstances and sentenced defendant to death. (*Id.* at p. 457-460.)

beyond a reasonable doubt in the guilt phase. Accordingly, this Court aptly concluded:

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

(*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14, italics in original; *People v. Cox*, *supra*, 30 Cal.4th at pp. 971-972.)

In *Ring*, the United States Supreme Court addressed the Arizona death penalty sentencing scheme. "In Arizona, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by Arizona law for the imposition of the death penalty." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 588.) "'A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 596.) Thus, under Arizona law, the finding of an aggravated circumstance by a judge exposes a defendant to a greater punishment than that authorized by the jury's guilty verdict. (*Id.* at p. 604.) Arizona's death penalty sentencing scheme is, therefore, dramatically different from California's capital punishment procedure.

In California, once a jury finds a defendant guilty of first degree murder and at least one special circumstance is found true, he is eligible for the death penalty and "'death *is* no more than the prescribed statutory maximum for the offense.'" (*People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263, original

emphasis, quoting *People v. Anderson*, *supra*, 25 Cal.4th at pp. 590, fn. 14.) In the penalty phase, the jury makes the normative decision as to which of the two penalties already authorized in the guilt phase, death or life without the possibility of parole, should be imposed. As this Court has concluded, "nothing in *Apprendi* or *Ring* suggests the sentencer in such a system constitutionally find any aggravating factor true beyond a reasonable doubt." (*People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.)

The *Blakely* decision provides no additional support for Howard's argument.

> [*Blakley*] simply relied on *Apprendi* and *Ring* to conclude that a state noncapital criminal defendant's Sixth Amendment right to trial by jury was violated where the facts supporting his sentence, which was above the standard range for the crime he committed, were neither admitted by the defendant nor found by a jury to be true beyond a reasonable doubt.

(*People v. Morrison* (2004) 34 Cal.4th 698, 730.)

Since death is already one of two penalties authorized by the jury's guilty and special circumstance verdicts in the guilt phase, in a California penalty phase trial, death is within the "standard range" which is authorized, and therefore, the jury's normative selection decision does not have to be made beyond a reasonable doubt. (*People v. Ward* (2005) 36 Cal.4th 186, 221; *People v. Stitely*, *supra*, 35 Cal.4th at p. 573; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730.)

Howard is also incorrect in his contention that the failure to articulate any burden of proof in the penalty phase is error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB 171-176.) "The death penalty statue is not unconstitutional for failing to provide the jury with instructions of the burden of proof and standard of proof for finding aggravating and mitigating circumstances in reaching a penalty determination." (*People v. Morrison*, *supra*, 34 Cal.4th at p. 730; *People v. Welsh, supra,* 20

Cal.4th at p. 767.) "Unlike the determination of guilt, 'the sentencing function is inherently moral and normative, not factual,' [citation] and thus 'not susceptible to a burden-of-proof quantification.'" (*People v. Sanchez* (1995) 12 Cal.4th 1, 81.)

Accordingly, Howard's challenge to the constitutionality the California capital sentencing statutes and process is without merit. This Court is the final arbiter as to the meaning and application of California law, and it has previously decided and rejected the issues raised by Howard. Howard provided no reason for this Court to revisit these matters.

XII.

THE JURY WAS ADEQUATELY ADVISED OF THE SCOPE OF ITS SENTENCING DISCRETION AND THE DELIBERATIVE PROCESS TO DECIDE THE APPROPRIATE PUNISHMENT

Howard claims his death sentence must be reversed because CALJIC No. 8.88 was vague and imprecise, failed to describe the weighing process accurately, was improperly weighted toward death, and deprived him of an individualized moral judgment. Howard claims the use of the words "so substantial" and "warrants" in the instruction do not convey the "standard of appropriateness" for the jury's decision whether death is the appropriate punishment. Howard also faults the instruction for not informing the jurors they must return a sentence of life without parole if they determine that mitigation outweighed aggravation, and because it supposedly required him to persuade the jury death was an inappropriate penalty. Howard contends the instruction violated his rights to a fair jury trial, reliable penalty determination and due process under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and "corresponding sections" of the California Constitution. (AOB 187-198.) Howard has waived his challenge due to his

failure to properly preserve the issue for appeal. In any event, his complaints are meritless.

A defendant's failure to request a clarifying instruction at trial waives his claim on appeal. (*People v. Hart, supra*, 20 Cal.4th at p. 622.) Since no clarifying instruction was requested, Howard waived the issue. (See *People v. Arias, supra*, 13 Cal.4th at p. 171.)

Even if the merits of Howard's claim are reached, there is no basis for relief. The instruction does not suffer from the defects complained about by Howard. As this Court has aptly concluded, the instruction adequately informs the jury of their duty to decide the appropriate punishment and what it should consider to reach that decision. (*People v. Smith* (2005) 35 Cal.4th 334, 370, quoting *People v. Arias*, *supra*, 13 Cal.4th at p. 171.)

This Court has repeatedly rejected arguments identical to Howard's.

> The trial court instructed the jury that to "return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.84.2 (1986) rev.).)[14] Defendant contends the words "so substantial" in this instruction violate various federal and state constitutional provisions because they are impermissibly vague. Defendant further claims that the use of the word "warrant" is improper because it means "authorized" and directs the jury's attention away from the crucial issue of whether a death sentence is "appropriate." We have previously rejected identical contentions. (*People v. Sanchez* (1995) 12 Cal.4th 1, 81 [47 Cal.Rptr.2d 843, 906 P.2d 1129]; *People v. Breaux* (1991) 1 Cal.4th 281, 315-316 [3 Cal.Rptr.2d 81, 821 P.2d 585].)

(*People v. Mendoza* (2000) 24 Cal.4th 130, 190; *People v. Catlin*, *supra*, 26 Cal.4th at p. 174; *People v. Kipp, supra,* 18 Cal.4th at p. 381, and cases cited therein.)

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14. The words of former CALJIC No. 8.84.2 are now contained in CALJIC No. 8.88. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.)

Howard acknowledges this Court rejected the fundamental basis of his argument in *People v. Preito, supra*, 30 Cal.4th at p. 264, and *People v. Catlin* (2001) 26 Cal.4th 81, 174 (AOB 187, fn. 81), but nevertheless urges reconsideration of this Court's prior decisions on the issue. Howard fails to provide any persuasive reason for this Court to revisit the matter. Howard's reliance on *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, is misplaced. The use of the word "substantial" in the Georgia instruction is obviously different than the use of the word in the California instruction. The California instruction calls for the jury to consider two sets of circumstances, i.e., mitigation and aggravation, to reach a just punishment. The Georgia instruction required a more specific subjective finding, i.e., whether the defendant has a substantial violent criminal history to qualify as aggravation. This Court has already declined to rely on the Georgia decision (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14), and there is no reason to reconsider the matter.

For these reasons, Howard's claim should be deemed waived and, in the alternative, found meritless.

XIII.

INTERCASE PROPORTIONALITY REVIEW IS NOT MANDATED BY THE UNITED STATES CONSTITUTION

After acknowledging that California does not provide for intercase proportionality review, and California's capital sentencing statutes and procedures have passed constitutional muster, Howard claims it is time to revisit the United States Supreme Court decision in *Pulley v. Harris* (1984) 465 U.S. 37 [104 S.Ct. 871, 79 L.Ed.2d 29]. Relying solely on the fact Funches, as the shooter, received life without the possibility of parole and as his accomplice, Howard received a death judgment, Howard argues comparative case review is the most rational means to ascertain whether a whole sentencing scheme

produces arbitrary results. Howard claims California's sentencing scheme is inconsistent in penalty phase verdicts, and does not prevent arbitrariness. Howard concludes that the absence of intercase proportionality review violated his Eighth and Fourteenth Amendment rights not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence. (AOB 199-203.)

To the extent he did not object at trial on this basis, he forfeited this claim. (*People v. Sanders, supra*, 5 Cal.4th at p. 589.) In any event, even if Howard had preserved the claim, he is not entitled to any relief. As this Court has previously found, his claim is meritless.

The jury's finding Howard guilty of Sherry Collins' murder in the first degree and the special circumstance true that her murder occurred during the commission or attempted commission of robbery, made Howard eligible for two possible penalties, death or life without the possibility of parole. In making this claim, Howard completely ignores his prior violent felony convictions for assault with a deadly weapon that caused great bodily injury upon two different people. Additionally, it was shown in the penalty phase that Howard's violent criminal conduct was escalating in severity. As a result of Howard's criminal actions, Sherry Collins was brutally murdered within inches of her five-year-old daughter. The penalty imposed by the jury was commensurate with Howard's "personal responsibility and moral guilt." (See *People v. Marshall, supra*, 50 Cal.3d at p. 938.) Howard does not provide a persuasive reason to revisit the *Pulley v. Harris* decision, nor to mandate intercase proportionality in California's capital punishment statutes or procedures.

The evidence demonstrated that Howard planned with Mitchell Funches to rob someone the night of Sunday, December 6, 1992. Both men were armed with handguns. When Torrence commented they could get caught, Howard dismissed the notion saying they would shoot their way out. The victim was

particularly vulnerable. When she arrived home after sundown and drove into her garage, it was completely dark. Howard and Mitchell pounced upon her, standing at the doors on either side of her small car. Collins knew she had her five-year-old daughter with her in the car. When Howard tried to rip her from the car, Collins struggled and fought with Howard, while still seated in the driver's seat. Clearly, Howard and Funches used the element of surprise, and did not even allow her to exit the car before they descended upon her to commence the robbery. Howard had his gun in his hand while he struggled with Collins. When she began to scream, Funches fired a fatal shot at her head.

The jury was well aware that Howard did not fire the fatal shot. His lawyer eloquently argued that point to the jury in both the guilt and penalty phases. However, the jury also heard how Howard had aided in an assault upon an unsuspecting James Pearsall. Howard distracted Pearsall while Howard's cohort approached and cold-cocked Pearsall with brass knuckles. The blow was delivered to Pearsall's jaw, he never saw it coming, and he was knocked out cold. Pearsall suffered permanent nerve damage as a result of Howard's assault that inflicted great bodily injury.

Howard did not change his ways after the vicious and senseless assault on Pearsall. Instead, in a short time, Howard's violent criminal conduct escalated and within six months of being released from prison, Howard committed the vicious crime against Sherry Collins.

Howard also had a history of violent criminal behavior. Howard used a ruse to isolate Laura Carroll in the back of an unlit deserted bathroom. When Ms. Carroll realized what she confronted in Howard, she fought for her life. After she struck Howard in the face and started for the door, Howard grabbed her from behind and plunged a knife down into her neck at the shoulder. Howard left her in the back of the bathroom, but not before he displayed his

cold, callous nature by turning towards Ms. Carroll, raising the bloody knife in front of his eyes and ordering, "shut up, bitch."

In support of his argument, Howard points to the life without parole sentence imposed on Funches, the individual who fired the shot that killed Collins. By so doing, Howard is blending intercase and intracase proportionality review. As this Court established "intracase proportionality review is 'an examination whether *defendant's* death sentence is proportionate to *his* individual culpability, irrespective of the punishment imposed on others.'" (*People v. Hill* (1992) 3 Cal.4th 959, 1014, overruled on other grounds in *Price v. Superior Court, supra,* 25 Cal.4th 1046, quoting *People v. Adcox* (1988) 47 Cal.3d 207, 274, italic in original.) The Eighth Amendment does not require this Court to incorporate into a proportionality determination any comparison of Howard's sentence "with that of another culpable person, whether charged or uncharged." (*People v. Hill*, *supra*, 3 Cal.4th at p. 1014, citing *Pulley v. Harris*, *supra*, 465 U.S. at p. 53; *People v. Padilla* (1995) 11 Cal.4th 891, 961, overruled on other ground *People v. Hill, supra*, 17 Cal.4th 800; *People v. McLain* (1988) 46 Cal.3d 97, 121 ["Unless the state's capital punishment system is shown by the defendant to operate in an arbitrary and capricious manner, the fact that such defendant has been sentenced to death and others who may be similarly situated have not does not establish disproportionality violative of constitutional principles."].) Funches' sentence cannot be considered in connection with Howard's claim.

The United States Supreme Court held that intercase proportionality review is not required by the Eighth Amendment. (*Pulley v. Harris*, *supra*, 465 U.S. at pp. 50-51.) This Court has consistently found that the California capital law includes no authorization or necessity for such review. (*People v. Manriquez* (2005) 37 Cal.4th 547, 590; *People v. Harris*, *supra*, 37 Cal.4th at p. 366; *People v. Gray*, *supra*, 37 Cal.4th at p. 237; *People v. Moon* (2005) 37

Cal.4th 1, 48; *People v. Stitely*, *supra*, 35 Cal.4th at p. 574; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730.)

Howard's argument that "the vast majority of states" include an intercase proportionality review (AOB 201-202, & fn. 85), is not persuasive. How other states have constructed their capital sentencing systems is irrelevant to a judicial evaluation of the validity of the California system. As long as California's capital law is constitutionally valid without intercase proportionality review, and it clearly is, it does not matter that it would also be valid if it included such review, nor that other states have chosen to do so. Howard's penalty should be affirmed.

XIV.

CALIFORNIA'S CAPITAL SENTENCING SCHEME GENERALLY, AND HOWARD'S DEATH SENTENCE SPECIFICALLY, DO NOT VIOLATE UNITED STATES OR CALIFORNIA LAW; INTERNATIONAL LAW IS NOT RELEVANT

While acknowledging this Court has previously rejected the claim that California's death penalty scheme violates international law, Howard claims the State's capital sentencing statutes and individual death sentences violates Article VII of the International Covenant on Civil and Political Rights and the Eighth Amendment of the United States Constitution. Even assuming Howard has standing to raise an alleged violation of the International Covenant on Civil and Political Rights, his claim is without merit because he has not established any violations of federal or state constitutional law occurred during his trial. (*People v. Cornwell, supra*, 37 Cal.4th at p. 106; *People v. Turner*, *supra*, 34 Cal.4th at pp. 439-330.)

Howard urges this Court to reconsider it holdings and findings regarding the death penalty in connection with an alleged violation of international law,

and vacate Howard's death sentence. (AOB 204-209.) Howard has not presented any reason for this Court to reexamine its prior rulings in this issue. (*People v. Dickey* (2005) 35 Cal.4th 884, 932; *People v. Jenkins, supra*, 22 Cal.4th at p. 1055; *People v. Hillhouse, supra*, 27 Cal.4th at p. 511; *People v. Brown* (2004) 33 Cal.4th 382, 403-404 ["'International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements'"].) As this Court recently reiterated in *Dickey*:

> Finally, "we need not consider whether a violation of state or federal constitutional law would also violate international law, 'because defendant has failed to establish the premise that his trial involved violations of state and federal constitutional law. . . .' ([*People v. Jenkins*, *supra*, 22 Cal.4th at p.] 1055 [95 Cal.Rptr.2d 377, 997 P.2d 1044].) Moreover, had defendant shown prejudicial error under domestic law, we would have set aside the judgment on that basis without recourse to international law." (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511., 117 Cal.Rptr.2d 45, 40 P.3d 244; *Burgener*, *supra*, 29 Cal.4th at p. 885, 129 Cal.Rptr.2d 747, 62 P.3d 1.)

(*People v. Dickey*, *supra*, 35 Cal.4th at p. 932.)

Howard presents no reasons that would warrant reassessment of this Court's prior decisions on this issue, and he has not demonstrated a violation of California or federal constitutional law. Accordingly, the claim should be denied.

XV.

HOWARD'S FEDERAL CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BECAUSE CALIFORNIA'S CAPITAL SENTENCING SCHEME DOES NOT REQUIRE WRITTEN FINDINGS BY THE JURY

Howard claims that the failure to require written findings regarding the sentencing choice deprived him of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, equal protection and meaningful appellate review of his death sentence. (AOB 210-212.) Howard acknowledges this

Court has found this does not render the capital sentencing scheme unconstitutional.

This Court has held that California's death penalty statute does not lack procedural safeguards necessary to protect against arbitrary and capricious sentencing under the Eighth and Fourteenth Amendments. (*People v. Blair* (2005) 36 Cal.4th 686, 753, citing *People v. Griffin*, *supra*, 33 Cal.4th at pp. 593-594, and *People v. Rodriguez, supra*, 42 Cal.3d at pp. 777-779; see also *Tuilaepa v. California, supra*, 512 U.S. at p. 973.) The United States Constitution does not require a jury make written findings regarding the existence of aggravating factors in rendering a sentence of death. (*People v. Davis, supra*, 36 Cal.4th at p. 572; *People v. Blair*, *supra*, 36 Cal.4th at p. 753; *People v. Griffin*, *supra*, 33 Cal.4th at pp. 593-594 [written statement of reasons for the penalty decision is not required by *Apprendi* nor *Ring*]; *People v. Rodriguez*, *supra*, 42 Cal.3d at pp. 777-779; see also *People v. Jenkins, supra*, 22 Cal.4th at p. 1053; see also *Pulley v. Harris, supra,* 465 U.S. at pp. 53-54; *California v. Ramos, supra*, 463 U.S. at p. 1008; *Zant v. Stephens* (1983) 462 U.S. 862, 876-880 [103 S.Ct. 2733, 77 L.Ed.2d 235].) This Court has repeatedly rejected Howard's contention that a written finding of aggravating factors is constitutionally required (*People v. Cornwell, supra*, 37 Cal.4th at p. 105; *People v. Prieto, supra*, 30 Cal.4th at p. 275; *People v. Boyette* (2002) 29 Cal.4th 381, 466; *People v. Arias, supra*, 13 Cal.4th at p. 190; *People v. Marshall, supra*, 50 Cal.3d at pp. 935-936; *People v. Rodriguez, supra*, 42 Cal.3d at p. 777), and he provides no justification for this Court revisiting the decisions. His claim should therefore be rejected.

XVI.

NO INDIVIDUAL ERRORS OCCURRED TO PROVIDE FOR CUMULATIVE ERROR; HOWARD'S TRIAL WAS FUNDAMENTALLY FAIR, AND THE SENTENCE WAS RELIABLY RENDERED

Howard claims numerous errors occurred in his trial that were individually and cumulatively prejudicial. Howard concludes his conviction and sentence must be reversed. (AOB 213-215.)

As set forth above, no individual errors occurred during Howard's trial. Assuming errors, they do not individually or cumulatively require reversal of Howard's conviction. (*People v. Slaughter, supra*, 27 Cal.4th at p. 1223; *People v. Koontz* (2002) 27 Cal.4th 1041, 1094; *People v. Cooper* (1991) 53 Cal.3d 771, 830 ["little error to accumulate"].) Howard was entitled to a fair trial, which he received, not a perfect trial. (See *People v. Stewart* (2004) 33 Cal.4th 425, 522.)

Ample evidence supported Howard's guilt, and it is not reasonably probable he would have received a more favorable verdict or sentence. (See *People v. Davis, supra,* 36 Cal.4th at p. 573; *People v. Coffman* (2004) 34 Cal.4th 1, 128-129; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 512 [penalty phase absent errors, no reasonable probability of a difference result].)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment and sentence be affirmed.

Dated: February 8, 2006

Respectfully submitted,

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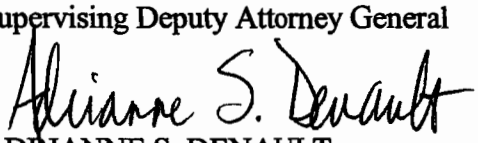

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CERTIFICATE OF COMPLIANCE

I certify that the attached DOCUMENT TITLE uses a 13 point Times New Roman font and contains 28,452 words.

Dated: February 8, 2006

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **PEOPLE v. DEMETRIUS CHARLES HOWARD**
Case No.: **S050583 (CAPITAL CASE)**

I declare:

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

On **February 8, 2006**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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Case No.: **S050583 (CAPITAL CASE)**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **February 8, 2006**, at San Diego, California.

Connie Pasquali
Declarant

Connie Pasquali
Signature

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