No. S118775 - CAPITAL CASE

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
JAVANCE MICKEY WILSON,
Defendant and Appellant.

San Bernardino County Superior Court, Case No. FVA12968
The Honorable James A. Edwards, Judge

RESPONDENT'S SECOND SUPPLEMENTAL BRIEF

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FACTUAL AND PROCEDURAL BACKGROUND

In early 2000, needing money, appellant Javance Wilson targeted taxicab drivers to rob and murder. His first victim, James Richards, was working as a driver for Yellow Cab in San Bernardino. (15 RT 3842.) On January 7, 2000, Richards was dispatched to a Stater Brother's grocery store where he picked up Wilson and, as Wilson requested, headed towards Bloomington—a neighborhood about 25 minutes away. (15 RT 3843-3848.) Once there, Richards followed Wilson's directions to a remote location at the end of a dirt road cul-de-sac on Laurel Avenue. (14 RT 3567; 15 RT 3848-3849.) Using a recently-stolen .22 caliber handgun, Wilson robbed Richards at gunpoint, and then forced Richards out of the taxi and onto his knees; he then demanded Richards close his eyes and open his mouth. (15 RT 3782-3783, 3849-3853.) Wilson shoved the handgun into Richards's mouth and pulled the trigger. (15 RT 3852-3853.) But the gun malfunctioned and did not fire. (15 RT 3852-3853.) Richards took off running and, after Wilson fired at him a second time and the gun jammed again, he was able to escape into a nearby home. (14 RT 3568-3572; 15 RT 3857.) Wilson fled the scene in Richards's taxicab. (14 RT 3571.)

Once the police arrived to the scene, Richards provided a detailed description of Wilson, describing him as a "light skinned black male," about six feet tall, 200 to 220 pounds in weight, about "mid thirties" in age, "real short hair" on his head, with pock marks on his face, wearing light colored pants, and a bulky jacket. (15 RT 3858-3859.) Several weeks passed during which

time the police had not located a suspect, and Richards did not have contact with the police during that time. (15 RT 3861-3862.) This worried Richards because he thought Wilson may try to come after him, particularly because Wilson had Richards's personal information from his wallet. (15 RT 3865.) Richards grew paranoid and, although he had been sober for a "a year or so," he started using methamphetamine again. (15 RT 3864-3865.) Richards was unable to return to his job as a taxi cab driver, and he was "using real heavy," so he checked himself into a sober living home in San Bernardino. (15 RT 3866.)

About six weeks later, after Richards was out of the sober living home, Wilson—now armed with a recently-stolen .44 Magnum handgun—again called the Yellow Cab in San Bernardino to request a ride, and again asked to have a taxi dispatched to a Stater Brother's grocery store. (14 RT 3576-3577, 3580.) Again, he directed the driver—this time, Andres Dominguez—to the exact same remote location where he had robbed and attempted to murder Richards. (15 RT 3773-3774.) Shortly after Dominguez drove Wilson to that location, a neighbor who lived on the street heard a gunshot and went outside to investigate. (15 RT 3773-3776.) The neighbor discovered Dominguez's dead body in the street next to his taxi. (15 RT 3777.) Dominguez had been shot once in the head from close range, and his cell phone had been stolen. (14 RT 3577; 15 RT 3811-3812; 16 RT 4176.)

Less than two hours later—using Dominguez's cell phone—Wilson called Yellow Cab in Pomona and again requested a ride.

(15 RT 3840-3841; 16 RT 4177-4178.) This time, Victor Henderson was dispatched to pick up Wilson. (15 RT 3840.) Like Richards and Dominguez, Henderson followed Wilson's directions to a residential area. (15 RT 3976-3979; 16 RT 4029-4030.) At approximately 2:30 a.m., several residents awoke to the sound of gunfire outside. (15 RT 3976-3979; 16 RT 4029-4030.) Henderson had been shot twice and killed. (15 RT 3800.) The first gunshot wound was to his back as he was running away and likely paralyzed him instantly; the second gunshot wound was to his heart—fired from close range and consistent with someone standing over him. (15 RT 3800-3804.)

Because of the similarities in the commission of these crimes, law enforcement believed the same person was responsible for all of them. As the lone survivor, investigators sought Richards's help in identifying the assailant. Shortly after the Dominguez and Henderson murders, Richards was interviewed by investigators. (15 RT 3862-3863.) During that interview he discussed an acquaintance of his (from the sober living home) that had been talking about committing robberies, and even mentioned a cab driver, but Richards told the investigator that although that acquaintance "looked a lot like" the assailant, he "didn't think it was him." (15 RT 3866-3867.) Later, Richards provided a physical description of the suspect to a sketch artist, but when the composite drawing was complete, Richards told the artist that he did not believe it "look[ed] that much like the guy." (15 RT 3863-3864; 12 CT 3421.)

Over the next few weeks, investigators also showed Richards two 6-pack photo lineups. The first array did not contain a photograph of Wilson, and Richards did not identify anyone as the assailant. (15 RT 3868; 16 RT 4165; Ex. 148; 12 CT 3492.) The second array—which was shown to Richards a few days after the first array—did include a photograph of Wilson, and when Richards was shown the lineup, he said that Wilson's photo "jumped right out," and he "knew immediately." (15 RT 3869-3870; 17 RT 4445-4446; Ex.16; 12 CT 3422.) Richards circled Wilson's photograph and signed his name and the date next to it. (15 RT 3869-3870; 17 RT 4445-4446; Ex.16; 12 CT 3422.)

After Wilson was arrested, investigators arranged for Richards to participate in a live lineup. (15 RT 3870-3871.) Although Wilson was a participant in the live lineup, Richards was not able to identify him, stating that he was not "100 percent," and later stating that the perpetrator "isn't here today." (15 RT 3870-3871; 12 CT 3567.) At the preliminary hearing five months later, Richards was able to identify Wilson. (1 CT 173-174.)

Prior to the beginning of trial, Wilson filed a motion to exclude Richards's pretrial identification, alleging it was the product of unduly suggestive identification procedures. (See 3 CT 705-716.) The trial court conducted a lengthy hearing, including taking testimony from Dr. Kathy Pezdek, an eyewitness identification expert called by the defense. (See 4 RT 904-946.) The trial court denied the motion, finding nothing in the evidence presented showing the procedures used here were unduly and

unconstitutionally suggestive such that the court should exclude this otherwise relevant evidence. (4 RT 1080-1082.) In his opening brief, Wilson contends the trial court erred in denying his motion to exclude Richards's pretrial identification for the same reasons asserted in his pretrial motion. (AOB 29-71.)

During the guilt phase retrial (two years after commission of the crimes), Richards was questioned at length about his prior opportunities to identify Wilson, and his prior statements. (See generally, RB 19-41.) He also positively identified Wilson in court during his testimony. (15 RT 3873-3874.) As to his in-court identification, Richards testified that Wilson had a "very distinctive" look to his face and he was "very certain" that Wilson was the person who robbed him and attempted to murder him. (15 RT 3874-3875.)

The jury was instructed with CALJIC No, 2.92, which indicated as follows: "Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crimes charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant[.]" (18 RT 4800-4801.) The instruction then provided a nonexclusive list of such factors. Among those listed was the "certainty factor" which told the jury to consider, "[t]he extent to

which the witness is either certain or uncertain of the identification." (18 RT 4800-4802; see CALJIC No. 2.92.)[1]

In the instant brief, Wilson contends this isolated portion of the eyewitness identification instruction was erroneous and warrants reversal of his convictions. (SSAOB 15-16.) Relying on this Court's opinion in *People v. Lemcke* (2021) 11 Cal.5th 644 (*Lemcke*), Wilson asserts that inclusion of the certainty factor constituted both prejudicial instructional error and a violation of his right to due process. (SSAOB 18-36.) Wilson also contends the opinion in *Lemcke*, in addition to a recently enacted provision regarding identification procedures (Penal Code, § 859.7), requires this Court to reconsider the state law standard regarding admission of eyewitness identification evidence at trial, and also bolsters his initial argument in his opening brief regarding the trial court's ruling on his motion to exclude the pretrial identification evidence. (SSAOB 37-42.) Lastly, Wilson reiterates the cumulative error claim he raised in his opening

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[1] In addition to the factor Wilson alleges was problematic, the instruction also indicated the jury should consider the following factors: The witness's opportunity to observe the perpetrator; The stress the witness was under; The ability of the witness to provide a description of the perpetrator and the extent to which the defendant fits that description; The cross-racial or ethnic nature of the identification; The witness's capacity to make an identification; Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup; The period of time between the alleged criminal act and the witness's identification; Whether the witness had prior contacts with the alleged perpetrator; and, Whether the witness's identification is in fact the product of his or her own recollection. (18 RT 4800-4802; see CALJIC No. 2.92.)

brief, but supplements the claim with the errors he alleges here. (SSAOB 43.)

For the reasons detailed below, all of Wilson's claims should be rejected.

ARGUMENT

I. BECAUSE THE TRIAL COURT'S INSTRUCTION REGARDING EYEWITNESS IDENTIFICATION EVIDENCE WAS AND REMAINS A CORRECT STATEMENT OF LAW, THERE WAS NO INSTRUCTIONAL ERROR AND NO DUE PROCESS VIOLATION

Wilson contends the trial court committed reversible error by instructing the jury with the model instruction on eyewitness identifications (CALJIC No. 2.92), which listed witness certainty as one of many factors to consider in assessing the accuracy of eyewitness identifications. (SSAOB 9.) But he cannot demonstrate any error because the instruction was and remains a correct statement of law. To the extent Wilson contends the trial court should have modified the instruction, or provided additional clarification, he has forfeited that claim because he failed to request any modification below. Even if the instruction was erroneous, any error was harmless under any standard given the other evidence and instructions, and the overwhelming evidence of Wilson's guilt. Finally, analysis of this claim under due process principles yields exactly the same result—in light of the other evidence presented and the jury instructions as a whole, inclusion of the certainty factor did not render Wilson's trial fundamentally unfair.

A. The instruction is a correct statement of the law

This Court has repeatedly upheld inclusion of an eyewitness's level of certainty as one of many factors a jury can

consider when evaluating evidence. (*People v. Wright* (1988) 45 Cal.3d 1126, 1141; *People v. Johnson* (1992) 3 Cal.4th 1183, 1230; *People v. Sanchez* (2016) 63 Cal.4th 411, 461-462.) Inclusion of the certainty factor is not erroneous where, as here, the instruction lists the factor in a neutral manner, as one possible consideration amongst many others, and "does not direct the jury that 'certainty equals accuracy.'" (*Lemcke*, *supra*, 11 Cal.5th at p. 647, citing *Sanchez, supra,* 63 Cal.4th at p. 461 [finding no error and no prejudice].)

Wilson appears to contend that this Court's opinion in *Lemcke*, *supra*, 11 Cal.5th 644, overruled the prior opinions finding this instruction proper, and repeatedly refers to his alleged instructional error as "*Lemcke* error," but he acknowledges that this Court did not find any error in *Lemcke* itself. (See *Lemcke, supra*, 11 Cal.5th at p. 656, fn. 6; SSAOB at p. 17, fn. 5 ["Somewhat paradoxically, this Court did not resolve a claim of *Lemcke* error in *Lemcke* itself."]. Instead, the court resolved only the due process claim presented for review, and held the instruction had no impact on the defendant's right to due process and a fair trial. (*Lemcke, supra*, 11 Cal.5th at pp. 654-661.)

The *Lemcke* court did consider the propriety of giving this instruction in light of growing scientific agreement that a witness's certainty in identifying a perpetrator is a complicated matter and is not necessarily correlated to accuracy. (*Lemcke, supra*, 11 Cal.5th at pp. 661-669.) Ultimately, this Court referred the matter to the Judicial Council, so it could reevaluate

"'whether or how the instruction might be modified to avoid juror confusion regarding the correlation between certainty and accuracy.'" (*People v. Wright* (2021) 12 Cal.5th 419, 453, quoting *Lemcke, supra,* 11 Cal.5th at p. 647.) But contrary to Wilson's contentions, the *Lemcke* court did not conclude that the risk of any such juror confusion equated to instructional error, let alone instructional error warranting reversal. (*Lemcke*, *supra*, 11 Cal.5th at p. 670 [affirming judgment].)

B. Because the trial court had no sua sponte duty to modify the instruction, and Wilson did not request any modification, his contention that the instruction should have been modified is forfeited

To the extent Wilson contends the instruction should have been modified, this Court has also already held that he is obligated to request that modification in the trial court. (*Sanchez*, *supra*, 63 Cal.4th at p. 461 ["If defendant had wanted the court to modify the [eyewitness identification] instruction, he should have requested it."].) Where no such request was made below, this Court held the trial court had no sua sponte duty to modify CALJIC No. 2.92, and any claim on appeal that the instruction should have been modified is forfeited. (*Sanchez,* at p. 461.)

Again, this Court's opinion in *Lemcke* did not overrule *Sanchez* on this point. (See *Lemcke*, *supra*, 11 Cal.5th at pp. 656-657.) On the contrary, *Lemcke* acknowledged the holding in *Sanchez*, and its discussion of modifying the instruction where the evidence includes both certain and uncertain identifications. (*Ibid.*) There, the *Sanchez* court noted that its finding that there was no sua sponte duty to modify the instruction was "especially

forceful here because, under the facts, it is not clear defendant would want the modification[,]" since the evidence included both certain and uncertain identifications. (*Sanchez*, *supra*, 63 Cal.4th at pp. 461-462.) The same is true with respect to Richards's pretrial identifications. The evidence showed both certain and uncertain identifications, and defense counsel may not have wanted the instruction modified. Accordingly, to the extent Wilson contends the instruction should have been modified, he has forfeited that claim by failing to request any modification below. (*People v. Hudson* (2006) 38 Cal. 4th 1002, 1011-1012, quoting *People v. Andrews* (1989) 49 Cal.3d 200, 218 [""Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.""].)

In a footnote, Wilson contends the forfeiture rule should not apply to him because any request he could have made for modification would have been futile. (SSAOB at p. 17, fn. 5, citing *People v. Perez* (2020) 9 Cal.5th 1, 7-8 (*Perez*).) As this Court acknowledged in *Perez*, under certain circumstances, a failure to object may be excused where requiring an objection "would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal." (*Id.* at p. 8, internal quotations omitted.) The test for determining whether to excuse the failure to object at trial is based on

considering "the state of the law as it would have appeared to competent and knowledgeable counsel at the time of trial." (*Ibid.*, internal quotations omitted.)

But "[a] defendant claiming that [the futility exception] applies must find support for his or her claim in the record. The ritual incantation that an exception applies is not enough." (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 853, internal citations omitted.) And while the trial in this case predated this Court's opinions in *Sanchez* and *Lemcke*, as this Court explained in *Sanchez*, "[s]tudies concluding there is, at best, a weak correlation between witness certainty and accuracy are nothing new." (*Sanchez*, *supra*, 63 Cal.4th at 462.)[2]

As appellant notes, Dr. Pezdek testified in pretrial proceedings and at the actual trial regarding the circumstances of Richards's identifications and the impact those circumstances may have had on Richards's level of confidence in the accuracy of

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[2] This issue was addressed at least as early as 1984 when this Court issued its opinion in *People v. McDonald* (1984) 37 Cal.3d 351, holding that trial courts have discretion to admit expert testimony on this subject to address this very concern. (Id. at p. 369 ["[O]ther psychological factors have been examined in the literature that appear to contradict the expectations of the average juror. Perhaps the foremost among these is the lack of correlation between the degree of confidence an eyewitness expresses in his identification and the accuracy of that identification. Numerous investigations of this phenomenon have been conducted: the majority of recent studies have found no statistically significant correlation between confidence and accuracy, and in a number of instances the correlation is negative—i.e., the more certain the witness, the more likely he is mistaken."].)

his identification. (See AOB 12-14, citing 4 RT 905-921, and 18 RT 4654-4678.) Thus, the record demonstrates that defense counsel and the trial court were fully apprised of the issues regarding eyewitness identifications, and nothing suggests the court would not have modified the instruction had appellant made the request. Because appellant cannot show that a request to modify the instruction would have been futile, this claim is forfeited.

Finally, Wilson contends that although he did not object to, or otherwise request modification of, CALJIC No. 2.92, the instruction impacted his "substantial rights." (SSAOB at p. 17, fn. 5.) However, as detailed below in subsection I.E., instruction with CALJIC No. 2.92 did not deprive Wilson of his right to due process, or otherwise impact his "substantial rights." As such, Wilson is unable to raise this claim for the first time on direct appeal.

C. Even assuming error, it was harmless under any standard

Even assuming the trial court erred by not sua sponte modifying CALJIC No. 2.92 to clarify or omit the certainty factor, Wilson's claims must be rejected because any such error was harmless under any applicable standard. Ordinarily, instructional error is assessed under the *Watson* reasonable probability standard. (*People v. Watson* (1956) 46 Cal.2d 818; *People v. Flood* (1998) 18 Cal.4th 470, 490.) Only where jury instructions relieve "the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense" do they violate the defendant's due process rights, and only then

"does the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18 apply." (*People v. Flood*, *supra*, 18 Cal.4th at p. 491.) Here, the alleged instructional error did not relieve the prosecution of proving every element of the charged crimes beyond a reasonable doubt. Therefore, the *Watson* harmless error standard, not the more stringent *Chapman* standard, applies. But this Court need not reach that precise question because any error is harmless under both standards.

The risk posed by the certainty factor as provided in CALJIC No. 2.92 is that "the wording of the instruction might cause some jurors to infer that certainty is generally correlative of accuracy." (*Lemcke*, *supra*, 11 Cal.5th at p. 657.) And, contrary to that common misconception, "witness certainty is not necessarily correlated with accuracy of eyewitness identifications." (*Sanchez*, *supra*, 63 Cal.4th at p. 495 (conc. opn. of Liu, J.).) Instead "the strength of the confidence-accuracy relationship varies, as it depends on complex interactions among [many] factors." (*Id.* at p. 497; and see CALCRIM No. 315 (2023 edition) [adding, in response to *Lemcke*, this sentence: "A witness's expression of certainty about an identification, whether the identification was made before or at the trial, may not be a reliable indicator of accuracy." And listing factors that might bear on how to evaluate the correlation between certainty and accuracy].) But even if some or all of the jurors in this case shared that common misconception regarding the correlation between certainty and accuracy, and assuming those jurors read the certainty factor to implicitly support that notion, (see *Lemcke*, *supra*, 11 Cal.5th at

p. 666 ["As written, the instruction implies that each of these factors have a direct, linear bearing on accuracy."]), the other evidence and instructions, and the arguments from both counsel, would necessarily have countered and corrected their common misconception, thus rendering any error harmless under any standard.

Here, just as in *Lemcke*, Wilson presented extensive expert testimony challenging the validity of Richards's identifications. (18 RT 4643-4702; *Lemcke*, *supra*, 11 Cal.5th at p. 647 [finding that "[a]lthough the language may prompt jurors to conclude that a confident identification is more likely to be accurate, [the defendant] was permitted to call an eyewitness identification expert who explained the limited circumstances when certainty and accuracy are positively correlated."].) Dr. Pezdek opined that "[w]itness confidence is very easy to manipulate" (18 RT 4677) and attacked the significance of Richards's identification at length. She opined that Richards's identification of Wilson was unreliable for various reasons including the cross-racial nature of the identification (18 RT 4672-4674), his prior suggestions that it was someone other than Wilson, and what she characterized as suggestive tactics by law enforcement (e.g., 18 RT 4654-4662). Dr. Pezdek explained that a witness's confidence in their identification tends to increase over time, and can be buttressed by their in-court identifications—which are inherently suggestive:

> So any time a witness is told anything about, yeah, you picked the right guy, good job, or something like that, the witness' confidence will increase over time as a

> result of just hearing that comment, and that's been shown a number of times. Their accuracy doesn't increase over time. Nothing is happening to their accuracy, but it's their confidence. So that they can get to court and say, I'm sure that's the guy, or I'll never forget that face even.
>
> How do you explain that a witness comes to court and picks the defendant out and says, I'll never forget that face. I really – you know, that's the face I remember. I'm 100 percent sure, but yet at a photographic lineup right after the incidents they say, I don't know. I think it's him. I can't really tell. Well, one explanation for that is that they were told that they had picked the right guy and that's what's boosting their confidence.

(18 RT 4678.) As this Court explained in *Lemcke*, "[n]othing in [the jury instruction] suggested that the jury should ignore [the doctor's] expert opinion on witness certainty." (*Lemcke*, *supra*, 11 Cal.5th at p. 658.) To the contrary, and as in *Lemcke*, the jury here received multiple instructions informing it how to weigh and evaluate expert opinion testimony. (*Id.* at p. 647; 11 CT 3011 [CALJIC No. 2.80], 3013 [CALJIC No. 2.82], 3013 [CALJIC No. 2.83].)

In addition to the testimony of Dr. Pezdek, the jury heard extensive additional testimony regarding the identification procedures, the allegations of undue suggestiveness, and about Richards's credibility both generally, and more specifically with respect to his identification. (See *Wright*, *supra*, 12 Cal.5th at p. 453, citing *Lemcke*, *supra*, 11 Cal.5th at p. 660 [relying on cross-examination of witnesses and other evidence regarding identification procedures]; and see 15 RT 3883-3889; 16 RT 4202;

17 RT 4465-4468 [regarding whether Richards was shown a third photo array]; 18 RT 4781 [circumstances of Richards's ability to see Wilson]; 17 RT 4362-4386; 18 RT 4722-4723 [Richards's credibility].)

Second, when considered as a whole and in context, the jury instructions communicated that witness certainty was only one factor to consider in assessing one piece of evidence. The jury would not have read the single sentence regarding the certainty factor to mean it should accept witness certainty as conclusive and irrefutable proof of the identification's accuracy. Again, just as in *Lemcke*, the instruction did not "state that the jury must presume an identification is accurate if the eyewitness has expressed certainty." (*Lemcke*, *supra*, 11 Cal.5th at p. 657.) The certainty language at issue here, as in *Lemcke*, was neutrally worded and merely one of many factors the jury was permitted to consider. (*Lemcke*, *supra*, 11 Cal.5th at p. 657 ["the instruction merely lists the witness's level of certainty at the time of identification as one of 15 different factors that the jury should consider when evaluating the credibility and accuracy of eyewitness testimony."]; 18 RT 4801-4802.) Also just as in *Lemcke*, the neutral wording of CALJIC No. 2.92 "leaves the jury to decide whether the witness expressed a credible claim of certainty and what weight, if any, should be placed on that certainty in relation to the numerous other factors listed . . ." (*Lemcke*, *supra*, 11 Cal.5th at p. 657.)

Further, the jury was instructed that a witness's "innocent misrecollection is not uncommon" (11 CT 3004; CALJIC No.

2.21.1), that the jurors were "the sole judges of the believability of a witness and the weight to be given the testimony of each witness" (11 CT 3003; CALJIC No. 2.20), and that a witness who is willfully false "in one material part of his or her testimony is to be distrusted in others" (11 CT 3005; CALJIC No. 2.21.2). As this Court explained in the nearly identical context in *Lemcke*, "[t]he jury 'thus remained free to exercise its collective judgment to reject what it did not find trustworthy or plausible.'" (*Lemcke*, *supra*, 11 Cal.5th at p. 658, quoting *Cupp v. Naughten* (1973) 414 U.S. 141, 149.)

Finally, the subject of the reliability of Richards's identifications was covered extensively by both parties during closing arguments. Initially, the prosecutor discussed the significance of Richards's identification of Wilson and argued that the defense was using it to distract from the bigger, and entirely consistent picture of Wilson's guilt. (18 RT 4845 ["[Defense counsel] is attempting to try this case as an eyewitness identification case by and large, namely, that there's – the Richards identification is too weak. And I submit to you just outright that the Richards identification is a very, very small portion of the identifying evidence which incriminates Mr. Wilson. And in fact, it's merely just a corroborative element. It's hardly the main thing."]; 4871 ["[C]ollectively we are dealing here with a wall of overwhelming evidence which incriminates Mr. Wilson in an extremely serious case. . . . It is not an eyewitness I.D. case. . . . We don't even need Mr. Richards's I.D. to place Mr. Wilson on the case. It is corroborative but it is hardly the basis of

the case. All of our witnesses in this case are corroborated time and time again. . ."].)

Defense counsel's closing argument focused heavily on the believability of Richard's identification, noting that Richards was unreliable because of his prior criminal history (18 RT 4909, 4911), and flagging the inconsistencies in his various opportunities to identify Wilson as the perpetrator. (18 RT 4910 ["[Richards] has gone from making an identification in a photo lineup after having first fingered another man and then going to a live lineup and not making an identification and now coming in here and telling you that he has 100 percent confidence that Mr. Wilson is the man."].) Defense counsel also highlighted the evidence and testimony regarding the suggestive tactics used by law enforcement and the role those played in undermining the reliability of Richards's identifications. (18 RT 4913-4915 ["From the testimony you heard about memory, is it any wonder that Mr. Richards is now firmly convinced that he should identify Mr. Wilson?"].)

In rebuttal, the prosecutor returned to this point and, after conceding the identification procedures and circumstances made Richards's identification "precarious," he argued that it did not matter because—no matter what the jury thought of the accuracy of Richards's identifications—the evidence as a whole still proved Wilson's guilt with overwhelming certainty. (18 RT 4940 ["If we had nothing but the Richards I.D. case in terms of incriminating Mr. Wilson, you know, absolutely I would concede that it is a very precarious identification scenario. But when you look at

corroboration, I would rather have let's call it the weak or susceptible witness that is surrounded by pillars of corroboration, as is Mr. Richards and most of the other witnesses in this case . . ."].)

In light of the other evidence (including extensive testimony from the eyewitness identification expert), the other instructions, and the arguments of counsel, any error in failing to modify the certainty factor was harmless because the jury would not have clung to any misconception that certainty necessarily equates with accuracy.

Fourth and finally, Wilson argues this error was prejudicial because "this was a close case," and he maintains that Richards's identification of him was the critical piece of evidence that solidified the jury's guilty verdicts. (SSAOB at p. 35.) But the record refutes, rather than supports, this contention. Even if Richards's identifications of Wilson had been excluded in their entirety, the jury would have been left with overwhelming evidence of Wilson's guilt. This case aptly demonstrates why the law considers circumstantial evidence every bit as persuasive as direct evidence, and why juries are instructed to consider both equally. (See e.g., *People v. Manibusan* (2013) 58 Cal.4th 40, 87 ["[C]ircumstantial evidence is as sufficient as direct evidence to support a conviction."].)

At the outset, the evidence confirms that Wilson admitted to multiple people that he committed these crimes. He admitted his guilt to his wife, Melody Mansfield, to his half-brother, Sylvester Seeney, and to his half-brother's girlfriend (and his own personal

good friend), Phyllis Woodruff. (See, e.g., 14 RT 3646-3648 [Wilson told Woodruff in detail how he robbed and attempted to murder Richards, showed her the .22 handgun he used, and showed her the wallet he took from Richards], 3734-3735 [Wilson confessed to Mansfield that he murdered "the cab drivers"], 3735 [Wilson admitted to Seeney that he murdered Henderson and Dominguez], 3739 [Wilson showed Seeney the .44 Magnum handgun he used in the murders].) The mere fact of Wilson's numerous admissions is incriminating, but here, those admissions are all the more persuasive because they included details only the perpetrator could have known, and the other evidence and testimony from numerous disinterested civilian witnesses corroborates Wilson's whereabouts, his access to the firearms used to commit these crimes, the details of the killings, and Wilson's possession in the immediate aftermath of the crimes of the items stolen from the victims. (See *People v. Cooper* (1991) 53 Cal.3d 771, 836-837 ["[T]he evidence of guilt was extremely strong. Many items of circumstantial evidence pointed to defendant's guilt. Some alone were quite compelling; others less so. . . . Defendant sought to discredit or minimize each of these items of evidence, but the sheer volume and consistency of the evidence is overwhelming."].)

The evidence presented at trial showed that, the day prior to the crimes against Richards, Wilson was involved in the residential burglary and theft of multiple firearms. The homeowner testified that on January 6, 2000, his house was burglarized, and his cache of firearms was stolen, including his

.22 caliber Phoenix Arms handgun that "didn't work too well at all" because it would "jam on [him] . . . virtually every time [he would] attempt to use it." (15 RT 3779-3783.) At trial, the homeowner identified the gun used against Richards as the very same .22 handgun that was taken from his house on January 6. (15 RT 3782-3784.) After the attempted murder of Richards, Wilson showed off that .22 handgun, bragged about how he used it to rob Richards, and later admitted that he gave the gun to a friend of his, Brad McKinney. (E.g., 14 RT 3642, 3647-3649.) When investigators executed a search warrant at Brad McKinney's home, they recovered the gun. (15 RT 3998-4001.) Still another independent witness—a family friend of Wilson's—testified that some weeks after the January 6 burglary of the home with the guns, Wilson sold him a hunting rifle that the homeowner identified as one of the other guns taken from his home during the burglary. (15 RT 3782; 16 RT 4046-4048.)

Separate, independent, and unrelated witnesses confirmed that, between December of 1999 and February of 2000, Wilson frequently visited his mother, who lived in a motel directly adjacent to the Stater Brothers grocery store where Richards was dispatched to pick up Wilson. (14 RT 3580; 15 RT 3842-3843.) The manager of the motel confirmed he saw and spoke to Wilson either the day of, or the day before, the robbery and attempted murder of Richards. (See 14 RT 3580; 15 RT 3785-3787, 3842-3843.) Furthermore, Wilson lived with his grandparents "on and off" at their home in Bloomington, near Laurel Avenue—the same

remote cul-de-sac where both Richards and Dominguez were attacked. (See 14 RT 3660-3661; 16 RT 4047-4048, 4196.)

When Wilson described his attempted murder of Richards to Woodruff, he told her that he, "stuck the gun in the man's mouth," but the "gun jammed." (14 RT 3646.) These facts were confirmed by Richards and could only have been known by the perpetrator. In addition, after the Richards robbery, Wilson took Woodruff and Seeney to see the taxicab he had stolen from Richards, which he had parked at a nearby apartment complex. (14 RT 3649-3651, 3738.) He also showed them the wallet he said he had stolen from the cab driver. (14 RT 3645-3646, 3737-3738.) As Wilson was rifling through it in front of Woodruff, she could see the picture ID of a young white man inside the wallet. (14 RT 3647.) She later recognized that man as James Richards when she saw him coming into court for his testimony. (See 14 RT 3647-3648.)

As for the Dominguez and Henderson murders, Wilson had recently been involved in another residential burglary, where he again stole a cache of weapons, including, among others, the .44 Magnum handgun that was used to murder Dominguez and Henderson. (See, e.g., 15 RT 3789-3792.) Shortly before those murders, it was Wilson who had possession of the .44 Magnum handgun, among many other firearms. (14 RT 3651-3652.) Wilson was "boasting" about and "admiring" the .44 Magnum, stating that he "liked" the gun and that "it would put a big hole in somebody." (14 RT 3652.) Ballistic testing later established that the same .44 Magnum that Wilson possessed was used to

murder both Dominguez and Henderson. (E.g., 14 RT 3652; 15 RT 3922-3923, 3938.)

On February 20, just hours before the murders, Wilson was at a barbeque at Woodruff's house, where several witnesses confirmed Wilson was wearing a white puffy jacket. (14 RT 3631-3632, 3658-3659, 3724-3725, 3732.) One of the neighbors awoken by the gunshots that killed Henderson looked out her bedroom window and saw the assailant fleeing in a white puffy jacket. (15 RT 3984-3985.) And additional witnesses testified that Wilson still had a puffy white jacket the day after the Dominguez and Henderson murders. (14 RT 3592-3593, 3709-3710.)

In addition, less than two hours after Dominguez was murdered, his stolen cell phone was used to call the cab driven by Henderson. (15 RT 3840-3841; 16 RT 4177-4178.) The following day, Wilson was the person in possession of that stolen cell phone, using it to call a friend, and later loaning the phone to that friend. (See 14 RT 3700-3704; 16 RT 4177-4181.) And when Wilson discussed the murders with Seeney, he told Seeney that one of the cab drivers "begged for his life" but Wilson shot and killed him anyway because "the driver saw his face." (14 RT 3735, 3739.) Those facts were corroborated by Henderson's injuries and the neighbor who testified she could hear someone yelling in pain—and again, were facts that only the perpetrator could have known.

Witnesses of the immediate aftermath of the Henderson murder also saw the assailant injure his leg as he was attempting to get into a getaway car, with his leg getting twisted

underneath the car and drug for a short distance as the car was fleeing the scene. (15 RT 3983-3985; 16 RT 4037-4038.) Wilson relayed a nearly identical description of the injury to Seeney, telling him he injured his leg when he was fleeing the scene because he "got dragged by the car" and hurt himself. (14 RT 3736.) Multiple other witnesses testified they were with Wilson the day before the Dominguez and Henderson murders, and that Wilson did not have a leg injury at that time. (14 RT 3698, 3725-3726.) Still others testified that they were with Wilson the day after the Dominguez and Henderson murders and noticed that he was "limping" "pretty bad," and "couldn't bend [his leg] too well because it hurt so he had to keep his leg straight," and he had a bloody rag wrapped around his leg. (14 RT 3593, 3705-3706, 3725-3726.)

Finally, Richards necessarily could have only identified the assailant in the crimes against him, and had no knowledge or information pertaining to the crimes against Dominguez and Henderson. But because the crimes against Richards bore such striking similarity to the crimes committed six weeks later against Dominguez and Henderson, the evidence powerfully supports the inference that the same person committed all of these crimes. Richards, Dominguez, and Henderson all worked for Yellow Cab companies serving the Inland Empire area east of Los Angeles. (See 14 RT 3577, 3580 [Dominguez worked for Yellow Cab San Bernardino]; 15 RT 3840 [Henderson worked for Yellow Cab Pomona], 3842 [Richards worked for Yellow Cab San Bernardino].) Both Richards and Dominguez picked up the

assailant from nearby Stater Brothers grocery stores. (See 14 RT 3580; 15 RT 3843.) When Wilson was later arrested, he had a Yellow Cab business card in his wallet. (16 RT 4186.) Furthermore, Richards and Dominguez were both directed to, and attacked, in the exact same rural location on Laurel Avenue in Bloomington—a location with which Wilson had prior familiarity from his time living in the neighborhood. (See 14 RT 3567; 15 RT 3773-3774, 3848-3849.)

The prosecutor was correct when he specifically argued that Richards's identification of Wilson was a "very, very small portion" of the prosecution's case, and that it was "merely corollary to so many other things that incriminate Mr. Wilson and connect him with these crimes." (18 RT 4845.) When the individual pieces of evidence are considered together as a whole, the complete picture of Wilson's guilt is virtually indisputable. (See also, *Bourjaily v. United States*, 483 U.S. 171, 180 ["The sum of an evidentiary presentation may well be greater than its constituent parts."].) For the foregoing reasons—in addition to those set forth in the Respondent's Brief and the First Supplemental Respondent's Brief—even assuming the trial court erred by not sua sponte modifying CALJIC No. 2.92 in the manner Wilson now urges, any error was harmless under either *Watson* or *Chapman*.

D. Considering the alleged instructional error with respect to the penalty phase also reveals no prejudice

Wilson alternatively argues that even if his convictions are not reversed as a result of instructing the jury with the model

version of CALJIC No. 2.92, then his death judgment must be reversed because of the impact on the penalty phase. (SSAOB at p. 36.) Specifically, he relies on the prosecutor urging the jury to accord aggravating weight to Wilson robbing, carjacking, and attempting to murder Richards, as well as arguing to the jury that the crimes Wilson committed against Richards were "a large part of the circumstances of the two murders" as the offenses committed against Richards showed Wilson was "sadistic" and "ritualistic." (SSAOB at p. 36, citing 22 RT 5934.) He also argues that the jury's "distorted assessment" of the accuracy of Richards's identification of Wilson adversely impacted the penalty phase weighing process, particularly as it pertained to lingering doubt. (SSAOB at p. 36, citing *Lockhart v. McCree* (1986) 476 U.S. 162, 181.)

Wilson's reliance on lingering doubt regarding whether he was the person who robbed, carjacked, and attempted to murder Richards is unavailing. Initially, Wilson did not present a lingering-doubt argument during the penalty phase, focusing instead on his mental health, troubled upbringing, and previous time in custody. The only mention the prosecutor made of lingering doubt in his penalty phase argument was in reference to the collective wealth of evidence against Wilson. (22 RT 5916 ["One thing you also have going for you is that Mr. Wilson's guilt of these crimes is certain. There can be no lingering doubt in light of the overwhelming evidence that incriminates him of these horrible crimes."].) Defense counsel did not mention lingering

doubt once during his closing argument, and instead accepted the jury's guilty verdict as rendered:

> [Y]ou will remember that at the end of the guilt phase I made some arguments to you about the sufficiency of the evidence. That was my job and I did it. It was my duty as a lawyer for Mr. Wilson to in any way I could attempt to test the evidence that was presented to you so that as you listen to it and made decisions about it, you could be confident that you had been tested and you did accept the evidence as meaning that Mr. Wilson was guilty and we accept that verdict. It is very important to me, though, that I make sure that you understand that there was nothing done there that was intended to be dishonest or misleading. We did not present to you any evidence, nobody was called who lied to you, nobody came in and gave you say an alibi saying he wasn't there, he was with me somewhere else.

(22 RT 5942-5943.)

Furthermore, as detailed above, even setting aside the Richards identifications, the evidence against Wilson was overwhelming. For these reasons, Wilson's claim that the model version of CALJIC No. 2.92 impacted the jury's ability to weigh lingering doubt is entirely without merit, and he has shown no prejudice warranting reversal of the penalty phase.

E. Because the inclusion of the certainty factor did not render Wilson's trial fundamentally unfair, he has failed to show a violation of his right to due process under either the state or the federal constitution

Wilson contends the inclusion of the certainty factor did not just constitute standard instructional error, it also rendered his trial fundamentally unfair such that he was denied his rights to due process under both the state and federal constitutions.

(SSAOB 25-36.) For many of the reasons already discussed, this claim too should be rejected.

In *Lemcke,* considering a nearly identical instruction,[3] this Court held that inclusion of the certainty factor "did not render [the defendant's] trial fundamentally unfair." (*Lemcke*, *supra*, 11 Cal.5th at p. 647.) In a subsequent decision, this Court rejected the same argument with respect to the identical instruction given here—CALJIC No. 2.92. (*People v. Wright, supra,* 12 Cal.5th at p. 453 [inclusion of the certainty factor "did not violate defendant's due process rights"].) Like the defendants in *Lemcke* and *Wright*, Wilson also fails to show the trial court's instructions violated his right to due process under either the state or federal constitution.

At the outset, Wilson insists he is raising a due process claim distinct from those already rejected by this Court in *Lemcke* and *Wright*. (SSAOB 19, 22, 26-27, fn 10.) As relevant here, the defendant in *Lemcke* argued the instruction violated his

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[3] The jury in Lemcke was instructed with CALCRIM No. 315, where the certainty factor instructs the jury to consider, "[h]ow certain was the witness when he or she made an identification," and the jury here was instructed with CALJIC No. 2.92, which directs the jury to consider "[t]he extent to which the witness is either certain or uncertain of the identification." (18 RT 4801-4802.) This slight difference in the wording of the instructions was addressed in Lemcke, and this Court found "no material distinction between the two instructions." (Lemcke, supra, 11 Cal.5th at p. 656, fn. 6 ["In effect, the instructions set forth two ways of saying the same thing: that jurors should consider the witness's level of certainty when assessing the credibility and accuracy of the identification testimony."]; see also Wright, supra, 12 Cal.5th at p. 453.)

due process rights because in equating certainty with accuracy, it effectively lowered the prosecution's burden of proof. (*Lemcke*, *supra*, 11 Cal.5th at p. 657.) Here, Wilson contends his claim is different and that his due process rights were violated because the instruction "impar[ed] the jury's ability to accurately find facts regarding an identification's reliability." (SSAOB 19.) Although Wilson words it differently, the substance of his claim is precisely the same as the claim raised and rejected in *Lemcke*—that the false insinuation that certainty equals accuracy impaired the jury's fact-finding such that it lowered the prosecution's burden of proof. This Court rejected that claim because in light of the neutrality of the instruction itself and considering the instructions as a whole, the jury's fact-finding was not impacted and it "'remained free to exercise its collective judgment to reject what it did not find trustworthy or plausible.'" (*Lemcke*, at p. 658, quoting *Cupp v. Naughten* (1973) 414 U.S. 141, 149.)

In any event, despite Wilson's contention that this claim must be analyzed in a manner distinct from the one in *Lemcke*, the due process analysis is the same for any alleged instructional error. "The touchstone of due process is fundamental fairness." (*Lemcke*, *supra*, 11 Cal.5th at p. 655 [internal quotation marks and citations omitted].) To that end, the "instruction must be considered in the context of the instructions as a whole and the trial record." (*Ibid.*, quoting *People v. Mills* (2012) 55 Cal.4th 663, 677, internal quotation marks omitted.) "If the charge as a whole is ambiguous, the question is whether there is a reasonable

likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (*Lemcke*, *supra*, at p. 655 (internal quotation marks omitted).)

Here, for all the reasons discussed above regarding the harmlessness of any purported error, Wilson cannot show that this instruction was likely to be applied by the jury in an unconstitutional manner, or that it otherwise rendered his trial fundamentally unfair. Even without the benefit of expert testimony like that given in this trial by Dr. Pezdek, this Court similarly found no due process violation. (*Wright*, *supra*, 12 Cal.5th at p. 453.) The *Wright* court explained that "[a]lthough the defense below did not present an eyewitness identification expert as had occurred in *Lemcke*, [the] defendant's primary trial strategy was to discredit [the eyewitnesses], and to imply that the eyewitnesses were testifying falsely." (*Ibid.*)

The same must also be true here, where Wilson had not only the benefit of an eyewitness identification expert, but also attacked Richards's credibility and reliability on multiple additional fronts, including his drug use, criminal history, and the discrepancies in his prior statements—all with the goal of convincing the jury that Richards's identifications were either mistaken or untruthful. Where, as here, "the trial court's instructions as a whole properly instructed the jury how to evaluate the evidence presented," and also "instructed the jury with CALJIC No. 2.20 concerning the believability of a witness and CALJIC No. 2.21.2 concerning a witness who is willfully false[,]" instruction with the certainty factor as provided in

CALJIC No. 2.92 does "not violate defendant's due process rights." (*Wright*, *supra*, 12 Cal.5th at p. 453.)

In arguing his due process rights were violated, Wilson cites and relies on the United States Supreme Court opinion from *Perry v. New Hampshire* (2012) 565 U.S. 228 (*Perry*), noting that *Perry* held that the Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." (SSAOB 18, quoting *Perry*, at p. 237.) But this explanation of the protection afforded by the due process clause undermines rather than supports Wilson's arguments that a due process violation occurred here. The trial court here correctly admitted this evidence and then again appropriately protected the means by which Wilson was permitted to attack its credibility and reliability—leaving the ultimate decision to the jury. For these reasons, Wilson has failed to show any due process violation.

II. NOTHING IN *LEMCKE* OR IN PENAL CODE § 859.7 WARRANTS RECONSIDERATION OF THE RULES REGARDING ADMISSION OF RELEVANT EVIDENCE, NOR DOES EITHER BOLSTER WILSON'S ARGUMENT THAT THE TRIAL COURT ERRED IN DENYING HIS MOTION TO EXCLUDE RICHARD'S PRETRIAL IDENTIFICATIONS

Wilson's second and third arguments can be disposed of quickly. As noted above, in his opening brief, Wilson argues the trial court abused its discretion by denying his motion to exclude Richards's pretrial and in-court identifications as the products of unduly suggestive identification procedures. (AOB 29-71.) Now, he supplements that claim by arguing that recent "changes in the

law," referring to *Lemcke* and recently enacted Penal Code section 859.7, further demonstrate the trial court's error in this regard, and require this Court to "modify the state-law test for admitting eyewitness identifications into evidence." (SSAOB 37-42.)

But *Lemcke* expressly did not consider or resolve any issue related to the admission of identification evidence, it addressed only the instruction given to the jury regarding how to evaluate such evidence. (*Lemcke*, *supra*, 11 Cal.5th at p. 654 [noting that the defendant had not "challenged the admission of any of the identification evidence."].) And this Court's conclusion in *Lemcke*—that the standard instruction should be clarified—has no bearing on a trial court's determination that the evidence was admissible in the first instance.

A trial court ruling on a motion to exclude eyewitness identification evidence must first consider "whether the identification procedure was unduly suggestive and unnecessary," and only if it determines the procedure was unduly and unnecessarily suggestive does it turn to the second question, which is "whether the identification itself was nevertheless reliable under the totality of the circumstances." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.)

Here, the trial court answered the first question in the negative, so it never needed to reach or consider the second question. (See 4 RT 1080-1081 ["I think the law is, was the line-up in this case, the photo- line-up, so suggestive or impermissibly suggestive as to violate due process? And I don't find any

evidence to support such a finding."].) This means the trial court did not need to determine whether, despite the lack of unduly suggestive procedures, the identification was nonetheless reliable. It is only in the context of this second inquiry that the trial court would have possibly considered the certainty Richards expressed when he made the prior identifications.[4]

Once the trial court correctly determined the evidence was admissible, it appropriately left the parties free to elicit testimony and evidence regarding the circumstances of Richards's identifications (both the positive identifications and those in which he failed to identify appellant or identified the wrong person) to either bolster or undercut the reliability of those identifications. (4 RT 1082 ["[A]ll of this can be brought out to the jury, and it's up to the trier of fact to determine how much weight, if any, to give Mr. Richards' anticipated in-court identification. I do not believe that there has been a sufficient showing that this identification is worthless, and therefore should be excluded."].)

Further, even if the court here (or trial courts in general) evaluated Richards's certainty as one factor potentially bearing on the identification's accuracy, such consideration by a court

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[4] Wilson's broad characterization of *Lemcke's* reach also seems to conflate or confuse the evidence on which he relies in making his various claims. When the trial court considered the question of the admissibility of Richards's identifications, it was necessarily only considering the circumstances related to the pretrial identifications. It could not have included in its analysis Richards's certainty expressed with respect to the identification he made during this trial.

does not carry with it the same risk that the court (as opposed to a jury) will adhere to the "common misconception" that certainty is a reliable indication of accuracy. (See *Lemcke*, *supra*, 11 Cal.5th at p. 661-669.) This is particularly true in this case where the trial court had already heard from Dr. Pezdek and was fully informed about the scientific studies rebutting that misconception. (See 4 RT 904-946.) And just as with the jury's consideration of this issue, the trial court likewise would have considered all of the evidence regarding the circumstances of Richards's prior statements and opportunities to identify Wilson and the court would not have concluded that any expression of certainty necessarily reflected accuracy.

Next, Wilson argues the enactment of Penal Code section 859.7 demonstrates that the admission of Richards's identification was "erroneous and unconstitutional." (SSAOB 41.) This recently enacted provision requires law enforcement agencies to adopt certain regulations for the administration of identification procedures. (Pen. Code, § 859.7.) But what Wilson's argument ignores is that this provision is both expressly prospective—so it cannot serve to regulate the identification procedures used with Richards 20 years prior to its operative date—and it specifically disclaims any role in the admission of evidence: "Nothing in this section is intended to preclude the admissibility of any relevant evidence or affect the standards governing the admissibility of evidence under the United States Constitution." (Pen. Code, § 859.7, subd. (d).)

Nothing in either *Lemcke* or Penal Code section 859.7 has any impact on the admission of Richards's identifications of Wilson, nor does either impact the analysis regarding the propriety of the jury instruction. Wilson's claims to the contrary should be rejected.

III. EVEN WHEN CONSIDERED CUMULATIVELY, ANY ERRORS WERE NOT PREJUDICIAL AND DO NOT WARRANT REVERSAL

In his opening brief, Wilson claimed that his convictions and death sentence must be reversed because the purported errors at his trial were cumulatively prejudicial. (AOB 282-287.) Wilson now amends that argument to include the claims he raises in both this supplemental brief, and the supplemental brief he filed in 2017. (SSAOB at p. 43.) As set forth in Respondent's Brief, where few or no errors have occurred, and where any such errors found to have occurred were harmless, the cumulative effect does not result in the substantial prejudice required to reverse a defendant's conviction. (E.g., *People v. Price* (1991) 1 Cal.4th 324, 465.)

Here, the sole case upon which Wilson relies to support his claim of cumulative error is a 35-year-old decision from the 9th Circuit Court of Appeals regarding a "balkanized" review of the issues raised. (SSAOB at p. 43, citing *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) What Wilson's argument fails to account for, however, is that the issues he raises fail on their merits, and any such errors that may have occurred were harmless in light of the overwhelming circumstantial evidence implicating Wilson in the charged crimes. Plainly stated, Wilson is a habitual, cold-blooded murderer who, shortly after being

released from custody for killing someone, robbed and vigorously attempted to murder James Richards, robbed and murdered Andres Dominguez, and then callously executed Victor Henderson as he pled for his life. Even had the trial court excluded Richards's identification outright—as Wilson argued in the first issue in his Opening Brief, and again in his Second Supplemental Opening Brief—and even had the trial court allowed Wilson to impeach Seeney with his purported recantation to a defense investigator—as Wilson argued in the fourth issue in his Opening Brief, and again in his First Supplemental Opening Brief—there remained an overwhelming amount of circumstantial evidence conclusively establishing Wilson's guilt.

As such, even considered in the aggregate, the alleged errors could not have affected the outcome of the trial, and Wilson's claim of cumulative error should be rejected.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court reject the claims raised in Appellant's Second Supplemental Opening Brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SECOND SUPPLEMENTAL BRIEF** uses a 13 point Century Schoolbook font and contains 8850 words.

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June 21, 2023

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STATE OF CALIFORNIA
Supreme Court of California

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