IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **BRANDON ARNAE TAYLOR,** Defendant and Appellant.	**CAPITAL CASE** S062562

County Superior Court No. SCD113815
Frederic L. Link, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

HOLLY WILKENS
Supervising Deputy Attorney General

MATTHEW MULFORD
Deputy Attorney General
State Bar No. 184000

110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2227
Fax: (619) 645-2271
Email: Matthew.Mulford@doj.ca.gov

Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **BRANDON ARNAE TAYLOR,** Defendant and Appellant.	**CAPITAL CASE** **SO62562**

INTRODUCTION

Brandon Arnae Taylor, 22, cut the screen on the back window of a Rosa Mae Dixon's home. He attacked and brutally raped the 80-year-old widow in front of her 72-year-old sister. Dixon struggled for breath throughout the sexual assault, including during Taylor's efforts to force her to orally copulate him. Taylor, who was certified in CPR and trained to recognize the signs of distress, ignored the obvious indications she was having a heart attack and instead robbed her sister. Police arrested Taylor as he fled because a neighbor heard a cry for help and called 911. Although paramedics resuscitated Dixon at the scene and transported her to a hospital, she later died. Beyond the eyewitness identifications of Dixon's sister and neighbor, blood and DNA evidence linked Taylor to the crimes.

STATEMENT OF THE CASE

On September 19, 1995, the San Diego County District Attorney filed an information that charged Taylor with residential burglary (Pen. Code, §§ 459, 460), first degree robbery (Pen. Code, §§ 211, 212.5), forcible rape of an elderly victim (Pen. Code, §§ 261, subd. (a)(2), 1203.09, subd. (f)), forcible

oral copulation (Pen. Code, § 288a, subd. (c)) and murder (Pen. Code, § 187, subd. (a)), including the special circumstances of murder committed during the commission of a burglary, rape, and oral copulation (Pen. Code, § 190.2, subd. (a)(17)). (1CT 41-43; also 4CT 907-909 [First Amended Information]; see 8CT 1685 [regarding dismissal of a great-bodily-injury allegation]; 1688 [regarding dismissal of a robbery-murder special-circumstance allegation].)

On January 25, 1996, the court declared a doubt as to Taylor's mental competence and suspended proceedings. (8 CT 1638; see Pen. Code, § 1368.) On February 23, 1996, the court denied Taylor's motion to relieve appointed counsel. (8 CT 1640.) On April 15, 1996, the court found Taylor mentally competent to stand trial (8 CT 1657), and the next day granted Taylor's renewed request to appoint new counsel (8 CT 1658).

On October 28, 1996, jury selection began. (8 CT 1676.) On November 1, 1996, a jury was sworn. (8 CT 1678) On November 13, 1996, the jury heard closing arguments and found Taylor guilty of murder, rape of a elderly victim during a burglary, residential burglary, forcible oral copulation, and first degree robbery. (8 CT 1688-1694.) The jury found true the special circumstances of murder during a residential burglary, murder during a rape, and murder during a forcible oral copulation. (8 CT 1695-1697.) The jury began penalty deliberations on November 21, 1996 (8CT 1707), but on November 26, 1996, the court declared a penalty-phase mistrial due to juror deadlock (8CT 1711).

On April 28, 1997, jury selection began on the penalty-phase retrial. (8CT 1718.) On May 2, 1997, a jury was sworn. (8CT 1719.) On May 16, 1997, the jury determined the appropriate punishment was death. (8 CT 1698, 1738).

On June 27, 1997, the court denied the automatic motion to modify the verdict and sentenced Taylor to death. (8 CT 1739.) This appeal is automatic. (Pen. Code, § 1239.)

STATEMENT OF FACTS

Prosecutor's Case

On June 23, 1995, Betty Hayes, 72, was visiting San Diego and staying in the North Park neighborhood home where her sister Rosa Mae Dixon, 80, had lived for 45 years, 22 of those years as a widow. (24 RT 2259-2261.) The sisters were chatting in the living room, and Dixon had been working on a crossword puzzle when around 9:30 p.m. Taylor, 22, suddenly appeared and scared Hayes "to death." (24 RT 2262, 2270, 2283-2284, 2298-2299; 26RT 2633.) Taylor had torn through a mesh screen and entered through a back window. (24 RT 2261, 2284, 2324-2325, 2339-2342; 25 RT 2381-2382, 2477-2448; 26 RT 2576-2579, 2607-2608.)

Taylor mumbled his name before he closed the front door — the security-screen door was already shut — and sat down with the sisters. (24 RT 2261-2263, 2299.) When Dixon rose, Taylor grabbed her nightgown. (24 RT 2263, 2300.) Dixon told Hayes to dial 911, but Taylor chased Hayes into a bedroom and pulled the telephone wires from the wall before she could make the call. (24 RT 2263-2264, 2301-2302.)

Taylor dragged the sisters to another bedroom where he pushed Dixon to the floor and removed her panties. (24 RT 2264-2266, 2302.) Taylor pulled down his shorts, but when he realized that the space between the foot of the bed and wall was too narrow, Taylor picked Dixon up and threw her to the floor on the side of the bed, banging Dixon's head and knocking Hayes to her knees in the process. (24 RT 2264-2266, 2292.) The women begged Taylor not to hurt them, and though Dixon began gasping for breath, Taylor penetrated Dixon's vagina with his penis several times. He then lifted her head, put his penis to her lips, and attempted to insert it into her mouth. (24 RT 2266-2269.) Dixon shook her head and said "'no'" while continuing her struggles to breathe.

(24 RT 2268-2269.) Taylor eventually let Dixon's head fall, and Hayes did not see her sister move again. (24 RT 2268-2270.)

Taylor turned to Hayes with his penis in hand and asked whether she "wanted it." (24 RT 2270-2271.) She said no and saw that he had already ejaculated. (24 RT 2271.) Taylor pulled up his shorts, rummaged through Hayes's purse, and was disappointed that she had only a few scattered dollars until he found around $70 in another compartment. (24 RT 2271-2273; 25 RT 2474-2476, 2485-2490.) Taylor took the larger bills and fled out the back door. (24 RT 2273-2274, 2288, 2305.) Hayes, who had worked as a nurse's aide for nearly 30 years, checked Dixon, but "just knew that she was gone," and so Hayes secured the back door and yelled for help. (24 RT 2274-2275, 2306.)

Dixon's next-door neighbor Eric Kirkpatrick, meanwhile, went to Dixon's home when he heard a cry for help. (25 RT 2379, 2382, 2394-2395.) Since Dixon's metal-screen and front doors were closed, Kirkpatrick looked through a side window and saw Taylor hunched over on his knees, saying something like "shut up" and "'I don't want to have to hurt you.'" (25 RT 2382-2385, 2390-2391, 2396.) Kirkpatrick returned to his home, called 911 at 9:36 p.m., and went outside to meet a series of police officers who began arriving within three minutes. (24 RT 2320-2322, 24 RT 2337-2339; 25 RT 2383-2386; 26 RT 2588-2590, 2605-2606.) Hayes told officers that the assailant was wearing a plaid vest, white t-shirt, and shorts. (24 RT 2276, 2293-2294 2303-2305.)

Two arriving officers went directly to an alley behind Dixon's home where they heard someone running. (24 RT 2343-2346, 2361-2362, 2364; 25 RT 2427-2430; 26 RT 2589-2590, 2605-2607.) At gunpoint, the officers pulled Taylor down from a fence. (24 RT 2347-2348, 2357; 25 RT 2430-2431.) When asked why he had been in the yard, Taylor said, "'I thought the house was vacant.'" (24 RT 2349, 2366.) Taylor denied living there, but said

that officers could "'take [him] home.'" (24 RT 2349, 2360.) Taylor said that a friend named John Hall "had just raped an old woman inside the house." (25 RT 2432-2434.) A third officer backtracked Taylor's route while looking for the alleged Hall before confirming with Hayes that there had only been one assailant. (25 RT 2407-2409, 2433-2434.) Taylor had blood on his clothing, was carrying a plaid vest, and lived only a block away. (24 RT 2348, 2359; 25 RT 2431-2432, 2462-2465; see ex. 25.)

When officers found Dixon, her nightgown was bunched around her waist, she was not wearing underwear, and there was blood on her legs and the floor near her vagina. (24 RT 2329.) Although she was not breathing or responsive and looked about to die, two officers performed CPR. (24 RT 2320-2322, 2327-2328, 2333-2334, 25 RT 2400, 2415-2420.) A paramedic's heart monitor showed that although Dixon's heart had stopped beating, there was some electrical activity. (25 RT 2399-2401.) The paramedic gave Dixon adrenaline and several emergency heart medications that restored her pulse. (25 RT 2400-2401, 2404.) Still, Dixon, did not breath on her own. (25 RT 2403-2406; 26 RT 2620.) The fact that Dixon's heart had stopped gave her only a one percent chance of survival. (25 RT 2402-2403; 26 RT 2627.)

At the hospital, Dixon was critically ill, completely unresponsive, and breathing through a ventilator. (26 RT 2552, 2618-2619, 2622.) She bled extensively from vaginal injuries — including separate two-inch-long and one-inch-long tears that occurred three to four inches inside of her — which were very rare in cases not involving a foreign object and which were consistent with a "brutal amount of force." (26 RT 2530-2535, 2553-2558.) Dixon's cardiac arrest deprived her brain of oxygen, and she would have died at the crime scene within five minutes but for the medical intervention. (26 RT 2621-2622.) Despite aggressive medical efforts, Dixon began to have seizures or

convulsions, which indicated her brain cells were dying. (26 RT 2623-2624.) Her kidneys shut down, and the situation became hopeless. (26 RT 2624.)

Taylor, meanwhile, stood for two separate curbside lineups in the alley during which Hayes and Kirkpatrick each identified him. (24 RT 2276-2277, 2294-2295, 2306, 2350-2351; 25RT 2387, 2392-2398, 2411-2414.) During the first lineup, Taylor did not wear the plaid vest he had been carrying when apprehended, and Hayes commented on its absence until officers produced it and placed it on Taylor's shoulders. (25 RT 2413.)

Taylor was calm and cooperative. (24 RT 2351, 2353; 25 RT 2450, 2452-2453; 26 RT 2563-2566, 2571, 2612-2613.) His pockets contained two American Red Cross identifying cards, one for first aid and one for CPR. (25RT 2476-2477.) Although smelling of alcohol, Taylor did not exhibit any obvious signs of intoxication. (24 RT 2353-2354; 25 RT 2434-2435, 2437, 2453; 26 RT 2563, 2566, 2612.) Taylor denied feeling ill and denied taking medications. (25 RT 2458.) A breath sample taken at 5:00 a.m. showed that Taylor had a blood-alcohol level of .01. (26 RT 2563-2564.) A nurse who swabbed Taylor's penis and urethra found blood. (25 RT 2448-2455, 2504-2505; 26 RT 2561-2562, 2568.)

The next day, after two separate doctors determined that Dixon was brain dead, she was removed from the ventilator and died around 10:00 p.m. (26 RT 2624.) The medical examiner and a cardiologist believed that fear, pain from vaginal tearing, and stress likely caused Dixon's blood pressure to surge and her heart to race, which triggered the cardiac arrest that resulted in her death. (26 RT 2535-2536, 2546-2547, 2624-2628.) This heart stoppage deprived her brain of oxygen, which led to brain death. (26 RT 2537-2538, 26 RT 2621-2622.) Dixon, who was in good health for her age, would not have died when she did except for the attack. (25 RT 2401-2402; 26 RT 2536-2539, 2541, 2627-2630.) Dixon's autopsy revealed that she had numerous abrasions

and bruises that were consistent with a struggle. Apart from bruising to her chest, which may have been caused by CPR, the medical examiner opined that her injuries were not related to the efforts to save her life. (26 RT 2527-2530.)

Much of Taylor's clothing — including his "'No Fear'" t-shirt, boxer shorts, and plaid vest — contained reddish brown stains that proved to be blood or mixtures of blood and semen. (25 RT 2480-2483; 2499-2502.) Blood found on Taylor's penis, hands, and various items of clothing was consistent with Dixon. The probability of a random match to the blood's DNA profile was about in 1 in 87,000 among Caucasians, but the profile was inconsistent with Taylor. (25 RT 2503-2505; 26 RT 2508-2509, 2515-2516, 2521.) Sperm found in and on Dixon's body and clothing was consistent with Taylor. The probability of a random match to the sperm's DNA profile was about 1 in 1300 among African Americans. (26 RT 2510-2517, 2521, 2535, 2553-2554, 2558.) More precise testing helped confirm that the blood on Taylor's shirt matched Dixon's DNA profile because the probability of a random match in the general population was only 1 in 400 billion among Caucasians. (27 RT 2691-2692, 2704-2706; see ex. 7.)

Testing of Taylor's urine did not reveal any reportable amounts of amphetamine or methamphetamine, and it was negative for other drugs, including cocaine, opiates, PCP, and LSD. (24 RT 2352, 2363; 25 RT 2434, 2443, 2489; 26 RT 2633-2642, 2653; 27 RT 2666.) Blood testing, which is generally more likely than urine testing to depict someone who has recently been under the influence, was similarly negative and did not reveal even the trace amounts of amphetamines present in the urine tests. (26 RT 2642-2648.)

Guilt Phase Defense

Dr. Marc Cerbone, a defense-retained psychiatrist, interviewed Taylor for about 20 minutes and reviewed various medical and investigatory records.

(29 RT 2742, 2767-2771, 2793.) According to Dr. Cerbone's review of these records, Taylor started using marijuana and alcohol when he was age six and repeatedly used them when he was between eight and ten. (29 RT 2746.) Taylor began using methamphetamine when he was between 12 and 14 years old and for about three years regularly ingested "several lines a day," or about a half a gram. (29 RT 2746-2748.) In 1989, when Taylor was 16, his mother feared he was abusing drugs and twice placed him in Harbor View, a drug treatment facility, where a doctor diagnosed him as being dependent on multiple drugs, including methamphetamine; Taylor had an average intelligence and was not noted to be psychotic. (29 RT 2744-2747, 2764-2767, 2778.) During his two Harbor View stays, which each lasted about a month, Taylor received anti-psychotic medications and was occasionally placed in restraints or sedated for behavioral outbursts. (29 RT 2749-2752.) Taylor, for example, threatened to kill a Harbor View staff member and to "'rip off [his] head and stuff it down [his] neck,'" and called a female staff member a "'bitch, cunt, [and] whore.'" (29 RT 2775-2776.) Taylor told hospital staff that he had heard voices, and he believed that his mother and doctor had conspired against him by selling his ideas about teenage mutant-ninja turtles to Hollywood. (29 RT 2748, 2753, 2756-2757.) After his release, other reports indicated that Taylor continued to abuse methamphetamine, marijuana, alcohol, and LSD, and often displayed signs of delusional thinking. (29 RT 2753, 2755-2759.)

Dr. Cerbone diagnosed Taylor as having a methamphetamine and marijuana dependence, found that he abused other drugs such as cocaine, alcohol, and LSD, and believed that he had suffered from a substance-induced psychotic disorder, a psychiatric disorder not otherwise specified, and antisocial personality disorder. (29 RT 2743-2744, 2759, 2771, 2792 [Dr. Cerbone].) Dr. Cerbone acknowledged, however, that he reviewed reports from two other psychologists, one of whom had been retained by the defense, that did not find

Taylor to be psychotic. (29 RT 2778-2787, 2794.) Dr. Cerbone opined that Taylor's methamphetamine, LSD, and alcohol abuse may have hurt his ability to control his behavior and violent impulses, which may have included sexual behavior that was harmful to others. (29 RT 2760-2764, 2772, 2790.)

A defense psychiatrist described how chronic abuse of drugs such as methamphetamine, LSD, and alcohol may cause someone to be impulsive, lack inhibition, or experience paranoia or psychosis. (29RT 2808-2817.) A defense pathologist reviewed Dixon's medical records, which indicated she was diabetic, had emphysema, and had some mild heart disease that made her vulnerable to cardiac arrest from trauma. (29 RT 2842, 2853-2855, 2858-2859, 2862, 2871.) The defense pathologist agreed that the medical examiner had done an excellent autopsy and agreed it was likely that the rape, fear, and forcible oral copulation all had contributed to Dixon's death. (29 RT 2872, 2879.) A defense toxicologist tested Taylor's urine sample and found it was weakly positive for amphetamine and found .4 nanograms per milliliter of LSD, an amount that was less than the test manufacturer's suggested cutoff number for detectable levels of LSD. (29 RT 2889-2891, 2900, 2902.) The toxicologist extrapolated Taylor's blood-alcohol level to be between .12 and .14 at the time of the crimes. (29 RT 2895.)

Penalty Phase

After the first jury could not reach a verdict regarding penalty, a second jury heard testimony regarding Taylor's crimes, including from Hayes, Kirkpatrick, various police officers, and medical experts. (See, e.g, 41 RT 3954-3984, 4003-4011, 4026-4038, 4053-4078, 4079-4087; 42 RT 4099-4120, 4150-4177, 4183-4198, 4199-4230; 43 RT 4271-4290; 44 RT 4363-4383.) One of Taylor's own penalty-phase witnesses, Dr. Steven Gabaeff, a board certified emergency physician, testified that Dixon's was "the worst case I have

seen as far as amount of injury" during his 20-year career and was comparable to documented cases involving "foreign objects like knives and so forth inserted into the vagina." (45 RT 4527-4528, 4544.)

In addition, testimony from Dixon's family illustrated how her death had "devastated four generations of a very close family." (43 RT 4308.) After witnessing the brutal sexual assault, Hayes was "scared all the time now" and "can't hardly stand to be alone." (41 RT 3972.) Two of Dixon's daughters, two adult granddaughters, and her 13-year-old great-grandson testified about their personal pain, grief, and heartbreak. (43 RT 4290, 4294, 4295, 4305, 4316-4317; 44 RT 4383.) The violent manner of Dixon's death caused several family members great difficulty sleeping. (41 RT 3973; 43 RT 4291-4293; 44 RT 4387-4388.) Others needed counseling. (43 RT 4293, 4307-4309; 44 RT 4387.) Friends believed Dixon had died in "the most violent manner" imaginable, which was "something that elderly women live in fear of;" it was "the ultimate violation of their dignity or their independence." (43 RT 4307.)

The family took her loss especially hard during holidays. (43 RT 4306-4307, 4388-4389.) A daughter's pre-existing but manageable multiple sclerosis had severely deteriorated due to the stress and shock of Dixon's death such that she had lost bladder and bowel control as well as the vision in one eye. (43 RT 4308-4309.) One granddaughter described how there was "no healing" due to the way in which Dixon died; she told jurors that she lost both an auto-detailing business and a ten-year romantic relationship and that she struggled to raise her son without the help that Dixon had provided. (43 RT 4295.) Another granddaughter said that Dixon's death had led her into a "downward spiral" in which she was clinically depressed, withdrew from her friends, gained 50 pounds, often sobbed hysterically, and had required medication. (44 RT 4387-4388.)

Dixon had volunteered once a week at a local school for more than a decade, and the children cried when learning that "Grandma Mae" was murdered. (43 RT 4310-4312; 44 RT 4330-4335.) Dixon also had worked part-time with a senior-citizen organization and was an election volunteer. (43RT 4306, 4314.)

Aggravating Evidence

Taylor and his mother and sister lived for eight years, off and on, as a family with Carol L. and her son Jason. (44 RT 4352-4353, 4360-4361.) Jason L. and Taylor were as close as brothers, and they had a normal life growing up. (44 RT 4356, 4360.) But one afternoon when Jason L. was 8 years old and Taylor around 12 years old, Taylor asked Jason L. to masturbate him and give him a "blow job." (44 RT 4353, 4356.) Jason L. initially refused, but when Taylor threatened him with a steak knife, Jason L. orally copulated him. (44 RT 4353-4354.) Taylor forced Jason L. to a bed and repeatedly put "his penis in [Jason L.'s] buttocks." (44 RT 4354-4355.) Taylor told Jason L. that if the sodomy hurt, he should "just scream into the pillow." (44 RT 4354.) Jason L. cried from the physical and emotional pain, and though he tried to call for help out an open window, he "couldn't yell, couldn't say nothing." (44 RT 4355.) Taylor told him to calm down "like nothing had happened." (44 RT 4355.)

Taylor ordered Jason L. to write a note that Taylor kept; the note included Taylor's dictation of the attack's details and the extraction of a written promise from Jason L. not to talk about it. (44 RT 4355-4356.) When some time later Jason L. did tell his mother, she was in shock, and when she told Taylor's mother, it was as if they did not want to believe him and did not pursue the matter. (44 RT 4357, 4360.)

Jason L. did not tell trial investigators about the attack until he received a subpoena and realized that he would have to testify under oath. (44 RT 4358-

4359.) Jason L. said the attack had come as a complete surprise and still could make him "feel scared and dirty" like "a filthy person" because Taylor violated his "private self" and had "no remorse." (44 RT 4356-4358.) Although at the time of his testimony he was working in Louisiana with his wife and baby, he said the attack "is going to stay with me to the day I die." (44 RT 4357-4358.) Jason L. said Taylor was often very nice and polite, but he "could just turn around on you" and "be mean and evil like an animal." (44 RT 4356.)

Less than a year before the murder, on August 11, 1994, a plainclothes police officer made eye contact with Taylor, who was with a group of workers cleaning a downtown San Diego sidewalk. (42 RT 4264-4267.) Taylor confronted the officer and asked what he was staring at. (42 RT 4265.) When the officer denied staring at anything, Taylor stood in front of him and angrily said, "'That's good for you,'" and "'I will fuck you up.'" (42 RT 4265-4268.) Only after the officer showed Taylor his badge and arrested him for making a violent threat did Taylor become cooperative. (42 RT 4266-4268.)

Six months after the murder, on January 25, 1996, Taylor's then-attorney told the court that she believed Taylor was mentally incompetent. (43 RT 4302-4304.) Taylor said he no longer wanted her as his attorney, rose from his chair, and lunged at her. (43 RT 4302-4304.) Taylor said, "'You have no client, you fucking cunt,'" and though he attempted to strike her, the attorney evaded him, and two marshals immediately restrained him. (43 RT 4302-4304; see 4RT 606.)

Six weeks after the courtroom outburst, on March 9, 1996, sheriff's deputies told Taylor that he needed to move from his individual jail cell to a cell module — where he would have to share the television set with other inmates — but Taylor refused, saying that deputies had no authority to move him and that he wanted to talk to his lawyer. (42 RT 4232-4233, 4239, 4250-4251, 4261-4262.) When Taylor continued to refuse, a sergeant ordered that a group

of deputies extract him from the cell using pepper spray and a protective shield that emits an electric charge. (42 RT 4233, 4244, 4247.) Taylor walked out of his cell, but then attacked the deputies, broke free from their hold and the shield, and ran approximately 500 feet before he was subdued and handcuffed by more than five deputies. (42 RT 4233-4236, 4247-4249, 4255-4256.) Later, however, Taylor calmly accepted the paperwork indicating that he had been charged with a disciplinary violation; he said he started to fight because he was "'given no reason why [he] was to be moved.'" (42 RT 4249-4250, 4260.)

Taylor was Red Cross certified in CPR the night Dixon died. (44 RT 4337-4342.) He, along with only one-third of his CPR class, received an *A* grade for course work that included instruction on how to recognize someone in distress and the fact that brain death may begin only four minutes after someone loses their pulse and stops breathing. (44 RT 4342-4349.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY RULED UPON TAYLOR'S MULTIPLE MOTIONS TO REPLACE HIS FIRST COUNSEL

In Argument I, Taylor contends that, before and during the pre-trial mental-competency hearing, the trial court abused its discretion in denying his repeated requests to replace appointed counsel. (AOB at 57-70, citing *People v. Marsden* (1970) 2 Cal.3d 118; see Pen. Code, § 1368.) Although he acknowledges that the trial court eventually appointed him two new lawyers, Taylor argues that he and his first counsel had an irreconcilable conflict during the mental-competency hearing such that he was denied the benefit of a reliable competency determination. The trial court, however, properly exercised its discretion, both by initially denying Taylor's *Marsden* requests and ultimately granting him new counsel.

When ruling on a *Marsden* motion, the trial court must consider any specific examples of counsel's allegedly inadequate representation, but the defendant is entitled to relief only where appointed counsel is not providing adequate representation or where the defendant and counsel have become embroiled in an "irreconcilable conflict." (*People v. Hart* (1999) 20 Cal.4th 546, 603, citing *People v. Marsden*, *supra*, 2 Cal.3d at 118.) Denial of the motion is not an abuse of discretion unless the defendant shows that a "failure to replace the appointed attorney would 'substantially impair' the defendant's right to assistance of counsel." (*People v. Webster* (1991) 54 Cal.3d 411, 435.) The Sixth Amendment does not guarantee a "meaningful relationship" between the accused and his attorney. (*People v. Montiel* (1993) 5 Cal.4th 877, 905; *People v. Clark* (1992) 3 Cal.4th 41, 100.) If a defendant makes no sustained, good-faith effort to work out any disagreements with counsel or to give counsel a fair opportunity to demonstrate trustworthiness, a trial court may properly find there is no "irreconcilable conflict." (*People v. Crandell* (1988) 46 Cal.3d 833, 860; see *People v. Barnett* (1998) 17 Cal.4th 1044, 1085-1086 [finding no error even though a later *Marsden* motion was granted on similar facts that were presented in an earlier *Marsden* motion].)

A trial court should consider a defendant's *Marsden* motion to substitute counsel even where a doubt has been declared as to his mental competence. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 85-90; *People v. Solorzano* (2005) 126 Cal.App.4th 1063, 1069-1070 [reversing where the trial court's erroneous refusal to consider a *Marsden* motion during competency proceedings may have denied the defendant a reliable competency determination].)

A. When Taylor's Counsel Declared a Doubt as to His Mental Competence, He Moved for New Counsel, and the Court Granted His Motion after Finding Him Competent

On January 25, 1996, Taylor's appointed defense attorney, Mary Ellen Attridge, declared a doubt as to Taylor's competency to stand trial. (4 RT 601.) According to Attridge, Taylor was uncooperative, uncommunicative, paranoid, and believed that Attridge was conspiring with the prosecutor. (4 RT 601-603.) Taylor said that Attridge was "crazy" (4 RT 602), had "turned against him," had "committed larceny and so forth," and had "turned a federal court case over to some psychologist I don't even know." (4 RT 604-605.) The court, specifically noting Attridge's experience and concerns about Taylor, declared a doubt about Taylor's competence. (4 RT 605.) When Taylor said, "Excuse me, Judge. I have fired this attorney," the trial court said, "I know you have" and calendared further competency-hearing dates. (4 RT 605-606.) Taylor rose from his chair, lunged at Attridge, and said "'You have no client, you fucking cunt.'" (43 RT 4302-4304; also 4 RT 606.) Although Taylor attempted to strike Attridge, she evaded him, and two marshals immediately restrained Taylor. (43 RT 4302-4304.)

At the next hearing, which occurred a month later on February 22, 1996, the court noted that Taylor had been seen by a county doctor, who believed that Taylor did not suffer from any mental problems that would render him incompetent. (5 RT 608-609.) Attridge, however, made an in camera offer of proof regarding Taylor's mental health, and the court agreed to proceed with the competency hearing. (5 RT 610-615.) When the court asked whether Taylor understood what was happening, Taylor said, "So far my attorney believes that I am incompetent and for that reason I decide that I need another attorney." (5 RT 614.) The court pointed out that Taylor had been granted the assistance of a second attorney, John Lee, but Taylor said that Lee worked with Attridge and "We don't get along at all." (5 RT 614.) Taylor said, "I can't go to trial in this

state with an attorney I don't trust, that doesn't benefit me.... Like riding a horse with a broken leg." (5 RT 616.) The court proposed addressing the competency issue first, "and then we'll handle the *Marsden* problem." (5 RT 614.)

The next day, February 23, 1996, after selecting experts and calendaring dates for the competency hearing (6 RT 621-626; also 5 RT 615-620), the prosecutor suggested that an immediate *Marsden* hearing would be appropriate. (6 RT 626-630, citing, e.g., *People v. Stankewitz*, *supra*, 51 Cal.3d at p. 72.) When Attridge indicated that this required a personal request, Taylor made one, and the court granted him a *Marsden* hearing. (6 RT 631.) Once the courtroom was clear, however, Taylor refused to sit down, called the court "insubordinate," and asked for a "new judge, too." The court instead called for a recess. (6 RT 632.)

At the continued *Marsden* hearing that afternoon, Taylor said he wanted a new attorney because Attridge gave him "misleading legal advice" by ignoring a request for a speedy trial; he said she had "decided to lash out" at him and was "insubordinate" and "brutal." (6a RT 635.) Attridge explained that she believed Taylor's dissatisfaction stemmed from a mental defect because she had no idea what his comments about having "lashed out at him" concerned. (6a RT 635-636.) She attributed Taylor's "insubordinate" comments to (1) her declaration of a doubt about his mental competence and (2) her refusal to permit Taylor to keep police reports in his cell — which she explained was to stop other inmates from using the information in the reports to fabricate seemingly plausible evidence against Taylor. (6a RT 636.) Attridge said Taylor had been more lucid when he initially had agreed to waive his speedy-trial rights. (6a RT 636-637.) Taylor declined to be heard further because Attridge had "said it all." (6a RT 637.) The court denied the *Marsden* motion, ruling that Attridge and Lee were both fine lawyers and that Taylor

appeared to have some sort of mental problem, whether real or feigned, that caused him to have a "recalcitrant or defiant attitude." (6a RT 637-639.)

On April 3, 1996, while the parties were discussing procedures for the competency hearing, Taylor again seemed to make a *Marsden* motion. (9 RT 696, 701.) But when the courtroom was cleared, Taylor twice denied having anything to say before adding, "No comment." (9RT 702.)

On April 8, 1996, Attridge waived Taylor's right to a jury trial on the competency determination over Taylor's objection. (10 RT 770-772.) When the court explained to Taylor that Attridge could make this decision despite his wishes, Taylor said several times that he had "fired her" and that she was not his attorney. (10 RT 774-775.)

After the court determined on April 15, 1996, that Taylor was mentally competent to stand trial, the parties discussed the resumption of criminal proceedings. (15 RT 1581-1583.) Taylor indicated that he did not want to waive time until July and asked "how long would it be before I can see another attorney?" (15 RT 1584.) Noting that the judge had found him competent, Taylor said he wanted to fire his attorney, wanted another *Marsden* hearing, and wanted to "relieve [the court] as [his] judge." (15RT 1585.) Once the courtroom was cleared, Taylor said he needed a new attorney because Attridge was not representing him. (15a RT 1586.) He said "these are proceedings that I would not have taken. I would — things that she said to you, my public defender would have not. We would not have discussed these issues. My public defender would not have questioned my sanity." (15a RT 1586.) The court, however, ruled that Attridge's doubt about Taylor's mental competence was not sufficient grounds to relieve her. (15a RT 1586-1587.)

But the next morning, the court revisited its *Marsden* ruling. (16a RT 1589.) The court explained that it had always believed that Taylor's reasons for seeking to replace Attridge and Lee were completely unfounded, but after the

competency hearing — and particularly after both Attridge and Lee gave testimony indicating their doubts about Taylor's competency (see 11 RT 869-917; 14 RT 1431-1443) — the court found that Taylor's distrust of Attridge had "a little bit more validity than it did before." (16a RT 1589-1591.) So although Taylor had no reason to distrust Attridge initially, and although the court doubted whether any attorney might ever receive Taylor's confidence, the fact of the hearing itself and the "friction" from seeing his counsel testify provided sufficient reason to doubt whether Attridge and Lee should remain as Taylor's counsel. (16a RT 1591-1592.) Lee believed that given significant time he and Attridge could regain Taylor's confidence or at least provide adequate assistance even without his cooperation. (16a RT 1592-1594.) But Taylor again indicated he wanted a new lawyer, and the court granted his renewed motion, finding that the "dynamics of the personalities involved warrant changes." (16a RT 1594-1595.) Noting that Attridge and Lee had handled the case appropriately, the court found that the deterioration in the relationship had been caused by Taylor "whether consciously or unconsciously." (16a RT 1595.)

B. The Trial Court Properly Found That The Actions of Taylor's Attorneys During the Competency Hearing, Including Their Testimony Against Him, Contributed to a Breakdown

As soon as the prosecutor alerted the court to the need to hold *Marsden* hearings even when criminal proceedings were suspended, the trial court appropriately considered and ruled upon Taylor's multiple *Marsden* motions. (6a RT 635-639; 9 RT 702; 15a RT 1586-1589.) When denying Taylor's initial *Marsden* motion, the court properly found that Taylor's own recalcitrance and defiance, including his failure and possible inability to assist his counsel, were the reasons for the tension. (6a RT 637-639.) If Taylor was mentally competent, then his willful refusal to assist counsel was a valid ground upon which to deny the motion. (*People v. Crandell* (1988) 46 Cal.3d 833, 859-860.)

Alternatively, if Taylor was mentally incompetent to assist counsel, as believed by Attridge, proceedings would simply remain suspended. Taylor, moreover, needed a lawyer during the competency proceedings, even though he did not want the issue of competency pursued. (See Pen. Code, § 1368, subd. (a) ["the court shall appoint counsel"].) Anyone appointed to replace Attridge would have faced the same difficulties as Attridge in trying to obtain Taylor's cooperation to participate and assist with a mental-competency hearing against his wishes. (See 16a RT 1591-1594.) Furthermore, Taylor's explanations for his unhappiness, when he provided an explanation at all, remained essentially the same, and so the court properly denied his ensuing *Marsden* requests. (See 6a RT 637 [Attridge had "said it all"]; 9RT 702 ["No comment"].)

But after the trial court determined that Taylor was mentally competent, Attridge's and Lee's actions in pursuing a mental-competency hearing provided grounds for Taylor's distrust that could impact their preparation and presentation of his defense. (See 16a RT 1589-1592.) While Taylor's initial failure to cooperate with Attridge may have fallen short of an irreconcilable conflict and been present regardless of whom represented Taylor during mental-competency proceedings, the court saw that Taylor's continuing unease stemmed from counsels' courtroom actions during the competency hearing. In other words, the competency hearing itself contributed to the tension between Taylor and his counsel, which made Taylor's refusal to work or cooperate with Attridge and Lee specific to Attridge and Lee. After the competency hearing — but not before or during it — the court could fully credit Taylor's unhappiness with counsel as creating an irreconcilable conflict that could be remedied by a change in counsel.

Taylor argues that requiring him to participate in a competency hearing with an attorney from whom he "felt completely alienated" deprived the competency hearing of any meaning and accuracy. (See AOB at 64-67, citing

People v. Solorzano, supra, 126 Cal.App.4th at p. 1070.) Unlike *Solorzano*, however, Taylor in fact received several *Marsden* hearings both before and after the mental-competency hearing. An inability to assist or to communicate with counsel is a major reason for the need to determine mental competency, but any such break in the attorney-client relationship during a mental-competency hearing is separate from the criminal process, which has already been suspended. Unlike a trial, in which a defendant must communicate with counsel to shape the investigation and defense strategy, a competency hearing involves different concerns. A defendant's inability or refusal to communicate during a competency hearing does not compromise any defense to the charged crimes. There is no basis from which to conclude that Taylor's right to assistance of counsel was substantially impaired by permitting Attridge and Lee to represent Taylor in the competency proceeding, or that any irreconcilable conflict existed.

Taylor's brief creates a false dichotomy by suggesting that either he was incompetent, such that criminal proceedings should never have been reinstated, or he was competent, such that the trial court should have found a breakdown at the first hint of his disagreement with Attridge. (See AOB at 63-65; cf. *People v. Barnett* (1998) 17 Cal.4th 1044, 1085-1086 [suggesting that a lapse of time may support relieving counsel even where other circumstances do not appear to have changed].) Adopting Taylor's reasoning, however, would deprive trial courts of the ability to conduct a competency hearing whenever defendants disagreed with their appointed attorneys' doubts about their mental competency. With Taylor, for example, any attorney appointed to replace Attridge and Lee during the competency proceedings would almost certainly have encountered the same resistence from Taylor about the need for a competency determination. (See 6 RT 631 ["Never been any question of my competency in my life"]; 16a RT 1591-1592 [regarding doubts that any attorney

would receive Taylor's cooperation].) This, in turn, would have provoked Taylor to make another *Marsden* motion to challenge his new attorney, which would have required yet another attorney. And so on.

From the trial court's perspective, Taylor's initial and potentially irrational refusal to cooperate with Attridge and Lee may been caused by a mental impairment that both supported the need for a competency hearing and the denial of the initial *Marsden* motion. After the competency hearing, Taylor had a specific reason not to trust Attridge and Lee that was unique to them. The trial court properly ruled on each of Taylor's *Marsden* motions.

II.

THE TRIAL COURT PROPERLY CONDUCTED VOIR DIRE AND IMPANELED TWO IMPARTIAL JURIES

In Argument II, Taylor contends that the trial court violated his constitutional and statutory rights to a fair trial by conducting a group, and not individual, voir dire and by using jury questionnaires that were allegedly inadequate to discover any racial biases of prospective jurors. (AOB at 71-93; see Argument III, *post.*) Taylor has forfeit his claim by failing to challenge juror for cause or exercising all of his peremptory challenges at trial. In any event, the trial court properly exercised its discretion, and by accepting two separate juries without exhausting Taylor's peremptory challenges, defense counsel implicitly agreed that each sitting juror could be fair and impartial. There was no error.

The Constitution "'does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury.'" (*People v. Chatman* (2006) 38 Cal.4th 344, 536, quoting *Morgan v. Illinois* (1992) 504 U.S. 719, 729 [112 S.Ct. 2222, 119 L.Ed.2d 492].) The amendment of Code of Civil Procedure section 223 by 1990's Proposition 115 abrogated the requirement of individual sequestered voir dire during the death-qualifying portion of jury selection and

made sequestered voir dire a matter for the trial court's discretion. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1199; *People v. Box* (2000) 23 Cal.4th 1153, 1179; *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1171-1181.) Group voir dire may be impracticable when it results in actual rather than merely potential bias. (*People v. Vieira* (2005) 35 Cal.4th 264, 287.) Jurors may receive voir dire questions in advance. (*People v. Douglas* (1990) 50 Cal.3d 468, 522-523.)

The trial court has broad discretion in assessing juror qualifications for cause. (*Uttecht v. Brown* (2007) ___U.S. ___ [127 S.Ct. 2218, 2224]; *People v. Roldan* (2005) 35 Cal.4th 646, 696; *People v. Weaver* (2001) 26 Cal.4th 876, 910.) When prospective jurors give conflicting or confusing answers regarding their fitness to serve, the trial court must determine whether the prospective jurors will impartially apply the law, and the trial court's resolution of factual matters is binding on this Court if supported by substantial evidence. (*People v. Weaver*, *supra*, 26 Cal.4th at p. 910, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146-1147.) A defendant's failure to challenge jurors for cause or with a peremptory challenge precludes a claim that the trial court inadequately examined prospective jurors for bias and prejudice. (*People v. Hart* (1999) 20 Cal.4th 546, 589.)

Taylor's counsel failed to challenge juror for racial prejudices and failed to exhaust his peremptory challenges. (See 23 RT 2188; 40RT 3910-3911.) Accordingly, he is foreclosed from raising this argument on appeal. (*People v. Hart*, *supra*, 20 Cal.4th at p. 589.) Defense counsel had the opportunity to question and view all of the potential jurors — including their posture, body language and tone of voice — and accepted the panels in both phases even though possessing several peremptory challenges. By failing to exhaust Taylor's peremptory challenges, defense counsel implicitly agreed that each juror could be fair and impartial.

Even if Taylor properly preserved this claim, it has no merit. The trial court appropriately conducted voir dire. It established that each prospective juror had sufficient time to sit for a lengthy trial, it relied on an extensive juror questionnaire to provide a common starting place for asking individual questions, and it routinely spoke with many prospective jurors in private for a variety of reasons. (See, e.g., 23 RT 2004, 2013-2014, 2073, 2158 [regarding chambers voir dire]; 40 RT 3815, 3818, 3822, 3828, 3830-3831, 3834, 3843, 3845 [same].) Although Taylor argues that the group voir dire was inappropriate (see AOB at 77), he does not point to any specific or actual bias that resulted from the trial court's group voir dire. (See *People v. Vieira, supra*, 35 Cal.4th at pp. 287-289 [holding that the possibility that prospective jurors tailored their voir dire answers to conform with the trial court's comments did not reflect actual bias].) Because of his failure to demonstrate specific or actual bias, his claim necessarily fails on the merits.

Taylor also argues that the trial court "did not ask any of the people who sat on [Taylor]'s two juries about their racial attitudes," (AOB at 79), but on the next pages of his brief he quotes four questions from the two jury questionnaires that did, in fact, ask about "racial attitudes" (AOB at 80, & fn. 22, citing 9CT 1752, AOB at 83, citing 17CT 3547-3548.) Taylor argues that these questions were insufficient by noting that two guilt-phase jurors, Juror # 3 and Juror # 8, gave inconsistent answers to the four questions regarding race: they indicated that they had no racial or ethnic prejudices and that Taylor's race would not affect them, but also checked the line for "no" when asked whether they could be "impartial." (AOB 80-82, citing 9CT 1804, 1934.) Juror #3 and Juror #8 both stated, however, that there was no reason that they could not be fair. (9 CT 1815, 1945.) Taylor similarly notes that a total of four jurors from both trials who, while admitting to having "'mild'" prejudices, indicated that they could be fair. (AOB 81, 84-85.) All of these jurors were questioned by

the court, which was in the best position to evaluate their responses. Taylor's counsel, moreover, did not request an opportunity to question them about any inconsistency, despite having the opportunity to do so. (See, e.g., 23 RT 2020, 2022-2223, 2032-2034, 2037, 2058-2059; 40 RT 3826-3827, 3830, 3844, 3847.) Accordingly, the record reflects that the trial court's voir dire was appropriate and that Taylor received a fair trial.

III.

THE TRIAL COURT PROPERLY CONDUCTED GROUP VOIR DIRE

In Argument III, Taylor contends that Code of Civil Procedure section 223 violated his state and federal equal-protection rights because it treated criminal cases differently than civil cases and because it denied him "individual, sequestered voir dire." (AOB at 94-102; see Arg. II, *ante*; also *People v. Stitely* (2005) 35 Cal.4th 514, 537, fn. 11 [noting that the 2001 amendment to Code Civ. Proc., § 223 did not change the provisions regarding group voir dire]) Taylor acknowledges that this "Court has rejected this claim in previous opinions." (AOB at 97, citing *People v. Robinson* (2005) 37 Cal.4th 592, 612-13; *People v. Ramos* (2004) 34 Cal.4th 494, 512-513.) Taylor argues that this Court's reasoning applied the "wrong level of scrutiny" and its decisions were "entirely speculative." (AOB at 98, 100.) *Robinson* and *Ramos* are properly decided, and Taylor provides no persuasive basis for revisiting them. There was individual voir dire, moreover, because the trial court spoke with some jurors in private. (See *People v. Stitely* , *supra*, 35 Cal.4th at pp. 537-539; see, e.g., 23RT 2004, 2013-2014, 2073, 2158 [regarding chambers voir dire]; 40 RT 3815, 3818, 3822, 3828, 3830-3831, 3834, 3843, 3845 [same].) Accordingly, there was no error.

IV.

THE PROSECUTOR PROPERLY EXERCISED HER PEREMPTORY CHALLENGES

In Argument IV, Taylor contends that the prosecutor violated his constitutional rights when she excluded four jurors — one from the first panel that decided guilt and three from the second panel that decided penalty — allegedly due to their race. (AOB at 103-127 [citing, e.g, *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] and *People v. Wheeler* (1978) 22 Cal.3d 258.) The record reveals that the prosecutor properly used her peremptory challenges and that Taylor's guilt and penalty phases were determined by fair and impartial juries.

When a defendant believes that the prosecutor is using peremptory challenges to a prospective juror solely on the basis of an unconstitutional group bias, he must make a prima facie case of such discrimination. (*Batson v. Kentucky* (1986) 476 U.S. 79, 93-94 [106 S.Ct. 1712, 90 L.Ed.2d 69] Once that showing is made, the burden shifts to the prosecutor, who must provide a race-neutral explanation for striking the juror in question, and then the trial court must decide whether the defendant has shown purposeful discrimination. (*Johnson v. California* (2005) 545 U.S. 162, 165 [125 S.Ct. 2410, 162 L.Ed.2d 129].) "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 131 L.Ed.2d 834] [per curiam]; *People v. Cornwell* (2005) 37 Cal.4th 50, 66-67.) The trial court is in the best position to evaluate credibility, and this Court should give the trial court's findings great deference. (*Rice v. Collins* (2006) 546 U.S. 333 [126 S.Ct. 969, 974, 163 L.Ed.2d 824]; *People v. Huggins* (2006) 38 Cal.4th 175, 227.)

A. The Prosecutor Dismissed a Guilt-Phase Juror Due to Her Limited Life Experience

The prosecutor used her fourth guilt-phase peremptory challenge to excuse Prospective Juror Tanisha Brooks. (23 RT 2151.) Defense counsel objected and, although noting that there was still another black woman on the panel, argued that the prosecutor had excluded Brooks due to her race. (23 RT 2155-2156.) The prosecutor doubted that defense counsel had established a prima facie case, but she explained that Brooks had "basically no life experience" because she was 23, single, and childless. (23 RT 2156.) Brooks, moreover, was undecided on the death penalty. (23 RT 2156.) The prosecutor was also concerned that Brooks had not been "forthright" about her brother's prior arrest, perhaps in part because the prosecutor had difficulty reading Brooks's handwriting on the jury questionnaire. (See 13 CT 2901, ¶ 69.) The trial court, however, noted that Brooks believed her brother had been treated fairly concerning his guilty plea for manslaughter. (23 RT 2123, 2156-2157.) When the prosecutor added that Brooks had not voted, defense counsel declined to be heard, and the court denied the motion. (23 RT 2157.)

The trial court properly overruled Taylor's motion. The prosecutor gave several race-neutral reasons to explain her challenge, none of which were contested by defense counsel. (23 RT 2157.) The trial court appropriately recognized these reasons, including that Brooks was relatively young, was not registered to vote, and had little life experience. These findings were reinforced by Brooks's admission that she had "never really thought about" the death penalty. (13 CT 2904, ¶ 76.) Brooks equivocated when asked on the juror questionnaire whether she supported or opposed the death penalty, as she checked both boxes. (13 CT 2904, ¶ 79.) Each one of the prosecutor's race-neutral reasons sufficiently supports the trial court's ruling.

Taylor argues that other jurors, particularly Juror #8, provided similar answers to Brooks. (AOB at 110-117.) Defense counsel, however, failed to make these arguments at trial, which indicates that none of the trial participants believed that Brooks was similarly situated to other potential jurors. Taylor, moreover, overlooks that no guilt-phase juror provided the same combination of answers or a similar number of troubling answers as Brooks. In contrast to Brooks, for example, Juror #8 was 43-years old, married with two children, owned a home, and had registered to vote. (9 CT 1924, ¶ 4, 1926-1927; cf. AOB at 115 [arguing that there "is nothing to distinguish the answers given by the two women."].) The trial court's ruling was proper.

B. The Prosecutor Dismissed Three Penalty-Phase Jurors Due to their Occupations and Prior Jury Service that Ended in a Mistrial

Defense counsel objected when the prosecutor used her eighth and ninth peremptory challenges to dismiss Prospective Jurors Al Fulton and Carol Doxtator. (40 RT 3864-3865.) In the chambers conference, moreover, defense counsel also objected to the prosecutor's fourth challenge to Prospective Juror Madelyn Estrada. (40 RT 3862, 3866.) Although the court did not make a specific finding that Taylor had stated a prima facie case of discrimination — and noted that only two of the challenged jurors were "non-Caucasian" — it again asked the prosecutor to explain her reasons for the challenges. (40 RT 3867.)

Regarding Fulton, the prosecutor noted that he worked for 28 years as a probation officer, which was an occupation the prosecutor tried to avoid due to their "preformed ideas" about the criminal-justice system. (40 RT 3867.) Fulton had a college degree in social welfare and worked as a counselor, both of which the prosecutor viewed as negatives. (40 RT 3867-3868.) She also noted that Fulton had expressed concern on his jury questionnaire about the

"inequities" and "'causes'" of illegal drug use, which was closely related to the defense theory of the case. (40 RT 3868, citing 22 CT 4953, ¶ 72.)

Next, the prosecutor noted that Doxtater, a psychiatric nurse, had prior work experience in areas that would be covered in the trial and by extensive mental-health testimony. (40 RT 3868.) Doxtater was initially undecided on the death penalty before changing her mind later during the voir dire questioning by the court. (See 40 RT 3869; compare 22 CT 4926-4927, ¶¶ 77, 81 [noting she had not "formed an opinion" and was "undecided"] with 40 RT 3860 ["You are not undecided anymore. Thank you."].) With Estrada, the prosecutor noted that she previously served as a juror on a case that ended in a mistrial and that Estrada had concerns whether the death penalty was imposed consistently. (40 RT 3868-3869.)

The prosecutor, furthermore, may have had more reasons for each challenge, but the court cut her off regarding each challenge. (40 RT 3868-3869; see, e.g., 40 RT 3859-3860 [regarding Doxtater's admission that she had been injured by a mentally ill patient].) Moreover, defense counsel offered no counter argument or rebuttal and had challenged a minority jury himself. (See 40RT 3869.) The court found no "systematic exclusion." (40 RT 3869.)

As with the guilt phase, the trial court properly accepted the prosecutor's race-neutral reasons for each of these three prospective penalty-phase jurors. None of these reasons, moreover, were even contested by defense counsel at trial, which implicitly suggests that defense counsel, like the trial court, found them plausible. This Court should defer to the trial court's unchallenged rulings regarding the prosecutor's credibility.

Taylor argues that the prosecutor's explanations for her challenges were similar to answers provided by other jurors who were not challenged, but he exaggerates the alleged similarities. (AOB at 120-124.) The prosecutor's first explanations for Fulton and Doxtater were based on their occupations and not

simply their college training or the fact that they gave "'social worker therapy type' answers." (See AOB at 120-121.) The prosecutor did in fact dismiss a white juror who, like Fulton, worked as a probation officer. (40 RT 3867; see 40 RT 3791-3793, 3861 [regarding Prospective Juror James Hastings].) And though Taylor notes, but does not argue, that the prosecutor did not challenge Alternate Juror #1, the record reveals that Alternate Juror #1 was an experienced nursing supervisor who confirmed that she had little direct contact with her female patients and who did not make any mental-health diagnoses. (See 40 RT 3890-3893; cf. AOB at 122, fn. 52.) And though Taylor suggests that other sitting jurors gave answers similar to the excused jurors regarding notions of wealth and poverty (see AOB at 120-121), the prosecutor did not rely on wealth and poverty as factors when exercising these challenges.

Taylor also argues that the prosecutor's first reason for dismissing Estrada — her prior experience on a jury that ended in a mistrial — "seems nonsensical" because he believes there is no reason to hold one person responsible for the previous jury's failure to reach a verdict. (AOB at 124.) The record here, however, demonstrates that the prosecutor was entitled to be cautious about jurors who could not agree and dismiss Estrada. (*People v. Rodriguez* (1999) 76 Cal.App.4th 1093, 1099-1100, 1114.)

Finally, Taylor criticizes the court for failing to make an adequate record or for being too cursory in its voir-dire questions. The court, however, answered these concerns on the record by noting, without objection, that since the parties had 20 pages of answers from each juror on the questionnaires, it did not intend to go "through much deeper with these people." (40 RT 3779-3780.) As defense counsel later conceded, a minority juror participated in the guilt phase. (AOB at 117, citing 40RT 3866.) This fact suggests the prosecutor exercised her peremptory challenges in good faith and not for a prohibited

reason. (*People v. Huggins* (2006) 38 Cal.4th 175, 236.) The trial court properly rejected Taylor's *Batson* challenges.

V.

THE PROSECUTOR PROPERLY CROSS-EXAMINED AN EXPERT WITNESS ABOUT THE BASIS FOR HIS OPINIONS AND HIS DIAGNOSIS OF TAYLOR

In Argument V, Taylor contends that the prosecutor's guilt-phase cross-examination of defense expert Dr. Marc Cerbone violated his constitutional rights, including his rights against self-incrimination, because Taylor believes Dr. Cerbone's previous testimony at a mental-competency hearing should have been shielded from questioning during trial. (AOB at 127-138, citing, e.g., *In re Hernandez* (2006) 143 Cal.App.4th 459.) By calling Dr. Cerbone as his own witness, however, Taylor opened the door to the prosecutor's cross-examination. After Dr. Cerbone told jurors about Taylor's mental-health history in rendering his diagnosis, the prosecutor was entitled to ask why Dr. Cerbone had not mentioned to the jury his previous diagnosis of Taylor, which indicated that Taylor had antisocial personality disorder or may have been prone to violence. Neither Dr. Cerbone nor the prosecutor, moreover, discussed anything before the jury that Taylor said during an immunized mental-competency interview.

The Fifth Amendment protects a defendant "who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence" from giving a compelled statement as part of a mental-competency examination that can be used against him at trial or during a penalty phase. (*Estelle v. Smith* (1981) 451 U.S. 454, 468 [101 S.Ct. 1866, 68 L.Ed.2d 359]; see *People v. Pokovich* (2006) 39 Cal.4th 1240, 1254 [holding that a defendant's trial testimony may not be impeached with his prior inconsistent statements made during a judicially immunized competency evaluation]; *People v. Jablonski*

(2006) 37 Cal.4th 774, 802-803 [regarding California's judicially created immunity]; also *People v. Weaver* (2001) 26 Cal.4th 876, 959-961 [finding a harmless error where experts simultaneously evaluated a defendant's competency and sanity].) But if a defendant requests a competency evaluation or presents psychiatric evidence in his own defense, then the prosecutor may, consistently with the Fifth and Sixth Amendments, rebut this presentation "with evidence from the reports of the examination that the defendant requested." (*Buchanan v. Kentucky* (1987) 483 U.S. 402, 422-425 [107 S.Ct. 2906, 97 L.Ed.2d 336]; *People v. Poggi* (1988) 45 Cal.3d 306, 330 [regarding penalty-phase evidence]; see *Penry v. Johnson* (2001) 532 U.S. 782, 794-795 [121 S.Ct. 1910, 150 L.Ed.2d 9] [holding that *Estelle v. Smith* may be distinguished where, among other things, the defendant places his mental status in issue and introduces his own psychiatric evidence].)

A. The Prosecutor's Cross-Examination Focused on the Bases for an Expert's Diagnosis, But Did Not Involve Any Compelled Statements Made by Taylor

Dr. Cerbone testified in Taylor's guilt-phase defense and told jurors that he had reviewed Taylor's mental-health records. He noted, for example, that Taylor had twice been committed to Harbor View, which was an "inpatient psychiatric rehabilitation program." (29 RT 2745.) Dr. Cerbone said he believed that Taylor (1) abused cocaine, alcohol, and LSD, (2) was dependent on methamphetamine and marijuana, and (3) suffered from a substance-induced psychotic disorder and a psychiatric disorder not otherwise specified. (29 RT 2742-2744.) Dr. Cerbone said chronic drug use may cause a loss of "impulse control," which may lead to an overreaction or misinterpretation of perceived threats. (29 RT 2760.)

On cross, the prosecutor clarified that Harbor View was a drug-treatment facility and that Taylor's mother sent him there, twice, presumably because

Taylor would not stop using drugs. (29 RT 2763-2767.) Dr. Cerbone admitted, moreover, that Taylor's Harbor View physician never noted that Taylor was psychotic despite having more time to observe Taylor than during Dr. Cerbone's 20-minute examination. (29 RT 2766-2768.) The prosecutor also emphasized that Dr. Cerbone's trial testimony omitted the portion of Dr. Cerbone's previous diagnosis that indicated Taylor had antisocial personality disorder — which included features of violence and manipulation. (29 RT 2771-2772.) When the prosecutor asked whether a loss of "impulse control" might refer to threats or violence, such as a threat to cut off a Harbor View staff member's head, defense counsel objected, and the court met with the parties in chambers. (29 RT 2772.)

Defense counsel clarified that he believed the prosecutor's cross-examination questions had referred to information that was not in the medical-history records. But the prosecutor explained, with eventual agreement from defense counsel, that the questions were in fact based on the records. (29 RT 2773.) Before resuming, the court ruled that if the prosecutor asked Dr. Cerbone about specific facts contained in the Harbor View records, Taylor's counsel would be entitled to ask on redirect about specific facts to bolster their case. (29 RT 2773-2775.)

When questioning resumed, the prosecutor elicited that Taylor had once threatened to "'rip off [a Harbor View staff member's] head and stuff it down [his] neck,'" and had called a female staff member a "'bitch, cunt, [and] whore.'" (29 RT 2775-2776.) On redirect, Taylor's counsel attempted to elicit specific examples of Taylor's mental-health delusions that occurred at Harbor View, but Dr. Cerbone denied that Taylor had had any delusions. (29 RT 2795-2796.)

The prosecutor's questions, and the trial court's rulings, were proper for cross-examination. (See, e.g., Evid. Code, §§ 351, 356, 761, 765, 769, 770, 773, 804, 1203.) Taylor had notice of the trial court's rulings, moreover,

because this issue was fully litigated in limine. (See 19 RT 1882; AOB at 127-130.) The protections for a defendant's judicially compelled or protected competency-hearing statements were not implicated because Dr. Cerbone did not specifically rely on any of Taylor's statements in his direct examination, and the prosecutor did not inquire about them on cross examination. As defense counsel conceded during the chambers conference, the prosecutor's questions to Dr. Cerbone were in fact based upon the mental-health records that Dr. Cerbone relied upon in forming his opinion. Even assuming that Dr. Cerbone did somehow rely on Taylor's statements, moreover, Taylor interjected them into the trial as part of his own defense, which permitted the prosecutor to rebut them. (See *Buchanan v. Kentucky*, *supra*, 483 U.S. at pp. 422-423.)

B. Expert Opinions Should Be Tested By Cross-Examination

Taylor seems to argue that the prosecutor's cross-examination of Dr. Cerbone implicated evidence that should be covered by California's judicially created immunity as a "fruit" of a defendant's competency-related statements. (See AOB at 131-135, citing, e.g., *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 454.) This novel argument, however, would permit a defendant to shield not only his own prior inconsistent statements (see *Pokovich*, *supra*, 39 Cal.4th at p. 1254), but also his medical records and the inconsistent statements of an expert who has no self-executing Fifth Amendment trial right. Unlike a defendant who may be required to talk to an expert during a mental-health expert during a competency examination, the expert who examines the defendant faces no such compulsion or coercion in terms of later proceedings because defense counsel can choose which experts to retain and rely on during trial. Although this Court believes there are reasons to risk permitting a defendant to perjure himself on the stand because of the importance of encouraging the defendant to be honest during a mental-competency

evaluation (see *Pokovich*, *supra*, 39 Cal.4th at p. 1253), no similar interest would be served by extending judicial immunity to the prior opinions of an expert witness. Experts should tell the truth whenever they testify and need not be called to testify when another expert's opinion could suffice.

When a defendant elects to call a mental-health expert as part of his defense, prior contact by the mental-health expert with a defendant during a competency hearing cannot prevent a prosecutor from cross-examining the expert during trial. Taylor, for example, relied on three different mental-health experts during the competency hearing, but called only Dr. Cerbone at the guilt phase. (See 11 RT 918 [Dr. MacSpeiden]; 12RT 1031 [Dr. Benson]; 13 RT 1129 [Dr. Cerbone].) While Dr. Cerbone talked with Taylor for 20 minutes, another defense-retained expert, Dr. MacSpeiden, spent seven or eight hours with Taylor. (29 RT 2767, 2778-2779.) Taylor was entitled to select his most favorable witness for trial, but the prosecutor was no less entitled to explore the bases for this expert's opinion in front of the jury. When Taylor called Dr. Cerbone to the stand, Taylor could not prevent the jury from learning that Dr. Cerbone had believed that Taylor had antisocial personality disorder. Otherwise, jurors would not have received an accurate depiction of Taylor's mental health in determining his mens rea.

Any error, finally, was harmless beyond a reasonable doubt. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258 [108 S.Ct. 1792, 100 L.Ed.2d 284] [regarding errors under *Estelle v. Smith*]; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Taylor's guilt does not rest with the jury's knowledge that he once threatened staff members at a drug-treatment facility. The evidence of Taylor's guilt was undeniably overwhelming. (25 RT 2504.) Taylor's brutal rape of an elderly widow in the sanctity of her own home is the basis for his conviction, not the testimony of Dr. Cerbone on cross-examination.

VI.

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT JURORS REGARDING THE LESSER-RELATED OFFENSE OF TRESPASS

In Argument VI, Taylor contends that the trial court erred by omitting instructions regarding the lesser-related offense of trespass. (AOB at 139-145; see 28 RT 2712-2715 [regarding Taylor's instructional request]; 30 RT 2919-2920 [same].) Taylor acknowledges that this Court rejected a similar argument in *People v. Birks* (1998) 19 Cal.4th 108, 118 fn.8, 136, which held that defendants are not entitled to instructions on lesser offenses like trespass that are not necessarily included within a charge such as burglary. (AOB at 142; see also *People v. Epps* (1973) 34 Cal.App.3d 146, 163 [citing cases noting that trespass is not a lesser-included offense of burglary].)

Birks was properly decided, and this Court should decline Taylor's request to revisit the issue, particularly because Taylor's supporting authority considers lesser-included offenses, but not lesser-related offenses. (See AOB at 140-143, citing *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739-740 [regarding failure to instruct on simple kidnaping as a lesser-included offense of kidnaping for robbery].) Although Taylor argues that the omission of trespass instructions deprived him of fundamental fairness or the ability to present his defense, he overlooks the fact that the jury had multiple options upon which to reach a verdict. (See 8 CT 1691-1694 [regarding the lesser crimes to murder of rape, burglary, oral copulation, and robbery]; cf. AOB at 144.) If jurors had had a reasonable doubt about Taylor's burglarious intentions, they would have acquitted him of burglary, trespass instruction or not. There was no error.

VII.

The Trial Court Properly Ruled That No Substantial Evidence Supported an Instruction on Second Degree Murder

In Argument VII, Taylor contends that the trial court prejudicially rejected his request to instruct jurors regarding the lesser offense of second degree murder. (AOB at 146-163.) But as with trespass and burglary (see Arg. VI, *ante*), second degree murder is not a lesser-included offense of first degree felony murder. (Cf. *People v. Valdez* (2004) 32 Cal.4th 73, 114-116, fn. 17, fn. 19 [noting, but not resolving, the issue].) Even assuming that second degree murder may be a lesser-included offense of felony murder, no substantial evidence supported the notion that Taylor killed Dixon either intentionally or with a conscious disregard for life — but not during the course of a rape, burglary, or forcible oral copulation. (See 28 RT 2712-2715 [regarding Taylor's instructional request]; 30 RT 2919-2920 [same].) The trial court acted properly, and by finding Taylor guilty of rape and oral copulation, the jury's verdicts necessarily render any error harmless.

A. Second Degree Murder is Not a Lesser Included Offense of First Degree Felony Murder

The prosecutor charged Taylor with willfully and unlawfully killing Dixon during the commission or attempted commission of three felonies: rape, burglary, and oral copulation. (1CT 41-43; also 4 CT 907-909.) The prosecutor did not charge that Taylor had an intent to kill, acted with conscious disregard for life, or acted with malice aforethought. (See, e.g., *People v. Robertson* (2004) 34 Cal.4th 156, 165; ["The felony-murder rule eliminates the need for proof of malice in connection with a charge of murder"]; *People v. Cavitt* (2004) 33 Cal.4th 187, 197 [noting that once a predicate felony has been committed, defendants are "strictly responsible" for any killing]; *People*

v. Rios (2000) 23 Cal.4th 450, 460, fn. 6; *People v. Dillon* (1983) 34 Cal.3d 441, 465-75.) Jurors had no basis under the charge or evidence to conclude that Taylor committed murder other than as a felony murder in the first degree. (See *People v. Valdez, supra*, 32 Cal.4th at pp. 114-116, fn. 17; also *People v. Anderson* (2006) 141 Cal.App.4th 430, 444 [assuming without deciding that second degree murder is not a statutorily included offense of first degree felony murder].)

Taylor misplaces his reliance on *People v. Anderson, supra*, 141 Cal.App.4th at p. 444-445, which held that second-degree-murder instructions were required when it was a lesser-included offense due to the language of the accusatory pleading. (AOB 151-153.) Unlike *Anderson*, Taylor's prosecutor did not mention in the charges the words *malice* or *malice aforethought*, which might have given rise to the duty to instruct on second degree murder. (Cf. *People v. Anderson, supra*, 141 Cal.App.4th at pp. 444-445 [noting the information charged malice].) The pleadings gave Taylor notice — through the special-circumstance allegations and the separate charges of rape, burglary, and oral copulation — that his homicide liability hinged upon the felony-murder rule. (1CT 2, 41-42.) In *Anderson*, moreover, the initial information charged Anderson's codefendant, but not Anderson herself, with a predicate offense for felony murder, which gave her even less reason to know that any homicide liability would flow from a felony-murder theory. (*Id.* at pp. 445-446.) Because Taylor's prosecutor proceeded against him only upon the theory of felony murder, his case is distinguishable from *Anderson*. Second degree murder was not a lesser-included offense.

B. No Evidence Supported an Instruction of Second Degree Murder, and Any Error Was Necessarily Harmless

Due process requires instructions on a lesser-included offense only when the evidence warrants an instruction, such as when there is a question as

to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of a lesser offense. (*People v. Moon* (2005) 37 Cal.4th 1, 25-27; *People v. Valdez, supra*, 32 Cal.4th at pp. 116-118, fn. 23, distinguishing *Beck v. Alabama* (1980) 447 U.S. 625, 634 [100 S.Ct. 2382, 65 L.Ed.2d 392]; *People v. Neely* (1993) 6 Cal.4th 877, 897; see *Hopkins v. Reeves* (1998) 524 U.S. 88, 95-96 [118 S.Ct 1895, 141 L.Ed.2d 76].) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Taylor argues that sufficient evidence supported a second-degree-murder instruction because he lacked a burglarious intent when he entered Dixon's home, and Dixon may have died solely from the shock of seeing him appear. (AOB at 158-160; see Arg. XIV, *post.*) Taylor overlooks, however, the ample evidence that Dixon was still alive after seeing Taylor: she rose from her seat, told her sister to dial 911, pleaded with Taylor not to hurt her, and said "no" when Taylor tried to penetrate her mouth with his penis after brutally raping her. (24 RT 2263, 2266-2268.) Dixon did not begin her struggles to breathe until after Taylor slammed her head before raping her. (24 RT 2266-2267.) Taylor, moreover, does not posit a non-burglarious intention for his entry and similarly does not explain how any reasonable juror could conclude that he killed Dixon with a conscious disregard for life, but not while committing rape and forcible oral copulation.

Finally, Taylor essentially conceded his guilt as to rape and forcible oral copulation (30 RT 2988-2989 [regarding defense counsel's closing argument]), and the jury found beyond a reasonable doubt that Taylor committed both of these crimes and their related special circumstances. The jury thus necessarily found that Taylor committed a first degree felony murder, which would render any error regarding second degree murder harmless. (See *People v. Prince*

(2007) 40 Cal.4th 1179, 1268-1269; *People v. Lewis* (2001) 25 Cal.4th 610, 646, citing *People v. Sedeno* (1974) 10 Cal.3d 703, 721.)

VIII.

TAYLOR HAD SUFFICIENT NOTICE THAT HE FACED LIABILITY UNDER THE FELONY-MURDER RULE

In Argument VIII, Taylor contends the court erred in instructing regarding first degree felony murder; he seems to believe that the prosecutor charged him with only "second degree malice murder" because the information referred to Penal Code section 187 but not also to Penal Code section 189. (AOB at 164-171; see 1CT 41-43; 4CT 907-909.) It's not clear why Taylor believes he could have been convicted of "malice murder" when the information did not contain the word *malice*. (See Arg. VII, *ante*.) Still, Taylor concedes that this Court has previously rejected his argument. (AOB at 166-167, citing *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; also *People v. Kipp* (2001) 26 Cal.4th 1100, 1131-1132.) Assuming that Taylor has adequately preserved this issue despite his failure to mention it during trial (see AOB at 164, fn. 66), the instructions were proper. (*People v. Kipp, supra*, 26 Cal.4th at pp. 1131-1132.)

Taylor had adequate notice that he could be punished for first degree felony murder from the complaint (1 CT 2) and the information (1 CT 41-42), both of which specifically identified the charge of murder in addition to the special-circumstance allegations of murder during rape, burglary, and oral copulation. (See Pen. Code, §§ 187, 190.2, subd. (a)(17); also Pen. Code, § 952 [noting that "technical averments" are not necessary in a charge].) After the preliminary hearing, the magistrate found that sufficient evidence supported the murder charge and the special-circumstance allegations. (Prelim. Hear. Tr. 149-150.) Jurors in fact found beyond a reasonable doubt that he

committed the charged crimes as well as the special-circumstance allegations. (5 CT 971, 979, 982-984; cf. AOB at 169-170, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435].) There was no error.

IX.

JURORS NEED NOT UNANIMOUSLY AGREE UPON A THEORY OF FIRST DEGREE MURDER

In Argument IX, Taylor contends the trial court violated his constitutional rights by failing to instruct the jurors that they must unanimously agree concerning each essential fact of the first-degree-murder charge. (AOB at 172-181.) Although Taylor believes that juror agreement on the predicate offense supporting his first-degree felony-murder conviction is essentially an element of murder (see Arg. X, *post*), juror unanimity is not required regarding the theory of murder. (See, e.g., *People v. Cook* (2006) 39 Cal.4th 566, 604, citing *Schad v. Arizona* (1991) 501 U.S. 624, 631-632 [111 S.Ct. 2491, 115 L.Ed.2d 555].) Taylor's argument that two factual scenarios could have legally supported a theory of burglary — based on his entry into Dixon's home and his later entry to the bedroom — does not help his claim. (See *People v. McPeters* (1992) 2 Cal.4th 1148, 1184-1185 [holding that juror unanimity was not necessary regarding the location of robbed money]; *People v. Beardslee* (1991) 53 Cal.3d 68, 92 [regarding guilt as a direct participant or as an aider and abettor].) The jury's finding that Taylor committed each of the three special circumstances, moreover, also renders any error harmless. (*People v. McPeters*, *supra*, 2 Cal.4th at 1185.)

X.

THE SPECIAL-CIRCUMSTANCE INSTRUCTIONS AND VERDICT FORMS ACCURATELY EXPLAINED THE ELEMENTS OF THE SPECIAL CIRCUMSTANCES

In Argument X, Taylor contends the trial court prejudicially erred by omitting language from the verdict forms and from the then-standard special-circumstance instructions, CALJIC No. 8.81.17, which would have required jurors to find that (1) the murder was carried out to advance the burglary, rape, or oral copulation and (2) these crimes were not merely incidental to the murder. (AOB at 182-196.) Taylor concedes, however, that this Court has previously rejected a like argument. (AOB at 186-187, citing *People v. Valdez* (2004) 32 Cal.4th 73, 113-114 [noting that similarly omitted language is not an element of the special circumstance]; see also AOB 370, fn. 123 [accepting that a defendant who actually kills may appropriately be eligible for the death penalty under Pen. Code, § 190.2, subd. (a)(17)].) The omitted language from the instruction is not an element because Penal Code section 190.2, subdivision (a)(17), does not include these words. From the evidence, moreover, Taylor was not entitled to a pinpoint instruction containing this language because there was no evidence indicating that he intended a murder; if anything, the killing was a consequence of the rape's and forcible oral copulation's brutality, which means that it fell squarely within the ambit of the special circumstance. (See *People v. Navarette* (2003) 30 Cal.4th 458, 505.)

XI.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH SEVERAL STANDARD CALJIC INSTRUCTIONS REGARDING CIRCUMSTANTIAL EVIDENCE, CONSCIOUSNESS OF GUILT, WITNESS TESTIMONY, FALSE STATEMENTS, MOTIVE, AND FLIGHT

In Arguments XI and XIII Taylor makes the related contentions that six standard CALJIC instructions — numbers 2.02, 2.03, 2.22, 2.27, 2.51, and 2.52 — violated various of his constitutional rights, including trial by jury, due process, and the burden of proof beyond a reasonable doubt . (AOB at 197-211, 226-236.) During a conference discussing jury instructions, the trial court overruled Taylor's counsel objections to these instructions (28 RT 2719) — except for CALJIC Nos. 2.22 and 2.27, which Taylor did not challenge until this appeal.

Even assuming that Taylor properly preserved challenges to these instructions on the grounds now raised on appeal, he concedes on the merits that this Court has previously rejected his arguments. (AOB at 197, 233, citing, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [regarding CALJIC No. 2.22 and weighing conflicting testimony]; *People v. Crittendon* (1994) 9 Cal.4th 83, 144 [regarding CALJIC No. 2.02 and circumstantial evidence].) There is no reason to reconsider this Court's prior decisions. (See *People v. Rogers* (2006) 39 Cal.4th 826, 888-889 [regarding CALJIC No. 2.27 and the testimony of a single witness; also CALJIC Nos. 2.22 and 2.51]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1134-1135 [regarding CALJIC No. 2.51 and motive]; *People v. Hughes* (2002) 27 Cal.4th 287, 346-347 [regarding CALJIC No. 2.03 and consciousness of guilt]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1054-1055 [regarding CALJIC No. 2.52 and flight].)

Taylor specifically argues that CALJIC No. 2.03, regarding a defendant's false statements (30RT 2928), and CALJIC No. 2.52, regarding

flight from the crime scene (30 RT 2931), were argumentative and permitted jurors to draw "irrational permissive inferences." (AOB at 200, 206.) But the instructions were proper statements of law, and a jury may draw inferences that are supported by evidence without offending the Constitution. (See *County Court of Ulster County v. Allen* (1979) 442 U.S. 140, 157-61 [99 S.Ct. 2213, 60 L.Ed.2d 777] [regarding the difference between mandatory and permissive presumptions and inferences].) Sufficient evidence rationally supported instructions regarding flight and false statements. (See AOB at 197-198, citing 24 RT 2346-2347 [regarding Taylor's flight and arrest while climbing a fence], 2349 [regarding Taylor's false claim that he thought the house was vacant] 25 RT 2432-2433 [regarding Taylor's false claim that John Hall "had just raped an old woman inside the house"].) There was no error.

XII.

CALJIC NUMBER 2.90 PROPERLY DEFINED THE PROSECUTOR'S BURDEN OF PROOF BEYOND A REASONABLE DOUBT

In Argument XII, Taylor contends that the trial court's use of CALJIC No. 2.90 to define the burden of proof (see 30 RT 2933-2934; 5 CT 971) prejudicially violated his constitutional rights because, among other things, it: (1) implied that jurors must articulate a reason for their doubt (AOB at 212-214); (2) indicated that a possible doubt is not a reasonable doubt (AOB at 214-217); (3) failed to affirmatively instruct that Taylor had no obligation to present a defense or refute evidence (AOB at 217-219); (4) omitted that a defense attempt to refute the prosecutor's evidence did not shift the burden of proof (AOB at 219-220); (5) failed to explain what jurors should do about a conflict or lack of evidence (AOB at 220-221); and though it allegedly failed to explain that the presumption of innocence should continue during deliberations (AOB at 221-222), it should not have indicated that the burden

continued "'until'" the contrary is proved (AOB at 222-223). Taylor's argument is frivolous and should be rejected. (*People v. Hearon* (1999) 72 Cal.App.4th 1285, 1287; *People v. Miller* (1999) 69 Cal.App.4th 190, 213 ["baseless contention"]; see, e.g., *Victor v. Nebraska* (1994) 511 U.S. 1 [114 S.Ct. 1239, 127 L.Ed.2d 583]; *People v. Freeman* (1994) 8 Cal.4th 450, 504-505; *Lisenbee v. Henry* (9th Cir. 1999) 166 F.3d 997, 999-1000; also Pen. Code, §§ 1096, 1096a.)

XIII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH STANDARD CALJIC INSTRUCTIONS

Taylor's contention in Argument XIII has been addressed with Argument XI, *ante*, which is incorporated by this reference.

XIV.

THE PROSECUTOR'S CLOSING ARGUMENT PROPERLY COMMENTED ON TAYLOR'S FAILURE TO CALL LOGICAL WITNESSES AND DID NOT ADDRESS HIS DECISION TO REMAIN SILENT

In Argument XIV, Taylor contends that the prosecutor's guilt-phase argument violated his Fifth Amendment right against self-incrimination by improperly commenting on his decision not to testify. (AOB at 237-243, citing *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106].) The trial court, however, properly overruled Taylor's objection because the prosecutor's argument was a permissible comment on Taylor's failure to produce any evidence that provided a non-criminal explanation for his entry into Dixon's home. The prosecutor did not suggest that jurors should draw any adverse inferences from Taylor's decision not to testify.

A prosecutor may not suggest that a defendant's failure to testify implies guilt. (*United States v. Robinson* (1988) 485 U.S. 25, 30-32 [108 S.Ct. 864,

99 L.Ed.2d 23].) A prosecutor may, however, comment on the failure of defense counsel to introduce material evidence or call logical witnesses. (*People v. Cornwell* (2005) 37 Cal.4th 50, 90-91 [regarding prosecutor's argument that the defense "'didn't bring a single person in here to explain why that car was there.'"].) This Court reviews claims of prosecutorial misconduct in argument to determine wether there was a reasonable likelihood the comments could have been understood to refer to the defendant's silence. (*People v. Clair* (1992) 2 Cal.4th 629, 662-663, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 73-73 [112 S.Ct. 475, 116 L.Ed.2d 385].)

In closing argument, Taylor's counsel conceded that Taylor had committed rape and robbery (30RT 2987-2988), and counsel acknowledged that Taylor "may have been up to no good" when he entered Dixon's home (30RT 2996). But counsel argued there was a reasonable doubt as to Taylor's mental state such that there may not have been a burglary or a murder. (30 RT 2991-2996.)

The prosecutor seized the notion that Taylor was "up to no good" when he entered. (30RT 3001.) After noting that Taylor raped and forced Dixon to orally copulated him, she said:

> "[S]o when counsel admits that when he entered he was up to no good, what are those reasonable choices of up to no good? What is that you can do at someone else's house at night that is up to no good that would not constitute theft of a felony?
>
> "I mean, this is reality, this is reason, this is not asking you to stretch the facts. This is asking you to just use the facts. There is no other reasonable explanation.
>
> "Who took this stand and gave you a reasonable explanation as to another reason that the defendant may have been there?"
>
> (30RT 3001.)

The court overruled Taylor's objection (30 RT 3001), and the prosecutor continued:

> "For example, I don't know, did a neighbor or a friend or somebody say that there was a debt between these two people so he would have some reason that is up to no good of entering through the window[?]" (30RT 3002.)

There is no reasonable likelihood that anyone would have viewed the prosecutor's rhetorical question as anything other than fair comment about Taylor's failure to present any explanation about his mental state at the time of his entry. The prosecutor did not refer to Taylor's silence, and she specifically provided jurors with an example of how Taylor could have provided evidence through other witnesses, such as a neighbor testifying about a possible debt. (30 RT 3002.) Taylor himself acknowledges that the prosecutor's argument "was not a direct statement about [Taylor]'s failure to testify." (AOB at 240.)

Even assuming error, a brief reference to the failure to offer testimony, particularly when unaccompanied by any suggestion that a specific inference of guilt should be drawn, is harmless beyond a reasonable doubt. (See *People v. Hovey* (1988) 44 Cal.3d 543, 572, citing *Chapman v. California* (1967) 386 U.S. 18, 24, [87 S.Ct. 824, 828, 17 L.Ed.2d 705]; also *People v. Hardy* (1992) 2 Cal.4th 86, 154 [regarding overwhelming evidence of guilt, including admissions].)

XV.

THE TRIAL COURT PROPERLY TAILORED THE PENALTY-PHASE JURY QUESTIONNAIRE TO ASCERTAIN WHETHER JURORS COULD FOLLOW THE LAW

In Argument XV, Taylor contends that the trial court violated his constitutional rights by including "pinpoint" questions on the penalty-phase juror questionnaire that were prompted by the refusal of two original jurors to impose the death penalty in the circumstance where the defendant did not have

an intent to kill. (AOB at 244-254.) The prosecutor was entitled to ask the prospective jurors on retrial if they would follow California law and consider the death penalty even where a defendant did not have an intent to kill. The trial court properly exercised its discretion.

Trial courts must devote sufficient time and effort to death-qualifying voir dire so that the court and counsel receive sufficient information regarding the prospective jurors to determine whether their views on capital punishment would prevent or substantially impair the performance of their duties. (*People v. Stitely* (2005) 35 Cal.4th 514, 538-540 [upholding use of a 25-page questionnaire].) The trial court has broad discretion over the number and nature of questions about the death penalty. (*Id.* at p. 540.) A trial court should be evenhanded in questioning prospective jurors during death qualification and should inquire into jurors' attitudes both for and against the death penalty. (*People v. Champion* (1995) 9 Cal.4th 879, 908-909 [finding no prejudice where the court asked whether jurors' views would prevent them from imposing death without also asking whether they would automatically impose death].) Prosecutors may tailor specific questions that are relevant to determine whether jurors are subject to challenge for cause. (*People v. Noguera* (1992) 4 Cal.4th 599, 645 [affirming where a prosecutor asked prospective jurors whether they could "consider" imposing death on a defendant who was only 18 or 19 at the time of the crime and where there was only one murder victim].)

After the parties met with the jurors who mistried the first penalty phase, the trial court said that two jurors who "'voted life without the possibility of parole stated that although they felt strongly that ... the death penalty should be imposed, they felt that they could not impose the death penalty unless they saw something in the evidence that showed an intent to kill.'" (AOB at 245, quoting 38RT 3650-3651; see also 6 CT 1340-1346

[regarding first jury's penalty-phase questions about intent to kill].) Before the penalty phase, the prosecutor requested that the court ask specific questions regarding the mens rea for felony murder and for the death penalty. (See AOB at 244-248, citing, e.g., 38 RT 3650-3662.) Defense counsel acknowledged that the trial court could "instruct the jurors across the board" that California law "does not require that the defendant personally intend[] to kill" during a felony murder in order to be death eligible, but argued that the trial court should not include any specific questions on the jury questionnaire. (38 RT 3662.) The trial court overruled counsel's objections. (38 RT 3662-3666.) After asking the parties to submit specific proposals (38 RT 3865), the court included the following language on the questionnaire:

> 85. The law in California says that when a person is engaged in the commission of certain felony crimes such as burglary, rape, and oral copulation, and a death results, then he can be convicted of first degree murder. This is called a felony murder case. Also in such a felony murder case if the person is the actual killer, he may be subject to the death penalty even though he did not have the intent to kill a person. That is, the death can be unintentional or accidental.
>
> A. Do you have any views, attitudes, principles or religious reasons about capital punishment that would prevent or substantially impair your ability to follow the law in regards to capital punishment as far as the felony murder rule is concerned?
>
> Yes ___ No ___
>
> If yes, please explain:
>
> B. Would you be able to consider imposing the death penalty in a felony murder case in which a defendant did not intend to kill the victim?

Yes ___ No ___
If yes, please explain:

C. Would you automatically vote for the sentence of life without the possibility of parole in a felony murder case in which the defendant did not intend to kill the victim?

Yes ___ No ___
If yes, please explain:

D. Would you automatically vote for the sentence of death in a felony murder case in which a defendant did not intend to kill the victim?

Yes ___ No ___

If yes, please explain:

(AOB at 247-248, citing 17 CT 3356-3557.)

The trial court properly exercised its discretion, particularly in light of defense counsel's agreement that question 85 accurately stated California law. (See 38RT 3662.) The language regarding felony murder was evenhanded and did not bias or suggest to jurors that any particular result was compelled or foreclosed. Subsections A and B appropriately established that California law permitted the death penalty under the felony-murder rule and permitted the prosecutor to establish at retrial whether any juror would be prevented or substantially impaired in imposing, or otherwise failing to consider, the death penalty. Subsections C and D, similarly, indicated that both life without the possibility of parole and death were options and that neither one should "automatically" be imposed. The questions were proper, particularly when considering the court's extensive group voir dire on the topic. (See e.g., 40 RT 3797-3801, 3803-3806, 3810.) Finally, even assuming error, it would not have

affected the determination of guilt. (See *People v. Heard* (2003) 31 Cal.4th 946, 966.)

XVI.

THE TRIAL COURT PROPERLY ADMITTED, AND THE PROSECUTOR PROPERLY ARGUED, EVIDENCE REGARDING THE IMPACT OF DIXON'S DEATH UPON HER FRIENDS AND FAMILY

In Argument XVI, Taylor contends that his constitutional rights were violated by the trial court's failure to limit so-called victim-impact evidence. (AOB at 255-268.) Although he argues that victim-impact evidence should have been limited to a single eyewitness regarding only the effects of the murder which were "readily apparent to the defendant" at the time of the crime (AOB at 259-260), these limitations are not required by the Constitution, California decisions, the Evidence Code, or Penal Code section 190.3, subdivision (a). The trial court properly exercised its discretion in admitting victim-impact evidence. (See 19 RT 1882-1887 [summarizing rulings, including admonishments that family members not discuss penalty during their testimony].)

The Eighth Amendment erects no categorical bar to a capital jury's consideration of victim-impact evidence relating to a victim's characteristics and the impact of the murder on the family, nor does it preclude a prosecutor from arguing such evidence. (*Payne v. Tennessee* (1991) 501 U.S. 808, 827 [111 S.Ct. 2597, 115 L.Ed.2d 720].) While victim-impact evidence is generally admissible under California law as a circumstance of the crime under Penal Code section 190.3, subdivision (a), irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational response should be curtailed. (*People v. Harris* (2005) 37 Cal.4th 310, 351.) Victim-impact evidence which is so inflammatory that it tends to encourage the jury toward irrationality and an emotional response

untethered to the facts of the case will violate due process under *Payne*. (*People v. Boyette* (2002) 29 Cal.4th 381, 444.) Victim-impact evidence need not be limited to circumstances known or reasonably knowable to the defendant. (*People v. Prince* (2007) 40 Cal.4th 1179, 1286-1291, & fn. 28 [rejecting challenge to a videotaped interview depicting the victim and testimony from eight family members].)

The testimony of Dixon's daughters, granddaughters, and great-grandson was brief, and it succinctly described their grief, loss, and difficulty adjusting to life after learning of Taylor's crimes. The fact that Hayes survived Taylor's attack and was able to testify against him should not entitle Taylor to artificially limit the impact of his destructive actions. The trial court appropriately exercised its discretion. Notably, the first jury, which could not render a verdict, heard essentially the same evidence and viewed the same exhibits and did not return a verdict of death. (Compare, e.g., 6 CT 1353 [regarding penalty-phase exhibits] with 7 CT 1616 [regarding penalty-phase exhibits].) Taylor has not me his burden of showing that the victim-impact evidence was unduly prejudicial.

XVII.

THE PROSECUTOR PROPERLY INTRODUCED AGGRAVATING EVIDENCE OF TAYLOR'S PRIOR VIOLENT CONDUCT, INCLUDING A FORCIBLY SODOMY AND ORAL COPULATION

In Argument XVII, Taylor contends that the penalty-phase introduction of his violent conduct as aggravating circumstances under Penal Code section 190.3, subdivision (b), violated his constitutional rights. (AOB 269-296.) The trial court, however, properly admitted the evidence that Taylor sodomized Jason L. at knife point, threatened to "'fuck up'" a plainclothes police officer, and assaulted sheriff's deputies when he refused to move jail cells. These

incidents revealed that Taylor has a continuing history of violence and were properly considered by the penalty jury.

Neither the state nor federal Constitution forbids admitting evidence of unadjudicated prior crimes, including the surrounding circumstances, for use in a penalty determination. (*People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Brown* (2004) 33 Cal.4th 382, 402; *People v. Danielson* (1992) 3 Cal.4th 691, 719-720.) Before a penalty-phase juror can consider evidence of other violent criminal activity in aggravation, he or she must find the existence of such activity beyond a reasonable doubt. (*People v. Huggins* (2006) 38 Cal.4th 175, 239; see *People v. Clair* (1992) 2 Cal.4th 629, 673 [regarding jury instructions].) In the absence of evidence to the contrary, it is presumed that the jury follows the instruction that requires other-crimes evidence be proven beyond a reasonable doubt. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1089.)

Taylor concedes that evidence of prior violent juvenile criminal conduct may be considered as an aggravating factor. (AOB at 282, citing *People v. Lucky* (1988) 45 Cal.3d 259, 295; also *People v. Lewis* (2001) 26 Cal.4th 334, 378-379.) Use of juvenile misconduct as aggravating evidence does not violate the Eighth Amendment. (*People v. Raley* (1992) 2 Cal.4th 870, 909.) Possible remoteness of prior offenses is not a proper ground for exclusion. (*People v. Anderson* (2001) 25 Cal.4th 543, 585.) Penal Code section 190.3, subdivision (b), applies to crimes which involve a threat of force as well as the express use of force. (*People v. Clair* (1992) 2 Cal.4th 629, 677; see *People v. Mason* (1991) 52 Cal.3d 909, 954-957 [regarding escape attempts and multiple attempts to possess weapons while incarcerated].)

The three types of aggravating evidence challenged by Taylor (see AOB at 275-279, 285-287, 292-293) reveal that he, in addition to killing his neighbor Dixon, had a long history of threatening and hurting friends and

family (44 RT 4353-4354 [Jason L.]), the attorney representing him (43 RT 4302-4304 [regarding the Attridge stipulation]), and a simple bystander (42 RT 4264-4268 [Off. Cherski]). Taylor also demonstrated that incarceration is insufficient to restrain him because he has already attacked his jailers, even when there was no realistic way for him to escape from the fifth-floor cells. (See 42 RT 4233-4239 [Dep. Perry].) These incidents were properly admitted as to penalty.

Taylor concedes, moreover, that the trial court had no duty to identify in the jury instructions the elements of the crimes implicated by Taylor's unadjudicated conduct. (See AOB at 282-283, citing *People v. Davenport* (1985) 41 Cal.3d 247, 281-282.) Defense counsel's penalty defense focused on Taylor's mental state, and by not requesting instructions on the elements of the crimes implicated by Taylor's prior violence, defense counsel discouraged the jury from focusing on the similarities between the sexual assaults of Dixon and Jason L., in which Taylor overpowered unusually vulnerable victims.

Taylor's brief also identifies, at footnote 96 on page 294, the appropriate crimes implicated by his assaultive and criminal threats to Officer Cherski, including Penal Code sections 240 and 422. Taylor's attack on jail deputies, which required more than five men to restrain him, was at minimum an assault and battery. These incidents of prior violence, which covered a decade and continued even after his incarceration on murder charges, were properly introduced and considered by the jury. There was no error.

XVIII.

THE PROSECUTOR PROPERLY INTRODUCED A PHOTOGRAPH DURING THE PENALTY PHASE THAT DEPICTED THE VICTIM WHEN SHE WAS IN THE HOSPITAL

In Argument XVIII, Taylor contends that the prosecutor's penalty-phase usage of a photograph depicting Dixon when she was bleeding in the hospital

violated his constitutional rights. (AOB at 297-312.) Although Taylor argues that the trial court improperly evaluated the photograph or otherwise abused its discretion, the court properly determined that the photograph was probative and material as an aggravating circumstance of the crime and because it rebutted a potential defense argument.

The admission of allegedly gruesome photographs is a question of relevance, and this Court will not disturb a trial court's discretionary decisions unless the prejudicial effect of the photograph clearly outweighs its probative value. (*People v. Moon* (2005) 37 Cal.4th 1, 33-35; *People v. Roldan* (2005) 35 Cal.4th 646, 713; *People v. Scheid* (1997) 16 Cal.4th 1, 13-14; Evid. Code, §§ 210, 352.) Because there is no risk that penalty-phase jurors will convict an innocent man, photographs that are "'gory,' 'stunning,' and 'shocking,'" may be admitted even when they are inadmissible to prove guilt. (*People v. Moon*, *supra*, 37 Cal.4th at pp. 33-35.) Penalty-phase prosecutors may place the defendant in a bad light. (*People v. Box* (2000) 23 Cal.4th 1153, 1201.)

During the guilt phase, defense counsel objected to the prosecutor's exhibit 8 — a blown-up photograph depicting Dixon in the hospital with blood on her legs and torso — and argued that it was inflammatory and irrelevant. (25RT 2369-2370; see 21RT 1929-1937.) The prosecutor explained the photograph was taken in the hospital, and not at the crime scene, due to the efforts to save Dixon's life and that it was relevant to demonstrate Dixon's lack of consent and the rape's trauma. (25 RT 2370-2371.) The court ruled that exhibit 8 was admissible, in part because it had excluded several other photographs depicting Dixon's bloody vaginal wounds. (25 RT 2371-2373.) The court later explained to the jury that it had ruled that the medical examiner should generally use diagrams to illustrate his testimony rather than photographs of the victim. (26 RT 2531-2532.) When the prosecutor introduced exhibit 8, the court overruled defense counsel's objection to the

introduction of a sanitized version of the photo; the court explained to jurors that tape had been placed on the photo to obscure Dixon's vagina because "it was determined that it was not important for you to see." (26 RT 2556-2558.)

Before the penalty phase, defense counsel argued that the photograph may have been taken several hours after the attack and that some of the dark coloring may have come from an orange sterilizing solution such as betadine, but not, or at least not exclusively, from Dixon's blood. (38 RT 3666-3669.) The court, however, noted that Dixon's blood was on Taylor's penis and clothes and could be seen in other photographs on the floor of her home, which supported the notion that exhibit 8 depicted Dixon's blood. (38 RT 3669-3671.) Once the court determined that defense counsel had proffered little or no evidentiary support for the betadine theory, the court found the photograph to be probative and material and denied the motion. (38 RT 3669-3673, 3687-3689.)

During a break in testimony at the penalty phase, moreover, the prosecutor produced the original Polaroid photograph upon which exhibit 8 had been based. (42 RT 4179.) Although the original photograph was smaller than exhibit 8 and did not contain the tape that obscured Dixon's vagina, both the prosecutor and defense counsel agreed that the color in the original was more accurate than in exhibit 8. (42 RT 4179-4180.) The prosecutor, anticipating that Taylor's counsel still intended to argue that exhibit 8 depicted a sterilizing agent rather than Dixon's blood, suggested that if she introduced the original photograph instead of exhibit 8, it might save the time and expense of re-calling her witnesses in rebuttal. (42 RT 4179.) Without waiving the earlier and overruled objection, defense counsel requested that the original "should be the only photograph that should be used in this case," and the court agreed. (42 RT 4180-4181.) The cardiologist testified that the original photograph, which was introduced as exhibit 141, accurately depicted Dixon's

"vagina showing blood" at the time she was admitted in the hospital. (42 RT 4191-4192.)

The court properly exercised its discretion. At the guilt phase, the court specifically limited the type and number of photographs depicting Dixon's injuries and further sanitized exhibit 8 by the using tape. At the penalty phase, the court's rulings are even less open to question because Taylor had already been convicted and because defense counsel agreed that exhibit 141 should be used in place of exhibit 8. In light of counsel's agreement that exhibit 141 was preferable to exhibit 8, moreover, any error was necessarily harmless. The first jury saw exhibit 8, which in defense counsel's view was less desirable than the original. The photo could not have been inherently prejudicial because the jury that did not return a death judgment viewed the less-objectionable photograph. The photographs could not have caused prejudice.

XIX.

THE TRIAL COURT PROPERLY OMITTED A PENALTY-PHASE INSTRUCTION REGARDING THE PRESUMPTION OF INNOCENCE

In Argument XIX, Taylor contends that his death sentence should be reversed because the trial court did not instruct jurors regarding the presumption of innocence at the penalty phase. (AOB 313-316.) Taylor, of course, had already been found guilty of the charged crimes beyond a reasonable doubt, and this Court has previously rejected his argument that other-crimes evidence as used in aggravation require full constitutional protection, including instructions regarding the presumption of innocence. (*People v. Benson* (1990) 52 Cal.3d 754, 810; also *People v. Prieto* (2003) 30 Cal.4th 226, 262-263 [reaffirming *Benson* after *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556].) There is no reason to revisit these holdings.

XX.

TAYLOR'S PENALTY RETRIAL DID NOT VIOLATE HIS CONSTITUTIONAL RIGHTS

In Argument XX, Taylor contends that his penalty retrial violated various constitutional rights, especially his Eighth Amendment right against cruel and unusual punishment, because California is one of a minority of states that permits a penalty retrial when a first jury cannot reach a unanimous decision. (AOB at 317-321.) Taylor concedes that the Supreme Court has found that a penalty-phase retrial is not a double-jeopardy violation. (AOB at 321, citing *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 106-110 [123 S.Ct. 732, 154 L.Ed.2d 588].) This Court has also rejected similar constitutional challenges. (See *People v. Gurule* (2002) 28 Cal.4th 557, 645-646; *People v. Davenport* (1995) 11 Cal.4th 1171, 1192-1194.) Indeed, the trial court had no discretion to do anything other than select a new jury for a new penalty phase. (*People v. Thompson* (1990) 50 Cal.3d 134, 176-177, citing Pen. Code, § 190.4, subd. (b).) These decisions appropriately resolve this issue. Since a defendant may be held for a retrial without violating double-jeopardy principles, it is inconceivable that the fact of retrial alone — which has nothing to do with punishment — could be considered cruel or unusual. Accordingly, Taylor's arguments should be rejected.

XXI.

UNREPORTED DISCUSSIONS WERE ADEQUATELY RECONSTRUCTED IN A SETTLED STATEMENT SUCH THAT TAYLOR HAS RECEIVED MEANINGFUL APPELLATE REVIEW

In Argument XXI, Taylor contends that, despite Penal Code section 190.9's requirement that all proceedings be reported, various unreported discussions and proceedings occurred and violated his constitutional rights. (AOB at 322-331.) Although noting that the parties entered an amended

stipulation regarding an engrossed settlement of the record that painstakingly reconstructed nearly all of the omissions (AOB at 330, citing 41 CT 8656-8660) and conceding that he cannot demonstrate prejudice (AOB at 330), Taylor argues that the unreported proceedings should be reversible per se (AOB at 327-330). Regarding state law, the miscarriage-of-justice standard controls. (*People v. Roberts* (1992) 2 Cal.4th 271, 326; see Cal. Const., art. VI, § 13.) Regarding federal law, the more than twelve-hundred-page record provides "meaningful appellate review." (*People v. Huggins* (2006) 38 Cal.4th 175, 204-205.) Accordingly, any error was harmless under any standard.

XXII.

THE TRIAL COURT PROPERLY IMPANELED JURORS WHO COULD APPROPRIATELY CONSIDER CAPITAL PUNISHMENT

In Argument XXII, Taylor contends that California's procedures for producing a death-qualified jury violated his constitutional rights. (AOB at 332-367; see Arg. XV, *ante*.) Taylor does not challenge any particular ruling regarding any particular juror or challenge for cause; instead he cites studies and law-review articles questioning the practice and procedures under which prospective jurors are selected. Taylor's arguments, however, are better addressed to the Legislature because the death-qualification procedures used at his trial have long been judicially approved and are sound.

Prospective jurors may be questioned and challenged for cause based upon their views regarding capital punishment if those views would prevent or substantially impair the performance of their duties as defined by the court's instructions and the juror's oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *People v. Schmeck* (2005) 37 Cal.4th 240, 262; *People v. Crittenden* (1994) 9 Cal.4th 83, 121.) The death-qualification process does not support a constitutional prohibition on capital punishment

under either state or federal law. (See, e.g., *People v. Lenart* (2004) 32 Cal.4th 1107, 1120, citing *Lockhart v. McCree* (1986) 476 U.S. 162, 165 [106 S.Ct. 1758, 90 L.Ed.2d 137]; also *People v. Jackson* (1996) 13 Cal.4th 1164, 1198-1199 [rejecting the defendant's proffered social-science evidence].) There is no constitutional infirmity in permitting a prosecutor to use peremptory challenges on the basis of specific juror attitudes toward the death penalty. (*People v. Avila* (2006) 38 Cal.4th 491, 558-559, citing, e.g., *People v. Brown* (2004) 33 Cal.4th 382, 403.) Excusing jurors unable or unwilling to vote for the death penalty under any circumstances does not compromise the constitutional right to an unbiased jury. (*People v. Avena* (1996) 13 Cal.4th 394, 412.)

There is nothing unusual or unconstitutional about inquiring whether prospective jurors can follow the law. Without this type of voir dire, prosecutors would be precluded from following the legislative will as expressed in the Penal Code, and the death penalty could be open to other constitutional challenges on the grounds that it was randomly or arbitrarily imposed. The jury selection process properly afforded both parties the opportunity to question and impanel a fair and impartial jury. (See *Uttecht v. Brown* (2007) ___U.S. ___ [127 S.Ct. 2218, 2224].)

XXIII.

THE DEATH PENALTY IS APPROPRIATE FOR FELONY MURDER

In Argument XXIII, Taylor contends that his death sentence "based on felony murder simpliciter" violates the Eighth Amendment and international law because California law permits the death penalty for the direct killer in a felony murder, even without proof of a culpable mental state. (AOB at 368-383; cf. Pen. Code, § 190.2, subd. (b) [an actual killer need not have an intent to kill].) Taylor, however, is sufficiently culpable because his actions actually

caused Dixon's death in a manner that demonstrated reckless indifference to human life. (See *Tison v. Arizona* (1987) 481 U.S. 137, 151-152, 158, fn. 12 [107 S.Ct. 1676, 95 L.Ed.2d 127]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1138-1147, overruling *Carlos v. Superior Court* (1983) 35 Cal.3d 131; also *People v. Anderson* (2001) 25 Cal.4th 543, 601 [rejecting the claim that the felony-murder special circumstance violated the Eighth Amendment because it included unintentional killings].) In *Tison*, for example, the Supreme Court accepted that two brothers acted with sufficiently reckless indifference to life when they helped two convicted murderers escape from prison at gun point, aided in the carjacking of a family of four, and then left the family in the desert with the convicts, who executed the family. (*Tison v. Arizona, supra*, 418 U.S. at pp. 139-141, 156-158.)

Taylor's "brutal" actions that ripped an 80-year-old woman's vagina in multiple places at the depth of three and four inches demonstrate a reckless indifference for life just as if he had pierced her with a knife. (26 RT 2530-2535 [Dr. Super]; 2556 [Kinsey]; 45RT 4544 [Dr. Gabaeff].) Taylor's CPR training meant that he surely knew that Dixon had difficulty breathing and remaining conscious, and his immediate flight underscored his indifference and disdain for her safety and life. (See *Hopkins v. Reeves* (1998) 524 U.S. 88, 99-100 [118 S.Ct. 1895, 141 L.Ed.2d 76] [noting that "proof of a culpable mental state with respect to the killing" is not an element of a capital-eligible felony murder and may be established on appeal], citing *Cabana v. Bullock* (1986) 474 U.S. 376, 385 [106 S.Ct. 689, 88 L.Ed.2d 704].) Taylor's death sentence is unquestionably appropriate.

XXIV.

TAYLOR RECEIVED A FAIR TRIAL AND MAY NOT OBTAIN RELIEF DUE TO ALLEGED CUMULATIVE ERROR

In Argument XXIV, Taylor contends that, even if no individual error is prejudicial, reversal is required due to cumulative error. (AOB at 384-386.) Assuming for argument's sake the existence of more than one error, each must be evaluated under the applicable standard of prejudice. There is no doubt as to Taylor's identity as the perpetrator, and he was convicted and sentenced by juries that represented a fair cross-section of the community. At bottom, Taylor was entitled to a fair trial, not a perfect one. He received a fair trial. (See *People v. Box* (2000) 23 Cal.4th 1153, 1214; *People v. Beeler* (1995) 9 Cal.4th 953, 994.) Any error did not significantly influence the fairness of the trial or undermine the penalty determination. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1038.)

XXV.

TAYLOR'S DEATH SENTENCE MAY STAND SO LONG AS THERE IS A SINGLE VALID SPECIAL CIRCUMSTANCE AND NO PREJUDICIAL ERROR

In Argument XXV, Taylor contends that, if his conviction is reversed as to any count or if the finding of any special circumstance is vacated, his penalty must also be reversed and remanded for a new penalty-phase trial. (AOB at 387.) The United States Supreme Court, however, rejected a similar argument in *Brown v. Sanders* (2006) ___ U.S. ___ [126 S.Ct. 884, 892-94, 163 L.Ed.2d 723]. In *Sanders*, the court held that the invalidation of two special circumstances on appeal did not render a death sentence unconstitutional where two other special circumstances were proper and where all the facts and circumstances admissible to prove the invalid special circumstances were properly introduced under another factor regarding the

circumstances of the crime. (See also *Clemons v. Mississippi* (1990) 494 U.S. 738, 745-50 [110 S.Ct. 1441, 108 L.Ed.2d 725] [regarding appellate reconsideration of death judgment]; *Zant v. Stephens* (1983) 462 U.S. 862, 890 [103 S.Ct. 2733, 77 L.Ed.2d 235] [invalidity of one aggravating factor does not require vacation of death sentence].) A single valid special circumstance is sufficient to determine the defendant is eligible for the death penalty. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1102.)

XXVI.

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT DEATH BE FOUND BEYOND A REASONABLE DOUBT, THAT AGGRAVATING FACTORS OUTWEIGH MITIGATING FACTORS, OR THAT JURORS RECEIVE INSTRUCTIONS REGARDING UNANIMITY

In Argument XXVI, Taylor contends that California's death-penalty laws are unconstitutional because they do not require that prosecutors prove beyond a reasonable doubt that aggravating factors outweigh mitigating factors, that death is the appropriate penalty, that jurors be instructed on unanimity, and that there should be a presumption of life. (AOB 390-422; see also Arg. XXVII, *post.*) Taylor acknowledges that this Court has previously rejected his arguments. (See, e.g., AOB at 391-392, citing *People v. Fairbanks* (1997) 16 Cal.4th 1223, 1255 [regarding unanimity, proof beyond a reasonable doubt, and aggravating factors outweighing mitigating factors], at 409, citing *People v. Hayes* (1990) 52 Cal.3d 577, 643 [regarding the burden of persuasion], at 414, citing *People v. Taylor* (1990) 52 Cal.3d 719, 749 [regarding unanimity], at 415, fn. 144, citing *People v. Prieto* (2003) 30 Cal.4th 225, 365 [regarding unanimity], and at 421-22, citing *People v. Arias* (1996) 13 Cal.4th 92, 190 [regarding no presumption of life].)

Taylor requests that this Court revisit its prior decisions in light of *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], but this Court has already done so. (*People v. Prince* (2007) 40 Cal.4th 1179, 1297-1298; *People v. Beames* (2007) 40 Cal.4th 907, 934-935; *People v. Chatman* (2006) 38 Cal.4th 344, 409-410; *People v. Jurado* (2006) 38 Cal.4th 72, 143; cf. AOB at 392-403, 415.) The instructions were proper. (See, e.g., *People v. Moon* (2005) 37 Cal.4th 1, 42-43 [rejecting 19 separate challenges to CALJIC No. 8.88]; also *People v. Breaux* (1991) 1 Cal.4th 281, 314-315 [no requirement that the trial court instruct jurors that their consideration of mitigating evidence need not be unanimous].)

XXVII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.88

In Argument XXVII, Taylor contends that CALJIC No. 8.88, regarding the penalty-phase jury's weighing of aggravating and mitigating factors, violated his constitutional rights because it was too vague by using the words "so substantial," failed to convey that death is "appropriate" rather than "warranted," failed to explain what must happen if mitigating evidence outweighs aggravating evidence, and failed to explain that Taylor did not have to explain that death was inappropriate. (AOB at 423–434.) As Taylor concedes, this Court has rejected his vagueness argument (AOB at 425-426, citing *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14; also *People v. Moon* (2005) 37 Cal.4th 1, 43; *People v. Davenport* (1995) 11 Cal.4th 1171, 1231) and his mitigating-outweighs-aggravating argument (AOB at 431, citing *People v. Duncan* (1991) 53 Cal.3d 955, 978; also *People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Dennis* (1995) 17 Cal.4th 468, 552). Similarly,

CALJIC No. 8.88 does not lower the prosecutor's burden of proof and is not unconstitutional for failing to inform jurors that death must be the appropriate penalty and not just the warranted penalty. (*People v. Moon, supra*, 37 Cal.4th at p. 43.) CALJIC 8.88 "accurately describes how jurors are to weigh the aggravating and mitigating factors." (*People v. Elliot* (2005) 37 Cal.4th 453, 488.)

XXVIII.

INTERCASE PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY REQUIRED

In Argument XXVIII, Taylor contends that the failure of California law to provide for "intercase proportionality review in capital cases" violates his constitutional rights. (AOB at 435-438.) As Taylor acknowledges, the United States Supreme Court and this Court have rejected this argument. (AOB at 436, citing *Pulley v. Harris* (1984) 465 U.S. 37, 51-53 [104 S.Ct. 871,79 L.Ed.2d 291]; see *People v. Moon* (2005) 37 Cal.4th 1, 48; *People v. Brown* (2004) 33 Cal.4th 382, 402.).) Taylor's sentence is lawful and proper.

XXIX.

CALIFORNIA'S DEATH-PENALTY LAW COMPORTS WITH THE EIGHTH AMENDMENT, INTERNATIONAL LAW, AND EVOLVING STANDARDS OF DECENCY

In Argument XXIX, Taylor contends that California's death-penalty laws violate the Eighth Amendment, evolving standards of decency, and international law, including the International Covenant of Civil and Political Rights. (AOB at 439-443.) As Taylor acknowledges, this Court has rejected this argument. (AOB at 443, citing, e.g., *People v. Brown* (2004) 33 Cal.4th 382, 403-404 [assuming the defendant had standing to raise an issue regarding a treaty, the United States adopted the ICCPR only upon reserving the right to impose a sentence of death].) California's death-penalty law is not cruel and

unusual punishment. (*People v. Moon* (2005) 37 Cal.4th 1, 47-48.) It does not violate international norms. (*People v. Perry* (2006) 38 Cal.4th 302, 322.) Taylor's sentence is appropriate.

XXX.

WRITTEN PENALTY-PHASE JURY FINDINGS ARE NOT CONSTITUTIONALLY REQUIRED

In Argument XXX, Taylor contends that California's death-penalty scheme violates his constitutional rights because it does not require the jury to prepare a "written statement of findings and reasons for its death verdict." (AOB at 444-445.) As Taylor acknowledges, this Court has rejected this argument. (AOB at 444 [citing *People v. Fauber* (1992) 2 Cal.4th 792, 859]; see also *People v. Davenport* (1995) 11 Cal.4th 1171, 1232; *People v. Medina* (1995) 11 Cal.4th 694, 782; *People v. Turner* (1994) 8 Cal.4th 137, 209.) Written findings are not necessary to facilitate "meaningful appellate review." (See *People v. Moon* (2005) 37 Cal.4th 1, 43; cf. AOB at 445.) There was no error.

CONCLUSION

For the reasons set forth, this Court should affirm the judgment of death and sentence of death in its entirety.

Dated: August 20, 2007

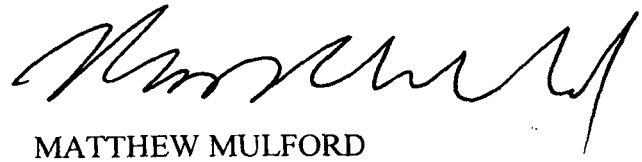
Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

HOLLY WILKENS
Supervising Deputy Attorney General



MATTHEW MULFORD
Deputy Attorney General

Attorneys for Plaintiff and Respondent

MM:adc
SD1997XS0006
80156177.wpd

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 19,047 words.

Dated: August 20, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

MATTHEW MULFORD
Deputy Attorney General

Attorneys for Plaintiff and Respondent

MM:adc
SD1997XS0006
80156177.wpd

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Brandon Arnae Taylor**
No.: **S062562**

I declare:

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

On August 20, 2007, I served the attached **Respondent's Brief** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the 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:

Alison Pease
Office of the State Public Defender
Deputy Public Defender
801 K Street, Suite 1100
Sacramento, CA 95814
(Attorney for Defendant and Appellant)
(2 Copies)

The Honorable Bonnie M. Dumanis
District Attorney
San Diego County District Attorney's Office
330 West Broadway, Suite 1320
San Diego, CA 92101

CAP - SF
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

The Honorable Frederic L. Link, Judge
San Diego County Superior Court
Main Courthouse
THIRD FLOOR
Department SD-26
220 West Broadway
San Diego, CA 92101

Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814 E-15

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 20, 2007, at San Diego, California.

A. Curiel	
Declarant	Signature

80156404.wpd