In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **KELVYN RONDELL BANKS,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S080477

Los Angeles County Superior Court, Case No. BA109260
The Honorable Charles E. Horan, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Appellant was indicted on three counts of murder (Pen. Code,[1] § 187, subd. (a); counts 1, 7, & 8), attempted murder (§§ 187, subd. (a), 664; count 2), forcible rape (§ 261, subd. (a)(2); count 3), forcible oral copulation (§ 288a, subd. (c); count 4), first degree residential robbery (§ 211; count 5), first degree residential burglary (§ 459; count 6), and attempted second degree robbery (§ 211; count 9). The People alleged the multiple-murder special circumstance (§ 190.2, subd. (a)(3)). As to the murders charged in counts 1 and 8, the indictment alleged that the offenses were committed while appellant was engaged in the commission of robbery and burglary (count 1) and attempted robbery (count 8) (§ 190.2, subd. (a)(17)). Enhancements to all nine counts were alleged for the personal use of a firearm (§ 12022.5, subd. (a)). (1CT 145-153.)

Appellant pleaded not guilty and denied the special allegations. (1CT 156.)

Trial was by jury. (8CT 2059.) The trial court denied the defense motion for acquittal on count 7. (8CT 2079.) The jury found appellant guilty on all counts, with the exception of the murder charged in count 7.[2] The jury also found true the special circumstance allegations and the firearm use allegation. (8CT 2157-2166, 2176-2180.)

The first penalty phase trial resulted in a mistrial after a hung jury. (8CT 2228, 2276.) After a retrial, the jury returned a verdict of death. (9CT 2408-2410.)

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[1] Unless otherwise indicated, all further statutory references will be to the Penal Code.

[2] The jury acquitted appellant in the murder of Michael Haney in count 7. (8CT 2163.)

The trial court denied appellant's motion for new trial and motion to reduce the penalty. (17CT 4576.) The trial court sentenced appellant to death on counts 1 and 8. (17CT 4577-4580.) The trial court imposed and stayed the sentence of life imprisonment on count 2 and the upper term of six years on count 6, plus 10 years for the personal firearm use enhancement. The trial court imposed the following additional concurrent sentences: the upper term of eight years on count 3; the upper term of eight years on count 4; the upper term of nine years on count 5; and the upper term of three years on count 9. As to counts 3, 4, 5, and 9, the trial court imposed the additional upper term of 10 years for the personal firearm use enhancement.[3] (17RT 4573-4574, 4577-4579.) The trial court imposed a $1,000 restitution fine and a $200 sex offense fine. (17RT 4579-4580.) Appellant received a total of 1,232 days custody credit, consisting of 1,072 actual days and 160 days good time/work time. (17RT 4579.)

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

STATEMENT OF FACTS[4]

A. Guilt Phase -- Prosecution Evidence

1. Coleman Murder (Count 1), Latasha W. Attempted Murder (Count 2), And Related Sexual Offenses (Counts 3 & 4)

a. Events of July 1, 1996

On July 1, 1996, at about 2:00 a.m., Charles Coleman was driving his car to his house located on Halldale Avenue in Los Angeles. Coleman's 17-year-old friend Latasha W. was in the front passenger seat of the car. (27RT 1700-1701, 1704, 1706, 1724, 1777, 1835.) Coleman was a

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[3] As previously mentioned, the trial court imposed a 10-year enhancement on count 6 as well.

[4] The facts related to the murder of Michael Haney (count 7) are omitted given appellant's acquittal of that crime. (8CT 2163.)

paraplegic confined to a wheelchair. (27RT 1702, 1704.) Although he was capable of operating a car, he required assistance to enter his house because it was not wheelchair accessible. As a result, Coleman stopped briefly in front of the house of his neighbor who frequently assisted Coleman. Coleman then drove to his house and parked on the front yard. (27RT 1704-1706, 1775-1778.)

Appellant and another man approached Coleman's car from the alley located between the house and Slauson Avenue. (27RT 1708-1709, 1711-1714.) They had come from the direction where Coleman had briefly stopped to get assistance. (27RT 1708-1709.) Appellant displayed a handgun and talked to Coleman about some Hispanics around the neighborhood. (27RT 1709-1710.) Coleman appeared to know appellant and the other man. (27RT 1783-1784.) Appellant put the gun away and at Coleman's request, pulled Coleman and his wheelchair up three or four steps that led to the house. (27RT 1710-1711.) Latasha W. went inside and sat on a couch. Appellant's companion entered the house and closed the front door. (27RT 1710-1711.) Once inside of the house, Coleman asked appellant about the Hispanics. (27RT 1711-1712.) Appellant stood directly behind Coleman and pointed a gun at the back of his head. Appellant pulled the gun trigger twice, but the weapon did not discharge. After he pulled the trigger a third time, appellant shot Coleman in the back of the head, which caused Coleman to fall to the floor from his wheelchair. (27RT 1712-1713, 1791.)

Appellant grabbed Latasha W.'s arm and forced her into Coleman's bedroom where he demanded the location of Coleman's money and drugs. (27RT 1715-1716.) Latasha W. knew Coleman sold drugs but did not know where they were stored. (27RT 1765-1766, 1825.) However, she

told appellant that Coleman kept money in a hole in his mattress.[5] (27RT 1716, 1766.) Appellant instructed Latasha W. to kneel in the corner of the bedroom and after she complied, he threw the mattress on top of her. (27RT 1717, 1747.) Appellant then searched the bedroom. (27RT 1718-1719.)

Appellant forced Latasha W. from the bedroom. In the living room, appellant's accomplice rummaged through Latasha W.'s purse. (27RT 1719, 1721.) The accomplice had placed socks taken from Coleman's bedroom over his hands.[6] (27RT 1716-1717.) Latasha W. told the accomplice that her purse contained no valuables. On appellant's order, the accomplice left the house through the front door. (27RT 1722, 1804-1805.)

Appellant forced Latasha W. to the laundry room at the rear of the house. (27RT 1722-1723.) While holding a gun in his right hand, appellant unbuckled his pants with his other hand. (27RT 1723-1724, 1805.) He then told Latasha W. to orally copulate his penis. (27RT 1724-1725.) Before Latasha W. complied with that demand, appellant put his gun down on the washing machine at Latasha W.'s request because she was afraid of it. (27RT 1727.) Latasha W. asked appellant not to hurt her. In an attempt to curry sympathy, Latasha W. falsely told appellant that she had a baby. (27RT 1729, 1806-1807.) Appellant assured Latasha W. that as long as she complied with his demands, he would not hurt her. (27RT 1727, 1805-1807.) He ripped her shorts, forced her onto her hands and

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[5] Coleman was expected to receive a monetary settlement for an accident claim. (27RT 1823-1825.)

[6] Latasha W. told police that appellant had also placed socks over his hands but removed them when they went into the laundry room. (26RT 1628; 27RT 1882-1883.)

knees, and forcibly raped her. He then forced her onto her back and forcibly raped her a second time. (27RT 1725-1728.)

Subsequently, appellant's accomplice and a second accomplice entered the house through the front door. (27RT 1729-1730, 1791-1792.) Appellant kept Latasha W. in the kitchen at the second accomplice's instruction. (27RT 1730.) While in the kitchen, Latasha W. heard the bedroom and living room being ransacked. (27RT 1732.) Appellant and his accomplices referred to one another as "Blood" three or four times.[7] (27RT 1758.) Latasha W. believed that the "Blood" reference had gang significance. (27RT 1758.) Coleman's nickname was "Wink." (27RT 1783-1784.) Although Latasha W. did not know if Coleman was a gang member at the time of his death, she was aware that he used to be affiliated with the Black Stone gang, a Blood gang. Coleman also knew people affiliated with gangs. (27RT 1784.)

Latasha W. was then led into the living room where appellant ordered her to lay face-down on the floor. (27RT 1732-1733.) Using a telephone cord, the first accomplice tied Latasha W.'s hands behind her back. (27RT 1733-1736.) Her legs were also tied together. (27RT 1734-1735.) Once Latasha W. was bound, the house was searched for another five to seven minutes. (27RT 1736-1737.) Latasha W. heard someone state they found what they were looking for.[8] (27RT 1737.) The accomplices exited the

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[7] Appellant had a Harvard Park Brims or Blood gang tattoo on his left arm. Gang members commonly referred to one another as "Blood" as a form of a friendly greeting. (32RT 2579-2581.)

[8] Latasha W. told Los Angeles Police Detective Sal Labarbera that she saw the first accomplice trying to open a gray combination box safe that Coleman had stored on a bedroom dresser. (27RT 1730-1731, 1745-1746, 1884.)

house and started Coleman's car. (27RT 1737-1738.) Meanwhile, appellant shot Coleman again. (27RT 1738.) From a distance of approximately six feet, appellant then shot at Latasha W., the bullet striking her left ear. Latasha W. knew that appellant, and not his accomplices, had shot her, because she recognized his shoes. (27RT 1739-1740, 1810-1812.) Latasha W. remained motionless until she heard the car drive away.[9] (27RT 1740, 1813-1814.)

Latasha W. waited several minutes and then made certain that appellant and his accomplices had left. (27RT 1740, 1813.) She checked on Coleman, who was moaning. Because the telephone cord had been cut, Latasha W. left the house to seek help. (27RT 1740-1741, 1813.) Barefoot, she ran into the middle of Slauson Avenue and flagged down Los Angeles Police Officer Martin Martinez in his patrol car. (26RT 1607-1610, 1635, 1637; 27RT 1741-1743.) Latasha W. was yelling frantically, screaming, crying, and flinging her arms. She had traces of blood on the left side of her face and her clothing was in disarray. (26RT 1609-1610, 1641, 1644.) She told Officer Martinez that her friend had just been shot at his house nearby and that she herself had been raped and shot. (26RT 1611-1613, 1641, 1644, 1648, 1650.) Latasha W. gave Officer Martinez a report of the crimes that was consistent with her trial testimony. (26RT 1623-1633, 1644-1645, 1648, 1652-1655; 27RT 1879-1887, 1901-1902.)

Latasha W. described the shooter as an African-American male who was approximately five feet, nine inches tall, about 180 pounds, bald, about

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[9] Police located Coleman's car, a Ford Thunderbird, approximately two blocks away on the 1500 block of 59th Street toward Harvard Park. (27RT 1688-1690, 1697.)

27 years old, and wore a black jacket and a white T-shirt.[10] (26RT 1612-1614; 27RT 1785-1787, 1827.) The shooter also wore black or dark colored shoes. (27RT 1811-1812, 1885.) The shooter's handgun was stainless steel. (26RT 1618.) She described the first accomplice as an African-American male who was approximately five feet, six inches tall, about 140 pounds, who wore his hair in a ponytail, and wore a white long-sleeved shirt and gray khaki pants.[11] (26RT 1614, 1617-1618; 27RT 1714-1715; 1787, 1819-1820.) The first accomplice was barefoot. (27RT 1721, 1812.) At trial, Latasha W. testified that she did not remember what the second accomplice looked like, but he wore black pants, black shoes, and a heavy knee-length jacket that had many pockets.[12] (26RT 1652; 27RT 1788, 1791, 1821-1822.)

Paramedics provided medical treatment to Latasha W.'s ear. (26RT 1643; 27RT 1693, 1759-1760.) Madeline Marini performed a sexual assault examination on Latasha W. at California Hospital. (27RT 1693-

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[10] Latasha W. described the shooter/rapist to Detective Labarbera as a Black male, five feet, nine inches tall, with a shaved or bald head, a medium built, in his mid-twenties, clean-shaven or possibly had stubble, wearing black pants, a white T-shirt, a heavy black jacket that fell to his mid-thigh, and black and white Nike tennis shoes. (27RT 1886-1887, 1901.)

[11] Latasha W. described the first accomplice to Detective Labarbera as a Black male, in his mid-twenties, five feet, seven inches tall, with a thin build, a thin mustache, his straight hair pulled back into a ponytail, and wearing gray pants, a white T-shirt, a white knit cap, and was barefoot. (27RT 1886-1887.) The suspect who wore gray pants tied up Latasha W. (27RT at 1822.)

[12] Latasha W. described the second accomplice to Detective Labarbera as a Black male, five feet, seven inches tall, with a thin build in his early twenties, clean shaven, his hair was in French braids, and he wore a white T-shirt and black tennis shoes. (27RT 1886, 1900-1901.)

1694, 1757-1758; 29RT 2122-2124, 2131.) Latasha W. told Marini that someone shot at her head, but missed. Latasha W.'s left ear was lacerated and she complained of a hearing problem. (29RT 2132.) Latasha W. was barefoot. (29RT 2137-2138.) Marini collected oral, vaginal, and rectal swab specimens from Latasha W. An aspirate and Latasha W.'s blood sample were also taken. (29RT 2126-2127, 2130, 2136-2137.) Latasha W. had physical injuries that were indicative of sexual assault, including numerous redness and abrasions on both the fourchette and vaginal walls. There were small broken vessels (petechia) in the vagina that were consistent with being caused by blunt force trauma. Marini also observed white discharge in the vagina. (29RT 2134-2136.) The form established by the Office of Criminal Justice Planning ("O.C.J.P.") that Marini completed in connection with Latasha W.'s sexual assault examination indicated that ejaculation did not occur outside of the body and that no condom was used. Because there was no notation indicating "no ejaculation," Marini concluded that ejaculation occurred inside of the body orifice. (29RT 2139-2140.) Latasha W. told Marini that three Black men were present when she was assaulted. Latasha W. described the rape suspect as five feet, nine inches tall, weighing approximately 170 pounds, bald, and wearing black clothes. (29RT 2141.) Latasha W. was measured as five feet, four inches tall and weighing 127 pounds. (29RT 2138.) Latasha W. told Marini that the rape suspect had stated, "If you lift your head, we're going to blast you." (29RT 2143-2144.)

b. Identification of Appellant

On August 7, 1996, Los Angeles Police Detective Sal Labarbera presented Latasha W. with a six-pack photographic array. (27RT 1750, 1876-1878.) Latasha W. immediately selected appellant's photograph and identified him as "the person that came into Charles' house and shot

Charles. He raped me and then shot me, too." (27RT 1750-1753, 1816, 1818, 1829-1831, 1878, 1901-1902.)

Latasha W. subsequently identified appellant during a live line-up. (27RT 1751-1754.) Latasha W. indicated that she was positive appellant was the individual who had committed the crimes. (27RT 1754-1755.) On August 27, 1996, she also positively identified appellant before the grand jury. (29RT 2020-2021.)

At trial, Latasha W. identified appellant as the same person who had shot Coleman and had sexually assaulted and shot her. (27RT 1714, 1839.)

c. Evidence Recovered At Crime Scene

Police found Coleman's body on the floor with his feet partially on the foot pegs of his wheelchair. (27RT 1685-1686.) A pool of blood formed near Coleman's head. Around that area, police recovered a copper or lead jacketed fragment from an expended bullet and a bullet fragment from an expended bullet. (27RT 1684.) These fragments had no comparative value. (32RT 2577-2579.) There were no expended cartridge casings recovered. (32RT 2578-2579.)

d. Forensic Evidence

Deputy Medical Examiner Pedro Ortiz conducted Coleman's autopsy on July 3, 1996. (27RT 1846-1848, 1857-1858.) Coleman was shot twice. (27RT 1864.) One bullet entered the back of his head, passed through the back of his skull, and exited through the center of his head. (27RT 1863.) This wound was a "loose contact" wound indicating that the muzzle of the weapon was close to the skin when it discharged because there were soot deposits and evidence of gun powder on the entrance wound. There was also a soot deposit on the bone inside of the wound indicating it was a close range shot. (27RT 1865-1867.) A second bullet entered the left side of his head above the left earlobe and exited through the right temple. (27RT

1863-1864.) This distant-range wound was sustained from a distance of more than two feet. (27RT 1867-1868.) It was not possible to determine which gunshot wound occurred first. (27RT 1864.) The wound sustained at close contact would have caused death in seconds. (27RT 1868-1869.) Death would have occurred within minutes of the other wound. (27RT 1868-1869.)

Criminalist Michael Mastrocovo examined the biological samples from Latasha W.'s rape kit. Sperm was detected in the vaginal aspirate, three vaginal slides, the rectal swab, and a rectal slide. (29RT 2019-2021, 2024-2027, 2029-2030.) Sperm was also detected on Latasha W.'s panties. (29RT 2030-2031.) On April 30, 1997, Mastrocovo sent blood samples of appellant and Latasha W. along with five vaginal swab samples from the rape kit to Cellmark Diagnostics in Germantown, Maryland for DNA analysis. (29RT 2032-2033, 2035-2039, 2041, 2145, 2147.)

Robin Cotton was the director at Cellmark Diagnostics. (29RT 2148-2149.) Cellmark Diagnostics compared the DNA profiles of appellant and the sperm fraction obtained from the vaginal swabs. (30RT 2187.) Cotton concluded that the frequency of the combination of allele types common in both profiles would occur in about one in 17 million people in the African-American population. (30RT 2192-2193.)

2. Foster Murder (Count 8)

a. The Shooting

On July 26, 1996, at about 12:30 a.m., Sandra Johnson drove Yvonne McGill and Charles Foster to the Home Savings Bank located on Vermont Avenue in Los Angeles. (30RT 2241-2245, 2261-2262, 2266-2268.) Johnson parked her car with the headlights faced toward the automated teller machine ("ATM"). Foster went to the ATM. While waiting in the car, Johnson and McGill noted that Foster was taking an inordinate amount of time, about 10 minutes. McGill saw that Foster's wallet was out. Foster

was fumbling around with some items, possibly looking for his ATM card. (30RT 2246-2248, 2268-2269, 2284, 2291-2292.) Johnson was concerned when she noticed a blue van in a nearby alley pass by her car two or three times so she repositioned her car facing Vermont Avenue, parallel to the ATM, in order to have a better view of the alley behind her. (30RT 2246-2248, 2278-2279.)

From her side view mirror, Johnson saw a man approach the passenger side of the car and alerted McGill. The man was hooded and wore a red bandana over his face. (30RT 2248-2250, 2270.) Because the man's eyes were not concealed, Johnson could tell he was Black and had brown eyes. (30RT 2255-2256.) McGill, who was seated in the front passenger seat and closer to the man than Johnson (30RT 2251), saw the man's eyes and his complexion in that region. McGill testified that she saw "death" in the man's eyes because she thought she was going to die. (30RT 2270-2271, 2276, 2299.)

When he reached the passenger side window, the man pointed a large black gun through it. McGill threw up her hands and screamed, "Oh, God." (30RT 2248-2249, 2251, 2268-2270, 2279, 2287, 2301-2304.) The gunman pointed the gun at McGill's face. (30RT 2304.) Johnson started her car and drove away while the masked gunman looked at Foster standing about 12 feet away by the ATM. (30RT 2270-2271, 2251, 2299-2302.) The gunman walked toward the ATM. (30RT 2251-2252.) Johnson continued to drive despite McGill's plea not to leave Foster. (30RT 2256, 2270-2271.)

As Johnson and McGill reached 54th Street and Vermont Avenue, McGill testified that she heard two gunshots. McGill stated, "Oh, my God. He shot [Foster]." (30RT 2270-2271.) Johnson testified that, as she crossed Slauson Avenue, she heard one gunshot. Johnson heard a second gunshot after they flagged down Los Angeles Police Officer Brad Wise,

who was in a patrol car on Vermont Avenue. Johnson and McGill reported that someone had shot their friend at the ATM. The police car responded to the bank followed by Johnson and McGill. When they arrived, Foster was dead, lying face-down in front of the ATM. (30RT 2251-2253, 2256-2258, 2272, 2307-2309, 2311-2312.)

Patricia Manzanares saw appellant shoot Foster. (30RT 2343; 31RT 2453.) Manzanares lived in a ground-floor apartment on the 1000 block of West 57th Street. Her apartment window abutted an alley and faced the bank from across a parking lot. (30RT 2319-2321, 2339-2342, 2345, 2365, 2376.) Manzanares saw two men pass by the window. One man stayed in front of her window in an alley and the other man, who Manzanares later identified as appellant, walked toward the bank. Appellant was wearing a mask. (30RT 2344, 2374, 2378-2379; 31RT 2451.) Appellant approached Foster, who was using the ATM. (30RT 2345-2346; 31RT 2438-2439.) After Foster slightly looked over his right shoulder, appellant shot him. (30RT 2346.) Appellant returned to the alley near Manzanares's apartment window and removed his mask. (30RT 2346-2347, 2359; 31RT 2450.) Manzanares was about five to six feet away when this occurred. (30RT 2347, 2359, 2384-2385, 2389.) The bank's bright lights aided Manzanares to clearly see his face. (30RT 2347-2348, 2377; 31RT 2444-2445.) Appellant laughingly told his companion who had stayed near Manzanares's window, "Oh shit" and "Goddamn." (30RT 2367-2369, 2385, 2387; 31RT 2442-2443.) Appellant and his companion left the area in a large green car with a white top that was parked in an alleyway facing northbound at 57th Street. (30RT 2369-2371, 2385-2386.)

Manzanares called the police. (30RT 2379-2381.) She described the shooter as a Black male, 25 to 26 years old, about five feet six or seven inches tall, weighing about 190 pounds, a short "Afro" haircut, with a chubby face, and little whiskers around his upper lip and chin. The shooter

wore a black and white checkered shirt, a heavy black jacket, black baggy jeans, and a red mask that extended below his collar. (30RT 2390-2391; 31RT 2457-2459; 32RT 2565-2566.) The shooter's companion was a Black male, five feet, two inches tall, thin, and had no facial hair. (30RT 2392; 31 RT 2443-2444; 32RT 2566.)

On August 21, 1996, Manzanares identified appellant from a six-pack photographic array as the individual who had shot Foster. (30RT 2348-2352; 31RT 2448-2449; 32RT 2550-2552, 2559.) Manzanares also identified appellant as the shooter from a live lineup. (30RT 2352-2355.) On August 27, 1996, Manzanares, appearing before the grand jury, identified appellant as the shooter from a six-pack photographic array. (30RT 2355-2356.)

McGill described the gunman to police as a Black male, who was five feet eight or nine inches tall, and who wore a large black jacket. The gunman had a red sweater wrapped around his head, but his eyes were visible. McGill testified that the gunman's complexion around his eyes was similar to her own complexion or a shade lighter. (30RT 2292-2296.) She also testified that she might have told police that the gunman had a dark complexion.[13] (30RT 2298.) McGill described appellant's complexion at trial as light. (30RT 2298-2299.)

On August 27, 1996, McGill positively identified appellant's photograph from a six-pack photographic array. McGill recognized appellant's eyes as those of the gunman. (30RT 2272-2275, 2296.) At trial, McGill identified appellant's eyes as those of the gunman. (30RT 2276.)

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[13] Los Angeles Police Detective Frank Weber testified that McGill described the gunman as having a dark complexion. (30RT 2334-2336.)

A video recording of the gunman brandishing a handgun at the passenger side of the car was played for the jury at trial. (30RT 2280, 2285-2286.) The video depicted the gunman wearing a long jacket with a square emblem on the left lapel. (30RT 2287.)

b. Crime Scene Evidence

Police recovered two firearm casings within five to 10 feet north of Foster's body. A senior citizen discount card was in the receipt slot of the ATM, which sustained damage from a bullet strike. Two expended bullets were recovered: one inside of the ATM and the other just west of Vermont in an alley. (30RT 2316-2317, 2331-2332.) There was also a small amount of debris from Foster's clothing on the shelf of the ATM. (30RT 2326, 2332.) An empty deposit envelope was clenched in Foster's right hand beneath his body. (30RT 2330-2331.)

c. Autopsy Findings

Foster sustained two fatal gunshot wounds. (31RT 2424.) The first bullet entered his right hand and exited the base of his right thumb; it then created a second entrance wound at his throat and exited near his neck on his left shoulder. (30RT 2327; 31RT 2419-2422, 2424.) The second bullet struck the back of Foster's head and exited through his forehead. (30RT 2327; 31RT 2423-2425.)

3. Appellant's Arrest And Recovery Of Firearm

On July 31, 1996, at about 12:30 a.m., Los Angeles Police Officer Marcelo Raffi and his partner Officer Santana were patrolling the area of Harvard Park near Vermont Avenue and 62nd Street in a marked patrol car. (28RT 1968-1970.) Appellant was among a group of people walking southbound on Vermont Avenue. Upon seeing the patrol car, appellant looked startled, he reached for his waistband, and he ran southbound. (28RT 1971-1973, 1988-1992.) Pursuing appellant, Officer Raffi activated

red forward facing lights and followed appellant to 62nd Place, where he ran east. (28RT 1973, 1991.)

Appellant was pursued as he ran into an alley 50 feet from the sidewalk. In the middle of the alley, appellant went east into an opening that led into a backyard. Anticipating appellant's movements, Officer Raffi went into an adjacent backyard where appellant emerged holding what appeared to be a square blue object in his hand. Appellant dropped the object on a pile of wood when Officer Raffi illuminated the area with a flashlight. (28RT 1975-1976, 1993, 1997-1998.) Appellant then turned away from Officer Raffi, raised his hands, and walked toward Officer Santana. (28RT 1976-1977, 1996-1997.) Officer Raffi recovered a blue-steel, nine-millimeter, semiautomatic handgun from the exact position where appellant had dropped the object. (28RT 1977-1978, 1995.) The handgun was loaded with one round in the chamber and a magazine containing five rounds of ammunition. (28RT 1979-1980.)

Appellant's booking photograph related to his gun possession arrest that was taken on July 31, 1996, depicted him wearing a dark black or denim blue jacket that had a square logo covered up on the upper left corner and fell somewhere between his thighs and knees.[14] (28RT 1982-1986.) Manzanares identified this jacket as identical to the jacket worn by the bank shooter. (30RT 2363.)

4. Evidence Recovered From Appellant's Residence

On August 21, 1996, police searched appellant's residence located at 1446 West 58th Place in Los Angeles. (31RT 2461.) Appellant lived there with D'Joy Robinson and her 14-year-old son Carlos. (31RT 2467; 32RT 2575-2576.) Both live ammunition and ammunition boxes were recovered

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[14] The booking photograph also depicted appellant wearing a red "dog shirt." (28RT 1982-1983.)

from a dresser drawer located in the southern-most bedroom. (31RT 2461-2463.) In the closet of the middle bedroom police recovered a black jacket and black pants. (30RT 2373; 32RT 2545-2546, 2558, 2574-2575.) Officer Raffi identified the recovered jacket as the same one appellant had worn on July 31, 1996. (28RT 1998-2000.) Manzanares identified the recovered jacket as the same type of jacket the bank shooter wore. (30RT 2363.) Four red shirts were also recovered in two different areas of the residence: two from a dresser drawer where the ammunition was found and two on the laundry room floor. (32RT 2546-2547, 2549-2550, 2557-2558.)

Appellant's residence was located extremely close, about 50 yards, from Coleman's house. (32RT 2581-2584.) Appellant's house was about one-half mile from the bank where Foster was murdered. (32RT 2581-2582.)

5. Ballistics Evidence

The parties made the following stipulations regarding the ballistics evidence. The nine-millimeter handgun recovered on July 31, 1996, was operable. (31RT 2485.) The handgun fired both of the Speer casings and both of the bullets recovered from the Foster crime scene. (31RT 2478-2479.) The handgun contained nine-millimeter rounds manufactured by CCI, Norenco, Federal, and Speer. (31RT 2479-2480.) The Speer cartridge casing in the handgun and the Speer casings from the Foster crime scene bore the same head stamp and shared the same caliber, brand, type, and material composition. (31RT 2483.) One box of ammunition recovered from appellant's residence was for Speer nine-millimeter ammunition; the Speer materials from the handgun and the Foster crime scene were commonly packaged in that type of box. (31RT 2462-2463, 2484.) The empty ammunition box recovered from appellant's residence was for CCI ammunition and the CCI cartridges found in the handgun was

of the type commonly packaged in that type of box. (31RT 2462-2463, 2484.)

B. Guilt Phase -- Defense Evidence

Appellant did not testify on his own behalf. (32RT 2703-2704, 2719-2721.) However, he presented the testimony of Los Angeles Police Officer Donna Shoates and Detective Labarbera.

Officer Shoates and her partner Officer Ronesha McCoy transported Latasha W. to California Hospital for the sexual assault examination on July 1, 1996. (32RT 2633-2636.) Latasha W. was upset, uncomfortable, and appeared to be in mild shock. (32RT 2636. 2642-2643.) Her left ear was bleeding from a gunshot wound. (32RT 2642.) The suspect Latasha W. described was a male Black, bald, five-feet, nine inches tall, weighing 175 pounds, and wearing a large black jacket, white T-shirt, and black pants. (32RT 2637-2638.) Latasha W. stated that the suspect shot her friend, raped her, and shot her as he fled. (32RT 2638.) The suspect had two accomplices, whom Latasha W. was unable to describe. (32RT 2638.) Latasha W. stated that the rapist had not ejaculated outside her body. (32RT 2638-2639, 2642, 2644.) Coleman, according to Latasha W., was a Black P-Stone gang member, and he was also a known drug dealer. (32RT 2640.)

Detective Labarbera testified that on July 12, 1996, he showed Latasha W. a binder containing more than 100 booking photographs of some members of the Harvard Park Bloods gang. (33RT 2722-2725, 2731.) Appellant's photograph was not included in that binder. (33RT 2730.) Latasha W. selected one photograph and stated that the individual

looked like the person who had attacked and shot her.[15] (33RT 2725.) However, she was not absolutely certain of the identification. (33RT 2731.) Later, when presented with a six-pack photographic array containing appellant's photograph, Latasha W. unequivocally identified appellant. (33RT 2732-2733.)

C. Penalty Phase --Prosecution Evidence[16]

The parties stipulated that appellant was born on April 3, 1973. (45RT 4907-4908.)

1. Violent Criminal Activity (§ 190.3, subd. (b))

a. January 23, 1988 Robbery Of Luz Hernandez

At about 8:00 p.m. on January 23, 1988, appellant and Lashan Thomas walked behind Luz Hernandez, who was standing on a sidewalk waiting for her husband. Appellant told Thomas, "Watch me rob her." Appellant approached Hernandez and demanded her money and purse. After she refused to comply, appellant struck her across the back of her head with a pipe. Hernandez fell to the ground. Appellant took about $20 from Hernandez. On the back of her head, Hernandez had a two inch bruise that was bleeding. Hernandez's husband ran across the street and

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[15] Upon further investigation, Detective Labarbera ascertained that the individual had been in custody at the time of Coleman murder. (33RT 2732.)

[16] Respondent summarizes the penalty phase retrial facts. At the first penalty phase trial, the following prosecution witnesses testified: Eddie Candelaria (35RT 3030-3038), Armando Quintana (35RT 3039-3048), Lashan Thomas (35RT 3049-3061), Sandra Hess (35RT 3062-3079), Detective Thomas Butler (35RT 3083-3097), Richard Bee (35RT 3098-3114), Joseph Elloie (35RT 3115-3122), Henry Nandino (35RT 3122-3138), Bridget Robinson (35RT 3140-3169), Sandra Vinning (35RT 3169-3176), Chandra Vinning (35RT 3178-3183), Sevedeo Sanchez (37RT 3369-3392), and Deputy Roberto Perovich (37RT 3392-3396).

called for help. (45RT 4903-4906, 4908, 4910, 4916, 4918.) At the time of the robbery, Thomas observed that Hernandez was pregnant. (45RT 4906.)

Los Angeles Police Officer Stephen Carmona responded to the scene and detained appellant and Thomas who had been running on the sidewalk in the area of Rampart and Second Streets. (45RT 4912-4914.) Hernandez positively identified appellant as the person who had struck her in the back of the head with a pipe. Hernandez also identified Thomas as the second suspect. (45RT 4914-4915.) Thomas told Officer Carmona that appellant had struck Hernandez. Thomas later led Officer Carmona to the pipe, which was in the rear yard of 262 Benton Way. The pipe was metal, about one foot in length and one inch in diameter. (45RT 4906, 4911-4912, 4915-4917.) Because of the robbery, Thomas was sent to the California Youth Authority for three years. (45RT 4907.)

Hernandez and her husband were unavailable witnesses at the time of the penalty phase trial. The prosecution read their testimony from a prior juvenile proceeding in Los Angeles County Superior Court held on February 24, 1988.[17] (48RT 5424-5492.) The prior testimony showed the

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[17] The trial court instructed the jury as follows:

> There was a proceeding on February the 24th, 1988 in Department 203 of the L.A. County Superior Court involving [appellant's] case with Ms. Hernandez. [¶] At that hearing, Ms. Luz Hernandez testified, as did her husband, and those witnesses are unavailable for this proceeding. [¶] That means they cannot be here or brought to court. [¶] And, therefore, the law allows their prior testimony to be read to you. [¶] So it is as if they were testifying here. [¶] I will give you a further instruction on that at the very end of the case, but you will hear testimony from two witnesses, Luz Hernandez and her husband. [¶] Since they are not here, we have another attorney here who is going to assist us in simply reading the answers. [¶]

(48RT 5424-5425.)

following. On January 23, 1988, at about 8:30 p.m., Hernandez and her husband were at Tommy's restaurant located on Rampart Avenue at Beverly Boulevard in Los Angeles. (48RT 5427-5428.) After leaving the restaurant, Hernandez noticed appellant and Thomas following behind her on Rampart Street and looking at her. (48RT 5429-5430, 5451-5452.) When Hernandez separated from her husband to investigate a for rent sign across the street, appellant struck Hernandez on her head, on the area above her right ear. (48RT 5431-5433, 5456-5457, 5460-5461, 5464, 5472.) Hernandez screamed. (48RT 5434-5435.) Appellant ran away with Thomas, who had been hiding behind a bush. (48RT 5435, 5464-5466, 5472-5473, 5479-5480.) Both Thomas and appellant held "sticks;" Thomas's stick measured between one foot and 15 inches in length, while appellant's stick was longer, about two feet in length. (48RT 5436-5437, 5446-5451.)

Hernandez's husband, Carlos Pineda Hernandez, saw appellant and Thomas running from Hernandez after she screamed. (48RT 5482, 5485-5486, 5489-5491.) Appellant and Thomas were both clutching something in their hands. (48RT 5488.)

The blow to Hernandez's head resulted in a hematoma that became inflamed and was swollen for five days. Hernandez also suffered a very intense headache. (48RT 5438-5439.) Hernandez was nearly three months pregnant at the time appellant struck her. Five days after appellant struck her, Hernandez began to hemorrhage and lost her baby on February 1, 1988. (48RT 5439-5440.)

b. March 31, 1988 Choking Of Sandra Hess

On March 31, 1988, appellant was a student in Sandra Hess's literacy class at the Barry J. Niedorf Juvenile Hall in Sylmar. (45RT 4782-4785, 4800-4802.) Appellant approached Hess at her desk without permission and repeatedly harassed her about her refusal to give him a "good gram,"

i.e., an acknowledgement of a student's good behavior, good student work, and good citizenship. Receiving good grams were very important because they informed the juvenile court of a student's progress in school. (45RT 4785-4787.)

Appellant told Hess that he needed the good gram for his court appearance on the next day, claiming that he deserved it. Hess repeatedly refused because, the previous day, she had appellant removed from the classroom for behavior problems, such as being disruptive, being out of his seat, and continuously talking to his seat partner. Appellant was permitted to rejoin his class after Hess counseled him on his disruptive behavior and on the importance of an education. Hess also declined to give appellant a good gram because he had not produced any school work. As a result, appellant "was most unhappy." (45RT 4785-4787, 4790-4792.)

While Hess was in the process of removing appellant from the classroom for refusing to return to his seat and to be quiet, appellant, without any warning, placed his right arm around Hess's throat, and used his left arm to push against it in a "choke hold" position. The amount of pressure appellant applied to Hess's throat cut off her air supply and she was unable to breathe. Hess thought appellant was going to kill her. Appellant moved Hess out of her seat and across the classroom until they were in the middle of the room. Hess motioned to another student in the classroom to pick up the emergency telephone that would immediately alert the probation department and she managed to say the word "phone." As appellant moved Hess across the room in the choke hold, he yelled at that student, "Come on. You said you'd help me. We'll get her. We'll get her. We'll get her." When the other student reached for the emergency telephone, appellant stated, "Don't pick up the phone. Don't do that. Don't do that." As soon as the emergency telephone was picked up, appellant sat on the chair beside Hess's desk and smiled. When a probation

officer entered the classroom, Hess pointed at appellant and stated, "He tried to kill me. He tried to kill me." Appellant responded, "No, I didn't. I didn't. I didn't touch her." Appellant acted as if nothing had happened with an innocent expression on his face. (45RT 4787-4790, 4793-4798.)

As a result of appellant's assault, Hess's larynx was bruised, her throat was sore for six weeks, and she had to speak in a whisper for a week. (45RT 4798-4800.) With the exception of appellant's 1988 assault, no other high risk youth had ever attacked Hess during her career teaching juvenile delinquents that began in the 1960's. (45RT 4783-4785, 4793.)

c. August 5, 1989 Assault Of Richard Bee

On August 5, 1989, appellant was in the custody of the California Youth Authority at the living unit in Humboldt Hall. The unit housed about 75 juveniles. (45RT 4826-4827, 4832-4834.) Bedtime at the unit was 9:00 p.m. (45RT 4835.) At about 9:45 p.m., appellant refused to stop talking to another juvenile and to sleep after more than one warning from youth counselor Richard Bee. Because appellant was disturbing the other juveniles in the unit, Bee informed appellant that he would be placed in a detention room until the morning. As Bee escorted appellant to the detention room, appellant was breathing hard, he was clenching his fist, and he was argumentative, stating, "Fuck that. I'm not going. No. Why do I have to go? Give me a break." (45RT 4824-4830, 4835-4838.) Appellant refused to calm down despite being warned that he would be "maced." Almost simultaneously as Bee maced him, appellant swung and struck Bee's chin and chest. (45RT 4830-4831, 4839.) As a result, Bee sustained a sore jaw and a bruised chest. (45RT 4831.) Appellant was forcibly subdued, handcuffed, and eventually detained in a lock down unit. (45RT 4827-4828, 4831-4832, 4840.)

d. February 21, 1994 Beating, Rape, and Choking Of Bridget Robinson

Appellant was Bridget Robinson's former boyfriend. (46RT 5112-5113.) They lived together with Robinson's three-year-old daughter at 1358 South Bernside Avenue. (46RT 5113, 5116, 5129.) On February 21, 1994, appellant accused Robinson of cheating on him. (46RT 5114, 5128, 5132-5133, 5137.) Appellant had been drinking. (46RT 5114, 5133.) He struck Robinson's face with his fists, which caused her forehead to bleed. He also struck the top of her head with hair clippers, which caused bleeding and resulted in a scar. (46RT 5115-5116, 5119, 5152.) Appellant ordered Robinson on her hands and knees and told her that she was going to do things that she had never done before. When Robinson resisted, appellant hit her with his fists and forced her to orally copulate him. (46RT 5116-5117, 5126.)

Robinson tried to run out of the door, but appellant stopped her. Robinson kicked appellant's groin. Appellant responded by punching her with his fist so hard that she was knocked unconscious onto the floor. When she regained consciousness, appellant forcibly raped her. Robinson did not resist because she was in great pain, she feared getting hit again, and her little girl was "right there" next to them while the rape occurred. (46RT 5117-5120, 5126.)

Subsequently, appellant asked Robinson to enter a closet with him so they could talk. As he sat behind her with his hands around her neck, appellant apologized, asked Robinson to forget everything, and asked if they could "start all over." Appellant also asked Robinson not to call the police or tell anyone what had happened. Robinson agreed with him because she knew that he was either going to hurt her or kill her. Appellant disbelieved Robinson so he choked her by putting his right arm around her neck with his bicep pressing against her throat. Robinson pretended to pass

out, but coughed when he released her. Appellant then proceeded to choke Robinson three more times. Robinson fought appellant because she believed that he planned to hurt her child. Robinson believed that she was going to die. (46RT 5120-5123, 5126.)

Appellant eventually stopped choking Robinson. He told her that he wanted to leave the residence but he needed to call his family to pick him up. Appellant, however, was incapable of using the telephone because he had ripped the telephone cord from the wall and disabled it in order to prevent Robinson from telling her sister what appellant had done. (46RT 5122-5124.) Appellant tied Robinson's feet and hands with the telephone cord and told her, "I'm taking your little girl in case you get loose." He then left the residence with Robinson's daughter to purchase a telephone cord. (46RT 5124, 5126.) Robinson freed herself, ran upstairs to a neighbor's residence, and asked her to call the police. Robinson quickly returned downstairs. As she tried to retie her bindings so appellant would be unaware she got loose, appellant returned to the residence. (46RT 5124.) Appellant made the telephone operational. While Robinson was talking to her sister on the telephone, appellant stood over her with an iron and threatened to hit her with it if she revealed anything. (46RT 5125.)

Appellant was aware that Robinson was pregnant with his child or possibly with twins, at the time he beat, raped, and choked her. The severity of appellant's attack on Robinson caused a miscarriage. (46RT 5126-5127.)

Robinson reported appellant to the police. (46RT 5126, 5134.) Appellant was subsequently held in jail on the related criminal charges. During his time in custody, appellant telephoned Robinson and apologized for Robinson's miscarriage. However, appellant also threatened to kill Robinson's mother and sister if she went to court. (46RT 5126-5128.)

e. December 11, 1994 Gang Related Attack

Los Angeles Police Detective Christopher Barling testified as an expert on the Harvard Park Brims gang, also known as the Six Deuce Brims gang. (46RT 5000-5003, 5011.) The Harvard Park Brims gang was an African American "Blood" gang and was associated with the color red. Blood gangs were rivals of "Crip" gangs which were associated with the color blue. (46RT 5003-5005.) It was not uncommon for members of the Harvard Park Brims gang to refer to themselves as "Blood." (46RT 5006-5007.) The Coleman and Foster crime scenes were within the territory of the Harvard Park Brims gang. (46RT 5003, 5011-5012.)

Appellant had the letters "H.P.B.," short for Harvard Park Brims, tattooed in a gothic or roman style on his left arm, spanning the length of his forearm to his wrist. (46RT 5007.) Appellant's gang moniker was Poochie. (46RT 5007.)

f. December 10, 1996 In-Custody Assault Of Inmate

On December 10, 1996, at about 11:00 p.m., Los Angeles County Sheriff's Deputy Roberto Perovich heard an inmate screaming for help from a cell in the disciplinary module at the Wayside jail facility. (45RT 4962-4965, 4968.) Upon responding to the cell with another deputy, Deputy Perovich observed that inmate Sevedo Sanchez was screaming and had redness and swelling on the left side of his face. (45RT 4965-4966, 4968.) Appellant was the only other occupant of the cell. (45RT 4965-4967.) Deputy Perovich observed that Sanchez's bible was in the cell toilet. (45RT 4967.)

g. January 31, 1999 In-Custody Gassing Of Sheriff's Deputy

On January 31, 1999, at 7:10 a.m., Los Angeles County Sheriff's Deputy Arthur Penate was conducting a routine security check of the

seventh floor of the Twin Towers jail facility, which housed two different types of inmates in single cells: the mentally ill and the extremely violent. Appellant was housed in the cell block for violent inmates. (46RT 4970-4971, 4974, 4986, 4989, 4993.) Deputy Penate opened a small slot in the cell door to give appellant his breakfast which had been left in front of the door. As he received the tray, appellant bent down for no apparent reason and threw a carton containing feces and urine at Deputy Penate, aiming at his face but only hitting his torso. (46RT 4971-4972, 4980-4981, 4989.) Appellant announced, "Here. You're a bitch," as he threw the carton. (46RT 4984.) On days following the incident, appellant laughingly told Deputy Penate, "See. See. I told you I was going to get you[.] [¶] [¶] You know what I am. You know what I am." (46RT 4985.) Written on the interior of appellant's cell were the words, "Penate is a bitch," "Fuck off," some gang-related writing, and a comment about "the system."[18] (46RT 4983-4984.)

A few days before the incident on January 31, 1999, appellant accused Deputy Penate of disrespecting him because Deputy Penate had told another inmate that appellant was a troublemaker. (46RT 4972-4974, 4988.) On a separate occasion about two weeks before the January 31 incident, appellant complained about the lateness of his meal service even though it was due to his own conduct. When Deputy Penate told appellant to be patient, appellant replied, "No. No. No. No. No. Let me tell you

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[18] The gang-related writing included, "Sixx Duse," "Brims," "Poochie." (46RT 5008.) Detective Barling opined that the writing signified "marking a territory," which proclaimed to others that "Poochie" from the Six Deuce Brims gang was in the cell. (46RT 5009.) The cell also contained writing of "Westside Brims, Poochie. Fuck the system," with the word "system" crossed out, which to a gang member meant "you want to get rid of them and you have no regard for them and you want them to die." (46RT 5009-5010.)

who I am and how it is. [¶] Let me tell you who I am and what I am capable of doing. [¶] . . .[¶] You know who I am? [¶] You better ask your deputy friends and ask who I am." (46RT 4974-4979, 4987-4988.)

At least three times a week, appellant's compliance with deputies was conditioned on receiving special items, such as extra clothing or blankets. (46RT 4979-4980, 4990-4991, 4994-4999.)

2. Circumstances Of The Present Crimes (§ 190.3, subd. (a))

a. Crimes Against Coleman and Latasha W.

The prosecution presented photographs of the Coleman crime scene. (45RT 4845-4856.) Consistent with her testimony during the guilt phase portion of the trial, Latasha W. testified about the events of July 1, 1996. (45RT 4856-4900, 4919-4942, 4944-4945.) The parties made several stipulations related to the DNA evidence: (1) blood samples were taken from both appellant and Latasha W. for purposes of DNA comparison; (2) Madeline Marini testified she obtained vaginal swabs from Latasha W.; (3) Michael Mastrocovo examined Latasha W.'s rape kit and forwarded samples to Cellmark for DNA testing; (4) Mastrocovo found sperm on the vaginal swabs and on the interior crotch area of Latasha W.'s panties; (5) Mastrocovo noted that Latasha W.'s clothing had been torn in two at the crotch area; (6) Cellmark analyzed the DNA evidence in this case and determined that the non-sperm fraction of the swabs matched Latasha W., while the sperm fraction matched appellant; and (7) one in 17 million African Americans have the same combination of DNA found on the sperm fraction. (45RT 4949-4953.)

On July 3, 1996, Los Angeles County Deputy Medical Examiner Pedro Ortiz performed an autopsy on Charles Coleman. (47RT 5287-5289.) Dr. Ortiz determined that Coleman died as a result of sustaining two gunshots to the head. (47RT 5287.) Both of the gunshots were quickly

fatal wounds. (47RT 5300.) One gunshot entered on the left side of his head and exited on the area of the right temple. (47RT 5289.) The other gunshot was a "loose contact" gunshot which was on the back of his head and was discharged when the gun muzzle was resting against the back of his head. (47RT 5289-5292.) Laboratory tests showed that Coleman had cocaine and a cocaine metabolite in his urine and cocaine metabolite in his blood stream. (47RT 5300-5301.) Based on the test results, Dr. Ortiz opined that Coleman had ingested cocaine about one hour or more before his death. (47RT 5301.)

b. Evidence Related To The Foster Murder

Detective Frank Weber (46RT 5016-5037, 5141-5145), Yvonne McGill (46RT 5037-5057), and Patricia Manzanares (46RT 5058-5091) testified consistently with their guilt-phase testimony.

Officer Marcelo Raffi testified consistently with his guilt-phase testimony. (46RT 5091-5108.) The parties stipulated that the gun recovered by Officer Raffi was tested and confirmed it was the murder weapon in Foster's death. The recovered gun contained six live rounds, including two "CCI" brand rounds and one "Speer" brand round. The "Speer" round in the recovered gun and the "Speer" casings recovered from the Foster crime scene were the same types of rounds that were found in the "Speer" ammunition box recovered from appellant's residence. (47RT 5165-5168.)

The parties stipulated that on August 21, 1996, the police executed a search warrant at the residence located at 1446 West 58th Place. Appellant resided there with D'Joy Robinson and her 14-year-old son Carlos. (46RT 5110-5111, 5164.) The police recovered four red T-shirts (People's Ex. 43), an empty "CCI Blazer" brand nine-millimeter luger ammunition box (People's Ex. 44), and a jacket (People's Ex. 20) at the residence. (47RT at 5164-5165.)

The parties stipulated that Dr. Steve Scholtz performed an autopsy on Foster on July 27, 1996. Dr. Scholtz determined the cause and manner of death was gunshot wounds to the head and that two photoboards accurately depicted Foster's wounds. Foster sustained a total of five gunshot wounds. Writing on the photoboards was performed under oath by an autopsy surgeon during a guilt phase proceeding and accurately reflected the coroner's findings. (47RT 5303-5305.) A blood screening revealed cocaine metabolite in Foster's system. Dr. Scholtz opined that this indicated Foster had, in all likelihood, ingested cocaine some time during the day of his death. (47RT 5304-5305.)

3. Victim Impact Testimony

Coleman was survived by his elder sister of two years Chandra Vinning ("Chandra"), his mother Sandra Vinning ("Sandra"), and his daughter, Cherie. (47RT 5169-5171, 5174.) Due to a medical disability that made it difficult for Sandra to write, Chandra penned a letter that summarized Sandra's feelings about losing her son. (47RT 5171-5172.) As a result of Coleman's death, Sandra's health deteriorated; her ability to walk and write worsened. (47RT 5173.) Both as a child and as an adult, Coleman was very helpful to Sandra. Coleman ensured that Sandra appeared for her numerous doctor's appointments by either giving her taxi fare, or by enlisting another driver to take Sandra, or by driving Sandra himself. (47RT 5173-5174.) Coleman's daughter Cherie was "the joy of his life." On the night of his murder, Coleman earlier had taken Cherie to an amusement park. (47RT 5175, 5179.) Coleman's death deprived Cherie of a father to watch her grow up, see her graduate, get married, or have her own children. (47RT 5176.) Chandra had moved to New York when Coleman was 16 years old. By the time Chandra returned to the Los Angeles area, Coleman was an adult with a child. Chandra testified that Coleman's murder prevented her from spending time with Coleman as an

adult. (47RT 5175-5176.) Chandra missed Coleman very much, especially on special occasions like birthdays and holidays. (47RT 5177.)

D. Penalty Phase -- Defense Evidence[19]

Appellant did not testify in his own behalf. (48RT 5386-5387.)

1. Armando Quintana

Armando Quintana testified regarding the January 23, 1988 robbery Of Luz Hernandez. (48RT 5497.) Quintana was a witness at the prior juvenile proceeding. (48RT 5500-5501.) On the date of the incident, Quintana was on the porch of a group home on Rampart Street where he worked. Quintana saw two juveniles standing in front of the group home. Neither juvenile had anything in their hands. (48RT 5498-5499, 5507-5508.) The juveniles walked away and Quintana lost sight of them. (48RT 5499-5500.) About 30 seconds to one minute later, Quintana heard Hernandez scream across the street. Hernandez was alone, holding her head, and told Quintana that "they hit me." (48RT 5500, 5504-5506.) Quintana flagged down a nearby patrol car. (48RT 5501.) Quintana later identified one juvenile as the same one who had been standing outside the group home. (48RT 5503, 5507-5508.) Quintana testified that there was only one juvenile at the prior proceeding. (48RT 5508.)

2. Los Angeles Police Officer Ernest London

Officer Ernest London testified regarding the February 21, 1994 beating, rape, and choking of Bridget Robinson. (48RT 5510-5511.)

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[19] Respondent summarizes the penalty phase retrial facts. The following defense witnesses testified at the first penalty phase trial: Linda Allen (36RT 3191-3220), Barbara Mitchell (36RT 3220-3247), Brian Keith Mitchell (36RT 3259-3276), Carole Sparks (36RT 3297-3323), Dr. Louis Weisberg (37RT 3397-3419), Dr. Ira Mansoori (37RT 3419-3440), Dr. Michael Gold (37RT 3442-3508), and Nancy Kaser-Boyd (37RT 3514-3560).

Officer London responded to Robinson's residence on a report of domestic violence. (48RT 5511.) Officer London heard a male and a female arguing inside of the residence. (48RT 5512.) Officer London subsequently entered the residence and interviewed Robinson. Appellant, who was also inside of the residence, was interviewed by Officer London's partner. (48RT 5512-5513.) Robinson claimed that appellant assaulted her with a pair of hair clippers. (48RT 5514.) Robinson said that she and appellant were unmarried, but had resided together for seven months. Robinson stated that appellant was intoxicated and accused her of seeing her old boyfriend. (48RT 5514, 5518.) Robinson and appellant argued. Appellant hit Robinson on the forehead with electric hair clippers. (48RT 5514-5515, 5518.) Officer London observed a one-inch laceration on Robinson's forehead. (48RT 5515, 5523.) Robinson stated that appellant threatened to kill her and her family if she called the police. (48RT 5515, 5522.) Although Robinson told Officer London that appellant had forcibly raped her (5515-5516, 5521), she did not want to file a formal report for that crime. (48RT 5518, 5524.) Appellant later tied Robinson with an electric cord and went to a store. Robinson untied herself and called the police from a neighbor's house. (48RT 5515, 5522.) Appellant was arrested for assaulting Robinson with the hair clippers. (48RT 5518, 5523.)

3. Detective Frank Weber

Detective Weber conducted his first interview with Patricia Manzanares on July 26, 1996, at 11:20. A secretary at the South Bureau Homicide station interpreted for Manzanares, who spoke Spanish. (47RT 5306-5307.) Manzanares did not mention that any suspect laughed. (47RT 5308-5309.) Manzanares described the shooter as having a chubby face, no facial hair, a short Afro haircut, who wore baggy jeans, a black and white check shirt, a heavy black and white jacket, and a red mask. The shooter was five feet, six or seven inches tall, about 25 to 26 years old, and weighed

about 190 pounds. (47RT 5309-5310.) The second suspect was a Black male and five feet, two inches tall. (47RT 5310.)

Manzanares told Detective Weber that the shooter was three feet away from her window, "face-to-face," when he removed the fabric over his face. (47RT 5310-5311.) On August 21, 1996, Manzanares identified the shooter from a six-pack photographic array. In making the identification, Manzanares wrote in Spanish that she was scared and that she immediately recognized the shooter. (47RT 5311.)

Manzanares was always a cooperative witness in this case. (47RT 5311-5312.) From the very beginning of her involvement, Manzanares always stated that she would be able to recognize the shooter who removed his mask immediately after murdering the victim at the ATM. (47RT 5312-5313.) She also stated that "she got the best look at that person." (47RT 5313.)

4. Appellant's Family Members

a. Linda Allen

Linda Allen was appellant's maternal aunt. (47RT 5204-5206.) Appellant's mother, Carole Sparks, was Allen's elder sister. (47RT 5206.) Allen and Sparks had five other siblings. (47RT 5206.) Allen and Sparks grew up in the same household. (47RT 5207.) Sparks ran away from home "all the time." Allen testified that Sparks "would do . . .the average runaway kid thing [which was] take things and flee with them." (47RT 5210-5211.)

Allen testified that appellant was Sparks's only child. (47RT 5208-5209.) According to Allen, Sparks discovered she was pregnant with appellant when she was hospitalized for injuries she sustained from being hit by a van. (47RT 5209, 5211.) As a result, Sparks was in a body cast for a "long time." (47RT 5209.)

Sparks's family, especially Allen, took care of Sparks at home after the accident. Sparks was about two or three months pregnant with appellant, but she did not want the baby. (47RT 5211-5212.) Sparks gave birth to appellant when her pelvis and legs were still in casts. (47RT 5212-5213.) Allen and her sister Jeanette took care of both Sparks and appellant for about two or three months after his birth.[20] (47RT 5213, 5235.) Allen did not enjoy caring for appellant because Sparks "was a monster," ordering Allen to do things. (47RT 5213-5214.) Sparks and appellant eventually moved away. (47RT 5216.)

After Allen married in 1975, she did not see appellant for a long period of time. (47RT 5236.) Allen renewed contact with appellant during 1978 when he was three or four years old and lived with Allen's sister Bobbie for a period of less than a year. (47RT 5236-5238.) Appellant then returned to his mother. (47RT 5238.) Allen did not have any contact with appellant after that point until she saw appellant at a grocery store several years later. (47RT 5238-5239.) When appellant was about six or seven years old, he tried to make money for his mother by taking grocery store customers' bags to their cars. (47RT 5228-5229.) Because appellant complained of hunger to Allen, she prepaid a grocery store to provide him food. Allen would not give money directly to appellant because he would give it to his mother. (47RT 5230.) In Allen's opinion, Sparks did not take good care of appellant. (47RT 5231.)

At the time of her car accident, Sparks worked as a dancer or stripper. (47RT 5209.) During that time Sparks had a relationship with Melvyn Banks ("Melvyn"). Sparks claimed and Melvyn acknowledged that Melvyn was appellant's father. (47RT 5211.) At one point, Sparks moved

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[20] Allen did not know appellant's precise date of birth. (47RT 5234-5235.)

in with Melvyn. (47RT 5217.) Allen testified that Melvyn was very abusive, at times beating Sparks with golf clubs and burning her with cigarettes. (47RT 5217.) On one occasion, Allen called an ambulance after seeing Sparks on the floor with injured legs and burns on her chest. (47RT 5217-5218.) Allen testified that Melvyn was deceased at the time of the penalty phase trial. (47RT 5219.)

When appellant was about three or four years old, he lived with Allen's eldest sister Barbara Mitchell. Appellant stopped living with Mitchell when Sparks's claimed him. (47RT 5221-5222.) When appellant was six or seven years old, Allen did not have contact with appellant because he was living with Sparks, and Sparks would not have allowed it. (47RT 5222-5223.) Sparks did not want members of her family to have contact with appellant when he was in foster care. Allen testified that Sparks once threatened to kill her and burn down her house because Sparks believed that Allen had taken appellant from his foster home and taken him to a family gathering. (47RT 5223-5224.)

During the period when appellant was not in custody from November 30, 1993, through February 21, 1994, Allen frequently saw appellant at family gatherings and because she was "setting him up on programs, taking him [to job] interviews, getting his I.D. and birth certificate" in an attempt to help him become a better person. (47RT 5256-5257.) On each occasion Allen saw appellant, he was respectful to her, he acted appropriately under the circumstances, he did not exhibit any violence towards her or to others, and he did not possess weapons. (47RT 5257.)

During the period from May 17, 1996, when appellant was paroled, until his arrest in this case about two months later, Allen saw appellant fairly frequently. (47RT 5258.) On the occasions Allen had contact with appellant, she tried to help him become a productive member of society and

to prevent him from committing more crimes by driving him to job interviews and buying him an entire wardrobe. (47RT 5258-5259.)

Allen testified that appellant loved Sparks. (47RT 5224-5225.) Appellant used to tell Allen that he hoped he could live with Sparks. (47RT 5225.) Although appellant was affectionate to Sparks, Allen had never seen Sparks act affectionately toward appellant. (47RT 5225.)

Allen testified that Sparks heavily used drugs, including pills and marijuana, before Sparks's accident. (47RT 5209-5210.) Allen stated that Sparks had been using drugs since Sparks was a teenager. Allen witnessed Sparks overdose "quite a few times" when they were children. According to Allen, those overdoses required an ambulance. (47RT 5210.) Allen also testified that Sparks used illegal drugs while Sparks was recuperating from her accident. (47RT 5212.)

In November 1993, after the attack on Luz Hernandez and Sandra Hess, Allen picked up appellant after his release on parole.[21] Allen took appellant to Mitchell's house, where Sparks was reunited with appellant. (47RT 5245-5246.) Appellant was then able to stay out of custody almost three months before he was arrested for the incident involving Bridget Robinson.[22] (47RT 5246.) Thereafter, appellant returned to the California Youth Authority where he remained until 1996. (47RT 5246.)

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[21] Allen testified that she did not know about appellant's attack on Luz Hernandez or Sandra Hess. Allen only knew he was in custody because he violated parole. (47RT 5246-5247.) Allen never thought to ask appellant why he had gone to the California Youth Authority. (47RT 5247-5248.)

[22] Allen testified that she was unaware of appellant's assault on Bridget Robinson until hearing her penalty phase testimony. (47RT 5248-5249.) Although she was in contact with appellant from 1993 through 1996 during the period he was at the California Youth Authority, Allen never asked him why he was in custody. (47RT 5249-5250.)

At the time of her penalty phase testimony, Allen did not have any contact with Sparks. (47RT 5215.) However, on May 17, 1996, Allen picked up appellant from a train station upon his second release from a California Youth Authority facility and drove him to Sparks's residence. Sparks did not want appellant at her residence so Allen took appellant to her sister Jeanette's house. (47RT 5215-5216, 5242-5243, 5246.) Appellant did not tell Allen "I can't stay here [at Sparks's house] because this is a Crip neighborhood and I'm a Blood." (47RT 5243.) Allen and appellant never discussed his Blood gang membership. (47RT 5243.) However, Allen had asked appellant why he had body tattoos, including "H.P.B." in large gothic letters and his grandmother's name.[23] (47RT 5243-5244.)

When appellant showed affection to Sparks, she used to remark, "You're my man. You will take care of me." (47RT 5231-5232.) According to Allen, Sparks always made such comments, even when appellant was not old enough to walk. (47RT 5232.)

Allen testified that Sparks attempted suicide with frequency when they were growing up. After appellant's birth, Sparks also drank Drano at her mother's house. (47RT 5232-5233.) Sparks was at a "real low" when appellant was about two years old. (47RT 5233.) Sometime between 1975 and 1977, Sparks asked Allen to keep appellant. Allen agreed, so long as Sparks was not "in the picture." (47RT 5233-5234.)

Before his conviction in this case, Allen saw appellant at a birthday party on August 17, 1996. On that occasion, appellant acted normally and he was not disrespectful to anyone. (47RT 5239-5240, 5251.) According to Allen, appellant had never been disrespectful in the presence of his

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[23] Allen testified that she did not know that "H.P.B." stood for the Harvard Park Blood gang. (47RT 5243-5244.)

family members. (47RT 5241-5242, 5253.) There was nothing in appellant's conduct during that occasion that gave any indication he had murdered Foster 18 days earlier or that he had done anything wrong in the recent past. (47RT 5252.) In the presence of his friends and family, appellant knew how to act respectfully and appropriately. (47RT 5242.) Appellant had always been honest with Allen and she believed that he knew it would be wrong to be dishonest to her. (47RT 5242.)

During the time appellant has been in custody in this case, Allen spoke with appellant on the telephone about two times a month and she exchanged letters with him. (47RT 5207-5208, 5239.) Allen testified that she knew of the crimes appellant had been convicted of in this case. Allen loved appellant and wanted him to live. (47RT 5208, 5239.)

b. Barbara Mitchell

Mitchell was appellant's maternal aunt. (47RT 5321-5322.) Mitchell was the eldest sister of Allen and Sparks. (47RT 5322.) Mitchell had not spoken to appellant while he was in custody in this case. (47RT 5341-5342, 5343-5346.) Mitchell was aware of the crimes that appellant had been convicted of in this case. Mitchell loved appellant and did not want him to die. (47RT 5332-5333.)

Sometime in the early 1960's Mitchell lived outside of California; however she returned to Los Angeles when Sparks was injured in the car accident. Sparks discovered she was pregnant during her hospitalization for injuries related to the accident. (47RT 5323, 5333.) Sparks subsequently gave birth to appellant. (47RT 5323-5324.) During her pregnancy with appellant, Sparks took prescribed pain medication. (47RT 5324.) To Mitchell's knowledge, Sparks was not taking any illegal drugs during her pregnancy. (47RT 5324.) Mitchell helped care for Sparks and appellant after their discharge from the hospital. (47RT 5325.)

At some point, Sparks and appellant moved from Mitchell's mother's house to "the jungle," a neighborhood in Los Angeles. (47RT 5325-5326.) Sparks subsequently went to live with appellant's father, Melvyn Banks. (47RT 5326.) According to Mitchell, Melvyn beat Sparks, choked her, pushed her down stairs, slammed car doors on her, and pulled her hair. (47RT 5326-5327.) As a result of one violent incident, Sparks was at Inglewood Hospital for about five days. Mitchell cared for appellant, who was about one year old, off-and-on during that time. (47RT 5327.)

Mitchell's main contact with appellant was during the period after his birth until he was about six years old. (47RT 5347.) When appellant was about two years old, Sparks had dropped him off at the same daycare center where two of Mitchell's sons attended. Appellant had a note pinned on his jacket that stated, "Take him. I don't want him." (47RT 5327-5328, 5334-5335.) Thereafter, appellant solely lived with Mitchell for about three years.[24] Mitchell had intermittent custody of appellant for the following two years. During that two year period, Sparks had primary custody of appellant. (47RT 5328-5329.) Sparks told Mitchell that she wanted custody because she would receive county money for his care. However, Mitchell had custody of appellant pursuant to a court order. (47RT 5329, 5346.) Mitchell told Sparks that Sparks could not have appellant and contacted the police when Sparks took appellant. Eventually, a court gave Sparks custody of appellant after a hearing. (47RT 5346.) Thereafter, Mitchell had no contact with appellant until he was about nine years old. (47RT 5346-5347.)

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[24] Sparks swallowed Drano in her mother's bathroom when appellant was two years old and living with Mitchell. Appellant did not witness that incident. (47RT 5354-5356.) During that time period, Sparks was also acting strangely. (47RT 5354.)

Mitchell wanted to raise appellant with her sons. (47RT 5329.) Appellant lived in Mitchell's house as one of her own children; he had toys, clothes, and his own bed. (47RT 5330.) When Sparks took appellant from Mitchell's house, Sparks did not take any of appellant's toys or clothing with them. Mitchell testified that appellant screamed and begged her to take him back as Sparks dragged appellant away from Mitchell's house. (47RT 5330.) Appellant's father never came to take appellant from Mitchell's house. (47RT 5332.)

As a child, appellant was affectionate to Mitchell. Mitchell believed that appellant loved Sparks, but that he was afraid of Sparks at the same time. (47RT 5331.) Appellant tried to hug Sparks, but Sparks would push him away and tell him, "You're a man child. [¶] You have to fend for yourself." (47RT 5331-5332.) As for his childhood relationship with his father, appellant would scream when he witnessed his father "jump on" Sparks. (47RT 5332.)

Mitchell last had regular contact with appellant when he was about six years old. (47RT 5334.) Mitchell never visited appellant when he was in California Youth Authority custody. However, Mitchell had visited appellant on visiting days at two different halfway houses, where he resided because he was "bad" when he was about nine or 10 years old. (47RT 5335-5336, 5350.) Although appellant was moved to different foster homes during his youth, Mitchell never asked him why he was moved or why he committed acts of violence in the foster home which caused his removal to other foster homes because he cried and had nightmares. (47RT 5336, 5350-5351.)

The last time Mitchell spent time with appellant was about four years before her penalty phase testimony, when he was released from the California Youth Authority for the second time. (47RT 5338.) During that time, appellant went to Mitchell's birthday party. (47RT 5338.) Mitchell

did not notice if appellant acted unusually at her birthday party. (47RT 5338.) His behavior at the party did not suggest that he had murdered a man in a wheelchair and raped a woman three weeks earlier, or that he was going to murder a man at an ATM two days later. (47RT 5339.)

Since appellant was 18 years old, Mitchell had only seen him about six times because of his incarcerations. (47RT 5339-5340, 5342, 5347.) Those six occasions were at family gatherings. (47RT 5342-5343.)

When appellant was 15 years old, Long Beach Police Department arrested appellant for leaving the Eastlake custodial facility. Mitchell spoke to appellant on the telephone and told him to return to Eastlake. (47RT 5340-5341, 5348.) In connection with that incident, Mitchell contacted a probation department officer and requested that appellant be allowed to remain with Sparks because "they were getting along well and needed each other." Mitchell recommended this because, at that time, appellant was 15 years old, he was able to clean and feed himself, and Sparks was more stable. On the other hand, when appellant was "little" and lived with Sparks, he was filthy and had nothing to eat. When appellant was five years old, he tried to cook lettuce and burned himself. (47RT 5348-5349, 5351-5353.)

Mitchell had never seen appellant act violently. (47RT 5338, 5343.) Mitchell never saw appellant possess a firearm. (47RT 5339, 5343.) Mitchell did recall asking appellant if he was "all right" when she noticed him "staring at something." Appellant responded by suddenly stating, "What? What?" (47RT 5338.)

Mitchell testified that Sparks was a drug addict. (47RT 5353.) According to Mitchell, Sparks used PCP, marijuana, and cocaine in the past. Mitchell testified that Sparks was "very weird." (47RT 5353-5354.) At the time of her penalty phase testimony, Mitchell had no contact with Sparks. (47RT 5332.) Mitchell testified that she did not like Sparks very

much. (47RT 5337.) The last time she had spoken with Sparks was about three years before her penalty phase testimony. (47RT 5337-5338, 5354.) During that time, Sparks was behaving strangely. Mitchell believed Sparks was "crazy." (47RT 5354.) Mitchell testified that Sparks's problems stemmed from mental illness and drug use. (47RT 5354.)

c. Carole Sparks

Appellant's parents were Sparks and Melvyn Banks. (47RT 5359-5360.) Sparks testified that she did not have a car accident shortly before she discovered her pregnancy with appellant. Sparks stated that she became pregnant after the accident. (47RT 5360-5361.) During the accident, Sparks smoked marijuana. Sparks denied ever using heroin, cocaine, or PCP. She denied ever having a drug problem and maintained that she had no drug arrests. (47RT 5361, 5368.) However, she was on pain medication during her pregnancy. (47RT 5361.) According to Sparks, appellant was born in 1972.[25] (47RT 5360.) Sparks denied that Mitchell and Allen took care of her after her accident. Sparks testified that they only helped lift her from her bed when she needed to go to the bathroom. (47RT 5379-5380.) Sparks also denied that Mitchell and Allen cared for appellant when he was an infant. (47RT 5380.)

Sparks denied that she once left appellant with two neighbors and disappeared for three weeks. The only person Sparks left appellant with was her "mother's daughter," Barbara Mitchell.[26] (47RT 5362.) Sparks

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[25] The parties stipulated that appellant was born on April 3, 1973. (45RT 4907-4908.)

[26] Sparks called Barbara Mitchell and Linda Allen her "mother's daughters," not her sisters. (47RT 5362.) Sparks did not get along with either Mitchell or Allen because they were "snoops and they exaggerate[d]." (47RT 5362, 5366-5367.) Sparks could not "stand" Mitchell and Allen because of an earlier misunderstanding or argument. (continued...)

also denied the incident described by Mitchell wherein appellant was dropped off at a daycare center with a note pinned on him stating, "Take him. I don't want him." (47RT 5362-5363, 5367.) Sparks testified that she asked Mitchell to keep appellant after he was born because of Sparks's "illness" and because Sparks was attending beauty school at the time. Mitchell was unable to take in appellant so Sparks took appellant to school with her. (47RT 5363, 5368-5369.) According to Sparks, appellant never lived with Mitchell, but he had lived with Allen after being released from incarceration. (47RT 5364.) Sparks testified that appellant never lived with anyone other than Allen. (47RT 5364.) However, appellant lived with Sparks "for a while" after his release from incarceration before the crimes in this case, but "he got into a misunderstanding there and had to leave."[27] (47RT 5364-5365.)

Sparks denied being a stripper in the past. (47RT 5368.) She had been, however, a beauty school student, a bartender, and a waitress. (47RT 5368-5369.) Sparks denied drinking Drano, but she did drink a mixture of peroxide, sugar, water, and a few other ingredients to clear out her system from suspected PCP in her home's ventilation system. (47RT 5380-5381.)

Sparks testified that appellant's father lived with her from 1969 through 1971, and about two or three months of 1972. (47RT 5380, 5382.) Sparks did not live with appellant's father after appellant's birth. (47RT 5383.) Sparks denied that appellant's father beat her or that she was hospitalized from any such beatings. (47RT 5380, 5382.)

(...continued)
(47RT 5366.) Sparks also felt that Mitchell and Allen tried to manipulate her. (47RT 5367-5368.)

[27] Sparks testified that on that occasion, appellant had "somewhat of a temper tantrum," so Sparks asked appellant to leave. (47RT 5375.)

As a young man, appellant went to foster homes because he was involved in criminal activity. (47RT 5369.) Sparks took appellant to elementary school, but he left campus and was not present when Sparks went to pick him up. (47RT 5369-5370.) Sparks pointed out that when appellant got into trouble with authorities, the police would always bring appellant to her, proving she was not an unfit parent. (47RT 5377-5378.) Sparks also made appellant return stolen property on August 26, 1982. (47RT 5373, 5376.) Appellant lived in a group home from May 11, 1987, until August 20, 1987. On a number of occasions, appellant ran away from his court ordered placements and either went to Sparks, or his aunt who would take him to Sparks. A court later allowed him to live with Sparks on a trial basis. (47RT 5373-5374, 5378.)

Sparks had never seen appellant commit any crimes when he was an adult. (47RT 5376.) Sparks had also never seen appellant attack or beat anyone, or possess a weapon. (47RT 5376.) If appellant was committing any crimes, he knew not to do so in Sparks's presence. (47RT 5377.)

When asked how she felt about appellant, she stated, "That is the part of me that is missing[.]" (47RT 5378-5379.) Sparks analogized her feelings to losing one arm, "something that you're used to having is gone. [¶] You are missing it. [¶] . . . [¶] It is like a part of me [is] missing." (47RT 5379.)

Sparks refused to speak with defense investigators before her penalty phase testimony. (47RT 5365.) Sparks also "never really had a conversation" with defense counsel immediately before her penalty phase testimonies. (47RT 5366.)

5. Appellant's Mental Health

a. Dr. Louis Weisberg

In 1988, Dr. Weisberg, a psychiatrist, worked as an independent contractor for the California Youth Authority. (48RT 5390-5392.) Dr. Weisberg evaluated wards once or twice a week. (48RT 5392.) Dr. Weisberg conducted a psychiatric evaluation of appellant in 1988. (48RT 5392.) Appellant was 15 years old. (48RT 5400.) Appellant was evaluated to determine the type of placement or treatment he needed in the California Youth Authority system. A psychiatric evaluation was conducted to determine if there were any major psychiatric illnesses, treatable disorders, or anything else that required referral for further evaluation. (48RT 5393, 5394-5395, 5404.)

Although Dr. Weisberg had no independent recollection of the evaluation, he had generated a report of it. (48RT 5393.) The report did not refresh Dr. Weisberg's recollection of appellant, nor would Dr. Weisberg recognize appellant if he saw him. (48RT 5393.) The report indicated that appellant was in custody because he attacked Hess. (48RT 5396.) The report stated that appellant made the following statements during the interview: (1) "he felt very frightened of what he had done because Hess was older"; (2) "he was afraid that he might really hurt someone"; and (3) "[h]e feels frightened about his behavior." (48RT 5396-5398.)

In addition to the personal evaluation, Dr. Weisberg had access to the appellant's central file, which included the probation officer's report and any other previous evaluations. (48RT 5393-5394.) The report noted that appellant's mother had a significant history of alcohol and drug abuse. (48RT 5398.) This information likely came from the central file and appellant himself. (48RT 5398, 5407.)

Dr. Weisberg's principal diagnosis of appellant was severe "Conduct Disorder Indifferentiated Type" [sic], which meant that appellant "did things across the board" and "didn't do a specific kind of anti-social activity." (48RT 5398.) Conduct Disorder was characterized by disruptive conduct, a disregard for laws and for authority, an avoidance of consequences. Thus, Conduct Disorder was "a state of sort of omnipotence where they want to create their own rules and have others follow their rules and they want to create their own environment." (48RT 5412.) Conduct Disorder also referred to a pattern of anti-social behavior of persons under the age of 18. (48RT 5412.)

Dr. Weisberg explained that like narcissism, the criteria of Conduct Disorder included self-absorption and disregard for others. However, it differed from narcissism because it had the component of a desire to harm others for personal gain. (48RT 5413.) Dr. Weisberg testified that he was unsure whether appellant willfully would have wanted to harm others for his own gain, or whether that was something appellant could not prevent himself from doing and acted out those impulses. (48RT 5413-5414.)

Dr. Weisberg also diagnosed appellant with "Intermittent Explosive Disorder," which meant that appellant could become explosive at any time in a violent manner. (48RT 5398-5399.) Dr. Weisberg also noted that appellant had explosive personality traits and anti-social personality traits. (48RT 5398-5399.)

Anti-social personality disorder is characterized by an unstable employment history, frequent arrests due to unlawful behavior, aggressiveness with physical fights, impulsive and reckless behavior, repeated lying, and most importantly, the complete absence of remorse or

anxiety for the consequences of anti-social behavior.[28] Lack of remorse is characteristic of repeat offenders and individuals with anti-social personality disorder because they simply will do anything to avoid responsibility for culpable conduct. (48RT 5404-5405.) In some instances, Dr. Weisberg would expect a person with anti-social personality disorder to act aggressively because of something in his environment that upset him. (48RT 5414.) However, a person with anti-social personality disorder would have the same ability to scheme, plan, premeditate, or plan out an attack, such as the murder and robbery of Coleman and the sexual assault of Latasha W. (48RT 5414.)

In his report, Dr. Weisberg recommended that appellant's blackouts needed to be evaluated to rule out "organicity," or brain disorder and seizure disorder as opposed to appellant's desire to deny awareness of his own violence and to avoid responsibility. (48RT 5399-5400, 5405-5406.) The report also stated that appellant required "an intensive treatment program." (48RT 5399.) Dr. Weisberg made that recommendation based on the information he had received that implied appellant had a neurologic problem or organic brain dysfunction. (48RT 5400, 5415.)

Dr. Weisberg did not recall how long his interview of appellant was; however, Dr. Weisberg usually conducted interviews lasting at least 30 minutes. (48RT 5394, 5411.) Dr. Weisberg also reviewed central files before interviews. (48RT 5394.)

Dr. Weisberg testified that in determining whether appellant had been lying about feeling remorse for his attack on Hess, it would be significant if appellant: (1) had denied committing the offense less than one month before his psychiatric evaluation ; (2) told his probation officer that he did

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[28] Dr. Weisberg testified that individuals must be 18 years old in order to be fully diagnosed with personality disorder. (48RT 5404.)

not want to go to the California Youth Authority, but asked that he be sent to camp instead; (3) told his probation officer that he could control himself in committing the same types of offenses if he wanted; (4) admitted choking Hess to a person preparing a California Youth Authority case report on June 11, 1995, but claimed that he was going to escape from the California Youth Authority and that was why he was admitting it. (48RT 5401-5404, 5407-5408.)

Dr. Weisberg testified that there was no way to determine whether appellant or any other inmate lied during an evaluation. (48RT 5402.) This was particularly true with someone like appellant, who had a history of conduct disorder, anti-social personality traits, and obviously wanted to avoid culpability and punishment. (48RT 5402-5403.) People with anti-social personality disorder can appear to be superficially charming, but in actuality are simply acting a part for their own personal gain at the expense of their victim. (48RT 5411.) Those with the disorder cannot be trusted to tell the truth and show little remorse and moral conscience. (48RT 5412.) Because of their skill in lying and their credibility in presentation, persons with the disorder are especially difficult to diagnose on the initial interview. (48RT 5412.) Anti-social personality disorder is a form of mental illness. (48RT 5415.) There is no cure for anti-social personality disorder. (48RT 5411.)

The report indicated that appellant did not appear psychotic, he had no delusions, he denied a history of head injuries and seizures, he denied a history of psychiatric problems in the family, he denied having neurologic difficulties, and he appeared to be within the normal range of intelligence. (48RT 5408.) There was no evidence of "acute organicity," which was a brain disorder that prevents a person from knowing where he is and from thinking clearly. (48RT 5408-5409.) Dr. Weisberg noted in the report that appellant had no defects in memory. Dr. Weisberg did not recall whether

appellant claimed he did not attack Hess or whether he said that he blacked out or did not remember the event. (48RT 5409-5410.) However, a person with anti-social personality disorder could claim not to remember committing an offense in order to avoid culpability. (48RT 5410-5411.)

Dr. Weisberg assumed that appellant attempted to manipulate him during the evaluation because all wards would do that. (48RT 5406.) At the time of appellant's evaluation, Dr. Weisberg did not believe appellant was a malingerer. (48RT 5406.) Dr. Weisberg testified that more than a single psychiatric interview was not necessarily needed to determine whether a patient was malingering. (48RT 5406.) Malingering could be evidenced by repeatedly changing versions of an incident. However, Dr. Weisberg considered appellant's mother's drug use during her pregnancy with him and appellant's background as very important factors in helping to determine whether appellant was malingering. (48RT 5406-5407.)

b. Dr. Michael Gold

Dr. Gold was a neurologist who performed a neurologic examination on appellant. (48RT 5527-5528, 5531-5532.) Appellant was very cooperative with Dr. Gold. (48RT 5534, 5552-5553.) The neurologic examination was composed of an interview with appellant, a general physical examination, and diagnostic tests. (48RT 5532, 5535-5536.) Specifically, Dr. Gold performed three diagnostic tests to evaluate appellant's brain's appearance and function: (1) a brain wave test or "EEG" (short for electroencephalogram); (2) an MRI brain scan; and (3) a SPECT scan. (48RT 5536-5537.) The entire examination and history took between one hour and one hour and a half. (48RT 5553.)

The physical examination revealed that appellant's general medical health was normal. (48RT 5537.) The neurologic test showed that the left side of appellant's body perceived or felt sensation more poorly than the right side, and the left side of his body demonstrated different reflexes than

the right side of his body. In conjunction, those two findings indicated to Dr. Gold that something was affecting the right side of appellant's brain because the right side of the brain controls everything on the left side of the body. (48RT 5537-5538, 5557, 5561.) For the most part, Dr. Gold had to rely on appellant's honesty regarding his sensation or feeling on the left and right sides of his body. (48RT 5561-5562.) Dr. Gold concluded that there was some area of appellant's brain that was abnormal or damaged. (4RT 5538.)

The EEG test of appellant was completely normal and his MRI scan was normal. (48RT 5562-5563.) The SPECT scan showed that appellant's frontal lobes, occipital lobes, parietal lobes, deep structures, and cerebellum were all normal. (48RT 5563.) However, the SPECT scan showed one abnormality. The SPECT scan employed glucose injected with a radioactive material. (48RT 5537-5538, 5557-5558.) Appellant's SPECT scan showed a mild decrease in the utilization of the radioactively laced glucose in the temporal lobes, the area under the region of the temples. (48RT 5538-5539, 5545-5546, 5558.)

Dr. Gold diagnosed appellant with malfunction or abnormal function of his temporal lobes. (48RT 5539.) The left temporal lobe is responsible for understanding, reading, speaking, and writing language. (48RT 5539.) Dr. Gold did not detect any speech difficulty with appellant. (48RT 5560-5561.) The right temporal lobe, in most people, is responsible for behavior, impulse control, and emotions. The right temporal lobe can contribute to memory and personality. (48RT 5539, 5558-5559, 5562.) Dr. Gold did not detect any problems with appellant's memory. (48RT 5561.)

There are many causes of temporal lobe damage, some from birth and some acquired in childhood or adulthood. Specifically, temporal lobe damage could be caused from birth trauma, head injury, or during development in the womb because of the poor health of or drug and alcohol

use by the mother, or exposure to drug and alcohol. (48RT 5549-5550.) Dr. Gold could not determine when or how appellant's temporal lobe damage occurred. (48RT 5550-5551.) The SPECT scan supported Dr. Gold's physical findings. (48RT 5551.) Dr. Gold concluded that appellant was a brain injured person. (48RT 5551.) However, in his medical report, Dr. Gold noted that the changes in the temporal lobes were subtle and may be within the broad range of normal, i.e., appellant was on the "edge" of normal. (48RT 5557, 5563-5564, 5580-5581.)

Appellant gave Dr. Gold a history that suggested, but did not prove, that appellant could be experiencing a type of epilepsy or seizure that arises in the temporal lobe. Dr. Gold was not convinced that appellant suffered from seizures, but concluded that it remained a possibility. If appellant was a regular patient, Dr. Gold would have given appellant a test of anti-seizure medication to determine whether it helped him. (48RT 5540, 5554-5557, 5579-5580.) Dr. Gold acknowledged that "things are not always so clear in neurology." (48RT 5540.)

Dr. Gold opined that the type of activity exhibited by appellant in his 1988 assault on Hess was not consistent with a person acting under a seizure. (48RT 5566-5567.) Appellant's actions in the Coleman murder and Latasha W. rape and attempted murder also did not typify the expected conduct of a person suffering from a temporal lobe seizure. (48RT 5567-5570.) Seizures leave an individual in a confused state and cause either a convulsion (falling down and shaking) or a temporarily confused state where the individual can commit violent acts, but not over a prolonged period or time (not over many minutes, or half an hour, or 45 minutes), nor goal oriented crimes. (48RT 5570.) Similarly, appellant's conduct in the 1988 robbery of Hernandez, the 1994 assault and rape of Robinson, and the Foster murder were not the type of conduct consistent with a person suffering a seizure. (48RT 5576-5578.) Dr. Gold acknowledged that he

could not tell the jury anything about appellant's mental state at the time he committed any of the crimes in this case. (48RT 5578.) Dr. Gold did not know whether appellant's temporal lobe abnormality in any way accounted for the criminal conduct in this case. (48RT 5584.) However, appellant's brain injury could affect his behavior as the brain is responsible for behavior and impulse control. (48RT 5584-5586.)

c. Dr. Carl Osborne

Dr. Osborne was a forensic psychologist. (48RT 5590-5591.) In 1998, Dr. Osborne was engaged by the defense to interview and diagnose appellant. (48RT 5594.) Dr. Osborne had about 18 hours over eight separate visits of direct contact with appellant. (48RT 5594-5595; 49RT 5709.) Dr. Osborne never asked appellant why he had committed the crimes against Luz Hernandez and Sandra Hess. (49RT 5710-5713.) Rather, Dr. Osborne focused on the crimes that appellant was convicted of in this case. (49RT 5711-5712.) Dr. Osborne also reviewed material that pertained to appellant, including previous psychological and psychiatric reports, an extensive record from the Department of Social Services regarding appellant's early childhood, Child Protective Services records, interviews with appellant's family members, interviews of appellant's father's family, and some of appellant's own writings. (48RT 5594-5596.) Dr. Osborne also personally spoke with appellant's aunt Barbara Mitchell and with appellant's two cousins Keith and Darryl Mitchell. (48RT 5595-5596.)

Dr. Osborne performed three psychological tests on appellant: (1) the Wechsler Adult Intelligence Scale Third Edition; (2) the Validity Indicator Profile; and (3) the Wechsler Memory Scale. (48RT 5596-5597.) The first test was the current edition of the best formed individual I.Q. test which was composed of 14 separate sub-tests that measured very different areas of functioning and assisted in the formation of ideas on how appellant

functioned in various areas and in day to day life. The second test was used to measure a "response set" and to determine whether or not appellant was malingering.[29] Malingering is always a concern in forensic evaluations. According to Dr. Osborne, there is a presumption in forensic psychology that people will manipulate tests or have the tendency to do so. The third test was a fairly sophisticated measure of human memory capabilities. (48RT 5597-5598.)

Based on the interviews with appellant, the results of the psychological tests, and appellant's related case file, Dr. Osborne concluded that in general, appellant suffered from several severe and chronic mental illnesses, among which were intermittent explosive disorder and probably substance dependence. (48RT 5601.)

Persons suffering from intermittent explosive disorder have a period of built-up tension or emotion that results in explosive aggressive behavior. A very small trigger can set off the built-up pressure. After the person has an explosive episode, they tend to have a feeling of relief, show more relaxation, and less intensity. In many cases, there is a period of quiescence, but the pressure begins to build anew. If a person is in a very stressful situation, the explosive episode can occur very rapidly and can occur in a series of outbursts. In a less stressful situation, there can be moderate to quite long periods of time where no explosive behavior outbursts occur. (48RT 5601-5603; 49RT 5693-5695, 5705.)

One trigger for appellant's explosive behavior was the perception of being disrespected. For example, if a deputy sheriff told another inmate

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[29] Malingering was defined as "the intentional production of false or grossly exaggerated physical or psychological symptoms." (48RT 5600.) There are generally two categories of malingering: (1) malingering psychosis, i.e. "craziness"; or (2) malingering cognitive problems, i.e. pretending to be less capable of thinking. (48RT 5600.)

that appellant had a behavior problem, that could be perceived as a sign of disrespect and perhaps would trigger explosive behavior. (49RT 5695.) Another example of appellant's explosive conduct was his act of throwing feces in the courtroom.[30] (49RT 5698, 5705-5706.) Intermittent explosive disorder can be premeditated or planned conduct, but does not have to be. (49RT 5706.) Dr. Osborne believed that appellant did plan his conduct. Sometimes in the midst of that planned conduct the explosive disorder shows itself. (49RT 5706-5707.) Dr. Osborne did not have the expertise to opine on whether a person suffering from temporal lobe disorder generally plans out their attacks on their victims. (49RT 5709.)

Dr. Osborne found that appellant generally had a normal I.Q. Appellant's full scale I.Q. was 94. (48RT 5604.) Statistically, an I.Q. score between the range of about 85 and 115 is usually considered normal. (48RT 5604-5605.)

Dr. Osborne found many things looked average in appellant. However, Dr. Osborne found that appellant seemed to have significant trouble with three different tasks that comprise "working memory," which is the ability to put things into your head and manipulate them on a short term basis. (48RT 5605-5606.)

Dr. Osborne interpreted the results of the Wechsler Memory Scale test very broadly because the second part of the Validity Indicator Profile test showed that on the date that appellant took the memory scale test, appellant was not paying very close attention to what he was doing. However, Dr. Osborne noted that generally, the memory scale test results were completely consistent with appellant's I.Q. test as there were strengths and weaknesses in both tests in the same areas. (48RT 5606-5607.)

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[30] A discussion of this incident is discussed in detail in Arg. XIII, *post.*

The Validity Indicator Profile test is composed of two parts. The first part of the test was non-verbal and showed that appellant responded in an open and honest manner. The second part was a verbal test that required choosing which of two words was closer in meaning to a target word. The second part of the test required the test taker to be able to read and understand the usual range of vocabulary words. A mechanical scoring of the second part indicated that appellant was not paying attention. This meant that appellant passed many simple and harder questions, but missed many middling questions. However, Dr. Osborne interpreted appellant's results on the second part of the test as showing appellant's problems rather than any inattention. (48RT 5606-5611.)

Appellant appeared to be very eager to do the best that he could on the Validity Indicator Profile test and was very disappointed when he was told the outcome of that test. (48RT 5611-5612.) Appellant was cooperative with Dr. Osborne and did not try to hit or attack him. (48RT 5611.)

Dr. Osborne spent about a total of eight hours over three days administering all three tests on appellant. (48RT 5613.) Based on the test results, Dr. Osborne concluded that appellant was mentally ill and suffered from intermittent explosive disorder. (48RT 5613-5614.) Dr. Osborne also based his opinion on the opinions of neuropsychologist David Rudnick and neurologist Michael Gold who believed that appellant was organically brain damaged. (48RT 5613-5615.) According to Dr. Osborne, the results of appellant's I.Q. test were completely consistent with the theory of underlying brain damage. (48RT 5615.) Appellant's problem with working memory was consistent with Dr. Gold's diagnosis of temporal lobe damage. (48RT 5616; 49RT 5690-5691.) Generally, appellant's working memory problem meant that he had difficulty anticipating the outcome of his own behavior. (49RT 5691-5693.)

Dr. Osborne opined that appellant's behavior throughout his life was influenced by several factors. First, appellant's behavior was influenced by his chaotic childhood of being shifted from place to place. Second, appellant's mother contributed to appellant's behavior, specifically, her drug addiction, her neglect of him, and her act of taking him away from his aunt's home, where he was happy. (49RT 5686-5687, 5696.) Third, appellant's behavior was also influenced from his history of extreme interuterine trauma. (49RT 5690.) Fourth, appellant's father's absence from appellant's upbringing and appellant's father's violence against his mother influenced appellant's behavior. (49RT 5687, 5696.) Fifth, appellant's organic brain damage influenced his behavior. (49RT 5687-5688.)

The presence of temporal lobe brain damage and intermittent explosive disorder are related because they both involve impulse control. The temporal lobe affects impulse control, while intermittent explosive disorder is an impulse control disorder. (49RT 5695-5696.) Dr. Osborne testified that an impulse to act was not something that appellant could stop. (49RT 5696.) Periodically, appellant could not control his "primitive impulses" if he was highly stimulated and upset. (49RT 5696.)

Dr. Osborne opined that appellant was mentally ill. (49RT 5697.) Dr. Osborne characterized appellant's case as a "broken thermostat." (49RT 5697-5698.) This meant that appellant, because of the combination of his disorders and the way they interacted with each other, engaged in certain types of behaviors as he led his daily life that resulted in his increasing tension. That increasing anger and insensitivity to the people around him built up as time went by, but he did not have a way to cope with it. In Dr. Osborne's opinion, appellant did not have a thermostat to turn the furnace off. (49RT 5698.) Appellant did not make himself mentally ill. (49RT 5704.) Appellant acknowledged to Dr. Osborne that he was broken and

indicated that he wanted help to behave differently. Dr. Osborne believed that there were things that could be done for appellant. (49RT 5704, 5742.) One of the ways to deal with a person with impulse control problems is to sedate him to such a degree so that he cannot hurt others. (49RT 5705.)

According to Dr. Osborne, appellant had partial control over his disorders. At times during appellant's life, he could keep "a lid on it" for a short period of time. (49RT 5698-5699.) There are several medications that can control behavior like appellant's. (49RT 5700.) The most commonly used medication is Haldol. (49RT 5701.) These medications must be taken on a very regular basis over long period of time in order to control behavior. (49RT 5700.) Dr. Osborne believed that appellant had been prescribed these medications periodically. (49RT 5700.) However, appellant has never been forced to take the medications and had selectively decided whether to take them or not. (49RT 5700.)

Dr. Osborne had never seen the combination of intermittent explosive disorder, polysubstance dependence, and temporal lobe damage before appellant's case. (49RT 5701-5703.)

Dr. Osborne found that appellant was and currently is a manipulative person. (49RT 5714, 5736.) Dr. Osborne believed that appellant always will try to manipulate people. (49RT 5736.) From a review of appellant's records, Dr. Osborne determined that in general, appellant for a long time had malingered or lied to get things for himself that made his life easier or better. (49RT 5714.) Dr. Osborne found that appellant lied "a lot." (49RT 5715.) Malingering is a common trait of the types of mental illnesses that appellant has. (49RT 5744.)

Appellant understood the difference between right and wrong. Appellant knew that skipping school, stealing, and killing people were wrong. (49RT 5719-5720.) Appellant told Dr. Osborne of his childhood, which included stealing bicycles on a daily basis, stripping the bicycles to

make them harder to identify, running away from school each time after his mother brought him there, skipping school to hang out with his friends, and claiming that he carried grocery bags for money to help his mother but instead spending his earnings on video games. (49RT 5717-5722.)

Appellant denied to Dr. Osborne that he had committed the Coleman murder and the rape and attempted murder of Latasha W. (49RT 5723.) Appellant told Dr. Osborne that he killed Foster because he lost his temper because Foster had no money. (49RT 5723-5729.) The fact that appellant laughed after murdering Foster was something Dr. Osborne would expect from someone with intermittent explosive disorder because one aspect of appellant's condition is a tremendous emotional rush that comes with very intense behavior. Appellant "gets off" on very intense circumstances. (49RT 5729-5730.) It was also possible, however, that appellant laughed after the murder merely because he thought it was funny. (49RT 5730-5731.) Appellant's description of his attack on Robinson was convoluted and confusing. Appellant admitted to parts of the crime and denied others. Appellant's version of events took many different turns. (49RT 5731-5733.)

Appellant had a long history of violent behavior. Dr. Osborne believed that appellant will remain as violent as he always has been. (49RT 5736-5737.) Appellant's violent behavior was very situational and specific. (49RT 5737.) Dr. Osborne could not determine a percentage, but concluded that appellant had been able to stay free from committing crimes for only some months since he was out of custody when he was 18 years old until the present. (49RT 5740.) Appellant went to the California Youth Authority for assaulting Luz Hernandez and for choking Sandra Hess. When he was released from prison, he was out for just a short period of time, attacked Bridget Robinson, and then returned to prison. Appellant

was again released from prison on May 17, 1996, and within eight or nine weeks killed two people. (49RT 5741.)

d. Dr. Iraj Mansoori

Dr. Mansoori was a psychologist with the California Youth Authority on May 14, 1991. (49RT 5773-5774.) Through 1991 Dr. Mansoori counseled appellant. (49RT 5775.) Appellant was referred to Dr. Mansoori in late 1990, and had about 12 to 15 individual one-hour sessions with Dr. Mansoori over a period of about six months. (49RT 5775-5776.) Dr. Mansoori did not recall the precise reason for the referral, but appellant was ultimately referred to the doctor because the live-in unit treatment team determined that a counselor would help appellant to be "contained." Dr. Mansoori put appellant on a supportive psychotherapy schedule for maintenance. (49RT 5780-5781.)

Dr. Mansoori got along with appellant. Appellant never tried to attack the doctor. (49RT 5776.) However, appellant was bitter and angry most of the time. (49RT 5776.) On May 14, 1991, Dr. Mansoori authored a report related to appellant's suitability for parole. Appellant was found not suitable for parole. (49RT 5777-5778.) In response to being informed by Dr. Mansoori that he would not be paroled, appellant stated, "That's okay." Dr. Mansoori interpreted appellant's response as a preference for the California Youth Authority over what appellant was offered at his home. (49RT 5778.)

6. Appellant's Childhood

a. Mary Goldie

On January 21, 1977, Mary Goldie was a detective with the Pasadena Police Department assigned to the juvenile section. (49RT 5782-5783.) When appellant was three years old, a female with the surname of Berkins brought him to Goldie. Berkins and appellant were not related. (49RT

5783-5784.) Goldie had no way to contact appellant's mother and had no information about his father or appellant's other relatives. (49RT 5785.) Ultimately, Goldie and Berkins agreed that appellant needed to be placed in a foster home. (49RT 5784.) Goldie took appellant into protective custody and took him to a shelter care home arranged through McClaron Hall, a facility for abused and neglected children. (49RT 5785-5786.)

b. Juanita Terry

In 1978, Juanita Terry was a protective services worker in the metro office of the Los Angeles County Department of Public Social Services (49RT 5787-5788.) By the time Terry became responsible for appellant's case on March 31, 1978, appellant was not in the care of his mother and had been placed in the care of his aunt Barbara Mitchell. (49RT 5788-5790, 5797-5798.) Appellant was taken away from his mother's care because his mother was presumed to be mentally unstable, she had been beating him, and she had not been giving him consistent care and supervision. (49RT 5790.) Terry contacted Barbara Mitchell at her home about once a month and checked on appellant's welfare. (49RT 5790-5791.) Terry believed that appellant should not have been under his mother's care because she had provided an unsafe environment. (49RT 5794-5796.) Terry's notes of appellant's case indicated that on some occasions, his mother had attempted to remove him from the nursery school or interfered with his care in Mitchell's home. (49RT 5794.) When a child is taken from the custody of his natural parents, there must be a substantial indication that a child is in danger. (49RT 5795.) In October 1978, appellant's mother regained custody of appellant. (49RT 5795, 5797-5798.)

c. Verna Emery

The parties stipulated that on or about January 31, 1978, Verna Emery, who was a neighbor of appellant and his family, reported that

appellant's mother Carole Sparks was acting violently and "freaking out." Up to a month prior to that date, Emery believed that appellant was receiving good care. The parties also stipulated that from around January 31 to February 4, 1978, Emery spoke to the Department of Protective Social Services and reported the events of January 31, 1978, and also stated that she saw Sparks talk to people who were not there, scream, yell, and act strangely. Emery believed that Sparks might be mentally ill. During the period of January 31 through February 4, 1978, Sparks struck appellant. (49RT 5805-5807.)

E. Rebuttal -- Penalty Retrial

Dr. Ronald Markman was a medical doctor specializing in psychiatry. (49RT 5808-5809, 5825.) Dr. Markman conducted a personal interview with appellant for about one and one-half hours in the lockup area of the courthouse on September 2, 1998. (49RT 5810-5811, 5828, 5836-5837.) Dr. Markman asked appellant questions about the crimes that appellant had committed. (49RT 5811, 5835.) Based on the circumstances surrounding the interview, many of appellant's responses appeared to be very thought out and self serving. (49RT 5811-5812.) Appellant denied committing the crimes he was convicted of in the guilt phase trial. (49RT 5812, 5835-5836.)

Dr. Markman found appellant's written notes of his alleged memories of his past to be totally unconvincing and not consistent with any developmental or behavioral pattern. (49RT 5812, 5834.) For example, appellant wrote that he was concerned at the age of two years old that his mother was being physically abused by his father and that appellant was afraid that his mother would die and leave him. Dr. Markman found that the concept of recalling something that occurred at age two was highly unlikely and a particularly traumatic event such as the one described by appellant would be repressed. (49RT 5812-5813, 5834.) Moreover, the

concept of death was not something a child developed until the age of at least eight or nine, possibly even age 10. (49RT 5813.) Another example of appellant's written notes that was unconvincing was his alleged recollection of his mother being in an automobile accident that occurred while she was pregnant with him. Appellant's narrative of that event was totally inconceivable given that he wrote about it as if he had an independent recollection of the event. (49RT 5813.)

There are a variety of impulse disorders. (49RT 5814.) Dr. Markman opined that appellant's act of concealing a bag of urine and feces for at least one hour and throwing it inside of the courtroom at the trial judge and prosecutor was not indicative of an impulse disorder because the conduct demonstrated a certain amount of planning and thinking. (49RT 5814-5816.) An impulse disorder related to an event or activity without any thinking or planning behind it. (49RT 5815.) Conduct stemming from an impulse disorder is done on the spur of the moment with what is available at that time. (49RT 5815.) The impulse interferes with what the person suffering from the disorder was doing and comes on spontaneously and immediately. (49RT 5817.) The facts of the Foster robbery and murder also could not be characterized as conduct related to an impulse disorder. Dr. Markman opined that the very nature of the crime – the approach, the attack, the confrontation, the planning to avoid apprehension – was not consistent with an impulse disorder. Rather, the facts of the crime indicated a premeditated act. (49RT 5816-5817.)

Appellant's normal brain MRI indicated the absence of physical abnormalities. (49RT 5818-5819.) Appellant's normal EEG test suggested that the electrical function in his brain was normal. A SPECT scan demonstrates the function of the organ imaged. Neither an MRI, EEG, or a SPECT could be used to make a diagnosis or to predict behavior. (49RT 5821-5822.)

Dr. Markman opined that premeditated conduct was not consistent with temporal lobe disorder. (49RT 5822.) Temporal lobe disorder is characterized by an electrical storm in the brain where nerve cells fire irregularly and not in order. That condition would not allow for a behavioral pattern which was planned, intentional, and deliberate. People who act within the framework of a temporal lobe seizure usually act very erratically, spontaneously, and unpredictably. (49RT 5822-5823.) The facts of the Coleman murder and the Latasha W. rape and attempted murder was totally inconsistent with temporal lobe disorder and seizure. (49RT 5824-5825.)

Dr. Markman accepted Dr. Gold's interpretation that the SPECT scan showed that there was some profusion impairment in the temporal lobes bilaterally. However, Dr. Markman rejected Dr. Gold's conclusion that appellant had brain damage. (49RT 5831-5832.) Generally, the abnormal results from brain tests cannot be correlated to specific behavior because there are too many associational areas and the mapping of behavior that is not clear cut in the brain. (49RT 5838-5841.) Dr. Markman concluded there was no evidence of documented clear cut brain damage in appellant, and even if there were, it would not translate into the behavior exhibited by appellant in the crimes in this case or the crimes against Hernandez, Hess, and Robinson. (49RT 5843-5844.)

ARGUMENT

I. BECAUSE APPELLANT DID NOT ESTABLISH A PRIMA FACIE CASE OF GROUP BIAS, THE TRIAL COURT PROPERLY DENIED HIS *WHEELER* MOTION

Appellant, who is African-American, contends the trial court erred in overruling the defense *Batson/Wheeler*[31] objection to the prosecutor's peremptory challenges against three African-American prospective jurors in violation of the federal and state constitutions. (AOB 53-75.) Respondent disagrees.

A. Factual Background

On appeal, appellant challenges only the trial court's ruling as to three of the five peremptory challenges exercised by the prosecutor against prospective African-American jurors: Juror No. 6 (#5321); Juror No. 12 (#2726), and second Juror No. 12 (#8322). (AOB 53, 62.) For the sake of convenience, respondent shall refer to the prospective jurors in question by their initials, as provided in their questionnaires. Thus, Juror No. 6 (#5321) is hereinafter referred to as "Juror J.R.," Juror No. 12 (#2726) as "Juror R.W.," and Juror No. 12 (#8322) as "Juror A.I." (See 4CT 1088-1102 [Juror J.R.'s questionnaire]; 5CT 1359-1375 [Juror R.W.'s questionnaire]; 6CT 1692-1706 [Juror A.I.'s questionnaire].)

Without objection from defense counsel, the prosecutor exercised his first peremptory challenge to excuse Juror J.R. and his fifth peremptory challenge to excuse Juror R.W. (24RT 980, 1057.) After the prosecutor

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[31] *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S. Ct. 1712, 90 L. Ed. 2d 69] (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). For the first time on appeal, appellant asserts a claim under *Batson*. (See 25-1RT 1226 [defense counsel brought only "a motion under *People v. Wheeler*."].) This Court has held that consideration of a *Batson* claim is not forfeited on appeal if *Wheeler* was the only case cited in the trial court. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

used his eleventh peremptory challenge to excuse Juror A.I., defense counsel made a motion under "*People v. Wheeler*" because the prosecutor had excused five prospective jurors who were African-American. (25-1RT 1226.) After stating that appellant was African-American, defense counsel argued, "It appeared to me that certain jurors were very neutral on everything." (25-1RT 1226.) The trial court noted that it was "an interesting time to bring the motion" and stated that the last juror, Juror A.I. was excused for an obvious reason, "[t]o wit, I am not sure I can be fair because [appellant] is so young." Defense counsel replied that youth was a mitigating factor and then stated she "couldn't see the reason for the peremptory on the first woman who was excused which was Juror [J.R.]." (25-1RT 1226-1227.) The trial court allowed defense counsel to elaborate on her motion once she had reviewed her notes. (25-1RT 1226-1227.)

After a recess, the trial court inquired if defense counsel wished to present further argument in support of her motion. (25-1RT 1228.) Beyond noting the specific prospective African-American jurors that the prosecutor had excused, defense counsel did not offer any new grounds. (25-1RT 1228-1229.) When the trial court inquired if there was "anything else that [defense counsel] wish[ed] to add," defense counsel responded, "Nothing at this time." (25-1RT 1229.) The trial court then asked the prosecutor if he wished to be heard on the issue of whether a prima facie showing of group bias under *Wheeler* had been established. The prosecutor declined to comment because no prima facie case of group bias had been shown. (25-1RT 1229.)

The court nonetheless invited the prosecutor to comment by stating the prosecutor was entitled to argue the issue. The prosecutor clarified that he had exercised 11 peremptory challenges: six against females, five against males, five against African-Americans, two against Whites, three against Hispanics, and one against an Asian. Defense counsel agreed with

the prosecutor's characterization. (25-1RT 1230.) The trial court noted, and defense counsel agreed, that the defense's 10 peremptory challenges were directed against two Hispanics, three Asians, three Whites, and one African-American. The trial court did not note the background of the remaining juror that defense counsel had excused and defense counsel did not clarify the record in that respect. (25-1RT 1231.) The prosecutor noted that the current panel included four African-Americans, two male Whites, a male Armenian, two female Whites, a female Asian, and a male of uncertain racial background. (25-1RT 1230.) Defense counsel agreed that there were four African-Americans on the jury panel, but considered the Armenian male to be White and the male of uncertain race to be Hispanic. (25-1RT 1231-1232.) Defense counsel argued that the majority of the prosecutor's challenges had been to African-American jurors and that those jurors all passed the court's test on challenges for cause because they had all stated they could give the death penalty. (25-1RT 1232.) Those jurors, defense counsel conceded, "had some degrees of hesitation as other jurors have had" but "[t]hey have had some degrees of definiteness as to when they were going to give the death penalty." As an example, defense counsel proffered Juror J.R., who had written in her questionnaire she believed in an eye for an eye and a tooth for a tooth. (25-1RT 1233.) However, as the trial court found, Juror J.R. had also selected "Don't know" to questions 32, 33, and 34 in the questionnaire.[32] (25-1RT 1233;

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[32] Question 32 asked, "In this penalty phase would you automatically, in every case, regardless of the evidence, vote for the death penalty?" Question 33 asked, "In this penalty phase would you automatically, in every case, regardless of the evidence, vote for life in prison without the possibility of parole?" Question 34 asked, "Do you have any conscientious objections to the death penalty which you believe might impair your ability to be fair and impartial in a case in which the prosecution is seeking the death penalty? (See, e.g., 4CT 1097-1098.)

(continued...)

see 4CT 1097-1098.) When asked to explain her answers to those questions on voir dire, Juror J.R. had stated, "No, I wouldn't automatically. No." (24RT 929.)

The trial court found no prima facie showing had been made. (25-1RT 1233-1236.) In making this determination, the trial court considered "[t]he make[-]up of the panel as it has appeared from time to time." The trial court also observed that the manner in which the defense exercised challenges was relevant "not because there [was] anything impermissible, but it artificially skew[ed] things."[33] For example, the defense had exercised 10 peremptory challenges, only one of which was to an African-American juror. The trial court observed that "when the defense does not excuse jurors of a particular sex or race, or what have you, the other side is left in a situation where mathematically as a matter of probability the chances will rise dramatically that the prosecution will exercise challenges." (25-1RT 1234-1235.) The trial court found that the questionnaires of each of the five jurors that defense counsel had pointed to presented "ample ground" for the prosecution's peremptory challenges similar to at least eight out of the 10 jurors that defense counsel had excused in peremptory challenges. (25-1RT 1236.) Thus, the trial court found no prima face case had been made. (25-1RT 1236.)

The trial court then informed the prosecutor that he could, but was not required to, indicate his reasons for those peremptory challenges. (25-1RT 1236.) However, the trial court stated no response was required as to Juror

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(...continued)

[33] This Court has emphasized that rulings pursuant to *Batson* and *Wheeler* "require trial judges to consider all the circumstances of the case and call upon judges' powers of observation, their understanding of trial techniques, and their broad judicial experience." (*People v. Howard* (1992) 1 Cal.4th 1132, 1155 [internal quotations marks and citations omitted].)

A.I., "given the obvious nature of that situation[.]"[34] (25-1RT 1237.) The prosecutor replied that justification for his challenges were unnecessary given the lack of a prima facie showing. However, the prosecutor elected to state that the answers in the questionnaires spoke for themselves and the challenged jurors' oral answers during voir dire either caused him discomfort or concern on their ability to impose the death penalty. The prosecutor exercised his peremptory challenges because of the jurors' inability to impose the death penalty. (25-1RT 1237.)

Subsequently, the sole issue defense counsel wished to clarify was the relevance of the effect of the defense's peremptory challenges on the prosecution's challenges. (25-1RT 1237.) Defense counsel stated that, during the past 22 years of her trial experience in downtown Los Angeles, the number of African-American jurors had been shrinking. (25-1RT 1237-1238.) Thus, defense counsel reasoned that although there were one-third or less African-American prospective jurors in general on the panel, the prosecutor had exercised almost half of his peremptory challenges against African-Americans. (25-1RT 1238-1239.) The trial court concluded that merely counting the number of challenges of a particular race was not

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[34] In her questionnaire, Juror A.I. indicated that her brother was in prison for a robbery conviction and her husband had been convicted of a drug possession charge. (6CT 1694-1695; 25-1RT .1221-1222) During voir dire, Juror A.I. stated that viewing photographs related to autopsies and murder scenes that would be presented during the trial would be "too emotional" for her. Juror A.I. did not believe she could view a photograph of a dead body without becoming sick. (25-1RT 1215-1218.) In response to questioning on the death penalty, specifically to the trial court's question, "Can you think of any reason you would tend to favor one side or the other here," Juror A.I. hesitated and replied "No." When asked to explain her hesitation, Juror A.I. stated, "The defendant seems very young." (25-1RT 1220-1221.) Finally, Juror A.I. had an A.A. degree in child development and had taken some courses in general education at California State University, Los Angeles. (25-1RT 1223; 6CT 1694.)

telling. For instance, the trial court made no assumption of group bias from defense counsel's challenge of three Asian jurors. The trial court reiterated that the defense's peremptory challenges were relevant simply to illustrate the point that when "one side fails to exclude the other side will exclude given what is left on the panel." (25-1RT 1239-1240.) The trial court also found that the answers in the questionnaires in which the excused jurors "expressed problems with the concept of the death penalty and its imposition and doubts about their ability and confusion in some cases" were the reason the prosecution had excused those jurors. In addition, the trial court stated that there were "[m]any other things that would certainly give pause to a reasonable opponent in a criminal case." (25-1RT 1243-1244.)

The final composition of the seated jury was six African-American jurors and six White jurors. (26RT 1619-1620.)

B. Relevant Law

This Court has set forth the applicable law as follows:

> Under *Wheeler*, . . ."[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias - that is, bias against 'members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds' - violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. [Citations.]" [Citation.] "Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment. [Citations.]" ([Citation].)
>
> "The United States Supreme Court has recently reaffirmed that *Batson* states the procedure and standard trial courts should use when handling motions challenging peremptory strikes. 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes.

> [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]'" ([Citations].)

(*People v. Hawthorne* (2009) 46 Cal.4th 67, 77-78.)

"Ordinarily, [this Court] review[s] the trial court's denial of a *Wheeler/Batson* motion deferentially, considering only whether substantial evidence supports its conclusions." (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.) However, "the trial court's finding that [appellant] failed to establish a prima facie *Wheeler/Batson* violation must be reviewed in light of intervening legal developments." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1292.) As this Court explained in *Carasi*:

> In *Johnson v. California* [(2005)], *supra*, 545 U.S. 162, 125 S.Ct. 2410, 162 L.Ed.2d 129, the United States Supreme Court reversed *People v. Johnson* (2003) 30 Cal.4th 1302, in which we confirmed that the relevant California standard - even if it sometimes had been expressed as a "'reasonable inference'" (*People v. Johnson, supra*, 30 Cal.4th at p. 1312) - was to show that it was "more likely than not" that purposeful discrimination had occurred. (*Id.* at p. 1318.) The high court has since disapproved this exacting standard for federal constitutional purposes, and has said that a prima facie burden is simply to "produc[e] evidence sufficient to permit the trial judge to draw an inference" of discrimination. (*Johnson v. California, supra*, 545 U.S. at p. 170.)

(*People v. Carasi, supra*, 44 Cal.4th at pp. 1292-1293.)

Because the trial in the instant appeal occurred in 1998 and 1999, and the United States Supreme Court's opinion in *Johnson* was filed in 2005, on appeal "[this Court] independently determine[s] whether the record permits an inference that the prosecutor excused jurors on prohibited discriminatory grounds. ([Citation.])" (*Id.* at p. 1293.) The record includes voir dire and any juror questionnaires. (*People v. Griffin* (2004) 33 Cal.4th 536, 555.) (*Ibid.*) "Moreover, if [this Court] find[s] that the trial

court properly determined that no prima facie case was made, [it] need not review the adequacy of the prosecution's justifications, if any, for the peremptory challenges. ([Citation.])" (*People v. Farnam* (2002) 28 Cal.4th 107, 135; accord *People v. Young* (2005) 34 Cal.4th 1149, 1173.)

C. The Record Supports The Trial Court's Determination That Appellant Failed To Establish A Prima Facie Showing Of Discriminatory Purpose

On appeal, appellant challenges only the trial court's ruling as to three African-American prospective jurors: Juror J.R.; Juror R.W., and Juror A.I. (AOB 53, 62.) As appellant acknowledges (AOB 62), he and the crime victims were African-American. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 733 [contrasting this fact with the situation where defendant is a member of the excluded group and victim is member of the group to which the majority of the remaining jurors belong].) African-Americans are a cognizable group for purposes of *Batson* and *Wheeler*. (*People v. Alvarez* (1996)14 Cal.4th 155, 193.) An independent review of the record does not support an inference that prospective African-American jurors were excused because of their race.

First, although defense counsel had argued that the challenged jurors passed the trial court's test on challenges for cause (25-1RT 1232), "[a] prosecutor's reasons for exercising a peremptory challenge 'need not rise to the level justifying exercise of a challenge for cause.'" (*People v. Hamilton* (2009) 45 Cal.4th 863, 901, quoting *Batson*, *supra*, 476 U.S. at p. 97.) "[J]urors may be excused based on hunches and even arbitrary exclusion is permissible, so long as the reasons are not based on impermissible group bias." (*Id.* [internal quotation marks and citation omitted].) There is a presumption that a prosecutor uses his or her peremptory challenges in a constitutional manner. (*People v. Avila* (2006) 38 Cal.4th 491, 541.)

Second, the prosecutor's exercise of peremptory challenges to the three prospective jurors was based on their written and oral answers to the death penalty. (25-1RT 1237.) The prosecutor's reasons also support the trial court's finding that no prima facie case had been established. In response to the death penalty related questions 32 and 33 in her questionnaire, Juror A.I. selected "Don't know." (6CT 1701; 25-1RT 1218-1219.) During voir dire, Juror A.I. hesitated before responding no to the trial court's inquiry of whether she could think of any reason she would tend to favor either side. When prompted on the cause of her hesitation, Juror A.I. stated, "I'm just not sure." Juror A.I. observed that appellant "seem[ed] very young" and added, "I might hesitate [to make a decision]." (25-1RT 1220-1221.) Based on her oral and written responses, the prosecutor reasonably could have been concerned that Juror A.I. would be disinclined to vote for the death penalty. (*People v. Pinholster* (1992) 1 Cal.4th 865, 914 [a "prosecutor is entitled to exercise a certain number of peremptory challenges simply on a suspicion that the juror will be unfavorable to his or her cause"]; see also *People v. Richardson* (2008) 43 Cal.4th 959, 983-984 [finding no constitutional infirmity in peremptory challenges against jurors harboring attitudes on the death penalty that counsel reasonably believes is unfavorable].)

As to Jurors J.R. and R.W., appellant implies that the prosecutor must accept, at face value, the prospective jurors' oral answers. (See AOB 70-71.) This assertion must be rejected. A prosecutor is not obliged to believe a juror's voir dire testimony. (See *People v. Lewis* (2008) 43 Cal.4th 415, 474 [juror's written answers reflect some hesitation about the death penalty and the prosecutor reasonably could have believed they reflected juror's true feelings and undermined her assurance on voir dire that she would not automatically vote for life imprisonment without possibility of parole];

Wheeler, *supra*, 22 Cal.3d at p. 275 [a party may legitimately challenge a prospective juror based on a subjective mistrust of the juror's objectivity].)

Juror J.R. testified that she did not have "any confusion at all about the questions on the questionnaire." (24RT 927.) Question 31(f) of the questionnaire asked, "Regardless of your views on the death penalty, would you as a juror be able to vote for the death penalty on another person if you believed after hearing all the evidence that the penalty was appropriate?" (24RT 927-928.) When asked why she had circled both "yes" and "no" in response to question 31f, Juror J.R. stated, "It was put as -- it didn't have an 'I don't know' so I put a yes and no." (24RT 928; see 4CT 1097.) When asked if "don't know" was her answer, Juror J.R. stated, "Well, I understood it, but my answer to that is I don't know anything much about the death penalty." (24RT 928.) Juror J.R. testified that she understood that the jury would have to decide the appropriate penalty if there was a penalty phase and that the two choices were life in prison without parole or the death penalty. Juror J.R. also testified that in the event of a penalty phase, she could choose between the two choices. (24RT 928-929.)

However, in the questionnaire, Juror J.R. had selected "Don't know" in answer to questions 32, 33, and 34. Question 32 asked, "In this penalty phase would you automatically, in every case, regardless of the evidence, vote for the death penalty?" Question 33 asked, "In this penalty phase would you automatically, in every case, regardless of the evidence, vote for life in prison without the possibility of parole?" And Question 34 asked, "Do you have any conscientious objections to the death penalty which you believe <u>might impair</u> your ability to be fair and impartial in a case in which the prosecution is seeking the death penalty?" (4CT 1097-1098 [emphasis in original].) At voir dire, Juror J.R. testified that she understood question 34 and stated, "It's [sic] open-minded person, sir." (24RT 929.) When the trial court asked Juror J.R. to explain her answers to questions 32 and 33,

she replied, "No, I wouldn't automatically. No." (24RT 929.) Finally, Juror J.R. testified that she understood her duty to listen to additional evidence at the possible penalty phase, to consider all the guilt phase evidence, and to decide the appropriate penalty. Juror J.R. stated that she could handle that duty appropriately in this case. (24RT 930.)

Despite Juror J.R.'s oral answers on voir dire, the prosecutor could reasonably harbor doubt about that juror's stance on the death penalty given her written answers in the questionnaire. (See *People v. Stevens* (2007) 41 Cal.4th 182, 194 [juror's conflicting answers regarding the death penalty on voir dire and his questionnaire reflected ambivalence and supported the prosecutor's stated reason for peremptory challenge].)

Similarly, in response to question 30 of the questionnaire, Juror R.W. wrote, "I have never given a serious thought to the death penalty I would have to say I honestly don't know if I could vote on putting some one to death." (5CT 1369.) On voir dire, Juror R.W. first stated, "I don't know," when the trial court asked if her written answer was true. (24RT 1042.) She then stated, "Well, listening to what you had to say then by listening to the facts I think I would be able to." When the trial court asked what had changed her mind, Juror R.W. replied, "Um, well, knowing that I have to listen to the facts and not go on my feelings." (24RT 1042.) In response to the trial court's question of whether she could weigh the aggravating and mitigating factors "or do you think your feelings about the subject is so strong that you're committed to go the other way on a case," Juror R.W. stated, "Um, I think I can do it. I really didn't have any strong feelings about it." (24RT 1043.)

Question 31(e) of the questionnaire asked, "Do you feel California should have the death penalty?" Juror R.W., in response, wrote, "I don't know. I don't see it as a way to stop crime because we don't kill everybody who commits a crime." (5CT 1370.) Juror R.W. similarly wrote, in

response to question 31 of the questionnaire, "I don't know what the purpose [of the death penalty] is because it still doesn't stop crime!" (5CT 1370.) In response to question 34, Juror R.W. selected "Don't know" as to any conscientious objections to the death penalty. (5CT 1371.) Thus, based on Juror R.W.'s questionnaire answers and her contradictory and ambivalent oral answers about the death penalty on voir dire, the prosecutor could reasonably harbor doubt about that juror's stance on the death penalty. (*See People v. Stevens, supra*, 41 Cal.4th at pp. 194-195 [juror's written response that he was neutral regarding the death penalty based in part that it was not shown to be a deterrent to crime and preferred to have all facts before passing judgment showed ambivalence].)

Moreover, although neither the prosecutor nor the trial court articulated the criminal history of the three jurors' relatives, the prosecutor did refer to the questionnaires and oral answers of the jurors as justification for his peremptory challenges. The record suggests ample grounds upon which the prosecutor might reasonably have challenged the three jurors in question. Juror J.R.'s brother was convicted of a felony for "stealing" for which he was serving a year sentence.[35] (4CT 1090-1091.) Juror J.R. wrote that she did not know if the outcome of her brother's case was fair because she "was not their [sic] for his case." (4CT 1091.) Juror J.R. had also visited her niece in a juvenile detention facility. (4CT 1090; 24RT 903.) The father of Juror R.W.'s oldest child was convicted of burglary and served a sentence at Chino state prison. He also had a "whole lot" of other criminal cases. (25-1RT 1038-1039.) Juror R.W. had visited him at

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[35] With regard to her brother's criminal case, Juror J.R. misunderstood the trial court's simple question, during voir dire, of whether the prospective jurors had any family or close friends who had been the victim of a *violent* crime. (24RT 876-877.)

prison.[36] (5CT 1361.) Juror A.I.'s brother was in prison for a robbery conviction and her husband had been convicted of drug possession. (6CT 1694-1695; 25-1RT 1221-1224.) "[A] prosecutor may reasonably surmise that a close relative's adversary contact with the criminal justice system might make a prospective juror unsympathetic to the prosecution." (*People v. Farnam, supra*, 28 Cal.4th at p. 138.) Thus, the record does not support the inference the prosecutor excused jurors on prohibited discriminatory grounds. (*People v. Carasi, supra*, 44 Cal.4th at p. 1292.)

The employment of Juror A.I. and Juror J.R. also supported the trial court's finding that no prima facie case of discrimination had been established. Although the prosecutor did not articulate it as reason for exercising his peremptory challenges, he did generally refer to the questionnaires and oral answers of the jurors as justifying his challenges. A prosecutor may challenge a potential juror whose occupation, in the prosecutor's opinion, would not render him or her the best type of juror to sit on the case for which a jury is being selected. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924-925.) Juror J.R. worked for the Department of Public Social Services (DPSS) as a typist. (4CT 1089; 24RT 927.) Juror A.I.'s college courses in psychology and sociology (6CT 1693), her associate's degree in child development (25-1RT 1223), and her employment as a teaching assistant at a children's center (6CT 1693) could have been race-neutral reasons for excusal. (See, e.g., *People v. Lewis*, *supra*, 43 Cal.4th at pp. 476-477 [juror had extensive educational background in psychology and sociology and occupational background evaluating prisoners]; *People v. Turner* (1994) 8 Cal.4th 137, 168-172

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[36] However, Juror R.W. inexplicably wrote in her questionnaire, "N/A" in response to the questions related to having family members who had been arrested or charged with a crime. (5CT 1361-1362.)

[juror had trained with Department of Social Services], abrogated on other grounds by *People v. Griffin*, *supra*, 33 Cal.4th at p. 555, fn. 5; *People v. Landry* (1996) 49 Cal.App.4th 785, 790-791 [race-neutral factors included job in youth services agency and background in psychiatry or psychology]; *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315 [proper to challenge those working in "social services or caregiving fields"]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394 [proper to challenge kindergarten teacher based on belief teachers are generally liberal and less prosecution-oriented].)

Appellant's attempt to cast the prosecutor's motives in a sinister light should be rejected. (AOB 70-71.) This is based on the prosecutor's statement, "I think it is creating a problem for me to justify when there is no prima face showing," which was in response to the trial court's offer that the prosecutor could, but was not required to, indicate his reasons for the peremptory challenges. (25-1RT 1236-1237.) However, no improper motive should be construed from the prosecutor's act of declining to justify his reasons. "Indeed, as the prosecutor indicated below, he was not obliged to disclose such reasons, and the trial court was not required to evaluate them, unless and until a prima face case was made." (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1292.)

Finally, the jury as seated at trial included six African-Americans. (26RT 1619-1620.) This was "an indication of the prosecution's good faith in exercising his peremptories." (See, e.g., *People v. Huggins* (2006) 38 Cal.4th 175, 236; accord *People v. Lewis*, *supra*, 43 Cal.4th at p. 480; *People v. Avila*, *supra*, 38 Cal.4th at p. 556; *People v. Guerra* (2006) 37 Cal.4th 1067, 1108.)

Accordingly, because appellant failed to meet his burden of establishing a prima facie case of group discrimination, the trial court correctly denied his *Wheeler* motion.

Even assuming error occurred, remand rather than reversal is appropriate. In *People v. Johnson* (2006) 38 Cal.4th 1096, this Court held that a limited remand for prosecutor to show nondiscriminatory use of peremptory challenges was appropriate when the defendant has stated a prima facie case of improper use of peremptory challenges, notwithstanding the lapse of time and elevation of trial judge to appellate court justice. (*Id.* at pp. 1099-1102.) "In this case, the court and parties have the jury questionnaires and a verbatim transcript of the jury selection proceeding to help refresh their recollection. The prosecutor may have notes he took during the jury selection process." (*Id.* at p. 1102.)

Although appellant recognizes *this* Court's decision in *Johnson*, he urges that he should get an outright reversal because so much time has passed. (AOB 73.) This argument should be rejected. Outright reversal would deprive the prosecution of the opportunity to demonstrate there was no impropriety in the exercise of the peremptory challenges, and the trial court of the opportunity to rule on it. Although some time has passed since the trial was held in 1998, there still may be independent recollection, notes, or other evidence that the prosecution and the trial court could utilize at a hearing on remand. Thus, even assuming error occurred, remand is the appropriate remedy in this case.

II. APPELLANT HAS FORFEITED THE CLAIM THAT A DEFECT IN THE INDICTMENT REQUIRES REVERSAL; IN ANY EVENT, APPELLANT HAD ADEQUATE NOTICE OF THE CHARGE IN COUNT 2

Appellant contends that his conviction for attempted willful, deliberate, and premeditated murder in count 2 must be reversed, and the conviction reduced to attempted murder, because the indictment failed to allege premeditation and deliberation in violation of his state statutory rights, thereby depriving him of his due process rights under the California Constitution and his rights under the Fifth, Sixth, and Fourteenth

Amendments of the federal Constitution. (AOB 76-81.) This claim is forfeited. Even assuming otherwise, it lacks merit.

A. This Claim Is Forfeited

Appellant argues that his due process right to notice was violated because count 2 of the indictment alleged only unpremediated attempted murder, not the crime of willful, deliberate and premeditated attempted murder of which he was convicted. (AOB 78-81.) When a defendant challenges the adequacy of notice in the charging document, he must object at trial or the issue will be deemed forfeited. (See *People v. Holt* (1997) 15 Cal.4th 619, 672 ["failure to demur on the ground that a charging allegation is not sufficiently definite waives any objection to the sufficiency of the information"].) Here, appellant has forfeited the instant claim on appeal because he failed to raise it below by demurrer. (*Id.*; see also § 1004, subd. (2).) Appellant only moved to set aside the indictment pursuant to section 995, subdivision (a)(1)(B), on the ground that he was indicted without reasonable or probable cause (1CT 182-239) and moved to dismiss the indictment based on the failure to inform the grand jury of exculpatory evidence (1CT 259-286). Appellant knew the prosecution's theory was that he committed a premeditated attempted murder as to count 2 of the indictment, which provided that appellant was accused of committing attempted murder "in violation of Penal Code Section 664/187(A), a felony," "willfully, unlawfully and with malice aforethought." (1CT 146.) Accordingly, the instant claim is forfeited.

Moreover, appellant was entitled to and received a copy of the transcript of the grand jury proceedings. (See 1CT 260-265; § 938.1.) Appellant also received the instructions given to the grand jury. (See 1CT 168 [order granting the defense disclosure of written charges read to the grand jury]; 15RT 386.) The grand jury was instructed that appellant was accused in count 2 of attempted murder with the allegation that the crime

was willful, deliberate, and premeditated. (1CT 126-128.) The grand jury was given the standard instructions defining attempted willful, deliberate, and premeditated murder and was tasked to determine whether the allegation was true or not true. (1CT 127.) Appellant thus had knowledge of the prosecution's theory from the grand jury transcript and written instructions. As such, he would have demurred if he believed the wording of the indictment was uncertain.

Furthermore, appellant did not object to the verdict form for the attempted murder in count 2, which required the jury to decide whether the allegation that the attempted murder willful, deliberate, and premeditated and was true. (8CT 2158; see 33RT 2710-2712.) Appellant did not move to reopen the case or request a continuance in light of the proposed verdict form or the prosecutor's closing argument in which the prosecutor argued that appellant committed the attempted murder in count 2 with deliberation and premeditation. (33RT 2845-2846; see *People v. Memro* (1995) 11 Cal.4th 786, 869 ["If the prosecution's felony-murder theory surprised defendant, he could have moved to reopen the taking of evidence so as to present a defense against it"]; *People v. Seaton* (2001) 26 Cal.4th 598, 641 ["defendant never objected to the lack of notice at trial, nor did her seek a continuance to prepare sufficiently to respond to the theory"].) Appellant also did not object when the verdict on count 2 was announced. (34RT 2990-2992.) Finally, appellant did not object later at sentencing when the trial court stated that the indictment had charged appellant in count 2 with the crime of attempted willful, deliberate, and premeditated murder and imposed and stayed the enhanced sentence of life for the attempted murder in accordance with section 664, subdivision (a), and the finding of premeditation. (52RT 6028-6029, 6043; 17CT 4569, 4571, 4573.)

Under these circumstances, appellant may not now complain of a violation of the statutory pleading requirement or his constitutional right to

notice. (*People v. Bright* (1996) 12 Cal.4th 652, 671 ["where defendant failed to object at trial to the adequacy of the notice he received, any such objection is deemed waived"], overruled on another ground in *People v. Seel* (2004) 34 Cal.4th 535, 550, fn.6.)

As for appellant's argument that the alleged pleading deficiency amounted to a statutory pleading violation that precluded his life sentence on count 2 (AOB 76-78), in *People v. Arias* (2010) 182 Cal.App.4th 1009, the Second Appellate District relied on this Court's decision in *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*) in finding that the defendant did not forfeit the claim that the prosecution failed to comply with the pleading requirement set forth in section 664, subdivision (a). (*People v. Arias, supra*, 182 Cal.App.4th at p. 1017, citing *People v. Mancebo, supra*, 27 Cal.4th at p. 749, fn.7.) In *Mancebo*, this Court found that forfeiture did not apply to the defendant's claim that his sentence was imposed in violation of One Strike law's express pleading requirements because the claim alleged an error that resulted in an unauthorized sentence. (*Mancebo, supra*, 27 Cal.4th at p. 749, fn. 7.)

Mancebo's forfeiture analysis should not be applied to the instant case. In *Mancebo*, the information failed to allege, or make any reference to, the multiple victim circumstance, in the face of section 667.61, subdivision (f), which mandated that the circumstances must be "pled and proved." (*Mancebo, supra*, 27 Cal.4th at p. 740.)

Here, on the other hand, the face of the indictment stated in relevant part,

> For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charge set forth in the aforestated Count hereof, the said [appellant], is accused . . . by this Indictment, of the crime of Attempted Murder, in violation of Penal Code Section 664/187(A), a felony, committed prior to the finding of this Indictment, and as follows:

> On or about July 1, 1996, in the County of Los Angeles, the crime of Attempted Murder, in violation of Penal Code Section 664/187(A), a felony, was committed by [appellant], who did *willfully*, unlawfully and with malice aforethought attempt to murder Latasha Latasha W., a human being.

(1CT 146 [italics added; original bold and all caps omitted].)

The term "willfully" in the indictment gave appellant notice that he was potentially subject to the enhanced punishment provision for attempted murder under section 664, subdivision (a). If appellant was uncertain from the transcript of the grand jury proceedings (see 1CT 126-128), and the absence of the additional terms "deliberate and premeditated," or whether the indictment's use of the word "willfully" signaled the prosecution's intent to charge him with willful, deliberate and premeditated attempted murder as to count 2, this uncertainty was apparent from the face of the indictment, rendering it subject to demurrer. (*People v. Holt, supra*, 15 Cal.4th at p. 672.) Appellant's failure to demur forfeits the issue on appeal. (*People v. Bright, supra*, 12 Cal.4th at p. 671.)

Even assuming this claim has been preserved for appellate purposes, it lacks merit.

B. Appellant Had Notice That The Attempted Murder In Count 2 Included The Allegation That The Crime Was Willful, Deliberate, And Premeditated

Section 664, subdivision (a), prescribes life in prison with the possibility of parole for an attempted murder that is willful, deliberate, and premeditated. The statute provides that the enhanced life term may not be imposed "unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact." (§ 664, subd. (a).)

Here, the indictment contained the allegation that the attempted murder in count 2 was willful, but did not include the additional terms of

"deliberate and premeditated." (1CT 146.) However, this technical inadequacy in the indictment does not warrant reversal. Section 952 provides that an accusatory pleading is sufficient if it alleges a crime "in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved," and using "any words sufficient to give the accused notice of the offense of which he is accused." Here, use of one of three descriptive terms, willful, was enough to alert appellant to the crime being charged in count 2.

Additionally, appellant had notice of the charge of attempted premeditated murder. This Court has recognized that "[b]oth the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them." (*People v. Seaton, supra*, 26 Cal.4th at p. 640.) "The 'preeminent' due process principle is that one accused of a crime must be 'informed of the nature and cause of the accusation.' [Citation.] Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial. [Citation]." (*Id*: at pp. 640-641.) "[N]otice is provided not only by the accusatory pleading but also by the transcript of the preliminary hearing or the grand jury proceeding." (*People v. Carrington* (2009) 47 Cal.4th 145, 183.)

Section 960 provides, "No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits." "'Even where an indictment or information is so defective that a demurrer thereto should have been sustained, still, if upon the trial the crime sought to be charged is

fully proved, the case falls within the saving grace of . . . section 960 of the Penal Code, relating to errors in matters of pleading, and the error is not prejudicial.'" (*People v. Schoeller* (1950) 96 Cal.App.2d 61, 64, citing *People v. Beesley* (1931) 119 Cal.App. 82, 87.)

Here, appellant's substantial rights were not prejudiced. Appellant was entitled to and received a copy of the transcript of the grand jury proceedings. (See 1CT 260-265; § 938.1.) Appellant also received the instructions given to the grand jury. (See 1CT 168 [order granting the defense disclosure of written charges read to the grand jury]; 15RT 386.) The grand jury was instructed that appellant was accused in count 2 of attempted murder with the allegation that the crime was willful, deliberate, and premeditated. (1CT 126-128.) The grand jury was given the standard instructions defining attempted willful, deliberate, and premeditated murder and was tasked to determine whether the allegation was true or not true. (1CT 127.)

Thus, from the outset, appellant knew that the prosecution was seeking an attempted willful, deliberate, and premeditated murder conviction in count 2. For that reason, defense counsel saw no need to object to a technical inadequacy in the indictment because appellant had notice of the charges against him. (See 1CT 182-239; compare *Mancebo*, *supra*, 27 Cal.4th at p. 745 [nothing in the charging documents or pleadings informed the defendant "that if he was convicted of the underlying charged offenses, the court would consider his multiple convictions as a basis for One Strike sentencing under section 667.61, subdivision (a) *and* use the circumstance of gun use to secure additional enhancements under section 12022.5(a)."]; *People v. Arias, supra*, 182 Cal.App.4th at p. 1019 ["neither the information nor any pleading gave defendant notice that he was potentially subject to the enhanced punishment provision for attempted murder under section 664, subdivision (a)."].)

The evidence at the grand jury proceeding regarding premeditation – namely that appellant, before fleeing the crime scene, shot Coleman and then shot Latasha W., striking her left ear – was identical to the evidence at trial. (1CT 34-35; 27RT 1739-1740, 1810-1812.) The prosecutor argued that appellant committed the attempted murder in count 2 with deliberation and premeditation. (33RT 2845-2846.) The defense never objected to or challenged the evidence and argument of deliberation and premeditation; rather, it focused on misidentification and intent to kill. (33RT 2885-2887.)

Appellant thus had actual notice of the prosecution's premeditation theory, and it appears that even if the two additional words relating to deliberation and premeditation were added in the indictment, nothing about the trial would have been any different. Instead, striking appellant's enhanced sentence now would simply be a windfall. Appellant's claim must therefore fail under section 960. (See *People v. Peyton* (2009) 176 Cal.App.4th 642, 659 [variance in pleadings not regarded as material unless it is of such substantive character as to mislead accused in preparing defense], quoting *People v. Williams* (1945) 27 Cal.2d 220, 226; *People v. Paul* (1978) 78 Cal.App.3d 32, 43-44 [error in failing to allege overt act not prejudicial where defendant was fully aware of all overt acts, had benefit of discovery, and was aware of evidence against him]; *People v. McCurdy* (1958) 165 Cal.App.2d 592, 598 [claim of defective pleading rejected under section 960 where defendant failed to show that his defense was in any way prejudiced by form of information]; *People v. Thompson* (1948) 85 Cal.App.2d 261, 263-264 [no prejudice under section 960 where defendant was informed of nature of charges through grand jury transcript and any defect in form of pleading, which reflected words of statute, could not have misled him].)

Similarly, appellant's claim must fail because appellant impliedly consented to the jury's consideration of the issue by not objecting to the

verdict form, which required the jury to make a finding whether the attempted murders were willful, deliberate, and premeditated. In *People v. Toro* (1989) 47 Cal.3d 966, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3, this Court held that a defendant who was charged with attempted murder impliedly consented to the jury's consideration of the lesser related offense of battery with serious bodily injury and waived any objection to that charge based on lack of notice by not objecting to the proposed instructions or verdict forms or in any other way claiming unfair surprise. (*Id.* at pp. 977-798.) *Toro* held that "[t]here is no difference in principle between adding a new offense at trial by amending the information and adding the same charge by verdict forms and jury instructions." (*Id.* at p. 976, fn. omitted.) Here, appellant's lack of objection to the verdict form constituted an implied consent to the jury's consideration of the issue whether the attempted murder was willful, deliberate, and premeditated.

This case is also distinguishable from *Mancebo*. In *Mancebo*, the defendant was charged under the One Strike law with having used a firearm while kidnapping and committing sex offenses against two separate victims. The information alleged two circumstances under the One Strike law, including firearm use. It did not allege a multiple-victim circumstance. After a jury trial, the defendant was found guilty as charged. At sentencing, the trial court substituted a multiple-victim circumstance for each of the firearm use circumstances to support the imposition of One Strike sentences. It then used the firearm use findings to impose two additional 10-year terms under section 12022.5, subdivision (a). (*Mancebo*, *supra*, 27 Cal.4th at p. 740.) This Court held that "[s]entencing error occurred because defendant was given notice that gun use would be used as one of the two pleaded and minimally required circumstances in support of the One Strike terms, whereafter, at sentencing, the trial court used the

unpled circumstances of multiple victims to support the One Strike terms, and further imposed two 10-year section 12022.5(a) enhancements that could not otherwise have been imposed but for the purported substitution." (*Id.* at p. 753.)

The instant case is different from *Mancebo* because there was no improper "substitution" here at the time of sentencing. Rather, the jury was instructed on the principles of willful, deliberate, premeditated attempted murder and made the required factual findings that the attempted murder was willful, deliberate, and premeditated, upon which his sentence was based. Nor was appellant in this case affirmatively misled to believe that the prosecution would not seek to prove that the attempted murder was willful, deliberate, and premeditated. Rather, as discussed above, appellant had explicit notice of the prosecution's contention that the attempted murder was premeditated by virtue of the indictment's use of the word "willfully" and by the transcript of the grand jury proceedings. It now appears that appellant simply wishes to capitalize on what was at most a technical deficiency that had no impact on the fairness of the proceedings. (Compare *Mancebo*, *supra*, 27 Cal.4th at p. 749 [finding that prosecution's failure to include multiple-victim circumstance allegation in information was discretionary charging decision rather than mistake or excusable neglect].) Granting appellant relief under such circumstances "would encourage defendants and defense counsel to stand mute in the face of the most insignificant clerical errors in hopes of obtaining reversal on appeal." (*People v. Carr* (1988) 204 Cal.App.3d 774, 780, fn. 7.)

Accordingly, appellant's contention should be rejected.

III. THE FAILURE TO GIVE CALJIC NO. 8.67 WAS HARMLESS BEYOND A REASONABLE DOUBT

Appellant contends that his conviction for attempted willful, deliberate, and premeditated murder in count 2 must be reversed, and the

conviction reduced to attempted murder, because the trial court failed to instruct the jury on the essential elements of willfulness, deliberation, and premeditation in violation of his rights to jury trial and due process under the Sixth and Fourteenth Amendments of the federal Constitution. (AOB 82-90.) Respondent disagrees.

A. Relevant Facts

The trial court instructed the jury, in accordance with CALJIC No. 8.66, on the crime of attempted murder. (8CT 2131; 33RT 2803-2806.) However, the jury was not given CALJIC No. 8.67,[37] which instructs that in

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[37] CALJIC No. 8.67 provides:

It is also alleged in [Count[s] ___ of] the [indictment] that the crime attempted was willful, deliberate, and premeditated murder. If you find the defendant guilty of attempt to commit murder, you must determine whether this allegation is true or not true.

"Willful" means intentional. "Deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. "Premeditated" means considered beforehand.

If you find that the attempt to commit murder was preceded and accompanied by a clear, deliberate intent to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is attempt to commit willful, deliberate, and premeditated murder.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation.

To constitute willful, deliberate, and premeditated attempted murder, the would-be slayer must weigh and consider the question of

(continued...)

the event the jury finds a defendant guilty of attempted murder, it then must determine separately whether the premeditation allegation was true. (See 8CT 2086-2152; 33RT 2755-2830.) The defense did not request CALJIC No. 8.67, nor comment on its absence at trial. (See 32RT 2687-2714; 33RT 2717-2721, 2738-2752 [conference on jury instructions].)

In connection with the murder of Michael Haney in count 7, however, the jury was instructed with CALJIC No. 8.20, which defined the elements of deliberate and premeditated murder consistent with CALJIC No. 8.67. (8CT 2118-2119; 33RT 2789-2792.) The Comment to CALJIC No. 8.67 (5th ed. 1988) page 364, states that the instruction was "adapted from CALJIC No. 8.20 and meets the case law definition of willful, deliberate, and premeditated murder."

In the verdict form for count 2, the jury indicated that it had found to be true the allegations that the attempted murder was willful, deliberate, and premeditated and that appellant personally used a firearm in the commission of the offense. (8CT 2158.)

(...continued)

> killing and the reasons for and against such a choice and, having in mind the consequences, decides to kill and makes a direct but ineffectual act to kill another human being.
>
> The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.
>
> You will include a special finding on that question in your verdict, using a form that will be supplied for that purpose.

(CALJIC No. 8.67 (5th ed. 1988); see also *People v. Bright, supra*, 12 Cal.4th at p. 658 [quoting, in part, the fifth edition of CALJIC No. 8.67].) CALJIC No. 8.67 was given to the grand jury in this case. (1CT 127-128.)

B. The Error Was Harmless Beyond A Reasonable Doubt

"'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248; accord *People v. Young, supra*, 34 Cal.4th at p. 1202.) The failure to give an instruction on an essential issue may be cured if the essential material is covered by other correct instructions properly given. (See *People v. Burgener* (1986) 41 Cal.3d 505, 538, cited with approval by *People v. Musselwhite, supra*, 17 Cal.4th at p. 1248.) The argument of counsel is also considered. (*People v. Young, supra*, 34 Cal.4th at p. 1202.) An instructional error is harmless if it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" (*People v. Nguyen* (2000) 24 Cal.4th 756, 765; *People v. Cox* (2000) 23 Cal.4th 665, 676-677.)

The instructional error in the instant case was harmless beyond a reasonable doubt. The jury was given CALJIC No. 8.20, which defined the elements of willfulness, deliberation, and premeditation. (33RT 2790-2792.) By virtue of the instruction on the firearm allegation, the jury was also instructed that: (1) the prosecution had the burden of proving the truth of an allegation; (2) if the jury had a reasonable doubt that it is true, it must find it to be not true; and (3) it should include a special finding on that question in the verdict, using a form supplied for that purpose. (8CT 2143; 33RT 2819-2820.) The jury was further instructed that it should "[c]onsider the instructions as a whole and each in light of all the others." (CALJIC No. 1.10; 8CT 2089; 33RT 2759.)

Finally, the verdict form for count 2 required the jury to determine whether the allegation that the attempted murder was willful, deliberate, and premeditated was true. (8CT 2158; see *People v. Majors* (1998) 18

Cal.4th 385, 410 [oral instructional error was harmless in part where verdict form itself reflected a necessary finding by the jury].)

In light of all of the trial court's instructions, counsel's closing arguments, and the jury's finding of premeditation in the verdict form, any instructional error was harmless beyond a reasonable doubt. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 419-420 [any error in failing to instruct on intent to kill for felony-murder special circumstance harmless because jury found intent to kill]; *People v. Wader* (1993) 5 Cal.4th 610, 642 [same].) Accordingly, appellant's instructional error claim must be rejected.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE ATTEMPTED ROBBERY AND MURDER CONVICTIONS AND SPECIAL CIRCUMSTANCE FINDING (RESPONSE TO AOB ARGS. IV, V, & XI)

Appellant contends the evidence was insufficient to sustain the finding, in connection with the attempted robbery of Charles Foster in count 9, that the gunman harbored the specific intent to steal in violation of appellant's right to due process under the state and federal constitutions. (AOB 91-99.) In two separate but related claims, appellant contends his conviction for first degree murder of Charles Foster in count 8 under a felony-murder theory of guilt must be reversed because there is insufficient evidence to sustain a finding of an attempted robbery (AOB 100-101) and that there was insufficient evidence supporting the true finding on the special circumstance allegation that the murder of Charles Foster was committed during the commission of an attempted robbery (AOB 166-169). Respondent disagrees.

A. Relevant Law

In reviewing a challenge of the sufficiency of the evidence, this Court:

> review[s] the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.]

> The record must disclose substantial evidence to support the verdict - i.e., evidence that is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, [this Court] review[s] the evidence in the light most favorable to the prosecution and presume[s] in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] [This Court] resolve[s] neither credibility issues nor evidentiary conflicts; [this Court] look[s] for substantial evidence. [Citation.]

(*People v. Zamudio* (2008) 43 Cal.4th 327, 357 [internal citations and quotation marks omitted].)

Reversal for lack of substantial evidence is warranted only if "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; accord *People v. Zamudio, supra*, 43 Cal.4th at p. 357.) "'Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt. [Citations.]'" (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) Although "mere speculation cannot support a conviction" (*People v. Marshall* (1997) 15 Cal.4th 1, 34), this Court "'must accept logical inferences that the jury might have drawn from the circumstantial evidence'" (*People v. Zamudio, supra*, 43 Cal.4th at p. 357). "'[I]t is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt.'" (*Id.* at pp. 357-358.) "Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*Id.* at p. 358.) The test used to determine the sufficiency of the

evidence for a special circumstance allegation is the same as that for the substantive crime. (*People v. Mayfield* (1996) 14 Cal.4th 668, 790-791.)

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) "An attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission." (*People v. Medina* (2007) 41 Cal.4th 685, 694; accord *People v. Lindberg* (2008) 45 Cal.4th 1, 24.) "The crime of attempted robbery requires neither the commission of an element of robbery nor the completion of a theft or assault." (*People v. Lindberg, supra*, 45 Cal.4th at p. 28.) "The jury may infer a defendant's specific intent to commit a crime from all of the facts and circumstances shown by the evidence." (*Id.* at p. 27.)

B. Substantial Evidence Supports The Finding That Appellant Had The Specific Intent To Steal

The evidence showed that at 12:30 a.m., appellant first approached Foster's companions Johnson and McGill, who were waiting in a parked car as Foster used an ATM. Appellant had concealed his face with a red bandana and carried a handgun. (30RT 2241-2245, 2248-2250, 2261-2262, 2266-2268, 2270.) Appellant pointed a large black gun through the passenger window of the car (30RT 2248-2249, 2251, 2268-2270, 2279, 2287, 2301-2304) and pointed the gun at McGill's face (30RT 2304). Johnson drove away. Appellant then approached Foster, who was standing about 12 feet away using the ATM. (30RT 2270-2271, 2251-2252, 2299-2302, 2345-2346; 31RT 2438-2439.) Foster had been taking an inordinate amount of time at the ATM, about 10 minutes. Foster's wallet was out and he had been fumbling around with some items, possibly looking for his ATM card. (30RT 2246-2248, 2268-2269, 2284, 2291-2292.) Since a senior citizen discount card was found in the ATM after Foster was shot,

and there was cocaine in his system, a reasonable trier of fact could draw the inference that Foster was looking for his ATM card when appellant approached him. Appellant shot Foster in the head two times. (30RT 2270-2271, 2346; 31RT 2424.) Johnson and McGill alerted patrol officers who, by the time they responded to the ATM, discovered Foster dead, lying face-down in front of the ATM. (30RT 2251-2253, 2256-2258, 2272, 2307-2309, 2311-2312.) A senior citizen discount card was in the receipt slot of the ATM, which sustained damage from a bullet strike. (30RT 2316-2317, 2331-2332.) An empty deposit envelope was clenched in Foster's right hand beneath his body. (30RT 2330-2331.)

In closing argument, the prosecutor described what was depicted in the ATM surveillance video recording that was played for the jury at trial (30RT 2280, 2285-2286):

> [Appellant] approaches with the young ladies seated in the car. You can see him approach and stand next to the window. [¶] He then turns his attention toward the victim, Mr. Foster. You can see him [appellant] looking in the direction making sure that the girls actually leave, that they drive away. [¶] You see him [appellant] looking toward the exit and you can see the car is now gone. [¶] [Appellant] then holds the gun and begins pointing it at Mr. Foster, holding his right arm extended. [¶] You can see Mr. Foster cowering away. [¶] You can tell from his body language and you look at this photograph and you see what you see. [¶] I mean it is real obvious what is going on here. [¶] . . .[¶] . . .[¶] . . .[¶] Mr. Foster is terrified. He knows what is going to happen to him. He doesn't have anything to give this man or have anything of value to hand him. [¶] All he has in his hands is a piece of paper. [¶] You can see him. He is clutching it. You can see him holding it up.

(33RT 2869-2870.)

Appellant nevertheless asserts that there was no evidence of intent to steal because "[t]here was no evidence that the gunman requested money or property from Foster. Nor is there evidence that the gunman either reached for the piece of paper that Foster was holding or reached for Foster's

wallet." (AOB 95.) Even assuming there was no specific demand for money, the totality of the circumstances supports the jury's determination that appellant had the specific intent to steal. Appellant concealed his face and carried a handgun to an ATM, which is specifically designed to facilitate the withdrawal of money from a high volume of customers. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1129-1130 [finding substantial evidence of attempted robbery and burglary "[e]ven though the attackers were not specific in demanding money or drugs"], citing *People v. Jackson* (1963) 222 Cal.App.2d 296, 298 [attempted robbery conviction upheld where evidence established that defendant entered store, pointed a gun at store operator, and said only, "This is it."], and *People v. Gilbert* (1963) 214 Cal.App.2d 566, 567-568 [where two armed men appeared in market shortly after closing time and simultaneously displayed their weapons, one pointing at proprietor near cash drawer and the other herding remaining occupants to rear room, lack of phrase such as "this is a stickup" or "hand over your money" does not bar the reasonable inference that a forceful taking of property was intended].) Thus, the fact that appellant did not make a verbal demand for money does not bar the reasonable inference that a forceful taking of property was intended. (*People v. Lindberg, supra*, 45 Cal.4th at p. 29 [victim's frightened demeanor before he was knocked to the ground and his suggestion to take his house key before defendant first asked him whether victim had a car strongly suggested appellant initially approached victim "in a manner that communicated nonverbally this intent to steal."].)

Appellant points to the trial court's comment during the conference on jury instructions that the witnesses did not testify that the gunman reached for Foster's wallet. (AOB 99; 32RT 2690.) Appellant attempts to characterize the trial court's comment as expressing the view that the evidence does not support the specific intent to steal element of attempted

robbery. This mischaracterizes the trial court's comment; the court never said there was insufficient evidence of intent to steal. At best, the trial court only suggested an alternate theory of the crime based upon "evidence of some sort of an argument taking place, verbal argument" between the gunman and Foster. (32RT 2690.) In any event, it is the evidence presented at trial, not the comments of the trial court, that determines whether substantial evidence supports a verdict. (Cf. *People v. Romero* (2008) 44 Cal.4th 386, 404 ["it is the evidence presented at trial, not the comments of the trial court, that determines whether a defendant is entitled to an instruction on a lesser included offense."].)

In addition, appellant's failure to reach for the deposit envelope or Foster's wallet was not required for attempted robbery. "The crime of attempted robbery requires neither the commission of an element of robbery nor the completion of a theft or assault." (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 28.) The jury could reasonably infer that when he concealed his face, carried a handgun to an ATM, and pointed the weapon at a customer using the machine, appellant committed a direct act toward the commission of a robbery. (*Id.* at pp. 24, 27; see also *People v. Dillon* (1983) 34 Cal.3d 441, 452, 456 [defendant's conduct went beyond mere preparation and constituted attempted robbery of marijuana where defendants went to area carrying weapons, disguised themselves, divided into groups, and waited for opportunity, but did not encroach in field itself]; *People v. Bonner* (2000) 80 Cal.App.4th 759, 764, fn. 3 [sufficient proof of overt act where defendant made detailed preparations for a robbery, went armed to the scene, put mask over face, hid in waiting, and gave up plan when spotted by store employee]; *People v. Vizcarra* (1980) 110 Cal.App.3d 858, 862 [sufficient proof of overt act where would-be robber approached liquor store armed with firearm and hid on pathway leading to store before walking away after observation by customer].)

Finally, the fact that appellant fled the scene without actually taking anything from Foster does not defeat the inference that he intended to rob Foster. In *People v. Zapien* (1993) 4 Cal.4th 929, this Court upheld a robbery-murder special circumstance finding where the defendant shot and killed the victim after refusing her offer of money and jewelry. The defendant argued that his sole purpose was to kill the victim, not to rob her, because he took no property. (*Id.* at p. 984.) This Court disagreed, reasoning that an "equally plausible interpretation of the victim's statement is that the victim was responding to defendant's demand for money and jewelry," and that the defendant fled because he knew that the victim's daughter had called the police. (*Ibid.*)

Likewise here, the jury could have reasonably inferred that appellant changed his mind about taking Foster's property, after the murder, because Johnson and McGill would have summoned the police, or because other ATM customers might arrive on the scene.[38] (*People v. Zapien, supra*, 4 Cal.4th at p. 984; see also *People v. Rodrigues, supra*, 8 Cal.4th at p. 1130 ["The circumstance additionally supported the inference that the attackers would have succeeded in that plan had it not been for the telephone ringing."].) Alternatively, the jury could have reasonably found that appellant shot Foster in response to either Foster's refusal to give him money, as evidenced from the possible argument between the two men (see 30RT 2382-2383; 31RT 2439-2441, 2451), or when appellant discovered that Foster had no money to steal. (Cf. *People v. Carroll* (1970) 1 Cal.3d 581, 584-585 [finding that robbery and shooting of victim constituted one

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[38] Although not presented to the guilt phase jury, there was evidence presented at the penalty phase retrial that appellant killed Foster because he was angry with Foster. Dr. Osborne testified that appellant stated that he had killed Foster after losing his temper because Foster had no money. (49RT 5723-5729.)

indivisible transaction where defendant became angry after discovering no money in the victim's wallet and having the rest room door slammed in his face and subsequently pursued the victim into a bar and shot him].)

Although appellant speculates that the shooting of Foster was "perhaps motivated by gang rivalry" (AOB 96), there is no evidence to support that theory. (Cf. *People v. Wilson* (2008) 43 Cal.4th 1, 18 ["No evidence suggested that defendant here had an independent intent apart from committing the robbery."].) Absent an intent to commit robbery, there would have been no reason for appellant to be at the ATM, armed and disguised, at 12:30 in the morning. In any event, "[t]he existence of this possibility, however, does not render the evidence insufficient." (*People v. Wallace* (2008) 44 Cal.4th 1032, 1078; accord *People v. Hinton* (2006) 37 Cal.4th 839, 885.)

Accordingly, substantial evidence supports the attempted robbery conviction in count 9, the first degree felony-murder conviction in count 8, and the true finding on the special circumstance allegation that the murder was committed during an attempted robbery.

V. THE TRIAL COURT HAD NO SUA SPONTE DUTY TO INSTRUCT ON SECOND DEGREE MURDER; EVEN ASSUMING OTHERWISE, ANY ERROR WAS HARMLESS (RESPONSE TO AOB ARG. VI)

Appellant contends the trial court prejudicially erred in failing to sua sponte instruct the jury in connection with count 9 on express malice second degree murder, a lesser included offense of first degree murder. (AOB 102-113.) Respondent disagrees.

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

Second degree murder is an unpremeditated killing committed with malice aforethought. (*People v. Seaton*, *supra*, 26 Cal.4th at p. 672.) Second degree murder is a lesser included offense of first degree malice-

based murder. (*People v. Blair* (2005) 36 Cal.4th 686, 745.) This Court expressly has declined to resolve the question of whether second degree murder is a lesser included offense of first degree felony murder. (*People v. Romero, supra*, 44 Cal.4th at p. 402; *People v. Valdez* (2004) 32 Cal.4th 73, 114-115, fn. 17.) However, this Court has observed that "[f]irst degree premeditated murder . . . is not a lesser necessarily included offense of felony murder. Although their elements differ, first degree premeditated murder and felony murder are different theories of the 'single statutory offense of murder. [Citation.]' [Citation.]" (*People v. Valdez, supra*, 32 Cal.4th at p. 115, fn.17.) Furthermore, it is well settled that malice is not an element of felony murder. (See *People v. Dillon, supra*, 34 Cal.3d at p. 475; *People v. Cavitt* (2004) 33 Cal.4th 187, 197-198.) By parity of reasoning, if first degree murder based on malice is not a lesser offense included within first degree felony murder, then the malice based offense of second degree murder similarly is not a lesser offense included within felony murder. The trial court thus had no sua sponte duty to instruct on second degree murder because it is not a lesser included offense of first degree felony murder.

In addition, the trial court had no sua sponte duty to give second degree murder instructions because the prosecutor proceeded solely on a felony murder theory. The prosecutor requested instructions for a "straight felony murder" on the Foster murder. (32RT 2688.) The trial court asked defense counsel, "if they want to go felony murder only, what do you want to do on that? [¶] First or second [degree] on that one?" Defense counsel replied, "No." (32RT 2690.) When the trial court clarified "Felony murder only," defense counsel stated, "Yes." (32RT 2691.) The trial court rejected defense counsel's subsequent request for instructions on manslaughter because "[t]here is no evidence of what is needed to negate the malice aspects even if we did go on express malice. There is nothing to reduce this

to a manslaughter. No way, shape or form." (32RT 2691-2692.) The jury was instructed that the only theory of the Foster killing was felony murder. (33RT 2754, 2787; 8CT 2116.) Thus, the verdict form for the Foster killing only gave the jury the option of "not guilty or guilty of murder in the first degree" based on felony murder. (33RT 2754, 2788, 2794; 8CT 2116.)

Because the prosecution proceeded solely on a felony-murder theory, it was not required to prove malice. (*People v. Valdez, supra*, 32 Cal.4th at p. 116, fn. 19.) The prosecution only needed to prove that Foster was killed during the course of an attempted robbery. "Under these circumstances, a trial court 'is justified in withdrawing' the question of degree 'from the jury' and instructing it that the defendant is either not guilty, or is guilty of first degree murder. [Citation.] The trial court also need not instruct the jury on offenses other than first degree felony murder or on the differences between the degrees of murder. [Citations.]" (*People v. Mendoza* (2000) 23 Cal.4th 896, 908-909.)

Accordingly, the trial court had no sua sponte duty to instruct on second degree murder.

B. There Was No Substantial Evidence To Support A Second Degree Murder Instruction

When the statutory elements of the charged offense cannot be committed without necessarily committing another lesser offense, the other offense is a necessarily included lesser offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, fn. 5; *People v. Birks* (1998) 19 Cal.4th 108, 117-118.) A trial court must instruct sua sponte on all lesser included offenses whenever the evidence raises a question whether all the elements of the charged offense have been established and there is evidence of a lesser offense which is "'substantial enough to merit consideration' by the jury." (*People v. Breverman, supra*, 19 Cal.4th at p. 162.) In this context, "substantial evidence" means "'evidence from which a jury composed of

reasonable [persons] could . . . conclude[ ]' that the lesser offense, but not the greater, was committed." (*Ibid.*; accord, *People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

Assuming, arguendo, that second degree murder is a lesser included offense of first degree felony-murder, the trial court did not err in failing to instruct the jury sua sponte on second degree murder because "'[s]peculation is an insufficient basis upon which to require the giving of an instruction on a lesser included offense.'" (*People v. Valdez, supra*, 32 Cal.4th at p. 116, quoting *People v. Sakarias* (2000) 22 Cal.4th 596, 620, and *People v. Wilson* (1992) 3 Cal.4th 926, 941.) In *Valdez*, this Court found an absence of substantial evidence that the killing was other than robbery murder, and on appeal, found speculative "evidence that there may have been a struggle in the house and that the victim was shot at close range." (*People v. Valdez, supra*, 32 Cal.4th at p. 116.)

Similarly here, appellant offers nothing more than speculation in support of argument that sua sponte instruction on second degree murder was warranted. Appellant asserts, "the evidence shows that the gunman approached Foster, engaged him dialogue, and then shot him" (AOB 108) perhaps motivated by gang rivalry. (AOB 96.) Appellant appears to rely on Manzanares's testimony that she had heard Foster and the gunman either talking or arguing before Foster was shot and killed. (See 30RT 2382-2383; 31RT 2439-2441, 2451.) This evidence does not support appellant's speculation, raised for the first time on appeal, that the dialogue before the shooting supported an inference that Foster's killing was gang motivated. (AOB 96.) Rather, evidence that the appellant and Foster argued before Foster was shot supported the logical inference that appellant verbally communicated a demand for money. At the guilt phase closing argument, defense counsel did not dispute that Foster's death occurred during an attempted robbery, and argued instead that appellant had been

misidentified. (See 33RT 2923-2940.) "As a result, here, as in *People v. Valdez, supra*, 32 Cal.4th at page 117, [a]ll the evidence points to robbery as the motive for the killing[ ], and a jury finding of second degree murder . . . would have been based on pure speculation." (*People v. Romero, supra*, 44 Cal.4th at pp. 403-404 [internal quotation marks omitted]; see also *People v. Wilson, supra*, 3 Cal.4th at pp. 931, 940-941 [only "bare speculation, not substantial evidence" to support theory that murder did not coincide with taking of victim's money where victim was discovered with most of his cash missing and was shot twice in the head while he was sleeping].)

"Because there was no substantial evidence supporting an instruction on second degree murder, the high court's decision in *Beck* [*v. Alabama* (1980) 447 U.S. 625, 634, [100 S.Ct. 2382, 65 L.Ed.2d 392]] is not implicated." (*People v. Valdez, supra*, 32 Cal.4th at p. 118; see also pp. 118-119 & fn. 23.)

C. The Absence Of An Instruction On Second Degree Murder Was Harmless

Even assuming the trial court should have instructed on second degree murder, any error "is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085-1086; accord *People v. Horning* (2004) 34 Cal.4th 871, 906.) As discussed above, the prosecution proceeded on a felony-murder theory only; thus, the jury was instructed that in order to convict appellant of murder, it had to find the killing occurred during the attempted commission of robbery. (See 8CT 2116, 2127; 33RT 2787, 2798-2799.) Further, the jury was instructed that "[t]he specific intent to commit robbery or burglary and the commission or attempted commission of such crime must be proved beyond a reasonable doubt." (8CT 2120; 33RT 2793.)

By finding Foster's killing occurred during the attempted commission of a robbery, the jury necessarily determined it constituted murder of the first degree. (8CT 2164; see, e.g., *People v. Horning, supra*, 34 Cal.4th at pp. 904-906 [finding harmless failure to instruct on second degree murder as a lesser included offense because the jury found defendant killed in the commission of robbery and burglary, which meant it necessarily found the killing was first degree felony murder]; *People v. Lancaster* (2007) 41 Cal.4th 50, 85 [finding alleged error in failing to instruct on second degree murder was harmless because the jury found true kidnapping-murder special circumstance and necessarily rejected the factual theory on which argument for second degree murder instruction rested]; *People v. Prince* (2007) 40 Cal.4th 1179, 1268 [rejecting argument that trial court erred in failing to instruct on second degree murder in part because the jury found true the special circumstance allegation that defendant killed in the course of a rape or attempted rape].)

Because the jury's true finding on the special circumstance allegation demonstrates that it would have returned the same first degree murder verdict based on felony murder, any error was harmless.

VI. THE TRIAL COURT PROPERLY ADMITTED LATASHA W.'S STATEMENTS TO OFFICER MARTINEZ AS SPONTANEOUS UTTERANCES (RESPONSE TO AOB ARG. VII)

Appellant contends the trial court prejudicially erred by admitting Officer Martin Martinez's testimony that recounted Latasha W.'s out-of-court statements, which included double hearsay as to what Coleman told her, in violation of his state and federal constitutional rights to due process warranting reversal of his convictions in counts 1 through 6. (AOB 114-130.) Respondent disagrees.

A. Relevant Facts

Officer Martinez testified about Latasha W.'s statements to him after he observed her "running in the middle of the street yelling frantically" and crying. (26RT 1609-1610.) Officer Martinez described Latasha W. as being "[f]rightened[,] . . . [h]ysterical[,] . . . [e]motional[,] . . . [s]peaking very rapidly." (26RT 1610.) She also had traces of blood on the left side of her face. (26RT 1610.) Officer Martinez was permitted to testify regarding Latasha W.'s statements as to her observations immediately preceding and during the burglary of Coleman's residence, Coleman's murder, the sexual assault, and the attempted murder. (26RT 1611-1618, 1622-1637.)

The trial court overruled four hearsay objections to Officer Martinez's testimony. (26RT 1611, 1613, 1623, 1627.) Outside the presence of the jury, the trial court stated that it overruled the objections to Latasha W.'s statements because "the People laid a foundation that they were excited utterances given the description given by the officer, the shrieking, hysterical female running into the traffic." (26RT 1619.)

On cross-examination, Officer Martinez testified that he spent approximately two hours with Latasha W.. (26RT 1638.) At sidebar conference, defense counsel argued that a two-hour interview did not constitute a spontaneous statement, and asked the trial court to strike the officer's testimony and to admonish the jury. (26RT 1638-1639.) The trial court correctly stated the applicable legal standard: "[t]he issue of whether it is a spontaneous statement is whether prompted by questions or volunteered is apt to have been concocted or, on the other hand, are they statements prompted by an exciting event that the declarant is still feeling the stress of." The trial court found that the prosecutor had elicited testimony that described statements Latasha W. made while she was

"hysterical." (26RT 1639.) The trial court rejected defense counsel's objection, stating:

> Given the facts that she described, seeing the person shot at close range twice and being raped and the victim of a sex crime, that is not like a fender bender taking place. [¶] I would assume that the stress would be great and the period of reflection, although it might be longer than one would like, would not deprive the statements of their admissible character. [¶] If it turns out that [Latasha W.] had totally calmed down and some great gap had occurred, your objection may be well taken. [¶] I don't understand that to be the fact. [¶] The fact that [Officer Martinez] says that in total he was there for two hours, he may have been with her for two days, but that does not mean that the statements were made at the tail end of that contact. [¶] So your objection is noted.

(26RT 1640.)

On further cross-examination, Officer Martinez testified that when he first observed Latasha W. in the middle of the street, "[s]he said numerous things, many of which [he] did not actually grasp as to what she was saying other than she was yelling and very frantic." (26RT 1641.) At that time, Latasha W. was "screaming and carrying on" and Officer Martinez "couldn't understand what she was saying." (26RT 1644.) Latasha W. told Officer Martinez that "[her] friend was just killed" when the officer got her out of the street and to an adjacent gas station, where they spent approximately 30 minutes. (26RT 1641.) Latasha W. was more coherent at the gas station. (26RT 1644.) Officer Martinez then spent "[j]ust a couple of minutes" with Latasha W. in an effort to find the location of where the crimes had occurred. Thereafter, they remained in a patrol car. (26RT 1642.) Latasha W. was also able to convey to paramedics her general information. (26RT 1643-1644.) Officer Martinez agreed that "over the course of the two hours [Latasha W.] was able to calmly relate descriptions and things that went on in the house and g[ave] [him] what it is that [he had] testified to[.]" (26RT 1644.) Eventually, Officer Martinez

was able to establish "a chronological time and sequence of events" to Latasha W.'s statements. (26RT 1645.)

At a second sidebar conference, defense counsel again argued that Latasha W.'s statements were not spontaneous because "she was calmly, ultimately able to give [Officer Martinez] chronology and a sequence of events." Although defense counsel believed that what Latasha W. said while hailing the police and "five or 10 minutes later" was admissible, her statements "over the two hour period" were not. (26RT 1645, 1647.) The trial court overruled the objection, noting that "[t]he fact that one is able to relate an event in chronological order and at some point during those two hours you elicited that she was able to calmly relate events does not deprive the statement of the character necessary." (26RT 1646-1647.)

On redirect examination, Officer Martinez testified that at the end of the interview, Latasha W. was still in shock, crying, and shaking from the ordeal. (26RT 1659-1660.)

B. The Trial Court Properly Admitted The Challenged Testimony

Appellant contends the trial court abused its discretion in admitting Officer Martinez's testimony because Latasha W.'s statements "were not spontaneous, but instead were made in response to police questioning and upon thoughtful reflection." (AOB 121.) Specifically, appellant asserts that the circumstances show "that Latasha W. had the opportunity to reflect between the time of the incident and the time she made the statements." (AOB 123.) Appellant's claim must be rejected.

Hearsay is an out-of-court statement offered at trial to prove the truth of the matter asserted in the statement. (Evid. Code, § 1200, subd. (a).) Such evidence is inadmissible unless it falls within an exception to the hearsay rule. (Evid. Code, § 1200, subd. (b).)

Evidence Code section 1240 provides:

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

"Spontaneous declarations are admissible for their truth, not merely for the state of mind of the declarant." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1266; see also *People v. Garcia* (1986) 178 Cal.App.3d 814, 823 ["Statements admitted under [the spontaneous declaration exception to the hearsay rule] are generally admissible and are not limited to a specific purpose"].)

Statements are admissible under the spontaneous utterance exception if: (1) there is an occurrence startling enough to produce nervous excitement which renders the utterance spontaneous and unreflecting; (2) the utterance occurred before there was time to contrive and misrepresent, "i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance;" and (3) the utterance relates to the circumstance of the occurrence preceding it. (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

"When the statements in question were made and whether they were delivered directly or in response to a question are important factors to be considered on the issue of spontaneity. But . . ., [n]either lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.*" (*People v. Brown* (2003) 31 Cal.4th 518, 541, italics in original, internal quotation marks and citations omitted.) "Under the same reasoning, the fact that the declarant has become calm enough to speak coherently also is not inconsistent with spontaneity. To conclude otherwise would render the exception virtually

nugatory: practically the only 'statements' able to qualify would be sounds devoid of meaning." (*People v. Poggi, supra*, 45 Cal.3d at p. 319, citations omitted.)

"The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is ... the mental state of the speaker. The nature of the utterance-how long it was made after the startling incident and whether the speaker blurted it out, for example-may be important, but solely as an indicator of the mental state of the declarant. . . . [U]ltimately each fact pattern must be considered on its own merits, and the trial court is vested with reasonable discretion in the matter." (*People v. Brown, supra*, 31 Cal.4th at p. 541, citations and internal quotation marks omitted.)

If supported by substantial evidence, the reviewing court must uphold the trial court's determination of preliminary facts. (*Ibid.*, citing *People v. Phillips* (2000) 22 Cal.4th 226, 236.) "A trial court's decision to admit evidence under the spontaneous utterance exception to the hearsay rule will not be reversed unless the court abused its discretion." (*People v. Roldan* (2005) 35 Cal.4th 646, 714.)

Here, the trial court did not abuse its discretion in admitting Officer Martinez's testimony. Witnessing Coleman's violent murder and experiencing her own attempted murder and sexual assault was certainly an "occurrence startling enough to produce . . . nervous excitement and render the utterance spontaneous and unreflecting." (*People v. Poggi, supra*, 45 Cal.3d at p. 318.) When Officer Martinez first encountered Latasha W. after she ran from Coleman's residence, she was crying, "[f]rightened[,] . . . [h]ysterical[,] . . . [e]motional[,] . . . [s]peaking very rapidly." (26RT 1610.) At the end of the interview, which lasted about two hours, Latasha W. was still in shock, shaking, and crying. (26RT 1659-1660.) These facts amply supported the trial court's conclusion that Latasha W. was under the

stress of excitement and while her reflective powers were still in abeyance when she made statements to Officer Martinez. (*People v. Brown, supra*, 31 Cal.4th at p. 541.)

"[T]he fact that the statements were delivered in response to questioning does not render them nonspontaneous." (*People v. Poggi, supra*, 45 Cal.3d at pp. 319-320.) The record shows that when he first encountered her, Officer Martinez asked Latasha W. what had happened to her and what caused her to run down the street. (26RT 1611.) After she responded that her friend was just killed, Officer Martinez asked for further information, to which she stated that she was at a friend's house in the nearby area. (26RT 1611.) The record does not support appellant's assertion that Officer Martinez "spent approximately 30 minutes interviewing Latasha W. adjacent to the service station" and "interviewed her as she remained seated in the [police] vehicle." (AOB 121.) The record merely shows that Latasha W. and Officer Martinez spent approximately 30 minutes at the gas station and spent two hours in the patrol car. (26RT 1641-1642.) Although Officer Martinez testified that he was asking Latasha W. questions (26RT 1649), the record does not disclose the full extent to which Latasha W.'s statements were made in response to questioning. In any event, there is no suggestion in the record that questions were anything but routine and non-suggestive inquiries. (See *People v. Ledesma* (2006) 39 Cal.4th 641, 708-709 [statements admissible where made approximately 15 minutes after event, declarant appeared nervous, but in response to officer's questions, was able to describe perpetrators and provide license plate number]; *People v. Poggi, supra*, 45 Cal.3d at pp. 319-320 [statements admissible where made approximately 30 minutes after event, in response to questioning, and after declarant had been calmed sufficiently to speak coherently; questions were mostly simple and non-suggestive, such as "'What happened?'" and "'What happened

then?'"]; *People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1590 [statements admissible where made approximately 30 minutes after event and after declarant made her way to police station; record furnished no reason to believe officer's questions, to which declarant responded, were anything but routine, non-suggestive inquiries].)

Finally, the two-hour period of time in which Latasha W. made the statements did not deprive her statement of spontaneity. (See, e.g., *People v. Brown, supra*, 31 Cal.4th at 541 [statements made two-and-one-half hours after the crime held spontaneous]; *People v. Raley* (1992) 2 Cal.4th 870, 893-894 [statement made 18 hours after event held spontaneous]; *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1713 [statement made one to two days after event held spontaneous].)

Even assuming the trial court erred in admitting the evidence, it was not prejudicial. The erroneous admission of a hearsay statement is prejudicial and requires reversal when it is reasonably probable that the jury would have reached a result more favorable to the defendant in the absence of the error. (*People v. Harris* (2005) 37 Cal.4th 310, 336, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) Here, Latasha W. testified before the jury and related everything she experienced during the crimes, which was consistent with her statements to the officer on the night of the crimes. She was subject to cross-examination, and the jury had the opportunity to assess her credibility during her testimony.

Appellant contends that under either the federal harmless beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705, or the state standard of prejudice under Watson, admitting Officer Martinez's testimony was prejudicial because it recounted "a killing and vicious sexual and physical attack" and "also materially enhanced Latasha W.'s credibility, which was the central issue in the case on counts 1 through 6 because Latasha W. was the only

eyewitness to the events." (AOB 130.) The evidence may have bolstered Latasha W.'s credibility, but there was no significant challenge to her credibility that would have had any exculpatory effect. The evidence of appellant's guilt of the charges related to Coleman and Latasha W. was strong. Latasha W. consistently identified appellant as the person who murdered Coleman and who attempted to murder and raped her. (See 27RT 1714, 1750-1755, 1816, 1818, 1829-1831, 1839, 1878, 1901-1902; 29RT 2020-2021.) Latasha W.'s version of events was corroborated by DNA evidence. (30RT 2192-2193.) Moreover, Latasha W.'s trial testimony was consistent with Officer Martinez's testimony. (26RT 1623-1633, 1644-1645, 1648, 1652-1655; 27RT 1879-1887, 1901-1902.) Thus, even if portions of Officer Martinez's testimony constituted inadmissible hearsay, any error in admitting it was harmless because it was cumulative to other admissible evidence. (*People v. Cage* (2007) 40 Cal.4th 965, 991-993 [admitting statements to police officer harmless beyond a reasonable doubt because of the overwhelming evidence of guilt and because the statements were largely cumulative of other evidence at trial].)

Accordingly, under any standard, any error in admitting Officer Martinez's testimony was harmless. (*People v. Harris, supra*, 37 Cal.4th at p. 336.)

VII. THE TRIAL COURT PROPERLY ADMITTED LATASHA W.'S TESTIMONY ON REDIRECT EXAMINATION (RESPONSE TO AOB ARG. VIII)

Appellant contends that at the guilt phase, the trial court erred in permitting the prosecutor to elicit testimony about the origin of Latasha W.'s friendship with Coleman, which included evidence that she was the victim of a prior molestation and rape, because it was irrelevant and constituted highly prejudicial victim-impact evidence, thereby requiring reversal of the convictions in counts 1 through 6. (AOB 131-136.) Only

the claim of relevance has been preserved for appellate purposes. Even assuming otherwise, this contention lacks merit.

A. Relevant Facts

On direct examination, Latasha W. testified that she had known Coleman for about one and one-half years. Latasha W. stated that she and Coleman were friends and explained that she had contacted him on the night of the crimes because she had been arguing with her alcoholic mother. (27RT 1700-1702.) With regard to appellant's conduct during the burglary, Latasha W. testified that appellant asked her where Coleman's money and "dope" were located. Latasha W. responded that she did not know where Coleman put his dope but he put money into a hole he made in his mattress. (27RT 1716.)

On cross-examination, defense counsel questioned Latasha W. about Coleman's habits, including "the fact that he sold drugs." (27RT 1765-1766.) Latasha W. testified that Coleman sold drugs, but she had never seen drugs in his house. (27RT 1766.) Defense counsel asked further questions about the presence of drugs in Coleman's house and whether Latasha W. and Coleman discussed drugs the night of the crimes. (27RT 1825-1826.)

Defense counsel also questioned Latasha W. about Coleman's gang affiliation and nickname on cross-examination. Latasha W. stated that Coleman used to be in a gang and that he knew people affiliated in gangs. Defense counsel then asked with what gang Coleman was affiliated. Latasha W. testified that it was the Black Stone gang, a "Blood" gang. (27RT 1784.) Latasha W. also testified that she had been to appellant's house approximately 25 times and that she and her sister had spent the night there before. (27RT 1760-1761.)

On redirect examination, the prosecutor asked Latasha W. about the nature of her relationship with Coleman. Latasha W. testified that Coleman

was more of a best friend rather than a boyfriend. When the prosecutor asked why, defense counsel objected to the question as irrelevant, which the trial court overruled. (27RT 1835-1836.) The prosecutor pointed out that the jury heard that Coleman was a drug dealer and that he was a member of the Black P-Stone gang. Defense counsel interrupted with the objection "[a]ssumes facts not in evidence," which the trial court overruled. The prosecutor then asked, "Can you explain to these folks what it was about [Coleman] that you found appealing to cause him to be a close friend?" Defense counsel objected to the question as irrelevant and the trial court again overruled the objection. (27RT 1836.) Latasha W. testified that "[w]hat he did in that part of his life had nothing to do with me. [¶] . . .[¶] He had helped me out in a different situation. [¶] April of that same year I was molested by somebody. [¶] I was raped by somebody else." (27RT 1836-1837.) Defense counsel generally objected, but the trial court made no ruling. Latasha W. then continued to testify that the person who had molested her frequently came to her house. Latasha W. developed a close friendship with Coleman because he had told the person never to see Latasha W. again. By doing so, in Latasha W.'s mind, Coleman "probably saved her life." (27RT 1837.) The prosecutor then asked, "So in spite of whatever people might think of [Coleman], there was a side to him that you saw that was kind?" Latasha W. testified, "Yes." (27RT 1837.) In response to the prosecutor's question concerning the circumstances related to spending the night at appellant's house, Latasha W. testified that she and her sister were at Coleman's house one night, with Coleman's brother and mother making appearances later in the morning. (27RT 1837-1838.)

B. This Claim Is Partly Forfeited

Defense counsel's objection to the testimony of the molestation on the grounds of relevance and the assumption of facts not in evidence did not preserve for appeal appellant's current contention that the testimony was

improper victim impact evidence. (See *People v. Guerra, supra*, 37 Cal.4th at p. 1117 [counsel's objection to testimony of victim's love of Guatemalan people and the Spanish language on the sole ground of relevance did not preserve contention that it was improper character evidence].) Accordingly, the instant claim is forfeited on this ground.

Furthermore, appellant did not lodge any objection to the prosecutor's question regarding Latasha W. spending the night at Coleman's house. (27RT 1837-1838.) Accordingly, the claim related to that question and answer is also forfeited. (Evid. Code, § 353.)

In any event, appellant's claim is without merit.

C. The Trial Properly Admitted Latasha W.'s Testimony On Redirect Examination

Appellant contends that Latasha W.'s challenged testimony, which was elicited on redirect examination, constituted impermissible victim impact evidence and that its admission violated his due process right to a fundamentally fair trial.[39] (AOB 132-133.) He also argues that the testimony was irrelevant because the prior molestation and rape had no tendency to prove or disprove any disputed fact. (AOB 134.) The trial court did not abuse its discretion by admitting Latasha W.'s redirect testimony nor did the admission of the evidence violate due process.

On appeal, a trial court's admission of evidence as relevant is reviewed for abuse of discretion. (*People v. Wallace, supra,* 44Cal.4th at p.

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[39] "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913; accord *People v. Partida* (2005) 37 Cal.4th 428, 439.) "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]" (*People v. Partida, supra*, 37 Cal.4th at p. 439.)

1057.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "A court need not exclude otherwise admissible evidence merely because it might generate sympathy for a crime victim." (*People v. Guerra, supra*, 37 Cal.4th at p. 1118.)

Here, defense counsel attacked Coleman's reputation during her cross-examination of Latasha W. by eliciting testimony that Coleman was both a drug dealer and a former gang member and by implication attacked Latasha W.'s reputation and credibility because of her close association with him. (27RT 1765-1766, 1784, 1825-1826.) It was only then, on redirect examination, that the prosecutor presented evidence to rebut any inference that Coleman was still a gang member, or that Latasha W. was involved in Coleman's drug dealing or gang activities. He did so by asking Latasha W. about their friendship, which included the challenged evidence of Latasha W.'s prior molestation.

The trial court did not abuse its discretion in allowing the prosecutor to ask that question and Latasha W. to answer it. "'It is well settled that when a witness is questioned on cross-examination as to matters relevant to the subject of the direct examination but not elicited on that examination, he [or she] may be examined on redirect as to such new matter.'" (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 921, citation omitted.) "'The extent of the redirect examination of a witness is largely within the discretion of the trial court.'" (*Ibid.*, citation omitted.) The redirect examination was relevant because it permitted Latasha W. "to state facts and circumstances that tend[ed] to correct or repel any wrong impressions or inferences that might arise on the matters drawn out in cross-examination." (*People v. Tucker* (1956) 142 Cal.App.2d 549, 553, citing *People v. Corey* (1908) 8 Cal.App. 720, 725; see also *People v. Talle* (1952) 111 Cal.App.2d 650, 672 [evidence of decedent's character is admissible in murder prosecution

only when it is in issue].) Accordingly, the trial court did not abuse its discretion by admitting Latasha W.'s redirect testimony nor did the admission of the evidence violate due process.

Even assuming the trial court erred in admitting the evidence, it was harmless under any standard of prejudice. Evidence of Latasha W.'s prior molestation paled in comparison to her testimony related to appellant's brutal sexual assault on her and witnessing appellant murder a paraplegic. (*People v. Wallace, supra*, 44 Cal.4th at p. 1058 [no prejudice from admitting evidence that victim had poor eyesight and mobility problems where jury already knew victim was a frail 83-year-old woman]; *People v. Gurule* (2002) 28 Cal.4th 557, 622-624 [evidence of victim's nonviolent character, description of his religious background, and that his mother hugged him the morning of his death was harmless].) The redirect testimony could not have influenced Latasha W.'s credibility as she unequivocally identified appellant as the perpetrator and DNA evidence supported her version of events. Moreover, Latasha W.'s brief testimony regarding spending the night at Coleman's house on a prior occasion can hardly be characterized as "heartwarming" (AOB 135) or likely to appeal to the jury's sympathy. (27RT 1837-1838.)

Finally, "[t]he jury was properly instructed not to be influenced by passion, sympathy, or prejudice and to conscientiously consider and weigh the evidence in applying the law and reaching the verdict. (CALJIC No. 1.00.)" (*People v. Doolin* (2009) 45 Cal.4th 390, 439; 33RT 2758.) Accordingly, any error in admitting the challenged testimony was harmless.

VIII. THE CHALLENGE TO THE DNA EVIDENCE IS FORFEITED; EVEN ASSUMING OTHERWISE, IT LACKS MERIT (RESPONSE TO AOB ARG. IX)

Appellant contends the admission of Dr. Robin Cotton's testimony about the substance of a report authored by a non-testifying analyst

deprived him of the Sixth Amendment right of confrontation. (AOB 137-152.) This claim is forfeited. Even assuming otherwise, it lacks merit.

A. This Claim Is Forfeited

Crawford v. Washington (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*) held that the Confrontation Clause bars the admission of testimonial out-of-court statements, unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Id.* at pp. 53-54, 59.) A claim that the introduction of evidence violated the defendant's right to confrontation must be timely asserted at trial or it is forfeited on appeal. (See, e.g., *People v. Lewis* (2006) 39 Cal.4th 970, 1028, fn.19; *People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn.14.)

Appellant acknowledges that he did not object to Cotton's testimony on Sixth Amendment grounds at trial. (AOB 138.) However, he argues that "[n]o objection was necessary, nor would it have been appropriate, because *Crawford* was not decided until several years after appellant's trial." (AOB 138.) This argument is unavailing because this Court has found that a confrontation claim under *Crawford* was forfeited in a trial of capital case that occurred in 1996. (See *People v. D'Arcy* (2010) 48 Cal.4th 257, 280, 288-290 [finding forfeited defendant's claim that admission of tape-recorded statements to police in a trial that began on November 18, 1996, violated his federal constitutional rights under *Crawford*].)

Similarly, the United States Supreme Court specifically addressed the defendant's obligation to preserve review of Confrontation Clause issues, and held, "[t]he defendant *always* has the burden of raising his Confrontation Clause objection[.]" (*Melendez-Diaz v. Massachusetts* (2009) __ U.S. __, 129 S.Ct. 2527, 2541 [174 L.Ed.2d 314] (*Melendez-Diaz*) [italics in original].) *Melendez-Diaz* further held that "[t]he right to confrontation may, of course, be waived, including by failure to object to

the offending evidence[.]" (*Id.* at p. 2534, fn.3.) "It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (*if the defendant objects*) be introduced live." (*Id.* at p. 2532, fn.1 [first italics in original, second italics added].)

Accordingly, appellant forfeited the instant claim by failing to object at his trial in 1998. (*People v. D'Arcy, supra*, 48 Cal.4th at pp. 289-290, citing *People v. Geier* (2007) 41 Cal.4th 555, 609-611 (*Geier*) [the defendant's failure to object forfeited constitutional claims; constitutional claims were not of such magnitude that an exception to the forfeiture rule was warranted].) In any event, appellant's claim lacks merit.

B. Relevant Facts

The prosecution provided blood samples of appellant and Latasha W. along with five vaginal swab samples from the rape kit to Cellmark Diagnostics in Germantown, Maryland for DNA analysis. (29RT 2032-2033, 2035-2039, 2041, 2145, 2147.) Cellmark assigned the analysis to Glen Hall, who generated a report. (30RT 2196, 2218.)

Dr. Robin Cotton was the director at Cellmark Diagnostics. (29RT 2148-2149.) At the request of the defense, Dr. Robin Cotton testified in a hearing held outside the presence of the jury in order to lay foundation on the manner in which DNA testing was conducted on evidence in this case and also the statistical basis for any comparison. (29RT 2053-2113.) Dr. Cotton did not perform any of the testing on the samples from this case. (29RT 2079.) Dr. Cotton testified that she reviewed all of the documents in the case folder, including the analysis performed by Glen Hall, and reanalyzed the data on her own. (29RT 2066, 2079, 2082.) Cellmark Deputy Director Dr. Charlotte Word and staff member Jennifer Reynolds had reviewed Hall's analysis. (29RT 2079, 2082-2083.) Based on her review, Dr. Cotton testified that the testing done seemed to be appropriate,

"[e]verything look[ed] normal . . . [or not] out of the ordinary," and that "it [was] a very nice, clean set of data." (29RT 2066.) Defense counsel asked Dr. Cotton questions about a document titled, "STR Allele Gene Results," which included Word and Hall's observations of the test sample results. (29RT 2081-2084, 2093-2097.) Dr. Cotton had the original film of the sample that Hall had analyzed and that Word had reviewed. (29RT 2084, 2097.)

As to the statistical analysis used, Dr. Cotton testified at the hearing that it was "the same statistical analysis that [Cellmark] use[d] in all of [its] case work." She noted that "there [was] nothing unusual about the statistical data[base] that was presented. It [was] the same type of data that [Cellmark] present[ed] in all of [its] PCR case work." (29RT 2066-2067.) The statistical database used was generally accepted in the scientific community. (29RT 2067.) Dr. Cotton repeatedly testified that substructure information reflecting an individual's multiracial background (29RT 2068-2071) was irrelevant to the statistical database used in this case. Rather, it was a factor used in the calculation of the population frequency. (29RT 2076-2078, 2100-2102, 2105, 2109-2111.)

Defense counsel argued that because the database used did not account for the substructure, the DNA evidence should be excluded. (29RT 2114-2115.) The trial court denied the motion to exclude the evidence, finding that defense counsel's arguments went to the weight, and not the admissibility, of the evidence. The trial court was "convinced that the tests were performed in a correct scientific manner using correct scientific procedures and checks and that the results, therefore, [were] reliable." (29RT 2117-2118.)

Dr. Cotton subsequently testified at the guilty phase that the DNA profiles of appellant and the sperm fraction obtained from the vaginal swabs were compared. (30RT 2187.) Dr. Cotton found that appellant

could not be excluded as being the possible contributor to the sperm fraction of the vaginal swabs. (30RT 2187-2190.) She concluded that the frequency of the combination of allele types common in both profiles would occur in about one in 17 million people in the African-American population. (30RT 2192-2193.)

C. Relevant Law

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const. amend. VI.) The purpose of the Confrontation Clause is to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig* (1990) 497 U.S. 836, 845 [110 S.Ct. 3157, 111 L.Ed.2d 666].

In *Crawford*, the United States Supreme Court held the Confrontation Clause bars the admission of testimonial out-of-court statements, unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Crawford, supra*, 541 U.S. at pp. 53-54, 59.) Only "testimonial statements" implicate the Confrontation Clause and *Crawford's* holding. (*Davis v. Washington* (2006) 547 U.S. 813, 821 [126 S.Ct. 2266, 165 L.Ed.2d 224] ("*Davis*").) Although *Crawford* expressly refrained from defining the term "testimonial," it includes, at a minimum, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." (*Crawford, supra*, 541 U.S. at pp. 51-52, 68-69.) "Testimony" is defined as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." (*Id.* at p. 51.) "Affidavits" fall within the definition of "testimonial." (*Id.* at p. 52.)

In *Geier*, this Court analyzed *Crawford* and concluded that reports of DNA test results are not testimonial. (*Geier, supra*, 41 Cal.4th at p. 607.)

At trial, the director of the laboratory (coincidentally, Dr. Robin Cotton, the same expert in the instant case), which conducted the DNA testing, testified about the results of the testing, and further testified that the analyst who conducted the testing recorded her observations while the testing took place. (*Id.* at p. 596.) The director testified that she reviewed the testing conducted by the analyst and determined that it was according to protocol. (*Ibid.*) This Court explained that, although the DNA report was requested by a police agency, and it was reasonable to expect that the report might be used later at a criminal trial, the DNA results admitted into evidence were not testimonial because the analyst's "observations . . . constitute[d] a contemporaneous recordation of observable events rather than the documentation of past events." (*Id.* at p. 605.) "That is, she recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks." (*Id.* at 605-06.) This Court found nothing "accusatory" in the analyst's "simply following Cellmarks' protocol of noting carefully each step of the DNA analysis, recording what she did with each sample received[.]" (*Id.* at p. 607.) The circumstances under which the analyst generated her notes and report, not whether they would be available for use at trial, determined whether they were testimonial. This Court thus concluded the DNA report was not testimonial within the meaning of *Crawford* and *Davis*. (*Ibid.*)

In *Melendez-Diaz*, a four-vote plurality opinion, the United States Supreme Court held that a "certificate of analysis" constitutes a testimonial statement.[40] In that case, the defendant was charged with distributing and

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[40] The United States Supreme Court denied certiorari in Geier four days after it decided *Melendez-Diaz*. (*Geier v. California* (2009) 129 S.Ct. 2856, 174 L.Ed.2d 600.) "The denial of a writ of certiorari imports no

(continued...)

trafficking cocaine. Rather than offering live testimony to prove that the substance recovered by officers was cocaine, the prosecution submitted three "certificates of analysis" into evidence to show the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags and stated that the bags "[h]a[ve] been examined with the following results: The substance was found to contain: Cocaine." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2531.) The plurality held the certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" (*Id.* at 2532 [quoting *Davis*, 547 U.S. at p. 830].) Thus, the plurality held that "under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment." (*Ibid.*) The plurality reasoned that "[w]hether or not [the certificates] qualify as business or official records, the analysts' statements here--prepared specifically for use at petitioner's trial--were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment." (*Id.* at p. 2540.)

There are several cases currently pending before this Court on the issue of whether admitting the results of a forensic report by an expert who did not conduct the scientific testing violated the right to confrontation. (See, e.g., *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213) and *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2009, S176620 [both concluding that *Geier* remains viable]; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886 [observing that some of *Geier's*

(...continued)
expression of opinion upon the merits of the case." (*United States v. Carver* (1923) 260 U.S. 482, 490 [43 S.Ct. 181, 67 L.Ed. 361].)

rationale has been undermined by *Melendez-Diaz*]; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted Dec. 2, 2009, S177046 [concluding that *Geier* "appears" to have been disapproved by *Melendez-Diaz*]; *People v. Benitez* (2010) 182 Cal.App.4th 194, review granted and holding for lead case, May 12, 2010, S181137 [finding that *Melendez-Diaz* overruled *Geier*]; *People v. Bowman* (2010) 182 Cal.App.4th 1616, 1618, review granted and holding for lead case, June 9, 2010, S182172 [finding that *Melendez-Diaz* does not abrogate the holding in *Geier*].)

D. *Geier*, Not *Melendez-Diaz*, Applies To This Case

Melendez-Diaz is limited to the use of affidavits to prove the results of scientific laboratory tests. Therefore, under *Geier*, the trial court in this case properly admitted Dr. Cotton's testimony.

No live testimony was offered in *Melendez-Diaz* on the composition of the seized substance. Rather, the admitted evidence consisted only of affidavits. The plurality decision in *Melendez-Diaz* emphasized that the affidavits "contained only the bare-bones statement" that the seized substance contained cocaine, and the defendant "did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2537.) The decision did not reach the issue decided in *Geier*.

The plurality's holding in *Melendez-Diaz* was limited to the determination that the "Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits . . . ." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2542, fn. omitted.) Moreover, in his concurring opinion in *Melendez-Diaz*, Justice Thomas expressed his view that testimonial evidence consisted of extrajudicial statements "'only insofar as they are contained in formalized testimonial materials, such as affidavits,

depositions, prior testimony, or confessions.' [Citations]." (*Id.* at p. 2543 [Thomas, J., concurring].) Justice Thomas joined the plurality's opinion in *Melendez-Diaz* only because "the documents at issue in this case 'are quite plainly affidavits,'" and fell within "'the core class of testimonial statements' governed by the Confrontation Clause. [Citation.]" (*Ibid.*)

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (*Marks v. United States* (1977) 430 U.S. 188, 193 [97 S.Ct. 990, 51 L.Ed.2d 260].) As Justice Thomas supplied the necessary fifth and deciding vote in *Melendez-Diaz*, and concurred on grounds narrower than those put forth by the plurality, his position is controlling. (See, e.g., *Romano v. Oklahoma* (1994) 512 U.S. 1, 9 [114 S.Ct. 2004, 129 L.Ed.2d 1] [accepting Justice O'Connor's fifth and deciding vote in *Caldwell v. Mississippi* (1985) 472 U.S. 320 [105 S.Ct. 2633, 86 L.Ed.2d 231], and concurrence on grounds narrower than plurality as controlling].) Therefore, *Melendez-Diaz* did not overrule *Geier*, which is controlling in this case.

In *People v. Vargas* (2009) 178 Cal.App.4th 647 (*Vargas*) (rev. denied Feb. 3, 2010), Division Four of the Second Appellate District held that the reasoning of the majority in *Melendez-Diaz* was inconsistent with the primary rationales relied on by the court in *Geier* but that "because of the limited nature of Justice Thomas's concurrence, the precedential value of the majority's analysis on this point is unclear as applied to a laboratory analyst's report or similar forensic report. . . ." (*Vargas*, *supra*, 178 Cal.App.4th at p. 659.) But *Vargas* involved an entirely different factual

setting than this case, the facts of which are more similar to those in *Geier*.[41] Accordingly, *Vargas* is inapplicable in this case.

E. The Trial Court Properly Admitted Dr. Cotton's Testimony

The very live testimony found lacking in *Melendez-Diaz* was present in this case. Dr. Cotton, the director at Cellmark Diagnostics, testified as to the DNA test results. (29RT 2148-2149.) Based on her review of analyst Hall's work on the samples, Dr. Cotton concluded that appellant could not be excluded as being the possible contributor to the sperm fraction of the vaginal swabs (30RT 2187-2190) and that the frequency of the combination of allele types common in both profiles would occur in about one in 17 million people in the African-American population (30RT 2192-2193). Dr. Cotton concurred with the findings of both Word and Hall. (30RT 2196.) Dr. Cotton examined the x-ray film of the results from the loci tested and found it was "a very, very, good clean result" because the separation of the sperm DNA and non-sperm DNA was complete, with no overlap or mixture, and the technical quality of the film was very easy to read and interpret. (30RT 2195-2196.) Thus, the "accusatory" conclusion was

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[41] In *Vargas*, the defendant was convicted of rape. At trial, a nurse who conducted a sexual assault exam of the victim testified about the victim's statements during the exam that described the assault. The victim, a minor, did not testify. Analyzing the case under pre-*Melendez-Diaz* authority such as *Geier*, the court concluded that the victim's statements to the examining nurse were testimonial because they were made as part of the evidence gathering process for possible use at trial, instead of as part of a medical examination designed to diagnose an injury and render treatment. (*Vargas*, *supra*, 178 Cal.App.4th at pp. 660-662.) The Confrontation Clause violation was held harmless as to the defendant's conviction of forcible rape, but was not harmless as to, and therefore required reversal of, his conviction for rape by penetration with a foreign object, because the only evidence to support that charge came from the nurse's testimony. (*Id.* at pp. 662-664.)

reached and conveyed by a testifying expert, not through a non-testifying analyst's laboratory notes and report.

Moreover, the presence of a custodian of records, who also provided expert testimony, sharply distinguishes this case from *Melendez-Diaz*, which involved only "near contemporaneous" affidavits that were prepared almost one week after the tests were performed. (*Melendez-Diaz*, *supra*, 129 S. Ct. at p. 2535.) The testimony of a qualified custodian of records in the instant case provided appellant with the opportunity to test the authenticity of the DNA test results or inquire regarding the procedures followed and the conclusion arrived upon -- an opportunity unavailable to the defendant in *Melendez-Diaz*. (See *Geier*, *supra*, 41 Cal.4th at p. 605 [stating that "contemporaneous recordation of observable events" as opposed to "documentation of past events" is not testimonial for purposes of the Confrontation Clause]; *People v. Beeler* (1995) 9 Cal.4th 953, 978-981 [finding the trial court did not abuse its discretion by admitting expert testimony regarding the victim's autopsy report by a pathologist who did not conduct the autopsy]; *People v. Brown* (2001) 91 Cal.App.4th 623, 653-654 [trial court properly admitted expert testimony based on non-testifying analyst's tests as reliable business records].)

Nevertheless, for a separate reason, Dr. Cotton properly relied on the non-testifying analyst's report and x-ray film in offering her expert opinion. Expert testimony may "be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) "So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony." (*Ibid.*) "And because [California] Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion

and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." (*People v. Gardeley, supra*, 14 Cal.4th at p. 618.) Therefore, Dr. Cotton's testimony was properly presented to the jury.

F. Any Error Was Harmless

Even assuming Dr. Cotton's reliance on Hall's report violated appellant's Sixth Amendment rights as construed by *Crawford*, any error was harmless beyond a reasonable doubt. "Confrontation [C]lause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431, 89 L.Ed.2d 674].)" (*Geier, supra*, 41 Cal.4th at p. 608.) "The harmless error inquiry asks: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' (*Neder v. United States* (1999) 527 U.S. 1, 18 [119 S.Ct. 1827, 144 L.Ed.2d 35].)" (*Geier, supra*, 41 Cal.4th at p. 608.) Here, the answer is yes.

Latasha W.'s testimony, which provided graphic detail of the murder and sexual assault and her consistent, unwavering, and unequivocal identification of appellant as the perpetrator in a six-pack photographic array (27RT 1750-1753, 1816, 1818, 1829-1831, 1878, 1901-1902), in a live line-up (27RT 1751-1755), before the grand jury (29RT 2020-2021), and finally at trial was strong evidence that was sufficient by itself to convict appellant of Coleman's murder, Latasha W.'s attempted murder, and the sexual assault against her. (See *People v. Hart* (1999) 20 Cal.4th 546, 611-612 [victim's own testimony was sufficient by itself to support rape, sodomy, and oral copulation conviction but was also was also corroborated by physical evidence including seminal fluid, bruises and abrasions on her body, injury to her perineum]; *People v. Saddler* (1979) 24

Cal.3d 671, 684 [conclusion that instructing jury with CALJIC No. 2.62 harmless based largely on the strength of the one eyewitness's testimony].)

Accordingly, any alleged Confrontation Clause error was harmless beyond a reasonable doubt.

IX. DEFENSE COUNSEL'S REMARKS DURING OPENING STATEMENT WERE NEITHER DEFICIENT NOR PREJUDICIAL (RESPONSE TO AOB ARG. X)

Appellant contends he was denied his state and federal constitutional rights to effective assistance of counsel when defense counsel mistakenly conceded, during opening statement, appellant's presence at the scene of Coleman's murder and related offenses, thereby requiring reversal of his convictions in counts 1 through 6. (AOB 153-165.) Respondent disagrees.

A. Relevant Facts

In the written motion for severance (2CT 287-300), the defense summarized appellant's post-arrest videotaped statements to homicide detectives, including his admission that he went to Coleman's residence with two other suspects, stood outside while the others entered, and his knowledge that they intended to commit a robbery. Appellant, however, denied shooting Coleman or Latasha W. and denied sexually assaulting Latasha W.[42] (2CT 289.) Arguing that severance of the crimes alleged as to victim Haney should be severed from the crimes alleged as to victims Coleman and Foster, the defense argued there was a danger of a "weak" murder case, i.e. the Haney crimes, being joined with much stronger charges given that "in the Coleman case [appellant] has admitted being

[42] Deputy Public Defender Gregory Fisher filed the severance motion. (2CT 287.) Fisher was subsequently substituted with Deputy Alternate Public Defender Joy Wilensky, who represented appellant during pretrial hearings and during the guilt and penalty phases of trial. (2CT 318.) Wilensky adopted all motions filed by prior counsel (11RT 269) and renewed the motions filed by prior counsel (12RT 279).

inside the location during at least part of the criminal episode. To this extent, at least, his identification by Latasha W. cannot reasonably be disputed." (2CT 298.)

In the written response to the severance motion (2CT 347-350), the prosecutor only addressed appellant's post-arrest statements by stating: "the Coleman counts are supported by not only the victim's identification of [appellant] as the perpetrator of the crime, but DNA results on the semen samples collected from Latasha W. [that] conclusively identify [appellant], thus corroborating her testimony, and contradict his statement denying that he raped Latasha W." (2CT 348.)

At the hearing on the severance motion, appellant's post-arrest statements were not discussed. The trial court denied the motion. (19RT 556-568.)

During opening statement, defense counsel admitted appellant's presence at the Coleman crime scene. Defense counsel stated, "[Appellant] admitted to the police when he was questioned that he was present at the Coleman murder. [¶] He denied that he was the shooter. [¶] He denied raping Ms. Latasha W. [¶] But he did admit that he was present. [¶] At the end of this, you will get aider and abettor instructions --[.]" The prosecutor requested a sidebar conference in which he objected on the ground that the prosecution did not intend to introduce appellant's post-arrest statement into evidence in its case. Defense counsel replied that she was anticipating the introduction of the statement by the prosecution. In light of the prosecution's decision not to admit the statement, defense counsel requested to inform the jury that the prosecution was not going to offer appellant's statement. (26RT 1585-1586.) The trial court stated that "rather than assuming," defense counsel could have "tr[ied] to ask [the prosecutor] ahead of time." The trial court then suggested that defense counsel "move to another area" in her opening statement. (26RT 1587.)

Defense counsel's opening statement resumed without any further objection. (26RT 1588-1591.)

Trial proceeded with the testimony of two prosecution witnesses. Subsequently, outside the presence of the jury, defense counsel moved for mistrial based on her remarks in the opening statement. She stated that had she known that the prosecution did not intend to use any of appellant's statements, she would not have told the jury that he admitted his presence during the crime. (27RT 1662.) She further informed the trial court that she had reviewed the post-arrest statements and "felt that there was enough things in the statement with a good *Miranda* that the prosecution was going to use it." (27RT 1663.) The trial court noted that "[t]rials take many twists," and "[t]he fact that they are in possession of evidence of a statement does not necessarily mean they will use it." The trial court denied the motion for mistrial stating that the statements of counsel are not evidence "[s]o anything you say in your opening statement the jury is told they cannot consider it as evidence. [¶] We will see what the evidence shows in the case." (27RT 1663.) The trial court reasoned, "I don't see how it could be incompetence to comment on what you believe the evidence will prove in the case." The trial court made an affirmative finding that defense counsel was not incompetent. Even assuming counsel's actions fell below that of a competent advocate, the court found it did not deprive appellant of any meritorious defense to any of the charges in the case. (27RT 1664-1665.)

B. Appellant Has Failed To Demonstrate That Counsel's Performance Was Ineffective Or Prejudicial

A defendant claiming ineffective assistance of counsel in violation of his Sixth Amendment right to counsel must show not only that his counsel's performance fell below an objective standard of reasonableness

under prevailing professional norms but also that it is reasonably probable, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].) "'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656.)

In considering a claim of ineffective assistance of counsel, it is not necessary to determine "'whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*In re Fields* (1990) 51 Cal.3d 1063, 1079, quoting *Strickland v. Washington, supra*, 466 U.S. at p. 697.) Here, appellant has failed to demonstrate either inadequate performance or a reasonable probability that absent the alleged error, the result would have been different.

1. Defense Counsel's Performance Was Not Deficient

Evidence Code section 1220 permits a hearsay statement made by a party to be admitted against that party. (See *People v. Carpenter* (1999) 21 Cal.4th 1016, 1049 [discussing application of section].) As outlined in the written motion for severance, appellant's guilt in the Coleman and Latasha W. crimes was supported by strong evidence of guilt, including appellant's post-arrest statement to the police in which he admitted his presence with two other men, but denied shooting and sexually assaulting the victims. (2CT 289, 298.) Based on the prosecution's written response to the motion in which the prosecutor argued that the evidence contradicted appellant's post-arrest denial of rape (2CT 348), defense counsel reasonably anticipated that the prosecutor intended to use the incriminating post-arrest

statement at trial. The fact that the prosecution later decided not to introduce the evidence does not render defense counsel's remarks during opening statement ineffective.

Defense counsel had reviewed the circumstances of appellant's post-arrest statements to the police and believed that there was good reason for the prosecution not to exclude the statements given that the statements did not run afoul of *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]. (27RT 1663.) Appellant has failed to show that the post-arrest statements were inadmissible under *Miranda*. Thus, defense counsel's analysis of the legal issue should be presumed to be correct.

From the opening statement, it seems clear that counsel's defense strategy at that time was to acknowledge appellant's presence at the scene of the Coleman and Latasha W. crimes and to concede he was an aider and abettor, but to argue that he did not personally shoot Coleman and Latasha W. and rape Latasha W. (26RT 1585; see *People v. Williamson* (1977) 71 Cal.App.3d 206, 213 [trial court rejected defendant's proffer to admit his statement at the time of his arrest that placed him at the scene of the crime].) In light of the very strong evidence of appellant's guilt of the first degree murder of Coleman, the attempted premeditated murder of Latasha W., and the sexual assault of Latasha W., defense counsel's concession as to appellant's presence was based upon a reasonable tactical determination. (See *People v. Gurule*, *supra*, 28 Cal.4th at pp. 611-612 [concession that victim was killed during a robbery and defendant was guilty of first degree murder under the felony-murder rule was not unreasonable where counsel also argued defendant was not the actual killer and therefore a special circumstance could not be found true]; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1243 [during voir dire, counsel could reasonably have decided, in light of very strong evidence that defendant killed the victim, to concede that point and focus the jury's attention on the degree of murder

and the truth of the special circumstance allegations]; *People v. Samayoa* (1997) 15 Cal.4th 795, 846-847 [concession that defendant was guilty of first degree murder and burglary was not unreasonable where evidence was overwhelming and only viable defense was that defendant lacked intent to kill]; *People v. Freeman* (1994) 8 Cal.4th 450, 498 ["Recognizing the importance of maintaining credibility before the jury, we have repeatedly rejected claims that counsel was ineffective in conceding various degrees of guilt"]; *People v. Mayfield* (1993) 5 Cal.4th 142, 176-177 [it was not unreasonable for counsel to concede murder, where counsel was seeking convictions for lesser degrees of murder and People's evidence put defendant at grave risk of two first degree murder convictions]; *People v. McPeters* (1992) 2 Cal.4th 1148, 1186-1187 [counsel conceded defendant's presence at the crime scene, thus repudiating defendant's alibi testimony; under the circumstances counsel was not ineffective for attempting to make the best of a bad situation]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1060-1061 ["good trial tactics often demand complete candor with the jury, and . . . in light of the weight of the evidence incriminating a defendant, an attorney may be more realistic and effective by avoiding sweeping declarations of his or her client's innocence"].)

Accordingly, appellant has failed to demonstrate that defense counsel's remarks during opening statement that conceded his presence at the Coleman and Latasha W. crime scene constituted ineffective assistance of counsel.

2. Defense's Counsel's Remarks Were Not Prejudicial

Even assuming defense counsel's remarks constituted deficient performance, it is not reasonably probable appellant would have achieved a more favorable result. The trial court emphasized before opening statements that "[s]tatements made by lawyers during the trial are not

evidence" (26RT 1562), the purpose of opening statements was "to outline what [both sides] believe the evidence will tend to show and the witnesses that will testify and things of that nature and they will give you a preview of the case" (26RT 1565). The prosecutor began his opening statement by stating, "It is important that you understand what I say is not evidence. And what the defense attorney says is not evidence. And there is a reason for that." (26RT 1566.) At the close of the guilt phase, the trial court again instructed the jury that "statements made by the attorneys during the trial are not evidence" and to "base your decision on the facts and the law." (33RT 2756, 2759.) The jury is presumed to have followed these instructions.[43] (*People v. Boyette* (2002) 29 Cal.4th 381, 431; see also *People v. Redd* (2010) 48 Cal.4th 691, 727, fn. 16 [noting that jury was repeatedly informed that the statements of counsel was not evidence in rejecting claim that concession of guilt during opening statement constituted ineffective assistance of counsel]; cf. *People v. Caldwell* (1980) 102 Cal.App.3d 461, 473-474 [trial court properly refused to excuse for cause prospective jurors who were present when defense counsel inquired whether one juror had read anything about codefendant's videotaped confession and each juror affirmed that he or she could be entirely impartial].)

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[43] None of the exceptions to the rule that the jury is presumed to follow the law applies here. (See, e.g., *People v. Seiterle* (1963) 59 Cal.2d 703, 710 ["exceptional cases in which the improper subject matter is of such a character that its effect on the minds of the jurors cannot be removed by the court's admonitions"]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1374 [co-defendant's confession that implicates non-testifying defendant overcame presumption].) Appellant has provided nothing to rebut the presumption that the jury followed the court's instructions in this case. (See *People v. Alfaro* (2007) 41 Cal.4th 1277, 1326.)

Moreover, opening statements occurred on August 12, 1998 (8CT 2062), and the jury began deliberations on August 25, 1998 (8CT 2081), nearly two weeks later. Any error from the remarks during opening statement was minimized and dissipated by the nearly two-week gap between opening statement and the close of evidence. (See *United States v. Crawford* (E.D. Cal. 2009) 680 F.Supp.2d 1177, 1202 [any error from counsel's promise to call witness and then failing to produce him "was minimized and dissipated by the significant temporal gap of over six weeks between the opening statements and the close of evidence"], citing *People v. Stanley* (2006) 39 Cal.4th 913, 955 [counsel did not render ineffective assistance by failing to follow through on a representation made in his opening statement to present the testimony of a defense witness where the defense rested its guilt phase case nearly three weeks after delivering its opening statement, and given the strength of the evidence against defendant on all charged counts, counsel's failure to present the police witness testimony referred to in the opening statement did not prejudice the guilty verdicts.].) Thus, it is not reasonably probable appellant would have achieved a more favorable result if defense counsel had not made the challenged remarks during opening statement.

Accordingly, appellant's ineffective assistance of counsel claim must be rejected.

X. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY WITH CALJIC NO. 17.41.1 (RESPONSE TO AOB ARG. XII & XXIII)

Appellant contends the trial court's instructions to the guilt phase jury in the language of CALJIC No. 17.41.1 violated his rights to jury trial and due process under the Sixth and Fourteenth Amendments to the federal Constitution. (AOB 170-173.) He makes an identical claim related to the instruction given at the penalty phase. (AOB 300.) Since appellant's trial,

this Court has, as appellant concedes, rejected similar claims that the instruction violates a defendant's federal constitutional rights. (See, e.g., *People v. Wilson* (2008) 44 Cal.4th 758, 805-806.)

The validity of CALJIC No. 17.41.1 was definitively resolved by this Court in *People v. Engelman* (2002) 28 Cal.4th 436, which held the instruction does not infringe upon a defendant's federal or state constitutional right to trial by jury or his or her state constitutional right to a unanimous verdict. (*People v. Engelman, supra*, 28 Cal.4th at pp. 441-445.) And, as the instruction of the jury with CALJIC No. 17.41.1 did not affect appellant's substantial rights, he has therefore forfeited any claim of error by failing to object below. (See 32RT 2687-2714; 33RT 2717-2721, 2738-2752; 50RT 5055-5881, 5883-5885; *People v. Elam* (2001) 91 Cal.App.4th 298, 310 ["His failure to do so waives any claim of error on appeal unless CALJIC No. 17.41.1 affected his substantial rights. In our view, it did not."]; § 1259 ["The appellate court may . . . review any instruction given, . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."].)

The arguments set forth by appellant are not new, nor are the concerns appellant raises concerning CALJIC No. 17.41.1 unique or necessarily implicated by reference to the specific facts or particular circumstances of the instant case. Appellant has offered no legal or factual basis that would dictate that the opinion in *Engelman* does not resolve this claim against him, nor has appellant set forth facts or an argument which would dictate or suggest the issue should be revisited and reconsidered. This claim is forfeited, and in any event, instruction of the jury with CALJIC No. 17.41.1 was not error. Respondent adopts herein by reference the reasoning expressed by this Court in *People v. Engelman, supra*, 28 Cal.4th at pages 441 through 445.

Accordingly, the challenge to CALJIC No. 17.41.1 must be rejected.

XI. APPELLANT HAS FAILED TO SHOW THAT HE WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL OR AN IMPARTIAL JUDGE (RESPONSE TO AOB ARG. XIII)

Appellant contends the trial court denied his rights to a fair trial and due process of law by its repeated erroneous rulings against the defense and remarks disparaging defense counsel. (AOB 174-189.) Specifically, appellant argues that throughout the trial, the trial court displayed animosity toward him and repeatedly disparaged defense counsel before the jury, selectively overruled defense objections, and made numerous rulings that favored the prosecution over the defense as described in AOB Arguments I, VI-VIII, including: "1) the rejection of mental health issues affecting appellant, holding hearings outside of appellant's presence, and threats of cell extraction, 2) interruption of defense counsel's opening statement and admonishing the jury, and 3) accusing defense counsel of bad faith in questioning the prosecution's expert witness Dr. Robin Cotton. (AOB 176.) The instant claim is forfeited. Even assuming it has been preserved for appellate purposes, it lacks merit.

A. The Instant Claim Is Forfeited

Appellant did not timely and specifically object to the trial judge's remarks as judicial bias or misconduct or request an admonition. Appellant has not asserted or shown that objection was futile or that an admonition would not have cured any harm. (See, e.g., *People v. McWhorter* (2009) 47 Cal.4th 318, 373; *People v. Bell* (2007) 40 Cal.4th 582, 603, fn. 7; *People v. Snow* (2003) 30 Cal.4th 43, 78; *People Fudge* (1994) 7 Cal.4th 1075, 1108.) Accordingly, appellant's judicial bias or misconduct claim was not preserved for purposes of appeal.

B. Relevant Law

Even if not forfeited, the specific claims of judicial bias or misconduct are without merit. The applicable legal principles are well settled. Defendants have a due process right to an impartial trial judge under the state and federal Constitutions. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1111.) "The due process clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of the case. (*Bracy v. Gramley* (1997) 520 U.S. 899, 904-905 [117 S.Ct. 1793, 138 L.Ed.2d 97].)" (*People v. Guerra, supra*, 37 Cal.4th at p. 1111.)

"Mere expressions of opinion by a trial judge based on actual observation of the witnesses and evidence in the courtroom do not demonstrate a bias. [Citations.] Moreover, a trial court's numerous rulings against a party-even when erroneous-do not establish a charge of judicial bias, especially when they are subject to review. [Citations.]" (*People v. Guerra, supra*, 37 Cal.4th at pp. 1111-1112.)

> Although the trial court has both the duty and the discretion to control the conduct of the trial [citation], the court 'commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution' [citation]. Nevertheless, "[i]t is well within [a trial court's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior." [Citation.] Indeed, "[o]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." [Citation.]

(*People v. Snow, supra*, 30 Cal.4th at p. 78.)

This Court reviews "the propriety of judicial comment on a case-by-case basis in light of its content and the circumstances in which it occurs." (*People v. Cash* (2002) 28 Cal.4th 703, 730.) As set forth below, appellant has failed to show that he was deprived of his constitutional right to a fair trial or an impartial judge.

C. The Trial Court's Finding, Made Outside The Presence Of The Jury, That Appellant's Conduct Was A Deliberate Attempt To Delay Trial Did Not Show Bias

As an example of misconduct, appellant recites the trial court's comments during pretrial proceedings and during trial in which "the judge refused to accept that appellant suffered from serious mental illness, which affected his ability to attend court hearings and assist in his defense." (AOB 177.) This claim is without merit. As discussed below, appellant completely fails to explain how the trial court's findings constituted misconduct. In any event, the record supports the trial court's finding that appellant employed "suicidal gestures" and physical complaints related to his medication in order to delay his trial. Finally, with the exception of the trial court's August 12, 1998, comment, the trial court made all other challenged comments outside the presence of the jury which could not have adversely influenced the jury. (See *People v. Guerra, supra*, 37 Cal.4th at p. 1112; *People v. Snow, supra*, 30 Cal.4th at p. 79.)

1. February 24, 1998: Pretrial Conference

During a pretrial conference on February 24, 1998, defense counsel informed the trial court that she was engaged in another murder trial and therefore had to obtain permission from the other trial judge to appear at pretrial conferences set in the instant case. (14RT 334-336.) Defense counsel also indicated that appellant was "heavily medicated," that he was "in the mental health ward and they unstrapped him to come to court," and

requested "two weeks to find out exactly what the situation is with this medication." (14RT 335.) The trial court inquired if defense counsel wished to return to court in two weeks on March 16, 1998, making it "[d]ay zero of 30 on that?" Defense counsel replied, "Yes. I think we better make it zero of 60." (14RT 336.) The parties thereafter discussed DNA discovery. (14RT 336-338.) The trial court then attempted to give appellant advisements and to obtain a waiver of his right to a speedy trial:

> The Court: . . . Sir, do you understand that you have a right to a speedy trial?
> [Appellant]: ([Appellant] nodded.)
> The Court: Is that "yes" or "no"?
> [Appellant]: That is yeah.
> The Court: You will have to answer so that your answers can be written down.
> [Appellant]: I don't feel too good right now.
> The Court: Well, you look just fine to me. [¶] Do you want to go back in the back in the lockup and take five or what?
> [Appellant]: Man, what else are you going to say, man?
> The Court: Well, what I am going to say is that you have a right to a speedy trial. [¶] I will ask you if you understand that right. [¶] Do you?
> [Appellant]: Yeah.
> The Court: I want to ask you if it is agreeable with you that we come back here March the 16th, 1998, at 8:30 as day zero of 30. [¶] Is that agreeable with you?
> [Appellant]: Yes, it is.
> The Court: Very good. [¶] Have a good day. [¶] See you next time.

(14RT 338-339.) The next scheduled pretrial conference was set for March 16, 1998. (14RT 339.) The matter was re-calendared to March 18, 1998, because defense counsel was engaged in trial. (2CT 364A.)

2. March 18, 1998: Appellant Absent From Pretrial Conference

On March 18, 1998, the trial court noted that appellant was absent. The trial court stated the following:

> Counsel, we have been told the following: [¶] Deputy Harvey has been in contact with the jail. [¶] [Appellant] is not present in the building and he is in his cell and he indicates that he does not feel well and refuses to come out.
>
> That is what I am told.
>
> The sheriffs indicate, if necessary, they will extract him from his cell to bring him over here. [¶] That is where it stands right now.

(14RT 340-341.)

Defense counsel asked the trial court not to order cell extraction. Defense counsel stated that she had spoken to appellant late the previous day. She informed the trial court the following:

> [Appellant] was doing quite well in custody the several years he has been in custody. [¶] A few weeks ago he started having mental health problems, again, and he has a long history of this that is documented through his years in CYA. [¶] I brought and I ordered a copy of the jail medical records when this started. [¶] If the court recalls, last time he was here he behaved very differently than he has before. [¶] He started to act out. [¶] He is very heavily medicated and he feels that he cannot concentrate and can't walk. . . .[¶] His problem is that he does not like the medication and he does not think it is helping him and he has to stay on it for a while because these kinds of medications . . . [¶] He is on Travil, . . . amongst other things that they give him. [¶] I would like to give him a few days. [¶] As soon as I get a break, I will talk to him. [¶] I have my mental health people working with him, too. . . .[¶] I don't want to put him in a position where he is going to have a problem. [¶] I don't want them to go in and force him out and cause problems when they are not needed at this point. [¶] I would like to put this over to a week from Friday.

(14RT 341-342.)

The trial court asked whether appellant was in the infirmary. Defense counsel responded that appellant was in the mental health unit, he had been "shackled down through periods of the last few weeks," and that "there were two suicide attempts." Defense counsel disagreed that appellant refused to go to court because he was not feeling well, as Deputy Harvey

had relayed to the trial court. Defense counsel stated that appellant went into a "litany" of "I can't go to court and I am afraid I am going to get hurt or that I will hurt somebody." (14RT 342-343.) The trial court replied, "That is not what I was told yesterday." Defense counsel stated that appellant's medical records showed that he was being medicated. (14RT 343.)

The trial court explained that some progress had to be made in this case and noted that both the court and defense counsel made accommodations in order to hold the present hearing:

> The problem is this: [¶] . . .[¶] Whether he feels fit to go or not, we have to proceed on the case somehow. [¶] We can't let Mr. Banks decide when we are going to schedule motions based upon how he feels. [¶] We need to get these darn things done. [¶] As you know, we set today aside. And with the cooperation of the judge that you're in front of, he got you here today. [¶] I know you are in a three defendant jury trial [¶] My jury is not here today so I took the time to do this. [¶] . . .[¶] . . . We set today aside for you as well. So I would like to have him here.

(14RT 343.) The trial court proposed to have appellant brought to the courtroom to waive his presence for the purposes of the hearing on the defense motions. Because the trial court did not "have enough evidence to say that [appellant was] voluntarily absent," the trial court wished to speak to appellant in order to "assess the situation." (14RT 343-344.)

After a court recess, the trial court stated that it had "spoken to Lieutenant Franklin over at the county jail and he indicates the following: [¶] [Appellant] has some bandages on his arms and he has no idea whether they are fresh or the result of old activity. Nor do I." (14RT 346.) Defense counsel stated that appellant had bandages on his arm the last time he was in court and since that last court appearance, had "tried again." Appellant was on suicide watch. (14RT 346-347.) The trial court relayed that Lieutenant Franklin indicated that, if necessary, appellant could be forcibly

brought to court, but that appellant had stated that "he [would] in all likelihood hurt someone should they make him come." Due to appellant's size, the lieutenant did not recommend forcible cell extraction. (14RT 347.) A facsimile from Lieutenant Franklin stated: "Per your request I contacted Inmate Banks and asked him if he was going to court today, March 18, 1998. Inmate Banks stated that he feels that he would hurt someone if he left his cell today. I advised him that I had talked to you and he reiterated that he did not care who wanted him court." (2CT 366.) The facsimile noted that appellant was housed in a mental observation housing module for inmates who were suicidal.[44] (2CT 366.)

The trial court then stated that it would give appellant "a pass today," but informed defense counsel that she had to tell him "[t]hat he can't set the pace over here" and that if necessary, the court would order appellant's forcible extraction from his cell. The trial court listed several methods of cell extraction against inmates who refused to attend court. The trial court was concerned about jeopardizing the safety of not only sheriff's deputies, but of appellant as well. (14RT 347-348.) In light of appellant's refusal to go to court, the trial court heard argument on the defense motions, but only gave tentative rulings. The trial court told defense counsel that she could "repeat for your client when he returns and urge the court to either go with or vary from these tentative rulings" which would not be final court orders. (14RT 349, 360-367.) At the conclusion of the pretrial conference, the trial court stated that appellant "refused to come to court today and indicated if he was brought, someone would be hurt. [¶] It did not sound like he was talking about himself. [¶] He is not here and we made every effort to get him here and the record should reflect that." (14RT 379.)

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[44] A letter dated March 26, 1998, containing the identical information was filed in the trial court on March 30, 1998. (2CT 371.)

3. March 27, 1998: Appellant Present At Pretrial Conference

At the next scheduled pretrial conference on March 27, 1998, appellant was present in court. The trial court explained to appellant that it was "informed last time that you had refused to come out of your cell. [¶] They didn't want to use any force without the absolute need. [¶] So what we did was rather than have a big brawl, we decided to go forward and try to hear some matters without you being here. [¶] Now you have a right to be present at each proceeding. [¶] Do you understand that?" Appellant stated that he understood. (15RT 384-385.) The trial court cautioned appellant, "I don't want to get into a situation where the sheriffs are going to have to send five or six guys to pull you out of your cell, but we will have to do that if necessary. [¶] If you want to waive your presence during some of these proceedings, I don't have a real problem with that. But you cannot do that by just saying: I'm not coming." (15RT 385.) Appellant assured the trial court, "I'll show up. [¶] I was having problems that day. [¶] I'll show up." The trial court stated, "It is better if you are here so you are apprised of what is going on. [¶] That is my opinion, anyway. [¶] How do you feel? [¶] All right?" Appellant replied, "I feel all right." (15RT 385.) The trial court then permitted defense counsel to give further argument on the motions for which the court had made tentative rulings. (15RT 385-386.) After hearing further argument, the trial court made final rulings on some of the motions and took other motions under submission. (15RT 386-408.)

4. April 21, 1998: Appellant Absent At Pretrial Conference

At the pretrial conference of April 21, 1998, appellant was not present in court. The trial court stated that appellant "[was] what I'm told by the bailiff overdosed on something." Defense counsel told the trial court, "This

is the third suicide attempt in the last two weeks. The first one they pumped his stomach, second one they gave him something so he will throw up because they saw he had gathered the pills. And now he tells me he is back in the hospital he tried again last night." The trial court asked defense counsel what she wanted to do. (17RT 454.) Defense counsel proposed to modify the existing trial date of May 13, 1998, to a trial setting date and to hold argument on other motions on that date. The trial court stated, "I don't want to do it, counsel. I will leave it on, get him out here in the next week or so. I don't want to change the trial date right now. We have had the case an awful long time." (17RT 454-455.) The trial court decided to preserve the original trial date. The trial court declined to issue a cell extraction order and instead announced its intention to issue and hold a warrant for appellant until May 4, 1998, "due to his apparent medical problem." (17RT 455-456.)

5. May 4, 1998: Appellant Absent From Pretrial Conference

On May 4, 1998, appellant was absent from court. Defense counsel stated, "Every two days, it's a suicide attempt. And he just seems to have disintegrated very rapidly." (18RT 504.) The trial court inquired why appellant was not present. Defense counsel replied that she had not spoken to appellant and had not seen him in a week. The last time she saw appellant, "he seemed to be doing okay. And then the next day I got word that he had attempted suicide, and he was in county hospital." (18RT 505.)

The bailiff informed the trial court, "This morning I got word from the lockup here in the building that he was refusing to go to court. So I called his module where he is housed at and talked to an Officer Herran (phonetic) and he informed me that . . . [¶] . . . [¶] . . . it is true that he is refusing to come to court and that we would have to extract him if we wanted him in court today." Based on the similarity between the trial court's surname

(Horan) and Officer Herran's name, the trial court quipped, "I was working last night over there." The trial court asked the bailiff if he had ever met Officer Herran. After the bailiff replied no, the trial court humorously added, "Who else is going to think there is a conspiracy going on with Mr. Banks?" (18RT 505.) The proceedings were continued to May 13, 1998. (18RT 507.)

6. May 13, 1998: Appellant Present At Pretrial Conference

At the next court date of May 13, 1998, appellant was present in court for the ruling on the severance motion. (19RT 554.) At the conclusion of the pretrial conference, the trial court informed appellant, "Mr. Banks, we will need you on our next appearance and every appearance thereafter. I don't want to get into cell extractions or anything at county jail. So cooperate. [¶] We need you here on this case. [¶] Do you understand?" Appellant stated that he understood. (19RT 571.)

7. June 25, 1998: Appellant Present At Pretrial Conference

On June 25, 1998, appellant was present in court. (20RT 576.) Defense counsel requested a continuance for a trial date for the first or second week in August and summarized her progress on the discovery in this case. (20RT 577.) The prosecutor lamented, "I don't think this thing is ever going to go to trial at the pace we are going. [¶] It seems that this was a date certain for trial and what happens is every time between the date that we set it as a date certain and the next date, Ms. Wilensky comes in with 35 more things that she just has to have before we can possibly go to trial on this case." (20RT 578.) The prosecutor noted that when the current trial date was set, he had subpoenas generated and prepared the exhibits. (20RT 578.) With both parties' concerns in mind, the trial court stated that "absent some absolute unforeseen circumstance," trial was set for August 3,

1998. In order to facilitate that trial date, the trial court ordered the parties to confer on and finalize the jury questionnaire before July 15, 1998. (20RT 580.) The trial court stated that it would request a panel of a "couple hundred people" for jury selection. (20RT 581.) Defense counsel mentioned that she intended to re-approach the death penalty committee with a plea offer from appellant. (20RT 581.) At the conclusion of the pretrial conference, the trial court advised appellant of his right to a speedy trial and obtained a waiver to continue the matter and set the case for trial on August 3, 1998, with the understanding that the prosecution had 10 days from that date to bring him to trial. (20RT 584.)

8. July 13, 1998: Appellant Present At Pretrial Conference

Appellant appeared at the next court appearance on July 13, 1998. (21RT 586.) The trial court and the parties finalized the jury questionnaire. (21RT 586-594.) Defense counsel informed the trial court that she was submitting appellant's plea offer to life without the possibility of parole to the death penalty committee. (21RT 595-596.) Mindful of the scheduling conflicts of the prosecutor and defense counsel, the trial court indicated that it would order two prospective jury panels and hand out the questionnaires on August 3, 1998. (21RT 596-597.) Defense counsel informed the trial court that as they approached the trial date, the sheriff's department planned to move appellant out of the mental health unit of the county jail. Defense counsel requested a court order to keep appellant housed in that unit because "[h]e seem[ed] to be doing better." (21RT 599.) Appellant "[had] been doing real well the last couple of weeks there." (21RT 599.) The trial court granted the request for the order but could not guarantee whether the sheriff's department would comply with it given "some security problem that would preclude it[.]" Appellant told the trial court, "If you make the order, they will follow it." (21RT 599-600.)

9. August 3, 1998: Appellant Absent On Trial Date

On the day set for trial, August 3, 1998, appellant was not present in court. Defense counsel stated, "I was told that he is a medical missout because they had to pump his stomach last night," but she did not know the reason why. (22RT 601.)

The bailiff later informed the trial court, "I talked to Deputy Cisitto . . .[who] informed me that [appellant] took 20 pills and they had to pump his stomach this morning and that he will be listed day to day. [¶] They said to order him out every day. [¶] They don't know right now if he will make it tomorrow or Wednesday." (22RT 605.)

The trial court stated, "We are scheduled, as you know and [appellant] knows, for trial. [¶] As far as [appellant] knew, he was scheduled to meet a jury today, I assume. [¶] Right?" The prosecutor agreed, but defense counsel disagreed, stating that she believed her investigator informed appellant that "we were going to do the motions today," and that "[appellant] knew that we were not going to go pick a jury today." (22RT 605-606.) The trial court ordered the parties "to research the issue of a defendant who is clearly voluntarily absenting himself from a capital case as he has done over and over again." The trial court found that "[appellant] seems to want to come to court when he wants to come to court and when he does not, he doesn't. [¶] He either injures himself, although none of his injuries are life threatening. [¶] He comes sometimes and other times he does not." The trial court continued to state, "[t]he sad fact is that we have to try the case at some point. [¶] I don't know how we can keep jurors on call forever. [¶] We have 200 jurors coming in on Wednesday or 150 on Wednesday. [¶] So we are going to do something with them. I don't think it is appropriate to send a pack of jurors away and say: [¶] We will see you tomorrow, and maybe Mr. Banks will come in. [¶] We need to get going on the case." Because the trial court was concerned that appellant would

"do things throughout the trial that he thinks will delay the case," the court wanted research on the issue of a capital defendant's voluntary absence from trial. (22RT 606-607.)

Defense counsel stated that she was "concerned about the court's characterization" as she believed that appellant was mentally ill, brain damaged, and that he "didn't understand and work on the same level that we do and most of the other defendants do." Defense counsel stated that appellant "had a long, long history of suicide attempts, not just since this case has happened. [¶] He has had a long history of doing damage to himself." The trial court noted that appellant had apparently been unsuccessful in those suicide attempts. (22RT 607.) Defense counsel disputed the court's characterization of appellant's conduct as "purposely stalling" because "as far as Mr. Banks knows, he knows that the committee is meeting as to a plea on this" and "[i]t is not a question where he is trying to stall the inevitable. He does not know that it may be." (22RT 608.)

The trial court doubted appellant's conduct constituted suicide attempts and stated, "If a guy has been trying to kill himself his entire life, one would suspect that one would succeed. [¶] I am not trying to minimize your client's problems. I assume he has problems. But when he has a court date that he does not want to make, his so-called attempts seem to coincide with my court calendar." (22RT 608-609.) The trial court ordered defense counsel to tell appellant that his "next medical problem that is self-induced" would be considered an attempt to delay the trial. (22RT 611.) The trial court stated that if it was legally precluded from proceeding with trial in appellant's absence, it would tell the prospective jurors "the reason for their inconvenience" and tell them that "[t]he defendant will not come to court from jail and, therefore, folks, we have dragged you down here and will have to ask your indulgence[.]" (22RT 611-612.) The trial court refused "to play a game wherein we keep ordering up and . . . go to the trouble of

bringing 150 . . . people into the courtroom while we wait patiently for [appellant] to feel like coming." The trial court ordered defense counsel to advise appellant that "depending on the results of both counsel's research," the trial would proceed without him in the event of his absence. (22RT 612.)

10. August 4, 1998: Appellant Requests Paramedics In Lockup

The following day, August 4, 1998, defense counsel spoke with appellant in the lockup area of the courtroom. Appellant was initially calm and trying to communicate with defense counsel, who imparted what the trial court had ordered the previous day. Appellant then told defense counsel that he was starting to feel ill. Appellant told defense counsel that his medications associated with stomach pump locked his jaw, he was beginning to feel dizzy, and did not feel well. (22RT 617.) When the bailiff went into the lockup, appellant stated that he needed his medication, his jaw was locking because he needed his medication, he needed to go, and he requested paramedics. (22RT 617.)

The trial court made the following findings:

> It seems that while I don't doubt that [appellant] may have some problems that are beyond the ability of this court to diagnose, it seems, again, that the bulk of his problems revolve around his court dates. [¶] His "suicide attempts", all of which have been fruitless, revolve around his court dates. [¶] His refusal to come to court on certain occasions, it has not been the matter of a suicide attempt or medication or anything else other than Mr. Banks notifying deputies at the county jail that he refuses to come in and I have not ordered a cell extraction. [¶] I don't see the need to do that. [¶] We have never done that with Mr. Banks. [¶] I haven't gone to the extreme of having deputies enter a cell and drag him into court. [¶] It gets people hurt and it is needless. [¶] But we are going to have to go forward, counsel, absent something other than a representation of Mr. Banks that he has his jaw locking up on him.

(22RT 618.)

Defense counsel again reiterated appellant's past "suicide attempts" and medical history. (22RT 619.) Given his medical history, defense counsel was "concerned that the court has this attitude about Mr. Banks." Defense counsel implied that appellant's suicide attempts could have been prevented had jail personnel watched appellant swallow his pills. (22RT 620.)

The trial court made the following additional findings:

> My problem is this. [¶] Mr. Banks is obviously a competent person, as you agree, since I notice that you have never made a motion for him to be examined [pursuant to section] 1368 for obvious reasons. [¶] The man when you speak to him is absolutely competent and intelligent and ready, willing and able at some -- unwilling but able to go forward with this case. [¶] His problem is, prime problem, again, you know more about you[r] client than I do, certainly seems to be that he hurts himself from time to time or does things that are perceived by you that are attempts to take his life. [¶] That does not mean we can continue the case for 15 years for him to stop cutting his arm or taking an overdose of medication or whatever it is. . . .

(22RT 620-621.)

Defense counsel suggested that the court order psychologists at USC, who were not on the list for court appointment, to conduct brain tests on appellant in order "to satisfy the court that [appellant] is not playing games." Defense counsel noted that jail personnel disagreed with the defense expert's diagnosis of organic brain damage and argued that they treated appellant with the incorrect medication. (22RT 621-622.)

The trial court again observed, "[t]here is not a thing wrong with [appellant] when he is in court. [¶] He is responsive and is like any other defendant that I have ever seen. [¶] The problem is getting him into a courtroom. [¶] Once he is in court he is controllable." (22RT 622.)

Defense counsel argued that appellant "did not know until this morning that there was not going to be a plea. [¶] So I don't think that is 100 percent -- . . . I think he had great hopes that there would be a plea and I just told him this morning . . . [s]o I don't know if that was upper most in his mind." (22RT 623-624.)

The prosecutor countered that "it is interesting that his jaw locked up as soon as he was told there was not going to be a plea." The prosecutor also disagreed with defense counsel's characterization of appellant's past conduct as suicide attempts given that his CYA file revealed that "all of those attempts seem to coincide with his desire to be housed in a different location." (22RT 624.) The prosecutor had no suggestions for obtaining appellant's presence at trial especially because appellant "knows how the system works. So he plays the game where he knows he will be sent back to county jail by saying: [¶] I need paramedics." (22RT 625.) The trial court ordered appellant's appearance the next day when 150 prospective jurors were expected. (22RT 625.)

11. August 5, 1998: Appellant Absent For Trial

The next day on August 5, 1998, appellant was not present in court. The trial court stated, "[appellant], once again, is refusing to come to court, I am told. [¶] He won't leave his cell. [¶] So it appears that we will have to have him brought physically into the courthouse and then, thereafter, into the courtroom." The trial court clarified that appellant apparently was claiming that he was too sick to go to court. (23RT 627.) The trial court stated that on the previous day after counsel left the courtroom, it spent about three hours speaking to the doctors at the county jail, including Dr. Clark, the medical doctor in charge of the jail's medical system. At the court's request, Dr. Clark spoke directly to Dr. Ortego of the jail's health staff. Dr. Ortego opined that in spite of the suicidal gestures, appellant was not a serious threat. However, Dr. Ortego recommended that appellant be

watched while in transit and in the holding area to prevent delays in the trial proceedings. The doctors were also of the opinion that appellant was mentally stable to start trial, he was medically cleared, and he was physically able to proceed with trial. The doctors faxed the trial court that information and sent the trial court a letter to the same effect. (23RT 628-629; see 8CT 2056 [letter dated Aug. 4, 1998, from Dr. Clark to the trial court].)

The trial court recounted its prior concerns about appellant's conduct related to his absence from court appearances. Although the trial court had tried to find another method to obtain appellant's presence that did not involve endangering the safety of both sheriff's deputies and appellant, the trial court stated that it would have appellant "brought over to the courtroom." (23RT 629-631.) After defense counsel argued that appellant's medical complaints were not feigned, the trial court noted that although appellant claimed he was currently sick and refused to leave his cell, he was not in the infirmary and had not requested to be admitted there. Based on all of the circumstances, the trial court concluded that appellant was conveying the message that "I would like to be anywhere but court." (23RT 631-634.) The trial court observed that it was the sixth or seventh time appellant had failed to appear in court. (23RT 634.) The trial court found that appellant voluntarily absented himself from the proceedings with knowledge that trial would commence. The trial court also ordered appellant's cell removal because he had disrupted the trial proceedings. (23RT 645.) In consultation with counsel, the trial court discussed how it could proceed in the event of appellant's continued absence. (23RT 634-648.)

After a recess, appellant appeared in court. (23RT 652.) The trial court stated that it spoke with Lieutenant Moltman at the county jail who had informed the court that deputies "discussed the matter" with appellant

and forcible extraction had not been necessary to secure appellant's court appearance. (23RT 652-653.) The trial court then spoke directly to appellant as follows:

> Mr. Banks, look, my friend. [¶] I understand from time to time you feel like you do not want to be here for various reasons, but you can't make the rules. [¶] . . . [¶] . . .[¶] I want to tell you man to man what will happen[.]

(23RT 653.) The trial court explained that court had been scheduled 15 minutes earlier, there were 150 prospective jurors waiting for the case to start, and that it was important not to inconvenience the jurors. (23RT 653.) The trial court ordered appellant to go to court when scheduled and stated, "If you have a problem, you work it out in this courtroom with me, not with the deputies." (23RT 653-654.) The trial court cautioned appellant that if he did not comply, a cell extraction would occur in which deputies or appellant could get hurt. (23RT 654.)

Addressing the trial court, appellant denied that he had refused to go to court. Rather, appellant claimed that he was dizzy from his medication. (23RT 656.) The trial court replied, "I have a hard time believing that. [¶] They called us and said that: [¶] [Appellant] is refusing to come and will not come and what do you want us to do?" Appellant responded that if he had refused to leave his cell, deputies would have extracted him. Appellant stated that after the lieutenant told him "what was going on," appellant agreed to go to court. (23RT 656.) The trial court noted that appellant appeared to be mentally alert, he was smiling, he looked physically fit, and "one would not expect any physical malady whatsoever." (23RT 657.) The trial court invited comment from both appellant's relatives and defense counsel. Appellant's aunt stated that appellant "smiles like that regardless." Defense counsel observed that appellant looked better than yesterday morning and that "[h]e [did] not look to me as he has when he has been on other medication and feeling physically well." (23RT 657.)

Thereafter, the prospective jury panel was sworn and the trial court made introductory remarks. (23RT 660-748.) Outside the presence of the prospective jurors, the trial court advised appellant on his right to present at all stages of the proceedings with a few exceptions. The trial court did not believe there would be further problems securing appellant's presence in court. However, in the event appellant failed to appear, the trial court stated that it would instruct the jury that any delay was due to the recalcitrance of appellant to go to court. The trial court clarified that if it or the attorneys were responsible for a delay, that information would also be relayed to the jury. (23RT 749-750.) The trial court also informed appellant that if he refused to go to court, the trial court would make a finding that appellant disrupted the proceeding by his absence and/or waived his right to his presence so that the case would proceed even in his absence. (23RT 750-751.) The trial court advised appellant, "If a jury sees the defendant in a capital case is not there, they may infer a lack of interest on your part which may not be the best thing for them to infer. [¶] Any questions about what I have said?" Appellant replied, "No. I hear you." (23RT 751.)

Appellant subsequently was present during all days of the guilt phase trial.

12. The Trial Court's Findings Do Not Show Bias Or Misconduct

The trial court's finding that appellant absented himself from the court in order to delay trial and the trial court's rejection of appellant's medical excuses for his court absences is supported by the record. (*People v. Lewis* (2006) 39 Cal.4th 970, 994 ["the [trial court's] comments suggesting Lewis was feigning mental incompetence, and had used outbursts and other tactics to manipulate and delay the proceedings, did not suggest that the court had prejudged competence or could not be fair"].) Appellant's apparent

"suicide attempts" and alleged adverse reactions to medication coincided with his scheduled court appearances. On March 18, 1998, appellant claimed he did not feel well and refused to leave his cell to attend the scheduled court appearance. (14RT 340-341.) Appellant also told jail personnel that "he [would] in all likelihood hurt someone should they make him [go to court]." (14RT 347, 379.) On April 21, 1998, appellant was absent because he had overdosed in an apparent suicide attempt. (17RT 454.) The trial court expressed concern about the lack of progress in the trial. (17RT 454-455.) Appellant was absent on May 4, 1998, because he refused to go court. (18RT 505.) Most notably, on August 3, 1998, the date set for trial, appellant was absent because that morning, his stomach was pumped because he had taken 20 pills. (22RT 605.) The trial court stated that appellant knew that prospective jurors were summoned for that date. (22RT 605.) At the immediately preceding court appearance in which appellant was present, the trial court had stated that two prospective jury panels would be ordered for August 3, 1998, and questionnaires would be handed out. (21RT 596-597.) Appellant was also present in court on June 25, 1998, when the trial court stated that "absent some absolute unforeseen circumstance," trial was set for August 3, 1998. (20RT 580.) On August 4, 1998, appellant arrived in the lockup area of the courtroom only to claim that his jaw was locked after he was advised that the death penalty committee declined his plea offer in this case. He subsequently requested paramedics and was returned to county jail. (22RT 623-625.) Moreover, as the trial court pointed out, defense counsel never declared a doubt as to appellant's mental competency within the meaning of section 1368. (22RT 620-621.) Finally, appellant was absent on August 5, 1998. The trial court spent about three hours consulting with Dr. Clark, the medical doctor in charge of the jail's medical system, about appellant's mental condition. Dr. Ortego, a doctor with the jail's mental health staff,

opined that despite appellant's suicidal gestures, he was not a serious threat. The doctors stated that appellant was mentally stable to start trial, he was medically cleared, and he was physically able to proceed with trial. (23RT 628-629.) After appellant was threatened with forcible extraction from his cell by jail personnel, he appeared in court mentally alert, smiling, looking physically fit, and did not appear to be suffering from any type of physical malady whatsoever. (23RT 657.)

Thus, the record supports the trial court's finding that appellant timed his suicidal gestures and physical complaints related to his medication to coincide with his scheduled court appearances in order to delay his trial. The trial court's findings did not suggest that the court could not be fair. (*People v. Lewis, supra*, 39 Cal.4th at p. 994.)

D. The Trial Court's Warnings Of Cell Extraction Do Not Show Bias Or Misconduct

Appellant fails to explain how the trial court's comments on the consequences of appellant's refusal to leave his cell on days he had court appearances amount to judicial misconduct that violated his rights to a fair and impartial trial. Jail personnel, and not the trial court, first raised the possibility of forcible cell extraction when appellant first refused to leave his cell for his court appearance on March 18, 1998. (14RT 340-341, 347.) On March 27, 1998, the trial court explained to appellant that it was "informed last time that you had refused to come out of your cell. [¶] They [jail personnel] didn't want to use any force without the absolute need. [¶] So what we did was rather than have a big brawl, we decided to go forward and try to hear some matters without you being here." The trial court cautioned appellant, "I don't want to get into a situation where the sheriffs are going to have to send five or six guys to pull you out of your cell, but we will have to do that if necessary." In response to the trial court's question of how he felt, appellant replied, "I feel all right." (15RT 384-

385.) Subsequently, on May 13, 1998, the trial court similarly told appellant about peaceably securing his presence in court without resorting to cell extraction. (19RT 571.) Finally on August 5, 1998, the trial court made its first and only order for cell extraction after appellant failed to appear on the first and second day of trial. (23RT 629-631.) The trial court's warnings of cell extraction were properly aimed at peaceably securing appellant's presence in court and did not constitute misconduct.

E. The Trial Court's Tentative Rulings On Pretrial Motions Do Not Show Bias

On March 18, 1998, the trial court made tentative rulings on several defense motions in appellant's absence. These tentative rulings were made in light of appellant's refusal to leave his jail cell and his statement to jail personnel that "he [would] in all likelihood hurt someone should they make him [go to court]." (14RT 347.) The trial court emphasized that they were not final rulings and informed defense counsel that she could repeat the substance of the rulings to appellant and when he returned to court, reargue the motions to the trial court. (14RT 349, 360-367.) In fact, at the next pretrial conference on March 27, 1998, defense counsel made further argument on some of the motions and was permitted to present further argument on others. (15RT 386-389, 392-396, 398-402, 405-408.)

The record shows the trial court was concerned about the progress of the trial. (14RT 347-348.) As provided by section 1044, it is "the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the *expeditious* and effective ascertainment of the truth regarding the matters involved." (Emphasis added.) Here, the trial court acted consistent with its authority under section 1044 to expedite the trial. The procedure of hearing argument and making *tentative* rulings was devised with an eye toward using valuable court time that both the trial

court and defense counsel had carved from their busy schedules in other cases.

Moreover, the trial court suggested and allowed defense counsel to make further argument on the motions while appellant was present at the next court date. This supports the conclusion that the trial court was unbiased. In any event, appellant cannot show that he was prejudiced by this procedure. (See *People v. Holt, supra*, 15 Cal.4th at pp. 706-707 [no reversal for defendant's absence at proceedings at which evidentiary motions, the admissibility of his statement, and a possible objection to an anticipated question by the prosecutor were discussed because there was no indication his presence at these proceedings might have had any impact].)

F. The Trial Court's Comment During Jury Selection Does Not Show Bias

At jury selection on August 12, 1998, the trial court stated, "My apology for the delay. [¶] There was a problem obtaining the presence of [appellant] in a timely fashion this morning. [¶] He is now here and we can go forward." (23RT 1452.) The trial court's comment to the jury did not cast appellant in a negative light or imply that he was personally responsible for the delay. The trial court only generally stated "[t]here was a problem obtaining the presence of [appellant] in a timely fashion," which indicated that the problem could have been attributable anything from sheriff's deputies to an act of nature. Moreover, the trial court did not inform the prospective jury on August 5, 1998, that the delay was due to appellant's refusal to go to court as the trial court had advised appellant it would do in the event he failed to appear. (23RT 749-750.) Accordingly, the trial court's comment did not adversely influence the jury. Even if the trial court's remarks implied a criticism of appellant, it was a brief, isolated comment that does not warrant reversal. (See *People v. Bell, supra*, 40 Cal.4th at p. 605.)

G. The Trial Court's Interruption Of The Defense Guilt Phase Opening Statement Does Not Constitute Judicial Misconduct

In her opening statement to the jury, defense counsel stated, in relevant part:

> I want you to keep a very, very open mind as you are listening to this testimony. [¶] Each homicide is a totally different case and you have to decide on them totally separately. [¶] They are not being charged together so you can use one for the other. [¶] If a piece of evidence that you feel belongs to one or the other, that is fine. But they are three separate cases and you need to decide them separately and you need to decide them individually. [¶] It is fine for you to discuss and you should --

(26RT 1591.) The trial court interrupted, stating, "Counsel, let me remind you that this is not argument. [¶] That will come at the end of the case. [¶] Go ahead and make your statement." (26RT 1591.)

Appellant argues that "[t]he interruption and admonition were inappropriate because defense counsel was properly explaining to the jurors that the homicides were three separate cases and that the jurors needed to decide them separately." (26RT 1591.) This claim is unavailing. Immediately before the trial court interrupted, defense counsel was essentially arguing what the jury should consider or "discuss" during deliberations and how they should view the evidence that the prosecution was intending to present. This was impermissible remark in opening statement. "The function of an opening statement is not only to inform the jury of the expected evidence, but also to prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning." (*People v. Dennis* (1998) 17 Cal.4th 468, 518.) "The defendant's opening statement should be limited to a preview of his or her own evidence; counsel should not at this stage attempt an argument on the prosecution's case." (5 Witkin, Cal. Crim. Law 3d (2000) Crim Trial, § 520, p. 742, citing *People v. Goldenson* (1888) 76 Cal. 328, 349 [no error to require

defense counsel to limit opening statement to "a statement of the facts, the effect thereof, and his conclusions therefrom, without any argument upon the evidence introduced by the prosecution"].) The trial court's comment during the opening statement was a reasonable attempt to "control all proceedings during the trial" (§ 1044) and clearly was not intended to disparage defense counsel, nor created the impression that the court was allied with the prosecution.

H. The Trial Court Reasonably Found That Defense Counsel's Question Posed To Dr. Cotton Was Asked In Bad Faith

Appellant argues that "[t]he trial court also made erroneous accusations that defense counsel was questioning a prosecution expert witness in bad faith and based on facts not in evidence." (AOB 183.) This claim lacks merit.

1. Relevant Facts

On direct examination before the jury, Dr. Cotton testified that Glen Hall analyzed evidence in this case. (29RT 2154.) The following nine loci on the DNA strand were tested: DQA1, LDLR, GYPA, HBGG, D7S8, GC, CSF, TPOX, THO1. (29RT 2168, 2170; 30RT 2186-2189.) The presence of an X and Y chromosome in the analyzed sperm fraction indicated that the donor was male. (30RT 2186, 2189.) Given that appellant's known DNA profile matched the nine loci tested, he was not excluded as a possible contributor to the sperm fraction of the vaginal swab. (30RT 212186-2190.) Two reports were prepared in this case. (30RT 2197.)

On cross-examination before the jury, defense counsel elicited the following testimony from Dr. Cotton. The Los Angeles Police Department and the prosecution hired Cellmark to perform DNA analysis of the evidence in this case. (30RT 2197.) Of the two reports prepared on the analyzed evidence in this case (30RT 2198, 2220-2221), the first report

included information for the following five loci: DQA1, LDLR, GYPA, HBGG, and D7S8 (30RT 2228). Based on the test results for those five loci, the first report indicated that the statistical frequency calculation in the African-American population with the same combination of alleles was one in 8,000. (30RT 2228.) Dr. Cotton testified that Hall only initially tested those five loci because that was the system that the Los Angeles Police Department originally asked Cellmark to use and it was the system that Cellmark typically started with. (30RT 2228-2229.) The parties stipulated that the Los Angeles Police Department requested Cellmark to test the additional four loci. (30RT 2229.) The trial court noted, "Once they got to a certain point and found that it was one out of 8,000 they decided to go further." (30RT 2229.) Defense counsel asked Dr. Cotton if Hall had retested the first five loci for purposes of the second report. (30RT 2230.) Dr. Cotton replied in the negative and stated that the second report reflected test results for the four additional loci, plus the test for determining the sex of the donor. (30RT 2230.) The following colloquy subsequently occurred:

> Q So basically under the first set of testing, the prosecution indicated they didn't like the statistics.
>
> [The prosecutor]: I will object to that characterization.
>
> The Court: Look, this is so objectionable. [¶] What [Dr. Cotton] said was the following: [¶] They tested several loci and stopped, were asked to do more and said fine and kept going and kept up with their results. [¶] So, please, counsel, I assume you understand and please do not ask questions that misstate the evidence in the case or that assume facts not shown by the evidence in the case. [¶] Please don't do that.

(30RT 2230-2231.) Defense counsel then resumed questioning and concluded cross-examination. (30RT 2231.)

Outside the presence of the jury, the trial court asked defense counsel to justify why she had asked Dr. Cotton whether additional testing was

carried out because the prosecution was unhappy with the result. The trial court's understanding of the evidence was that the prosecution or police submitted the DNA evidence "and it is tested at several locations for certain traits, if you will, or markers, . . .[¶] [t]hey stop at that point and record a number and they keep going thereafter upon the request of the prosecution." Defense counsel explained the following:

> [She received] "all of this discovery very, very late but what -- I got it in two batches. [¶] What it appeared happened was that that seemed to be a final report. That particular report is the same format that the subsequent report is. [¶] So at that point it was the one that I had and it was a final report. [¶] I then subsequently, in another batch of materials from Cellmark, got the second report. [¶] So I had assumed --

(30RT 2235-2236.)

The trial court clarified,

> I am talking about today, now, asking questions of a witness in front of a jury and I am concerned about it.
>
> There is a lot of leeway that counsel have, but intentionally misleading a jury is not among them. So you tended to imply by your question that what had happened was a particular result was obtained, scrapped, a retest took place and now there is a greatly heightened probability against your client at the request of the People.
>
> But what happened was additional and different markers are looked for much in the situation of [ ] finding out if something was human blood and then if the answer is yes, now that we find it is human blood, let's test it for type.
>
> You implied very strongly to the jury what took place, was results came out one in 8,000 and that wasn't acceptable and, therefore, that had to be scrapped and retested. [¶] That is not what happened, is it?

(30RT 2236-2237.)

Defense counsel replied that her question was asked in good faith based on her reading of the final report and that "the tests were done as Dr. Cotton said, the normal base tests were done. The results came back and

they were not strong enough. One in 8,000 is not enough, especially compared to one in 17 million and so what happened was they decided to go farther." (30RT 2237.)

The trial court found that the implication of defense counsel's question "was not that they had gone further and done additional tests which is what happened but that they did it wrong the first time and then had to scrap it." (30RT 2237.) Defense counsel denied that the question made that implication. (30RT 2237-2238.) The trial court found the question to be "so disingenuous" because defense counsel knew what the argument would be if Cellmark had stopped analysis after testing four or five loci: "Well, couldn't they go further and why didn't they. Then when they do go further, apparently they would be accused of some wrongdoing." (30RT 2238.) Defense counsel argued that "[t]he statistics that they came up with were very strong statistics. [¶] I think I can bring up the fact that it was not an original set of statistics. [¶] . . .[¶] I don't know who told them to go further." (30RT 2238.) The trial court pointed out, "It is the original set of statistics now with a greater answer due to additional loci being tested." The trial court continued, "It is a continuation of the same comparison and not as you suggest they don't like the results so they have to done away with. [¶] They keep looking." (30RT 2240.)

2. The Trial Court's Comment Regarding The Posed Question Did Not Constitute Misconduct

It is not improper for a trial judge to object sua sponte or otherwise interrupt defense counsel in performance of the court's duty to control trial proceedings and to limit the introduction of evidence 'to relevant and material matters.'" (*People v. Sturm* (2006) 37 Cal.4th 1218, 1241; see also Evid. Code, § 765, subd. (a) ["The court shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may

be"].) "[I]t is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact and to assure that ambiguities and conflicts in the evidence are resolved insofar as possible." (*People v. Carlucci* (1979) 23 Cal.3d 249, 255.) The trial court also has broad discretion in controlling the scope of cross-examination. (*People v. Farnam*, *supra*, 28 Cal.4th at p. 187.)

Here, the record supports the trial court's finding that the question posed to Dr. Cotton intended to mislead the jury. (Cf. *People v. Earp* (1999) 20 Cal.4th 826, 859-860 ["a prosecutor commits misconduct by asking 'a witness a question that implies a fact harmful to a defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means'"], quoting *People v. Price* (1991) 1 Cal.4th 324, 481.)

Contrary to defense counsel's explanation to the trial court, there was no good faith basis to ask Dr. Cotton, "So basically under the *first set of testing*, the prosecution indicated they *didn't like the statistics*." (30RT 2230 [emphasis added].) On direct examination, Dr. Cotton had testified regarding the test results, on all nine loci, of appellant's known DNA profile and the DNA profile obtained from the sperm fraction. (30RT 2186-2189.) Based on the test results on all nine loci, the frequency of the combination of allele types common in both profiles occurred in about one in 17 million people in the African-American population. (30RT 2192-2193.) On cross-examination, Dr. Cotton testified that initially, only the first five loci were tested because "[t]hat was the system that L.A.P.D. originally asked us to use and it is the system that we typically start with." (30RT 2229.) Based on the test results on the five loci, the first report indicated that the statistical frequency calculation in the African-American population with the same combination of alleles was one in 8,000. (30RT

2228.) The remaining loci then were tested at the prosecution's request. (30RT 2229.)

The difference in the two statistical frequencies of one in 8,000 versus one in 17 million was clearly attributable to the number of loci tested. As the trial court noted, "Once they got to a certain point and found that it was one out of 8,000 they decided to go further." (30RT 2229.) The trial court thus reasonably found that defense counsel had no good faith basis in suggesting that "under the *first set of testing*, the prosecution indicated they *didn't like the statistics*" given that the test results on the first five loci only confirmed that additional testing on the remaining loci was warranted. Dissatisfaction with the statistical frequency of one in 8,000 clearly had nothing to do with the request for testing on the remaining loci. Defense counsel's justification, given outside the jury's presence, did not establish any good faith basis for asking the question.

Moreover, the trial court's lone comment before the jury did not constitute misconduct. (Compare *People v. Sturm, supra*, 37 Cal.4th at p. 1238 [under "unique facts" of the case, trial judge committed misconduct by engaging in a pattern (intervening more than 30 times) of disparaging defense counsel and defense witnesses].) A trial judge's privilege not only to summarize the evidence, but to analyze it critically, is rooted in English common law. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 766.) Under Article VI, section 10 of the California Constitution, "[t]he court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." The purpose of this mandate "was to abolish the prior limitations on the trial judge's participation in the trial of a case with respect to comment on the evidence and the credibility of witnesses," and "to place 'more power' in the judge's hands and [to] make him a real factor in the administration of justice . . ., [not] a mere referee or automaton as to the

ascertainment of the facts. . . ." (*People v. Rodriguez, supra*, 42 Cal.3d at p. 766, internal quotation marks and citations omitted; see § 1093, subd. (f).) Although Article VI, section 10 on its face imposes no limitations on the content or timing of judicial commentary, judicial comment on the evidence must be "accurate, temperate, nonargumentative, and scrupulously fair." (*People v. Rodriguez, supra*, 42 Cal.3d at p. 766.) "The trial court may not . . . withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*Ibid.*) "For example, it is settled that the court need not confine itself to neutral, bland, and colorless summaries, but may focus critically on particular evidence, expressing views about its persuasiveness." (*Id.* at p. 768.)

Consistent with its constitutional and statutory authority, the trial court properly summarized the evidence, as testified by Dr. Cotton, and merely stated, "So, please, counsel, I assume you understand and please do not ask questions that misstate the evidence in the case or that assume facts not shown by the evidence in the case. [¶] Please don't do that." (30RT 2230-2231.) The trial court's comment served only to properly inform the jury that the question misstated the evidence or assumed facts not shown by the evidence in the case. It should reasonably be viewed as an appropriate attempt to "control all proceedings during the trial" "with a view to the expeditious and effective ascertainment of the truth regarding the matters involved" (§ 1044), rather than an attempt to "discredit the defense or create the impression it is allying itself with the prosecution." (*People v. Snow, supra*, 30 Cal.4th at pp. 81-82, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 353.)

Finally, in instructing the jury, the trial court told the jurors that they "must determine what facts have been proved from the evidence received in the trial and not from any other source." (8CT 2087.) It stated, "You are

the sole judges of the believability of a witness and the weight to be given the testimony of each witness." (8CT 2101.) The trial court specifically informed the jury to not take "anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion." (8CT 2144.)

Accordingly, the trial court's comment did not deprive appellant the rights to a fair trial or an impartial judge.

XII. APPELLANT RECEIVED A FAIR TRIAL; TO THE EXTENT ANY ERROR OCCURRED, THE EFFECT WAS HARMLESS (RESPONSE TO AOB ARG. XIV)

Appellant contends that the cumulative effect of the alleged errors denied him the due process right to a fundamentally fair trial. (AOB 190-193.) Respondent disagrees.

A defendant is entitled only to a fair trial, not a perfect one, even where he has been exposed to substantial penalties. (See *People v. Marshall* (1990) 50 Cal.3d 907, 945; see also *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96].) When a defendant invokes the cumulative error doctrine, the litmus test is whether the defendant received due process and a fair trial. (*People v. Kronmeyer* (1987) 189 Cal.App.3d 314, 349.) Therefore, any claim based on cumulative errors must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid.*; see *People v. Carrera* (1989) 49 Cal.3d 291, 332 [accord]; *People v. Williams* (2009) 170 Cal.App.4th 587, 646 [accord].)

For the reasons articulated in Arguments I through XI, *ante*, respondent submits that either no errors occurred or that any alleged error either considered individually or together was harmless. (See *People v.*

Thomas, *supra*, 2 Cal.4th at p. 532 [finding that prosecutor's misstatement of witness's testimony, prosecutor's ambiguous comments that might have been taken as attack on defense counsel's integrity, and remarks by victims' parents cumulatively did not warrant reversal of murder conviction]; *People v. Williams, supra*, 170 Cal.App.4th at p. 646 ["any errors which we have found, and any others we may have assumed for purposes of argument, were harmless under any standard, whether considered individually or collectively."]; *People v. Najera* (2006) 138 Cal.App.4th 212, 228-229 [rejecting cumulative error claim where prosecutor committed misconduct, but defense counsel did not object, and even assuming trial court erred in excluding defendant's statement to police and instructional error occurred].)

Appellant received a fair trial, in which the evidence of his guilt was overwhelming. (See, e.g., *People v. Carter* (2003) 30 Cal.4th 1166, 1231 [rejecting cumulative error claim where trial court failed to admonish the jury pursuant to section 1122 and to reinstruct the jury with general evidentiary principles in the course of its penalty phase charge]; *People v. Boyette*, *supra*, 29 Cal.4th at pp. 467-468 [rejecting cumulative error claim where "trial court should have excused one prospective juror for cause, and it improperly limited the questioning of a witness" and "the prosecutor committed some instances of misconduct"].) Accordingly, his claim of cumulative error must be rejected.

PENALTY PHASE ARGUMENTS

XIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING APPELLANT'S REMOVAL FROM THE PENALTY RETRIAL AFTER APPELLANT THREW FECES AND URINE IN THE PRESENCE OF THE PROSPECTIVE JURY PANEL AND LATER SPAT AT THE TRIAL COURT (RESPONSE TO AOB ARG. XV)

Appellant contends his removal from the courtroom during the entire penalty retrial violated his statutory and constitutional rights to be present at trial, to assist counsel, to present a defense and evidence in mitigation, to confront witnesses, to receive a fair trial, and to a reliable penalty determination. (AOB 194-224.) Respondent disagrees.

A. Relevant Facts

1. Guilt Phase

At the beginning of the guilt phase trial, and outside the jury's presence, the trial court informed appellant that he had the right to be present at all stages of the trial proceedings, with a few exceptions, including voir dire and the taking of evidence. (23RT 749.) Based on the trial court's finding that appellant had deliberately attempted to delay trial by refusing to go to court, the trial court stated, "Now I don't believe that we will have further problems obtaining your presence in court. [¶] I really do not want anymore problems. [¶] If we have problems, I will have to instruct the jury and will do so that the reason for any delay is the recalcitrance of the defendant refusing to come to court. [¶] That would not be good for you tactically for the jury to learn about it." (23RT 749.) The trial court further informed appellant that although he had the right to be present, a waiver of his presence at a death penalty case could be made. Specifically, the trial court advised appellant:

> There are two situations wherein a defendant is not present during even critical portions of a death case. [¶] One is when he

> waives his presence voluntarily in open court and says: [¶] I don't want to be here for this particular proceeding, [¶] and the judge agrees. [¶] The other is if the defendant becomes disruptive and has to be removed. If you, for some reason, refuse to come into the courtroom when required, which is every day, I will make a finding that you have disrupted the proceeding by your absence and/or waived your right to your presence so the case will go on even if you are not here. [¶] I am not saying that that is license for you to be absent. I want you here. I am telling you we need you. We want you here. But the downside would be, hey, the train rolls and you don't need that. [¶] If a jury sees the defendant in a capital case is not there, they may infer a lack of interest on your part which may not be the best thing for them to infer. [¶] Any questions about what I have said?

(23RT 750-751.) Appellant responded, "No. I hear you." (23RT 751.)

2. Penalty Phase Retrial

During voir dire of the prospective jury at the penalty phase retrial, the trial court engaged in lengthy questioning of Prospective Juror No. 1, who expressed ambivalence with respect to imposing the death penalty. (43RT 4464-4473.) Defense counsel and the prosecutor made arguments with respect to Prospective Juror No. 1 at a bench conference. (43RT 4473-4479.) The trial court then permitted both defense counsel and the prosecutor to further question Prospective Juror No. 1. (43RT 4479-4486.) Outside the presence of the prospective jury, the trial court and the parties discussed whether Prospective Juror No. 1, based on his responses, could or should be dismissed for cause. (43RT 4487-4489.)

After a recess, the trial court informed the prospective jury panel that there were only a few challenges remaining and that with the exception of Prospective Juror No. 1, the panel was excused for the remainder of the day. (43RT 4490.) As the panel of prospective jurors were in the process of exiting the courtroom, appellant yelled at the court, "You're evil. Evil.

Demon."[45] (43RT 4491; see also 44RT 4515-4516 [defense counsel noted that appellant yelled out that the trial court was evil and a demon].) After appellant was taken into the lockup, the prospective jurors resumed their seats at the trial court's request. (43RT 4491.) The trial court then told the prospective jurors the following:

> Thought you were going to get out of here. [¶] Ladies and gentlemen, what I want you to do is this: [¶] Disregard what happened. [¶] It is not the first time that has happened. Probably not the last time that something like that will take place in a courtroom. [¶] It's a tense time for those involved in this case. That is for obvious reasons. [¶] Do your best to disregard what it is that you saw [appellant] do. [¶] It is not part of this case. [¶] . . .[¶] Is there anybody who feels they cannot do that? [¶] No. 2, how about you?

(43RT 4491-4492.) Prospective Juror No. 2 replied, "I didn't hear what he said. [¶] I just saw something was going on. I didn't even understand the words." (43RT 4492.) The trial court then individually asked each prospective juror, with the exception of Prospective Juror No. 1, if they had a problem with the court's admonition. All prospective jurors replied in the negative. (43RT 4492-4493.) The trial court then stated, "Things are said sometimes in the heat of the moment. [¶] I don't know whether that was simply an outburst or something that was designed to have a certain effect. [¶] Who knows. [¶] I will not speculate about it and you will not either." (43RT 4493.) The trial court continued to question Prospective Juror No. 1 after the other jurors left the courtroom. (43RT 4493-4495.) After hearing argument from the parties, the trial court found that Prospective Juror No. 1 could not be challenged for cause. (43RT 4496-4497.)

The trial court then turned to appellant's courtroom disturbance, stating the following:

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[45] As explained in greater detail later, appellant apparently threw a fecal bomb at the trial court when he yelled at the court.

> Let the record reflect that in the presence of the jury, or at least all but two, [appellant] had a bomb made of fecal matter that he launched, which is now resting on the wall behind the court, some portion of it. [¶] It is now hanging on the courtroom wall. [¶] I notice that it is spread on that end of the counsel table and some apparently toward Mr. McCormick [(the prosecutor)].

(43RT 4497-4498.)

The trial court asked if appellant had wrapped the "bomb" in a paper towel. The prosecutor replied that appellant "had a plastic bag here and the initial toss was toward you [(the trial court)] and then toward me. That is where it landed." (43RT 4498.) The trial court noted that "[a] lot of it got on the defense table." The prosecutor stated that feces was also on the front of the bench, of which the bailiff informed the trial court, "You don't want to see it." (43RT 4498.)

The trial court told defense counsel, "I think your client is going to have a hard time convincing the court that he will be present during the balance of the trial[.]" (43RT 4498.) Defense counsel asked the court to determine whether appellant was being medicated, noting it had been "a problem on and off" and that the "[l]ast [she] heard, they were going to medicate [appellant] again." (43RT 4498.) Defense counsel informed the trial court that they "got through the first trial fine, but [appellant] was on medication the entire time. And the court knows that the last few weeks I have been concerned about this. [¶] I have to find out. If [appellant] is not being medicated, it may be a whole different ballgame." (43RT 4498.) The trial court replied as follows:

> I doubt very much that anything [appellant] says or does at this point is going to convince the court that he will be in our presence during the trial.
>
> This is not the way that I conduct trials.
>
> What happens is this. [¶] [Appellant] is absolutely -- you tell me if I'm wrong -- I noticed nothing with [appellant] today in terms of his demeanor or his ability to cooperate with counsel and the ability to control himself until the very end of court

when counsel made a point that she did not like the way the questioning was going and thought there was some unfairness in the questioning.

[Appellant] responded with his objection which was acting out and screaming and cursing and throwing fecal matter at the court in the presence of the jury.

So that tells me [appellant] is capable of controlling himself when he wishes and when things do not go the way he thinks they should, [appellant] acts out.

So this is a long history with [appellant], not this particular behavior, but coming to court when he pleases and things of this nature and refusing to come and the court having to get orders to remove him from the cell and playing those games with him. We will not continue to play the games with [appellant].

My intention is to have [appellant] far removed from the proceedings until concluded.

(43RT 4499-4500.)

Outside the presence of the prospective jury the following day, defense counsel questioned whether the prosecution intended to use evidence of the disturbance as a factor in aggravation. (44RT 4501-4502.) Defense counsel noted, "when a similar incident happened before that [appellant] was not medicated at that time." (44RT 4502.) After the prosecutor expressed uncertainty, the trial court asked that a decision be made quickly. (44RT 4503-4504.) Defense counsel then asked the trial court about its intention regarding appellant's presence during the penalty retrial. (44RT 4504.) The trial court replied, "Not to have [appellant] present." After defense counsel asked for clarification, the trial court responded as follows:

If [appellant] wants to testify, he may be brought forward to testify.

Let me just make a record.

What happened yesterday I think is fairly clear. But as the jury was leaving, and with most jurors in the room, probably two or three may have made it out, I'm guessing, but that is my best recollection, the rest were strung out from the [jury] box to the door, [appellant] was seated in a position directly opposite the

jury box and at the other side of the room and then both defense counsel and a gap in the counsel table and then the prosecution closest to the box and the jury box is on the court's right side, as the jury was filing out at the end of the day's proceeding, all but one juror, one had been asked to remain, as I recall, [appellant] jumped up and began screaming at the court and reached into his pocket or his clothing, withdrew a bag of some sort, and I could not tell what was in it initially and threw things in the courtroom and in the direction of the court.

It turned out that it was a bag filled with fecal matter and probably urine -- [¶] . . .[¶] And the items were spread rather thoroughly through the courtroom. [¶] Some of the matter ended up on counsel table by the defense attorney and others made it all the way to the rail in front of the jury box and the distance in between. [¶] A lot of fecal matter ended up in the well [of the court]. A whole bunch on the front of the bench. Some behind the court and on the wall behind the court and on the books up here and computer and so forth.

The court was unscathed. I think all counsel were lucky as well. [¶] That, to me, is a sufficiently outrageous act. I can't think of a more outrageous act in front of the jury in a death penalty trial doing what [appellant] did. [¶] It was obviously well thought out. Nothing that came out at the spur of the moment. [Appellant] had a bag of feces in his pocket and unless he carries that around, he had that and let loose. Then after he was calm.

[Appellant] said: [¶] I'm done, [¶] or [¶] That's it, [¶] or some words indicating that he was not interested in fighting and he went with the bailiff into lock up.

I don't think the court should have to put up with that nor should we subject jurors to that behavior, or counsel, although you are all thick skinned people and quite professional. [¶] You have seen things in court before, but I don't think it is something that we need to put up with and I will not put up with it. [¶] I will not let a defendant come in this courtroom and throw fecal matter in the direction of the participants to show his displeasure, or whatever his reasons. [Appellant] has demonstrated to me in the past his unwillingness to follow the rules. [¶] Last time, you might recall, I bent over backwards to not have [appellant] injured when he would refuse to come to court. [¶] Not one time did the court order him in or do a cell extraction. We finally got through trial no. 1.

> We are in trial no. 2 and the pressure is back on and for whatever reason this incident occurred. It was at a relatively non-controversial part of the case.
>
> So the court fears that no matter what precaution we take, there would be a huge potential for further disruption of this case by [appellant].
>
> Really it was without warning. It is not something that you can see bubbling to the surface and do anything about, taking a break, when he acts. [¶] [Appellant] took me completely by surprise and I think probably counsel as well. [Appellant] looked quite calm all day long. [¶] I look at [appellant] when he comes out and I know what we are dealing with and he looked relatively calm and well behaved and then all of a sudden bang, there he went. [¶] So I don't think it is appropriate to have him in here. [¶] I can't think of a restraint, short of absolute mummification, which I don't propose, that would protect the participants and the integrity of the trial.

(44RT 4504-4508.) The trial court then allowed defense counsel to respond. (44RT 4508.)

Defense counsel stated that she was at a disadvantage because the trial court did not believe that appellant was mentally ill. (44RT 4508.) Defense counsel continued by stating her belief that appellant was mentally ill, brain damaged, and required medication. (44RT 4509.) Defense counsel stated that: the jail stopped appellant's medication sometime in December or slightly earlier; after a suicide attempt, the jail stopped medicating appellant; and appellant was not medicated on January 31 when he committed a similar incident (throwing fecal matter) on a sheriff's deputy at the jail. (44RT 4509-4510.) Defense counsel asked that before appellant was permanently barred from the penalty phase, the trial court "inquire of the jail as to what they are doing so they can try to make him participate." (44RT 4510.) The trial court declined to investigate appellant's mental health. The court also declined "to wait for a cocktail or brew" that defense counsel believed would be effective given that they

were "in the middle of the trial" with "70 jurors standing in the hall right now that had been ordered back a half hour ago." (44RT 4510-4511.)

Defense counsel moved for mistrial and requested that the first panel of prospective jurors be dismissed. (44RT 4513.) The trial court denied the motion, reasoning that appellant could not gain a mistrial by disrupting the proceedings. (44RT 4513.) The trial court noted that appellant "could have waited two minutes until the jury was gone if his problem was with the court" and stated that the timing of appellant's disruption "was done for the benefit of the jury." (44RT 4513-4514.)

Defense counsel requested that the trial court question the prospective jurors again and to admonish them not to discuss the incident with the second panel. (44RT 4514.) The trial court agreed to admonish the prospective jurors not to talk to any panel members or anyone else about the incident. (44RT 4514-4515.) The trial court stated that it would inform the current prospective jury panel that appellant was not present due to his actions. (44RT 4516.) The trial court then invited suggestions from counsel regarding the advisement to be given to the second jury panel. (44RT 4516.) Defense counsel simply suggested advising the jury, "Just [appellant] is not present." (44RT 4516-4517.) The trial court did not believe that was a sufficient advisement because it did not want the jury to have the impression that "we simply conduct these trials inabsentia." (44RT 4517.) Defense counsel then suggested, "say [appellant] has indicated that he does not want to be present." When the trial court disagreed, defense counsel argued, "Well, that's the interpretation basically of his actions. [¶] The court has admonished him before if he does not behave himself in court, the court is going to absent him from the court." (44RT 4517.) Thus, defense counsel assumed there was "an implied: [¶] I don't want to be here [¶] in the actions." (44RT 4517-4518.) Without objection, the trial court ultimately decided to tell the current jury panel

"that due to the activities of [appellant] yesterday afternoon, he will not be with us." As to the second panel, the trial court would not inform them of what appellant did, but would state "that due to a behavior problem with [appellant], he is not with us at this point. He is not with us right now." (44RT 4520-4521.) The trial court subsequently admonished the current jury panel as follows:

> Ladies and gentlemen, yesterday we had an incident that you observed, or most of you observed. [¶] The courtroom is cleaned up and we are ready to go forward. [¶] I want you to do this for me. [¶] We have a new panel of jurors that we are going to finish up with. [¶] In all likelihood, given the number of peremptory challenges available, the bulk of you folks will be here on this case. Then a few probably from the new group. [¶] Obviously, they weren't here yesterday so I want you to follow this directive. [¶] . . .[¶] First of all, do not discuss anything about this case with anybody, even among yourselves, until it is over and you are deliberating. [¶] And, most certainly, do not tell any juror who wasn't here yesterday, okay, what went on in the afternoon. [¶] Do you understand that? [¶] They weren't here. There is no sense for them to get involved in this. [¶] Is everybody clear on that?

(44RT 4524-4525.) The prospective jurors answered in the affirmative. (44RT 4525.) No prospective juror had any questions of the court. (44RT 4525-4526.)

The jury was impaneled for the penalty phase retrial. (44RT 4590-4591, 4716.) Outside the jury's presence, the trial court ordered that appellant to be brought into the courtroom. The trial court denied defense counsel's request to speak with appellant in the lockup before that. (44RT 4719-4720.) The trial court advised appellant as follows:

> Mr. Banks, the court has decided that you will not be able to be with us for the trial based on that little incident yesterday afternoon and some other problems that we have had. However, if you wish, I will do the following. I think we can do it. [¶] If you want a speaker wired up so that you can hear the proceedings as they take place, we can probably accomplish

> that. [¶] What it will require is that you don't try to break the speaker or damage it or yell, or whatever, because if you are going to do that, then we will not bother because it takes time to wire up. [¶] Do you want a speaker back there or not?

(44RT 4720-4721.) The trial court then granted defense counsel's request to confer with appellant. (44RT 4721.) However, the trial court declined to grant counsel's request for "a few minutes alone" with appellant, stating "It is a straight forward statement. If he does not want one, he doesn't want one. If he does, he does." The trial court then addressed appellant directly, "Do you want a speaker, Mr. Banks, so you can listen or not?" Appellant gave no audible response. The trial court ordered appellant out of the courtroom because he refused to answer the court. Appellant stated, "Shut up." The trial court then explained: "Let the record reflect that Mr. Banks spit on the court. [¶] Thank you, Mr. Banks." (44RT 4721.) After appellant was taken into the lockup, the trial court continued, "Mr. Banks became angry and tried to spit on the court. [¶] I think he succeeded this time. That was a good shot. 12 feet away. I think he succeeded this time." (44RT 4721-4722.)

Defense counsel tried to excuse appellant's conduct, stating, "we got through the first trial without a problem. He behaved. He was pleasant. There was no problem. [¶] I did request to speak to him before. . . .[¶] . . . Again I still do not know whether he is being medicated. I don't know what the situation is. He is a mentally ill, brain damaged man." (44RT 4722.) The trial court questioned counsel's characterization of appellant, stating "I don't know." (44RT 4722.) Counsel continued, "I have had some, you know, ability to keep things quiet and peaceful and I requested to talk to him. He then came out and asked me if he could talk to me alone. [¶] I will ask the court not to make any final rulings on his presence until -- [.]" (44RT 4722-4723.) The trial court maintained that its earlier order would stand, explaining, "Look, counsel. You saw what I just saw. And --

I don't know. If you are going to ask me to control him, fat chance." (44RT 4723.) Counsel again stated that appellant was medicated during the first trial, but she was unsure if appellant was currently medicated and indicated that appellant was in the hospital. (44RT 4723.) The trial court denied counsel's request to reconsider its ruling and stated, "Fecal matter thrown at the court. Spit on today. That's enough. That's it. Case close[d]." (44RT 4723.)

The trial court proposed, without objection, to "reiterate to the jury that [appellant] will not be with us because he is not going to be, that is, unless he testifies." (44RT 4724.) The court subsequently reaffirmed its ruling excluding appellant from the penalty retrial "for the obvious reasons earlier stated and his continued acting up, spitting, et cetera[.]" However, the trial court stated that "if [appellant] is needed by either side to be brought forward, make the request ahead of time. I will hear your argument and we will make arrangements and figure out how to do it. [¶] We will bring him forward for a short period of time. Undoubtedly, he will scream or do something, but we will deal with it." (44RT 4725.)

When the court pre-instructed the jury, its final instruction was as follows:

> Your job is to set penalty, as you know. [¶] For reasons that I will ask you not to speculate about, but for things that have happened heretofore, including today, [appellant] will not be able to be with us during the proceedings. That is unusual in the extreme, but it is necessary and that's the court's decision in this case. [¶] I want you folks to do the following:
>
> That fact should not be utilized by this jury as an aggravating or mitigating factor in this case. It is a procedural fact that [appellant] will not be here. And if anybody has a question, it will be answered at the conclusion of this case and not sooner in all likelihood.
>
> I will ask you folks to trust the court when I tell you that you are not to utilize this without further order of this court, to

not use this for or against [appellant] or for or against the prosecution.

Is everybody clear on that?

(44RT 4731.) The jurors answered the court's question in the affirmative and they did not have any questions. (44RT 4732.)

During the penalty retrial on March 11, 1999, the trial court was notified that appellant was not in the building because he had refused to leave his jail cell. The trial court saw no need to order a cell extraction unless appellant was needed for the court day and inquired of defense counsel, who stated, "I am willing to stipulate if there is going to be a problem, because I don't want any more problems, that he was identified by your various witnesses if you will be willing to stipulate, also, that these witnesses when they looked at him the first trial said he was light skinned." (45RT 4766-4767.) The trial court and defense counsel then engaged in a lengthy discussion regarding re-litigating elements of the guilt phase trial. (45RT 4767-4779.) The prosecutor later informed the court that he did not intend to offer appellant's courtroom misconduct in his case, although he suspected that the defense psychiatrist, Dr. Osborne, would refer to it. (45RT 4780.) In order to avoid bringing appellant into the courtroom, the parties stipulated that Sandra Hess previously identified appellant at the first trial as the person who had assaulted her. (45RT 4800-4801.)

The next day, March 17, 1999, outside the presence of the jury, defense counsel requested that appellant be allowed to hear the testimony in the defense case slated for that day. (47RT 5154.) The trial court reminded counsel that appellant had spit at the court when it had asked if he wished to listen to proceedings through a speaker. (47RT 5155.) Counsel stated that appellant's spitting "was not over the right of the loud speaker." Rather, appellant spit at the court because "he felt the court was not allowing him to communicate" with counsel. (47RT 5155.) The trial court

observed that appellant "may feel whatever he chooses to feel," and agreed to do its best to arrange for the installation of a speaker. (47RT 5155-5156.) However, the court did not believe the law required that accommodation given appellant's conduct. (47RT 5156.)

Outside the presence of the jury on March 17, 1999, the trial court stated that appellant refused to go to court and that the speaker system would not be rewired. (48RT 5385.) The court indicated that if appellant wished to testify, he would be allowed to do so. In the event appellant declined to testify, the court stated it required a signed waiver form. (48RT 5385.) Defense counsel presented a signed waiver from appellant stating that he would not testify. (48RT 5386.) After confirming that appellant had knowingly and intelligently waived his right to testify, the court accepted the waiver. (48RT 5386-5387.) The court ordered counsel to inform appellant that if he changed his mind, he would be welcome to testify in the case. (48RT 5387.)

Outside the presence of the jury on March 18, 1999, at 1:38 p.m., the trial court informed counsel that appellant was in the building. (49RT 5758.)

On March 25, 1999, the penalty verdict was read in court in appellant's absence. (51RT 6000-6002.) The trial court then took questions from the jury. Juror No. 1 stated that he was concerned appellant was not able to be present during the proceedings and asked the trial court for an explanation for his absence. (51RT 6007.) The trial court replied that appellant

> had some problems acting out. I think one of you saw it one day when he threw feces all over the courtroom. That's not something I can permit in court. [¶] [Appellant] was brought back into the courtroom. What we were going to do was wire up the speaker so he could have access, and he acted out again during that proceeding. So it was impossible, in my opinion, having handled a few of these trials and having had some

> experience with [appellant] in the past, it would have been impossible to have a trial that would not turn into an absolute circus unless [appellant] were absent.
>
> It's not made by this court, but, again, made by [appellant] with knowledge of the consequences of his actions, in my opinion. But if I was wrong, a higher court will certainly let me know about that, as they do sometimes.

(51RT 6007-6008.)

On July 8, 1999, the trial court began the sentencing hearing noting appellant's presence in the lockup. The bailiff offered to set up the speaker in the lockup. At the court's suggestion, appellant was positioned so that he could hear the courtroom proceedings. (52RT 6013.) After the bailiff and another courtroom deputy tested the speaker, the trial court stated, "Let the record reflect that the speaker can be heard in the lockup." (52RT 6014.) Defense counsel requested, based on appellant's desire, that he be personally present. In support of the request, counsel stated that when she spoke with appellant the previous day, he appeared to be as calm as he was during the first trial and they had discussed courtroom behavior. (52RT 6014-6015.) The trial court denied the request "except insofar as [appellant] might wish to speak to the issue of the appropriate sentence." (52RT 6015.) After counsel conferred with appellant, she stated that he did not wish to address the court. (52RT 6015.) The trial court noted that the lockup door was open and that appellant was approximately 10 feet outside the courtroom. (52RT 6016.) The court expanded on the denial of appellant's request to be present in the courtroom as follows:

> The request to bring him into the courtroom itself would be denied based upon his prior behavior in this courtroom which I need not repeat. [¶] It included the throwing of items, fecal matter, urine, around the courtroom; [¶] on the second visit, or the next visit after that, spitting on the court. [¶] And I don't doubt at all your belief that [appellant] would be able to control himself. You may be correct. But given the past track record of [appellant], I'm not as confident as you are. [¶] I don't think it

> is appropriate to have counsels' safety jeopardized even if you think it is a good idea, and the deputies and [appellant]. [¶] So he will be 10 feet off stage able to hear us. [¶] And we will go forward.

(52RT 6016.)

The trial court continued:

> One other thing. [¶] One reason that I am loathe to bring him forward is that we are under and have been for the last couple of months a restraining order issued by the federal court which precludes us from using one item that would control a person, could control a person who stands up or spits or throws something and that is the React [stun] belt. [¶] We are not allowed to use it. [¶] That leaves us with one less option which is gagging people, chaining them, and all of that stuff, which to me is the equivalent of absence. [¶] If you gag somebody and you shackle them, you are as good as absent in any event since you cannot communicate with counsel.

(52RT 6017.)

To clarify the record, defense counsel stated that, "The court brought [appellant] out and told him about loud speakers and then there was another outburst to the court and we never set up the loud speaker so that he did not hear the trial. [¶] In fact, many of the days he was not here. . . . [¶] . . .[¶] The court asked him, but he never answered the court because he asked to speak to me." (52RT 6018.) The trial court responded, "I don't believe [the speaker system] was thereafter set up based upon [appellant's] response which was to simply spit at the court. [¶] I took that as: [¶] No, I'm not [¶] interested." (52RT 6018.) The prosecutor and the trial court concurred that the speaker system was not connected. (52RT 6019.) The court believed that appellant was on a separate floor of the building.[46] (52RT 6019.)

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[46] It is unclear from the record whether appellant was on a separate floor of the buiding during the entire penalty phase retrial.

B. The Trial Court Did Not Abuse Its Discretion By Removing Appellant From The Retried Penalty Phase Proceedings

Appellant contends that his "conduct did not warrant removal for the duration of [the second penalty] trial because 1) the trial court did not personally address appellant to warn him about such conduct, nor did the trial court personally address appellant about whether he would conform his behavior, 2) appellant had not engaged in prior courtroom misbehavior, 3) the conduct occurred when appellant was not medicated, which was an issue affecting appellant's behavior that the court did not consider in its ruling, 4) the trial court failed to consider less intrusive means, and erroneously considered removal more beneficial to appellant than being physically restrained in the courtroom, and 5) the trial court failed to give appellant any opportunity to return after a 'cooling off' period." (AOB 217-218.) All of these claims lack merit.

1. Relevant Law

"A criminal defendant's right to be personally present at trial is guaranteed under the federal Constitution by the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment. It is also required by section 15 of article I of the California Constitution and by sections 977 and 1043. [Citations.]" (*People v. Concepcion* (2008) 45 Cal.4th 77, 81, 84.) "A defendant's right to presence, however, is not absolute." (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202.) "[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to

conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." (*Illinois v. Allen* (1970) 397 U.S. 337, 343 [90 S.Ct. 1057, 25 L.Ed.2d 353] (*Allen*) (fn. omitted).)

At the time of appellant's trial, section 977, subdivision (b)(1) provided:

> In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided by paragraph (2). If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided by subdivision (c).

(Stats. 1998, c. 931 (S.B. 2139), § 374, eff. Sept. 28, 1998.)

Section 1043,[47] subdivision (b)(1), provides in pertinent part that "[t]he absence of the defendant in a felony case after the trial has

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[47] Section 1043 provides in relevant part:

> (a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial.
>
> (b) The absence of the defendent [sic] in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases:
>
> > (1) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom.
> > (2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent.

(continued...)

commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in any . . . case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom." Subdivision (c) of section 1043 provides that "[a]ny defendant who is absent from a trial pursuant to paragraph (1) of subdivision (b) may reclaim his right to be present at the trial as soon as he is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings."

(...continued)

> (c) Any defendant who is absent from a trial pursuant to paragraph (1) of subdivision (b) may reclaim his right to be present at the trial as soon as he is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.
>
> (d) Subdivisions (a) and (b) shall not limit the right of a defendant to waive his right to be present in accordance with Section 977.
>
> (e) . . . [¶] If there is no authorization pursuant to subdivision (a) of Section 977 and if the defendant fails to appear in person at the time set for trial or during the course of trial, the court, in its discretion, may do one or more of the following, as it deems appropriate:
>
> (1) Continue the matter.
>
> (2) Order bail forfeited or revoke release on the defendant's own recognizance.
>
> (3) Issue a bench warrant.
>
> (4) Proceed with the trial if the court finds the defendant has absented himself voluntarily with full knowledge that the trial is to be held or is being held.
>
> Nothing herein shall limit the right of the court to order the defendant to be personally present at the trial for purposes of identification unless counsel stipulate to the issue of identity.

"[A] trial court retains the discretion to remove a capital defendant who 'has been disruptive or threatens to be disruptive. . . . The trial court's ability to remove a disruptive or potentially disruptive defendant follows not only from section 1043, subdivision (b)(1), but also from the trial court's inherent power to establish order in its courtroom. [Citations.]'" (*People v. Majors*, *supra*, 18 Cal.4th at p. 415.) The reviewing court "generally defer[s] to a trial court's determination as to when disruption from a defendant may be reasonably anticipated. [Citation.]" (*Ibid.*)

2. The Trial Court Warned Appellant That Disruptive Behavior Would Result In Removal From The Courtroom

Contrary to appellant's assertion that the trial court did not warn appellant that he would be removed if he continued disruptive behavior (AOB 209), the trial court did warn appellant, at the beginning of the guilt phase, that if he became disruptive he would be removed from the courtroom. Appellant stated that he understood the court's warning. (23RT 750-751.) This warning was sufficient to place appellant on notice of the consequences of disruptive behavior. "The manifest purpose of the warning requirement in the statute is to inform a defendant of the consequences of further disruptions so as to allow him a final opportunity to correct his behavior. That purpose was satisfied here; the essential elements of the required warning were implicit in [appellant's] exchange with the court. [Appellant] was made aware that he was entitled to be present in court at any and all times, provided he did not disrupt the proceedings." (*People v. Sully* (1991) 53 Cal.3d 1195, 1240.)

Moreover, warnings need not be contemporaneous with exclusion to be sufficient to satisfy *Allen's* requirements. (*United States v. Munn* (10th Cir. 1974) 507 F.2d 563, 567 (holding that *Allen* "does not . . . require . . . a contemporaneous warning," and a warning that occurred "[s]everal weeks

before trial" was sufficient to satisfy *Allen*). Here, defense counsel acknowledged that the trial court had previously admonished appellant that "if he does not behave himself in court, the court is going to absent him from the court." (44RT 4517.) Thus, appellant has forfeited any challenge that the warning given during the guilt phase was insufficient. (Cf. *People v. Howze* (2001) 85 Cal.App.4th 1380, 1396 [where defendant refused to go to court and his counsel failed to object to his absence on jurisdictional or constitutional grounds "public policy demands a defendant be estopped to assert that the court violated his right to be present or acted in excess of its jurisdiction when it commenced trial in his absence."].) Thus, appellant was sufficiently on notice that if he disrupted the trial proceedings, he would be removed from the courtroom.

Even if appellant did not have sufficient notice that his disruptive conduct could result in being barred from the penalty retrial proceedings, the trial court was not required to warn appellant before ordering his removal given his sudden and unprovoked act of throwing feces and urine in the presence of the jury. (See *People v. Price*, *supra,* 1 Cal.4th at pp. 405-406 ["A trial court need not wait until actual violence or physical disruption occurs within the four walls of the courtroom in order to find a disruption within the meaning of section 1043."].)

3. The Trial Court Had No Duty To Personally Address Appellant Regarding His Behavior

Appellant argues that the trial court erred by failing to give him an opportunity to conform his behavior and return to the courtroom for the penalty retrial. (AOB 214.) This contention must be rejected. "Counsel would read [*Allen*] to mean that when [the defendant] was excluded . . . [from] his trial, he should have thereafter been brought back at least once a day to ascertain whether he would promise to behave properly and if he did so promise, he should then have been allowed to stay in the courtroom

unless, and until, his next outbreak, ad infinitum. *Allen* contains no such requirement." (*United States v. Nunez* (10th Cir. 1989) 877 F.2d 1475, 1477-1478; see also *Scurr v. Moore* (8th Cir. 1981) 647 F.2d 854, 858-859 [although telling disruptive defendant "he could return to the courtroom if he behaved properly" is a desirable procedure," *Illinois v. Allen* makes no such absolute requirement. The *Allen* court stated only that once the confrontation right is lost it can be reclaimed as soon as the defendant is willing to conform his behavior consistent to the decorum required in judicial proceedings."].) Appellant has cited no case reversing a conviction or penalty because a trial court failed to adequately advise a defendant of his right under section 1043, subdivision (c), to reclaim his right to be present in the courtroom after being removed for disruptive conduct.

Here, the trial court did not abuse its discretion in removing appellant from the courtroom without giving appellant the opportunity to conform his behavior. As the trial court reasonably pointed out, appellant's conduct of screaming out "You're evil," and "demon" and by thereafter throwing feces and urine at both the court and the prosecutor in the presence of the prospective jury was a "sufficiently outrageous act" that "was obviously well thought out. Nothing that came out at the spur of the moment. [Appellant] had a bag of feces in his pocket and unless he carries that around, he had that and let loose. Then after he was calm." (44RT 4506.) Appellant's conduct constituted attempted "gassing," which means intentionally placing or throwing human excrement or other bodily fluids, or any mixture containing such materials, on another person. (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 507; see also §§ 243.9, subd. (b); 4501.1, subd. (b).) Gassing poses the risk of spreading disease. (See §§ 243.9, subd. (c) [permitting testing of gassing suspect for hepatitis or tuberculosis to ensure transmission does not occur]; 4501.1, subd. (c) [same].) The completely unexpected nature of appellant's conduct that

posed a health risk to both the jury and to court personnel justified appellant's permanent exclusion from the courtroom for the entire penalty retrial especially since appellant's egregious misconduct came without any "warning. It [was] not something that you can see bubbling to the surface and do anything about, taking a break, when [appellant] acts." (44RT 4508.)

In any event, even after appellant disrupted trial proceedings by throwing feces and urine in the courtroom, he continued to misbehave by spitting at the trial court on the following day, thus giving no sign of changing his behavior. (44RT 4721-4722.) The trial court reasonably found that it was unable to control appellant given his unexpected conduct of first throwing fecal matter at the court and then spitting at the court the following day. (44RT 4723.) The trial court was justified in removing appellant from the entire penalty retrial because his continued misconduct indicated he was able to control himself but instead chose not to. (See *People v. Medina* (1995) 11 Cal.4th 694, 739 ["it is apparent from the record that, even after defendant had ample opportunity to 'calm down,' he continued to misbehave, and gave no sign of changing his behavior."].)

4. The Trial Court Reasonably Rejected The Claim That Appellant's Misconduct Resulted From Mental Illness

As stated above, the trial court rejected the suggestion, made by defense counsel, that appellant's conduct was the result of mental illness. The trial court found that appellant expressed his dissatisfaction in the questioning of Prospective Juror No. 1 by "acting out and screaming and cursing and throwing fecal matter at the court in the presence of the jury" which indicated that appellant was "capable of controlling himself when he wishes and when things do not go the way he thinks they should, [he] acts out." (43RT 4499.) The trial court further found that appellant's conduct

"was obviously well thought out" as he "had a bag of feces in his pocket and unless he carrie[d] that around, he had that and let loose." (44RT 4506.) Appellant's conduct of telling the trial court to "shut up" and then spitting on the court was further substantial evidence that appellant's disruptive conduct was not the result of mental illness, but reflected deliberate and intentional decision-making aimed at expressing his displeasure with the trial court. Moreover, defense counsel never asserted that appellant was incompetent to stand trial. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1005.)

Accordingly, the trial court reasonably found that appellant's disruptive conduct was not a product of mental illness.

5. The Trial Court Had No Duty To Consider Less Restrictive Alternatives

Appellant argues that the trial court abused its discretion in failing to consider a less restrictive alternative to his complete removal from the courtroom, such as leg and arm shackles. (AOB 215-216.) This contention is forfeited because appellant failed to raise it in the trial court. (See *People v. Marks* (2003) 31 Cal.4th 197, 224.) Although the trial court noted that "I can't think of a restraint, short of absolute mummification, which I don't propose, that would protect the participants and the integrity of the trial," appellant did not suggest any alternatives that he deemed acceptable. (44RT 4508.)

Accordingly, the current claim that the trial court failed to consider less restrictive alternatives, such as shackles, is forfeited. In any event, the trial court was not obligated to take steps less drastic than removing appellant from the courtroom given the circumstances previously discussed. (See *People v. Pena* (1992) 7 Cal.App.4th 1294, 1310 ["We do not agree with appellant's contention a trial judge is required to employ a series of

increasingly severe steps to deal with a disruptive defendant before ejecting him or her from the courtroom."].)

C. Appellant Has Failed To Demonstrate That The Trial Court's Removal Order Is Not Entitled To Deference

"[A] defendant may waive his right to be present at his trial by being disruptive at the trial, and appellate courts must give considerable deference to the trial court's judgment as to when disruption has occurred or may reasonably be anticipated." (*People v. Welch* (1999) 20 Cal.4th 701, 773.) Appellant argues that "no such deference is warranted here because . . . the trial court failed to conduct a meaningful hearing on the issue of appellant's removal, instead summarily removing appellant for the duration of the trial, having neither given appellant prior adequate warning nor inquired of appellant whether he would continue disrupting the proceedings in the future, nor having considered less restrictive means short of full removal." (AOB 205-206.) The record refutes appellant's assertion that no meaningful hearing was held, in that defense counsel was allowed to argue the matter before the trial court made a final ruling. (43RT 4497-4500; 44RT 4501-4521, 4722-4725.) Even assuming, arguendo, the trial court erred by deciding to remove appellant from the entire penalty retrial immediately after appellant threw feces and urine in the courtroom, the court was more than justified in removing appellant after he subsequently told the court to "shut up" and spat at the court. (44RT 4721-4723.) Thus, the trial court's decision to remove appellant for the duration of the penalty retrial is entitled to deference.

D. Appellant Has Failed To Demonstrate Prejudice

Although appellant argues that his removal constituted a structural defect warranting per se reversal of the death verdict (AOB 218), he acknowledges "that typically, however, erroneous exclusion of the defendant is not structural error that is reversible per se, but trial error that

is reversible only if the defendant proves prejudice" (AOB 219).[48] Appellant also claims that the prosecution failed to prove that his exclusion was harmless beyond a reasonable doubt. (AOB 220.)

It is the defendant's burden to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357; *People v. Hines* (1997) 15 Cal.4th 997, 1039.) The record fails to establish any prejudice by the trial court's ruling immediately after appellant threw a fecal bomb at the court in the presence of the prospective jury because appellant's later conduct of spitting at the trial court showed that he would not conform his conduct in the courtroom.

Moreover, with the exception of Deputy Arthur Penate, who testified about an incident in the jail in which appellant threw feces and urine at him after the first penalty phase trial, all the witnesses who gave material testimony in aggravation at the penalty retrial gave virtually identical testimony at the first penalty phase trial, at which appellant was present. (See 35RT 3049-3061 [first penalty phase trial testimony of Lashan Thomas], 3062-3079 [first penalty phase trial testimony of Sandra Hess], 3098-3114 [first penalty phase trial testimony of Richard Bee], 3140-3169 [first penalty phase trial testimony of Bridget Robinson]; 36RT 3392-3396 [first penalty phase trial testimony of Roberto Perovich].) Appellant has failed to demonstrate prejudice as he fails to explain how his attendance during the penalty phase retrial would have altered the outcome of the trial in his favor. (*People v. Bradford, supra*, 15 Cal.4th at p. 1358 ["defendant has failed to explain how his attendance during the testimony of these

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[48] Contrary to appellant's assertion (AOB 219, fn. 21), this Court did not decide the issue of whether structural error results from a defendant's absence during the presentation of the entire prosecution's case in *People v. Concepcion, supra*, 45 Cal.4th 77.

witnesses would have altered the outcome of his trial and, accordingly, has not demonstrated any prejudice."].)

XIV. ANY ERROR IN EXCLUDING SOME EVIDENCE OF "INSTITUTIONAL FAILURE" WAS HARMLESS BEYOND A REASONABLE DOUBT (RESPONSE TO AOB ARG. XVI)

Appellant contends that the trial court prejudicially erred by refusing to permit him to present evidence of "institutional failure" in support of a life sentence, including the proffered testimony of Dr. Ira Mansoori, who recommended neuropsychological testing when appellant was in the care of the CYA. Appellant asserts that the alleged error deprived him of the state and federal constitutional rights to due process, to present a defense, to a penalty determination based on all available mitigating evidence, and to a fair and reliable determination of penalty. (AOB 225-236.) Respondent disagrees.

A. Relevant Factual Background

1. Dr. Louis Weisberg

On March 17,1999, Dr. Weisberg, a psychiatrist who had evaluated appellant at the California Youth Authority when he was 15 years old, testified on behalf of the defense at the penalty phase retrial. (48RT 5390-5415.) Dr. Weisberg testified that psychiatric evaluations were performed for the purpose of "find[ing] out if there were any treatable disorders that the ward may have that they could help with since most of them had not received adequate evaluation treatment previously and to try to provide any diagnostic or treatment procedures that were appropriate and feasible" and "to utilize that in determining what kind of further placement or sentencing they would have." (48RT 5394-5395.) The trial court sustained the prosecution's relevance objection to defense counsel's question, "And did you expect that if you made certain recommendations that the

recommendations would be carried out?" (48RT 5395.) Dr. Weisberg subsequently testified that he had diagnosed appellant principally with severe conduct disorder, indifferentiated type, as well as intermittent explosive disorder. (48RT 5398-5399.) Dr. Weisberg also testified that he recommended appellant receive neurologic evaluation to rule out organicity (or brain disorder) and seizure disorder. An intensive treatment program was also recommended. (48RT 5399-5400.)

2. Dr. Mansoori

Outside the presence of the jury at the penalty phase retrial, defense counsel outlined the relevance of Dr. Mansoori's proposed testimony. At the California Youth Authority, Dr. Mansoori evaluated appellant several years after Dr. Weisberg. (49RT 5747-5748.) Counsel argued that Dr. Mansoori's testimony was relevant because it showed "that people were recognizing that there probably neurological problems with [appellant]" when he was a young man." (49RT 5479.) The trial court found that evidence of a recommendation for further evaluation was not relevant to prove appellant had a neurological deficit. The court also noted that Dr. Weisberg, another doctor from the California Youth Authority, had already provided testimony on recommended care, and two other doctors (Michael Gold and Carl Osborne) had testified that the recommended test had now been performed and the test results were admitted. (49RT 5749-5750.) Defense counsel responded that Dr. Mansoori would testify that he had dealt with appellant longer than anyone at the California Youth Authority and that appellant was happy when told he would not be paroled from the California Youth Authority, which counsel argued corroborated Dr. Osborne's testimony that appellant was institutionalized. (49RT 5750-5751.)

Pursuant to the trial court's request, defense counsel prepared a written offer of proof for Dr. Mansoori's testimony in order to determine

whether it was relevant and cumulative. (49RT 5751-5752, 5758-5764.) The proposed testimony would be that Dr. Mansoori requested a neuropsychological testing, which derived from Dr. Weisberg's recommendation. (49RT 5759.) Appellant did not receive the test, which was unavailable at his institution. However, he could have been transferred to another institution where it was available. (49RT 5759-5761.) Defense counsel argued that the proposed testimony was relevant as follows:

> The first is that at three years after Dr. Weisberg, they are still talking about the fact that [appellant] has neurological problems and caring people wanted these things done. [¶] They were not followed through. [¶] The other relevance is that [Dr. Mansoori] saw [appellant] 12 times which seems to be the most amount of time anybody spent with him and he got along with him. [¶] [Dr. Mansoori] wasn't attacked. [¶] In fact, as a bearer of bad news to most other people: [¶] You can't get out of jail, [¶] [appellant] was calm and nice and, in fact, it was his impression that he was more comfortable with staying in the institution. [¶] Now the relevance of that is because I am allowed to present sympathetic aspects of my client's life and it goes to the tendency to evoke sympathy for somebody happier to remain locked up than to be free. [¶] And I think I have every right in [the] penalty phase to show that to the jury.

(49RT 5761.)

The prosecutor objected to the proposed testimony on the grounds that it was speculative and irrelevant. (49RT 5761-5762.) Defense counsel stated that she was baffled by the objection since the prosecutor had not objected to the testimony during the first penalty trial. (49RT 5762.)

The trial court ruled that Dr. Mansoori would only be allowed to testify to the following areas: (1) "How long he was with [appellant]"; (2) "That he got along with [appellant]"; (3) "[Appellant] was good to him"; and (4) "That he was the person that told [appellant] he could not leave Y.A. at that point" and "the manner in which [appellant] responded to that news." (49RT 5763-5764.) Dr. Mansoori was not permitted to testify that

he recommended neurological testing. (49RT 5770.) The court found the other proffered testimony to be either cumulative or irrelevant. (49RT 5764.)

B. Even Assuming The Trial Court Erred In Limiting The Testimony Of Doctors Weisberg and Mansoori, It Was Harmless

Based on the evidentiary rulings discussed above, appellant contends that the trial court erroneously precluded Dr. Weisberg from answering one question during direct examination and excluded some of the proffered testimony of Dr. Mansoori, at the penalty retrial in violation of his federal and state constitutional rights to present mitigating evidence. (AOB 225-234.) Respondent submits that it is unnecessary to determine whether the trial court erred in limiting the testimony of the two doctors because any error was harmless.[49] (See, e.g., *People v. Carter* (2005) 36 Cal.4th 1215, 1275 ["We need not decide whether the trial court's ruling to exclude Dr. Ellana's testimony in its entirety was erroneous, however, because even if we assume that error occurred, defendant suffered no prejudice."].)

A capital defendant has a constitutional right to present any relevant mitigating evidence at the penalty phase. (*People v. Brown*, *supra*, 31 Cal.4th at p. 576; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [106 S.Ct. 1669, 90 L.Ed.2d 1].) "However, '[e]xclusion of such evidence . . . does not automatically require reversal, but is instead subject to the standard of review announced in *Chapman v. California* [(1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]], that is the error is reversible unless it is harmless beyond a reasonable doubt.'" (*People v. Brown, supra*, 31 Cal.4th at p. 576.) "Penalty phase error is prejudicial under state law if there is a 'reasonable possibility' the error affected the verdict. ([Citation].) This

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[49] Respondent does not concede error occurred.

standard is identical in substance and effect to the federal harmless beyond a reasonable doubt standard enunciated in *Chapman v. California*." (*People v. Watson* (2008) 43 Cal.4th 652, 693.)

The cases that appellant primarily relies on, *People v. Mickle* (1991) 54 Cal.3d 140, 193, and *People v. Brown, supra*, 31 Cal.4th 518, 577-578 (AOB 231-232) support a finding of harmless error in this case. In *Mickle*, this Court found that the trial court erred in sustaining the prosecutor's relevance objections to the following questions related to the psychological care defendant received before the crimes: "(1) 'what should have been done' for defendant during each hospital and prison stay, (2) how has the professional 'perception' and 'treatment' of pedophilia 'change[d]' over the years, and (3) 'what should have been done to safeguard the public' each time defendant was released from an institution." (*People v. Mickle, supra*, 54 Cal.3d at p. 193.) This Court found that the proffered evidence of "the state's 'improper' diagnosis and treatment" "was relevant and admissible insofar as it suggested that defendant had sought and/or been denied treatment which might have controlled the same dangerous personality disorder that purportedly contributed to the instant crimes. The jury could reasonably view such fact as bearing on defendant's moral culpability." (*Ibid.*) However, this Court found any error was harmless beyond a reasonable doubt because "the jury heard a detailed account of the 'inappropriate' treatment received by defendant during each institutional confinement." (*Ibid.*)

Similarly, in *Brown*, although this Court found that the exclusion of a portion of evidence that medication was available to control defendant's hyperactivity was an abuse of discretion, the Court found the error harmless "[b]ecause defendant was able to put before the jury essentially the same evidence that had been excluded." (*People v. Brown, supra*, 31 Cal.4th at pp. 577-578.)

Here, as in *Mickle* and *Brown*, any error in limiting the testimony of the two defense doctors was harmless. "The jury was allowed to hear and consider the essence of the mitigating evidence." (*People v. Hughes* (2002) 27 Cal.4th 287, 397.) Dr. Weisberg testified that he had diagnosed appellant principally with severe conduct disorder, indifferentiated [sic] type, as well as intermittent explosive disorder. (48RT 5398-5399.) Dr. Weisberg also testified that he recommended appellant receive neurologic evaluation to rule out organicity (or brain disorder) and seizure disorder. An intensive treatment program was also recommended. (48RT 5399-5400.) As the trial court pointed out, Dr. Mansoori's proffered testimony that he had also recommended neurological testing was cumulative to Dr. Weisberg's testimony. (49RT 5764; see *People v. Loker* (2008) 44 Cal.4th 691, 730 [finding that exclusion of cumulative evidence does not deny a defendant due process of law].)

Although neither Dr. Weisberg nor Dr. Mansoori testified whether their recommendations for neurological testing in 1988 and 1991 were followed, there was no evidence presented that appellant received any neurological testing while he was in the custody of the California Youth Authority. The next mention of any neurological or psychological testing of appellant was during the testimony of Drs. Michael Gold and Carl Osborne, who had both examined appellant in 1998. (48RT 5542, 5594.) The jury therefore could infer that any recommendations for further testing in 1988 and 1991 were not acted on until 1998. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1073 [assuming court erred in sustaining relevancy objection to rabbi's testimony regarding position of Judaism on capital punishment, rabbi stated his Jewish faith confirmed in him that capital punishment was a violation of God's law, and the jury therefore could infer that Judaism disapproves of the death penalty]; *People v. Ervin* (2000) 22 Cal.4th 48, 103 [assuming trial court erred in excluding chaplain's opinion

on penalty, error was harmless where the jury heard chaplain testify he found defendant's involvement in jail's religious program "consistent and sincere"]; *People v. Ruiz* (1988) 44 Cal.3d 589, 622 [assuming trial court erred in excluding testimony from reverend who counseled jail inmates that defendant would lead "a moral and religious life" in prison, it was clearly harmless where reverend testified he had discussed religious and Christian principles with defendant, who expressed a desire to attend Oral Roberts University and to obtain a master's degree in theology].)

Finally, defense counsel emphasized "institutional failure" as a mitigating factor in closing argument. (*People v. Mickle, supra*, 54 Cal.3d at p. 194.) Specifically, counsel argued that in 1988, Dr. Weisberg examined appellant at age 15 years and recommended neuropsychiatric and neuropsychological testing based on his belief that appellant may have had organic brain damage. Counsel stated, however, that the recommended testing was "never done." Counsel made a similar argument with respect to Dr. Mansoori: "[appellant] sees Dr. Mansoori for twelve sessions. That work-up is never done." (50RT 5968-5969.) In arguing that the testimony of prosecution witness Dr. Markman should be disbelieved, counsel stated that Dr. Markman never looked at the SPECT scan performed by Dr. Gold. (50RT 5970.) Counsel continued, "And that is part of the problem of what [has] happened, is people like Dr. Markman. These are the people in the system. They don't care." (50RT 5971.) In surrebuttal argument, counsel argued that manifestations of appellant's temporal lobe damage and seizure disorder had appeared in the past, "but it ha[d] not been diagnosed." (50RT 5987.)

In view of all the other mitigating evidence that was presented, which included a full picture of appellant's family environment during his upbringing ,as well as the overwhelming aggravating evidence, there was no reasonable possiblity that there would have been any different result if

the excluded evidence had been admitted, and any error was harmless beyond a reasonable doubt.

Accordingly, any error in limiting evidence of "institutional failure" was harmless beyond a reasonable doubt.

XV. THE CONTENTION THAT THE TRIAL COURT ELICITED TESTIMONY SUGGESTING FUTURE DANGEROUSNESS IS FORFEITED; EVEN ASSUMING THE CLAIM IS PRESERVED FOR APPELLATE PURPOSES, IT LACKS MERIT (RESPONSE TO AOB ARG. XVII)

Appellant contends the trial court erred by eliciting testimony from Dr. Osborne suggesting future dangerousness, by permitting the prosecutor to do the same, and by overruling the defense objection to the prosecutor's argument on future dangerousness in violation of California law and his federal constitutional rights to due process and the right to a reliable penalty determination under the Eighth Amendment. (AOB 237-247.) Respondent disagrees.

A. Relevant Facts

1. Direct Examination Of Dr. Osborne

In the penalty retrial, Dr. Osborne testified on behalf of the defense. Dr. Osborne opined that appellant suffered from several severe and chronic mental illnesses, including intermittent explosive disorder. (48RT 5601.) Persons suffering from that disorder have a period of built-up tension or emotion that results in explosive aggressive behavior. A very small trigger can set off the built-up pressure. After the person has an explosive episode, they tend to have a feeling of relief, show more relaxation, and less intention. In many cases, there is a period of quiescence, but the pressure begins to build anew. If a person is in a very stressful situation, the explosive episode can occur very rapidly and can occur in a series of outbursts. In a less stressful situation, there can be moderate to quite long

periods of where no explosive behavior outbursts occur. (48RT 5601-5603; 49RT 5693-5695, 5705.) Dr. Osborne also opined that appellant had "a broken thermostat," which meant that, "because of the combination of his disorders and the way they interact with each other, [he] engage[d] in certain kinds of behaviors as he le[d] his daily life that result[ed] in his increasing tension." (49RT 5698.)

The following colloquy occurred:

> Q Does [appellant] have any control over his disorders at this point?
>
> A Partial. [¶] There are times when he can keep a lid on it for a short period of time. [¶] But I think a very important thing in his past history is just how short a time that is. [¶] You know, on any one occasion [appellant] may be able to control himself. He may not. But if you just look at the amount of time between his outbursts over his entire life, they're fairly short.
>
> Q Now you have worked at the prisons.
>
> A I have.
>
> Q As a psychologist?
>
> A Yes.
>
> Q At Corcoran [State Prison]?
>
> A Yes.
>
> Q And Corcoran is a very high security prison?
>
> A One of the two highest security systems in the state.
>
> Q Are you working with people that are sentenced to life without parole?
>
> A Yes, I was.
>
> Q . . .[¶] Were you brought in as a psychologist to deal with people with similar problems to [appellant]?
>
> A Yes.
>
> [The prosecutor]: I will object as being irrelevant.
>
> The Court: Sustained. Not relevant.
>
> By [defense counsel]:
>
> Q To your knowledge is there medication today that can control one's behavior in a situation like [appellant]?
>
> A There are several medications that can, in fact, put a lid on a person chemically.
>
> Q To your knowledge has [appellant] been given any of these medications in his life?

A I think periodically he has been prescribed them. [¶] One of the things that [appellant] does that complicates the picture is that he selectively decides to take or not take the medication. [¶] The medications that I am referring to have to be taken on a very regular basis over long periods of time to create the type of situation that I was talking about, keeping a chemical lid on behavior. [¶] And to my knowledge, [appellant] has never been forced to take the medications. [¶] So he can turn them down when he wants.

The Court: They can't force him to take them in state prison either, can they?

The witness: I believe there is a hearing in which they can, but I'm not certain.

The Court: They hold them down and make them take them?

The witness: Usually they jab them with a needle.

The Court: Go ahead [counsel].

By [defense counsel]:

Q What is the medication that they are using in state prison? [¶] I believe at one point you gave me a name of a medication that they use in state prison on prisoners like [appellant].

A There are many. [¶] Probably the most commonly used one is Haldol. In inside circles they call that the baseball bat.

(49RT 5698-5701.)

2. Cross-Examination Of Dr. Osborne

The prosecutor's questions challenged Dr. Osborne's expertise and opinions. Attempting to clarify Dr. Osborne's diagnosis, the prosecutor asked, "In terms of what you are asserting as a mental illness, you are talking about this impulse control problem," to which Dr. Osborne replied, "Intermittent explosive disorder. This is the diagnosis that [appellant] received back in CYA many years ago. It is still correct." The prosecutor then asked, "Is [appellant] *still* currently attempting to manipulate people?" Dr. Osborne answered, "Yes. He always will." (49RT 5736 [emphasis added].)

Defense counsel objected to the prosecutor's next question, "Is [appellant] currently prone to violence," and she requested a bench conference. The trial court overruled the objection and instructed Dr. Osborne to answer the question. (49RT 5736.) The following colloquy occurred:

> [Dr. Osborne]: Currently prone to violence? [¶] [Appellant] has -- [¶] I do not mean to be evasive here, but let me state fully that [appellant] has a long history of violent behavior over situations and over time. [¶] He will remain as violent as he always has been.
>
> By [the prosecutor]:
>
> Q Forever?
>
> A Barring something being done, not forever. [P] One of the things that is wrong with [appellant] remits substantially especially in terms of violent behavior when a person is in their forties.
>
> Q So we have to look forward to 16 more years of what we have seen in the past?
>
> A No. [Appellant], no matter what happens during this proceeding, will never be on the street again and violent behavior is very situational and specific.
>
> Q Well, Sandra Hess was in a custodial facility. [¶] Correct? [¶] So we have seen what he has done in a custodial facility with a teacher. [¶] Right?
>
> A As a child, yes. Or as a youth, yes.
>
> Q I thought this was . . . a historical thing with him.
>
> A Well, let me clarify. [¶] Where he is going, there will not be a person like her [Hess] available.
>
> Q Well, he is go[ing] some[ ] place where there are visitors. [¶] Correct?
>
> A Yes.
>
> Q There are guards. [¶] Correct?
>
> A Correct.
>
> Q There are nurses. [¶] Correct?
>
> A No. I don't know about state wide in the prison system.
>
> Q You don't know if there are nurses in the state prison facilities?
>
> A That is not what I said. [¶] I don't know if he is going to be going to a place in the state system where nurses are available.

Q There are psychologists. [¶] Correct?

A I don't know if each facility has psychologists either.

Q You don't know who he will come in contact with. [¶] Correct?

A No. I'm not sure what the outcome of this whole thing will be for him.

Q But, certainly, beyond the prison population we normally think of, there are a lot of civilians in prison facilities including D.A.'s at times.

A Yes. Yes. I believe so. [¶] My understanding of where he is likely to wind up –

Q You know what? There's no question pending. [¶] Your experience with our prison system constitutes a two week stint at one prison that you went to. [¶] Is that correct?

A Yes.

Q Have you been to any of the other facilities?

A Not yet.

(49RT 5737-5739.)

3. Prosecutor's Closing Argument

Appellant challenges the prosecutor's following comments as improper argument on future dangerousness:

The problem with putting [appellant], who has no moral conscience, someplace, any place, even a prison, is there are teachers and counselors and guards and visitors and nurses and doctors, prison administrators, staff, secretaries, board of prison terms people, deputy district attorneys, there are other civilians that come into contact with people in the prison system as part of doing their daily routine.

And [appellant] doesn't care who he victimizes. He doesn't care who his victim is. He will randomly select them and he will get rid of them and he will execute them and he has done so.

You just look at what he has done.

[Defense counsel]: There will be an objection.

The Court: The objection will be overruled.

[The prosecutor]: Remember one thing early on when [appellant] was interviewed by one of these CYA people and he was on his way to go to prison. He told the CYA person, after having attacked Luz Hernandez and choked Sandra Hess, that he can control himself if he wants to.

> Well, the problem here is [appellant] doesn't want to control himself. [Appellant] wants to victimize anybody and everybody he can. And if you need any prove of it, look at what he has done on the inside and look at what he has done on the outside and that tells you everything you need to know about what kind of a person he is.
>
> He is so depraved, he is so uncaring, he is so unfeeling and he is such an absolute menace to any civilized society --

Defense counsel objected and was granted permission to approach the bench. At the bench conference, counsel stated, "Objection to the terminology of "depraved," that the prosecutor is using. The whole term of his argument and the characterizations I believe are improper." The trial court responded,

> I know of no authority whatsoever that would not allow comments on a multiple murder, rapist [ ]as being depraved, which means rather low conduct. There is nothing wrong with that argument. [¶] In terms of your other argument, I assume you wanted to approach to object to an argument about future dangerousness.
>
> Your objection is overruled because the court feels there is ample evidence on the record from your own psychiatrist to support that argument.

(50RT 5955-5957.)

B. The Claims Related To Future Dangerousness Are Forfeited; Even Assuming The Claims Are Preserved For Appellate Purposes, They Lack Merit

Appellant asserts that the trial court erred by "eliciting expert testmony suggesting future dangerouness," "when the trial judge asked Dr. Osborne the question, 'They can't force him to take them [i.e., medications to control behavior] in state prison either, can they?]'" (AOB 244; 49RT 5700-5701.) However, appellant did not object to the trial court's question. "[Appellant's] failure to object at trial . . . particularly where (as here) such action would have permitted the court to clarify any possible misunderstanding resulting from the [question], bars his claim of error on

appeal." (*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1053; see also *People v. Sanders* (1995) 11 Cal.4th 475, 531; *People v. Harris*, *supra*, 37 Cal.4th at p. 350; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1125.)

In any event, appellant's claims lack merit as to both the trial court's questioning of the defense expert and the prosecutor's cross-examination and argument. "While the prosecution is prohibited from offering expert testimony predicting future dangerousness in its case-in-chief ([Citation]), it may explore the issue on cross-examination or in rebuttal if defendant offers expert testimony predicting good prison behavior in the future. ([Citations.]) . . . 'If the defense chooses to raise the subject, it cannot expect immunity from cross-examination on it. ([Citations].)" (*People v. Jones* (2003) 29 Cal.4th 1229, 1260-1261 [internal quotation marks omitted].) Moreover, a trial court has "the power, discretion and affirmative duty . . . [to] participate in the examination of witnesses whenever he believes that he may fairly aid in eliciting the truth, in preventing misunderstanding, in clarifying the testimony or covering omissions, in allowing a witness his right of explanation, and in eliciting facts material to a just determination of the cause." (*People v. Harris*, *supra*, 37 Cal.4th at p. 350 [internal quotation marks omitted].)

The trial court's questions where proper to clarify the defense expert's testimony, which suggested that appellant could be medicated to prevent future dangerousness. Defense counsel questioned Dr. Osborne about his experience working as a psychologist in state prisons, specifically "working with people that are sentenced to life without parole." (49RT 5699.) Counsel, by subsequently asking, "To your knowledge is there medication today that can control one's behavior in a situation like [appellant]," and eliciting the response that "There are several medications that can, in fact, put a lid on a person chemically," introduced evidence that appellant would not pose a future danger. (49RT 5670.) Dr. Osborne stated that appellant's

behavior or "broken thermometer" could be controlled through medication, thus implying he probably would not be dangerous to other inmates and staff in prison. (Cf. *People v. Ochoa*, *supra*, 19 Cal.4th at p. 462 [because an aspect of penalty phase defense was that defendant was well behaved when not on drugs and was different only when intoxicated and the defense solicited expert's opinion that he would be a good prisoner, prosecutor was entitled to ask whether prohibited drugs might be available in prison so as to cast doubt on that testimony]; see *People v. Davis* (2009) 46 Cal.4th 539, 620 ["defendant's presentation of Dr. Wood's diagnosis of antisocial personality disorder opened the door to rebuttal testimony questioning that diagnosis or suggesting an alternative diagnosis"].)

"The prosecutor was entitled to refute defense expert testimony by cross-examining the expert about evidence that [appellant] might behave violently in prison, and by relying on that evidence in closing argument." (*People v. Avila*, *supra*, 38 Cal.4th at p. 610; *People v. Jones*, *supra*, 29 Cal.4th at p. 1260; *People v. Seaton*, *supra*, 26 Cal.4th at p. 679.) Since that is precisely what the prosecutor did in appellant's case, his closing argument was not improper. The prosecutor did not offer expert testimony concerning appellant's future dangerousness during the case-in-chief (see *People v. Jones, supra*, 29 Cal.4th at p. 1260), but did argue proper inferences that could be drawn from the Dr. Osbourne's testimony to refute the implication that appellant could be medicated to prevent future violent behavior (see *People v. Seaton, supra*, 26 Cal.4th at p. 679). Moreover, the prosecutor appropriately relied on appellant's past acts of violent behavior, as evidenced in the Coleman and Foster murders as well as his choking of Hess while in CYA, to indicate that prison would not be suitable for him. (*People v. Ervine* (2009) 47 Cal.4th 745, 797.) These remarks fell within this Court's acknowledgment that "the prosecutor may argue the defendant is dangerous." (*People v. Freeman*, *supra*, 8 Cal.4th at pp. 520-521

[rejecting defendant's contention that the prosecutor improperly argued future dangerousness by noting that defendant had killed before and might in prison]; see also *People v. Ervin*, *supra*, 22 Cal.4th at p. 99 [prosecutor's remarks that "if defendant were sentenced to life imprisonment without possibility of parole, based on his earlier disciplinary record he could present a discipline problem to prison authorities, as he would have 'nothing to lose,' and he 'can try to get away with anything, and no one can give him one more day's time,'" "were proper argument derived from evidence indicating that defendant might cause disciplinary problems if sentenced to life imprisonment"].)

Even assuming the trial court and prosecutor committed error on the issue of future dangerousness, there was no prejudice because Dr. Osborne did not agree with the implied premise of the prosecutor's line of questioning, replying that appellant's past violent behavior was "very situational and specific." (49RT 5737; see *People v. Boyette*, *supra*, 29 Cal.4th at p. 448 [assuming prosecutor committed misconduct by asking expert to predict defendant's propensity for violence, there was no prejudice because witness did not agree with the implied premise of prosecutor's line of questioning].) Moreover, in response to the court's questioning, Dr. Osborne suggested that appellant could be involuntarily medicated to control his violence. (49RT 5700-5701.) Dr. Osborne also testified that appellant's condition could remit in his forties, implying that any future dangerousness was not permanent. (49RT 5737.) In view of all the other aggravating evidence, including appellant's long history of extremely violent behavior and Dr. Osbourne's opinions about the relationship of violence to appellant's mental condition, there is no reasonable possibility that there would have been any different result in the absence of error, and any error was harmless beyond a reasonable doubt.

XVI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN STRIKING DR. OSBORNE'S TESTIMONY RELATED TO ANTI-SOCIAL PERSONALITY DISORDER (RESPONSE TO AOB ARG. XVIII)

Appellant contends the trial court prejudicially erred by striking the testimony of Dr. Osborne that appellant suffered from antisocial personality disorder, which was relevant mitigating evidence in support of a life sentence, thereby depriving appellant of the state and federal constitutional rights to due process, to present a defense, to penalty determination based on all available mitigating evidence, and to a fair and reliable determination of penalty. (AOB 248-258.) Respondent disagrees.

A. Relevant Facts

1. Penalty Phase Retrial Testimony Of Defense Witness Dr. Osborne

Dr. Osborne was a psychologist who earned a Ph.D in clinical psychology and completed a post-doctoral fellowship in forensic psychology. (48RT 5590-5591.) In 1998, Dr. Osborne was engaged by the defense to interview and diagnose appellant. (48RT 5594.) Dr. Osborne had about 18 hours over eight separate visits of direct contact with appellant. (48RT 5594-5595; 49RT 5709.)

The fourth edition of the Diagnostic and Statistical Manual of the American Psychiatric Association or "DSM-IV," published in 1994 lists "all the different mental disorders" and was the "definitive source for diagnostic purposes." Dr. Osborne further stated that the DSM-IV included information on "how to make the diagnosis, what to expect to come along with it that you maybe had not thought of, what you had seen with an individual patient, prognosis, scientific research and things of that sort." (48RT 5598-5599.) In the field of forensic psychology and psychiatry, Dr. Osborne agreed that new research was turning up, and that "[w]e have

made some fairly dramatic discoveries recently. As long as the science keeps going, there will always be changes." (48RT 5599.)

Based on the interviews with appellant, the results of the psychological tests, and appellant's related case file, Dr. Osborne concluded that in general, appellant suffered from several severe and chronic mental illnesses, among which were intermittent explosive disorder, anti-social personality disorder, and probably substance dependence. (48RT 5601.)

Dr. Osborne described a person with anti-social personality disorder, in the broadest sense, as a person who engaged in a number of acts that are illegal and outside the normal social and moral boundaries of the society in which they live. The disorder comes in a number of different forms and has a number of additional dimensions that may or may not be present. By and large, the disorder is a life-long problem. It usually appears early on in the form of a "conduct disorder," which is the beginning of anti-social personality disorder before the age of 18. (48RT 5603-5604.) By the time that the person with the disorder reaches their forties or so, there is a fairly dramatic decrease in the behavior associated with the disorder. (48RT 5604; 49RT 5742-5743.) Dr. Osborne defined anti-social personality disorder as: "The essential feature of anti-social personality disorder is a pervasive pattern of disregard for and violation of the rights of others that begins in childhood or early adolescence and continues into adulthood." (49RT 5618.) The epidemiology showed that 80 percent of people in the prison system have anti-social personality disorder. (48RT 5619.)

Dr. Osborne's diagnosis of anti-social personality disorder was based on appellant's past behavior since the age of nine. (48RT 5620.) For a long period of time, appellant was interacting with children's protective services, he was in a series of group homes, and he was in the California

Youth Authority. All three of these agencies kept records of appellant's behavior over time. (48RT 5620-5621.)

In response to defense counsel's question of whether appellant was born with anti-social personality disorder, Dr. Osborne responded,

> That is a new answer for me to be able to give. [¶] We have suspected for a long time, in fact the DSM4, as I said was published in 1994 and has several statements in it that say: [¶] We believe this, or [¶] it is assumed or presumed that this travels in families. [¶] In 1995, there was a cluster of research articles that was published in the archives of general psychiatry, which I find very persuasive, that shows that, in fact, this is a genetically inherited problem.

(48RT 5621.)

The trial court recessed proceedings after defense counsel's next question, "What was it about [appellant's] genetic make up that you felt that that was part of the diagnosis?" (48RT 5621.) Outside the presence of the jury, the trial court stated that before proceeding with Dr. Osborne's testimony, it needed to clarify whether the doctor's proffered opinion was that appellant's anti-social personality disorder was "genetically based." Defense counsel and Dr. Osborne agreed with the trial court's assessment. (48RT 5622-5623.) After Dr. Osborne reread the definition of the disorder quoted above, the trial court inquired, "Any particular rights involved or any and all rights?" Dr. Osborne responded, "That is sort of the definition." (48RT 5624.) According to defense counsel, Dr. Osborne's proffered testimony would be "the criteria that the psychologists and psychiatrists come up with that appears to be present when they do their research in fathers and mothers." (48RT 5625.) The trial court ordered a "*Kelly-Frye*"[50] hearing, stating in relevant part: "If you take a definition that

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[50] *People v. Kelly* (1976) 17 Cal. 3d 24, and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.

basically makes any habitual criminal fit it and then you want to tender an opinion that that is genetically based, you have a big hill to climb." (48RT 5625.)

2. The *Kelly-Frye* Hearing

The following day, the trial court reiterated its concern about the admissibility of some of the proffered opinions of Dr. Osborne. The trial court stated:

> And I'm just a lay person, but it seems to me that what the defense is proposing to do is this: [¶] In effect, characterize long term criminality as a mental disease or defect of some sort and pigeon hole it into the mitigating here. [¶] Your expert is shaking his head no. [¶] [Dr. Osborne] is here, by the way, as well. The witness is present in the courtroom.
>
> As I understand the definition of A.P.D., anti-social personality disorder, the definition is quite straight forward, and the doctor read it to me two or three times yesterday, and it's simply, in a nutshell, long term criminality, i.e., long term deprivation of the rights of others or stamping on the rights of others beginning at a young age.
>
> The witness indicated that about 80 percent of the people up in state prison in his opinion suffer from that or are career criminals. [¶] I would concur that it is probably closer to 99 percent of the people I have sent to prison, if this court is representative, at least given their records suffer from the long term problem with respecting the rights of others in a criminal way, as a matter of fact.
>
> So to characterize that now as a disorder, defect or disease, or however you want to phrase it, malady, and then to go on and the witness was about to be asked to render an opinion that not only is it a psychiatric disorder of some sort but that it is genetically based as well -- [¶] He is nodding his head in agreement with the court's characterization. [¶] But if I am correct in my characterization of those opinions, this is to reduce this testimony to an absolute -- I forget the Latin term -- reducing this to the absurd.
>
> It is as if the witness is going to do the following: [¶] Offer a "expert opinion" based on the fact that there is a new psychiatric disorder; it is called committing a murder, and it is characterized by the commission of killing with malice

> aforethought. [¶] And the opinion is that that is the result or expression of a mental disease or defect and that further it is genetically based. [¶] That is really what we are talking about.
>
> You are taking a sociopathic, or you name it, however you want to characterize it, somebody who commits crime over and over and based on the commissions of those crimes, and very little else, coming up with a diagnosis and couching it with a scientific term and then going further and saying it is genetically based. [¶] I find that to be inadmissible in the extreme for a number of reasons.
>
> I would like to hear both of you on it and if you have testimony outside of the jury's presence, I will be glad to hear it.

(49RT 5628-5630.) The trial court did not dispute that Dr. Osborne had the requisite training and experience to testify to reasonable opinions by those in his field. (49RT 5630-5631.)

Defense counsel outlined the circumstances behind hiring Dr. Osborne, who had not testified at the first penalty trial. (49RT 5631-5633.) Counsel then stated that Dr. Osborne would discuss two areas of his diagnosis of appellant: anti-social personality disorder and intermittent explosive disorder. Dr. Osborne would testify that research had shown that individuals with anti-social personality disorder had parents who both had a combination of certain traits. Because the research supporting Dr. Osborne's opinion was published in the "biggest selling" psychology textbook in the country that was taught to new psychology students, defense counsel argued that "[t]he concept research is quite acceptable. (49RT 5633-5634.) Defense counsel also proffered other books and articles,[51] which

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[51] Dr. Osborne relied upon three articles from the Archives of General Psychiatry, Volume 52, November 1995: (1) "Differential Heritability of Adult and Juvenile Anti-social Traits" by Michael Lyons, Ph.D; (2) "Genetic Questions for Environmental Studies" by David Reiss; and (3) "Genetic Environmental Interaction in the Genesis of Aggressivity and Conduct Disorders" by Remi Cadoret. (49RT 5657-5658, 5660-5661.)

> talk[ed] about the fact that they are finding when they are doing the research that if parents have certain traits towards violence, alcohol and drug abuse, things like that, the combination of both parents produces a child that has a tendency towards or will probably become an A.P.D. [¶] But that in itself is not enough. There is another component of that which is that that child with that genetic background then put in a situation where there is no nurturing along the way or very poor nurturing, neglect or physical abuse, or problems like that, that seems to produce the A.P.D. personality.

(49RT 5634.) Defense counsel concluded that the proffered testimony was relevant and admissible during the penalty phase. (49RT 5635.)

The prosecutor objected to Dr. Osborne's conclusion that appellant genetically inherited his anti-social personality from his parents because it was not generally accepted in the psychiatric community. (49RT 5637.)

As an offer of proof, Dr. Osborne gave extensive testimony at the hearing. (49RT 5638-5670.) According to Dr. Osborne, the hereditary component of anti-social personality disorder had been recognized "for a long time":

> There is specific language in the DSM4 regarding the heritability of anti-social personality disorder. [¶] For about, and this is an estimate, about 20 years prior to that, there was longitudinal research that went on all over the world about this issue. However, until 1995, as a behavorial scientist, I was not persuaded that I could give a real concrete answer about genetic heritability.
>
> In 1995 there was a series of articles published in one of the most prestigious psychiatric journals by the name of Archives General Psychiatry which persuaded me quite strongly that there is a heritable component to anti-social personality disorder. [¶] This is what prompted the statement yesterday that I am able to give a new answer on this because I have always suspected this for a long time. [¶] And there was good research particularly in the broader area of criminality by a researcher by the name of Sarnoff Mednick.
>
> It wasn't until 1995 that we had good empirical numbers to show that, in fact, there is an inheritable component to A.P.D.

(49RT 5639-5640.)

Dr. Osborne relied upon the seventh edition of Abnormal Psychology in forming his opinion. He presented this psychology textbook, with the relevant portions highlighted, to the trial court. (49RT 5642, 5644.) The textbook listed the characteristics of anti-social personality disorder: "being an adult that does not work much, breaks the law, irritable, aggressive and does not pay his or her debts, reckless, doesn't plan too well[,] . . .[¶] . . .[¶] [s]hows no regard for the truth. No remorse." (49RT 5646-5647.) The textbook stated that the terms anti-social personality disorder and psychopathy are used interchangeably, but that an important distinction between the two was that the emotional detachment was more pronounced in a psychopath. (49RT 5647-5648.) The trial court noted that the textbook stated, "Furthermore, diagnostic concept in the field of psychopathology should not be synonymous with criminality." (49RT 5648.) Dr. Osborne agreed with that statement and testified, "And the concern that has been expressed for at least 100 years for this is to make sure we don't have A.P.D. completely synonymous with just plain criminality." (49RT 5648-5649.) The trial court observed, "You are coming pretty close when according to the book you have given me, 75 to 80 percent not just career criminal but of convicted felons would meet the criteria for that diagnosis." (49RT 5649.) The textbook also stated that research suggested that both criminality and anti-social personality disorder have inheritable components, which Dr. Osborne believed to be true. (49RT 5651-5652.) Dr. Osborne agreed with the principle that "true heritability implies of necessity a genetic component." In response to the question, "Has there been an isolation of a genetic component chemically or otherwise that would be responsible for criminality," Dr. Osborne responded, "We're not there yet" and he suspected that "we will find [ ] a cluster of genetic markers that we then discover, reveal, physical systems

that are particularly vulnerable to particular environmental stresses." (49RT 5654-5655.) Dr. Osborne testified that the studies he relied upon to reach his opinion neither indicated nor advocated that inherited traits were related to racial or ethnic backgrounds. (49RT 5661-5662.)

The trial court ruled the proffered opinion testimony that appellant may have inherited anti-social personality disorder to be inadmissible. (49RT 5673-5678.) The court found that the proffered opinion that appellant's parents suffered from the disorder "to be wholly without foundation, without relevance, to be so vague as to invite rampant speculation in the jury to have the great potential to mislead[.]" (49RT 5674.) The portions of the textbook that Dr. Osborne relied upon only indicated "that there is some suggestion in some research that there may be a heritability component to criminal conduct." (49RT 5674.) The trial court found that the diagnosis of anti-social personality disorder was simply a label for "a complex of [observable] behaviors, which is no more than a manifestation of repeated criminal conduct." (49RT 5674-5676.) The studies relied upon for the opinion that the disorder was inheritable, the trial court found, were "relatively new." (49RT 5676.) The trial court viewed the proffered opinion that the disorder was inheritable as functionally equivalent to the opinion that criminal conduct was inheritable. (49RT 5676.) The proffered opinion that the disorder had a genetic component was merely based on the premise that there was some correlation between criminal conduct of both the parents and the children; however, that "does nothing but tell the jury what everybody knows. If you come from a bad background or have bad parents, you may turn out that way yourself." (49RT 5676-5677.) However, the trial court would not preclude testimony "that oftentime[s] if a person comes from a background that may be seen as less than ideal," such as having an absent father and an inept mother, as

appellant had, "those sorts of conditions can breed a child that has a less than even chance[.]" (49RT 5677-5678.)

The trial court concluded:

> It's not there. It does not meet *Kelly-Frye*. It is not accepted. It is not proven to this court that the methods of research were such to allow you to come to this unique conclusion and it will confuse[,] mislead[,] and consume the jury's time to an undue degree.

(49RT 5678.)

3. Resumption Of Dr. Osborne's Direct Examination Testimony

In the presence of the jury, Dr. Osborne opined that appellant had anti-social personality disorder. To reach that diagnosis, Dr. Osborne relied upon the psychiatric testing of and interview with appellant, as well as appellant's records and "look[ing] at the type of people his parents were." (49RT 5682.) Defense counsel then asked, "And what was some of the characteristics that his parents had that had an influence on [appellant]," which prompted the trial court to order a bench conference. (49RT 5682.)

Outside the presence of the jury, the trial court found counsel's question to be overreaching his ruling, stating, "This is not even subtle to try to tie the two [appellant's anti-social personality disorder and his parents' characteristics] somehow together because you have to remember what your witness' opinion is on these things." (49RT 5683.) The trial stated that the expert could not tie the disorder to the parents and precluded any hint that the disorder was inherited. (49RT 5684.) Defense counsel stated, "I'm not asking if they were inheritable at this point." The trial court reiterated its previous ruling "that the opinion is meaningless in that it characterizes only a cluster of crime[s]." (49RT 5684.) The trial court ultimately struck all references to anti-social personality disorder in Dr.

Osborne's testimony because it found that it would "be very difficult for the jury to understand." (49RT 5685.)

The trial court subsequently instructed the jury as follows:

> Ladies and gentlemen, we are going to handle it this way. [¶] You may have heard testimony by this witness to something that he referred to as A.P.D., anti-social personality disorder. [¶] He gave us a definition. [¶] . . .[¶] That testimony is stricken from the record as being without foundation in this case. [¶] So you are to disregard the references to that syndrome. [¶] Everybody clear on that?

(49RT 5685-5686.) The jurors answered in the affirmative. (49RT 5686.)

B. The Trial Court Did Not Abuse Its Discretion In Striking Dr. Osborne's Testimony Related To Anti-Social Personality Disorder

An opinion that a person suffered from anti-social personality disorder can be admitted if foundational requirements are met -- for example, Dr. Weisberg was permitted to testify as to the characteristics of anti-social personality disorder (48RT 5404-5405, 5414) and that appellant had anti-social personality traits (48RT 5398-5399). But Dr. Osborne testified his opinion regarding anti-social personality disorder depended on not only his interview of appellant as well appellant's test results and records, but also "the type of people his parents were." (49RT 5682.)

Appellant contends that Dr. Osborne's testimony on anti-social personality disorder was not subject to *Kelly-Frye* (AOB 253-256) and that the error in striking the reference to the disorder in Dr. Osborne's testimony prejudicially deprived appellant of a reliable penalty determination (AOB 256-258).

The *Kelly-Frye* rule "conditions the 'admissibility of expert testimony based upon the application of a new scientific technique' on a 'preliminary showing of general acceptance of the new technique in the relevant scientific community.' [Citation.]" (*People v. Rowland* (1992) 4 Cal.4th

238, 265.) This Court has stated "We have never applied the *Kelly-Frye* rule to expert medical testimony, even when the witness is a psychiatrist and the subject matter is as esoteric as the reconstitution of a past state of mind or the prediction of future dangerousness, or even the diagnosis of an unusual form of mental illness[.]" (*People v. McDonald* (1984) 37 Cal.4th 351, 373; but cf. *People v. Shirley* (1982) 31 Cal.3d 18, 54 ["we hold that in this state the testimony of witnesses who have undergone hypnosis for the purpose of restoring their memory of the events in issue cannot be received in evidence unless it satisfies the *Frye* standard of admissibility]; *Ramona v. Superior Court* (1997) 57 Cal.App.4th 107, 121 ["Unlike an analysis of the factors affecting eyewitness identification or the direct examination of a wound or injury, the use of sodium amytal to retrieve repressed memories of child sexual molestation is a scientific technique or method which is subject to the *Kelly* requirements of reliability and acceptance by the relevant scientific community."]; *People v. Tanner* (1970) 13 Cal.App.3d 596, 600-601 [upholding ruling barring admission of "47 XYY" chromosomal syndrome to support defense of insanity where studies on the condition failed to reach the necessary standards of acceptance and reliability in their field].) This Court has also stated, "absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly-Frye*." (*People v. Stoll* (1989) 49 Cal.3d 1136, 1157.)

Here, Dr. Osborne's stated reliance on "the type of people [appellant's] parents were" (49RT 5682) for his diagnosis of anti-social personality disorder plainly signaled to the trial court that Dr. Osborne was relying on a genetic component, which is a new scientific basis for the diagnosis. Appellant failed to carry his burden of proof at the *Kelly-Frye* hearing, so the trial court properly excluded Dr. Osborne's testimony concerning anti-social personality disorder.

Regardless of the *Kelly-Frye* ruling, the trial court also excluded reference to that disorder from Dr. Osborne's testimony on the alternative grounds that his opinion lacked foundation given there was no evidence that appellant's parents had the same disorder and that " the methods of research [underlying the proffered testimony that anti-social personality disorder contained a genetic component]. . . [would] confuse[,] mislead[,] and consume the jury's time to an undue degree." (49RT 5678.) That determination was a proper exercise of the trial court's discretion. "The trial court retains discretion to exclude expert testimony . . . that is unreliable or irrelevant, or whose potential for prejudice outweighs its proper probative value." (*People v. Carpenter*, *supra*, 21 Cal.4th at p. 1061.)

The trial court in this case properly found that the proffered testimony that appellant may have inherited anti-social personality disorder, "i.e., to commit criminal conduct," was based on inadequate foundation because there was no evidence that appellant's parents suffered from the same disorder or had a history of criminality themselves. (49RT 5673-5674.) Dr. Osborne acknowledged that "true heritability implies of necessity a genetic component." (49RT 5654.) Thus, because appellant failed to establish the preliminary facts pertinent to determining the relevancy of the proffered opinion, it was properly excluded for lack of foundation. (See, e.g., *People v. Lucas* (1995) 12 Cal.4th 415, 466-468 [evidence that defendant's car was moved and cleaned was not relevant to prove defendant's guilty knowledge unless preliminary fact that defendant was responsible for car's condition was established]; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1156 [explaining that an element of an affirmative defense is a "preliminary fact" "upon which depends the admission of the evidence comprising the entire defense"]; *People v. Collins* (1975) 44 Cal.App.3d 617, 628 [evidence of threatening telephone

call made to witness was not relevant unless preliminary fact of caller's identity was established], superseded by statute on another ground as stated in *People v. Cole* (1982) 31 Cal.3d 568, 577-578; Evid. Code, § 403, subd. (a)(1) [a proponent of evidence has the burden of establishing all preliminary facts pertinent to determining the relevancy of that evidence].)

The trial court also did not abuse its discretion in excluding Dr. Osborne's testimony related to anti-social personality disorder on the grounds that it would "confuse[,] mislead[,] and consume the jury's time to an undue degree." (49RT 5678.) The proffered opinion that appellant had inherited anti-social personality disorder essentially advocated a genetic explanation for appellant's criminality. The trial court was reasonably concerned that this evidence, which the court found was based on unreliable methods of research, would confuse and mislead the jury given the longstanding scientific controversy regarding the genetic predisposition to commit crime. (See, e.g., Genetics and Responsibility: To Know the Criminal From the Crime, 69-SPG Law & Contemp. Probs. 115, 115-118 (2006).) Accordingly, the trial court did not abuse its discretion in limiting Dr. Osborne's testimony.

In any event, appellant was not prejudiced from striking from the record Dr. Osborne's testimony related to anti-social personality disorder. Dr. Weisberg had also testified as to the characteristics of anti-social personality disorder (48RT 5404-5405, 5414) and that appellant had anti-social personality traits (48RT 5398-5399). Thus, appellant was not otherwise precluded from presenting anti-social personality disorder as mitigating evidence through other means. (*People v. McWhorter*, *supra*, 47 Cal.4th at pp. 363-364 ["Although Haussman's expert opinion . . .was properly excluded as speculative and lacking adequate foundation, defendant was not otherwise precluded from presenting this defense

through admissible testimony and evidence."].) Thus, there is no reasonable possibility the alleged error affected the penalty verdict.

Moreover, the exclusion of Dr. Osborne's testimony on anti-social personality disorder was not prejudicial given that the disorder is characterized by negative traits, such as frequent arrests due to unlawful behavior, aggressiveness with physical fights, repeated lying, and the complete absence of remorse or anxiety for the consequences of anti-social behavior. (See, e.g., *People v. Hines*, *supra*, 15 Cal.4th at p. 1065; *People v. Davis* (1995) 10 Cal.4th 463, 528.) The disorder has been described as "simply a name for how people behave," "another way of describing criminal acts, especially habitual criminality," which does not cause criminal conduct but instead "is a name of that criminal conduct." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 405).

Accordingly, appellant's claim must be rejected.

XVII. THE TRIAL COURT'S ORDER GRANTING DR. MARKMAN'S ACCESS FOR A PSYCHIATRIC EXAMINATION OF APPELLANT WAS AUTHORIZED BY EVIDENCE CODE SECTION 730; EVEN ASSUMING ERROR OCCURRED, IT WAS HARMLESS (RESPONSE TO AOB ARG. XIX)

Appellant contends the trial court prejudicially erred by ordering, over defense objection, a psychiatric evaluation by prosecution psychiatrist Dr. Ronald Markman, and allowing Dr. Markman to undermine the defense case in mitigation by testifying as an expert witness in the prosecution's rebuttal case, thereby requiring reversal of the death judgment as a violation of appellant's rights to silence, to counsel, to a fair trial, to a reliable penalty determination, and to due process under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal Constitution. (AOB 259-269.) Respondent disagrees.

A. Relevant Facts

1. First Penalty Phase Trial

After the guilt phase verdicts were rendered, the prosecution filed a motion for appointment of a psychiatric expert on August 28, 1998. (8CT 2182-2188.) In support of its motion, the prosecution quoted Evidence Code section 730, which provides in relevant part:

> When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required.

(8CT 2182-2183.) The motion was based on the representation of the defense that it would present the testimony of psychologist Nancy Kaser-Boyd at the penalty trial. (8CT 2183-2184.) The prosecution requested that Dr. Ronald Markman be appointed and that appellant submit to an interview of up to approximately four hours individually and not in presence of counsel. (8CT 2185.)

During the first penalty trial on September 1, 1998, the prosecutor informed the trial court that Dr. Ronald Markman was employed "to provide assistance in psychiatric work for the prosecution." Dr. Markman, the prosecutor stated, believed that speaking to appellant about a variety of issues was one of the factors that would be useful in making his evaluation. The prosecutor had requested that Dr. Markman be allowed to speak with appellant. However, the prosecutor was told that appellant refused to submit to an evaluation by Dr. Markman. (36RT 3248.)

Defense counsel countered that the defense itself had never requested the appointment of a general psychiatrist for a specific reason. Once the defense made the determination that appellant had a history of a

neurological problem, the defense immediately turned to a neuropsychiatrist. Counsel maintained that she had no objection if the prosecution also employed a neuropsychiatrist, who counsel argued was trained differently than "a plain, ordinary psychiatrist," such as Dr. Markman. (36RT 3248-3251.) Counsel also argued that "the world has changed and what is being done in psychiatry has changed since then." Counsel stated that she knew of Dr. Markman's reputation and could predict what type of testimony he would give. (36RT 3249.) Counsel reiterated that she had no quarrel if a neuropsychiatrist evaluated appellant, but objected to Dr. Markman, who was "[a] plain old ordinary psychiatrist [who] w[ould] do the plain old ordinary psychiatry thing." (36RT 3250-3251.)

The trial court rejected defense counsel's objection stating the following:

> It is pretty straight forward. [¶] You are putting in one way, shape or form your client's -- in this phase of the case, in the penalty phase, you are putting on evidence to suggest that there are reasons that his background motivated his actions.
>
> You also, in addition, put on evidence that there is a physical aspect, abnormality, defect, injury, however you want to characterize it, malady, something physical and identifiable that motivated his conduct. [¶] You want sort of a clean separation there and it is not there in the evidence.
>
> The last several witnesses we have heard from I can only surmise were put up on the witness stand to demonstrate that there were reasons apart from injury, some reason in the defendant's background and abuse, however you want to characterize it, that caused him to act out. [¶] In fact, you asked one of the witnesses that question.
>
> The circumstances of his upbringing brought him here to this room, presumably. [¶] It is not true that you are not putting on evidence of your client's psychological well-being. You are doing so by the last witnesses you have put up.
>
> His mental state and his psychological make up is all obviously at issue in the case. [¶] . . .[¶] It seems relatively clear to me that is what you are doing with these witnesses.

(36RT 3251-3252.)

Defense counsel denied the trial court's assertion and responded that she was "[b]asically showing [ ] a damaged child from birth subjected to the type of family situation that he was in." It was not the defense premise that appellant's "mother caused all of this by herself by the way she treated him." Rather, the defense was attempting to show that appellant's brain damage probably was caused by the fact that his mother was a drug addict and gave birth to him while she was in a body cast. (36RT 3252.)

The trial court replied that the jury would determine whether those facts proven were proven and assign weight to them. The trial court found the prosecution's request -- to have a psychiatrist, who was also a medical doctor, speak to appellant on the issues that the defense case was presenting -- to be fair. The trial court observed that if appellant refused to speak to Dr. Markman, no one would "hold a rubber hose to [appellant] and order him to talk." However, the trial court cautioned that, "in all likelihood the jury will be told that the People have a right to conduct an examination on these issues and [appellant] has chosen not to cooperate in that situation." (36RT 3252-3253.)

When defense counsel remarked that Dr. Markman would not learn anything meaningful from appellant in the space of a half-hour or hour in light of appellant's history of 27 years and "a ton of CYA records," the trial court pointed out that counsel "put [her]self in a situation where an expert could not be *appointed* any earlier because [she] did not turn over [her] documentation from [her] experts until last week." (36RT 3253-3254 [italics added].) The prosecutor stated that defense counsel intended to present the testimony of Nancy Kaser-Boyd, a psychologist who would address appellant's mental issues. (36RT 3254.)

Defense counsel subsequently admitted that she planned to present the testimony of psychiatrist Nancy Kaser-Boyd. (36RT 3254-3255.) In

response to the trial court's observation that counsel's objection to Dr. Markman's evaluation of appellant was based on the fact that the defense was not presenting the testimony of a psychiatrist, counsel stated that she thought Dr. Markman would instead rebut Dr. Gold's testimony, and not that of Dr. Kaser-Boyd who would "testify to some of the effects of the emotional things that [appellant] went through as a child." The trial court stated that the prosecution was entitled to rebut that testimony through the evaluation of appellant's records and speaking to appellant. Counsel stated, "I guess my objection would not have been that as soon as [the prosecutor] knew that I had these physical tests that showed that [appellant] was organically -- had temporal lobe damage, I would have assumed at that point so that [Dr.] Markman's testimony would have been meaningful that he would have had weeks to interview [appellant]." Counsel believed that nothing meaningful could result from Dr. Markman speaking with appellant in an "hour or half hour or 10 minutes." (36RT 3254-3256.)

The trial court found that defense counsel's objection was an inadequate legal ground for appellant to refuse to speak with Dr. Markman. The court then gave the following order to appellant:

> You are ordered to cooperate with Dr. Markman in his interview of you regarding your background and so forth. Matters that he may find of interest. [¶] If do you not do so, I don't believe there is any legal ground not to, so if you do not do so, the jury will be told in all likelihood by the court that your refusal is one that they can consider in weighing the validity of the evidence that you have put forth in the penalty phase.

(36RT 3256.) The trial court continued to state that both sides were permitted to present evidence of appellant's mental health, but that the defense could not do so and deprive the prosecution of that opportunity. Pursuant to the prosecutor's request, the trial court also ordered that Dr. Markman was permitted to spend up to four hours with appellant in the

absence of the attorneys from both parties. (36RT 3256-3258.) The minute order for proceedings on September 1, 1998, states:

> Defense objection to appointment of psychiatrist at the request of the People overruled. [¶] [Appellant] is ordered to cooperate with Doctor Ronald Markman. If [appellant] does not cooperate with the doctor, this will be told to the jury and the refusal to cooperate may be considered in weighing the evidence. [¶] The examination will take place in the absence of any attorney.

(8CT 2213-2214.)

Appellant did not comply with the examination order. (39RT 3797.) Dr. Markman did not testify during the first penalty trial.

2. Penalty Retrial

After a mistrial was declared in the first penalty trial, the prosecutor stated that appellant had refused to speak to Dr. Markman and requested an order for appellant to answer Dr. Markman's questions. Defense counsel reminded the trial court of its prior objection to a psychiatrist, but not a neuropsychiatrist, examining appellant. (39RT 3797-3799.) Specifically, defense counsel objected to Dr. Markman's lack of training or qualification in dealing with an organically brain damaged individual. (39RT 3799.) The trial court again overruled the objection, finding that an examination by a competent psychiatrist was proper when appellant's mental faculties were put at issue, and ordered appellant to cooperate at the examination. (39RT 3798-3800.) Based on defense counsel's concerns that appellant would be questioned about the facts of the underlying offenses, the trial court further ordered:

> [E]xcept insofar as his refusal to answer any question, which might legitimately be based on the Fifth Amendment right against self-incrimination, [appellant] is ordered to cooperate. [¶] [Appellant] is ordered to answer any questions put to him by Dr. Markman.

(39RT 3801.)

The trial court also advised appellant:

> Mr. Banks, the problem is this. [¶] If you don't, nobody can make you talk. But the problem is this. [¶] If you do not once we have the trial next time, the People will be urging the court to tell the jury that you refused to cooperate with this psychologist and, therefore, they may look with displeasure on that fact and also give less weight than they might ordinarily to your expert.
>
> In other words, if you only cooperate with one and not the other, they will wonder why. They may see that as a consciousness of guilt or consciousness to hide damaging penalty phase information. [¶] Those are the potential pitfalls of refusing. [¶]

(39RT 3801.) After questioning from the court, appellant replied that he understood the court's order. (39RT 3801-3802.)

Dr. Markman subsequently testified as a rebuttal witness on March 18, 1999. (49RT 5809-5841.) Dr. Markman stated that he had conducted an hour and one-half, face-to-face interview of appellant in the courthouse lockup on September 2, 1998. (49RT 5810-5811, 5828.) Dr. Markman's notes of the interview were comprised of one page. (49RT 5830-5831.) Dr. Markman found that "[a] lot of [appellant's] responses appeared to be very thought through and self serving" by virtue of circumstances of the interview: appellant was in custody, he was facing serious charges, and facing serious punishment. Under those circumstances, Dr. Markman testified, "people generally tend to . . . develop a format with which they relate to interviewers, whether they be psychiatrists or social workers or probation officers." (49RT 5811-5812.) Dr. Markman declined to characterize appellant as manipulative. (49RT 5811.) Dr. Markman also testified that he asked appellant about the crimes in this case. (49RT 5811.) Appellant denied committing the Foster robbery and murder. (49RT 5812.)

Dr. Markman also gave testimony contrary to the conclusions of the defense experts. (49RT 5814-5825, 5831-5832, 5838-5844.)

B. The Trial Court's Order Granting Dr. Markman's Access For A Psychiatric Examination Of Appellant Was Authorized By Evidence Code Section 730

In *Verdin v. Superior Court* (2008) 43 Cal.4th 1096 (*Verdin*), this Court considered "whether a trial court may order . . . a criminal defendant, to grant access for purposes of a mental examination, not to a court-appointed mental health expert, but to an expert retained by the prosecution." This Court concluded that a trial court may not issue such an order. (*Verdin, supra*, 43 Cal.4th at p. 1100.) This Court began its analysis by concluding that such an examination constitutes "discovery," within the meaning of California's statutes governing discovery in criminal cases, namely, section 1054 et seq. (*Id.* p. 1105.) This Court acknowledged that courts in several cases, including *People v. Danis* (1973) 31 Cal.App.3d 782 (*Danis*), had held that a trial court may order a defendant who has placed his mental state at issue to undergo a mental examination conducted by an expert retained by the prosecution. (*Verdin*, *supra*, 43 Cal.4th at p. 1106.) However, this Court stated that *Danis's* reasoning that trial courts possess the "inherent power to order such discovery" is "insupportable following the 1990 enactment of section 1054, subdivision (e), which insists that rules permitting prosecutorial discovery be authorized by the criminal discovery statutes or some other statute, or mandated by the United States Constitution." (*Id.* at p. 1107.) Thus, this Court concluded that *Danis* and its progeny "have not survived the passage of Proposition 115." (*Id.* at pp. 1106-1107.) Furthermore, this Court concluded that neither California's criminal discovery statutes, any other statute, nor the United States Constitution authorize a compelled mental examination of a criminal defendant conducted by an expert retained by the prosecution. (*Id.*

at p. 1116.) This Court added, "The Legislature remains free, of course, to establish such a rule within constitutional limits." (*Id.* at p. 1116, fn. 9.)[52]

In *Verdin*, the People had argued that the trial court's order granting the prosecution access to the petitioner for purposes of a mental examination was authorized by Evidence Code section 730. (*Verdin*, *supra*, 43 Cal.4th at p. 1109.) This Court found that the People had failed to preserve this issue for appeal because "not only did the People fail to invoke Evidence Code section 730, the trial court did not appoint an expert pursuant to that section, but instead ordered petitioner to submit to an examination by an expert retained by the prosecution." (*Id.* at p. 1110.) In remanding the case to the court of appeal, this Court stated, "The People remain free on remand to move the trial court to appoint an expert pursuant to Evidence Code section 730 if, in its discretion, it decides that expert evidence 'is or may be required.'" (*Id.* at 1117.)

In this case, appellant relies on *Verdin* and argues that "[t]he trial court erred in ordering him to submit to a mental examination conducted by Dr. Markman, an expert retained by the prosecution, because such an examination is prohibited by Penal Code section 1054, subdivision (e), and it is not mandated by the federal Constitution." (AOB 260.) However, as the record discussed above shows, the prosecution sought the appointment of Dr. Markman pursuant to Evidence Code section 730 (8CT 2182-2183) and the trial court implicitly ordered appellant to submit to a mental examination under that statute. When defense counsel remarked that Dr. Markman would not learn anything meaningful from appellant in the space of a half-hour or hour interview in light of appellant's 27-year history and

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[52] In response to *Verdin*, the Legislature amended section 1054.3 in 2009, and took effect on January 1, 2010, to provide statutory authorization for the discovery procedure at issue in *Verdin*. (See § 1054.3, subd. (b)(2).)

"a ton of CYA records," the trial court pointed out that counsel "put [her]self in a situation where an *expert could not be appointed any earlier* because [she] did not turn over [her] documentation from [her] experts until last week." (36RT 3253-3254 [italics added].) This statement demonstrates that the trial court clearly contemplated the appointment of Dr. Markman pursuant to Evidence Code section 730. Moreover, the corresponding minute order which states, "Defense objection to appointment of psychiatrist at the request of the People overruled," supports a finding that the trial court's order was based on the prosecution's motion and Evidence Code section 730. (8CT 2213.) Thus, the trial court's order was permitted by section 1054, subdivision (e), because it was authorized and tethered to an "other express statutory provision[ ]." (*Verdin, supra*, 43 Cal.4th at pp. 1109-1110, 1116.)[53]

Accordingly, appellant's assertion that trial court ordered appellant to submit to a mental examination by an expert retained by the prosecution is not supported by the trial record and his reliance on *Verdin* is inapposite.

C. Any Alleged Error Was Harmless

Even assuming, arguendo, that the trial court did not rely on Evidence Code section 730 as authority for its order and that *Verdin* applies in this case, any error was harmless. "[I]t is not reasonably possible that the jury would have returned a penalty verdict of life without the possibility of parole in this case rather than death if the trial court had not allowed" Dr. Markman to testify regarding the statements appellant made during his

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[53] At the time of the trial court's ruling, there was authority affirming the general principle that where a defendant puts his mental status in issue, Fifth and Sixth Amendment rights are waived to the extent necessary to permit examination of that condition. (*People v. McPeters, supra*, 2 Cal.4th at p. 1190; *People v. Carpenter, supra*, 15 Cal.4th at pp. 412-413.)

interview with the doctor. (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1088.)

First, appellant's statements to Dr. Markman that the prosecution elicited during rebuttal were not prejudicial because it only comprised a very small and insignificant portion of the doctor's testimony. Dr. Markman stated that he had conducted an hour and one-half, face-to-face interview of appellant in the courthouse lockup on September 2, 1998. (49RT 5810-5811, 5828.) Dr. Markman's notes of the interview comprised of one page. (49RT 5830-5831.) Dr. Markman testified that he asked appellant about the crimes in this case. (49RT 5811.) Appellant denied committing the Foster robbery and murder. (49RT 5812.) Dr. Markman found that "[a] lot of [appellant's] responses appeared to be very thought through and self serving" by virtue of circumstances of the interview: appellant was in custody, he was facing serious charges, and he was facing serious punishment. Under those circumstances, Dr. Markman testified, "people generally tend to . . . develop a format with which they relate to interviewers, whether they be psychiatrists or social workers or probation officers." (49RT 5811-5812.) Dr. Markman declined to characterize appellant as manipulative. (49RT 5811.) Thus, based on the custodial and procedural setting of the interview, appellant's statements to Dr. Markman did not influence the doctor's ultimate opinion that appellant did not suffer from impulse disorder or organic brain damage.

Appellant's statements to Dr. Markman elicited by the prosecution were also no more damaging to the defense than other statements appellant made to his own expert, Dr. Osborne, who testified that appellant was and currently is a manipulative person. (49RT 5714, 5736.) Dr. Osborne determined that in general, appellant for a long time had malingered or lied to get things for himself that made his life easier or better. (49RT 5714.) According to Dr. Osborne, appellant lied with frequency (49RT 5715) and

malingering was a common trait of the types of mental illnesses afflicting appellant (49RT 5744). Appellant denied to Dr. Osborne that he had committed the crimes related to Coleman and Latasha W. (49RT 5723), but admitted that he killed Foster because Foster had no money (49RT 5723-5729). Given Dr. Osborne's testimony, the admission of appellant's brief and neutral denials of the Foster crime to Dr. Markman could not have had any effect on the penalty verdict.

The bulk of Dr. Markman's testimony focused on challenging the opinions presented by defense experts. Dr. Markman called into question the defense experts' conclusions that appellant had impulse disorder. (49RT 5813-5816.) In response to a hypothetical of a psychologist's diagnosis of impulse disorder to an individual's act of secreting urine and feces in a bag, concealing it for at least an hour or more in his pocket, and then launching the bag at a bench officer or prosecutor, Dr. Markman testified that he was in total disagreement with the diagnosis because the described act demonstrated a certain amount of planning and thinking, whereas an impulse disorder was characterized by an unplanned or unintended event or activity, in other words, an activity done on the spur of the moment with what is available at the time. (49RT 5814-5815.) Dr. Markman similarly rejected the suggestion that the facts of the Foster crimes were indicative of impulse disorder. (49RT 5816-5817.) The prosecution also elicited testimony to rebut the defense expert's diagnosis of temporal lobe disorder and that appellant suffered from seizures. (49RT 5817-5825.) Finally, Dr. Markman opined that appellant's criminal activity was not a manifestation of organic brain damage. (49RT 5843-5844.)

Moreover, Dr. Markman reviewed notes written by appellant to defense experts that were separate and distinct from appellant's interview statements to Dr. Markman. In reviewing the notes written by appellant about memories of his past, Dr. Markman testified that he found the notes

to be totally unconvincing and inconsistent with any developmental or behavioral pattern. (49RT 5812.) For example, appellant wrote "about being concerned at the age of two years old that his mother was being physically abused by his father, or by a person represented to be his father, and that he was afraid that his mother would die and leave him." (49RT 5812-5813.) Dr. Markman testified that "the concept of recalling something that happened at age two . . . would be highly unlikely. And particularly a traumatic event like that would be repressed," and "the concept of death is not something that a child develops until at least eight or nine, possibly even ten." (49RT 5813.) As to appellant's written note concerning "his mother being in an automobile accident," Dr. Markman noted that this incident occurred while she was pregnant with appellant, but that appellant wrote about it as if he had an independent recollection of it, which was totally inconceivable. (49RT 5813.)

Furthermore, the prosecution would have been entitled to call Dr. Markman as a rebuttal expert even if the doctor had not been allowed to interview appellant. (See *People v. Wallace, supra*, 44 Cal.4th at pp. 1088-1089; *People v. Carpenter, supra*, 15 Cal.4th at p. 406, overruled on another point in *Verdin, supra*, 43 Cal.4th at pp. 1106-1107.) Dr. Markman was entitled to review and from opinions based on other materials in the record related to appellant's mental state, including notes written by appellant in which he represented memories of his past (49RT 5812), the reports authored by defense expert Dr. Gold (49RT 5843) and other psychological reports from individuals who had examined him before trial, as well as reports from CYA, DPSS, and the sheriff's department (49RT 5835).

Neither the prosecution nor the defense referenced appellant's interview statements to Dr. Markman in their arguments to the jury. The prosecutor did not mention Dr. Markman in his opening argument. (See

50RT 5918-5958.) In rebuttal argument, the prosecutor argued that the jury did not need Dr. Markman's testimony to conclude that Dr. Osborne's diagnosis of impulse disorder was ludicrous, given that appellant's act of throwing a bag of feces and urine at two people inside the courtroom and the facts of the Foster robbery-murder were indicative of preplanned behavior. (50RT 5984.) The prosecutor stated, "the reason Dr. Markman came in here, the only reason, is to explain to you that everything Dr. Osborne told you is garbage." (50RT 5984.) As to Dr. Markman's qualifications, the prosecutor informed the jury, "[h]e is a medical doctor, a psychiatrist, a practicing current psychiatrist who teaches at UCLA, and he has been for 15 years and he testifies for both of us, both sides. He doesn't pick and choose and he doesn't speak at death penalty seminars for the defense." (50RT 5984.) As was true in the prosecutor's opening argument, he made no reference in his rebuttal argument to any statement appellant made to Dr. Markman. (See 50RT 5918-5958, 5982-5986.)

In her closing argument, defense counsel attempted to diminish Dr. Markman's testimony by referring to the six-month gap between his interview with appellant and the delivery of his report to counsel and by attacking his qualifications to render the opinion that appellant was not organically brain damaged. (50RT 5970.) Counsel told the jury that Dr. Markman's conclusions should be discounted because he lacked the specialized training of defense expert Dr. Gold. Dr. Markman, counsel argued, exemplified the system that did nothing to protect appellant from an abusive childhood, which ultimately led to his criminal activity. (50RT 5970-5972.) Counsel dismissed Dr. Markman's opinion that appellant's memories as a two-year-old were contrived, stating it was reasonable for young children to recall particularly traumatic events. (50RT 5972-5973.) Counsel never referred to appellant's interview statements to Dr. Markman in either her opening or rebuttal arguments. (See 5959-5981, 5987-5991.)

Finally, the jury was given a limiting instruction informing them that the statements made by an expert in the course of examining appellant could be considered only for the limited purpose of disclosing the information upon which the expert based his or her opinion, and that such statements were not to be considered as evidence of the truth of the facts related in the expert's testimony. (50RT 5890-5891; 9CT 2367.) The jury is presumed to have followed these instructions, and appellant has not rebutted this presumption. (*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1326; *People v. Boyette, supra*, 29 Cal.4th at p. 453.)

Accordingly, it is not reasonably possible that the jury would have returned a penalty verdict of life without parole in this case rather than death if the trial court had not allowed Dr. Markman to testify regarding appellant's brief interview statements. (*People v. Wallace, supra*, 44 Cal.4th at p. 1088.)

XVIII. EXCLUSION OF EVIDENCE INTENDED TO CREATE LINGERING DOUBT AT PENALTY RETRIAL WAS NOT PREJUDICIAL (RESPONSE TO AOB ARG. XX)

Appellant contends the trial court prejudicially erred by refusing to permit evidence at the penalty retrial on the issue of whether appellant committed the underlying offenses and by instructing the jury that appellant's guilt of the underlying offenses was conclusively presumed in violation of appellant's state and federal constitutional rights to due process, to present a defense, to a penalty determination based on all available mitigating evidence, and to a fair and reliable determination of the penalty. (AOB 270-277.) In support of his argument, appellant relies on this Court's decision in *People v. Gay* (2008) 42 Cal.4th 1195 (*People v. Gay*), which held that evidence intended to create a lingering doubt as to the defendant's guilt of the offense is admissible at a penalty retrial as a factor in mitigation under section 190.3. (*Id.* at pp. 1218-1220.)

Notwithstanding the applicability of *Gay* to the instant case, any error in excluding the proffered testimony intended to create lingering doubt was not prejudicial.

A. Relevant Facts

1. Defense Request To Present Evidence To Create Lingering Doubt

Before the presentation of testimony at the penalty retrial and outside the presence of the jury, defense counsel stated that she would stipulate that various witnesses identified appellant if the prosecutor agreed to stipulate that the same witnesses testified, after looking at appellant during the guilt phase trial, that appellant was "light-skinned." The prosecutor appeared inclined to agree to counsel's proposal if her representation of their testimony was accurate. Counsel agreed with the prosecutor's assertion that "[i]dentity is not an issue." (45RT 4767.) The trial court informed both parties that neither side could retry the guilt phase. (45RT 4767-4768.) Counsel stated that she understood the court, but believed that she was entitled to cross-examine on "certain points" based on "factor (k) and lingering doubt." (45RT 4768.) Cross-examination was additionally permitted, counsel argued, because of the jury instruction on lingering doubt and because counsel was permitted to argue lingering doubt to the jury. (45RT 4768.)

The court stated that "[f]actor (k) has nothing to do with lingering doubt." The court indicated that the jury would be instructed that appellant had been convicted of the underlying offenses. The court precluded counsel from arguing to the jury, "Do not give this guy a particular penalty because maybe he is not guilty," because appellant had already been found guilty. (45RT 4768-4769.) Counsel disagreed with the court stating, "I believe that I can bring out certain points such as identifications that did not match up" for the purpose of presenting lingering doubt. (45RT 4769-

4770.) The court refused to allow counsel to do that because it would have the effect of retrying the entire case. (45RT 4770.) In response, counsel clarified that there were only certain areas that she wished to cross-examine the witnesses. Counsel stated, "In other words, I want to go in with Ms. Latasha W. with her original description and what Officer Martinez, I believe his name was, goes to testify, the description that she gave at that time. [¶] I certainly believe I can bring up certain things that she was very positive of that did not match with some of the other descriptions that she gave." (45RT 4770.) The court and counsel subsequently repeated their previously stated positions. The court overruled counsel and reaffirmed its ruling that counsel was not allowed to elicit information to show that appellant did not commit the underlying offenses. (45RT 4770-4779.)

2. Trial Court's Reliance On Then-Applicable Authority

In connection with the crimes related to the ATM robbery and murder of victim Foster, the defense presented the testimony of Detective Frank Webber during the penalty retrial. (47RT 5306-5313.) On redirect examination, defense counsel asked Detective Webber the date he first showed six-pack photographs to eyewitness Manzanares. The trial court did not permit an answer and stated, "Let me remind both counsel that the identity of [appellant] as the perpetrator is not an issue in the case." The court found counsel's question to be irrelevant. (47RT 5313.)

Subsequently, outside the presence of the jury, the trial court reiterated its ruling by stating, "The identity of [appellant] is simply not an issue." The trial court directed counsel to this Court's decision in *In re Gay* (1998) 19 Cal.4th 771, at pages 813 and 814.[54] Specifically, the trial court

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[54] Specifically, the relied-on passage from *In re Gay, supra*, 19 Cal.4th at page 814 states, "[e]vidence intended to create a reasonable (continued...)

stated, "The holding is as clear as can be, among other things, that it is not proper, inappropriate, inadmissible, it's not good, to introduce evidence at a penalty phase on the issue of [appellant's] innocence." The trial court continued to state, "At the end of the case the jury will be instructed that it is not an issue since counsel can't seem to keep away from it." (47RT 5314-5316.)

Counsel disagreed with the trial court's characterization of her question to Detective Webber on redirect examination as one contesting identity. Rather, counsel stated that her question attempted to show that the jacket is one color on the video, in contrast with Manzanares's testimony that she told detectives the jacket was two colors (black and white), as well as elicit testimony "that people as good as they are as witnesses, . . . and are cooperative, are mistaken about certain things." Finally, counsel argued that her question on redirect examination served to mitigate the Manzanares's testimony that the suspect laughed after murdering Foster, which the witness had not mentioned before trial. (47RT 5316-5317.)

The trial court found that counsel "switched arguments from lingering doubt to impeachment on collateral matters." The trial court ruled that counsel could not ask any more questions to any defense witnesses about identification until first making an offer of proof with the court. The trial

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(...continued)
doubt as to the defendant's guilt is not relevant to the circumstances of the offense or the defendant's character and record." In *People v. Gay, supra*, 42 Cal.4th 1195, this Court later found this dicta unsupported by citation to any authority but observed that it appeared "to be in tension with [ ] other decisions concerning lingering doubt." This Court had "no cause to resolve the tension." (*People v. Gay, supra*, 42 Cal.4th at p. 1221, fn. 5.) *In re Gay* "involved the admissibility of evidence at a penalty phase trial before the same jury that determined guilt. It did not consider the scope of admissible evidence when as [in *People v. Gay, supra*, 42 Cal.4th 1195], there is a retrial of the penalty." (*People v. Gay, supra*, 42 Cal.4th at p. 1221.)

court again pointed out, "in terms of [defense counsel's] initial argument in the case, the lingering doubt issue, the case I cited to you speaks directly to that issue and says that defense counsel is precluded from introducing evidence on that issue at a retrial of a penalty phase before a different jury. That is right where we are. It is a clear case." The trial court declined counsel's offer to present other cases in support of her position, "unless the [California] Supreme Court has reversed itself in the last year." (47RT 5317-5319.)

3. Defense Presentation of Lingering Doubt Caselaw

Defense counsel later informed the trial court that she had read the decision in *In re Gay, supra*, 19 Cal.4th 771, but stated that this Court's decision in *People v. Davenport* (1995) 11 Cal.4th 1171 (*Davenport*), suggested that in a penalty retrial, the defense was entitled to revisit certain areas that raise lingering doubt. (*Davenport, supra*, 11 Cal.4th at p. 1194 ["a significant portion of the guilt phase evidence was presented to the jury. Defendant strenuously litigated this evidence and sought to raise a lingering doubt in the penalty jurors' minds as to the torture-murder special circumstance, i.e., whether Lingle was alive when she was impaled by the stake"].) The trial court indicated that it would review *Davenport*. (48RT 5387-5388.)

4. Defense Motion For Mistrial

The trial court indicated that it reread *In re Gay, supra*, 19 Cal.4th 771, and discussed the facts and holding in that case as follows:

> [T]he People [in *In re Gay*] wanted to put on in penalty a witness named Don Anderson.
>
> They proposed that Don Anderson would testify in the penalty phase that a witness, Marcia Holt, told him, i.e., told Don Anderson that she had not, in fact, seen the murder that she had earlier testified to in the guilt phase of the trial. [¶] This would have been offered under the theory of "lingering doubt" in the penalty phase. [¶] Our Supreme Court indicated that that

testimony would not have been admissible in the case, in the penalty phase.

I see no difference whatsoever at all in the situation here and in In re: Gay with one exception. [¶] At least in the matter of In re: Gay, both sides put on their full guilt phase case, obviously, whatever it was, before the same jury that heard penalty.

So presumably in that Gay matter, the jury would have had a context within which to judge the relevance and strength of this proposed testimony by Mr. Don Anderson where in our case, this jury has not heard the guilt phase presentation of the prosecution or defense nor do they know what it consisted of.

They, for example, did not see the young lady in question, Ms. Latasha W., identify [appellant] nor was she asked to do so at this proceeding.

In other words, there was no identification made of [appellant] from the witness stand by Ms. Latasha W. in this case so that the jury could determine that weight they would give it, for example. [¶] So he just wasn't brought into the courtroom.

What I am trying to say is that it was a greatly truncated case put on by both sides and for obvious reasons, legal and good reason. [¶] To allow, therefore, impeachment that would tend to prove presumably that [appellant] did not commit the murder would be inappropriate even in the situation of a unitary jury, but certainly in the case where this jury did not hear all the evidence presented.

So it would seem to me that it is not permissible per Gay so it will not be heard.

(49RT 5764- 5766.)

Defense counsel countered that *People v. Davenport, supra*, 11 Cal.4th 1171, which involved a penalty retrial, allowed the defense to revisit the guilt phase to the extent that it might raise lingering doubt. Counsel stated that she wished to pose to the officer two brief questions related to Latasha W.'s testimony that the shooter's shoes were black. Latasha W.'s pretrial statement to detectives described the shooter's shoes as black and white and the third suspect's shoes as black. Counsel pointed out that Latasha W. identified appellant by photograph during the penalty

retrial and that the parties stipulated that she had identified him at the guilt phase trial. Thus, counsel argued, the penalty retrial jury was aware that Latasha W. was "adamant in her description of who [appellant] is." (49RT 5766-5767.)

The trial court remained unpersuaded by counsel's argument and reaffirmed its initial ruling. Counsel again argued that the defense was entitled to present evidence of lingering doubt. The trial court permitted counsel to argue lingering doubt to the jury, but precluded the introduction of "evidence separate and apart to raise that lingering doubt[.]" The court proposed that the lingering doubt argument follow the lines of "People are human. They make mistakes . . . [¶] We are all human even when people are conclusively presumed to be guilty, as legally [appellant] is in this case." (49RT 5767-5769.)

Defense counsel moved for mistrial based on a violation of appellant's due process rights. (49RT 5769.) The trial court denied the motion, stating, "The cases are quite clear even in other states, counsel, in a retrial in penalty they allow no evidence other than to tell the jury the briefest information about the crimes, that that is not a violation of either the Eighth, Fourteenth or Fifth or any other amendment, so I presume it is the same here." The court ruled the proposed questioning was inadmissible on the grounds counsel had argued as well as under Evidence Code section 352. The court further stated, "It is absolutely beyond the power, I believe, of a jury to understand the difference between: [¶] We're not really putting this in to show he is not guilty even though it would tend to do so, but only that it might show something less -- a doubt less compelling to that. [¶] That requires mental gymnastics and instructional gymnastics by this court that I am not equipped to handle." (49RT 5769-5770.)

5. Conference On Jury Instructions

In denying the defense request for a lingering doubt instruction, the trial court stated the following:

> I think the law is clear that [appellant] is entitled, through his counsel, to argue the area of lingering doubt, but this is also -- that is true. You can always argue human fallibility. I mean, that is what lingering doubt is all about. Anybody can make mistakes, even though he is presumed conclusively under the law to have been proven guilty beyond a reasonable doubt. That is a fact as well. Somewhere in that nether world the courts have decided some argument might be appropriate.
>
> I want to remind you both, this jury did not hear the guilt phase and this jury most definitely did not hear all of the evidence available to both parties in the guilt phase, so any argument that a particular piece of evidence here demonstrates some doubt is obviously or may be met by an objection and may be met by a ruling of the court reminding the jury, folks, you didn't hear the evidence that led to this adjudication, you heard some of it to give you an idea -- to give you an idea of the circumstances of these offenses.
>
> So I would say that the argument can be made, but I would be careful -- I am not suggesting how you as an advocate should argue your case, because you argue well, you don't need my advice, but just in terms of what I feel are the legal parameters. I think it is appropriate, according to the U.S. and state supreme court, to argue, in effect, fallibility, that there are sometimes imperfections in the adjudicatory process wherein reasonable doubt may be -- guilt may be shown beyond a reasonable doubt, but that still there is not certainty in adjudication, conceivably, and that they can, if they want to consider that in terms of the serious nature of the penalty they are being asked by the prosecution to impose.
>
> I am not saying you use those words, but I would suggest it would be -- it might invite an objection and it might get a sustained objection and an admonition[.]

(50RT 5871-5874; see 9CT 2403.) Defense counsel agreed to conform her closing argument to the trial court's ruling. (50RT 5874.) Thus, it appears in rebuttal argument that counsel argued, "Human beings are fallible and

they can make the wrong decisions and that is something you also have to think about in this grave a decision." (50RT 5990.)

6. Instruction Given To Penalty Retrial Jury

The trial court read the guilt phase verdicts to the jury at the penalty retrial. (50RT 5907-5909.) The court then gave the following modified version of CALJIC No. 8.84, which provided in relevant part:

> Although you did not hear the guilt phase, you are instructed that you must *not* give effect to these findings, and that the defendant's guilt as to the above crimes, special allegations and special circumstances is conclusively presumed to have been shown beyond a reasonable doubt.

(50RT 5909 [italics added].) The written instruction did not include the italicized word "not."[55] (See 9CT 2391-2392.)

B. Relevant Law

"Although a capital defendant has no federal constitutional right to have the jury consider lingering doubt in choosing the appropriate penalty," this Court in *People v. Gay, supra*, 42 Cal.4th 1195, held that "evidence of the circumstances of the offense, including evidence that may create a lingering doubt as to the defendant's guilt of the offense, is admissible at a penalty retrial as a factor in mitigation under section 190.3." (*People v. Hamilton, supra*, 45 Cal.4th at pp. 911-912 [citing *People v. Gay, supra*, 42 Cal.4th at pp. 1218-1220].) "The 'circumstances of the crime' as used in section 190.3, factor (a), 'does not mean merely the immediate temporal and spatial circumstances of the crime. Rather it extends to "[t]hat which surrounds materially, morally, or logically" the crime.'" (*People v.*

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[55] The reporter's transcript includes the word "not" in the instruction, but it is not in the written instruction and it was not addressed during record correction. It appears that the reporter's transcript is in error because counsel or the trial court would be expected to have caught the error if the court had actually said "not" in the presence of the jury.

Hamilton, supra, 45 Cal.4th at p. 912 [quoting *People v. Blair, supra*, 36 Cal.4th at p. 749].)

"A defendant, however, has no right to introduce evidence not otherwise admissible at the penalty phase for the purpose of creating a doubt as to his or her guilt. [Citations.] "'The test for admissibility is not whether the evidence tends to prove the defendant did not commit the crime, but, whether it relates to the circumstances of the crime or the aggravating or mitigating circumstances.' [Citation.]" [Citation.] The evidence must not be unreliable [citation], incompetent, irrelevant, lack probative value, or solely attack the legality of the prior adjudication ([citations].)" (*People v. Hamilton, supra*, 45 Cal.4th at p. 912.) "Error in admitting or excluding evidence at the penalty phase of a capital trial is reversible if there is 'a reasonable possibility it affected the verdict.' [Citations.]" (Ibid.)

In *People v. Gay, supra*, 42 Cal.4th 1195, the trial court excluded evidence designed to show that Raynard Cummings, and not the defendant, had shot the victim, Officer Verna. (*Id.* at pp. 1214-1217.) After finding that evidence that the defendant was not the shooter was admissible at the penalty retrial under section 190.3 as a circumstance of the offense (id. at pp. 1217-1223), this Court determined that the trial court's rulings were prejudicial. (*Id.* at pp. 1223-1228.) Specifically, this Court found that "the trial court's rulings effectively limited the defense to a single eyewitness . . . and excluded the defense from presenting testimony from the four other eyewitnesses . . .who were also present and who would have described the shooter's complexion as inconsistent with defendant's but consistent with Raynard Cummings's." (*Id.* at p. 1224.)

This Court further found that "although the defense was permitted to offer isolated pieces of a circumstantial theory that Pamela Cummings was lying to cover up her husband's involvement and was attempting to shift the

blame to defendant instead . . .the defense was precluded from presenting the far more powerful evidence that Raynard himself, on at least four occasions, had admitted firing all of the shots." (*Ibid.*) "[B]ecause the error was compounded by the trial court's instruction to the jury, following opening statement, that defendant's responsibility for the shooting had been conclusively proven and that there would be no evidence presented in this case to the contrary," this Court declined to "decide whether the evidentiary rulings alone were prejudicial." (*Ibid.*) The trial court in *People v. Gay* also "instructed the jury at the close of evidence that '[i]t is appropriate for a juror to consider in mitigation any lingering doubt he or she may have concerning defendant's guilt' and then defined lingering doubt[.]" (*People v. Gay, supra*, 42 Cal.4th at p. 1225.) The jury also requested clarification of the instructions on lingering doubt. (*Id.* at p. 1226.) Thus, this Court held that "[t]he combination of the evidentiary and instructional errors presents an intolerable risk that the jury did not consider all or a substantial portion of the penalty phase defense, which was lingering doubt. The defense could have had particular potency in this case, given the absence of physical evidence linking defendant to the shooting and the inconsistent physical and clothing descriptions given by the prosecution eyewitnesses." (*Ibid.*)

C. There Is No Reasonable Possibility That Exclusion Of Evidence Allegedly Inconsistent With The Guilt Phase Verdict Affected The Penalty Retrial Verdict

As this Court stated in *People v. Gay*, error in excluding evidence at the penalty phase of a capital trial is reversible if there is a reasonable possibility it affected the verdict. (42 Cal.4th at p. 1223.) If the facts offered to show lingering doubt at the penalty retrial would not have affected the verdict, the exclusion of the proffered evidence was harmless. Therefore, this Court must consider the facts appellant sought to admit.

(Cf. *People v. Allen* (2008) 44 Cal.4th 843, 872 [assessing error from preclusion of defendant testifying in context of other evidence presented and facts defendant sought to establish].) "To preserve a contention that evidence should have been admitted, a party's offer of proof must make clear the substance of the proffered testimony. [Citation.]" (*Id.* at p. 872, fn. 19.)

In the present case, defense counsel described the following facts she sought to introduce to establish lingering doubt as to the identity of the perpetrator in the Coleman/Latasha W. and Foster crimes. As set forth below, there is no reasonable possibility, under the circumstances of this case, that the penalty verdict would have been different if the proffered testimony had been admitted.

1. Descriptions Of The Suspect's And Appellant's Complexions

First, defense counsel proposed to introduce evidence that guilt phase witnesses as to Foster's murder had testified, after looking at appellant during trial, that appellant was "light-skinned." (45RT 4767.) It appears that counsel desired to contrast this description with Johnson's and McGill's statement to Detective Webber that the gunman in the Foster crimes had a dark complexion. (30RT 2259-2260, 2298-2299, 2334-2336.) At the penalty retrial, McGill testified that the suspect "had a red scarf wrapped around his face in a ninja type fashion. You couldn't see nothing but his eyes and about this much right up here (indicating). [¶] Probably couldn't tell what complexion he was. [¶] I knew he was an African American." (46RT 5047.) McGill also testified at the penalty retrial that she selected appellant's photograph from a six-pack based on the similarity between his eyes and the suspect's. (46RT 5053.) Johnson never identified appellant and did not testify at the penalty retrial.

The exclusion of the proffered testimony that two witnesses had described the gunman in the Foster robbery-murder as having a dark complexion was not prejudicial because it had minimal probative value. The fact that McGill may have described the gunman's complexion as dark would not have cast any doubt on the accuracy of her identification of appellant based on the similarity of his eyes with those of the gunman, especially since she testified the killer had a cloth wrapped around the rest of his face.[56] Moreover, McGill independently selected appellant's photograph from a six-pack and positively identified him at the guilt phase. McGill's identification was also corroborated by another disinterested witness, Manzanares, who identified appellant as the gunman at the penalty retrial. (46RT 5067-5071.) Most importantly, the handgun used to murder Foster was recovered from appellant and police found a box of ammunition in appellant's house that was the same brand as the casings at the crime scene. (47RT 5165-5168.) Therefore, the penalty verdict would not have been affected by the proffered testimony that Johnson and McGill described the gunman's complexion as dark.

Defense counsel also proffered evidence of Latasha W.'s description, given to Officer Martinez, of the suspect who had murdered Coleman and raped and attempted to murder her. (45RT 4770.) At the guilt phase trial, Latasha W. testified that she told Detective Labarbera that the suspect "was Black and around [her own] complexion." (27RT 1785-1786.) Latasha W. described her complexion as "light brown." (27RT 1786.) Officer Martinez testified at the guilt phase that Latasha W. had not given a description of the suspect's complexion. (26RT 1652.) Detective

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[56] As a matter of common experience, the area around an individual's eyes may appear darker than the complexion on other portions of his or her face due to the presence of dark rings or circles or other natural discoloration.

Labarbera's guilt phase testimony of Latasha W.'s description of the suspect also did not include the suspect's complexion. (27RT 1886-1887, 1901.)

There is no reasonable possibility that the excluded evidence affected the penalty verdict. The fact that Latasha W. had not described the suspect's complexion to the police would not have cast any doubt on the accuracy of her consistent lineup and trial identifications. (45RT 4925-4928.) Significantly, Latasha W.'s identification of appellant was corroborated by DNA evidence that showed that appellant's DNA profile matched the sperm fraction from Latasha W.'s rape kit and that one in 17 million African-Americans had the same combination of DNA found on the sperm fraction. (45RT 4949-4953.) Thus, there is no reasonable possibility that Latasha W.'s failure to provide a complexion color description of appellant to police would have affected the penalty verdict.

2. The Suspect's Shoes

Defense counsel proposed to introduce testimony related to Latasha W.'s description of the shooter's shoes as black and white and the third suspect's shoes as black. (49RT 5766-5767.) During the guilt phase trial, Latasha W. testified that after appellant's accomplice tied her hands and legs (27RT 1733-1736), Coleman's house was ransacked. (27RT 1736-1737.) The accomplices exited the house and started Coleman's car. (27RT 1738.) Appellant shot Coleman for the second time (27RT 1738) and then shot Latasha W., who knew that it was appellant, and not his accomplices, who had shot her because she had recognized his shoes. (27RT 1739-1740, 1810-1812.) Latasha W. testified that the shooter's shoes were black or dark colored. (27RT 1811-1812, 1885.) Detective Labarbera testified that she had described appellant's shoes as black and white Nike tennis shoes (27RT 1886-1887, 1901) and one of the accomplice's shoes as black tennis shoes (27RT 1886, 1900-1901).

There is no reasonable possibility the penalty verdict would have been different if testimony regarding the suspects' shoes was admitted. Defense counsel thoroughly cross-examined Latasha W. on this subject during the penalty retrial. (45RT 4937-4939, 4941.) Moreover, Latasha W. testified that when the second shooting of Coleman occurred, appellant's two accomplices were outside of the house (45RT 4886-4887), and neither accomplice had a gun (45RT 4888). Latasha W. had an unobstructed view of appellant when he brandished a handgun as he first approached Coleman and Latasha W. outside of the house (45RT 4865-4869) and shot Coleman for the first time in the back of the head (45RT 4872-4873). Furthermore, Latasha W. had the opportunity to observe appellant's clothing, including his shoes, from the moment he first shot at Coleman, during the time he ransacked Coleman's house for drugs and money, and during the course of appellant's prolonged sexual assault of her. (45RT 4874-4882.) Thus, the fact that an accomplice also had black tennis shoes did not make Latasha W.'s identification unreliable or suspect. Finally, even assuming the jury might have had a lingering doubt as to whether appellant was the person who fired the second shot at Coleman and attempted to murder Latasha W., there is no reasonable possibility the jury had such a doubt as to whether he fired the first shot at Coleman in the back of the head. (See *People v. Lucero* (2000) 23 Cal.4th 692, 735.)

3. Manzanares's Identification Of Appellant

Finally, defense counsel proposed to establish at the penalty retrial that Manzanares's description to the detectives of the suspect's jacket as being two colors -- black and white -- was different than the jacket depicted on the video, which was one color, black. (47RT 5316-5317.) Manzanares testified, with the assistance of a Spanish interpreter at the guilt phase, that the suspect who shot Foster wore a heavy black jacket and she identified the jacket appellant wore in his booking photograph as the suspect's jacket.

(28RT 1982-1984; 30RT 2362-2363.) Detective Weber testified that Manzanares had described the suspect's jacket as a heavy black and white jacket. (32RT 2565-2566.) In her guilt phase testimony, Manzanares denied describing the jacket as black and white; rather, she told Detective Weber that the jacket was black and that it was worn over a white article of clothing. (31RT 2458-2459.)

At the penalty retrial, Manzanares testified that the suspect's jacket was black and identified the jacket in court. (46RT 5077.) During the defense case, Detective Weber testified that Manzanares had described the suspect's jacket as black and white. (47RT 5309-5310.) Thus, there is no reasonable possibility the penalty verdict would have been different if defense counsel had questioned Manzanares directly about the slight difference in her description of the jacket to police as black and white. The proffered impeachment was minimal in comparison to Manzanares's compelling identification of appellant from a six-pack (46RT 5068-5070), from a live line-up (46RT 5070-5071), and at the guilt phase trial. Moreover, defense counsel cross-examined Manzanares about her testimony that the suspect laughed after murdering Foster (46RT 5081-5082) and presented evidence that it was inconsistent with her statements to Detective Weber (47RT 5309-5310).

In sum, the exclusion of the proffered evidence would not have made a difference in assessing the evidence that was presented to show the identity of the shooter in the Coleman/Latasha W. and the Foster crimes. The proposed evidence designed to establish lingering doubt was marginal and not strong. (Compare *People v. Gay, supra*, 42 Cal.4th at p. 1224 [defense was precluded from presenting powerful evidence of lingering doubt].) The eyewitnesses were impeached on cross-examination on other matters related to their identification of appellant and the identification evidence was compelling. (Cf. *People v. Webster* (1991) 54 Cal.3d 411,

415 [in rejecting ineffective assistance claim, penalty jury unlikely to give lingering doubt substantial weight on issue of penalty where eyewitness and circumstantial evidence supporting guilt verdicts was very strong and a contemporaneous example of defendant's violent criminal leadership was presented at penalty phase]; *People v. Fudge*, *supra*, 7 Cal.4th at pp. 1119 [concluding exclusion of evidence that defendant would not pose a danger if given life in prison was harmless in part on finding that the proposed evidence was not particularly strong and witness presenting mitigating evidence was seriously impeached on cross-examination]; *People v. Tafoya* (2007) 42 Cal.4th 147, 174 [admission of excluded statement would not have resulted in a more favorable verdict for defendant where evidence would have added little to defendant's theory that he was not the aggressor and where prosecution presented contrary overwhelming evidence]; *People v. Brady* (2010) 50 Cal.4th 547, 558-559 [exclusion of proffered third party culpability evidence harmless where evidence of defendant's culpability overwhelming].)

For the same reasons, the trial court's admonition to the jury that identity was not an issue at the penalty retrial (47RT 5313) and its concluding instruction that appellant's guilt was conclusively proven beyond a reasonable doubt (50RT 5909), were also not prejudicial. (See *People v. DeSantis* (1992) 2 Cal.4th 1198, 1238 ["to the extent that the court's rulings and the prosecutor's comments merely reminded the jury that it was not to redetermine guilt, those actions did not remove the question of lingering doubt from the jury, but only told it the truth: that in the penalty phase defendant's guilt was to be conclusively presumed as a matter of law because the trier of fact had so found in the guilt phase"]; accord, *People v. Montiel* (1993) 5 Cal.4th 877, 912.) Because appellant's identity as the shooter in both the Coleman/Latasha W. and Foster crimes

was overwhelming, there is no reasonable possibility the instructions had any affect on the penalty verdict.

Accordingly, the exclusion of evidence intended to create lingering doubt at the penalty retrial was not prejudicial.

XIX. NO *BOYD*[57] ERROR OCCURRED; IN ANY EVENT, ANY ALLEGED ERROR WAS HARMLESS (RESPONSE TO AOB ARG. XXI)

Appellant contends the trial court prejudicially erred by permitting the prosecution to introduce inadmissible other crimes evidence in aggravation, including testimony from Deputy Penate about appellant's conduct in jail and purported mental state, and testimony from Carole Sparks about runaways and thefts, thereby requiring reversal of the death judgment for a violation of state statutory law and his state and federal constitutional rights to due process and to a fair and reliable determination of penalty. (AOB 278-287.) Respondent disagrees.

A. Relevant Facts

1. Testimony Related To Appellant's Conduct And Mental State In Jail

On direct examination at the penalty retrial, Deputy Arthur Penate testified that while giving appellant his breakfast in his Twin Towers jail cell on January 31, 1999, appellant threw a carton containing feces and urine at the deputy, striking him on the torso. (46RT 4971-4972.) Deputy Penate then described an incident that occurred a few days earlier in which appellant had accused Deputy Penate of disrespecting him when Deputy Penate told another inmate that appellant was a troublemaker. (46RT 4972-4974.)

Deputy Penate testified about the earlier incident as follows:

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[57] *People v. Boyd* (1985) 38 Cal.3d 762, 773-774.

Okay. [¶] The first time I met him -- [¶] See, I work the seventh floor. The seventh floor we have two different type of people: mentally ill people and the people that are real violent. They cannot get along with anybody else so they have to be housed by themselves. [¶] So [appellant] is housed in the violent side.

So then, again, [appellant's] meal was coming late and it wasn't there yet. So [appellant] is asking me: [¶] Hey, what happened to my food? [¶] And I told him: [¶] I already called downstairs and the food is the way, but you have to be patient. [¶] And [appellant] said: [¶] No. No. No. No. No. Let me tell you how it is, he says. [¶] You don't know who I am and --

(46RT 4974-4975.) At that point, defense counsel objected and request to approach at sidebar.

The following proceedings were held at sidebar conference:

[Defense counsel]: It is one thing for him to testify as to being hit by the feces and the urine. It is another thing to any other conversations that he has had with Mr. Banks. [¶] So there will be an objection as to any conversations that he had.

The Court: On what grounds?

[Defense counsel]: It does not fit in the proper penalty aggravation statute.

The Court: Do you want to be heard?

[Prosecutor]: It is the motivation for why he committed the crime and premeditation.

[Defense counsel]: [Deputy] Penate already testified that Banks said that: [¶] He disrespect me, or believed that he disrespected him.

The Court: Apparently, that was not all that was said. [¶] Objection overruled.

(46RT 4975-4976.)

In the presence of the jury, Deputy Penate resumed testifying about the prior incident as follows:

Okay. [¶] The reason is [appellant's] food is not late, but [appellant] is always getting himself in trouble. So one day [appellant] will be here and next day he will be there and following day he will be somewhere else. So his food has to be

chasing him around. [¶] So because he is always constantly moving and getting himself in trouble, his food was late this day.

So I told [appellant] -- [¶] that was the first time I ever met him. [¶] I said: [¶] You just got to be patient. Your food is going to be here. [¶] And [appellant] said: [¶] No. No. No. No. No. Let me tell you who I am and how it is. [Appellant] said: [¶] Let me tell you who I am and what I am capable of doing. And I said to [appellant]: [¶] Listen, I don't know who you are and I don't really care what you can do or not do, but I'm telling you that you have to be patient and wait like everybody else is. [¶] And [appellant] is like: [¶] No. No. No. So I said: [¶] Listen. I can't give you something that I don't have. You just have to be patient. [Appellant] just got mad and turned around and went to sit and that's the way -- no. No. [Appellant] said to me -- before he said before: [¶] You know who I am? He said: [¶] You better ask your deputy friends and ask who I am. [¶] Kind of like saying --

At that point, defense counsel objected on the grounds that Deputy Penate had already "testified as to what was said." Defense counsel also objected on the ground that Deputy Penate's "characterization is irrelevant." The trial court overruled the objection. Deputy Penate continued testifying as follows:

> And [appellant] was like telling me if I didn't know who he was, even though I knew because we have briefings every morning to describe what type of people that we have and he was one of them. [¶] So [appellant] was like intimidating, I guess. Or I don't know.

(46RT 4976-4979.)

Deputy Penate further testified that appellant usually manipulated people when appellant did not get what he wanted, stating, "[Appellant] is always doing little shows." Defense counsel objected to the quoted remark and moved to strike as non-responsive. The trial court overruled the objection. (46RT 4979.) Deputy Penate then testified that appellant engaged in such behavior at least three times a week. (46RT 4979.)

Without objection, Deputy Penate further testified that appellant's jail cell included "some gang script" and the phrases, "Penate is a bitch," and "fuck off." (46RT 4983-4984.) Deputy Penate also testified, without objection, that on days following the gassing incident, appellant laughingly told him, "See. See. I told you I was going to get you[.] [¶] [¶] You know what I am. You know what I am." (46RT 4985.)

On cross-examination, defense counsel posed questions to Deputy Penate which sought to establish that appellant was mentally ill while he was in custody. (46RT 4985-4993.)

On redirect examination, Deputy Penate testified that appellant's jail housing was based on his status as a violent individual, and not on his status as mentally ill. (46RT 4993.) Deputy Penate described appellant's manipulative behavior towards jail deputies as follows:

> Yeah. You have to understand one thing. [¶] Like I said, about seven of us work on the seventh floor. [¶] So there are seven of us here and if I already have a problem with [appellant] plus my other four partners, it will leave like only two or one person that can deal with [appellant]. [¶] And let's say [appellant] needs to go to court or we need to take [appellant] out. [¶] So this person needs to deal with [appellant]. She is going to do anything she can and give [appellant] anything he wants because if she does not do that, [appellant] is not going to help us. [Appellant] is not going to want to get dressed or come to court and stuff like that.

(46RT 4994.)

Over an overruled defense objection, Deputy Penate further testified that appellant did particular things on days that he was scheduled to go to court in order to receive additional favors. (46RT 4995.) When the prosecutor asked Deputy Penate, "Can you explain what [appellant] does to try to manipulate you as a deputy," defense counsel objected "to this whole line of questioning." The trial court overruled the objection. (46RT 4995.) Deputy Penate answered the question as follows:

> Every morning we [deputies] get everybody [the inmates] ready to go to court. [¶] There's five [inmates], say. [The inmates] all have one blanket to sleep on the seventh floor. [¶] So when they go to the court line, we give them one pants, one shirt. And that is all they get.
>
> But for [appellant] we have to get everything special. We have to give [appellant] one shirt, one blanket, underwear, socks and the other stuff. [¶] But when [appellant] gets back and you don't know that he has been given the socks or other stuff, then you think -- you know what I mean? It can create a problem later on that [appellant] can hide the stuff or can do anything with that stuff.
>
> So I don't know. [¶] [Appellant] does this all the time. [¶] Like I said, why [appellant] does that, it is just the way he is. If [appellant] does not get it, then he will not come to court.

(46RT 4995-4996.)

2. Carole Sparks's Testimony On Cross-Examination

The defense presented the testimony of appellant's mother, Carole Sparks, during the penalty retrial. (47RT 5359.) Defense counsel objected to the prosecutor's question, posed on cross-examination of Sparks, regarding an incident that occurred on July 16, 1982, in which appellant was arrested for stealing bicycles. (47RT 5370.) At sidebar, defense counsel argued that the prosecutor's question went beyond the scope of direct examination. Counsel also argued that the question constituted improper penalty phase questioning stating, "These are not incidents that should properly be before the jury. [¶] It is just adding more and more stuff instead of dealing with what we have brought out which is enough to deal with." (47RT 5371.) The prosecutor responded as follows:

> If [counsel] would have let me finish, [counsel is] trying to paint [Sparks] as the worst person in the world and the reason that [appellant] turned out bad where, in fact, according to my report, on July 16, 1982, [Sparks] took [appellant] to the police station and said she couldn't control him anymore. [¶] . . .[¶] [Sparks] later took [appellant] to -- when he came home on

> August 26 of 1982, he got arrested for vandalism and she took him to the station after he came home with stolen property.

(47RT 5371.)

Counsel countered that the prosecutor could have asked Sparks about the incident in question without specifically asking her whether she felt that she could control appellant. The trial court overruled the defense objection and informed the parties that at the end of the case, it would give the jury a limiting instruction on the crimes that they could consider. (47RT 5371-5372.) The court also stated the following:

> Believe me, the big picture, it seems to me, honestly speaking, is that in view of [appellant's] convictions for murder and rapes, vandalism or a bike theft in '82 is not going to be terribly prejudicial to your client. [¶] Your objection is noted and overruled. [¶] I think it is relevant given the defense.

(47RT 5372.)

Subsequently, in the presence of the jury, Sparks denied that after appellant was arrested for stealing bicycles on July 16, 1982, she went to the police and asked for help because she could not control appellant anymore. (47RT 5372-5373.) Regarding an incident in which appellant came home with stolen property on August 26, 1982, Sparks testified that she escorted appellant to the police and made him give back the property. Appellant also confessed to the police. (47RT 5373.)

Without objection on cross-examination, Sparks further testified that from May 11, 1987, until August 20, 1987, appellant had been in a group home, but the court had allowed appellant to return to Sparks on a test basis. (47RT 5373.) Sparks continued to state the following:

> Okay. [¶] Now [appellant's] probation officer, [appellant] ran away from one of those homes. [¶] Now if I was an unfit parent, they had been watching me anyway, if I was an unfit parent when [appellant] ran away, do you think [appellant's] probation officer would have told [appellant] to stay out with me?

(47RT 5373-5374.)

Without objection, Sparks testified on cross-examination that when appellant ran away from his ordered placements, he would either go to his aunt, who would return him to Sparks, or he would go directly to Sparks himself. (47RT 5374.) Sparks denied that on August 20, 1987, she returned appellant to the Eastlake juvenile facility and denied telling authorities there that he refused to go to school, that he was defiant, rebellious, and that she could not control him. (47RT 5374-5375.) Sparks clarified that appellant "got into some trouble with someone and he was arrested," which "caused him to be out of [Sparks's] home and back into the system[.]" (47RT 5375.)

Similarly without objection, Sparks testified on cross-examination that during appellant's most recent release on parole, he lived with her, but she asked him to leave after he had a "temper tantrum." Appellant was "all right" after visiting his cousin and he later returned to Sparks. (47RT 5375.)

Finally, Sparks testified on cross-examination that appellant, in his adulthood, had never committed any crime in her presence. However, without objection, Sparks stated that as to the incident of August 26, 1982, "Because [appellant] had all of this merchandise, you know, I told him to take it back where he got it from. That was it. [¶] I didn't see that. [¶] I just know that he had the merchandise." (47RT 5376.)

B. Relevant Law

At the penalty phase, evidence of a defendant's background, character or conduct that is not probative of any specific sentencing factor is irrelevant to the prosecution's case in aggravation and therefore inadmissible. (*People v. Boyd, supra*, 38 Cal.3d at pp. 773-774.) "Under section 190.3, factor (b), the jury may consider 'not only the existence of' criminal activity by defendant involving the use or attempted use of force

or violence 'but all the pertinent circumstances surrounding it [citation], and these circumstances may be shown through testimonial evidence.' [Citation.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 266.) "The criminal activity contemplated by Penal Code section 190.3 is conduct that constitutes an offense proscribed by statute." (*People v. Lancaster*, *supra*, 41 Cal.4th at p. 92.) "[W]hether a particular instance of criminal activity 'involved . . . the express or implied threat to use force or violence' (§ 190.3, factor (b)) can only be determined by looking to the facts of the particular case." (*People v. Cruz* (2008) 44 Cal.4th 636, 683.)

C. The Trial Court Properly Admitted Evidence Related To Appellant's Jail Conduct

Appellant contends the admission of evidence of certain allegedly noncriminal or nonviolent acts, as testified by Deputy Penate, constituted prejudicial error. (AOB 278-285.) Appellant failed to object to some of the evidence at issue and, accordingly, he thereby forfeited the objection on appeal. In any event, the evidence was either relevant to an appropriate penalty issue or of such a minor character as to render any error in its admission clearly harmless.

1. Testimony That Appellant Was A "Troublemaker"

Appellant contends Deputy Penate's testimony that appellant was a "troublemaker" did not prove violent criminal conduct and thus constituted inadmissible nonstatutory aggravating evidence. (AOB 285.) However, appellant failed to preserve this claim by making a timely and specific objection on the ground that the testimony constituted nonstatutory aggravation or on the same constitutional grounds raised on appeal. (See 46RT 4972-4976.) Accordingly, appellant has forfeited this claim for appellate purposes. (*People v. Carter*, *supra*, 30 Cal.4th at pp. 1203-1204.)

In any event, the evidence was admissible as part of the circumstances of the jail gassing incident, which appellant concedes was properly

admitted. Evidence that appellant overheard Deputy Penate tell another inmate that appellant "always gets in trouble" and that he was a "troublemaker" (46RT 4972-4974) provided the jury context of appellant's motive and "premeditation" in committing the gassing incident (46RT 4976) based on appellant's belief that Deputy Penate had been disrespectful to him. Accordingly, the challenged evidence was admissible as part of the circumstances of the jail gassing incident. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1135.)

2. Reference To Appellant's Jail Housing

Appellant contends that testimony that he "'cannot get along with anybody else' and so must be housed with the 'violent people' also does not prove violent criminal conduct." Appellant further claims that "Deputy Penate's description of the two types of people housed on the seventh floor -- mentally ill people and violent people -- and his statement that appellant was housed on the 'violent side,' strongly implied (based entirely on speculation) that appellant was violent, but not mentally ill." (AOB 285.)

This claim lacks merit. The challenged testimony merely placed in context the other admissible gassing evidence. The evidence tended to show the gravity of appellant's criminal conduct in jail, namely, "that he was undeterred by heightened supervision and special security measures." (*People v. Lewis* (2006) 39 Cal.4th 970, 1054 [evidence that defendant was housed in high-security settings reserved for inmates with disciplinary problems or violent histories placed in context other admissible incidents in aggravation and tended to show he was undeterred by heightened supervision and special security measures].)

3. Evidence Of Appellant's Intimidation And Manipulation

Appellant contends that "Deputy Penate's extensive testimony about appellant's mental state -- i.e., that he manipulates people and tries to

intimidate -- does not prove violent criminal conduct." (AOB 285.) This claim lacks merit. When explaining the incident in which appellant complained that he was not served his meal, Deputy Penate testified that he told appellant the food was on its way and to be patient. In response, appellant threatened Deputy Penate by stating, "No. No. No. No. No. Let me tell you who I am and how it is," "Let me tell you who I am and what I am capable of doing," "You better ask your deputy friends and ask who I am." (46RT 4977-4978.) Deputy Penate believed that appellant was "intimidating." (46RT 4979.) This testimony related a relevant circumstance of the gassing incident, in that it showed the wilful and intentional nature of appellant's gassing of the deputy. (See, e.g., *People v. Taylor* (2010) 48 Cal.4th 574, 656-657; *People v. Harris* (2008) 43 Cal.4th 1269, 1311; *People v. Monterroso* (2004) 34 Cal.4th 743, 775-776; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153; *People v. Hines* (1997) 16 Cal.4th 825B, 1060-1061; §71 [threatening public officers]; § 241.1 [assault on custodial officer].)

Moreover, Deputy Penate's testimony on redirect examination regarding appellant's manipulative behavior to jail deputies (46RT 4993-4996) was proper rebuttal to the defense questions posed on cross-examination which sought to show that appellant was mentally ill and organically brain damaged (46RT 4985-4993).

4. Graffiti In Appellant's Cell

Appellant asserts that Deputy Penate's testimony about finding graffiti in appellant's jail cell did not prove violent criminal conduct. (AOB 285.) Deputy Penate testified, without objection, that appellant's jail cell included "some gang script" and the phrases, "Penate is a bitch," and "fuck off." (46RT 4983-4984.) Appellant therefore forfeited this claim under both statutory and constitutional law. (*People v. Lewis, supra*, 39 Cal.4th at p. 1054; *People v. Abilez* (2007) 41 Cal.4th 472, 535.) In any

event, the evidence was admissible as a circumtance surrounding the noticed aggravating crime that the prosecution was relying upon at the penalty retrial. The graffiti evidence was relevant as a circumstance of the gassing to show that appellant committed a willful and intentional and planned act, rather than an impulsive one. Deputy Penate's testimony described appellant's deliberate conduct to assert his superiority and control over the guards, by using intimidating language, implying he was a "big shot," and his need to have his demands met, which culminated in the gassing of Deputy Penate to show him who was boss. The graffiti evidence showed appellant's contempt for Deputy Penate, which was a relevant circumstance to show appellant's mind set when he committed the gassing.

5. Any Error Was Harmless

Given the insignificant impact of the jail-related evidence as independent conduct involving a threat of violence, the minimal role it played in the prosecutor's argument, and the other compelling evidence presented during the penalty phase, any error was harmless beyond a reasonable doubt. (*People v. Lancaster, supra*, 41 Cal.4th at pp. 94-95.)

The prosecutor only perfunctorily mentioned the "[Deputy] Arthur Penate Incident" as an example of factor (b) evidence when listing the other incidents involving violence:

> "B" is the presence or absence of criminal activity involving violence. That is where we get to those other factors of the attack on Sandra Hess, the attack on Bridget Robinson, the Luz Hernandez incident, the Richard Bee incident, the Arthur Penate incident and Sevedo Sanchez. Those are the "b" factors.

(50RT 5929.) The prosecutor did not mention the jail gassing incident or other evidence related to appellant's conduct in jail at all in his rebuttal argument. (See 50RT 5982-5986.)

The prosecutor's closing argument instead focused on much more direct and graphic evidence of appellant's violent conduct. When appellant

was 14 years old, he struck visibly pregnant Luz Hernandez across the back of head with a pipe during a robbery. (45RT 4903-4906, 4908, 4910, 4916, 4918.) Five days after the crime, Hernandez lost her baby. (48RT 5439-5440.) About one month after the robbery, appellant choked Sandra Hess, a teacher in juvenile hall who had refused to give appellant a "good gram." During that assault, appellant attempted to dissuade another student from assisting Hess and later denied committing the assault. (45RT 4787-4790, 4793-4798.) When appellant was 16 years old and in the CYA custody, he struck youth counselor Richard Bee's chin and chest (45RT 4830-4831, 4839) and had to be forcible subdued and handcuffed (45RT 4827-4828, 4831-4832, 4840). When appellant was 20 years old, he beat, raped, and choked his girlfriend Bridget Robinson. (46RT 5115-5123, 5126, 5152.) The severity of appellant's assault caused Robinson to miscarry her child. (46RT 5126-5127.) While in-custody for the crimes appellant committed against Robinson, he threatened to kill her mother and sister if she went to court. (46RT 5126-5128.) While in custody in the charged crimes, appellant assaulted cellmate Sevedo Sanchez, causing redness and swelling on Sanchez's face. (45RT 4965-4968.)

The trial court also instructed the jury that it could consider "the incident involving Deputy Arthur Penate, 1-31-99," i.e. the gassing incident as evidence of conduct involving the express or implied use of force or violence. (50RT 5913.) The jury was also instructed not to consider any criminal acts beyond the six acts properly enumerated in the instructions as aggravating factors. (50RT 5914; see *People v. Monterroso, supra*, 34 Cal.4th at p. 775.)

Even if erroneously admitted as a circumstance of the gassing incident, the testimony about appellant's non-gassing jail conduct paled in comparison to the testimony related to appellant's actual violent behavior, and to the evidence of the Coleman/Latasha W. home invasion robbery,

murder, and sexual assault, and to the evidence of the Foster robbery-homicide. (*People v. Lancaster, supra*, 41 Cal.4th at p. 95 [finding harmless beyond a reasonable doubt admission of evidence of defendant's possession of handcuff key given the insignificant impact as evidence involving violence, the minimal role it played in prosecutor's argument, and other compelling evidence presented during penalty phase].) "In light of the circumstances of the charged crimes and the volume of evidence of prior criminal activity that was properly admitted, there can be no reasonable possibility that any improperly admitted evidence was prejudicial." (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 963, fn. omitted; accord, *People v. Lewis*, *supra*, 43 Cal.4th at p. 528.)

D. The Prosecutor's Cross-Examination Of Sparks Was Proper

Appellant contends that "[t]he prosecutor's cross-examination of Carole Sparks, wherein he elicited from her damaging testimony about appellant's runaways and thefts of bicycles and merchandise, also did not prove violent criminal conduct" and therefore did not constitute aggravating evidence under factor (b). (AOB 286.) The evidence was properly admitted.

As set forth in detail above, the prosecutor's question concerning appellant's runaways and thefts as a minor arose in the context of rebutting the defense theory that "the reason that [appellant] turned out bad" was his mother Carole Sparks was a bad parent. (47RT 5371.) Through the presentation of testimony by Sparks's sisters, the defense had attempted to portray Sparks in a negative light, calling attention to Sparks's drug and alcohol addiction (47RT 5209-5210, 5212, 5353-5354; 48RT 5398) and her ill treatment of appellant during his childhood (47RT 5231).

In light of the defense strategy to characterize Sparks as an unfit mother, the prosecutor informed the trial court that the purpose of

questioning Sparks about appellant's prior conduct as a minor was to rehabilitate Sparks as she had taken appellant to the police station after he came home with stolen property. (47RT 5371.) The trial court overruled the defense objection and stated that at the end of the case, it would give a limiting instruction on the factor (b) crimes that the jury could consider. (47RT 5371-5372.)

The trial court's ruling was proper. The prosecution was entitled to rebut evidence that appellant's life of crime was caused by his unfit mother with other evidence "suggesting a more balanced picture of his personality ([Citation]), even if some of it fell outside the scope of section 190.3 factor (b)[.]" (*People v. Carter, supra*, 30 Cal.4th 1166, 1202-1204 [prosecutor properly cross-examined defense witnesses concerning defendant's juvenile court record and aspects of his custodial history].)

In any event, as the trial court correctly observed, "in view of [appellant's] convictions for murder and rapes, vandalism or a bike theft in '82 is not going to be terribly prejudicial to [appellant]." (47RT 5372.) In light of the admissible evidence of appellant's prior violent crimes, including rape and assault, there can be no reasonable possibility that evidence of runaways and thefts of bicycles and merchandise was prejudicial. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1239 [error from admitting incident of juvenile misconduct of bringing BB guns onto school grounds was harmless given admissible evidence of defendant's prior violent crimes as an adult].) Moreover, the jury was instructed not to consider any criminal acts beyond the six acts properly enumerated in the instructions as aggravating factors. (50RT 5914; see *People v. Monterroso, supra*, 34 Cal.4th at p. 775.) Accordingly, appellant was not prejudiced from the prosecutor's questioning of Sparks.

XX. THE CHALLENGE TO THE TRIAL COURT'S COMMENTS AND QUESTIONING DURING VOIR DIRE IS FORFEITED; EVEN ASSUMING OTHERWISE, IT LACKS MERIT (RESPONSE TO AOB ARG. XXII)

Appellant contends the trial court's comments to the jury during voir dire and its instructions precluded the jury from giving full and fair effect to appellant's case in mitigation, thereby requiring reversal of the death verdict for a violation of appellant's state and federal constitutional rights to due process, jury trial, to present a defense, to a penalty determination based on all available mitigating evidence and to a fair and reliable determination of penalty. (AOB 288-299.) Specifically, appellant claims that "[t]he trial court defined mitigating factors in terms of 1) 'good' things that appellant had done and 2) matters relating to the offense. The court's use of the analogy of 'good and bad' to define 'mitigating and aggravating factors,' and its focus on mitigating factors relating to the offense, misleadingly omitted a discussion of factor (k) mitigation -- i.e. relevant life influences that adversely affected appellant." (AOB 294-295.) This claim is forfeited. Even assuming it has been preserved for appellate purposes, it lacks merit.

A. Appellant Forfeited His Challenge To The Trial Court's Comments And Questions During Voir Dire

Appellant tacitly acknowledges that he failed to object to the trial court's comments and questions during voir dire that he now challenges on appeal. (See AOB 289; 41RT 3943-3945, 4001-4002; 42RT 4079-4081, 4201, 4409-4410; 44RT 4532-4537.) As to appellant's claim that the trial court's comments misleadingly failed to include a discussion of factor (k) mitigation, "[i]f [appellant] wanted the court to give a fuller explanation during jury selection, he should have requested it." (*People v. Edwards* (1991) 54 Cal.3d 787, 841.) Appellant's failure to do so forfeits his

challenge to the trial court's voir dire comments to the prospective jury on appeal. (See, e.g., *id.* at 841; *People v. Livaditis* (1992) 2 Cal.4th 759, 781; *People v. Freeman*, *supra*, 8 Cal.4th at p. 487; but see *People v. Dunkle* (2005) 36 Cal.4th 861, 929 [declining to find forfeiture of instructional error claim affecting a defendant's substantial rights], overruled in part on another point by *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

Similarly, appellant's failure to object to the trial court's questioning during voir dire forfeits the issue on appeal. (See, e.g., *People v. Harris*, *supra*, 37 Cal.4th at p. 330 [failure to object to voir dire resulted in forfeiture on appeal]; *People v. Seaton*, *supra*, 26 Cal.4th at p. 635 [finding waiver of claim of improper questions to jurors about their attitudes regarding the death penalty]; *People v. Visciotti* (1992) 2 Cal.4th 1, 46-48 [finding waiver of claim that prosecutor's voir dire questions allowed him to "preargue his theory"].)

Even assuming otherwise, appellant's claim lacks merit.

B. The Trial Court's Comments And Questions During Voir Dire Were Not Misleading

"Appellant recognizes that in *People v. Romero* (2008) 44 Cal.4th 386 [*Romero*] this Court held that the trial court's comments to the jury during voir dire were not instructions but merely explanations. (*Id.* at p. 423.) The Court held that the trial court's comments were proper. (*Ibid.*)" (AOB 289.) However, appellant tries to distinguish his claim from *Romero* by stating: "Appellant does not argue that the court's comments during voir dire were jury instructions. Rather, the trial court's biased explanations of case issues during voir dire shaped the parameters of aggravating and mitigating evidence that, when considered together with the jury instructions given in this case, improperly precluded the jury from giving full and fair effect to the good character evidence presented by appellant in mitigation." (AOB 289-290.) This claim lacks merit.

As in *Romero*,[58] "[d]uring voir dire of the first and second panels of prospective jurors, the trial court made general comments about capital cases." (*Romero, supra*, 44 Cal.4th at p. 423.) In so doing, the court sometimes referred to mitigating evidence as "good" and aggravating evidence as "bad." (See 41RT 3944, 4001; 42RT 4080; 44RT 4532.) In its comments to the first panel, the court cautioned that "I will detail those factors to you later when I instruct the jury." (41RT 3944.) In addition, during the voir dire of a prospective juror on the first panel, the trial court commented:

> You weigh the aggravation and mitigation. Straight forward as that. [¶] You look at the aggravation and mitigation in the case and you decide whatever moral weight you feel is attributable to each and you weigh them and you determine in that manner what is the appropriate penalty. [¶] . . .[¶] . . .Death or life. [¶] You look at the crime and the offender. [¶] The good and the bad. [¶] Then you come up with your decision.

(42RT 4201.)

The trial court's "comments 'were not intended to be, and were not, a substitute for full instructions at the end of trial.'" (*Romero, supra*, 44 Cal.4th at p. 423, quoting *People v. Seaton, supra*, 26 Cal.4th at p. 636.) " 'The purpose of these comments was to give prospective jurors, most of whom had little or no familiarity with courts in general and penalty phase death penalty trials in particular, a general idea of the nature of the proceeding.'" (*Ibid.*, quoting *People v. Livaditis, supra*, 2 Cal.4th at p. 781.) As this Court also found in *Romero*, "[i]n the context of voir dire, the trial court's comments in this case were proper." (*Ibid.*)

To the extent, if any, appellant asserts judicial bias in connection with the challenged comments on voir dire (AOB 290, 295), it should be rejected because appellant utterly fails to explain how the comments were biased.

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[58] The trial judge in *Romero* and the instant case are the same.

(See *People v. Weaver* (2001) 26 Cal.4th 876, 986-987 ["we need not consider on appeal mere contentions of error unaccompanied by legal argument"].)

In any event, there is no evidence of bias in the trial court's voir dire comments. (*People v. Avila* (2009) 46 Cal.4th 680, 715-716.) The trial court's reference to mitigating evidence as "good" and aggravating evidence as "bad" was not improper. The court also informed prospective jurors that they would be given guidelines to follow in making the penalty decision. (41RT 3944.) In the concluding instruction at the penalty phase, the jury was instructed in the language of CALJIC Nos. 8.85, which list the relevant factors for the jury to consider (50RT 5910-5912), and 8.88, which defined aggravating and mitigating circumstances (50RT 5914-5917). There is thus no reasonable likelihood the the court's comments during voir dire prevented full and fair consideration of mitigating evidence. (See *People v. Avila, supra*, 46 Cal.4th at p. 716 [rejecting claim that during voir dire, "the trial court improperly defined mitigating evidence as 'good things' about defendant, forcing defendant to prove "' good things' in order to save his life," and making it 'impossible for the jury to apply the law and the facts' because it 'was completely misinformed regarding what constituted mitigation'"]; *People v. Edwards, supra*, 54 Cal.3d at pp. 840-841 [reference to mitigating evidence as "good evidence" and aggravating evidence as "bad evidence" during voir dire not error].)

"Moreover, as a general matter, it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury's verdict in the case. Any such errors or misconduct 'prior to the presentation of argument or evidence, obviously reach the jury panel at a much less critical phase of the proceedings, before its attention has even begun to focus upon the penalty issue confronting it.'" (*People v. Seaton*,

supra, 26 Cal.4th at p. 636, quoting *People v. Medina*, *supra*, 11 Cal.4th at p. 741.)

Accordingly, appellant's claim of error related to the trial court's comments during voir dire should be rejected.

XXI. THE TRIAL COURT'S LIMITATION OF THE DEFENSE SURREBUTTAL ARGUMENT WAS PROPER AND DID NOT CONSTITUTE JUDICIAL MISCONDUCT (RESPONSE TO AOB ARG. XXIV)

Appellant contends the trial court committed prejudicial misconduct during the defense surrebuttal argument by denigrating defense counsel for engaging in purported unethical conduct -- thus undermining counsel's credibility as appellant's advocate and bolstering the prosecution's argument for death -- and thereby violating his rights to counsel, due process, impartial jury, mitigation, a reliable penalty determination, and a fundamentally fair trial under the state and federal Constitutions. (AOB 301-308.) Respondent disagrees.

A. Relevant Facts

Appellant argues the trial court placed unconstitutional limits on his penalty phase arguments on two occasions. (AOB 302-304.) In the first instance, the trial court stopped defense counsel from arguing, during surrebuttal argument, that the jury's decision to impose the death penalty would not be a reflection of a civilized society:

> [Defense counsel:] You have -- you represent society and our society likes to think of ourselves as civilized, compassionate, merciful, just. We do not sink to the level of horrendous deeds and acts, because we represent the best of what society has, not the worst. We don't kill because somebody else kills, because that lowers us to the level of a horrendous verdict.
>
> The Court: Let me interrupt counsel and admonish the jury as follows:
>
> Arguments are interesting to hear and I allow a lot of leeway to both counsel, but they are getting quite out of hand.

[¶] Let me inform you folks of one thing. You are jurors on this case. You are here to fashion an appropriate penalty, whether it be death or life without possibility of parole. You have not demeaned or lowered yourselves to have committed any wrong. [¶] I hope you understand that. [¶] Do you?

(The jurors and alternate jurors answered collectively in the affirmative.)

The Court: Continue your argument, please, and let's stick to the appropriate path, if you would.

(50RT 5987-5988.)

In the second instance, the court stopped counsel from arguing that imposing the penalty of life imprisonment would ease the jury's conscience:

I have some concern because [appellant] has not been in the courtroom with me, and I am -- I am concerned, because he has not been here, you don't see him as a human being and a person also. [Appellant] is a broken, damaged person, but he is a person just the same. [Appellant] has done horrendous deeds. You have to make a decision about those deeds.

Every morning for the rest of your lives you will look in the mirror and you have to be content with who you see and what you have done, and it is much easier to look in that mirror if you give life.

(50RT 5989.)

At that point, the trial court interrupted counsel and the following colloquy ensued:

The Court: Once again, these arguments, counsel, if you want to sit down and formulate your thoughts to keep them ethical and lawful arguments, I will allow you to.

[Defense counsel]: I am not dwelling, your honor. I have made this argument before in this court.

The Court: Yeah, probably with the same result.

[Defense counsel]: No, your honor.

The Court: Let me -- do you want to debate with the court or do you want to be quiet and let the court admonish the jury as to their duties? I would prefer the latter.

(50RT 5989.)

The trial court then admonished the jury as follows:

> Ladies and gentlemen, again, this is not about your comfort or discomfort or what would be easier on you or harder on you. [¶] This is about a weighing, very straightforward process, weighing aggravation and mitigation and arriving at an appropriate penalty in that way, however it makes you feel, good, bad or indifferent.

(50RT 5990.)

After the conclusion of closing arguments, and outside the presence of the jury, the trial court explained its interruption of the defense closing argument:

> The Court: Let the record reflect the absence of the jury. [¶] [Defense counsel], look, I hate to interrupt an argument. [¶] Let me tell you so you understand what my thinking was. I think you are entitled to know. It seems to me that it is inappropriate for an attorney -- I would like you [prosecutor] to listen up as well.
>
> [Prosecutor]: I am listening. [¶] . . . [¶]
>
> The Court: I think it is inappropriate for an attorney in the case, whether be a civil case or criminal case or any other kind of case, to suggest to the jury that somehow they are lower creatures or criminals if they don't return a verdict asked for by counsel. [¶] I suggested that or I suspect that most jurors would take that argument that you made in that way.
>
> Also, I do not think at all it is an appropriate argument for either counsel to say when you look in the mirror you will feel better personally if you vote for death or you will feel better and always do -- [¶] . . .[¶]
>
> [Defense counsel]: May I say something?
>
> The Court: Yes. Sure.
>
> [Defense counsel]: The court interrupted me several times the first time that I argued in the last penalty phase, and last night I sat down with my notes and I took out everything that the court objected to.
>
> The Court: Probably you came up with some new ones.
>
> [Defense counsel]: No. I argued these last time. [¶] . . . [¶] I argued that last time in the exact same words and the court

didn't object.[59] I mean, if I ever have to do another one in here, I will know better, but I have used that --

The Court: Maybe the third time I will be back to the first one. [¶] Another thing. I really believe I wasn't trying to jump on you, but there was one at the beginning that I let go by that also was an inappropriate argument, whether made by him or you, which is to inject religion into the argument. It is inappropriate to suggest to the jury, if you are the D.A., that the Bible says eye for an eye, get this guy, or if you are the defense attorney, get up and say this is an absolute we are dealing with, folks, an absolute, thou shalt not kill, ie, if you folks argue not only are they animals, criminals and they should feel bad, they are sinners if they return an adverse verdict. [¶] I think that those things are improper argument, not just unappealing, but they are not -- they are not lawful to make. [¶] Anything else?

[Defense counsel]: No.

(50RT 5994-5997)

B. The Trial Court's Limitations On Defense Closing Arguments Were Proper

"[A] claim that defense counsel's argument improperly was limited invokes an aspect of the right to counsel. [Citation.] Hence it is grounded in the Sixth, not the Eighth Amendment." (*People v. Farley* (2009) 46 Cal.4th 1053, 1130, fn. 31.) "The right to present closing argument at the penalty phase of a capital trial, while broad in scope, 'is not unbounded . . .; the trial court retains discretion to impose reasonable time limits and to ensure that argument does not stray unduly from the mark. [Citation.]'" (*People v. Harris*, *supra*, 37 Cal.4th at p. 355.) "Juror determinations may not be the product of 'emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase,' or 'extraneous emotional factors.' [Citation.]" (*Ibid.*) "'On the one hand, [the trial court] should allow evidence and argument on emotional though

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[59] Defense counsel did not make the same arguments during the first penalty trial. (See 38RT 3705-3727, 3734-3735.)

relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'" (*People v. Jurado* (2006) 38 Cal.4th 72, 131, citations omitted.)

Here, the trial court correctly stopped defense counsel from arguing that "We don't kill because somebody else kills, because that lowers us to the level of a horrendous verdict" (50RT 5987) and "Every morning for the rest of your lives you will look in the mirror and you have to be content with who you see and what you have done, and it much easier to look in that mirror if you give life" (50RT 5989). Counsel's argument suggested that the jury itself would be murderers and killers themselves if they chose to impose the death penalty, rather than arguing the evidence warranted the penalty of life imprisonment. Counsel was "improperly addressing as a factor in mitigation the emotional impact a death verdict would have upon each juror. The jurors' reaction to the penalty imposed would constitute emotional responses 'untethered to the facts of the case' [citation], not proper factors for consideration." (*People v. Harris, supra*, 37 Cal.4th at p. 355.)

Moreover, the trial court's admonitions to the jury were proper. The court correctly told the jury, "You have not demeaned or lowered yourselves to have committed any wrong" (50RT 5988) and "this is not about your comfort or discomfort or what would be easier on you or harder on you" (50RT 5990). The trial court also did not prevent the defense from continuing to urge the jury to impose the penalty of life imprisonment based on legitimate mitigating circumstances. (See *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1044 [trial court properly sustained objection to defense comments on matters outside evidence, properly admonished jury

on this point, and did not prevent defendant from continuing to urge his interpretation of events upon jury]; see also *People v. Brown*, *supra*, 31 Cal.4th at p. 565 [court properly prohibited defense counsel from mentioning in closing argument that those younger than 18 years old are ineligible for the death penalty because fact that the Legislature has chosen 18 years as the lower limit for death penalty was irrelevant to defendant's individual culpability or whether he was more or less deserving of the death penalty].) For the same reasons, appellant has failed to demonstrate that the trial court's rulings and comments constituted judicial misconduct. The trial court's brief comments were harmless since jurors would have understood that the court's ruling related only to the challenged remarks, not to the balance of counsel's argument.

Accordingly, the trial court's limitation of defense counsel's surrebuttal argument was not an abuse of discretion and did not constitute judicial misconduct.

XXII. THE TRIAL COURT DID NOT EXHIBIT JUDICIAL BIAS OR COMMIT PREJUDICIAL MISCONDUCT (RESPONSE TO AOB ARG. XXIV)

Appellant contends that the trial court violated his rights to a fair trial, due process of law, and a fair and reliable determination of penalty, by its repeated erroneous rulings against the defense and remarks disparaging defense counsel. (AOB 309-319.) In essence, appellant claims that the trial court exhibited judicial bias or committed misconduct in the penalty phase.[60] Specifically, appellant argues: (A) the trial court committed misconduct during the penalty retrial voir dire by questioning death-scrupled jurors differently from pro-death jurors (AOB 310-313); (B) the

[60] Appellant raised a related claim of judicial misconduct (see AOB Arg. XIII at pp. 174-189), which he incorporates by reference in the instant claim (AOB 309).

trial court committed misconduct by limiting the cross-examination of witness Sandra Hess and by admonishing defense counsel in the presence of the jury (AOB 313-314); and (C) the trial court committed misconduct by improperly commenting to witness Bridget Robinson, which vouched for her credibility (AOB 315). Respondent disagrees. The claims of judicial misconduct or bias are forfeited. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1110; *People v. Guerra*, *supra*, 37 Cal.4th at pp. 1111-1112.) To the extent appellant asserts other claims of error, they lack merit.

A. The Trial Court Did Not Commit Misconduct In Conducting Its Inquiries Of Prospective Alternate Jurors

The trial questioned Prospective Juror T.H. (juror identification no. 6976) on voir dire. (43RT 4464-4473; 12CT 3302-3316 [related juror questionnaire].) During a break outside the presence of the prospective panel, the following colloquy between the court and defense occurred:

> The Court: You wanted to approach. [¶] What do you want to say?
>
> [Defense counsel]: I feel like we are picking two death penalties. [¶] For the People who have reservations about the death penalty, they appear to be questioned differently than the people who feel pro death penalty. And what [Prospective Juror T.H.] has been saying, if you look at what he does for a living and look at his background, he is not the kind of man who is going to stand up to the court particularly. [¶] At lunch time there was no question that there was going to be prosecution cause on the last jurors and we got through it quickly. [¶] I want to be fair and I have not been upset at any of the people who are very pro death penalty and they remained on the jury until I used a challenge. [¶] [Prospective Juror T.H.], with the court's questioning, is becoming more and more concerned that he is not giving the court the right answers because the court seems to feel that he is too pro death penalty, or too anti-death penalty.
>
> The Court: I would like you to point to one person on this jury who has said something like: [¶] I don't know if I can be fair.

[Defense counsel]: I can point to some that I have had to use my peremptory challenges with.

The Court: That said: [¶] I don't know if I can be fair?

[Defense counsel]: That is not what [Prospective Juror T.H.] has said. He said that he has been -- he has reservations about the death penalty. [¶] Again, there are people that have come through here that have been pro death penalty. The court has said: [¶] Well, you seem to feel strongly about the death penalty, and they have waivered, also. [¶] It seems in questioning these jurors that it is the pro people that seem to wind up on the juries.

The Court: Well, the record will speak for itself. [¶] I will tell you what I have a problem. People that are adults, this one [Prospective Juror T.H. is] 50 years old, who after having a week to think these things through can indicate to me the best that he can do is that he vacillates back and forth. [¶] That is not an answer that I can live with when a person says: [¶] I think I might be able to do x, although I am certainly not sure and I vacillate from day to day on that. [¶] That does give me pause and, frankly, is a little frustrating. [¶] So insofar as humanly possible, we need more of a firm response so that I can either go forward or do whatever. [¶] We have not gotten it yet. [¶] Do you have a suggestion to a question?

[Defense counsel]: The court did it with this juror. [¶] The standard is do your views substantially impair your ability to be a fair juror and follow the law. [¶] That is the standard. [¶] You asked it of this juror and he said: [¶] I'm not substantially impaired. I can do it.

The Court: I would like to quit with him. I am tired of talking to the fellow. But it seems as if every time I am ready to move on, and I thought I was done with him five minutes ago, I get a qualifier or I get a look or an adjective that cause me to ask additional questions. [¶] Do you have a question that you would like me to ask? I will ask it verbatim.

[Defense counsel]: If his mind is made up at this point that he would be -- vote anti-death penalty. [¶] Ask him if he is substantially impaired because he feels so strongly against the death penalty, which is what the case law talks about. [¶] . . .[¶]

The Court: My problem is this. It is as if a juror says: [¶] Well, look. I'm going to do my best to give this defendant a fair trial and I think I can probably do that and I know the law requires me to do that, but my views tell me otherwise. And it

might be against my religion to do so, but I think I can probably do it. [¶] Will you be satisfied with that type of response?

(43RT 4473-4478.) Defense counsel and the trial court subsequently discussed the question that counsel suggested should be posed to Prospective Juror T.H. (43RT 4478-4479.) The trial court then concluded:

> The whole point is this. [¶] What they have to be able to do is in an unbiased way assign weights and arrive at a decision without putting too fine an edge on it. [¶] What I get from [Prospective Juror T.H.] is: [¶] I think I can. I probably can. I'm not sure. I'll try to. [¶] So we will go forward.

(43RT 4479.) The trial court then asked if the prosecutor had any suggestions. The prosecutor stated that he did not. (43RT 4479.) The trial court next permitted both the prosecution and the defense to further question Prospective Juror T.H. (43RT 4479.)

Citing the voir dire of Prospective Juror T.H. as defense counsel's initial confrontation of the trial court on the disparate treatment of jurors depending on their death penalty views, appellant contends that the trial court remained undeterred. Appellant contends the trial court committed judicial misconduct by conducting subsequent inquiries of three *prospective alternate jurors* in a disparate manner that betrayed a pro-death bias. (AOB 310-313.) Appellant appears to base this argument solely on a numerical counting of questions, which is insufficient to establish a constitutional violation in this context. (*People v. Thornton* (2007) 41 Cal.4th 391, 425.) Appellant also appears to argue that the court's rulings sustaining the prosecutor's challenge for cause and denying the defense's two challenges for cause were evidence of the court's bias against him. (AOB 317.)

No alternate juror was needed or used at appellant's trial. (See 8CT 2327-2356.) Assuming there was some error regarding the voir dire of alternate jurors, which respondent does not concede, such error was plainly

harmless since none of these juror participated in deliberations. (See *People v. Navarette* (2003) 30 Cal.4th 458, 488.)

Moreover, similar to the defendant in *People v. Mills* (2010) 48 Cal.4th 158, 189, appellant here "does not assert the trial court applied different legal standards in granting or denying challenges for cause, that the court asked improper questions, that either the court or the parties failed to take the time or lacked a fair opportunity to ascertain the true views of the jurors, or that a biased juror was allowed to serve on the jury. Properly understood, [appellant's] claim is one of judicial misconduct; that is, he alleges the trial court did not conduct the voir dire proceedings in a neutral fashion and thus betrayed a bias in favor of the death penalty." Appellant fails to provide any meaningful analysis to establish that the trial court abused its discretion in connection with any of the rulings during jury selection. (See *People v. Farley, supra*, 46 Cal.4th at p. 1110.) As discussed below, a review of the record does not support a finding of judicial misconduct in the trial court's inquiries of three prospective alternate jurors.

1. Prospective Alternate Juror No. 4 (Juror ID No. 2488)[61]

Question number 35 of the juror questionnaire asked prospective jurors, "What are your general feelings about the death penalty and why do you feel that way?" In response to that question, Prospective Alternate Juror No. 4 indicated, "See [question] number #36, parts B and E." (12CT 3492.) Question number 36(b) asked, "Do you believe the death penalty is used too often? (If yes, please explain)." In response, Prospective

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[61] The juror questionnaire of Prospective Alternate Juror No. 4 (R.N., juror identification no. 2488) appears at pages 3482 through 3496 of volume 12 of the clerk's transcript, and his voir dire appears at pages 4645 through 4658 of volume 44 of the reporter's transcript.

Alternate Juror No. 4 wrote, "YES, because an impatient electorate wants simple solutions to complicated problems." (12CT 3493 [large caps in original].)

To question number 35(e), which asked, "Do you feel California should have the death penalty," Prospective Alternate Juror No. 4 responded, "NO, because the government should not have literal power over life and death. The government should only have enough power to generally keep things civilized. Democracy is an unavoidably laborious process." (12CT 3493 [large caps in original].) Prospective Alternate Juror No. 4 circled "no" to question number 35(f), which asked, "Regardless of your views on the death penalty, would you as a juror, be able to vote for the death penalty on another person if you believe, after hearing all the evidence, that the penalty was appropriate?" (12CT 3493.) He circled "yes" to question number 38, which asked, "Would you always choose life without the possibility of parole and never vote for the penalty of death, regardless of the evidence?" (12CT 3494.)

During the trial court's preliminary questioning on voir dire, Prospective Alternate Juror No. 4 stated that he did not feel strongly predisposed toward a verdict of death or a verdict of life without parole and that he could see himself rendering a death verdict or a verdict of life without parole depending on the facts and the law in this case. (44RT 4646.) The court then questioned Prospective Alternate Juror No. 4 about several responses in his questionnaire. (44RT 4646-4649.) The following colloquy between the court and the Prospective Alternate Juror No. 4 occurred concerning the death penalty:

> The Court: Your feelings about the death penalty, do you believe, as far as I can read them, you are generally opposed to the idea of the government passing a death penalty law for the reasons that you have stated. It is the law in this state unlike some. [¶] Do you think your views about the death penalty

would at all get in the way of your ability to follow the court's instructions and to decide our case based on the evidence and the law that I give you?

Prospective Alt. Juror No. 4: No.

The Court: Any doubt about that?

Prospective Alt. Juror No. 4: No doubt.

(44RT 4649-4650.) The court then asked Prospective Alternate Juror No. 4 three additional questions and then asked, "People pass for cause?" (44RT 4650-4651.) The prosecutor directed the court's attention to the juror's responses to question numbers 36(f) and 38 of the questionnaire. (44RT 4651.) The following colloquy between the trial court and Prospective Alternate Juror No. 4 occurred:

The Court: 36f like Frank. [¶] Let's see. [¶] Okay. [¶] Let's see. The very last question on page 12. [¶] [36]E was: [¶] Do you think we should have a death penalty, [¶] and you explained your answer. [¶] F was this: [¶] Regardless of those views, would you as a juror be able to vote for the death penalty on another person if you believe after hearing all the evidence that the penalty was appropriate, and you circled "no". [¶] Would you explain that response to me?

Prospective Alt. Juror No. 4: I understand that there is a distinct difference between my personal opinion and the precise letter of law and I understand that my duty as a juror, per se, is to follow the strict letter of the law, per se.

The Court: Well, it is. Can you explain why you circled "no"?

Prospective Alt. Juror No. 4: It is just as I put in there. I admit on a personal level I generally oppose the death penalty --

The Court: Let me read the question again. [¶] F. it says: [¶] Regardless of your views on the death penalty, would you as a juror be able to vote for the death penalty on another person if you believe after hearing all the evidence that that penalty was appropriate. You circled "no". [¶] I just want to know why you did that.

Prospective Alt. Juror No. 4: Well, I admit that I found those particular questions ambiguous.

The Court: What was ambiguous about that one?

Prospective Alt. Juror No. 4: Well, the distinction between knowing that there is that difference between my personal

opinion and the necessity to follow the word of law in a courtroom.

The Court: We seem to be dancing around one another. Would you tell me what you perceive to be an ambiguous phrase or word in that question?

Prospective Alt. Juror no. 4: I'm just trying to precisely remember.

The Court: I will read it again. [¶] Regardless of your views on the death penalty, would you as a juror be able to vote for the death penalty if you believe after hearing all the evidence that the penalty was appropriate.

Prospective Alt. Juror No. 4: If the strict letter of the law and the facts of the case as presented in court demand the death penalty, then it is necessary to follow the law.

The Court: Well the law says this. [¶] You are to weigh the aggravating and mitigating circumstances and arrive at a penalty determination in that fashion. [¶] Okay?

Prospective Alt. Juror No. 4: Yes.

The Court: Now the question seemed pretty forward. It says could you ever vote for death if the evidence pointed you toward that result. You said "no" and now you said "yes". [¶] Was there a confusion on your part or change of mind or what is going on is what we need.

Prospective Alt. Juror No. 4: Well, when I -- if I remember correctly on my form, I made some cross referencing to --

The Court: Not on that one.

Prospective Alt. Juror No. 4: Not specifically on that one. If the letter of the law and the facts in the case necessitate the death penalty then, yes, under those circumstances I will vote for the death penalty.

The Court: All right. [¶] [Question number] 38 asks this. [¶] Listen carefully. 38. [¶] Would you always choose life without the possibility of parole and never vote for the penalty of death regardless of the evidence. [¶] You circled "yes". [¶] Would you explain your answer to that?

Prospective Alt. Juror No. 4: Okay. I was thinking in terms of other things that I said that in general. As a personal view, I am opposed to the death penalty and I, like a lot of people here, I feel uncomfortable being here in these circumstances. I'm not saying that that will affect my judgment per se on the case.

The Court: But you said that you could never vote for the death penalty. [¶] Am I reading your answer correctly?

Prospective Alt. Juror No. 4: I --

The Court: The two seem irreconcilable is what I am pointing out.

Prospective Alt. Juror No. 4: Okay. If the law necessitates the voting for the death penalty, then I will have to vote for it.

The Court: We are going around in circles. [¶] Let me see counsel at the bench.

(44RT 4651-4655.)

At the bench conference, the trial court solicited suggestions and thoughts from both the defense and prosecution. The prosecutor believed that Prospective Juror No. 4's answers in the questionnaire unambiguously revealed his feelings toward the death penalty and his inability to impose it. Given those answers, the prosecutor believed that the voir dire responses were disingenuous, at best. (44RT 4655-4656.) The court then asked for a response from defense counsel, who stated,

> I don't believe the court can do that because I don't think the court at this point -- [¶] You might ask him if he wants to be on this case. Then you may judge from those answers. [¶] Most people do not want to be on these kinds of cases so that is why I quarrel with [the prosecutor's] take on it. [¶] The other thing is perhaps the court would like to inquire as to what he does for a living.

(44RT 4656.)

Subsequently, in open court, the trial court asked Prospective Juror No. 4 about his employment history:

The Court: Sir, when you are employed, what do you do?

Prospective Alt. Juror No. 4: I'm about to start over. I am going to go back to school.

The Court: What have you been doing? You have been out of school for a while, I take it. What have you been doing for a living?

Prospective Alt. Juror No. 4: I was a writer of a would be scholar and treatise on film.

The Court: All right. [¶] For the last many years?

Prospective Alt. Juror No. 4: Yes. 20 years.
The Court: 20?
Prospective Alt. Juror No. 4: No.
The court: What have you done for the past 15 or 20 years in terms of income? Would you tell me?
Prospective Alt. Juror No. 4: I've -- my dad helped me out a while.
The Court: What do you plan on doing now?
Prospective Alt. Juror No. 4: Going back to school.
The Court: With what end in mind?
Prospective Alt. Juror No. 4: I have to learn the basics about computers.
The Court: Don't we all? [¶] Okay. [¶] Thank you.

(44RT 4657.)

At the following bench conference, the trial court asked both sides if they had any further comment, which neither side had. The court then sustained the prosecutor's challenge for cause, stating the following:

> Let me put it this way. [Prospective Alternate Juror No. 4] is not unintelligent. [¶] He makes cross reference and arrows on his questionnaire and is quite clear in his responses and loves to explain them. He tells me that there are ambiguities in the questions. When asked what they are, he beats around the bush in what the court feels is an evasive attempt to answer my question.

(44RT 4658.) Defense counsel noted her objection on the record. (44RT 4658.) Thereafter in open court, the trial court excused Prospective Juror No. 4. (44RT 4658.)

The exchange between above amply supports the trial court's decision to engage in extended questioning of Prospective Alternate Juror No. 4 given that juror's contradictory and evasive responses in the questionnaire and on voir dire. Indeed, the trial court asked for defense counsel's input at two different times during its questioning of the juror and, at the suggestion of defense counsel, asked the juror additional questions about his employment history, which revealed his unpaid status as a writer for the

past 20 years. "When a prospective juror has made conflicting statements regarding his or her ability to remain impartial and apply the law despite strong personal beliefs, [the reviewing court] accept[s] as binding the trial court's assessment." (*People v. Navarette, supra*, 30 Cal.4th at p. 490; accord, *People v. Lewis*, *supra*, 43 Cal.4th at pp. 482-483; *People v. Thornton, supra*, 41 Cal.4th at pp. 418-419.) "Moreover, defense counsel's decision not to conduct further questioning suggests they believed [Prospective Alternate Juror No. 4] could not be rehabilitated." (*People v. Lewis, supra*, 43 Cal.4th at p. 487.) Accordingly, appellant's claims of disparate treatment and judicial bias must be rejected. (See, e.g., *People v. Mills, supra*, 48 Cal.4th at pp. 187-190; *People v. Martinez* (2009) 47 Cal.4th 399, 438-447; *People v. Thornton, supra*, 41 Cal.4th at pp. 419-425.)

2. Prospective Alternate Juror K.H. (Juror Identification No. 2733)

Appellant appears to argue that in comparison with the lengthy questioning of Prospective Alternate Juror No. 4, the trial court's questioning of "the very next prospective alternate juror" (herein designated as Prospective Alternate Juror K.H.; 12CT 3497-3511 [related juror questionnaire]) was brief. (AOB 311.) In response to question number 35 of the juror questionnaire, Prospective Alternate Juror K.H. wrote, "If one takes another[']s life in cold blood you must serve the consequences no matter what." (12CT 3507.) In response to question number 36(e), he explained that California should have the death penalty because "if you take another person[']s life for no jus[t] reason the [sic] you should pay the price [--] the death penalty." (12CT 3508.) Prospective Alternate Juror K.H. circled "no" to question number 39, which indicated that, he would not always choose the death penalty and that he would not vote for life without parole regardless of the evidence. (12CT 3509.)

On voir dire, the trial court asked Prospective Alternate Juror K.H., "Do you feel you are strongly predisposed toward a verdict of death or life without parole," to which the juror responded, "No." When asked, "Are there any matters on the questionnaire that you wanted me to take up here at the bench," Prospective Alternate Juror K.H. replied, "No. [¶] Everything I put down there is all right." (44RT 4660.) The court then engaged in a lengthy dialogue with the juror regarding his general questionnaire responses. (44RT 4660-4667.) The trial court and Prospective Alternate Juror K.H. next engaged in the following colloquy about his questionnaire responses to the death penalty:

> The Court: Okay. [¶] You seem like from your answers that you are a pretty firm supporter on the idea of a death penalty and I just want to make one thing clear. [¶] The fact that a person, for example, commits two murders or three or four or whatever or any crime for that matter, that does not tell you what the penalty will be. It tells you that there will be a penalty phase. The jury still has to decide in each case, whether it be a multiple murder, rape/murder, robbery/murder, the jury is still the ultimate decision maker as to penalty. [¶] You weigh aggravation and mitigation as to all charges shown and look at the facts about the offender and try to come up with the appropriate penalty.
>
> Prospective Alt. Juror [K.H.]: That's true.
>
> The Court: Do you think you will have any problem doing that?
>
> Prospective Alt. Juror [K.H.]: No, sir.
>
> The Court: Is there anything else that you think the attorneys or the court needs to know about your background or your frame of mind that we have not talked about?
>
> Prospective Alt. Juror [K.H.]: No. No.
>
> The Court: Okay.
>
> Prospective Alt. Juror [K.H.]: It's in the questionnaire.

(44RT 4667-4668.)

The prosecutor passed for excusing the juror for cause. Defense counsel declined to pass for cause and asked the court to further question the juror on his responses to question numbers 35 and 36(e). (44RT 4668.)

The court replied that it had already inquired as to those two questions and stated, "What he said is if you take another life for no just reason, you should pay the price, the death penalty. [¶] I explained to the gentleman a minute ago that it is not quite that easy." (44RT 4668.)

The court nevertheless further questioned Prospective Alternate Juror K.H. as follows:

> [The Court:] Do you understand that the mere fact that somebody is convicted of murder in the first degree is special circumstances regardless of what your feelings are of the death penalty, pro or con, you have to weigh the aggravating and mitigating circumstances in this case in order to determine what will happen in this case?"
>
> Prospective Alt. Juror [K.H.]: Yes, sir. [¶] I do.
>
> The Court: Any question in your mind about that?
>
> Prospective Alt. Juror [K.H.]: No, Sir.

(44RT 4669.)

The court then informed counsel that based on the juror's responses, no further inquiry was necessary. Counsel then accepted the court's offer to approach at sidebar. The following proceedings were held at the bench:

> [Defense counsel]: [Prospective Alternate Juror K.H.] is quite clear in his questionnaire if you take a life for no reason, cold blood, you get the death penalty. [¶] He just, again, referred to what he said in the questionnaire when he said -- when you asked him is there anything else, he said: [¶] No. What I said and what's in the questionnaire. [¶] To me it is quite clear that he in a first degree murder is going to wind up giving the death penalty. He is predisposed. He is for the death penalty and I think he is impaired.
>
> The Court: It is clear that he believes certain things about how things ought to be and he was asked what his general feelings are about the death penalty. He made the responses that you indicate. He is entitled to his opinion about that just as a person who thinks that you should only have the death penalty if you do a child murder. But if that juror indicates: [¶] Whatever my opinions are about it, I understand that I have to weigh aggravation and mitigation and it is not an automatic situation for either penalty, what more can you ask?

[Defense counsel]: I think it is a question that this gentleman needs to answer that if it is indeed a first degree murder in cold blood and there may not be a reason for doing it, which there isn't for most first degree murders, is there mitigation so that he could find life without parole?

The Court: I told him the defendant has been convicted of two murders and he has indicated in this case he could return a verdict of life without parole if that is what the evidence suggests. He also said that he could return a verdict of death. [¶] I will not sustain a challenge for cause on that, but I assume you made one.

[Defense counsel]: Yes.

The Court: It is disallowed.

(44RT 4669-4771.) Defense counsel later exercised a peremptory challenge on Prospective Alternate Juror K.H. (44RT 4693.)

"[A] prospective juror may be removed for cause only if that juror's views in favor of or against capital punishment would prevent or substantially impair the performance of his [or her] duties as a juror in accordance with the trial court's instructions and the juror's oath. [Citation.] [T]he qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty. [Citations.]" (*People v. Lewis, supra*, 43 Cal.4th at p. 488, internal quotation marks omitted.)

Here, substantial evidence supports the trial court's conclusion that Prospective Alternate Juror K.H. did not hold views regarding capital punishment that would prevent or substantially impair the performance of his duties as an alternate juror in this case. K.H. agreed that he would weigh aggravation and mitigation as to all charges shown and look at the facts about the offender and try to come up with the appropriate penalty. (44RT 4667-4669.) Defense counsel offered no other questions to pose to K.H. that the court had not already asked. (44RT 4669-4771.)

Moreover, unlike Prospective Alternate Juror No. 4 discussed above, K.H. did not make any contradictory or evasive responses in his

questionnaire or on voir dire, which would have necessitated additional questioning from the trial court. Although K.H. personally supported the death penalty, he indicated in the questionnaire that he would not always choose the death penalty and that he would not vote for life without parole regardless of the evidence. (12CT 3509.) His oral responses were consistent with that written response and did not warrant further inquiry in addition to what the trial court had already asked. (44RT 4660, 4667-4669.) For the same reasons, appellant has failed to show that the trial court's inquiry of K.H. constituted judicial misconduct. Accordingly, the trial court properly declined to excuse K.H. for cause. (*People v. Lewis, supra*, 43 Cal.4th at pp. 488-490.)

Finally, because K.H. was considered as an alternate juror only, and no alternate served in appellant's trial, there is no possibility of prejudice. (*People v. Mills, supra*, 48 Cal.4th at p. 186.)

3. Prospective Alternate Juror No. 1 (Juror Identification No. 5067)

In his juror questionnaire (13CT 3617-3631), Prospective Alternate Juror No. 1 wrote in response to question number 35 that "If one takes another life he should pay with his." (13CT 3627.) In response to question number 39, Prospective Alternate Juror No. 1 circled "no," indicating that, regardless of the evidence, he would not always choose death and not vote for life without parole. (13CT 3629.)

On voir dire, the trial court and Prospective Alternate Juror No. 1 engaged in the following colloquy:

> The Court: Do you know of any reason you would not be a good juror to hear this case?
>
> Prospective Alt. Juror No. 1: I'm a strong advocate of the death penalty.
>
> The Court: Do you think you are so strong an advocate that your mind is already made up in our case?
>
> Prospective Alt. Juror No. 1: I believe an eye for an eye.

The Court: That is not what I asked.

Prospective Alt. Juror No. 1: No.

The Court: I need to know. If you have your mind made up and will be a vote for death no matter if we put on evidence or not, I need to know that. [¶] If you think you can keep an open mind, I need to know that.

Prospective Alt. Juror No. 1: Yes.

The Court: Which is it?

Prospective Alt. Juror No. 1: I can keep an open mind.

The Court: Well, the fact that somebody is pro or con the death penalty does not necessarily mean they should or should not hear the case. [¶] You heard the question. You know what we are looking for. We need to find people that whatever their politics and their views of the death penalty will listen to our case, determine the facts from the evidence and find the good and the bad and the mitigating and the aggravating and weigh them and determine in that way whether someone deserves to get the death penalty or whether they don't. [¶] Do you understand your duty?

Prospective Alt. Juror No. 1: Yes.

The Court: Do you think you can do that or do you think your views are such that you are really predisposed a particular way?

Prospective Alt. Juror No. 1: I can keep an open mind, I guess.

The Court: You guess? I got people that will not give it to me today. [¶] I tell you. A lot of hedging. [¶] You guess. You think. Maybe. [¶] How sure are you?

Prospective Alt. Juror No. 1: I can keep an open mind.

The Court: Any doubt about it?

Prospective Alt. Juror No. 1: No.

The Court: If you develop some doubts, even in the next 10 seconds, I want you to let me know.

(Laughter)

The Court: Even throughout the trial. [¶] If it comes to your mind that you are not able to do your duties as I have tried to summarize them, please let us know so that we can get you out of here. [¶] Okay?

You felt that sometimes the criminal justice system is unfair. You say the racial makeup of juries. [¶] What do you mean specifically?

Prospective Alt. Juror No. 1: If you had a jury made up of Martians and a Martian was on trial, he would probably get off.

The Court: I don't know. Maybe. I haven't tried any Martians this year. [¶] Contrary -- maybe I have. I don't know.

(Laughter)

The Court: Well, yes. I guess that people tend to empathize if you are a Martian, you would empathize with Martians from Mars as opposed to those from Venus. [¶] You are suggesting that the best way is to have folks of a different race than the accused or a mixture of people or what?

Prospective Alt. Juror No. 4: There should be no bias at all but there has been.

The Court: So ordered.

Prospective Alt. Juror No. 4: The statistics have shown it.

The Court: No question. I think that anybody that really looked at it would have to admit that, yes, racial makeup of a jury can be a strong determinant of the outcome of the case. [¶] That is in some circumstances. It sort of depends on the nature of the case as well. [¶] In some cases it does not make any difference. You can have Martians hear the case and you know the evidence is so clear one way or the other it will not matter. [¶] Do you think the race of a victim, a defendant, a juror such as yourself, is apt to influence your verdict in the case?

Prospective Alt. Juror No. 1: No.

The Court: One way or the other?

Prospective Alt. Juror No. 1: No.

(44RT 4709-4713.)

At the sidebar requested by defense counsel, the following discussion occurred:

[Defense counsel]: I would challenge him for cause. [¶] He stood up here and he said an eye for an eye and then the court started questioning him and then, again, I have objected as to the way that these pro death penalty phase people have been questioned in the past. [¶] He is very clear in question 35. [¶] If one takes a life --

[Prosecutor]: I would ask her to keep her voice down.

The Court: Just a bit.

[Defense counsel]: In 35a.

The Court: There is no 35a.

[Defense counsel]: 36a.

The Court: It says "too many appeals". [(See 13CT 3628.)] [¶] I agree. So? So what.

[Defense counsel]: He has told the court in open court he believes in an eye for an eye. He is pro death penalty. [¶] I do not have anymore peremptories.

The Court: Neither does [the prosecutor].

[Defense counsel]: We are winding up with a very pro death penalty eye for an eye juror. [¶] I will ask the court to excuse him and let's try to get somebody a little more neutral whose mind is not made up before they start.

The Court: Anything else?

[Defense counsel]: I don't have to tell the court that he was pro death penalty.

The Court: I questioned him like I questioned everybody to the extent that I almost pounded on the poor fellow and tell me what the heck he was going to do. [¶] Anything else?

[Defense counsel]: No.

[Prosecutor]: No.

The Court: Challenge, if that was a challenge for cause, will be disallowed. [¶] You are both out of peremptories.

(44RT 4714-4716.)

Prospective Alternate Juror No. 1 subsequently was seated as an alternate juror but never deliberated. (44RT 4716.)

Here, substantial evidence supports the trial court's conclusion that Prospective Alternate Juror No. 1 did not hold views regarding capital punishment that would prevent or substantially impair the performance of his duties as an alternate juror in this case. The trial court engaged in a lengthy inquiry of Prospective Alternate Juror No. 1, as it had done with Prospective Alternate Juror No. 4. Prospective Alternate Juror No. 1 agreed that he would weigh aggravation and mitigation and expressed that he had no doubt that he could keep an open mind. (44RT 4710-4711.)

Although Prospective Alternate Juror No. 1 strongly supported the death penalty, he indicated in the questionnaire that he would not always choose the death penalty and that he would not vote for life without parole regardless of the evidence. (13CT 3629.) His oral responses were consistent with that written response. (44RT 4710-4711.) When he stated

that he "guessed" he could keep an open mind, the trial court asked subsequent questions to clarify his view. (44RT 4711.) Defense counsel offered no other questions to pose to Prospective Alternate Juror No. 1. (44RT 4714-4716; see *People v. Mills, supra*, 48 Cal.4th at p. 188.) The trial court was entitled to resolve any conflicts in the juror's responses in favor of retaining the juror based on its observations of the juror's demeanor, which is binding on appeal. (*People v. Lewis, supra*, 43 Cal.4th at pp. 489-490.) For the same reasons, appellant has failed to show that the trial court's inquiry of Prospective Alternate Juror No. 1 constituted judicial misconduct. Accordingly, the trial court properly declined to excuse Prospective Alternate Juror No. 1 for cause. (*People v. Lewis, supra*, 43 Cal.4th at pp. 488-490.)

Finally, because Prospective Alternate Juror No. 1 was seated as an alternate juror only, and no alternate served in appellant's trial, there is no possibility of prejudice. (*People v. Mills, supra*, 48 Cal.4th at p. 186.)

In conclusion, a review of the three challenged prospective alternate jurors demonstrates that the trial court "evaluated each prospective [alternate] juror individually and evenhandedly to reach a decision on the suitability of each for jury service." (*People v. Thornton, supra*, 41 Cal.4th at p. 425.) "The examination of such a small number of prospective [alternate] jurors constitutes an extremely limited sample of the trial court's overall performance, thereby diminishing the probative value of the examples proffered by [appellant] to support the inference he would have [this Court] draw." (*People v. Martinez, supra*, 47 Cal.4th at p. 447.) "Moreover, a trial court's numerous rulings against a party - even when erroneous- do not establish a charge of judicial bias, especially when they are subject to review. [Citations.]" (*People v. Guerra, supra*, 37 Cal.4th at p. 1112.) Accordingly, the three examples occurring during voir dire that appellant cites do not support his assertion of judicial bias or misconduct.

B. The Limitation Of Cross-Examination Of Sandra Hess Was Proper And Does Not Support The Inference Of Judicial Bias Or Misconduct

During cross-examination of Sandra Hess, defense counsel's question, "Did you at that point go to the school psychiatrist to find out anything more about [appellant]," prompted a sua sponte objection from the trial court, who stated: "I will sustain my own objection, [counsel]. [¶] It is not relevant. [¶] We have spent 40 minutes talking about an incident that occurred between the two and we have gone quite far afield." The court then allowed counsel to continue the cross-examination. (45RT 4818-4819.)

Shortly thereafter, defense counsel questioned Hess regarding the existence of any conferences that she may have had with appellant before March 31. Hess stated that she could not remember and "would have to go back through school records to answer [the] question." The following colloquy subsequently occurred:

> Q Had you looked at any of your school records before you came to testify the first penalty hearing?
> A Not as I did before this one.
> Q So you did go back and look at your records?
> A Yes.
> Q Did you see anything about having any other conferences with him before March 30th?
> A No. There was nothing prior to the March 31st incident.
> Q There was no record of a March 30th conference with him?
> A Yes. Yes. Excuse me. Yes.
> Q Did you write any notes about his behavior or anything that you refreshed your memory with?

(45RT 4819-4820.) At that point, the trial court stated interjected and the following colloquy between the court and defense counsel ensued in the presence of the jury:

> The Court: I will sustain my own objection. [¶] Are we conducting discovery, counsel, or is there a specific area?

[Counsel]: Your honor, I am cross-examining at penalty phase.

The Court: I think you are about done cross-examining this witness unless there is something new. [¶] If so, come up to the bench and explain what it is. [¶] Anything else?

[Counsel]: I have nothing more if the court is not going to allow me to cross-examine.

The Court: I will allow you to cross-examine from here to kingdom come to dooms day if you can elicit relevant information. [¶] If you have some, explain it to me. [¶] Come on up.

(45RT 4820-4821.)

The following proceedings were held at the bench:

The Court: What is it?

[Defense counsel]: [Hess] had notes obviously written. They are in the school records. [¶] I have --

The Court: About what?

[Defense counsel]: I have discovery about [appellant].

The Court: So you are doing discovery while you examine?

[Defense counsel]: We never heard there was any contact even as to counseling. I have no discovery of that or anything.

The Court: No. No.

[Defense counsel]: [Hess] never testified to this at the first penalty hearing.

The Court: Maybe nobody asked her, no. 1. [¶] No. 2, why do you feel it is important to use the phrase "prior penalty phase" before the jury? [¶] Was that inadvertent?

[Defense counsel]: Yes, it was.

The Court: I'm sure it was.

[Prosecutor]: I should indicate the only notes that [Hess] looked at was what I was provided by [defense counsel] the other day.

The Court: Do you have anything else of this witness?

[Prosecutor]: No.

The Court: We will not do this with every witness. [¶] [Hess] testified that your client put his arm around her neck and choked her. It is five minutes of testimony. [¶] We have not gotten into the meat of the case yet. We are not going to do this, I am telling you both. [¶] Get your witnesses up and get what it

is out of them and get them off or I will get them off for you. [¶] We are not going to sit around for months doing this.

(45RT 4821-4822.)

Appellant now contends on appeal that the trial court's limitation of the defense cross-examination of Hess and its admonition of counsel were evidence of judicial bias. (AOB 313-314.) These claims lack merit. "It is well recognized that the trial judge may comment on the relevance of evidence, and may sua sponte exclude irrelevant evidence." (*People v. Sturm, supra*, 37 Cal.4th at p. 1239.) The trial court acted consistent with it authority under section 1044 "to limit the introduction of evidence . . . to relevant and material matters."

The trial court's first sua sponte objection to the relevance of defense counsel's inquiry of whether Hess tried to find out more information about appellant from the school psychiatrist (45RT 4818-4819) was not an abuse of discretion because the answer to the question could not have "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

Even after cautioning counsel that her question went "quite far afield" (45RT 4819), counsel nevertheless persisted in disputing the court's direction by asking Hess whether she wrote any notes about appellant's behavior before his assault on Hess in the classroom (45RT 4820), which elicited from the trial court the second sua sponte objection on lack of relevance and an inquiry regarding the relevance of the question: "Are we conducting discovery, counsel, or is there a specific area." Rather than addressing the trial court's inquiry, counsel responded, "Your honor, I am cross-examining at penalty phase." The trial court then, for the second time, asked counsel to explain the relevance of the question by stating: "I think you are about done cross-examining this witness unless there is something new. [¶] If so, come up to the bench and explain what it is."

(45RT 4820.) Again, without addressing the court's concern, counsel replied, "I have nothing more if the court is not going to allow me to cross-examine." (45RT 4820.) The court for the third time asked for an offer of proof by stating, "I will allow you to cross-examine from here to kingdom come to dooms day if you can elicit relevant information. [¶] If you have some, explain it to me. [¶] Come on up." (45RT 4820-4821.) At sidebar, counsel failed to explain any relevance to the question posed to Hess. (45RT 4821-4822.) Even now on appeal, appellant does not provide the relevance of the question at issue.

It was incumbent on defense counsel to inform the trial court, by an offer of proof or other means, of the substance, purpose, and relevance of the evidence she sought to elicit from Hess. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1178; *People v. Fauber* (1992) 2 Cal.4th 792, 854; *People v. Livaditis*, *supra*, 2 Cal.4th at pp. 778-779; *People v. Whitt* (1990) 51 Cal.3d 620, 648; Evid. Code, § 354, subd. (a).) The offer of proof requirement gives the trial court an opportunity to change or clarify its ruling, and provides an appellate court the means of assessing prejudice. (*People v. Whitt, supra*, 51 Cal.3d at p. 648; *People v. Schmies* (1996) 44 Cal.App.4th 38, 53.) When it is apparent the trial court has not recognized the relevancy of the information sought to be elicited on cross-examination, the defendant must explain the theory of relevancy and specify the contents of the anticipated testimony. (See *People v. Whitt, supra*, 51 Cal.3d at pp. 648-650; *People v. Burton* (1961) 55 Cal.2d 328, 344-345; *People v. Coleman* (1970) 8 Cal.App.3d 722, 729-731; *People v. Lancaster* (1957) 148 Cal.App.2d 187, 196.) The defendant "cannot for the first time on appeal attack the [trial court's exercise of] discretion on grounds which he could have proffered in the trial court but did not disclose. A contrary rule would enable a party secretly to reserve a means of reversal in case the judgment went against him." (*People v. Lancaster, supra*, 148 Cal.App.2d at p. 196.)

The offer of proof requirement may be excused when the defendant is merely engaging in exploratory cross-examination to elicit information unknown to the defendant. (*People v. Burton, supra*, 55 Cal.2d at p. 344; *Gallaher v. Superior Court* (1980) 103 Cal.App.3d 666, 672; Evid. Code, § 354, subd. (c).) However, the requirement is not excused when the defendant knows the substance of the information sought on cross-examination and/or it is apparent the court does not recognize the theory of relevancy. (*People v. Allen* (1986) 42 Cal.3d 1222, 1270, fn. 31; *People v. Burton, supra*, 55 Cal.2d at pp. 344-345; *People v. Coleman, supra*, 8 Cal.App.3d at pp. 729-731; *People v. Lancaster, supra*, 148 Cal.App.2d at p. 196.)

Here, defense counsel ignored the court's numerous requests for an offer of proof on the relevancy of question posed to Hess. When an attorney engages in improper behavior, such as ignoring the court's instructions or asking inappropriate questions, it is within a trial court's discretion to reprimand the attorney, even harshly, as the circumstances require. (*People v. Snow, supra*, 30 Cal.4th at p. 78.) "It is settled that the trial court is given wide discretion in controlling the scope of relevant cross-examination." (*People v. Farnam, supra*, 28 Cal.4th at p. 187.) While "wide latitude should be given to cross-examination designed to test the credibility of a prosecution witness in a criminal case" (*People v. Cooper* (1991) 53 Cal.3d 771, 816), "[w]ithin the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal evidence. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 946, disapproved on another point in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.)

To the extent that the trial court's exchange with defense counsel (45RT 4820-4821) implied a criticism of counsel, it was the result of

counsel's repeated refusal to provide an offer of proof and did not show favoritism toward the prosecution. Rather, the court's comments were an attempt to "control all proceedings during the trial" "with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044; see Evid. Code, § 765, subd. (a) ["The court shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth , as may be . . ."].) The trial court dispelled any hint of favoritism by making the following comment in the presence of the jury:

> Ladies and gentlemen, I take more of an active role than most courts do and my job is to attain relevant information. [¶] And we are going to try to do this cogently, rapidly and clearly. [¶] I want *both sides* to understand that is the goal here, that we are not going to be here for a year trying the case. [¶] We will do it within the time estimate that the attorneys gave us, so I am going to try to do that. [¶] So if I seem to be pushing, you're right. I am.

(45RT 4823.)

Accordingly, the record does not establish that the limitation of cross-examination of Hess and the court's comments to defense counsel was the result of judicial bias or misconduct. (*People v. Snow, supra*, 30 Cal.4th at pp. 78-81.)

C. The Trial Court's Expression Of Sympathy To Robinson Was Not Evidence Of Judicial Bias

During the first penalty trial and the penalty retrial, Bridget Robinson testified about an incident in which appellant beat, raped, and choked her. (35RT 3140-3169.) At the end of her testimony at the penalty retrial, the trial court stated, "Ma'am, I'm sorry this happened to you and I want to thank you for coming back down." (46RT 5140.) After the testimony of the next witness, the trial court instructed the jury:

Folks, a moment ago when the young lady stepped down, I did something that I rarely do in speaking to the witness. [¶] It donned on the court that that is a matter being offered in aggravation and not one of the matters that the defendant has been convicted of, unlike the murders and so forth.

You will have to determine whether the incident described occurred, not me. I want you to do the following:

Disregard my comments to her that the court was sorry what happened. [¶] You decide what happened. [¶] My comments mean zero, absolutely zero, when it came to that.

I had forgotten that that was a matter that had not been -- it is a matter that is not one of the charged crimes. so it is improper and inappropriate. [¶] Disregard it and you resolve the evidence.

Everybody clear on that?

(The jurors answered in the affirmative.)

The Court: You must do that.

(46RT 5145-5146.)

The following day, defense counsel moved for mistrial based on judicial misconduct. The trial court recognized that it should not have made the comment to Robinson. However, the court's sympathy for Robinson was inadvertently expressed because she "invoke[d] a certain amount of sympathy." The court believed that "given her demeanor and her obvious credibility, the jury will find that something occurred." The court denied the mistrial motion because it had strongly admonished the jury to ignore its comment and reminded the jury of its role as the trier of fact. (46RT 5150-5153.)

On appeal, appellant claims that the trial court's comment "vouched" for Robinson's credibility and argues that "[t]he fact that the judge made the comment in the first place, however, is evidence of the appearance of bias." (AOB 315.) The trial court's comment was merely an expression of sympathy based on the witness's obvious demeanor and credibility and did not constitute vouching, "which constitutes an attempt to personally vouch for a witness's credibility[.]" (*People v. Coddington* (2000) 23 Cal.4th 529,

616, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Even if the trial court's comment is construed as a comment on Robinson's credibility, it was isolated and was not "contentious to a degree amounting to partisan advocacy" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 823), especially given the trial court's explanation to the jury that the remark was made under the court's mistaken belief that appellant had been convicted of his crimes involving Robinson.

The trial court's comment did not deprive appellant of his right to trial by jury. When considered with the court's almost immediate admonition and clarification to the jury (*People v. Gutierrez, supra*, 45 Cal.4th at p. 823) and the instructions given at the conclusion of the case that the jurors were not to take a cue from the trial court and that the jurors were the sole judges of the believability of a witness and the weight to be given to the testimony of witnesses (50RT 5892, 5901), any inference that the court had vouched for Robinson's credibility was not prejudicial. (*People v. Coddington, supra*, 23 Cal.4th at p. 616.)

Accordingly, appellant's claim of judicial bias should be rejected.

XXIII. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE UNITED STATES CONSTITUTION (RESPONSE TO AOB ARG. XXVI)

Appellant raises several claims regarding the constitutionality of the death penalty law as interpreted by this Court and as applied at his trial. He maintains that many features of the death penalty law violate the federal Constitution. (AOB 320-360.) As he himself concedes (AOB 320), these claims have been raised and rejected in prior capital appeals before this Court. Because appellant fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should be rejected.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant asserts that Penal Code section 190.2 is constitutionally defective, as it fails to "genuinely narrow" the class of death eligible defendants. (AOB 322-324.) This Court has repeatedly rejected such claims, and appellant has not distinguished his case from those previously decided. (See, e.g., *People v. Mills, supra*, 48 Cal.4th at p. 213.) Appellant's claim should likewise be rejected.

B. Penal Code Section 190.3, Subdivision (a), Does Not Allow For An Arbitrary Or Capricious Imposition Of The Death Penalty

Appellant asserts that Penal Code section 190.3, subdivision (a), fails to adequately guide the jury's deliberations, thereby resulting in the "wanton and freakish" application of this factor. (AOB 325-327.) This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *People v. Mills, supra*, 48 Cal.4th at p. 213; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 971-980 [114 S.Ct. 2630; 129 L.Ed.2d 750].) Appellant's claim should also be rejected.

C. California's Death Penalty Statute And Instructions Set Forth The Appropriate Burden Of Proof

Appellant also contends, in seven subclaims, that the death penalty statute and accompanying jury instructions failed to set forth the appropriate burden of proof. (AOB 327-354.) As explained below, each of these claims have previously been rejected by this court and are meritless.

First, appellant claims the instructions failed to require juror unanimity as to the aggravating factors and the death penalty statute and unconstitutionally failed to assign to the State the burden of proving beyond a reasonable doubt the existence of an aggravating factor. (AOB 328-331.) This Court has concluded that the death penalty law is not unconstitutional for failing to require that the jury be unanimous in finding the existence of

an aggravating factor. (*People v. Mills, supra*, 48 Cal.4th at p. 214.) This Court has also held that the sentencing function at the penalty phase is not susceptible to a burden-of-proof qualification. (*People v. Manriquez, supra*, 37 Cal.4th at p. 589; *People v. Burgener, supra*, 29 Cal.4th at p. 885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) Thus, the penalty phase instructions were not deficient by failing to assign to the State the burden of proving beyond a reasonable doubt the existence of an aggravating factor. (See *People v. Morgan* (2007) 42 Cal.4th 593, 626; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Nothing in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], or *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], impact what this Court has stated regarding the sentencing function at the penalty phase not being susceptible to a burden-of-proof quantification. This Court has expressly rejected the argument that *Apprendi*, *Ring*, and/or *Blakely* affect California's death penalty law or otherwise justifies reconsideration of this Court's prior decisions on this point. The reasoning set forth above applies equally to appellant's claim that *Cunningham v. California* (2007) 549 U.S. 270, 293-295 [127 S.Ct. 856, 871; 166 L.Ed.2d 856] also requires the State to prove an aggravating factor beyond a reasonable doubt. (*People v. Romero, supra*, 44 Cal.4th at pp. 428-429.)

Second, appellant claims the instructions failed to inform the jury that they may impose a sentence of death only if they are persuaded beyond a reasonable doubt that the aggravating factors exist and outweigh the mitigating factors and that death is the appropriate penalty. (AOB 340-344.) This Court has rejected this claim. (*People v. Mills, supra*, 48 Cal.4th at p. 214.)

Third, appellant asserts that the jury was required to base a death sentence on written findings regarding aggravating factors. (AOB 344-347.) This Court has rejected this claim. (*People v. Mills, supra*, 48 Cal.4th at p. 214.)

Fourth, appellant claims that the death penalty statute, as interpreted by this Court, forbids inter-case proportionality review, thereby guaranteeing arbitrary, discriminatory, or disproportionate impositions of the death penalty. (AOB 347-349.) This Court has held that "[t]he federal Constitution does not require intercase proportionality review. [Citation.] The absence of disparate sentence review does not deny a defendant the constitutional right to equal protection. [Citation.]" (*People v. Romero*, supra, 44 Cal.4th at p. 429; accord, *People v. Mills, supra*, 44 Cal.4th at p. 214.)

Fifth, appellant claims that the prosecution may not rely on unadjudicated criminal activity in the penalty phase, and even if it were constitutionally permissible to do so, such alleged criminal activity could not constitutionally serve as a factor in aggravation unless found to be true beyond a reasonable doubt by a unanimous jury. (AOB 349-350.) This Court has rejected this claim. (*People v. Mills, supra*, 48 Cal.4th at p. 214.)

Sixth, appellant contends the inclusion in the list of potential mitigating factors of such adjectives as "extreme" (factors (d) and (g)) and "substantial" (factor (g)) acted as barriers to the consideration of mitigation. (AOB 350.) This Court has held that the use of the adjectives "extreme" and "substantial" do not make the sentencing statute (§ 190.3) or instructions unconstitutional. [Citation.]" (*People v. Romero, supra*, 44 Cal.4th at p. 429.)

Finally, appellant argues that the failure to instruct that statutory mitigating factors were relevant solely as potential mitigators precluded a fair, reliable, and evenhanded administration of the capital sanction. (AOB

350-354.) This Court has rejected this claim. (*People v. Alexander* (2010) 49 Cal.4th 846, 938.)

In sum, appellant's challenges to the death penalty statute and jury instructions pertaining to the death penalty regarding the burden of proof are meritless. As such, the claim and subclaims must all be rejected.

D. California's Death Penalty Law Does Not Violate The Equal Protection Clause Of The Federal Constitution

Appellant claims California's death penalty law violates the Equal Protection Clause of the federal Constitution because non-capital defendants are accorded more procedural safeguards than a capital defendant. (AOB 354-357.) However, this Court has held on numerous occasions that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Tate* (2010) 49 Cal.4th 635, 713; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 590; *People v. Hinton, supra*, 37 Cal.4th at p. 912; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Boyette*, *supra*, 29 Cal.4th at pp. 465-467.) Thus, appellant's claim of an Equal Protection Clause violation is meritless and must be rejected.

E. California's Use Of The Death Penalty Does Not Fall Short Of International Norms

Finally, appellant's claims that the use of the death penalty as a regular form of punishment falls short of international norms. (AOB 357-360.) This claim has been repeatedly rejected by this Court, which has stated that "'[i]nternational law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]'" (*People v. Tate, supra*, 49 Cal.4th at p. 713.) Appellant has not presented any significant or persuasive reason for this Court to reconsider its prior decisions, and the present claim must therefore be rejected.

XXIV. THERE WAS NO ERROR IN EITHER THE GUILT OR PENALTY PHASE THAT REQUIRES REVERSAL (RESPONSE TO AOB ARG. XXVII)

In his final claim, appellant states that the cumulative error doctrine requires reversal. (AOB 361-362.) He is mistaken. A defendant -- even one facing capital punishment -- is entitled to a *fair* trial, not a *perfect* trial. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219; cf. *People v. Marshall, supra*, 50 Cal.3d at p. 945; see *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; see also *United States v. Hasting, supra*, 461 U.S. at pp. 508-509 ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error free, perfect trial, and. . .the Constitution does not guarantee such a trial"].)

Respondent has argued throughout that appellant received a fair trial. Simply stated, appellant has failed to show otherwise. Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Seaton, supra*, 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa* (2001) 26 Cal.4th 398, 447, 458; *People v. Catlin, supra*, 26 Cal.4th at p. 180.) Notwithstanding appellant's arguments to the contrary, the record contains few, if any, errors made by the trial court or prosecution. Certainly no prejudicial errors exist. Moreover, as set forth in the statement of facts and prior arguments, the evidence of appellant's guilt was simply overwhelming. A review of the record without the speculation and interpretation offered by appellant shows that appellant received a fair and untainted trial. The Constitution requires no more. Thus, even cumulatively, any errors are insufficient to justify a reversal of the verdicts. (See *People v. Carrera, supra*, 49 Cal.3d

at p. 332 [overwhelming evidence of guilt; no error affects the believability of the defendant's evidence].)

CONCLUSION

For the reasons stated, respondent respectfully requests that the judgment and sentence of the trial court be affirmed in all respects.

Dated: December 8, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 94,233 words.

Dated: December 8, 2010

EDMUND G. BROWN JR.
Attorney General of California

ALLISON H. CHUNG
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DECLARATION OF SERVICE

Case Name: People v. Banks Case No.: S080477

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; 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 December 8, 2010, I placed two (2) copies of the attached

RESPONDENT'S BRIEF

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Stephen M. Lathrop
Attorney at Law
904 Silver Spur Road, #430
Rolling Hills Estates, CA 90274

In addition, I placed one (1) copy in this Office's internal mail collection system, to be mailed to California Appellate Project (CAP) in San Francisco, addressed as follows:

California Appellate Project
Attention: Michael Millman
101 Second Street, Suite 600
San Francisco, CA 94105-3672

That I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court; and that I also caused a copy to be delivered to the appropriate District Attorney.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on December 8, 2010, at Los Angeles, California.

L. Luna

L. Luna
Signature

AHC:ll
LA1999XS0017
12-8-10