In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **LOUIS JAMES PEOPLES,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S090602

Alameda County Superior Court Case No. 135280
On Change of Venue From
San Joaquin County Superior Court Case No. SP062397A
The Honorable Michael E. Platt, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
GLENN R. PRUDEN
Supervising Deputy Attorney General
DONNA M. PROVENZANO
Deputy Attorney General
State Bar No. 215302
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1303
Fax: (415) 703-1234
Email: Donna.Provenzano@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

Over a five-month period, beginning in June 1997, appellant terrorized the city of Stockton. He carefully planned and orchestrated his one-man crime wave that started with an auto burglary and theft of a gun and culminated in the ruthless murders of four defenseless people. Explaining his motives, appellant wrote in his self-titled "Biography of a Crime Spree," that he committed the murders because he always wanted to know what it would be like to kill someone. Also, in the case of one victim, he wanted revenge.

On June 21, 1997, appellant burglarized Michael King's van, while King and his family were at a nearby park watching his son's baseball game. King, an Alameda County Sheriff's deputy, was off-duty at the time. Among other items, appellant stole King's service weapon—a Glock .40 caliber handgun. Having also secured King's personal information from the van, appellant placed an anonymous call to King the following day and said, "Thank you for the fucking gun, you idiot" and hung up.

A couple of months later, on September 16, appellant went to Cal Spray—a former employer—and exacted revenge for having been fired. In the early morning darkness, appellant vandalized numerous employees' vehicles, which were parked in the lot. When Thomas Harrison arrived for work and drove into the lot, he happened upon appellant leaning into one of the burglarized vehicles. Appellant pulled out the stolen Glock and fired at Harrison, striking him in the leg. As appellant fled the scene, he continued to fire over his shoulder. Harrison noticed that appellant smiled as he fired at him.

In need of money, on October 24, appellant walked into the Bank of the West that afternoon. He was wearing a jacket, ball cap, and glasses with dark lenses. Appellant went to bank employee Jason Tunquist's teller station and pushed a note toward Tunquist, which demanded money. In

exchange for Tunquist's compliance, no one would be shot. To impress upon Tunquist the seriousness of the demand, appellant pulled out the gun, cocked it, and aimed it at Tunquist. Tunquist gave appellant the money in his drawer, which totaled about $900. Appellant fled.

Two days later, on October 29, after disguising himself as a stranded motorist in need of a tow, appellant lured a former co-worker from Charter Way Tow, James Loper, out to an isolated rural county road. When the unsuspecting Loper got out of his tow truck, appellant began firing at him. Loper desperately sought refuge under his tow truck from the hail of bullets. Undeterred, appellant leaned down, canted the gun, and continued to fire at Loper under the truck murdering him. Appellant, who had been fired from Charter Way Tow, considered Loper a "goody goody two shoes." Knowing he had just created a vacancy, appellant called his former employer the next day, expressed his sympathy over Loper's death, and asked if he could have his job back.

On November 4, after carefully stalking his next target and planning his escape route, appellant walked into Mayfair Liquors, which was a small neighborhood store, intent on robbery and murder. A surveillance tape, later obtained by police, showed appellant repeatedly firing at store employee Stephen Chacko as Chacko ran for his life toward the store's front door trailing blood behind him. Chacko died just outside the front door in the parking lot, felled by appellant's greed and lack of humanity. Appellant shot at the store's register to try and gain access to the money it contained. Appellant went to Walmart later that day and shopped for more bullets. He was not done.

When news of Chacko's murder broke, appellant and his wife Carol were watching a news report. Before the murder victim's identity was revealed, appellant confirmed for Carol that it was Chacko who was dead. Appellant smiled and said something to the effect of, "We all go."

A week later, on the morning of November 11, appellant went to Village Oaks Market, which was a small "mom and pop" store in appellant's neighborhood. Pretending to be on a call at a payphone just outside the store, appellant waited until the store was free of patrons before entering. When police later arrived on the scene, they found a male employee, Jun Gao, laying dead on the floor, some of his teeth scattered near his head—the result of a bullet that went through his neck and out his mouth. Another employee, Besun Yu, was barely clinging to life. She was found unresponsive and huddled in a fetal position behind the store counter. Appellant had leaned over the counter and shot the diminutive woman twice as she cowered and crouched down trying to shield herself with her arms. Yu died of her wounds shortly after medical help arrived. This time, instead of shooting the store register, appellant tore the cash register from its moorings and took it with him when he fled. Writing of the murders shortly afterward, appellant said, "I never thought the two people in the Village Oaks store would die. After all, I only shot them two times each. Ha ha."

When police arrested appellant the next afternoon, they found the tools of his murderous trade in his backpack: a black nylon jacket, green knit gloves, a black baseball hat, a police scanner, a police radio call book (with various radio frequencies for the local police and fire departments), and a blue folder with the words "Biography of a Crime Spree." Inside the folder, were newspaper clippings from appellant's various crimes. In appellant's fanny pack, police found a small pair of binoculars, a Swiss army-type knife, a buck knife in a holster with appellant's initials, handcuffs, pepper spray, and Mike King's sheriff's badge and identification.

When police searched appellant's apartment, they found, among other things, a map of Stockton with certain locations marked, including Mayfair

Liquors and Village Oaks Market. There were other businesses highlighted on the map.

When detectives interviewed appellant after his arrest, he repeatedly and steadfastly denied involvement in the crimes. It was not until detectives confronted him with statements made by his wife, which implicated him, that appellant confessed. He led them to the murder weapon, which he had carefully wrapped and buried in a field.

At the guilt phase, appellant's defense centered on his mental state. Appellant attributed his crimes to his abuse of methamphetamine and childhood head trauma, which left him brain damaged to the point that it impaired his brain functioning. The jury rejected appellant's defense and convicted him on all but the attempted murder count. The jury was unable to reach a verdict on that charge, as well as on penalty.

During the penalty retrial, the prosecution presented the circumstances of appellant's heinous crimes. The jury also heard compelling victim impact testimony from the victims' family members, as well as evidence about appellant's prior convictions. Appellant's defense, again, focused on brain damage that may have impacted his actions. The defense also presented evidence of appellant's dysfunctional childhood. The second jury returned a verdict of death.

On appeal, appellant raises various challenges in connection with the guilt phase and penalty retrial. To the extent that appellant's claims have been preserved for appellate review, considered on their merits, the claims are unpersuasive. A brief summary of the primary issues in each of these claims is set forth below.

Appellant raises several issues that center on allegations of bias on the part of Judge Platt, who presided over the guilt phase and penalty retrial. In his first claim, appellant contends the trial court committed error when it denied his motion to disqualify Judge Platt based on three ex parte

communications that occurred between the judge and other individuals. Contrary to appellant's assertions, the trial court properly denied the disqualification motion because the record did not demonstrate that the ex parte communications showed a probability of actual bias on the part of Judge Platt.

In his second claim, appellant asserts the trial court erroneously denied his motions for a mistrial and for recusal of Judge Platt. The motions were based on Judge Platt's physical condition, the jury's knowledge thereof, and the purported restrictive effect of this situation on defense counsel's advocacy. However, appellant's claim is not cognizable on appeal. In any event, the motions were properly denied because there was nothing about Judge Platt's physical condition that impacted defense counsel's ability to advocate on appellant's behalf.

Appellant asserts in his third claim that the cumulative effect of Judge Platt's alleged misconduct and bias violated numerous federal and state constitutional guarantees. Contrary to his contentions, appellant's claim fails because, when the record is reviewed in its entirety, it demonstrates that Judge Platt ensured that the guilt phase and penalty retrial were conducted in a manner that was fair to appellant.

Appellant's fourth claim alleges the trial court improperly coerced a death verdict in its directives to the penalty retrial jury when they initially indicated during deliberations that they were at an impasse. However, as the record demonstrates, the trial court's instructions and suggestions did not constitute a coercive charge to the jury.

Next, in claim five, appellant alleges numerous instances of prosecutorial misconduct involving improper editorializing, deceptive practices, non-compliance with the court's orders, and improper argument to the jury. While the prosecutor effectively fulfilled his role as a zealous

advocate, none of the instances appellant cites in support of his claim—either singly or in combination—constitute prejudicial misconduct.

In the next group of claims, appellant assigns numerous instances of error to the trial court in its exclusion or admission of evidence, in whole or in part, during the guilt phase and penalty retrial. With regard to his sixth claim, appellant argues that, during the penalty retrial, the trial court erroneously excluded expressions of remorse that appellant made to pastors and the prosecutor exploited the court's ruling in his closing argument. Because the hearsay evidence of appellant's remorse lacked indicia of trustworthiness, the court properly excluded it. Nor, did the prosecutor improper argue the issue of remorse, as the defense raised the issue first.

Appellant's seventh contention is that the trial court erroneously denied his motion to suppress his taped statement, and other evidence, because the statement was the product of police coercion. Since the record proved appellant's statement was voluntary, the trial court properly admitted the evidence.

Next, in his eighth claim, appellant challenges the trial court's exclusion of proffered lay testimony, in the guilt phase and penalty retrial, on the effects of methamphetamine intoxication. However, the proffered evidence was inadmissible because it was not relevant or otherwise probative of appellant's mental state at the time he committed the crimes.

Under his ninth claim, appellant argues the trial court erred when it restricted cross-examination of a prosecution rebuttal witness during the penalty retrial, admonished the jury to disregard a portion of defense counsel's examination as a sanction for a discovery violation, and failed to instruct that counsel's errors should not be attributed to appellant. Because the line of questioning defense counsel pursued called for inadmissible hearsay, the trial court was correct in limiting the inquiry of the witness.

Further, the court's admonition concerning the defense discovery violation was adequate under the circumstances.

In his tenth claim, appellant contends the trial court erred during the guilt phase when it restricted the mental state profiling testimony of the defense forensic evidence expert. However, the portion of the testimony the trial court excluded was speculative and unreliable. Therefore, the court's ruling allowing some, but not all, of the testimony was proper.

Next, in his eleventh claim, appellant contends as error the court's exclusion of purported corroborating evidence of appellant's molestation. He further argues that the prosecutor's conduct exacerbated the gravamen of the error. On the contrary, the evidence was properly excluded because it was more prejudicial than probative and not relevant to defendant's character or record or circumstances of the offense. The prosecutor's argument was in accord with the evidence and court's rulings on the matter.

Appellant's twelfth claim challenges the court's admission of autopsy photos in the guilt phase and penalty retrial on the grounds they were inflammatory and cumulative. Contrary to appellant's argument, the photographs were relevant as they clarified expert testimony regarding the cause and manner of death, as well as being probative of appellant's malice, deliberation, and premeditation in murdering his victims. Additionally, while the general nature of the photographs may have been unpleasant, they were not unduly inflammatory.

In his thirteenth claim, appellant argues that during the guilt phase and penalty retrial, the court improperly permitted the prosecutor to introduce details of the crime through its cross-examination of defense witnesses. Appellant maintains these details were irrelevant, inflammatory, and cumulative. A prosecutor may bring in facts beyond those introduced in the testimony of an expert witness on direct examination in order to explore

the grounds and reliability of the expert's opinion. Accordingly, there was no error.

In his fourteenth claim, appellant raises several challenges to the introduction of victim impact evidence at the penalty phase retrial. None his challenges have merit. The evidence at issue was statutorily and constitutionally authorized.

Next, under claim fifteen, appellant contends the trial court improperly restricted the admission of mitigation evidence while permitting introduction of non-statutory aggravation evidence. In conjunction with this claim, appellant also argues the trial court erroneously denied defense motions to continue the guilt phase and penalty retrial. On the contrary, appellant was afforded ample opportunity to present mitigation evidence during the penalty phase retrial and was only prevented from presenting evidence that did not meet the standards for admission. Further, the evidence in aggravation at issue was statutorily authorized. Last, because appellant failed to show good cause for his motions to continue, the trial court properly denied them.

In his sixteenth claim, appellant attacks the trial court's rejection of certain defense proposals to modify and supplement instructions during the penalty phase retrial. Because appellant's proffered instructions were argumentative, duplicative of other instructions, or both, the trial court properly refused them.

Appellant's seventeenth claim challenges the trial court's denial of his motion for a mistrial based, in part, on allegations of juror misconduct. In this claim, appellant also argues as error the court's refusal to remove a purportedly biased juror. However, because there was no juror misconduct or a substantial likelihood of juror bias, the court's decisions were sound.

In the next group of claims, appellant raises constitutional challenges to California's death penalty framework. First, with regard to claim

eighteen, appellant contends Penal Code section 190.4, subdivision (b), which provides for retrial of the penalty phase of a capital prosecution, was unconstitutional as applied to him. Specifically, appellant alleges that the prosecution committed intentional misconduct for the purpose of securing a retrial, which should have served as a bar to the prosecution's ability to pursue a retrial. However, appellant misapprehends certain fundamental aspects of state and federal constitutional law as they apply to his penalty phase retrial. Further, this Court has previously addressed similar claims and denied relief.

As for claim nineteen, appellant argues the cumulative effect of the trial court's errors rendered the guilt phase and penalty phase retrial fundamentally unfair. We disagree. None of the errors claimed by appellant, whether considered individually or cumulatively, resulted in prejudice.

Last, in claim twenty, appellant contends that California's death penalty framework violates the federal constitution and international law and norms. His contentions are standard objections to California's death penalty statute and penalty phase instructions. Similar claims have been rejected by this Court and appellant provides no basis for this Court to reconsider its prior decisions.

Accordingly, the judgment and sentence in this case should be affirmed.

STATEMENT OF THE CASE

In an information filed on July 9, 1998, and subsequently in an amended information filed on May 11, 1999, the San Joaquin County District Attorney charged appellant, Louis James Peoples, with four counts

of first degree murder (counts 7, 9, 11, 12—Pen. Code, § 187),[1] one count of attempted willful murder (count 3—§§ 664, 187), three counts of second degree robbery (counts 8, 10, 13—§ 211) four counts of auto burglary (counts 1, 4, 5, 6—§ 459), and one count of receiving stolen property (count 2—§ 496, subd. (a)). (3 CT 579-591; 6 CT 1563-1573, 1575.) The information further alleged firearm-use enhancements as to the murder, attempted murder, and three of four burglary counts[2] (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1)). Multiple-murder, lying in wait, and robbery special circumstances were also alleged. (§190.2, subds. (a)(3), (a)(15), (a)(17)). Last, it was alleged that appellant personally inflicted great bodily injury in connection with the attempted murder count (§12022.7, subd. (a)). (3 CT 579-591; 6 CT 1563-1573, 1575.) Appellant pleaded not guilty. (3 CT 592-593.)

On September 30, 1998, appellant moved for a change of venue. (3 CT 624-632.) Although the prosecution initially opposed the motion, which the court denied without prejudice on January 4, 1999 (4 CT 931-932), the prosecution subsequently stipulated to a change of venue (5 CT 1337-1338) and the case was transferred to Alameda County Superior Court on March 9, 1999 (5 CT 1371).

The jury trial was divided into two phases: guilt and penalty. After the conclusion of the guilt phase, on August 11, 1999, the jury found appellant guilty of murdering James Loper, Stephen Chacko, Besun Yu, and Jun Gao. As to these murders, the jury convicted appellant of the

---

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

[2] Counts 5 and 6 were later dismissed on appellant's motion, pursuant to Penal Code section 1118. There was no objection by the prosecution. The court denied appellant's motion to similarly dismiss the attempted murder charge. (6 CT 1695.)

related robbery charges and found true the firearm-use enhancements and special-circumstance allegations. (8 CT 2023-2024.)

Further, the jury found appellant guilty of burglarizing Michael King's vehicle, receiving stolen property belonging to King, using a firearm to rob the Bank of the West, and using a firearm in the burglary of David Grimes's vehicle. (8 CT 2023, 2025-2027, 2031.) The jury could not reach a verdict on the attempted murder charge involving Thomas Harrison and the court declared a mistrial as to that count and the related allegations. (8 CT 2022.)

After conclusion of the penalty phase evidence, the jury was unable to reach a verdict and a mistrial was declared on September 27, 1999. (9 CT 2499.)

The prosecution retried the penalty phase to a new jury and on June 6, 2000, that jury returned a verdict of death. (12 CT 3214; 13 CT 3348-3349.)

On August 4, 2000, the court sentenced appellant to death. The court also imposed determinate term of 56 years on the capital and non-capital counts and enhancements. (13 CT 3424-3428.)

STATEMENT OF FACTS

I. GUILT PHASE: PROSECUTION CASE

A. Automobile Burglary: June 21, 1997

On June 12, 1997,[3] off-duty Alameda County Deputy Sheriff Michael King and his family arrived at Anderson Park in Stockton to watch his son play baseball. (28 RT 5569-5571.) The park was located at the intersection of West Benjamin Holt Drive and El Dorado Street. (28 RT 5560-5561, 5569.) King parked the family's white Plymouth Voyager van about 20 to

[3] All further date references in the Statement of Facts are to 1997, unless otherwise noted.

30 yards away from the baseball diamond in the field's parking lot. He left the driver's side window lowered about an inch and locked the van. (28 RT 5561-5562, 5572-5573.)

When King and his family returned to the van about two hours later, he noticed the passenger side door was unlocked. (28 RT 5573-5574.) There were no signs of forced entry. However, King determined that his fanny pack, which contained his fully loaded 40-caliber Glock service pistol, deputy badge, and identification card, was missing. His wife's purse was also gone, which contained, among other things, two checkbooks and other personal information. (28 RT 5564-5565, 5574, 5588-5590.) The gun's magazine—also missing—contained hollow-point 40-caliber bullets. (28 RT 5581.) King flagged down Stockton Police Department Officer Michael Scofield and provided a report. (28 RT 5560-5561, 5569, 5576.)

The next day, King contacted Scofield about two phone calls the Kings received at home. The first call was taken by King's fourteen-year-old son. (28 RT 5578.) The second call King took himself. The male caller said, "Thank you for the fucking gun, you idiot." The caller hung up. (28 RT 5566, 5577-5578, 5590.) The King's telephone number was on their checks. (28 RT 5578.)

B. Cal Spray Shooting: September 16

California Spray Dry (hereinafter "Cal Spray") was a plant that handled raw materials from slaughterhouses and fish canneries and turned the materials into a dry protein supplement that was used in pet food and fertilizer. The plant was located in an isolated rural area on the outskirts of Stockton. (28 RT 5593-5595, 5650, 5693-5694; 29 RT 5748-5749.)

On September 16, Thomas Harrison, a Cal Spray employee, pulled up to the secured plant entrance around 3:20 to 3:30 a.m. to start his 4:00 a.m. shift. (28 RT 5664, 5700-5702.) Harrison's co-worker, Timothy Steele, pulled up to the gate about the same time. (28 RT 5665, 5670, 5706-5707.)

As Steele pulled into the employee parking lot, his headlights fell upon someone leaning into the open passenger side door of a blue pickup truck. There were items on the ground near the truck, but Steele did not think anything of it. Steele gathered his personal belongings and opened his driver's side door to exit the vehicle. (28 RT 5666-5669.)

When Harrison drove into the lot, he noticed that co-worker David Grimes's pickup truck was vandalized; the windows were smashed, three tires were punctured and flat, as was the spare under the bed of the truck, and there was a large dent to the passenger side of the cab. (28 RT 5707.) Harrison got out of his vehicle, walked up to Steele, and asked him if he saw the damage to Grimes's truck. (28 RT 5669, 5710-5711.) Steele looked around and noticed that most of the vehicles in the lot were vandalized. (28 RT 5669; 29 RT 5755, 5775, 5796, 5801, 5804, 5810, 5822-5823.) It was later determined that several of the damaged vehicles' glove boxes were opened and rifled through, including Grimes's truck. Missing from Grimes's truck were binoculars, a flashlight, and a camera. (29 RT 5796-5797.)

Harrison noticed the blue pickup truck was "smashed up." (28 RT 5669, 5710-5711.) Thinking the man who was at the blue pickup truck was the owner, Harrison walked toward him to ask him if he knew what happened. (28 RT 5671-5672, 5711.) When Harrison was about halfway to the blue pickup, he saw the man appeared to be holding speaker boxes. The man, who Harrison later realized was appellant — a former co-worker at the plant— moved away from the truck and fired a large gun at Harrison twice. (28 RT 5712-5713, 5718-5719, 5724-5725, 5737.) Appellant had "a smile on his face" as he fired at Harrison from about 15 to 20 feet away. (28 RT 5672-5673, 5680, 5683, 5713, 5723.) Harrison panicked and went to the ground. (28 RT 5713-5715.) Appellant continued to shoot at Harrison while he was on the ground. (28 RT 5713-5715.) Harrison yelled

out, "'Oh, my God. He shot me. I can't believe he shot me." (28 RT 5673, 5680.) Harrison felt pain in his leg and pelvic bone. (28 RT 5724.)

According to Steele, as appellant, who was wearing dark clothing, ran toward a hole in a nearby fence, he turned the gun toward Steele and fired at him twice. (28 RT 5660, 5674, 5713-5714.) Steele heard one bullet go by his head, which lodged in a trailer behind him. (28 RT 5674-5675, 5681-5682, 5723.) Seeing Harrison was in a great deal of pain, Steele retrieved Harrison's cell phone and called 911. (28 RT 5676, 5721.)

Medical personnel arrived and Harrison was transported to the hospital where he remained for nine days. (28 RT 5596-5597, 5721.) He sustained a bullet wound to his upper right leg. (28 RT 5595.) The bullet went through his leg, hit the pelvic bone, and traveled up the side of his leg. (28 RT 5728-5729.) Harrison was in recovery for about six months after the shooting and had ongoing numbness in his right leg. (28 RT 5725-5726.)

Harrison described appellant as "a nice guy" and observed that they never had any problems with one another. (28 RT 5719, 5733.)

Evidence technicians recovered seven 40-caliber shell casings from the scene. The casings were in two areas, separated by about 90 feet. (32 RT 6600-6601.) Four of nine vehicles in the parking lot were vandalized. (28 RT 5626.) Harrison's vehicle had a bullet hole near the front windshield. (28 RT 5602.) In a smaller covered portion of the parking lot, two of three vehicles were vandalized. (28 RT 5626.) Officers located a large pair of bolt cutters in one of the vandalized vehicles. (28 RT 5612-5613.) Upon examining the area around the plant property, officers also discovered a two-foot wide cut in the chain link fence that appeared freshly made. (28 RT 5613, 5632.) The shell casings were located about 147 feet from the cut in the fence. (28 RT 5616-5617, 5633.) Dried blood product,

which contained shoe prints, was strewn about the parking lot. (28 RT 5614-5615, 5637.)

The next day, on September 17, between 2:30 and 3:30 a.m., Cal Spray shift supervisor Michael Liebelt received a phone call. The unidentified caller asked if "'anyone had gotten wasted out there last night?'" (29 RT 5758-5759.) Liebelt demanded to know who was calling. There was "a devious little giggle" and then the caller hung up. (29 RT 5759.) Liebelt did not recognize the caller's voice. (29 RT 5759-5760.)

Gregory Beal, who hired and eventually fired appellant, also received a phone call. The call was to Beal's home around midnight, a few hours before the shooting. The male caller said, "'Greg, we have a fire in one of our dryers.'" Beal did not recognize the caller's voice because he was "half asleep" at the time, but he believed it was someone who knew the procedures at the plant. (30 RT 6133-6136, 6140-6141.) Beal rushed out to the plant and discovered there was no fire. (30 RT 6136-6137.) He turned around and hurried home because he was concerned that someone may have tricked him into leaving his home for some nefarious purpose. (30 RT 6137.) Beal explained that his home phone number was unlisted, but employees had access to the number. (30 RT 6139.)

Cal Spray employees provided details about the plant and its surroundings. The plant machines, located about 150 yards from the parking lot, were very noisy and employees were required to wear earplugs. (28 RT 5655-5656, 5658.) It was impossible to hear anything when inside the plant while the large drying machines were operating. (29 RT 5749.) The smaller covered parking lot was near the business office and used only by management personnel. Although the plant operated 24 hours every day, the business office closed at normal business hours. (28 RT 5655, 5658-5659, 5690.) The smaller portion of the lot was well-lit, but not the larger

part. (28 RT 5660-5661; 29 RT 5756.) The hole in the chain link fence led to a large open field on the east side of the parking lot. (28 RT 5660.)

Liebelt, who trained appellant, explained that appellant started out as a good employee, but that repeated mistakes resulted in his eventual firing. (29 RT 5762-5770; 30 RT 6132.) Liebelt observed that appellant changed over time and became "very edgy" and "a little weird." (29 RT 5763, 5770.) However, appellant's erratic behavior started soon after he was hired in 1994. (29 RT 5781-5786.)

Beal explained that he wrote up appellant several times for mistakes. Appellant reacted by becoming angry at himself. Toward the end of appellant's employment, Beal and Liebelt noticed appellant outside the plant, walking in circles, and seemingly yelling at the sky or cursing himself. Eventually, appellant was fired. He took it personally and said it was not right. (29 RT 5787-5788; 30 RT 6144-6147, 6151.)

C. Bank of the West Robbery: October 24

On October 24, Jason Tunquist was working as a teller at the Bank of the West in Stockton. (29 RT 5826-5827.) It was a busy Friday. (29 RT 5827-5828.) Sometime between 3:30 and 4:30 that afternoon, a man, later identified as appellant, walked up to Tunquist's teller station and placed a note before Tunquist on the counter. (29 RT 5828, 5850.) The note read something to the effect of, "'Give me all your 10s, 20s, 50s, and 100s and no one will get shot.'" (29 RT 5829.) Initially, Tunquist was skeptical until he looked up and saw appellant pull out a gun, cock it, and aim it at Tunquist. (29 RT 5829-5830, 5857.) Tunquist grabbed a stack of bills from his drawer and placed them on the counter. There were no 50s among them because Tunquist did not have any in his drawer. Appellant took the money and ran out of the bank like a "gazelle." (29 RT 5830-5832, 5843.) Tunquist's supervisors later determined that appellant stole $900. (29 RT 5834, 5861.)

Tunquist observed that appellant wore a ball cap, wire-rimmed glasses with dark lenses, and a partially zipped jacket. (29 RT 5833, 5839-5840, 5868.) The description Tunquist gave police was of a male about five feet seven inches in height, about 150 pounds, 45 or 50 years old, and with a "weathered" look. (29 RT 5834, 5841, 5864.) Tunquist also observed that appellant had a "nervous twitch;" his chin protruded forward sporadically while he was waiting for Tunquist to get the money. (29 RT 5833, 5859.)

Tunquist identified appellant as the robber about a month later in November when he saw appellant's photo in a newspaper article. Tunquist was previously unable to identify the robber from a police photo line-up. (29 RT 5835-5836.)

D. Eight Mile Road Murder: October 29

On October 29, at about 3:48 a.m., San Joaquin County Sheriff's Deputy Kenneth Bassett was on routine patrol with his partner Deputy Bill Gardner. (29 RT 5877-5878.) They were traveling west on Eight Mile Road, about one-quarter of a mile from the Interstate 5 overpass near Stockton. The area was desolate and rural. (29 RT 5878-5781, 5933.) The deputies noticed a Charter Way Tow truck parked on the south side of the road, pointed in an easterly direction. The truck's front and rear lights were on and the engine was running. (29 RT 5882-5883, 5895, 5932.) Bassett thought it strange that no one was in the truck. (29 RT 5883.) There were no other vehicles in the area. (29 RT 5884.)

After they pulled in behind the truck, Gardner got out and walked up to the truck. He called back to Bassett that there was no one inside. (29 RT 5884.) A few seconds later, Gardner yelled out, "'He's under the truck.'" (29 RT 5884-5885.) Initially, Gardner believed the man, later identified as James Loper, was pinned underneath the truck. Loper was lying on his stomach and unresponsive. The deputies called for an ambulance. (29 RT 5884-5885.)

Using a flashlight to illuminate the area around the truck, Bassett located nine expended gun cartridges that appeared to be 40-caliber. They were on the driver's side of the truck. (29 RT 5885-5886, 5892, 5902.) The position of the cartridges suggested to Bassett that the shooter fired numerous rounds at Loper after Loper sought shelter under the truck. (29 RT 5909-5910.)

Bassett also observed, based on the pattern of the tire tracks, that Loper had made a u-turn in front of another vehicle and backed up. (29 RT 5903.) The tire patterns also suggested the other vehicle accelerated rapidly when it left the scene. (29 RT 5909-5910, 5921-5924.) Given the circumstances, the deputies called for back-up. (29 RT 5886-5887, 5907.)

When medical personnel arrived, they removed Loper from under the tow truck. Bassett observed blood on Loper's face and in the spot where he was lying. He also noticed a bullet strike on the underside of the truck. (29 RT 5888, 5893.)

San Joaquin County Sheriff's Office Homicide Detective Antonio Cruz responded to the scene—now a suspected homicide—and took over the investigation with his partner Detective John Huber. (29 RT 5915-5917.) Shell casings were located in two separate groupings. The casings were all within a diameter of 25 to 30 feet of the truck. (30 RT 6079.) Also, investigators found two bullet fragments under the truck and another about 84 feet down the road. (29 RT 5925-5927.) There were a pair of leather gloves near the passenger side of the truck and a pair of cloth gloves underneath the truck. (29 RT 5928.) Cigarette butts were located toward the rear of the truck along with two or three boot or shoe prints. A pair of blood-stained glasses and a lighter were recovered from underneath the truck. (29 RT 5834-5835, 5928-5929, 5938-5939; 30 RT 6065, 6081.) On a seat inside the truck, investigators found a clipboard with paperwork attached. The writing on the top sheet said, "Eight mile. w/I-5, black

Mazda 626, 1647 South Airport." (29 RT 5938; 30 RT 6064-6065, 6067.) Blood was present on the driver's side of truck. (29 RT 5935.) No weapons were found. (29 RT 5930.)

Doctor Sally Fitterer, forensic pathologist, conducted Loper's autopsy on October 29. (30 RT 5984.) Loper's body had 10 gunshot wounds, all of which were sustained while he was alive. (30 RT 6003-6005, 6007, 6056.) However, by the time medical personnel removed him from under the truck, Loper was dead. (30 RT 6051-6054.)

The wounds were as follows: one to Loper's left thigh that fractured his left femur (thigh bone) and which would have made it impossible for Loper to walk (30 RT 6008-6010, 6019, 6027-6028, 6057); one to the outside of the left forearm (30 RT 6011-6013); one to the lower left abdomen that passed through the left kidney and fractured a rib (30 RT 6013-6015); one to the left side of the chest that fractured a rib, passed through the small bowel, and lodged in the abdomen (30 RT 6015-6016); one to the left upper arm, which exited the arm and re-entered Loper's left upper chest fracturing the left humerus (upper arm bone) and a rib before passing through the pancreas, small bowel, and liver (30 RT 6016-6021); one to the upper left arm, which passed through the left humerus, left chest, and ribs, before perforating Loper's left lung, aorta, and right lung (30 RT 6020-6022); one superficial wound to his left flank (30 RT 6023); one superficial wound that passed through Loper's right side (30 RT 6023-6024); two superficial wounds to the left side of the chest that were atypical entry-exit-reentry wounds (30 RT 6034); and one wound to the upper left chest that traveled through the chest, entered the left arm, went through the left chest muscle above the breast, and through Loper's left armpit (30 RT 6035-6037). Four bullets were recovered from Loper's body and one from his belt. (30 RT 6029, 6038-6039.) Loper died as a result of the gunshot wounds to his abdomen, which caused him to bleed to death; most likely, in

a matter of minutes. (30 RT 6028-6029, 6058.) The shots were primarily fired from a range of at least 18 inches to 2 feet away. (See generally 30 RT 6008-6037.) Loper also had fresh abrasions on his face and hands, which were sustained when he was alive. (30 RT 6051-6053.)

Mary Kuwabara was a telephone answering service operator for Charter Way Tow. She was working the midnight to 8:00 a.m. shift on October 29. (30 RT 6089-6090.) Around 2:50 a.m., Kuwabara received a call from a man who identified himself as "Jason Lee" and said he was on Eight Mile Road, west of I-5, and needed a tow to 1647 South Airport, which was a long distance from Eight Mile Road. The caller described his vehicle as a black Mazda and said he was willing to pay cash. He provided a call-back number. There was nothing unusual about the man's voice or demeanor. There were no objective indications that he was intoxicated. (30 RT 6096-98, 6108-6109.)

Three drivers from the tow company were on call at the time. Loper was second on the list. He was dispatched to the Eight Mile Road call because the first driver on the list had been dispatched to an earlier call that came in at 2:28 a.m. (30 RT 6092-6093, 6098, 6104.) The male caller identified himself as "Doug Stone" and specifically requested a slide-back tow truck. (30 RT 6104.) Of the three drivers on call, only Loper did not have a slide-back truck. (30 RT 6105.) The man said that he was calling from a pay phone. He described his vehicle as a 1996 green Bronco and said that he needed a tow to Manteca. He provided a home phone number and specified that he would pay with cash or a credit card. (30 RT 6105-6106.) Kuwabara dispatched the first driver to the French Camp exit on Highway 99 south of Stockton. This location was at the opposite end of Stockton and from the Eight Mile Road location. (30 RT 6099-6100.) The locations implicated in the two phone calls represented about 14 square

miles. (30 RT 6125-6127.) Kuwabara observed that the voice on the first call sounded different from the second. (30 RT 6119.)

At 3:30 a.m., James Loper called in to Kuwabara and reported that he was on scene. (30 RT 6100, 6111.) At 3:53 a.m., sheriff's deputies called Kuwabara and asked her to contact the tow company's owner. (30 RT 6123-6124.)

Rodney Dove,[4] who owned Charter Way Tow with his wife Sandi, went out to the murder scene. Based on his observations, it appeared that Loper had backed his truck up to the car that was to be towed. (32 RT 6540-6542.)

Rodney explained that drivers were paid by commission on calls they made. The most lucrative calls were individuals calling off the street and paying cash. The longer the drive for the tow truck driver, the more money they made. The call that Loper responded to—from Eight Mile Road to South Airport—would be a lucrative call, as would the first dispatch from French Camp to Lathrop. (32 RT 6537-6539.)

According to Rodney and Sandi, appellant started working at the company in June. (32 RT 6545, 6576.) During appellant's employment, they garnished appellant's wages for some minor accidents. This was customary when tow drivers were at fault. (32 RT 6563-6565, 6577.) Appellant did not protest the first two garnishments, but he did object to the third one. (32 RT 6587-6588.) Appellant was suspended on October 6 because he failed a drug test. After 30 days, appellant could retest and, if he was clean, resume his duties. (32 RT 6548-6549, 6581.) Typically,

---

[4] In citing to the testimony of individuals who share the same surname, respondent refers to them by their first names to avoid confusion. No disrespect is intended.

employees are drug-tested before being hired and then tested one time each year thereafter. (32 RT 6545-6546.)

Rodney was not aware of any hostility or animosity that existed between appellant and Loper or, for that matter, between appellant and himself. (32 RT 6551-6552.) Although, Rodney recalled that appellant was unhappy when he made appellant take an Oakland Raiders sticker off the company-owned tow truck, which appellant drove. Appellant was also upset when he was suspended. (32 RT 6558-6559.)

The day after Loper's murder, appellant called the company and spoke to Sandi. Appellant said that he was sorry about Loper's death and said that Loper was a "'good guy.'" Knowing the Doves were shorthanded, appellant asked Sandi if they wanted appellant to come back to work sooner. She declined appellant's offer telling him that he had to wait the allotted 30 days and then retest. In Sandi's estimation, there was nothing unusual about the phone call. In fact, she thought appellant kind to call. (32 RT 6582.) However, after appellant's arrest, Sandi informed police of the call. (32 RT 6583.)

E. Mayfair Liquors Murder: November 4

On November 4, at about 7:33 a.m., Stockton Police Department Officer Ernest Alverson responded to Mayfair Liquors store, near Anderson Park in Stockton, on the report of shots fired. (31 RT 6178-6179, 6188.) When he arrived, Alverson saw a man lying in the parking lot about 25 feet from the store entrance. The man, later identified as Stephen Chacko, was bleeding and appeared lifeless. There was a group of people standing nearby. (31 RT 6180, 6184.)

Alverson and his partner, Officer Bowen, went inside the store. Stockton Police Department Detective Jeff Coon later joined the officers. There were broken items and heavy concentrations of blood throughout the store. A trail of blood led from one of the aisles to the front door and

outside into the parking lot. In the lot, there was a broken pair of eyeglasses with blood on them. There was a bullet hole in the cooler where sodas were stored, and one in the window near the front door. The cash register also had gunshot damage and there were spent 40-caliber cartridges inside and outside the store. (31 RT 6181, 6185, 6191, 6204-6206.)

There was a chain link fence that surrounded the store. Coon observed that a hole had been cut at the bottom of the fence, adjacent to the rear of the store, which was large enough for a person to crawl through. (31 RT 6207-6210.) There was also a boarded-up fence in this area with one slat unhinged. (31 RT 6210.) Witnesses told Coon they saw someone run toward the fence area. (31 RT 6212.)

Investigators recovered 19 bullet fragments, 14 shell casings, and one live round from the scene. (32 RT 6353.) One of the casings was located outside the store, about six feet from the entrance. (32 RT 6356.) A trail of eight pennies led from the front of the store around to the end of the shopping center. (31 RT 6294.) Crime scene analysis experts determined there were 12 separate firings of the murder weapon inside the store. (See generally 31 RT 6234-6253.)

Investigators recovered video footage from a security camera inside the store. The video was played for the jury. (32 RT 6372; People's Exh. No. 400.) The store opened at 7:00 a.m. The robbery and murder occurred about 20 minutes into the footage, after the first two customers of the day left the store. (31 RT 6203-6204; 32 RT 6370-6371.) Stephen Chacko was seen in the video standing in one of the store's aisles. Appellant was also visible in the video and could be seen with his arm extended. (32 RT 6377-6378.) At another point in the footage, appellant was standing behind the cash register looking into an open drawer of the register. (32 RT 6378-6379.) Next, appellant looked past the register, moved to the left of the register, and extended his right arm slightly. It was unclear what appellant

was holding in his hand. A second individual could be seen in the frame but is not identifiable. (32 RT 6380-6381.) In the next frames, an individual was at the front doorway and then gone. (32 RT 6382.)

Doctor Fitterer conducted Stephen Chacko's autopsy. He sustained five gunshot wounds. One bullet entered the left side of his chest and traveled along the outer surface of the chest wall. (32 RT 6333-6335.) Another entered the left shoulder, passed through the ribs, perforated Chacko's left lung, passed through his ribs again, and exited the chest cavity and back. (32 RT 6336-6338.) One bullet entered the right side of Chacko's body below the armpit, passed through his ribs, perforated his right lung, traveled through the pericardium (heart sac), grazed the right atrial and ventricular chambers, went through the wall separating the chambers and through the left ventricle, proceeded through the left lung and ribs, fracturing a rib, and then exited the armpit area. This wound was fatal. (32 RT 6338-6340, 6345, 6351.) Another bullet entered the left buttock and exited Chacko's left side near the hip. (32 RT 6340-6341.) One bullet struck Chacko in the right buttock and right hip area. (32 RT 6341.)

Detective Coon explained that after the Mayfair Liquors robbery and murder, he had a hunch that the crime was connected to the Eight Mile Road murder based on the shell casings and weapon used. (32 RT 6387-6392.) Also, the subject on the Mayfair Liquors video looked like the subject on the Bank of the West video, which investigators had also reviewed. (32 RT 6386-6387.)

F. Village Oaks Market Murders: November 11

Deputy Sheriff Charles Locke was on patrol on the morning of November 11, around 9:55, when he was dispatched to the Village Oaks Market at 6222 Harrisburg Place in Stockton on the report of gunshots fired and two individuals injured. (32 RT 6398-6399, 6403.) When Locke

arrived, two civilians directed him inside the store and said there were people inside who were hurt. (32 RT 6400.)

Because he was the first officer on the scene, Locke drew his gun and entered the store. He saw a trail of coins going from a store aisle and extending to about five feet outside the front door. (32 RT 6401, 6420.) Inside, there were a man and woman, who were "clinging to each other." The woman was on the phone talking rapidly in Chinese. Locke could tell from her voice that she was stressed and concerned. The man pointed to the cash register area. Locke looked and saw what he first thought was a "bundle of clothes." However, upon further inspection, Locke saw a female, later identified as Besun Yu, in a crouched position up against the counter. (32 RT 6401, 6408, 6411.) Locke explained that she was "in a real tight position" with "[h]er arms around her knees" and her head bent forward as if hiding herself. There were no obvious signs of injury, but Yu was unresponsive. (32 RT 6408-6410.) Locke pulled the woman out from behind the register and began administering CPR because she had a very weak pulse. (32 RT 6402, 6410.)

Locke also saw a male, later identified as Jun Gao, face down in a prone position with a large pool of blood near his head. (32 RT 6402, 6410, 6413.) Locke surmised there had been "some sort of impact" behind the man's left ear and there were what appeared to be teeth scattered near Gao. (32 RT 6410.) Upon closer inspection, Locke saw that Gao had a bullet exit wound near his mouth. (32 RT 6411.)

Locke further observed a pair of shoes, a pair of glasses, and 40-caliber shell casings near a cash register. (32 RT 6414.) It appeared the other cash register had been forcibly removed from one of the two work stations. (32 RT 6415, 6421-6424.) There was a safe in the store's office that was unlocked; inside were rolls of coins. (32 RT 6426-6427.) There were also two desks in the office. A purse was located in the drawer of one

of two desks. Inside the purse, was about $4,700 in cash. Additional cash was found in the other desk's drawers. (32 RT 6427.) Evidence technicians collected five shell casings, four expended bullets, and two bullet fragments at the scene. (32 RT 6450-6452.)

Michael Giusto, an expert in forensic firearms examination and bullet trajectory analysis with the state Department of Justice, opined that the 40-caliber casings recovered at the scene were "most likely" fired from a Glock pistol. (33 RT 6692.) Giusto also explained that given the positions of the casings recovered around the counter area, and the manner in which a Glock ejects cartridges, Yu was likely shot while she was behind the counter, while the shooter—appellant—was in front of the counter. (33 RT 6695-6697.)

Doctor Fitterer performed the autopsy on Jun Gao. The 43-year-old man sustained a single perforating gunshot wound, which entered Gao's left upper neck and exited through the mouth and right cheek. (33 RT 6636-6640.) The bullet perforated Gao's left jugular vein and carotid artery, went through his tongue, fractured his jaw, and knocked out his bridge and teeth. (33 RT 6640-6641.) Fitterer opined that the bullet traveled from back to front, which suggested the possibility that appellant was behind and to the left of Gao when he fired the gun. (33 RT 6644-6645.) Gao also had premortem abrasions on his forehead and cheek, as well as an internal brain injury that may have been due to the blunt force of falling and hitting his head on the floor. (33 RT 6638-6639, 6646-6649, 6668.) Gao died from blood loss due to the bullet wound. (33 RT 6645.)

Fitterer also performed the autopsy on 56-year-old Besun Yu. Yu suffered three gunshot wounds, two of which were to her back. (33 RT 6650-6653, 6674.) The remaining wound was to Yu's left thigh. (33 RT 6655-6656.) As for the two wounds in Yu's back, one bullet entered on the left side. It fractured her vertebral column and cut through Yu's spinal

cord. The bullet then traveled into Yu's right chest, went through her right lung, and fractured her right clavicle and right first rib. (33 RT 6656-6657.) The other bullet entered the left side of Yu's back a few inches lower than the other. It went through her left shoulder blade, entered the left chest cavity, fractured ribs, passed through Yu's left lung, and out her left chest cavity fracturing an additional rib. (33 RT 6658-6659.) The gunshot wound to Yu's back, which severed her spinal cord was fatal because it caused Yu to go into spinal shock and lose a significant amount of blood. (33 RT 6659-6660.) In Fitterer's opinion, Yu could have sustained one of the wounds while crouched down with her head tucked between her legs. (33 RT 6662, 6672.)

Steven Hobson, a Stockton resident, was driving on Highway 99 south through Stockton on November 11. He noticed a cash register in the middle of the freeway sitting by the center divider. Other motorists were swerving to avoid the object. Hobson pulled over and moved the register off the freeway and into some bushes. It looked like a piece of junk that had fallen off someone's vehicle. (32 RT 6467-6468, 6472, 6475.) The register's drawer was missing and it had exposed wires. (32 RT 6473.) About two or three hours later, Hobson's son, who was with him when he found the register, saw on the news that the register was connected to a robbery-homicide. (32 RT 6469, 6474.) Hobson called the police and told them about the register discovery. (32 RT 6469.)

Around this same time period, John Gareau, who lived on the outskirts of Stockton, was told by his stepdaughter that there was a cash register drawer and other related parts scattered on the street near their home. (32 RT 6509-6511.) Gareau went out and grabbed the register drawer by its cable and moved it off the street. His stepdaughter alerted police to the discovery. (32 RT 6511-6513.) Based on the comings and

goings of Gareau and his stepdaughter that evening, the drawer was left sometime between 6:00 p.m. and 7:30 p.m. (32 RT 6511-6513.)

A crime lab analyst determined that the register had been wiped of prints, but the cash register drawer did not appear to have been wiped down. (32 RT 6484-6486, 6519-6520.)

G. Police Investigation and Appellant's Arrest on November 12

Department of Justice analyst Michael Giusto examined the shell casings recovered from Cal Spray, Eight Mile Road, and Mayfair Liquors shootings. (33 RT 6705-6716.) He concluded the cartridges found at Eight Mile Road and Mayfair Liquors linked the crimes. (33 RT 6717-6718.) Further, after examining the casings collected from the Village Oaks Market, Giusto determined that the bullets at each of these crime scenes were fired from the same gun. (33 RT 6719.)

After responding to the Village Oaks Market on November 11, Detective Coon received information about a suspect vehicle that may have been associated with the crime. It was a 1990s Nissan Stanza, four-door, dark gray, with primer or oxidation marks. (33 RT 6750-6751.)

The next day, November 12, Stockton Police Department Officer Brian Swanson was on a special assignment looking for the suspect vehicle. (33 RT 6765-6766.) Shortly before 1 p.m., Swanson saw a vehicle in the parking lot at 230 West Benjamin Holt Drive—an apartment complex near several of the crime scenes—which matched the description. (33 RT 6767-6768.) Swanson conducted a registration check of the vehicle's license plate, which revealed the car was registered to Carol Peoples with appellant as a possible owner. (33 RT 6753-6754, 6769-6770.)

Detective Coon recognized appellant's name as person who had been terminated from Charter Way Tow. He told Swanson to stop and detain anyone that got in the car and drove away. (33 RT 6770.) Officers were

provided with a photo of appellant to aid in their surveillance of the apartment complex. (33 RT 6770-6771.) One of those officers saw a white male matching appellant's description walk away from the apartment complex. (33 RT 6771.)

Officer Swanson and other officers arrested appellant at 3:15 p.m. on November 12. (33 RT 6754, 6750, 6772-6773, 6809, 6816.) Officers recovered the following items from a backpack appellant was carrying at the time of his arrest: a black nylon jacket, green knit gloves, a black baseball hat, a police scanner, and a radio call book, which contained various radio frequencies for police and fire personnel, including the Stockton Police Department. (33 RT 6774, 6799-6801.) The backpack also contained a blue folder with the handwritten words, "Biography of a Crime Spree." (33 RT 6774.) Inside the folder were newspaper clippings about the crimes. Portions of the articles were highlighted. (33 RT 6774, 6798; 34 RT 6950-6953.) There was a note inside the folder, which read:

> Some of the inserts in this scrapbook were [] merely for the motive of revenge. Some was to support my family when I was unemployed. Some of them started out to be one thing and turned into something a little more extreme. I have to admit I've always wanted to murder someone, and the idea of a crime spree has appealed to me for some time now. Hence, the crime spree. I guess we will see where it goes. [] I never thought the two people in the Village Oaks store would die. After all, I only shot them two times each. [] Ha ha.

(33 RT 6797-6798; 34 RT 6949-6950; People's Exh. No. 578.)

Appellant's wallet was also in his backpack. Inside the wallet, police found a Walmart receipt dated November 4, at 2:04 p.m. with a list of items purchased. (34 RT 6930-6934.) There was also a tally sheet with coin and bill amounts, which was dated November 11, 1997. (34 RT 6935.) In the front pocket of the backpack was a piece of paper that listed Stockton businesses and locations with some accompanying notes. (34 RT 6937-

6938.) Also found in the backpack were: a California license plate, green knit gloves with silver duct tape on the fingers and back of the palm, an Oregon driver's license in the name of Nathan Gelder, and checkbooks in Michael and Eva King's names. (34 RT 6940-6945.)

Appellant was also wearing a fanny pack at the time of his arrest. Inside were a small pair of binoculars, a Swiss army-type knife, a mini MagLite flashlight, a buck-type knife in a holster with appellant's initials, handcuffs, pepper spray, a Social Security card in the name of Justin Werner, a black nylon gun holster, and Michael King's sheriff's badge and identification. (33 RT 6775, 6803-6805; 34 RT 6941, 6943.) The photo on King's identification appeared to be that of appellant. (34 RT 6945-6946.)

At the time of his arrest, appellant appeared "unkempt" and "slightly dirty," with his clothes askew. He was quiet. However, there was nothing about appellant's appearance or demeanor that struck Officer Swanson as odd. (33 RT 6777, 6792.) Swanson, who had training in drug recognition, did not observe any obvious signs of intoxication or drug use, including methamphetamine. (33 RT 6777-6778, 6795.) There was nothing unusual about appellant during the 10-minute drive to the police station. (33 RT 6793, 6813.)

Police subsequently obtained a search warrant for appellant's residence. On the night of his arrest, police executed the warrant. (33 RT 6861-6862.) Among other items, they found a Stockton map in the living room that had certain locations marked, including Mayfair Liquors and Village Oaks Market. There were other businesses highlighted on the map such as a liquor store and an electronics store. (33 RT 6867, 6883, 6885.) This map correlated with the list of businesses found in appellant's backpack. (34 RT 6938-6939). A slim jim—typically used to get into locked vehicles—was found in the hall closet. (33 RT 6871.) Police also collected items from both bedrooms, including a baseball cap found under a

bed and items from a trunk. A bag in the trunk contained rolled and loose coins and license plates from other states. (33 RT 6872-6873, 6875-6876, 6882.) An eviction notice issued by appellant's apartment complex on November 4 was also found. (33 RT 6887.)

Police discovered a note in the top drawer of a dresser in the master bedroom closet, which said:

> CWT Charter Way Tow. Can I help you? Dude, yeah, check this out. You and the popos are all fucked up about Jimbo. He was a punk. He was on dope like the rest of your Charter Way drivers. Jimbo didn't want to pay. That's why he got capped. He wasn't the goodie goodie everybody thought he was. So get it straight.

(33 RT 6887-6888.) A Doctor Pepper soda bottle was found on the bathroom floor. (33 RT 6886.) There was no methamphetamine or methamphetamine-related paraphernalia found in appellant's apartment, only three suspected marijuana seeds. (33 RT 6892-6893.)

From a dumpster nearby appellant's apartment, police found several newspaper clippings. Two concerned the Village Oaks Market. Portions of one of those articles were highlighted in pink. Another article showed police personnel at the scene of the Mayfair Liquors murder scene. (33 RT 6888-6890.) An empty Doctor Pepper bottle was also in the dumpster. (33 RT 6873, 6882.)

When police initially went to appellant's residence shortly after his arrest, they noticed boot prints in front of residence. This was significant because a certain type of boot print (Ariat brand boots) was found at the Eight Mile Road murder scene. (33 RT 6861-6863; 34 RT 6923-6926.) When police searched the residence, they found Ariat boots near the front door. (33 RT 6866.) The Ariat boots recovered from appellant's apartment were similar to the boot print pattern at Eight Mile Road and to those observed outside appellant's apartment. (34 RT 6927-6928.)

Appellant's apartment complex was very near to Anderson Park—the site of the King auto burglary in June, as well as Mayfair Liquors, and the Village Oaks Market. (33 RT 6755-6757.)

H. Appellant's Interview and Recovery of the Murder Weapon

Detectives Huber and Coon interviewed appellant.[5] They met appellant at the police annex around 4:30 to 4:45 p.m., on November 12 after his arrest. (34 RT 6922, 6928-6929.) The interview lasted approximately 12 hours, including time taken for breaks. (34 RT 6929.)

In Huber's opinion, during the interview, appellant did not manifest any objective indications of being under the influence of narcotics, including methamphetamine. However, he appeared sleepy and may have been withdrawing from the effects of narcotics use. Huber explained that he would have no idea if appellant used methamphetamine a day or two before the interview; even a urine sample would not be conclusive on that question. (34 RT 6947; 35 RT 7187-7189, 7228-7229.) Based on Huber's experience, some of appellant's behavior during the interview, such as rolling his eyes back or twitching, may have been an avoidance mechanism or a stress-related reaction to the interview. (35 RT 7216-7227.) These behaviors or reactions happened most frequently when appellant denied involvement in the crimes. (35 RT 7233.) Also, any signs of dehydration would not be unusual given the length of interview and the small amount of liquid appellant had to drink. (35 RT 7228.) Huber noted that appellant was missing the bottom portion of his dentures. (34 RT 6948; 35 RT 7236-7237.)

---

[5] Detective Huber represented the San Joaquin County Sheriff's Department and Detective Coon the Stockton Police Department since the crimes involved county and city jurisdictions.

Appellant explained that he highlighted the portions of the newspaper accounts of the crimes because they were mistakes made by the police in their investigation. (34 RT 6953-6956.) For example, appellant's handwritten note on one of the articles regarding the Village Oaks Market murders said: "In Village Oaks, the entire cash register was removed from the store, 11/11/97. Later that night, it was wiped clean of prints and disposed of. It was thrown off of the overpass located south of Hammer Lane on Highway 99 southbound. This happened about 8:30 p.m. in the slow lane." (34 RT 6956-6957.)

Appellant told the detectives with regard to the November 4 Walmart receipt, that while he and his wife Carol were at store, he left Carol to go and buy bullets in another part of the store. The shopping excursion took place after the murder of Stephen Chacko earlier that day. (34 RT 6959.)

During Huber's testimony, the videotapes of appellant's interview were played for the jury, after the court's special instructions. (34 RT 6957-6961, 6964-6969, 6983-6986, 6998-7004, 7092-7096, 7075-7080, 7092-7096.) In the first 9 or 10 hours of the interview, appellant denied involvement in the crimes over 200 times. It was not until the last hour of the interview, that appellant confessed his responsibility for the homicides and other crimes. (34 RT 6963.) Appellant drew a diagram showing where the murder weapon was located. (35 RT 7181.) The interview ended at approximately 4:30 a.m. on November 13. (34 RT 7089.)

Huber recontacted appellant in jail later in the morning on November 13 because police officers were having difficulty finding the murder weapon. (34 RT 7089.) Huber asked appellant if he would show the detectives the exact location. Appellant agreed and accompanied two detectives to the area where the gun was located. (34 RT 7089-7090.)

Later that morning, officers recovered a gray plastic bag from a vacant lot located about three blocks from appellant's residence, which was

also approximately 75 to 100 feet from a school. (35 RT 7241-7243, 7262-7263.) The plastic bag was partially covered by about six inches of mud and dirt and was secured so that moisture could not penetrate. (35 RT 7245, 7251, 7262.)

Inside the bag, were a black leather pouch and a box of 40-caliber, fully jacketed, hollow-point bullets. (35 RT 7246.) These bullets were designed to make larger wound cavities. (37 RT 7608-7609.) The zippered pouch contained a handgun (People's Exh. Nos. 622, 624), one rubber glove, six white envelopes, and an off-white piece of paper. (35 RT 7246-7247.) The gun was black with a silver slide on top and held 15 hollow-point 40-caliber rounds in the magazine. (35 RT 7249, 7251.) A note on one of envelopes read, "Give me all the 100's, 50's, 20's and 10's. Make it fast, and nobody will get shot." (35 RT 7252.)

Although the weapon had been altered and the serial number under the barrel obliterated, the recovered weapon was identified as that which appellant stole from Deputy Sheriff Michael King's vehicle in June. (37 RT 7605-7612, 7614-7617; People's Exh. No. 622.)

According to Michael Giusto, the prosecution's firearms expert, the breech face on the gun was also scratched out. (33 RT 6725.) He noted that there was a difference in the breech faces of the cartridges recovered from the Eight Mile Road murder scene compared to those from Mayfair Liquors. This suggested a possible alteration to the gun between the shootings. (33 RT 6727-6730.) Giusto explained that sandpaper could be used to alter a gun's breech face and doing so would make comparison of cartridges recovered from different crime scenes more difficult. (33 RT 6731-6733.)

Giusto test-fired the Glock and determined that it was operational. (33 RT 6724-6725.) Giusto determined that the cartridges recovered from the Village Oaks Market murder scene matched those test-fired from the

Glock. (33 RT 6735-6736.) The gun could hold up to 16 cartridges, including one in the chamber. (33 RT 6723-6724.)

On November 14, Detective Huber spoke with appellant once more. An audiotape of the brief interview was played for the jury. (34 RT 7090-7091.) Among other areas of inquiry, Huber asked appellant if he made alterations to the weapon. Appellant admitted to sanding down the gun. (34 RT 7090-7091; People's Exh. No. 663.)

II. GUILT PHASE: DEFENSE CASE

A. Lay Testimony

Appellant's mother, Loretta Peoples, told the jury that she was involved in a major car accident when she was eight and one-half months pregnant with appellant. (43 RT 8961-8962.) She delivered him two weeks later, without any complications. (43 RT 8962.) Yet, appellant was a very unhealthy baby. (43 RT 8963.)

Loretta described a couple of mishaps appellant experienced when he was young. At four years old, he tripped and fell and hit the back of his head on a gate while at the zoo. Appellant received about 8 to 10 stitches to close the resulting injury. (43 RT 8964.) At 10 years of age, appellant was playing baseball in the yard when his younger brother threw a bat at him hitting him above the eye. Appellant needed about six stitches. (43 RT 8965.) There were no complications from either incident. (43 RT 8966-8967.)

Appellant's father, Luther Peoples, testified to the history of alcoholism in his family, including his own battle with alcohol. There was also a history of alcoholism on Loretta's side of the family. (45 RT 9217-9220.)

Convicted felon Michael Quigel testified that he sold appellant methamphetamine beginning in the spring of 1997 while they lived in the

same apartment complex at 290 West Benjamin Holt Drive in Stockton. (37 RT 7652, 7703.) Quigel previously sold methamphetamine to appellant's wife Carol. (37 RT 7626-7627.) Appellant typically purchased $30 worth of the drug at a time, which was approximately 1.75 grams. Quigel recalled three or four such purchases by appellant. (37 RT 7628, 7632.)

While Quigel was living at the apartment complex, he saw appellant on a daily basis. Appellant always looked "jittery." Appellant's movements were fast, he was sweaty, his face was oily, and his eyes were "real pinned and big." Quigel further observed that appellant was "always wired," often moving his lips in a circular motion and expelling his tongue. (37 RT 7629-7630.) Appellant was "quiet," "kept to himself," and never bothered anyone. Quigel never saw appellant consume alcohol. (37 RT 7633.) In Quigel's opinion, appellant was a good father and a better parent than Carol. He never saw appellant behave violently toward his family or anyone else. (37 RT 7640-7641.) Quigel could not believe it when appellant was arrested for murder. (37 RT 7641.)

Quigel saw appellant on the morning of the Village Oaks Market murders. (37 RT 7633-7634.) Appellant was in his car when Quigel pulled up. Quigel saw that appellant's skin looked oily, his eyes "were real big," and he seemed "paranoid and real crazy looking." Appellant appeared "real skinny" and exhausted. Quigel had sold appellant $30 worth of methamphetamine two days before appellant's arrest, but he did not see appellant use the methamphetamine. Quigel also observed a cash register in the front seat of appellant's car. (37 RT 7634-7636, 7712, 7648.) Quigel waved to appellant four or five times, but appellant did not acknowledge Quigel at first. (37 RT 7635-7636.)

On August 28, 1998, Quigel provided a statement to District Attorney Investigator Pete Rosenquist. (37 RT 7644-7645.) At the time, Quigel was

on felony probation for robbery. (37 RT 7694.) Quigel lied to Rosenquist and said that he did not sell drugs to appellant. 37 RT 7645-7648, 7661, 7695.) Quigel never told Rosenquist that appellant looked crazy or appeared under the influence the day he saw him with the cash register. (37 RT 7655.) Nor did Quigel mention that appellant was always jittery or wired. (37 RT 7658.) Quigel contended his omissions resulted from Rosenquist's failure to ask specific questions. (37 RT 7659, 7700.)

Quigel contacted the District Attorney in March 1999 in an attempt to secure some type of leniency. That was because Quigel had a burglary charge pending and a related felony probation violation, which carried the potential for a six-year sentence. In fact, this was the second time Quigel raised the possibility of a deal whereby he offered to provide information about appellant in exchange for leniency on his pending case. Representing the District Attorney's Office, Rosenquist told Quigel there would be no deals. (37 RT 7660-7661, 7704, 7706.) At this meeting, Quigel said that he sold appellant $30 worth of methamphetamine before the Village Oaks Market murders. (37 RT 7645-7648, 7661, 7695.) Quigel did not mention that appellant looked sweaty, oily, or jittery on the morning of the Village Oaks Market murders. (37 RT 7662, 7715, 7717.) That morning, was the only time that Quigel noticed appellant had a crazy look about him. (37 RT 7728-7729.)

It was not until April 1999—shortly before trial was to begin—that Quigel told defense investigator Michael Kale that appellant was always wired from methamphetamine use. (37 RT 7664-7667.) Quigel said he shared the information because Kale asked him specific questions about appellant's appearance. (37 RT 7710; 38 RT 7859-7862.) Kale testified that Quigel "may have" disclosed that he was not a fan of the police, but Kale had no specific recollection about asking Quigel what his attitude was toward law enforcement. (38 RT 7867, 7870.)

Michael Jack lived in Stockton and was near the Village Oaks Market around 9:30 to 9:45 the morning of the murders there, waiting to use the pay phone outside the store. (37 RT 7731, 7745.) Appellant was on the phone and "looked like he was having a conversation." (37 RT 7732.) In Jack's opinion, appellant looked a little "sucked up" and like he had not slept. (37 RT 7732.) Jack further described appellant as looking "a little unshaven," "rough," "ratty" (37 RT 7734), and "wild looking" (37 RT 7740). Appellant appeared as if he had been using methamphetamine ("crank"). Jack's observations were based on his own experience with the drug, although he was not using methamphetamine at the time he saw appellant on the phone. (37 RT 7732.)

Jack also noticed that a car outside the store, which he assumed belonged to appellant, was parked oddly—at an angle across the parking space lines with the passenger door open. (37 RT 7734-7735.) Jack described the car as Nissan or Datsun, which had a primer spot on one of the doors. (37 RT 7735.)

Jack waited a few minutes while appellant was on the payphone. Then, Jack went inside the store to buy cigarettes for a minor. (37 RT 7737, 7747.) When Jack came out of the store, appellant was still on the phone. So, Jack got on his bicycle and left. (37 RT 7737.)

When police interviewed Jack after the murders, he was initially hesitant to talk them about his observations of appellant because Jack had purchased cigarettes for a child. (37 RT 7737-7738.) When police contacted Jack a second time, he was more forthright. (37 RT 7738.)

At the time that investigators first spoke to Jack, it was clear to him that the police were concerned about apprehending the perpetrator. Nonetheless, when Jack provided a detailed description of appellant, he

never mentioned that the man at the phone was a "crankster."[6] In fact, Jack described appellant as a clean-shaven white male adult, 35-40 years old, with a thin build and dark hair. (37 RT 7750, 7752.) Jack did not tell police investigators that appellant had wild-looking hair or that he appeared rough or ratty looking. (37 RT 7755-7756.) Jack also described appellant's car differently from his court testimony and he initially reported that he saw appellant in a car, not at a payphone. (37 RT 7753-7754; 38 RT 7868.)

Joni Fitzsimmons lived in the same Stockton apartment complex as appellant and his family. Fitzsimmons first met Carol, appellant's wife, at the pool with their children in the summer of 1997. (37 RT 7766-7768.) Fitzsimmons, Carol, and appellant did methamphetamine almost daily. (37 RT 7770-7771.) Appellant sometimes became irritable and withdrawn after using the drug. (38 RT 7797-7798.) During these times, he would work on his bicycle. (38 RT 7797-7798.) Despite appellant's near-daily use of methamphetamine, he was a good father to his children—Matthew and Lindsey—and he "'acted normal.'" (37 RT 7773; 38 RT 7821, 7833.)

At the time, appellant was working at Charter Way Tow. (38 RT 7800.) When appellant was suspended from the company, he was angry. (38 RT 7802-7803, 7835.) After that, arguments between appellant and Carol ensued. (38 RT 7803.) Despite appellant's irritability and anger, he was never violent. (37 RT 7773-7774; 38 RT 7806.) Fitzsimmons observed that Carol had a temper, which she would often vent at appellant. Carol also demeaned appellant. (38 RT 7804.)

Carol and appellant were experiencing financial pressures. When appellant lost his job, Carol yelled at him to get a new job. (38 RT 7813.)

---

[6] "Crank" is slang for methamphetamine. (http://www.urbandictionary.com/define.php?term=crank (as of October 5, 2011).)

Appellant controlled the family funds and when Carol needed money, she had to ask appellant. This was a point of contention. The couple argued about money often, including after appellant's pay from the tow company was docked for an accident. (38 RT 7812, 7823-7824, 7830.) At times, Carol would get drugs on credit and she and Fitzsimmons would exhaust the supply, which would make appellant very upset. (38 RT 7831.) However, Fitzsimmons was not aware of any conduct on Carol's part, which suggested that she condoned or otherwise was complicit in appellant's decision to commit any of the crimes in light of financial pressures. (38 RT 7843-7848.)

Fitzsimmons did not notice anything unusual about appellant's behavior during September and October, although he became "snappy" every once in a while. (38 RT 7816-7821.) However, during the last two weeks of October, Fitzsimmons saw appellant and Carol much less. (38 RT 7821.) In the two-week period before his arrest, appellant did not shave or get his hair cut. He was not eating and his cheeks were sucked in and his clothes were dirty. (38 RT 7829.) Around this time, appellant and Carol were on the verge of being evicted. (38 RT 7832.)

Appellant spent time with Fitzsimmons's children. (38 RT 7805.) Fitzsimmons entrusted them to appellant's care when he was under the influence of methamphetamine. (38 RT 7824-7825.) However, after Carol showed Fitzsimmons a gun in a black pouch that she found in their apartment, Fitzsimmons became upset knowing that her own son spent time in the apartment. After that discovery, Fitzsimmons stopped letting her son go to appellant and Carol's apartment alone. (38 RT 7852-7855.)

Following the murders, Fitzsimmons provided numerous statements to the police and to a defense investigator. (38 RT 7814.) She lied about a number of things, including telling the police that she never saw appellant use drugs. (38 RT 7815.) Defense investigator Kale testified that

Fitzsimmons was initially reluctant to talk and denied any drug use. (38 RT 7862-7863.)

Appellant's wife Carol testified on his behalf. She and appellant had been married for seven years. (38 RT 7884-7885.) They had two children—Matthew and Lindsey. Matthew was Carol's child from a previous relationship and was 14 years old at the time of trial. (38 RT 7885.)

Appellant and Carol started using drugs together when they met in the summer of 1988. (38 RT 7885-7886.) They both favored methamphetamine and appellant also indulged in marijuana. (38 RT 7886.) When appellant was doing drugs, oftentimes he would stay up late and not come to bed. This was due to the effects of the drugs; they caused sleeplessness. (38 RT 7895-7896, 7898.) The couple used drugs continuously, except for the time they moved to Florida in July 1991 to get away from the local drug culture in Stockton. However, they returned to Stockton in March of 1993 because of problems they were having with appellant's family there. When they returned, they fell back into using drugs. (38 RT 7887-7888.)

Appellant was a good husband and was never violent with Carol. She had no problem letting appellant care for their children during the time that he was using methamphetamine. (38 RT 7894-7895.)

Appellant's condition changed during the summer of 1997. He stopped eating and rarely slept. (38 RT 7889.) In Carol's opinion, appellant's physical condition changed dramatically beginning that summer and continued until his arrest in November. (38 RT 7890-7891.) However, Carol could not say how much sleep appellant was getting in the last few months before his arrest. (38 RT 7896.)

The couple had no income in September or October because appellant was not working. (38 RT 7907.) About three or four days before his arrest,

Carol and appellant fought about a letter that she found that he had written to someone else. (38 RT 7893.)

Carol had no involvement in appellant's crimes. (38 RT 7897.) She knew of James Loper because appellant spoke about him. (38 RT 7899.) She recalled watching the news about Loper's killing. It upset Carol because appellant worked for the same company. (38 RT 7899-7900.) Carol told police that when she and appellant were watching the news account regarding Loper's death, appellant smiled and said something to the effect of "'We all die.'" (38 RT 7900-7901.)

Carol was familiar with the Mayfair Liquors neighborhood store and knew Stephen Chacko. She often took Lindsey there to get ice cream. (38 RT 7901-7902.) Carol and appellant were watching television when news of the shooting aired. Carol remarked aloud that she hoped the person killed was not the big guy—the one she liked (Chacko was the larger of the two men who worked at the store). (38 RT 7902-7904.) Appellant told her that it was, in fact, the larger of the two men, which was noteworthy to Carol since that had yet to be revealed through news accounts. (38 RT 7904.)

The morning of appellant's arrest on November 12, appellant told Carol about his involvement in the string of crimes. (38 RT 7893.) Appellant explained to her how he lured Loper out to Eight Mile Road and that as soon as Loper got out of the truck, appellant just started shooting. (38 RT 7905-7906.) Carol saw the murder weapon when, some months before, her son Matthew, then 12 years old, found the gun in the closet and brought it to Carol. She told appellant to get it out of the house. (38 RT 7907).

When Carol first talked to police investigators, she lied for the first five hours of the interview because she was scared and was trying to protect her children. (38 RT 7906.) When Carol began to share the truth, she told

detectives that appellant had explained to her that he was angry because he could not get the register at Mayfair Liquors to open and so he took the money from underneath the register. (38 RT 7908-7909.) Carol also revealed that appellant told her that he tried to erase the serial numbers on the gun. She recalled seeing appellant working on the gun even after she told him to get rid of it. She was upset because the gun was still in the apartment. (38 RT 7909-7910.) Carol also related that when she and appellant went shopping at Walmart in Lodi around the time of the murders, she recalled him leaving her in the store for a while. (38 RT 7911-7912.)

Appellant never shared with Carol any of the money that he took during the robberies. (38 RT 7908.)

B. Expert Testimony

Doctor Joseph Chong-Sang Wu testified as an expert in Positron Emission Tomography (hereinafter "PET") scan brain imaging. (38 RT 7946-7949, 8034-8036.) Wu was a medical doctor and also an associate professor at the University of California Irvine Medical Center and the clinical director of the medical school's brain imaging center. (38 RT 7946.) He was board-certified in psychiatry, but was not a neurologist or radiologist. (38 RT 8037.)

Wu was asked by the defense to conduct a PET scan on appellant's brain. A technician completed the scan on September 14, 1998. (38 RT 7946, 8048, 8053.) Wu explained that PET scan imaging is used to analyze activity and functioning inside the brain by measuring glucose metabolism. (38 RT 7978, 7987.) He acknowledged that some insurance companies consider PET scan imaging experimental and most will not cover the costs of the test. (38 RT 8054-8056.)

Despite his background in psychiatry, Wu did not conduct a psychiatric evaluation of appellant or a diagnostic interview. (38 RT 8041-8042.) He did not take an extensive background history. Nor did he read

the relevant crime reports or watch appellant's interview with law enforcement. (38 RT 8042-8043.) Wu explained that he was not asked to do any of these things or render a final conclusion about appellant's mental health. (38 RT 8043-8044.) Wu's report was a "preliminary impression" and limited to three quarters of a page. (38 RT 8044.)

Based on his interpretation of the resulting data, Wu opined that appellant's brain function was abnormal. (38 RT 8004.) Relative to a baseline or normal scan, appellant's scan revealed a decrease in frontal lobe function, while the rear part of his brain showed increased activity. (38 RT 8000-8003.) Wu explained that this pattern is commonly found in certain conditions, including traumatic brain injury and high levels of substance abuse. (38 RT 8004.)

In Wu's opinion, injury to a person's frontal lobe, such as that presented by appellant's scan, impaired executive function or higher order thinking and judgment. (38 RT 8006.) Individuals with this kind of damage "will sometimes do inappropriate impulsive things." (38 RT 8006-8007.) However, Wu was not saying that individuals with orbital frontal lobe injuries had no ability to plan. (39 RT 8125.)

Appellant's abnormality was in the limbic region, an area of the brain typically associated with regulation of aggression. (38 RT 8010.) Because of appellant's brain defect, appellant was at a greater risk for poor judgment, which would be exacerbated under certain conditions, such as sleep deprivation or stimulant use. (38 RT 8012-8013.) Long-term stimulant use would adversely impact his brain function and activity. (38 RT 8014.) However, appellant's scan was not conducted while he was either using stimulants or sleep deprived. (38 RT 8053, 8067.)

Wu acknowledged that the scans would be affected if appellant was suffering from anxiety or depression. In fact, appellant's thoughts could affect the scan results. (38 RT 8073-8075.) Wu did not believe that

appellant's scan results were consistent with depression, although he could not rule it out. (38 RT 8079; 39 RT 8128-8129.) That was because frontal lobe dysfunction had been implicated in a number of psychiatric conditions. (39 RT 8211.) Wu estimated that 25 to 30 percent of the population had some history of psychiatric disorders, which would result in abnormal brain scans. (38 RT 8112.) He recognized that a psychiatric diagnostic evaluation of appellant would have been helpful to determine if appellant was suffering from depression at the time of the scan. (39 RT 8246.)

According to Wu, although the scan was conducted in September 1998, the results would likely have been the same around the time of appellant's crimes, absent an intervening event. (38 RT 8014-8015.) Further, if appellant was using stimulants and experiencing sleep deprivation at the time, the scan results would likely have revealed more pronounced abnormalities. (38 RT 8015.) While traumatic brain injury or long-term stimulant use could have been the cause of appellant's brain abnormalities, Wu could not ascertain the actual reason. (38 RT 8008, 8017.) He was not privy to any medical records associated with a traumatic brain injury or any manifestations of childhood head trauma. (38 RT 8060-8064.)

Wu co-authored a study with Doctor Monte Buchsbaum (the Raine study), which used PET imaging to examine whether a connection existed between brain abnormalities and violence. (39 RT 8120-8122.) The subjects were 22 individuals, 20 of whom were murderers that pleaded not guilty by reason of insanity. To the extent that the findings indicated a connection between brain defects and violence, Wu acknowledged that the study results could not be generalized to the population at large because the findings applied to a severely violent group who were legally insane. (39 RT 8122, 8209-8210.) Further studies were needed before generalizations could be made to violent offenders in general. (39 RT 8210-8212.)

Although other peer-reviewed studies supported Wu's view about a link between brain abnormalities and violence (the Volkow and Goyer studies), the design of the studies differed significantly from one another as well as from the Raine study. (39 RT 8203-8209, 8222.) Wu further acknowledged that predicting violent behavior could not be done with scientific certainty. (39 RT 8123.)

Wu was not well-acquainted with the facts of appellant's crimes. (39 RT 8138-8148, 8151-8157.) He recognized that many of appellant's individual acts in committing the crimes were not necessarily impulsive. (39 RT 8146, 8153.) However, Wu opined that appellant's actions were consistent with having an impaired ability to understand what he was doing, appreciate the consequences, and inhibit his aggressive impulses. (39 RT 8159.)

Wu's conclusion that appellant's crimes were the product of an impaired brain was not swayed by appellant's 260-plus denials to detectives of his involvement, law enforcement's post-arrest discovery of appellant's highlighted map with crime locales, appellant's writings in "Biography of a Crime Spree," appellant's highlighted inaccuracies in newspaper accounts of the crimes, and recovery of the altered murder weapon buried in waterproof plastic. (39 RT 8181-8193.) Wu clarified that he was not saying that appellant was incapable of planning. His opinion was that appellant's overall conduct demonstrated a "profound lapse of judgment" during the crime spree. (39 RT 8236.)

Wu conceded that not every criminal has brain damage and that criminal acts generally reflect poor judgment. However, he maintained that some criminal acts can have a rational basis. (39 RT 8242-8243.)

Doctor Daniel Amen, a medical doctor with specialties in brain imaging and psychiatry, testified as an expert in the area of the Single Photon Emission Computed Tomography (hereinafter "SPECT") brain

imaging process. (40 RT 8263-8264, 8282.) While SPECT and PET imaging are nuclear-based processes, they differ in that SPECT imaging measures blood flow activity in the brain, while PET imaging measures glucose (sugar) metabolism. (40 RT 8284.) Amen explained that SPECT imaging allowed for sophisticated evaluation of the medial temporal lobes, which are important in the biology of violent behavior. (40 RT 8286.) However, the scan was a tool designed to be correlated with a clinical history of the patient. (40 RT 8379.) Amen did not do a psychiatric evaluation of appellant because he was not asked. (41 RT 8425.)

Amen opined that, based on his experience, there was a correlation between substance abuse, impaired brain functioning, and violence. (40 RT 8298-8299.) However, he acknowledged there were few studies and no published articles that supported his view linking substance abuse and violence and that his view was not necessarily widely held in the scientific community. (40 RT 8371-8372, 8367-8370.) Generally speaking, if a person used methamphetamine for 10 years, a scan would reflect an abnormal brain. The same was true if the person had a history of heavy drinking or smoking. (40 RT 8369-8370.)

The defense retained Amen to do SPECT scans on appellant. (40 RT 8309.) Appellant was scanned three times: a baseline scan, a concentration scan in which appellant performed a focused task, and one for which appellant was provided Adderall (a legal stimulant), caffeine, and deprived of sleep so as to try and replicate his condition at the time of the offenses. (40 RT 8310-8311, 8319.) The baseline scan showed very poor activity in the prefrontal cortex area, which was abnormal. (40 RT 8313-8314, 8317.) The concentration scan showed a slight improvement in the inferior part of the prefrontal cortex, but it was still underactive, as were the temporal lobes, which was also abnormal. (40 RT 8314-8315, 8317.) The third scan revealed increased activity in the cingulate gyrus, which is part of the

limbic system and in charge of emotions. (40 RT 8316.) In short, according to Amen, appellant's brain was "very dysfunctional." (40 RT 8321-8322.)

From the scan results, Amen concluded that the combination of an underactive prefrontal cortex and overactive cingulate gyrus caused appellant to become fixated on negative thoughts and his brain was compromised in its ability to manage these negative fixations. (40 RT 8324-8327.) Methamphetamine, caffeine, stress, and lack of sleep would only serve to worsen these issues. (40 RT 8329; 41 RT 8508-8509.)

As to the cause of appellant's brain dysfunction, Amen could not be certain. It could be from a traumatic injury or substance abuse. (40 RT 8334-8337.) Amen opined that appellant's case was similar to patients he had treated who had histories of substance abuse and were alleged to have committed violence. (40 RT 8337.) In Amen's view, had appellant not been a methamphetamine user, he would not have committed the crimes. (41 RT 8510.) Methamphetamine and stress triggered heightened overactivity in appellant's cingulate gyrus, which, in turn, compromised his brain and caused him to go from one state of behavior to another. (41 RT 8513.) Amen believed that appellant's issues were treatable with medication. (40 RT 8390-8391.)

Amen and Wu collaborated previously and had been in contact regarding appellant's case. (40 RT 8357.) Amen explained that findings from PET and SPECT scans should be essentially the same. (40 RT 8358-8359.) However, Wu's view that PET imaging showed that a normal brain would be more active in the rear portion and less so in the front portion conflicted with Amen's view, based on SPECT scanning, that the front portion should be more active than the rear. (40 RT 8366.)

As for the specific details of appellant's crimes, Amen knew little. (40 RT 8409-8416.) Nonetheless, while he accepted that some of

appellant's specific acts evinced planning, overall, the conduct reflected "irrational thought and fixation" and general poor planning. That was because appellant's goal-oriented behavior in carrying out the crimes did not fit with positive life goals. (41 RT 8440, 8471-8472.) Amen acknowledged that a great deal of criminal conduct would be considered poor planning based on his view. (41 RT 8472, 8486.) Amen adhered to this view, despite appellant writing that he always wanted to murder someone and that the notion of a crime spree held appeal for him. Amen attributed these writings to appellant's use of methamphetamine, which compromised his brain function at the time. (41 RT 8487-8490, 8496-8497.)

Doctor Monte Buchsbaum testified as an expert in the area of nuclear imaging science. (41 RT 8541.) He worked at the Mount Sinai Medical Center in New York City where his practice was devoted to studies involving schizophrenia, autism, and aggressive impulse disorder. (41 RT 8526-8530.) Buchsbaum utilized PET scans in his practice and worked with Doctor Wu previously. (41 RT 8524-8530.) He was retained by the defense to review Wu's PET scan of appellant. Buchsbaum was also familiar with SPECT scanning and Doctor Amen. Buchsbaum reviewed appellant's SPECT scans and discussed the case with Amen. (41 RT 8546, 8551.)

In Buchsbaum's view, both Amen and Wu administered good scans. He did not think the scans were inconsistent with each other with respect to the levels of activity in the front and back of appellant's brain. (41 RT 8552, 8554-8556.) Buchsbaum acknowledged that he did not review the scans of Wu's control group members. (42 RT 8661.)

Buchsbaum observed that, in the PET scan, the frontal area of appellant's brain was more active than the back. (41 RT 8551.) Relatively few people display this type of abnormality. (41 RT 8552.) Buchsbaum

concurred with Wu's assessment regarding the abnormality in appellant's frontal lobe area. (41 RT 8555.) Regarding Amen's SPECT scans, Buchsbaum likewise concurred that the cingulate gyrus showed marked hyperactivity. (41 RT 8561.)

Buchsbaum explained that if the planning or organizational function in the frontal lobes is decreased, then parts of the cingulate gyrus may be more active and vice versa. (41 RT 8557-8558.) If the limbic system (i.e., the cingulate gyrus) is out of sync with the prefrontal cortex, it could result in dysfunctional behavior because the person may be more directed by emotion than thought. (41 RT 8560-8561.)

After reviewing appellant's PET and SPECT scans, Buchsbaum concluded that appellant had a defect in the area of his prefrontal lobe, which could have been the result of head trauma, substance abuse, genetic depression, or schizoid personality disorder. (41 RT 8575-8576; 43 RT 8928-8929, 8939, 8941.) He concluded that the deficit had been present for some time. (41 RT 8575-8576.) Buchsbaum further opined that his conclusions were consistent with appellant's conduct during the crime spree as well as his writings about the crimes. (41 RT 8578; 43 RT 8950-8954.) In short, appellant's behavior was "bizarre," "unusual," and indicative of poor planning. (43 RT 8957-8958.)

Buchsbaum recognized that while SPECT and PET scans are important tools in assessing disorders, a patient's medical history and other relevant facts were very important to have, as well. (43 RT 8933.) Buchsbaum did not have the benefit of Magnetic Resonance Imaging (an MRI), a neurological exam, or appellant's medical records to verify his conclusions, although a neurological exam would not have been necessary. (42 RT 8585-8587.)

Buchsbaum stated that there were four or five studies that utilized PET scanning in identifying a link between frontal lobe damage and

aggression, including the Raine study, which he co-authored. (42 RT 8606-8607.) In the Raine study, Buchsbaum concluded that individuals who were accused of murder tended to have lower values regarding frontal lobe activity, which impacted impulse control. (42 RT 8609-8610.) However, Buchsbaum repeatedly clarified that it was not possible to project the findings to the population at large and predict aggression. (42 RT 8610, 8614, 8709-8710; 43 RT 8921.) Researchers would need to study thousands of people to be able to generalize such an "unlikely finding" that frontal lobe damage leads to individuals becoming murderers. (42 RT 8611.) The implication of the Raine study was that the frontal lobe was important to impulse control and that the frontal lobe would "probably" be defective in cases of murder and other impulsive acts. (42 RT 8611.) As for Amen's conclusions about the functionality and activity of the cingulate gyrus, there were no studies that connected a hyperactive cingulate gyrus to aggression or violence. (43 RT 8893-8894.)

Doctor George Woods testified as an expert in psychiatry and addictionology (addiction medicine). (43 RT 9026-9027.) He was retained by the defense in December 1997 to discern what role methamphetamine played in appellant's criminal conduct and life in general. He met twice with appellant and reviewed numerous materials before testifying. (43 RT 9029-9030.) Yet, Woods did not make a diagnosis of appellant. (44 RT 9135-9136.)

Woods explained that there was a connection between methamphetamine-related impairment and dysfunctional behavior, including violence. (43 RT 9037; 44 RT 9079.) Nonetheless, methamphetamine addiction did not invariably lead to aggression. (44 RT 9138.) Some of the long-term effects of chronic methamphetamine use included paranoia, psychosis, agitation, weight loss, and hypervigilance. (43 RT 9042-9045; 44 RT 9071.) Typically, addiction took place over a

series of four stages. (44 RT 9071-9074.) Environmental and genetic factors contributed to addiction. (43 RT 9033-9035.)

In Woods's opinion, appellant's appearance and demeanor, as described by others and as reflected in the crime reports, were consistent with the latter stages of addiction. (44 RT 9104, 9120-9124.) There was no indication of psychosis. (44 RT 9144-9145.) Having viewed the tape of appellant's interview with detectives, Woods believed that appellant exhibited manifestations of chronic drug use and signs of withdrawal. (44 RT 9110.) Woods's interviews with appellant also confirmed a pattern of methamphetamine abuse. (44 RT 9125.) He reviewed appellant's PET and SPECT scans and felt they were consistent with chronic methamphetamine use and reflected the residual cumulative effects of drug use in terms of psychological and physical impairment. (44 RT 9116-9117.) Nonetheless, the scans could not predict a direct relationship between methamphetamine use and violence. (44 RT 9156-9157.)

Woods's opined that, considering appellant's history of drug abuse, it had had been a matter of time before appellant became violent given his methamphetamine use. (44 RT 9080.) Woods acknowledged that, in reviewing the crime reports related to appellant's arrest and search of his residence, no evidence associated with methamphetamine use was found. (44 RT 9149.)

III. GUILT PHASE: PROSECUTION REBUTTAL

Doctor Helen Mayberg was a board-certified neurologist with a primary focus on brain imaging research, PET scanning in particular. (45 RT 9222-9226.) Mayberg testified as an expert in the areas of neurology, PET scanning, and neuropsychiatry.[7] (45 RT 9263-9264.) In both a

[7] Although the prosecutor asked that Doctor Mayberg be qualified as an expert in "SPECT" scanning, it is clear from the record that her expertise (continued...)

clinical and research capacity, she conducted approximately 350 SPECT scans and 2,000 PET scans during her career. (45 RT 9260-9261.)

In preparation for her testimony, Mayberg reviewed copies of the scans done by defense experts Amen and Wu, the crime reports, transcripts of Wu, Amen, Buchsbaum, and Woods's trial testimony, Wu's control group sample, and all articles the defense experts referenced. (45 RT 9266-9272.) Mayberg was familiar with Wu and his work because, like Wu, Mayberg did considerable work on depression and its effects on the brain. She was also familiar with Doctor Buchsbaum. Although Mayberg did not know Doctor Amen, she was familiar with his work. (45 RT 9272.)

As a threshold matter, in Mayberg's view, generally speaking, a patient diagnosis was required before a PET or SPECT scan was administered. (45 RT 9264.) In her view, a PET scan should not be undertaken based only on a lawyer's referral because it was a medical procedure. (45 RT 9258-9259.) Moreover, since a scan is a picture of the brain in action, one cannot extrapolate back in time from the results. (45 RT 9315-9316; 46 RT 9450-9451.) However, a PET scan might have utility for a surgeon, even if it was taken a month before the surgery. (46 RT 9499.) Yet, that was a different situation than using the scan for research purposes to see what parts of the brain were affected by chronic methamphetamine use. (46 RT 9500.) In short, the scans could not reliably show what appellant's brain looked like at the time of his arrest. (46 RT 9443.)

With regard to Wu's PET scan and the control group he employed, Mayberg explained that, ideally, MRIs should have been done to see if

---

(...continued)
is in the area of PET neurological imaging. (See generally 45 RT 9223-9261.) Alternatively, it may have been a transcription error.

there were any brain abnormalities in the group. (45 RT 9302-9303.) Without this screening, it was difficult to identify appellant's brain as abnormal in comparison. Additionally, to be able to generalize findings based on the effects of methamphetamine on the brain, the group should have been comprised of people who used methamphetamine chronically and had no other brain abnormality. (45 RT 9306-9307.) Further, as concerned predictive values relating to aggression and the brain, the control group should have been screened to exclude those individuals with psychiatric or neurological diseases or diagnoses. (45 RT 9306-9307.) Last, the group should have been comprised of methamphetamine users who were not violent. (45 RT 9308.) In this way, there would have been controls for relevant variables that influenced the brain and the scan's ability to isolate for violence would have been optimized. (45 RT 9309.) In Mayberg's opinion, at least five individuals should not have been included in the control group and more should have been added. (45 RT 9305-9306.)

Mayberg pointed out that depression affected brain imaging in that it manifested as decreased frontal lobe and cingulate gyrus activity. This is true whether the depression is genetic or situational in its origins. (45 RT 9310-9313.) She agreed that chronic methamphetamine use could cause damage to the brain and that methamphetamine abuse could result in psychosis and paranoia and that clinical literature existed that supported a connection between the chronic use of methamphetamine and acts of violence. (46 RT 9488-9489.) Mayberg also recognized that sleep deprivation affected the brain. (46 RT 9488.)

Mayberg's opinion, based on appellant's PET scan and the raw data underlying the scan, was that mild hypometabolism (decreased activity) existed in two very discrete portions of his brain—the right frontal lobe and in the cingulate. This abnormality was more consistent with depression

than with chronic methamphetamine use or head trauma. (45 RT 9360-9363, 9370; 46 RT 9400, 9423, 9505.) If appellant's brain were affected solely by chronic methamphetamine use, it would have manifested in most other parts of his brain as well, not just the frontal lobes. (45 RT 9364; 46 RT 9400.)

Mayberg disagreed with the main conclusions reached by the defense experts. Specifically, she disputed Wu's assessment that the amygdala was one of the most active portions of appellant's brain. (46 RT 9398.) Mayberg further disagreed with Amen and Buchsbaum's views that significant disparity existed between frontal and rear brain activity. To the contrary, she noted that the raw data underlying the scans revealed normal front-to-back activity. (46 RT 9417-9418, 9423.) Mayberg respected and utilized Buchsbaum's work on schizophrenia and depression. However, she also believed his research, as contained in the Raine studies, was flawed due to bad controls, which resulted in limited conclusions. (46 RT 9469.)

While Mayberg agreed that damage to the limbic system—involved with primitive behaviors—could impair a person's ability to control their behaviors, she could not say that methamphetamine use, sleep deprivation, and stress would necessarily enhance irrational feelings in someone with decreased activity in the prefrontal cortex and increased activity in the limbic system. (46 RT 9493-9496.)

With regard to Amen's SPECT scans, Mayberg noted that he bypassed multiple steps, which made it impossible to discern what was happening in appellant's brain. (46 RT 9425.) In short, his scans were susceptible to false readings, including a false representation of blood flow in the cingulate gyrus. (46 RT 9433, 9436.) This, in turn, called into question the conclusions he reached based on these scans. (46 RT 9439.) To the extent that the scans might reflect increased blood flow in certain parts of the brain, that would be typical for anyone who had taken

amphetamines. (46 RT 9442.) Nonetheless, Mayberg disagreed with Amen's conclusion that the cingulate gyrus was overactive. (46 RT 9447.)

Additionally, Mayberg opined that the studies the defense experts cited in support of their opinions were irrelevant to appellant's case. (45 RT 9335.) The Grafman, Goyer, Volkow, and Raine studies all involved different parts of the brain and different types of people. (45 RT 9326.) Specifically, the Grafman study had no relation to appellant's case because it concerned a different part of the brain. (45 RT 9329.) The Goyer study focused on certain personality disorders and the Volkow study involved patients who were hospitalized due to mental illness. (45 RT 9330-9334.) In the Raine studies, all subjects were murderers, but they were not qualified as to whether they had head injuries, psychiatric disorders, or other characteristics that might have relevance to appellant's case. (45 RT 9335-9340.) Additionally, the Raine study repeatedly cautioned against generalizing the findings beyond the specific groups studied. (45 RT 9341.) Further, Mayberg noted there were no published studies on the effects of methamphetamine on the brain. (45 RT 9321.)

Doctor Kent Rogerson was a psychiatrist in private practice in Stockton. He was board-certified in psychiatry and neurology and testified as an expert in psychiatric care. (47 RT 9625, 9630.) Rogerson had assisted the prosecution and defense in various criminal cases during his career. He worked with the courts to evaluate competency, as well. (47 RT 9630-9633.) Rogerson was retained by the prosecution in appellant's case and asked to complete a general psychiatric exam and to assess competency, insanity, and whether appellant suffered from any mental disorders. (47 RT 9636.)

Rogerson examined appellant on November 13—the day after he was arrested. (47 RT 9634-9635.) The interview took place at the county jail and lasted a little less than two hours. (47 RT 9637.) The jail records

showed Rogerson's visit may have been shorter, but Rogerson explained that he did not personally sign himself in or out. (47 RT 9688-9691.) Rogerson obtained background information after his interview with appellant, which he incorporated into his diagnosis. (47 RT 9639-9640, 9647.)

Appellant freely discussed his crimes with Rogerson. (47 RT 9648-9650.) Appellant told Rogerson that he committed the robberies because he was unemployed and needed money to pay rent. (47 RT 9648.) After discussing his burglary of King's van and stealing the gun, appellant described the Loper murder, "[S]hooting the dude at work was the second one." (47 RT 9649.) He described Loper as "an asshole" and a "goodie-two-shoes." (47 RT 9649.) Appellant elaborated, "I shot him as he got out of the truck and left him where he dropped. I tried to get my job back by calling, but they wouldn't take me back because of the drug suspension." (47 RT 9649.) With regard to Mayfair Liquors and the Chacko murder, appellant said, "I walked in and shot him. I wasn't thinking. I was thinking about the money and paying bills." (47 RT 9650.) As for Village Oaks Market and the murders of Gao and Yu, appellant stated, "I didn't want them to resist. I just walked in and shot." (47 RT 9651.) He observed, "[J]ust kept going, so I wouldn't feel anything." (47 RT 9652.) When Rogerson asked appellant why he committed the crimes, appellant said, "I guess my motive was revenge and money." (47 RT 9652.)

As for drug use, appellant started using marijuana when he was 14 and progressed to amphetamines over the next several years. Appellant said that he used methamphetamine extensively in the 10 years preceding his arrest, with the exception of a two-year period when he was living in Florida. (47 RT 9651-9652.)

On a couple of occasions during the interview, appellant became tearful when discussing the effects of his crimes on his family—his daughter, in particular. (47 RT 9699.)

Regarding mental status, Rogerson determined that appellant's mood was appropriate and that his short-term and long-term memory and general judgment were intact. (47 RT 9641-9647.) Appellant's intellectual skills were average, at worst. (47 RT 9645.)

Rogerson determined that appellant met the criteria for competency. He did not show evidence of psychosis, depression, thought disorder, or brain injury. In Rogerson's opinion, appellant executed multiple complex behaviors in committing the crimes and was sane at the time of the offenses. (47 RT 9652-9653, 9660.)

Rogerson's psychiatric evaluation was that appellant engaged in excessive use of methamphetamine and developed a dependence on the drug, which impaired his functioning. He also observed that appellant exhibited some withdrawal symptoms. Additionally, Rogerson classified appellant as having an antisocial personality disorder with schizoid traits. (47 RT 9654-9655.) Rogerson explained that an antisocial personality disorder described someone who had no regard or respect for the rights or property of others and little ability to empathize. Typically, such a person engaged in deception and criminal conduct. (47 RT 9657, 9722-9723.)

In Rogerson's view, appellant exhibited seeds of this antisocial personality disorder in his teen years. Rogerson quoted Doctor Kerry Krop, a psychologist who evaluated appellant when appellant was 15 years old:

> "He is bored at home, at school, and generally with his friends. He sees money as a panacea and thus is motivated to get it [quoting appellant] 'anyway I can.' He has almost no insight into his self-destructive behavior patterns and sees little need for change. There is little guilt expressed regarding his situation, except that [quoting appellant] 'I wish I didn't get into trouble so much.'"

(47 RT 9658-9659.)

Krop's report also included background information from appellant's mother Loretta. She described some of the negative family dynamics that existed during appellant's formative years. (47 RT 9709-9710.) The report noted that appellant was submissive, suggestible, and overly dependent on others—a personality pattern that resulted in conflict for him. (47 RT 9711.) Krop strongly recommended family therapy. (47 RT 9712.)

Rogerson opined that appellant's actions in carrying out the crimes were "well thought out, carried out, and they were done in either the commission of a robbery or for revenge and that sort of thing." (47 RT 9660.) He did not observe any indication that the crimes were the result of impulse. (47 RT 9660.) On the contrary, appellant's conduct was purposeful and goal-driven. (47 RT 9660-9661.)

IV. DEFENSE SURREBUTTAL

Detective Coon stated that appellant's interview concluded around 5:00 or 5:30 a.m. on November 13. (47 RT 9725.) Appellant arrived at the field to assist in recovery of the gun at approximately 9:45 a.m. that morning and departed around 10:00 a.m. (47 RT 9725.)

V. PENALTY PHASE RETRIAL: AGGRAVATING FACTORS[8]

A. Circumstances of the Crimes

1. Auto burglary and theft of Michael King's gun

(See generally 78 RT 16155-16200.)

2. Cal Spray shooting

(See generally 78 RT 16200-16220, 16241-16336; 79 RT 16348-16392; 82 RT 16896-16909.)

3. Eight Mile Road murder

(See generally 79 RT 16395-16423, 16437-16527; 80 RT 16540-16555; 82 RT 17107-17139.)

4. Bank of the West robbery

(See generally 80 RT 16556-16587.)

5. Mayfair Liquors murder

(See generally 80 RT 16591-16703; 81 RT 16708-16741, 16842-16864; 82 RT 17139-17158.)

6. Village Oaks murders

(See generally 81 RT 16742-16780, 16789-16841; 82 RT 16966-16982; 82 RT 17159-17177.)

7. Police investigation and appellant's arrest

(See generally 81 RT 16866-16881; 82 RT 16916-16965; 83 RT 17193-17241, 17290-17349, 17357-17427.)

---

[8] Appellant's claims that involve penalty-phase issues relate to the retrial. For this reason, respondent does not set out the evidence adduced at the first penalty phase trial. Also, at the penalty retrial, the prosecution presented evidence about the crimes, which largely mirrored that adduced at the guilt phase. To conserve resources, it is omitted here. Insofar as these portions of the record may be relevant to any issue, they will be referenced accordingly.

B. Victim impact evidence

1. Impact of James Loper's Murder

Monica Loper was the wife of James Loper. They had been high school sweethearts and were married for about eight and a half years. The Lopers had two boys—Andy and James—who were six and eight years old, respectively, at the time of the murder in October. (83 RT 17429-17430.) Monica, James, and their children were living with James's parents at the time. (83 RT 17429.)

James's pager went off in the early morning hours of October 29. Monica explained that James's reaction was, "'Oh, great.'" He hated getting up early. James left the bedroom to make a call, returned to the room, got dressed, and told Monica that he had to leave. (83 RT 17435.) Monica said, "'Okay. I love you.'" James responded, "I love you, too." He left to go and do his job. (83 RT 17435.)

About 6:30 that morning, the couple's oldest son James went into Monica's room and said, "'Mommy, the sheriff's department's outside for you.'" Monica did not think anything of it and went to the door and then had James and the rest of the family wait inside the house. She told them she would be return in a few minutes and closed the door behind her. (83 RT 17434.) Detective Huber told her that James's body was found under his truck and that he had been shot and killed. (83 RT 17434-17435.)

Monica explained that James took the job with Charter Way Tow so that he could spend more time with their children. (83 RT 17340.) During James's employment, Monica visited the Charter Way Tow office with the children. She saw appellant, but never talked to him. (83 RT 17431-17432.)

Judith Loper was James's youngest sister. (83 RT 17436.) She described her brother as a protector and friend. He was a person that

"would do anything for anybody." They were a close family. (83 RT 17438.)

Judith explained that, since James's death, their father cried a lot and could not bring himself to attend the court proceedings. (83 RT 17437.)

Hazel Loper, James's mother, testified that around 5:30 on the morning of October 29 she was on her way to the cemetery, before heading to work, to visit her mother and father's graves. (84 RT 17455-17456.) On the way, she saw trucks and police cars at the end of Eight Mile Road. She did not think much of it and drove onto Interstate 5. (84 RT 17456.) Hazel then received a call from her eldest daughter Debbie who told her to come home. Hazel told Debbie that she could not because she was on her way to work. Debbie insisted that Hazel return home. (84 RT 17456.)

When Hazel returned, she found her oldest grandson crying. She thought perhaps something happened to her daughter Judy, who was in an abusive relationship. When Debbie told her that James was murdered, Hazel did not believe it. She told her that she heard his beeper go off that morning and his truck start. (84 RT 17457.) Hazel said that James was probably just on another call and would be back soon. Her family told her that James was dead. (84 RT 17457.)

Hazel explained that James was close to his sisters and that his death had devastated the family. Her youngest grandson could not go to school any longer and had to be home-schooled. Her eldest daughter's marriage ended. (84 RT 17457, 17460.) Ron—her husband of 38 years—could not come to court because he was afraid of what he might do that could put him in jail. (84 RT 17458.) James's death also affected the family financially because he helped buy the house in which their family resided. (84 RT 17461.) Hazel's health was compromised by the strain of her son's murder. (84 RT 17462.)

Hazel said that James loved his family and worked very hard because he wanted the best for them. (84 RT 17457.) He was saving money so that Monica could finish school. James also had plans to become a deputy sheriff and started doing ride-alongs. (84 RT 17457-17458.)

Monica and Hazel shared some of the Loper's family photos with the jury. (83 RT 17432-17433; 84 17459-17461.) Hazel said that it tore her apart knowing that her son died by himself out in the middle of nowhere. (84 RT 17458.)

2. Impact of Stephen Chacko's Murder

Anice Chacko was married to Stephen for seven years. They had two children and she was pregnant with a third at the time of his murder. (84 RT 17463-17464.) Stephen, who had been a lawyer in India, moved to the United States to be with Anice. They owned Mayfair Liquors together. (84 RT 17464-17465.)

On the morning of November 4, Anice noticed that Stephen did not call at 9:00 to wake her up, as he typically did. She kept calling the store, but there was no answer. (84 RT 17468.) On her way to work, Anice stopped by the store, which "was covered with plastic tape." (84 RT 17468.) Anice knew something was wrong. She wanted to go inside the store, but the police stopped her and said that Stephen was taken to the hospital. She thought he was going to be okay. Anice was taken to the hospital. (84 RT 17468-17469.)

After Stephen's death, Anice was forced to move to India with their children because they were "homeless." They moved in with Stephen's brother. (84 RT 17465-17466.) Stephen's body was transported back to India where he was buried. One of their young children asked Anice why his daddy was in a "special bed" and not talking to him. (84 RT 17467.) The children still did not understand that their father was not coming back to them. (84 RT 17467.) Anice explained that she and the children wanted

to return to the United States, but they did not have a house and she could no longer work. (84 RT 17467-17468.)

Anice described what was shown in several family photos. (84 RT 17466-17467.)

3. Impact of Besun Yu's Murder[9]

Besun Yu was Jack Yu's mother. He described her as the pillar of their family—like the center post in a tent. She was a loving and hard-working person. (84 RT 17471.) Besun took over the Village Oaks Market to help out a family friend who was having trouble managing the store. (84 RT 17473.) Besun would get up at 6:00 a.m., drive an hour to the store, and return home at 10 or 11 o'clock at night. Sometimes, she would provide some of the poorer children in the neighborhood with something to eat and drink as they passed the store on their way to school in the morning since they could not afford breakfast. (84 RT 17475.) Besun taught Jack and his siblings to be responsible. (84 RT 17472.)

Jack's mother and father were married for 30 or 35 years. His father had changed since Besun's murder. (84 RT 17472.) His mother's death also put pressure on Jack, as the firstborn son, to take over the market. He struggled with depression. (84 RT 17473-17474.) Jack's sister was not herself either. Neither of them smiled much anymore. (84 RT 17474.) It was important to Jack to testify so that people would know who his mother was and because he was angry that appellant took away his mother's life and then turned her murder into a joke. (84 RT 17476.)

Besun's son David Yu also testified. He described his mother as sweet and kind. (84 RT 17478.) She made sure the family was close. (84

---

[9] No victim impact evidence was presented regarding Village Oaks murder victim Jun Gao because he did not have family in the United States from whom the prosecution could secure such evidence. (49 RT 10306.)

RT 17479-17480.) David helped Besun when she took over the store. Like Jack, David saw his mother work long hours at the store. (84 RT 17479.)

Jack missed his mother's smile, her tender loving care, and her cooking. Since her murder, the family had drifted apart. The siblings did not see each other as often. (84 RT 17480.) David felt that his brother Jack changed a great deal after their mother's death. (84 RT 17481.) David felt like he was missing a part of himself, too. (84 RT 17482.)

Karen Tan was Besun's daughter. She wished the jury could have met her mother. (84 RT 17483.) Besun worked very hard for her children. Her only dream in life was to see her children grow up, get married, and have children. Only then, did Besun feel that her life would be complete. (84 RT 17486-17487.)

Karen felt that her mother was her soul mate. (84 RT 17484.) She talked to her mother and said good night every night before she went to bed. Karen would sometimes go to Besun's closet and smell her clothes. (84 RT 17487.) She said, "Do you know so many night, I woke up in the night, and I could feel my mom was holding my hand. Warm, chubby, hard working hand. I woke up like that. And I am disappointed there is no mother." (84 RT 17487.)

Like the other victims' family members, Jack, David, and Karen shared a few family photos. (84 RT 17474, 17481, 17484-17486.)

C. Appellant's Prior Convictions

Appellant's certified 1982 felony burglary priors from Florida were admitted into evidence. (84 RT 17488-17489; People's Exh. No. 667.)

VI. PENALTY PHASE RETRIAL: MITIGATING FACTORS[10]

A. Appellant's Family

Appellant's mother, Loretta Peoples, described their family and appellant's upbringing. He was the second-born of three sons. Larry was appellant's older brother and Lee the younger. (86 RT 17941-17942.)

As a baby, appellant was very anemic and of low birth weight. (86 RT 17957.) When he was a young child, appellant wet his bed. He also had allergies. (86 RT 17959.) He was very sensitive, timid, and shy. (86 RT 17961.) However, appellant was the most affectionate of the children. (86 RT 17964.) In Loretta's opinion, he was the most emotionally needy. Yet, these needs were never met. (86 RT 17962.)

Loretta explained that she was in a 40-year loveless marriage to Luther—a verbally abusive alcoholic. Luther was also an absent parent; he was in the Navy and at sea most of the time. (86 RT 17946, 17951-17952, 17954, 17965.) He rarely interacted with the boys. (86 RT 17962.) When he did interact, Luther was very critical. At times, he called appellant "stupid." (86 RT 17955, 17974.)

Appellant was a marginal student. (86 RT 17981.) In fifth grade, he started associating with the wrong crowd. (86 RT 17982.) In seventh grade, Loretta sent him to Carla Hawthorne who acted in the capacity of a social worker and counselor. (86 RT 17985-17986.) Eventually, Doctor Krop conducted a psychiatric evaluation of appellant. (86 RT 17987.)

During his teenage years, appellant still soiled his pants. (86 RT 17966.) This frustrated Loretta and on one occasion when this happened,

---

[10] At the penalty retrial, the defense presented testimony from numerous witnesses who had also testified during the guilt phase. To the extent that there was a significant and relevant difference in the witnesses' testimony between the guilt phase and penalty retrial, it is included in addition to the evidence in mitigation.

Loretta put appellant in a diaper and had Larry tie him to a tree in the front yard. (86 RT 17967.) The neighborhood children came by and made fun of appellant. He managed to get loose and then ran and hid underneath the family's car in the driveway until the children left. (86 RT 17967.) This tactic did not cure appellant of bedwetting or soiling his pants. (86 RT 17970.)

When Loretta could no longer control appellant, she had the sheriff take him. (86 RT 17986.) He became a ward of the court and was assigned John Fry as a counselor. Loretta later became aware that Fry was convicted of molesting children. (86 RT 17994.) Appellant was in and out of boys' homes as a youth. Although he managed to get his high school equivalency certificate, he committed burglaries and went to prison. (86 RT 17995.)

After getting out of prison, appellant moved to California to live with Loretta's parents. (86 RT 17996.) While in California, appellant met Carol and got married. (86 RT 17997.) In 1991, appellant and Carol and their children moved to Florida to live with Loretta and Luther. Appellant had been unemployed and Loretta and Luther thought they could help appellant and appellant could help them take care of Lee, who had been in an accident and had become a paraplegic. (86 RT 17947, 18002.) Appellant was the happiest he had ever been. (86 RT 18001.) He and Carol got jobs and were helping to pay rent. However, family tensions increased because Loretta and Luther had issues with Carol and her parenting. (86 RT 18003-18004.) The tensions boiled over, which resulted in appellant, Carol, and their children moving back to California in 1993. (86 RT 18005-18007.) Apart from a few bitter and acrimonious letters exchanged between appellant and his family, there was no contact until appellant's arrest in 1997. (86 RT 18007, 18014-18024.) Since appellant's arrest, appellant and his family had mended fences. (86 RT 18056.)

In Loretta's view, appellant was a loving father and husband. He never hit Carol or their children and he treated his dog well, too. (86 RT 17998, 18047-18048.)

Loretta shared numerous family photos with the jury as she talked about certain events in appellant's life. (86 RT 18031-18056.) She hoped the jury would spare appellant's life because he meant so much to her. (86 RT 18057-18058.)

Luther Peoples confirmed much of what Loretta testified to concerning family life and appellant's formative years, in particular. (See generally 86 RT 18143-18153.)

Growing up, the boys had a loving and caring mother; to a fault, in Luther's mind, because Loretta pampered the boys and was too lenient with them. So, Luther took the role of the stern disciplinarian. (86 RT 18167-18168, 18177.) Although he was at sea much of the time, Luther coached appellant's little league baseball team when appellant was young. (86 RT 18172.)

When appellant started having problems, Loretta went to various state agencies to secure help and Luther left the Navy to come home and try to put appellant on the right track. (86 RT 18152, 18170.) Luther stopped drinking in 1978 and was no longer drinking when appellant was in high school. (86 RT 18167.) Appellant completed ninth or tenth grade, but then his troubles with the law landed him at a boys' correctional facility for 18 months. Loretta constantly worried about appellant during his teen years, given his drug use and problems with the law. (86 RT 18175.) Despite eventually getting his high school equivalency certificate, appellant ran afoul of the law again and went to prison for two years. (86 RT 18175-18176.) Luther never turned his back on appellant during this time. He visited appellant when he was at the youth correctional facility and in prison, as did Loretta. (86 RT 18176-18177.) When appellant was released

from prison, he returned to home. (86 RT 18177.) Luther was no longer in the Navy and still sober. He and appellant spent time together going to baseball games. (86 RT 18178.)

Luther also concurred with Loretta's account of appellant's return to Florida with his family and the upheaval that led to their departure. (86 RT 18156-18160.) Luther read one of the caustic letters that he sent to appellant after appellant returned to California. (86 RT 18161.) Luther had since forgiven appellant for leaving Florida abruptly. (86 RT 18174-18175.)

Luther felt that he had grown to be a loving and caring father who was very supportive of his children, including appellant. (86 RT 18171.) He never abandoned appellant. (86 RT 18178.) Since reconnecting with appellant after his arrest, Luther talked to him and visited him every chance he had. (86 RT 18162.) Appellant's life had value and Luther hoped the jury would spare his son's life. (86 RT 18163.)

Appellant's brother Lee was four years younger than appellant. (86 RT 18134-18135.) Growing up, Lee was closer to appellant than to Larry. They shared a room until their family moved to Florida. (86 RT 18135.) Larry was more of a loner. (86 RT 18136.)

In 1986, when Lee was 17 years old, he fell off a dock into shallow water, which left him disabled. There was one occasion, while Lee was still hospitalized, that appellant rushed to the hospital in the early morning hours to help him. (86 RT 18136.) Appellant moved to California shortly after Lee's accident. (86 RT 18136.) He returned to Florida in 1991 and helped care for Lee on the weekends. (86 RT 18137.) The family environment deteriorated and appellant left Florida, which caused a large rift in the family. (86 RT 18138.) There were no phone calls to or from appellant in the years that followed; only letters. (86 RT 18139.)

After appellant's arrest, Lee and appellant spoke on the phone. Lee also visited appellant in jail, which was difficult and emotional. (86 RT 18140.) Lee loved appellant and supported him. (86 RT 18141.)

Larry Peoples—appellant's older brother—also testified. He worked as a correctional officer in Florida. (92 RT 19299-19300.) Larry described appellant as quiet, sensitive, passive, and timid. (92 RT 19301-19302.) He could not remember appellant ever getting into a fight. (92 RT 19302.) When they were younger, Larry's role was as appellant's protector. He tried to keep appellant out of trouble. (92 RT 19300-19301.)

Larry reiterated what other family members said about their upbringing and relationship with their parents. He felt that appellant took the brunt of Luther's punishment. He also recounted appellant's history with drugs and how he eventually ended up in prison. (92 RT 19302-19313, 19316-19317.)

One time, Larry found a 25-caliber Beretta handgun and some marijuana in appellant's room. Larry took the gun apart and buried it. Appellant never asked Larry about the gun or the marijuana. (92 RT 19314.) On another occasion, Larry noticed that a rifle their grandfather had given to appellant when he was younger was missing. Larry found it in appellant's car, which was parked outside a bar at the time. (92 RT 19315.)

Appellant was happiest and most stable when he returned to Florida with his wife and children. (92 RT 19318.) Appellant appeared to be a good husband and father. (92 RT 19318-19319.) He was also employed during this time. (92 RT 19320.) Yet, Larry discerned tension and sensed that appellant would ultimately leave Florida. Luther and Loretta's hostility toward appellant resulted from their feelings of betrayal since they built an addition onto the house and counted on appellant to help take care of Lee. (92 RT 19321.)

Larry lost contact with appellant for five and one-half years after appellant left Florida . (92 RT 19322, 19339.) The next thing Larry heard was that appellant was arrested, which shocked him. (92 RT 19322-19323.)

Having worked on death row in Florida prisons for six years, Larry believed the death penalty was appropriate in certain cases. However, he did not want appellant to receive a death sentence because appellant had shown humanity and his death would devastate their family. (92 RT 19338.)

Appellant's fifteen-year-old stepson Matthew loved appellant. (92 RT 19363.) Appellant was involved with Matthew's little league baseball team and taught him how to swim. (92 RT 19355, 19362.) Matthew visited appellant in jail as often as he could. He and appellant also exchanged letters. Matthew received over 100 letters from appellant, three of which he read to the jury. (92 RT 19356-19361.) Matthew shared some family photographs. (92 RT 19361-19363.)

Appellant's nine-year-old daughter Lindsey told the jury that she loved appellant and that he loved her. (92 RT 19373.) Lindsey was a fourth grade honor roll student. (92 RT 19364-19365.) She visited appellant in jail often. Lindsey and appellant exchanged written correspondence. (92 RT 19366.) She sent about 20 or 30 cards and letters to appellant; she read three to the jury. (92 RT 19367-19369.) Lindsey received about 110 letters from appellant and read four of them aloud. (92 RT 19367, 19369-19372.)

Appellant's wife Carol described appellant's parenting of his stepson Matthew and daughter Lindsey. He treated Matthew like he was his own son. (87 RT 18224.) Appellant helped with Lindsey's delivery and was primarily responsible for her potty training. (87 RT 18226, 18230.) He was a very loving family man; the children were his life. (87 RT 18228, 18230.) Carol believed appellant was a good father even though he was under the influence of methamphetamine while caring for their children and

their friends' children. Carol had no objection to appellant driving the children around while he was using methamphetamine. (87 RT 18295-18296.)

After Lindsey was born in 1991, Carol and appellant started using methamphetamine. Appellant was unemployed at that point. (87 RT 18231-18232.) Needing a clean start, they moved to Florida to live with appellant's family. (87 RT 18233.)

At first, things were fine in Florida. Luther bought Carol and appellant each a car and built an addition onto the house for them. (87 RT 18236.) Appellant got a job, was fired, and then found another job. They contributed $800 a month toward rent, insurance, and household expenses. (87 RT 18236.) Carol and appellant remained free of drugs or alcohol for the entirety of their time in Florida. (87 RT 18237.)

Family tensions arose because appellant's parents did not accept Matthew and they were hard on Carol, as well. Carol and Matthew were very unhappy living there. (87 RT 18238-18242.) Appellant was caught in the middle, but Carol persuaded him that they needed to move back to California. (87 RT 18243.)

They returned to California in 1993 and returned to using drugs. Appellant got a job at Cal Spray and was eventually fired. He then started working at Charter Way Tow. (87 RT 18248-18250.) Carol was drinking heavily at the time and treated appellant poorly. (87 RT 18251.) He never fought back when Carol picked fights; he walked away. (87 RT 18252.) During the nine years that they lived together, appellant was never violent with Carol. (87 RT 18305-18306.)

Appellant had accidents while working at the tow company and, as a result, his wages were garnished. He was eventually suspended, which angered him. (87 RT 18252.) There was no money coming in and they were using methamphetamine heavily. During this period, Carol yelled at

appellant a lot. (87 RT 18253-18255.) Over the summer, Carol saw appellant working on the gun that, as it turned out, became the murder weapon. (87 RT 18283.) Matthew found the gun and was playing with it, which scared Carol. (87 RT 18283.) It was Carol who suggested that appellant call Charter Way Tow after James Loper was killed. She told appellant what to say. Carol maintained that appellant did not ask for his job back during call. (87 RT 18254.) Shortly before appellant's arrest, they received a three-day eviction notice. Appellant was looking for work at the time. (87 RT 18279.) He had lost a lot of weight and his health was in decline. (87 RT 18279.) Appellant did drugs on the day of his arrest. (87 RT 18255.)

Carol maintained that she was not actually aware that appellant perpetrated the crimes until he told her on the day of his arrest. (87 RT 18284, 18288.) However, during television news coverage of James Loper's murder, appellant smiled and remarked that, "[W]e all have to go sometime." (87 RT 18280-18281.) Carol told police that she confronted appellant about the Loper murder and he did not deny it. (87 RT 18289-18290.) Later, when he affirmed his role as the killer, appellant told Carol that he killed Loper because Loper was a "suck-up" and a "brown-noser." He told Carol how he planned the ambush and murder of Loper. (87 RT 18299.) Appellant recounted that Loper was under the truck fighting for his life while he continued shooting at him. (87 RT 18300.)

Additionally, when Carol saw coverage of Stephen Chacko's murder on television, she remarked to appellant that she hoped it was not the nice one. Carol knew both men who worked there. (87 RT 18292-18293.) Smiling, appellant confirmed that it was the nice one. (87 RT 18293.) This was when Carol first suspected appellant's involvement. (87 RT 18281.) She also saw money from the Mayfair Liquors robbery in their home

around the time of the crime. (87 RT 18290.) Eventually, appellant told Carol the details of this crime, as well. (87 RT 18300-18301.)

She lied to the police for five hours, when they first interviewed her because she wanted to protect appellant. (87 RT 18285.) When detectives asked Carol why she did not leave after appellant killed Stephen Chacko, she said that it was because she loved appellant. (87 RT 18294.)

Since appellant's arrest, Carol no longer used drugs or alcohol. (87 RT 18270.) She still loved appellant. Appellant exchanged letters with Carol and the children every week. (87 RT 18255, 18279.) Carol read selected letters into record. (87 RT 18256-18262, 18273-18278.) She and the children visit appellant as much as they could. (87 RT 18262.) Carol shared family photos. (87 RT 18270-18271.)

Joyce Southard, Luther's younger sister and appellant's aunt, concurred with much of Luther and Loretta's testimony about their marriage, parenting, and appellant's home life. (86 RT 18106, 18115-18117.) When Luther, Loretta, and the children relocated to Florida, appellant lived with Southard. However, Southard was unclear about the reason; it may have been that she had plenty of room. (86 RT 18105-18106.)

Southard and appellant stayed in touch after appellant moved to California. (86 RT 18105-18107.) She read some of their correspondence into the record. (86 RT 18119-18121.) Southard loved appellant and hoped his life would be spared. (86 RT 18121.)

Alice Hamilton was Loretta's younger sister and appellant's aunt. (86 RT 18123-18124.) Hamilton laid out the history of grudges that existed on their side of the family. (86 RT 18124.) She confirmed much that other family members had to say about appellant and the family environment. (86 RT 18126-18128.) Hamilton further observed that Larry was the favorite in the family and Lee was a confident person. (86 RT 18128.)

Appellant, on the other hand, was more laid back. He was also a good husband and father. (86 RT 18128.)

Hamilton loved appellant. (86 RT 18132.) She and appellant kept in touch by mail. She also visited him. Hamilton read some of their correspondence to the jury. (86 RT 18129-18130.)

B. Friends, Neighbors, Co-workers, and Others

Joey Uybungco lived in Chula Vista, near San Diego. Appellant used to live near him when they were children. (89 RT 18591-18592.) Appellant was like a younger brother to Uybungco. (89 RT 18593.)

Uybungco previously described appellant as a normal kid from a normal family. He did, however, recall the incident when appellant was tied to a tree and laughed at by the neighborhood children, including Uybungco. He also recounted that appellant's mother gave appellant oil and vinegar to drink to clean out his body and his father locked appellant in the garage by himself when appellant was in trouble. (89 RT 18595-18596.) Nonetheless, Uybungco still believed that, overall, appellant's family, including his mother, was nice. (89 RT 18601.)

There were a lot of drugs going around in the neighborhood back then. Uybungco gave appellant his first marijuana cigarette when appellant was around 9 or 10 years old. (89 RT 18594.)

Appellant's family left Chula Vista without notice. (89 RT 18597.) Uybungco lost touch with appellant, until appellant's arrest. (89 RT 18601.) Appellant and Uybungco had since written to each other. (89 RT 18598.)

Jeffrey Sproles also knew appellant and Uybungco from Chula Vista when they were in sixth to eighth grades. (89 RT 18607.) Appellant was Sproles best friend. (89 RT 18608.) One time, appellant helped Sproles—who was shy—talk to a girl that Sproles had a crush on. (89 RT 18608.) Sproles considered appellant one of the people that helped build his life. (89 RT 18610.) Appellant seemed like a normal kid to Sproles. (89 RT

18613.) Sproles did not know if appellant used drugs during their friendship. Although, Sproles was aware that Uybungco did drugs and that appellant associated with Uybungco. Sproles believed that appellant started using drugs later. (89 RT 18614-18615.)

After appellant and his family moved, Sproles thought about appellant from time to time. (89 RT 18610-18611.) When the defense investigator called, Sproles was excited to hear appellant's name. However, when he learned what appellant had done, Sproles cried. (89 RT 18611.) He still loved appellant because of what appellant meant to Sproles. (89 RT 18612.)

Kenneth Blair was the assistant principal of appellant's high school in Keystone Heights, Florida. (86 RT 18072.) Blair had contact with appellant due to "low order" disciplinary problems like cutting school and not doing homework. (86 RT 18073-18074.) Blair noted that appellant's brothers Larry and Lee were good students. (86 RT 18090-18091.) He also felt that Loretta was a good mother who tried hard to be supportive of her children. (86 RT 18097.)

Blair described appellant as quiet and passive during high school. (86 RT 18075.) Appellant was ignored by most of the other students and had an almost "ghostlike" presence. (86 RT 18076-18078.) While appellant did not pose a threat to students or teachers, he associated with bullies. (86 RT 18081, 18088-18089.) John Hawthorne—son of Carla Hawthorne—was appellant's best friend. John was exceptionally violent and aggressive, which caused Blair to be concerned about appellant's association with John. (86 RT 18082, 18095.)

At one point, appellant's mother approached Blair about counseling for appellant. Blair explained the counseling options available, which were not extensive. (86 RT 18079-18081.) There was no drug counseling at the school. (86 RT 18082-18083.)

Blair was shocked when he heard the crimes appellant was accused of committing. (86 RT 18084.) Blair was unaware of appellant's confinement at the juvenile detention facility during his teenage years and his later prison incarceration. (86 RT 18093-18094.) When Blair heard about appellant's crimes, he wrote to appellant to see if he could reestablish a relationship with him. (86 RT 18085.) Blair would have made the trip to testify for any of the youth he knew from school. (86 RT 18086.) He cared for appellant despite what appellant had done. (86 RT 18087.)

Carla Hawthorne was appellant's outreach social worker when he was living in Keystone Heights. (89 RT 18549.) She worked for a community agency there and helped families deal with problems. (89 RT 18551.) Carla had three children: Tonya, Tosha, and John. Tosha and John were friends with appellant in school. (89 RT 185.) Appellant's mother contacted Carla for help because he was getting into trouble at school and with the law. (89 RT 18553, 18559.) Drugs had become a problem in the community, including with appellant and Carla's son John. (89 RT 18559-18560, 18562-18563.)

After meeting with appellant for about six months, Carla recommended that appellant undergo more extensive counseling in Jacksonville where such resources were available. (89 RT 18561-18564.) It seemed that the marital turmoil between Loretta and Luther had an impact on him, which appellant kept inside. Also, he was also constantly chided by other children in the neighborhood and called names. (89 RT 18555-18556.)

Carla described appellant as small in stature, withdrawn, quiet, and submissive, with very little self-esteem or confidence. (89 RT 18554, 18565.) He was also polite and respectful. (89 RT 18573.) Despite his docile nature, Carla acknowledged that appellant was a troubled boy, who

had numerous contacts with the juvenile justice system during this time. (89 RT 18573.)

Carla last saw appellant when he returned to Florida in the early 1990s. He seemed happy and was clean and sober. (89 RT 18566-18567.) Appellant looked good physically, too, having put on some weight. (89 RT 18567.) He was loving and openly affectionate. Appellant was employed, had assumed familial responsibilities, and was making good choices in his life. (89 RT 18569-18570, 18573-18574.)

Carla had a difficult time accepting that appellant committed the crimes. (89 RT 18571.) She cared for appellant and loved him. (89 RT 18572.)

Tosha Hawthorne stated that she and appellant enjoyed a close friendship when they were teenagers living in Florida. (89 RT 18576.) Tosha explained that appellant used a variety of drugs then: marijuana, cocaine, acid, barbiturates, and narcotics. (89 RT 18577.) Tosha and her brother John—also close friends with appellant—were using as well. (89 RT 18577-18578.)

Tosha described appellant as very quiet, timid, and submissive. He was a wallflower who, in her opinion, would not hurt anyone. (89 RT 18578.) On the other hand, her brother John was a bully who beat up people, including Tosha, and he picked on appellant a lot. John was very cruel and would sometimes burn appellant with cigarettes. (89 RT 18578.) Appellant never fought back; he merely told John to stop. (89 RT 18579.) John also verbally abused appellant, including accusing appellant of having been "butt-fucked." (89 RT 18580.) Tosha and her female friends tried to protect appellant from John. (89 RT 18581.)

Eventually, Tosha got off drugs and cleaned up her life. (89 RT 18582.) She saw appellant when he moved back to Florida with his wife and children. He was off drugs, looked healthy, and was a great husband

and loving father. (89 RT 18583-18584.) In Tosha's view, appellant's wife Carol was always nagging him, but he would never get upset with her. (89 RT 18585.) Appellant left Florida because Carol did not get along with his parents. Appellant wanted to stay, but was caught in the middle. (89 RT 18586.) Tosha lost contact with appellant after he left Florida, but she supported him and loved him. (89 RT 18586-18587.)

Roy Gratzmiller was appellant's probation officer in Florida. (87 RT 18197-18198.) Appellant went to prison as a youthful offender for two burglaries. Appellant was released to Gratzmiller's supervision. (87 RT 18200-18201.) Gratzmiller observed that appellant was more at ease meeting away from his home due to family tensions and stress that increased shortly after Lee's accident. (87 RT 18202-18203.)

Appellant was cooperative and, to Gratzmiller's knowledge, did not violate his probation. (87 RT 18204-18205.) However, when the prosecutor asked Gratzmiller whether he was aware of Larry People's statement regarding finding marijuana and guns in appellant's possession during this time, Gratzmiller said he was not. He acknowledged that if appellant was in possession of drugs or guns during the probationary period, it would have constituted a violation. It would not be unusual if a probationer or parolee deceived Gratzmiller. (87 RT 18215-18216.)

Guy Lazarro lived in Florida. He met appellant at the rendering plant where they both worked in 1992. (86 RT 18060-18061.) Lazarro knew appellant for about two months. They never socialized. (86 RT 18068-18069.) Lazarro felt that appellant was a good worker with a positive attitude. (86 RT 18062.) Although appellant was fired for making a mistake within the first 90 days of his employment, Lazarro believed it was unfair. (86 RT 18065.) He did not want the jury to render a death verdict because he saw something good in appellant. Lazarro never had contact with appellant after appellant was fired. (86 RT 18069-18070.)

Joni Fitzsimmons—a neighbor and friend—reiterated much of her guilt phase testimony about her association with appellant and Carol and their life at the apartment complex, including her opinion that appellant was a good father and family man. (87 RT 18312-18317.) She knew the couple and their children for about four and one-half months. (87 RT 18330.)

Fitzsimmons shared her observations of appellant, Carol, their marriage, and their parenting. Appellant and Carol argued, but it was typically Carol that started it. She would yell at appellant and he would walk away. (87 RT 18317.) The couple disagreed about how to discipline the children: Carol believed in corporal punishment; appellant did not. (87 RT 18318.) Carol was a heavy drinker, which upset appellant and created friction. (87 RT 18320-18321.) When she was drunk, Carol would sometimes engage in conduct that humiliated appellant, like flashing her bare breasts and asking others to fondle them. (87 RT 18319-18320.) She would often demean appellant and call him names. (87 RT 18326.)

Although she was not sure how much she saw appellant a couple of weeks before his arrest, Fitzsimmons noticed that he looked skinny, unkempt, and dirty. (87 RT 18324, 18335.) She noted that when appellant was on methamphetamine, he sometimes moved his jaw back and forth. (87 RT 18325.)

At one point, Carol showed Fitzsimmons a gun that appellant had during the time he was still employed at Charter Way Tow. Fitzsimmons had concerns about her children being in appellant's home with a loaded weapon there. (87 RT 18337-18339.)

When she spoke to law enforcement investigators, Fitzsimmons initially lied about the gun and drug use. (87 RT 18329, 18341-18343.) When she acknowledged to police that appellant used methamphetamine on a daily basis, she also told them that his behavior during July, August,

September, and October was normal. Appellant was his usual calm, nice, peaceful self. (87 RT 18330-18334, 18339.)

Mary Redvelski lived in the same Stockton apartment complex as appellant and Carol. (88 RT 18357.) Redvelski had two children and their families became friendly. (88 RT 18358.)

Based on her association with the couple, Redvelski described appellant as a "very sweet person" and seemingly normal during the six months she knew him. (88 RT 18358, 18365.) He loved working as a tow truck driver and, during the summer of 1997, appellant was working a lot. He sometimes looked disheveled after he was done working. At the time, Carol was drinking heavily. (88 RT 18359-18362.) Appellant was generally a quiet person, but not withdrawn. (88 RT 18370.) Redvelski's conversations with appellant were limited; they never discussed personal things. (88 RT 18371.)

Redvelski never saw appellant and Carol argue. (88 RT 18359-18361.) Nor did she have any knowledge regarding drug use in the apartment complex. Redvelski was a Mormon; she did not do drugs or drink alcohol. She never saw anything about appellant that led her to distrust him, including with her children. (88 RT 18362.) However, had she known about appellant's drug use, Redvelski would not have trusted him. (88 RT 18363.) Nonetheless, Redvelski felt that appellant was a good father and husband. It shocked Redvelski when she learned of appellant's arrest and his drug use. (88 RT 18363.) There was nothing out of the ordinary or unusual that Redvelski noticed about appellant during the time period in which he committed the crimes. (88 RT 18366-18367, 18372.) She remained friends with Carol and still cared about appellant. (88 RT 18364.)

Redvelski's ex-husband, David Eppling, lived in the apartment complex with Redvelski and next door to appellant and Carol. (88 RT

18374.) Eppling considered appellant an acquaintance; they never had personal conversations. (88 RT 18379-18380.) Appellant helped Eppling and Redvelski one time when their car broke down. (88 RT 18376.)

In Eppling's opinion, appellant appeared to be a normal person with a normal marriage. (88 RT 18381.) Appellant was a good father and Carol was a nice person who cared appropriately for her children. (88 RT 18375-18376.) Although, Eppling noted that Carol would get "hammered" and "boisterous" sometimes and "show herself off" to the public in the complex courtyard. (88 RT 18377.) Eppling could tell that this upset appellant, but appellant never confronted Carol. (88 RT 18377.) Appellant never impulsively flew off the handle or exploded in rage. He was able to control his feelings and reactions to Carol's negative conduct. (88 RT 18381-18382.)Carol would, at times, be upset over appellant's long work hours. Yet, Eppling never heard them argue or Carol criticize appellant. Nor did he ever hear arguing or shouting coming from appellant and Carol's apartment. (88 RT 18378, 18380-18382.)

Arnetta Scott lived in the apartment complex above appellant and Carol. (88 RT 18384, 18389.) Scott's son Julian went to school with appellant and Carol's daughter Lindsey. (88 RT 18384.) Appellant was very helpful because he took Julian to and from school while Scott was involved in a criminal trial in Oakland. (88 RT 18385.) Appellant also stayed with Julian when Carol took Scott to the hospital. (88 RT 18386.) She trusted appellant. (88 RT 18388.) Julian never reported any problems while in appellant's care. (88 RT 18391.)

Scott believed that Carol and appellant had a normal marriage. Scott never heard arguing coming from their apartment. (88 RT 18389.) Appellant seemed like a pleasant and nice person. She had no idea about his drug use. Scott never saw appellant use drugs and he never acted as if he was on drugs. (88 RT 18390-18391.) Nor was there was anything about

appellant to suggest that he was violent. (88 RT 18386.) If Scott had known definitively that appellant was using drugs, she would not have entrusted Julian to appellant's care. (88 RT 18389.)

Lori Fike was Carol's best friend. (88 RT 18393.) They met in 1996 when Carol and appellant moved in next to Fike. (88 RT 18394.) She never heard any major arguments between the couple. (88 RT 18395.) Fike felt that appellant was a kind and loving father—even while on methamphetamine. (88 RT 18395, 18398.) He was excellent at barbecuing. (88 RT 18396.) Fike loved appellant and felt that his life had value. (88 RT 18397.)

Edward Richards was also a neighbor and the person who secured appellant his job at Charter Way Tow. Richards was leaving the company and knew there would be an opening. (88 RT 18399-18400.) He described the job as stressful and demanding with long hours. (88 RT 18401.)

Appellant was quiet and mainly kept to himself. The children loved him. Richards was impressed with appellant's interaction with the children, which led him to take an interest in appellant and get him the job. (88 RT 18406.) Appellant had just been laid off from McDonald's and Richards thought appellant deserved a break. (88 RT 18407.)

Richards observed that Carol sometimes engaged in promiscuous conduct when she was drinking. She would get loud, too, which would prompt appellant to leave her presence. (88 RT 18406.)

Richards also knew James Loper from working at Charter Way Tow. He described Loper as "a nice guy." (88 RT 18408.) Despite what appellant had done, Richards remained appellant's friend. (88 RT 18408.)

Rhonda Allen coached appellant's daughter's baseball team in early to mid-1997. Allen saw appellant and Carol about three or four times a week then. (91 RT 19163.) Appellant was very involved and went to all of Lindsey's practices and games. Sometimes, he would help coach. (91 RT

19164.) Appellant was strict about Lindsey getting homework done before she went out to play. Allen liked appellant and thought he was a good father. (91 RT 19164, 19167.) Sometimes appellant or Carol would watch Allen's boys. The boys enjoyed having a male figure spend time with them. (91 RT 19165.) Allen tried to help appellant and his family when they were having financial problems. (91 RT 19168.)

Allen was not aware that appellant was using methamphetamine during the time she knew him. He did not act strange or abnormal when he was around the children. Had Allen known, she probably would not have entrusted her children to appellant's care. (91 RT 19172.) Allen also did not know that, during their association, appellant committed an auto burglary at Anderson Park. (91 RT 19173.) Allen lost contact with appellant around June 1997 when he started working at Charter Way Tow. (91 RT 19169-19170.)

Michael Quigel reprised much of his guilt phase testimony regarding his association with Carol and appellant, including having sold them methamphetamine. (88 RT 18413-18414.) Quigel said that he sold appellant methamphetamine the night before the Village Oaks murders. Appellant was with his friend Joey at the time. (88 RT 18418.) Quigel estimated that he sold appellant methamphetamine about three or four times. Typically, appellant bought small amounts. (88 RT 18442-18443.)

Quigel had a dim view of Carol and felt she was a "poor excuse for a woman." (88 RT 18446.) As for appellant and Carol's marriage, Quigel stated that the couple seemed to get along and he never saw them fight. (88 RT 18441.)

As he did during the guilt phase, Quigel recounted his encounter with appellant in the apartment complex on the morning of the Village Oaks murders. (88 RT 18416-18417.) He acknowledged that he left out many details about the encounter, when he first talked to the prosecution's

investigator—specifically with regard to appellant's appearance at the time,. (88 RT 18439-18440.)

Quigel, a state prisoner serving six years for armed robbery, tried unsuccessfully to obtain a deal from the prosecution in 1999 in exchange for his testimony about appellant. (88 RT 18413, 18423-18424, 18435.) Prior to that, in 1998, he gave a detailed statement to an investigator from the District Attorney's Office in which he said that appellant was wired all the time, but was still nice and calm when on methamphetamine. (88 RT 18429-18430.)

On one occasion during Quigel's association with appellant, appellant drove Quigel to a gas station in the early morning hours after they had used methamphetamine. (88 RT 18431-18432.) Quigel remarked to appellant that the female store clerk was "stupid" for unlocking and opening the door for appellant because she was alone and could easily be robbed. Appellant suggested to Quigel that they rob her. (88 RT 18432-18433.)

Gerald Ball lived in Stockton and was part-owner and manager of Cal Spray. (88 RT 18461.) Ball knew appellant from work. Appellant started out doing the low-end difficult work. (88 RT 18462-18464.) Initially, appellant performed well and was quickly promoted to an operator. Ball had a personal interest in appellant because he knew that appellant had a family and needed a break. (88 RT 18465.) While an operator, appellant had a couple of mishaps. He was demoted one time and then brought back up. (88 RT 18467-18468.) Over time, appellant's performance declined, which Ball suspected was drug-related. (88 RT 18468-18469.)

Ball thought appellant was bright, but was messing up his life. Ball "got in his face" and told appellant how disappointed he was in him. (88 RT 18471.) Appellant did not say much other than to suggest to Ball that things that Ball observed did not really happen and that Ball was imagining

it. (88 RT 18471.) Ball told appellant that he was going to be fired and the shop steward let appellant go a day or two later. (88 RT 18471-18472.)

Ball observed appellant behave oddly shortly before he was let go. He watched appellant walk across the parking lot, stop halfway, go to his knees, put his arms up in the air, and start talking to the sky. (88 RT 18470.) At the time, appellant was having serious problems at work. (88 RT 18474.)

Michael Jack testified to seeing appellant at the pay phone outside the Village Oaks Market, shortly before the murders, as he did during the guilt phase. (89 RT 18623-18646.)

Reverend Troy Skaggs ministered to jail and prison inmates to help them get their lives back on track. (92 RT 19294-19295.) Skaggs heard about appellant and went to the jail in Stockton to see him. He was unable to make contact with appellant, so he sent appellant a letter. They corresponded in this manner for about two years. Skaggs also sent appellant Bible studies. (92 RT 19296.) Since then, Skaggs met with appellant about nine times. He also met some of appellant's family. Since he started his prison ministry in 1953, it was only the third time that Skaggs testified on an inmate's behalf. (92 RT 19295, 19297.) Skaggs and his wife became friends with appellant and Carol. Skaggs valued appellant's life. (92 RT 19298.)

C. Psychosocial Expert Testimony

Doctor Amen testified about the three SPECT scans that he conducted on appellant in early 1999 and then an additional follow-up scan in 2000. (84 RT 17639-17640.) As he stated in the guilt phase, Amen's opinion was that the scans revealed that appellant possessed brain abnormalities, which affected his thought process. When appellant used methamphetamine, it exacerbated this dysfunction. (84 RT 17572-17574.)

Amen agreed that any person that used methamphetamine, cigarettes, or alcohol consistently for 10 years would have an abnormal brain. (84 RT

17575-17576.) Further, any person who abused drugs could have a heightened susceptibility to anger. (84 RT 17594.) In fact, statistically speaking, half of the jury would have potentially abnormal scans. (84 RT 17611.)

Amen had scanned the brains of 30 known killers—four of them were multiple murderers. (84 RT 17593.) Only one had an abnormal brain. (84 RT 17594.) While he opined that methamphetamine induced an irrational thought process in appellant that fueled the commission of his crimes, Amen conceded that murder, in general, was largely the product of an irrational thought process. (84 RT 17610.) Further, he could not explain why despite appellant using drugs for 27 years, there were not earlier instances of violence. (84 RT 17612.)

If Amen were to treat appellant, he would medicate him to balance his brain function and significantly inhibit dangerous behavior. (84 RT 17569-17571, 17696-17697.) Yet, medication would not fix appellant's brain and Amen could not predict whether appellant would commit violence in the future. (84 RT 17694, 17699.)

Doctor Wu testified that, based on his PET scan of appellant's brain, that he was 95 percent certain appellant's brain was abnormal, although it was not necessarily correlative of appellant being a murderer. (85 RT 17764-17765, 17768.) While the abnormality made appellant vulnerable to impulsive conduct, it did not exclude the possibility that he could plan and premeditate. (85 RT 17905-17906.) Wu's conclusions were "preliminary" in the sense that it would be helpful to have additional tests performed such as an MRI or neuropsychological testing. (85 RT 17831.) Wu acknowledged that he could not predict future behavior from looking at a scan. (85 RT 17790; 86 RT 17919.)

Wu estimated that 10 to 20 percent of the general population would have abnormal scans. (85 RT 17822.) Mood swings, anxiety, and fear

could affect brain scans, as could psychiatric illnesses that had a neurological component. (86 RT 17901-17903.) Of the general population, approximately one-quarter to one-third had psychiatric illnesses. (86 RT 17903.) There was a probability in excess of 95 percent that someone who used methamphetamine would have an abnormal scan. (85 RT 17804.)

Doctor Gretchen White was a licensed psychologist retained by the defense to investigate and evaluate appellant's social background and history, specifically, as it related to factor (k) mitigation evidence. (89 RT 18662-18667; 90 RT 18822.) She testified in 41 capital cases for the defense. (90 RT 18788.) Ninety-five percent of her work was defense mitigation in the form of psychosocial history. (90 RT 18789.) White taught seminars exclusively for capital defense lawyers. (90 RT 18794.)

White's psychosocial investigation was limited to appellant's childhood and teenage years; she did not focus on his adult life. White was, however, aware that appellant was married, had two children, and provided for his family by being employed for periods of time. (90 RT 18814.) Although she spent 10 to 12 hours interviewing appellant, White never asked appellant about his statement that he always wanted to murder someone. Nor did she ask if he had these thoughts when he was younger. (90 RT 18763, 18819-18820.) In her view, there was nothing about appellant's childhood or youth that suggested sadistic or bullying behavior. (90 RT 18828.) White opined that what appellant wrote in his "Biography of a Crime Spree" evinced the same pattern of viciousness and hatefulness that was exemplified in the correspondence between appellant and his family after he departed Florida in 1993. (90 RT 18820.)

With respect to appellant's family and upbringing, White opined—based in large part on Doctor Krop's report—that appellant was the product of "a very destructive family system." (89 RT 18674-18675.) To avoid dealing with the bad feelings generated by a family racked with tension and

bitterness, appellant shut down emotionally and turned to drugs. (89 RT 18677-18678.) Yet, White did not believe that appellant suffered emotional abuse to the extent that it reached a clinical level. (90 RT 18798.) Also, there was no indication of physical abuse. (90 RT 18799.)

White detailed Luther and Loretta Peoples's respective family histories, including alcoholism, grudges, bitterness, and other factors that White believed negatively impacted appellant. She also delved into their marriage and their hostility toward one another to the extent that it affected appellant. (90 RT 18716-18726, 18733-18762.) In White's view, appellant was the classic middle child: invisible, overlooked, and the neediest and most neglected of the three boys. (90 RT 18751-18756.)

During his teen years, appellant fell in with the drug crowd, which White maintained was a major contributing factor toward his downfall. (90 RT 18772-18773.) Although it was unclear exactly when appellant started using drugs, it was at an early age. (90 RT 18804-18809, 18826.)

Another contributing factor was appellant's molestation by his counselor, John Fry, who orally copulated appellant on two occasions. (90 RT 18778-18779; Defense Exh. Nos. 806, 824.)[11] Appellant never mentioned the molest until he was arrested. (90 RT 18779.) This was appellant's first sexual encounter. He felt ashamed and was angry at Fry because appellant trusted him. (90 RT 18781.) White characterized appellant's reaction to the molest as "passive." (90 RT 18782.) White also spoke to Michael Portbury and David Lamson—Fry's previous molest

---

[11] Certified documents were admitted. One was a juvenile record, which demonstrated that Fry was appellant's counselor. (90 RT 18780; Defense Exh. No. 824.) The other was a certified copy of Fry's conviction for procuring a person under the age of 16 for prostitution, which related to White's recounting of her discussions with Lamson and Portbury. (90 RT 18780; Defense Exh. No. 806.)

victims—to corroborate appellant's allegation that he was molested by Fry. (90 RT 18779-18780.)

White acknowledged that appellant received 18 months of counseling when he was in a group home and that his family was involved and visited him frequently. Nonetheless, White opined that the family needed more intensive therapy. (90 RT 18802-18803.)

In sum, White found that appellant's self-perception was that of generally being an incidental character in his own life. (90 RT 18782.) Recurring themes throughout his life centered around passivity, humiliation, taunting, and other effects from the poisonous home life he had while growing up. (90 RT 18783-18784.)

Doctor George Woods was a psychiatrist in private practice with a specialization in mental health issues arising from trauma or chemical dependency. (90 RT 18859-18860.) Woods was retained by the defense "to try to understand what had happened." (90 RT 18870-18871.) Among the individuals Woods interviewed were Pastor Kilthau and Reverend Skaggs. (90 RT 18872.) Woods did not conduct a clinical diagnosis of appellant. (90 RT 18948.)

Woods detailed appellant's past, including his burglary and weapons offenses. (90 RT 18876-18887.) He also generally explained the effects of methamphetamine use and the stages of substance abuse. (90 RT 18889-18913.)

With specific regard to appellant's drug use, Woods opined that appellant was addicted to methamphetamine and that there were genetic influences underlying his addiction. (90 RT 18915.) Woods also explained the phases of addiction as they manifested in appellant's life. (90 RT 18915-18928.) The fact that appellant committed the shooting at Cal Spray three years after he was fired indicated to Woods that appellant's mental state deteriorated in that span of time. (91 RT 19073.) Inasmuch as

appellant appeared normal to people around him, the impressions were deceiving. (90 RT 18933-18934.) That was because most of the people making these observations were on drugs themselves. Also, the effects of methamphetamine were, generally speaking, not obvious. (90 RT 18933-18934.)

As for why appellant committed the crimes, Woods believed that, at the time, appellant was experiencing an extreme emotional disturbance. Further, appellant's drug use caused him to misperceive reality, which led to paranoid ideations and aggressions. (90 RT 18930.) That did not mean, however, that appellant was incapable of planning or deliberating. (90 RT 18930.) Appellant could plan, but his paranoid ideations and aggressions propelled him to act out violently. (90 RT 18930.) Woods believed that appellant was impaired right up until the day of his arrest. (90 RT 18939.) Yet, when asked about some of appellant's actions in carrying out the crimes, Woods acknowledged the acts did not necessarily reflect paranoia; only unusual aggression. (90 RT 18969; 91 RT 19046.) As for whether appellant's letters to his family a few years before displayed signs of aggression, Woods said they evinced extreme viciousness—on both ends of the correspondence. (91 RT 19057.) In short, the four violent days of appellant's 35-year life were attributable to methamphetamine impairment. (91 RT 19079.) However, Woods believed that appellant knew right from wrong and could appreciate the nature of his actions. (91 RT 19055.)

With respect to appellant's crimes, while appellant was able to plan and carry out the crimes, Woods did not believe the crimes were well thought out. As an example, Woods pointed to the murder of Stephen Chacko. Woods opined that, although appellant shot Chacko five times and shot at the register twice, the fact that there were nine additional shots that did not strike Chacko meant that the crime was not the product of good planning. (90 RT 18971.) Even though Chacko was running for his life as

appellant chased him while firing at him, this did not alter Woods's view. (91 RT 19002-19003.) The same held true for the murders of Jun Gao and Besun Yu. (90 RT 18973.) Woods believed that, although Yu also died from the gunshot wounds, the trajectory and angle of the wounds manifested poor planning. (91 RT 19009-19011.) He said the same of appellant's murder of James Loper. (91 RT 19059.)

As examples of the "bizarre" nature of appellant's behavior in carrying out the crimes, Woods pointed to appellant having thrown the register from the Village Oaks Market onto the freeway, as well as the fact that he killed Loper to get his job back. (91 RT 19078-19079.)

When asked by the prosecutor if appellant explained his writings in "Biography of a Crime Spree" to Woods during the time Woods interviewed appellant, Woods said that appellant attributed them to the fact that methamphetamine had destroyed his heart. (91 RT 18997.)

Woods observed that appellant gained clarity and an appreciation of his actions, while he was in jail and not using drugs. (90 RT 18935.) In Woods's opinion, appellant was truly remorseful. He was very emotional and cried a lot. (90 RT 18936.)

Doctor David Lisak was a psychologist from Boston who testified as an expert in clinical psychology relating to sexual trauma on male adolescent development. (91 RT 19090-19091, 19098-19099.) Lisak did not interview appellant. Nor did he know anything about the case. (91 RT 19108, 19130-19131.) In most of the other capital cases in which Lisak testified for the defense, he evaluated the defendants by taking a childhood history and ascertaining the effects of abuse on their development. He did not do that here and could not offer an opinion specific to appellant. (91 RT 19134, 19146.)

Lisak explained that the long-term psychological effects of sexual trauma included long-standing fears, anxieties, phobias, vulnerability to

depression and substance abuse, inability to form relationships, and deep shame and humiliation. (91 RT 19100-19001, 19115.) Molestation could also affect self-esteem and self-worth. (91 RT 19108-19109.) The effects could last a lifetime. (91 RT 19112.)

When the abuse occurred during adolescence, especially if it is the victim's first sexual experience, it could interfere with identity development. (91 RT 19102, 19117-19118.) Oral copulation was one of the more intrusive forms of abuse. (91 RT 19103.) Further, hypothetically speaking, if a youth was abused by his probation officer, it might affect the victim's view of authority and could foster distrust of authority. (91 RT 19107.) Yet, Lisak was unaware of any details relating to appellant's incarcerations or his conduct during those periods. (91 RT 19145.)

Lisak opined that there was a link between molestation and violence. (91 RT 19119.) Approximately 15 percent of men were molested as boys and, of that group, about 35 percent go on to commit violence. (91 RT 19120.) Yet, none of the studies with which Lisak was familiar related sexual abuse to murder. (91 RT 19122, 19138-19139.)

D. Correctional Officers' Testimony

Judy Perez was a correctional officer with the San Joaquin County Sheriff's Department. She met appellant when he was arrested in 1997. (89 RT 18649.) Appellant was housed in the maximum security part of the jail. (89 RT 18657-18658.) At all times, he was to be supervised by three correctional officers. (89 RT 18655.)

Perez had contact with appellant for about a year while he was in jail. (89 RT 18649-18650.) She described appellant as quiet, obedient, polite, cooperative, cordial, and respectful. (89 RT 18650-18651.) For the most part, Perez knew that she was not going to have any problems supervising appellant. (89 RT 18654.) Perez observed that, at times, appellant appeared sad. (89 RT 18652.)

While correctional officers were sometimes exposed to negative conduct by maximum security inmates, appellant did not engage in such conduct. (89 RT 18660-18661.)

Johnny Johnson, also a correctional officer with the San Joaquin County Sheriff's Department, stated that appellant never gave him any problems during the time that Johnson supervised him. (90 RT 18830.) He and appellant got along fairly well. (90 RT 18831.) Johnson explained that, given appellant's high-security status, he had to be shackled whenever he was moved. Appellant went through this process repeatedly without any problems. (90 RT 18832-18835.) Nor did appellant pose problems when undergoing strip searches. (90 RT 18836-18837.) Johnson never saw appellant behave violently or aggressively. (90 RT 18833.) However, security procedures in the maximum-security unit were designed to minimize or eliminate the potential for inmates to become violent or aggressive. (90 RT 18442.) Appellant was one of the better-behaved maximum-security inmates. (90 RT 18838.)

Deputies Gary Sanchez and William Weston testified largely in accord with the other correctional officers concerning appellant's attitude and conduct during his confinement in jail. (91 RT 19155-1962, 19175-19182.)

James Esten was a retired California state prison corrections officer. He also worked in the prisons as a correctional counselor, a housing unit supervisor, and inmate appeals investigator. (91 RT 19184-19197.) He was familiar with 28 of the 32 state prisons and the rules pertaining to inmate classification, including death-eligible inmates.

Esten testified as an expert on whether appellant—a death-eligible inmate—could adapt to a life-without-parole prison sentence. (91 RT 19199-19203.) To be able to do so, Esten evaluated appellant's criminal history, including his conduct in penal institutions. (92 RT 19224.)

Esten detailed the classification and housing system at California prisons, including the type of high-security prison where appellant would be housed, if he were sent to prison for life. (92 RT 19239-19267.) Although drugs were available in prison, it was much less so than in society at large. The most popular drugs were marijuana and heroin. (92 RT 19277-19278.) Beyond the logistical difficulties of getting drugs, inmates also had a financial barrier to obtaining them. (92 RT 19278.) As for weapons, inmates manufactured them, but measures were taken to minimize this happening. (92 RT 19279.) "For the most part," guns were not available in prison. (92 RT 19279-19280.)

There was nothing about the nature of appellant's crimes that would cause problems for him in prison. (92 RT 19281.) Esten's opinion would be different had appellant stabbed or strangled his victims since those types of offenses can—and were—committed in prison. (92 RT 19282.)

After interviewing appellant and reviewing his history, Esten opined that if appellant were sentenced to life without parole, he would adapt peacefully to a maximum-security setting until he died a natural death or was killed by another inmate. (92 RT 19235-19236, 19283.) However, Esten was not familiar with all the facts of appellant's crimes and could not predict with absolute certainty whether appellant would become violent in the future. (92 RT 19238, 19287-19288.)

VII. PENALTY PHASE RETRIAL: PROSECUTION REBUTTAL

Doctor Helen Mayberg, a clinical neurologist and expert in the areas of neurology, PET and SPECT scanning, and nuclear imaging (93 RT 19540-19541), testified largely in accord with her guilt phase testimony.

Mayberg disagreed with Doctor Wu and Amen's conclusions. Her differential diagnosis was that appellant's scans revealed "overall a normal, absolute range of metabolism." (93 RT 19562.) While there was mild right frontal and right cingulate lobe low metabolism, no neurobiologic or

psychiatric diagnosis was indicated. (93 RT 19581-19582.) In short, Mayberg opined that the best evidence that appellant's brain was functioning properly was the evidence of the crimes themselves. (93 RT 19594.)

In Mayberg's view, if the scans reflected any neurobiological condition, it was possibly depression. Given that the scans were administered a year after appellant was incarcerated, they were consistent with sadness or depression. (93 RT 19581-19582.) Mayberg explained that when an individual was depressed, his or her attention span became very distracted and depression could lead to impairment of many functions of the frontal lobe. (93 RT 19595-19596.) Nonetheless, appellant's complete scan pattern was not necessarily indicative of depression. (93 RT 19734.)

Further, Mayberg disagreed with the defense experts' assertions that appellant's PET and SPECT scans corroborated each other. The scans did not show the same areas of the brain as being abnormal. (93 RT 19557, 19584-19585.) Wu pointed to abnormalities in the higher portion of the prefrontal cortex, which involved planning and organization. (93 RT 19587.) Yet, Amen's testimony, based on the SPECT scans, was that the lower part of lobe reflected abnormal activity. (93 RT 19588.)

Also, Mayberg explained that the defense exhibits generated from the scans were misleading. The three-dimensional PET scan exhibits essentially conflated the images of each member of the control group with the normal irregularities from appellant's scan. (93 RT 19557-19565.) In fact, some of the individual scans from the control group exhibited the same normal variation as appellant's, including hypometabolism. (93 RT 19604.) As for Amen's SPECT scans and conclusions, they showed that appellant's brain function seemed to worsen over the time that he was

incarcerated, which was counterintuitive since he was not ingesting drugs. (93 RT 19589.)

Mayberg clarified that the scientific community had yet to identify a part of the brain that was responsible for aggression. (93 RT 19608-19609.) Appellant's frontal lobe irregularity was not in an area commonly linked to aggression; the area was associated with apathy and passivity. (93 RT 19613.) In cases where there was frontal lobe damage or damage to the limbic system that resulted in aggression, it was typically impulsive and explosive aggression. (93 RT 19614, 19714.) On the other hand, appellant's aggression was planned and not consistent with brain damage, acute intoxication, or other drug-related issues. (93 RT 19615.) While the murders occurred over a two-week period, the auto burglary of Michael King's van and theft of his gun occurred in June. Three months later, appellant committed the shooting at Cal Spray. Five weeks later came the bank robbery. Another five days passed before he murdered James Loper. (93 RT 19691-19692.) On the contrary, considering appellant's history, his crimes represented an increasing pattern of violence over many years that escalated during the five-month period preceding his arrest. (93 RT 19692.)

Doctor Kent Rogerson—board certified in psychiatry and neurology—reprised much of his expert testimony from the guilt phase. Rogerson was in charge of mental health community services in San Joaquin County and frequently did work for the courts regarding competency evaluations. (94 RT 19765-1967.) Over the previous 25 years of his career, Rogerson testified about 100 times, conservatively speaking. (94 RT 19766.) He explained that it was unusual that the prosecution retained him in this case because, typically, he testified as a neutral and when not in that capacity, it was for the defense. (94 RT 19768-19769.)

Rogerson detailed his mental status evaluation of appellant, including his interview with him and comments appellant made about the crimes. (94

RT 19776-19787.) As for major psychiatric or mental disorders, Rogerson's diagnosis of appellant was that he was methamphetamine-dependent with evidence of acute or chronic withdrawal symptoms. Appellant also exhibited an antisocial personality disorder with schizoid traits. (94 RT 19790.) The latter disorder manifested itself as a pervasive pattern of disregard for the rights of others. Typically, antisocial personality types, such as appellant, had problems with the law and exhibited criminality. (94 RT 19792.) Rogerson opined that Doctor Krop's evaluation of appellant as a teenager revealed the genesis of appellant's antisocial personality disorder. (94 RT 19838.) Individuals with antisocial personality disorder were capable of committing heinous acts because they had little or no empathy for others. (94 RT 19884-19885.) Rogerson noted that appellant showed no objective signs of psychosis or paranoia. (94 RT 19795-19796.)

In Rogerson's opinion, appellant's crimes indicated goal-directed conduct with motive. His conduct in committing the crimes was not impulsive. (94 RT 19793-19794.)

As for whether appellant's dysfunctional family background or his methamphetamine addiction were responsible for his crimes, Rogerson observed that, in his experience, others with similar backgrounds made more law-abiding choices and these issues did not necessarily dictate appellant's course of conduct. (94 RT 19846-19848.) In fact, Doctor Krop's report concluded that appellant appeared to have intellectual potential and his judgment was not significantly impaired. (94 RT 19888.)

Rogerson elaborated that, although there was little question that appellant's later problems with methamphetamine abuse seriously impacted his life, he was capable of cognitively and intellectually making decisions to hurt someone. Appellant's writings and reaction to his crimes indicated that he committed the crimes for notoriety and to feel special, given his

feelings of inadequacy, which stemmed from being treated poorly as a child. Once appellant figured out that he could harm people and not feel badly about it, he kept doing it. (94 RT 19852, 19894.)

ARGUMENT

I. APPELLANT'S PRETRIAL MOTION TO DISQUALIFY JUDGE PLATT WAS PROPERLY DENIED

In his opening claim, appellant contends the trial court committed error when it denied his motion to disqualify Judge Platt based on three separate ex parte communications that occurred between the judge and other individuals. (AOB 87-97.) Accordingly, he alleges that his constitutional rights to due process of law, a fair trial, an impartial judge, and a non-arbitrary guilt, death-eligibility, and penalty determination were abridged. (AOB 97.)

Not so. The trial court properly denied the disqualification motion because the record did not demonstrate that the ex parte communications showed a probability of actual bias on the part of Judge Platt. Therefore, appellant's constitutional rights were not violated.

A. Procedural History

On November 6, 1998,[12] appellant moved to disqualify Judge Platt pursuant to Code of Civil Procedure section 170.1, former subdivision (a)(6)(C) (now subd. (a)(6)(A)(iii)), which requires disqualification if, "[f]or any reason . . . a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (3 CT 763-775; 1 RT 111-112.)

The disqualification motion was based on several ex parte communications. One occurred between Judge Platt and Deputy District

[12] The relevant events for this claim occurred in 1998, unless otherwise noted.

Attorney Lester Fleming, supervisor of the Homicide Unit, concerning the San Joaquin District Attorney's position on a probable change of venue motion. (3 CT 766-767.) Another conversation took place with the Honorable Stephen Demetras of the San Joaquin County Superior Court. Judge Demetras was responsible for Penal Code section 987.9 funding requests. (3 CT 767.) The third ex parte communication occurred with Patrick Piggott, counsel for appellant's wife, which occurred at the preliminary hearing and regarded the issue of whether appellant's wife would invoke her spousal privilege not to testify at the hearing. (3 CT 767-768.)

On November 10, San Joaquin County Counsel filed an answer to the disqualification motion. (4 CT 875-878.) Also that day, Judge Platt filed a declaration (3 CT 803-806; 1 RT 114), as did Deputy District Attorney Fleming (4 CT 872-874).

In his declaration, Judge Platt acknowledged the conversation with Fleming. He explained that the conversation occurred either in the hallway or outside the courthouse and possibly during the lunch hour. (3 CT 804-805.) The trial prosecutor, George Dunlap, was unavailable and so the judge asked Fleming if his office was going to oppose a possible change of venue motion. Fleming said the District Attorney would oppose such a motion, if it were made. (3 CT 804-805.) The contact lasted about 5 to 10 seconds. The judge did not express an opinion about a possible venue change. Nor did the judge discuss his previous work as a prosecutor on capital cases involving a venue change. The purpose of the discussion was to aid the judge in scheduling the motion and providing sufficient time to consider the issue. (3 CT 805.)

As for the conversation with Judge Demetras, Judge Platt explained that it occurred on September 16, as they encountered one another on the way to court. Judge Demetras asked Judge Platt if the District Attorney

was going to oppose a venue change. Judge Platt said that it appeared so. There was no discussion about funding applications or monies pertaining to the case. (3 CT 805.)

With respect to Patrick Piggott, Judge Platt said that Piggott approached the bench during the preliminary hearing to discuss potential scheduling problems. He also told the judge that Carol Peoples would invoke the spousal privilege. Judge Platt alerted the parties and the issue of the privilege invocation was heard in the presence of defense counsel and the prosecutor. (3 CT 805-806.)

Judge Platt declared that he was not biased or prejudiced against appellant. (3 CT 803.) He explained that, as a judge, he had made hundreds of rulings contrary to the District Attorney's position. During his legal career, Judge Platt worked as a prosecutor and a defense attorney. (3 CT 806.)

Deputy District Attorney Fleming declared that the conversation in question took place in May or June, on the sidewalk outside the courthouse, as he and the judge were walking in opposite directions. Judge Platt asked Fleming if the District Attorney was going to oppose the venue motion. Fleming replied in the affirmative. (4 CT 872.)

Based, in part, on Judge Platt's declaration, County Counsel argued there was no factual showing of actual bias or that a person aware of the facts might reasonably entertain a doubt about Judge Platt's ability to be impartial. (4 CT 877.) Additionally, County Counsel contended that Judge Platt could not be disqualified based on his having worked as a prosecutor before becoming a judge. (4 CT 877-878.) Last, County Counsel pointed out that Judge Plant properly litigated the issue of spousal privilege in the presence of both counsel. A copy of the relevant transcript was attached to the answer. (4 CT 878.)

On November 13, the District Attorney joined in County Counsel's answer to the disqualification motion. (4 CT 890-891.) That day, defense trial counsel, Michael Fox, filed a supplemental declaration (4 CT 882-885) and defense investigator Michael Kale also filed a declaration (4 CT 886-888).

Fox asked that the hearing court take judicial notice of *People v. Gordon*, a capital case in which Judge Platt was the prosecuting attorney. Fox asserted that, in that case, Judge Platt had an ex parte communication with Judge Demetras, the judge presiding over the case, which resulted in Judge Demetras being replaced. The case was granted a change of venue from San Joaquin County. (4 CT 882-883.)

In his declaration, Michael Kale detailed his interview with Deputy District Attorney Fleming, which took place in October. Fleming told Kale the conversation with Judge Platt was brief and may have occurred outside the courthouse during the lunch hour. (4 CT 887.) Fleming had the impression that Judge Platt was not in favor of a venue change and that such a motion would be closely scrutinized and not granted unless absolutely necessary. (4 CT 887.) The judge may have mentioned his experience with the *People v. Gordon* and *People v. Caputo* capital cases as a prosecutor, or Fleming said he may have recalled the judge's involvement independently of their conversation. (4 CT 887.) Fleming told the judge that the District Attorney's Office would oppose a change of venue. (4 CT 887.) Fleming told Kale that he did his best to recall the conversation, which was brief and which had occurred some months before. (4 CT 887.)

Kale also spoke to Piggott, who confirmed that he approached Judge Platt on the morning of the preliminary hearing and advised him that Carol Peoples would assert her privilege not to testify. (4 CT 888.) Piggott did this so he did not surprise the judge during the hearing and to avoid "showboating" when Carol was called to the stand. (4 CT 887-888.) They

had a brief discussion about applicable code sections and Piggott provided the judge with copies of those code sections. (4 CT 888.)

Pursuant to established procedure, the Honorable Duane Martin of the San Joaquin County Superior Court was assigned to hear the disqualification motion. (4 CT 897; 1 RT 120, 123-124.) On November 18, the parties advised the court that the matter would be submitted on the documents, without an evidentiary hearing. (1RT 124-126.)

On November 20, Judge Martin heard the disqualification motion. (4 CT 899.) In addition to the papers filed by the parties, the court read the transcripts of the proceedings on August 7 and August 17, regarding the venue issue. (1 RT 129-130.) Defense Attorney Fox argued in accord with his filings on behalf of appellant. (1RT 130-137.) Additionally, he contended that the declarations of Judge Platt and Lester Fleming were contradictory on some points. (1 RT 133.) Judge Martin told Fox that he was familiar with Judge Platt's involvement with the *Gordon* case. (1 RT 135-136.) In concluding his argument, Fox said the following: "It is the appearance—and I just stress that word, I can't stress it enough—it is the appearance of impropriety that creates such doubt regarding a judge's impartiality." (1 RT 137.)

County Counsel's Chief Deputy, Robyn Truitt, reiterated that Judge Platt's previous occupation as a prosecutor did not, alone, require his disqualification. (1 RT 137.) Truitt maintained that the judge's discussion with Fleming about venue centered on the judge's concern about scheduling. The transcripts of the relevant proceedings made clear that there was no prejudice or bias against appellant. (1 RT 138.)

Deputy District Attorney Dunlap addressed the court briefly and joined County Counsel's argument. (1 RT 139-140.)

Fox responded and reiterated that the circumstances gave rise to the appearance of "some impropriety" and that Judge Platt was not "completely impartial." (1 RT 141 ["I'm just saying that based on appearances . . . ."].)

Judge Martin began his remarks by noting that the legal question was governed by an objective standard. (1 RT 142.) With respect to Judge Platt's discussion with Piggott, the court found that the judge and attorney were "bending over backwards" not to generate controversy around Carol Peoples's involvement in the case, which would be publicized and which might serve to prejudice the jury pool. (1 RT 142.) Judge Martin found that the average member of the public would believe that Judge Platt was doing the best he could to preserve the procedural integrity of the case, without delving into the merits. (1 RT 143.)

With respect to Judge Platt's conversation with Judge Demetras, the court found that Judge Demetras's comment or question to Judge Platt about the defense trying to move the case did not concern the merits. Instead, it seemed that it was a typical remark one judge might make to another about a case. (1 RT 144.)

Regarding the conversation with Deputy District Attorney Fleming, Judge Martin first noted that it took place in public and by happenstance. (1 RT 145, 153.) The declarations indicated that the conversation may have occurred over the lunch hour and that Fleming's wife was present, which suggested that Judge Platt encountered Fleming as Fleming was having lunch with his wife. (1 RT 145, 154.) The court noted that Judge Platt's comments were in service of ascertaining whether time would need to be allotted for extended hearings on the subject. (1 RT 146.) After reading the relevant transcripts and declarations, Judge Martin found that the average person would see the conversation as an effort on Judge Platt's part to anticipate the effect on the court's calendar, if the prosecution opposed the venue change motion. The reasonable person would not conclude from

the conversation that Judge Platt was biased or prejudiced against appellant. (1 RT 146-150.) Accordingly, Judge Martin denied the motion. (4 CT 899; 1 RT 151-152.)

Although defense counsel expressed his disappointment with the ruling (1 RT 154), appellant acknowledges that he did not petition for a writ of mandate as statutorily required (AOB 95).

B. Appellant Has Failed to Show a Probability of Actual Bias

Although an order denying a motion to disqualify a judge, made pursuant to Code of Civil Procedure section 170.3, subdivision (d),[13] is not reviewable on appeal, section 170.3, subdivision (d), does not bar review on appeal of nonstatutory claims that a final judgment is unconstitutionally invalid because of judicial bias. (*People v. Brown* (1993) 6 Cal.4th 322, 335.) While appellant's nonstatutory due process claim is reviewable, it is nonetheless without merit.

A defendant has a due process right under the state and federal Constitutions to an impartial trial judge. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *People v. Brown*, *supra*, 6 Cal.4th at p. 332.)

Recently, in *People v. Cowan* (2010) 50 Cal.4th 401 (*Cowan*), this Court explained the requisite showing for a nonstatutory due process claim of judicial bias. Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii) provides "'an explicit ground for judicial disqualification'" based on "'a public perception of partiality, that is, the appearance of bias.' [Citation]." (*Cowan*, *supra*, 50 Cal.4th at 456.) However, the Court, citing

---

[13] California Code of Civil Procedure section 170.3, subdivision (d) states, in part: "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding."

its earlier decision in *People v. Freeman* (2010) 47 Cal.4th 993 and the United States Supreme Court's decision, in *Caperton v. A. T. Massey Coal Co.* (2009) 556 U.S. ___ [129 S. Ct. 2252] (*Caperton*), observed that "the due process clause operates more narrowly." (*Cowan*, *supra*, at 456.) The Supreme Court clarified that the mere appearance of bias would not suffice for judicial disqualification. Instead, there must be the probability of actual bias, which is objectively assessed based on the circumstances in a particular case. (*Ibid.*, citing *Caperton*, *supra*, 556 U.S. at p. ___ [129 S.Ct. 2259].) A claim relating only to the appearance of bias is to be pursued under state disqualification statutes, with resort to the Constitution being a rarity. (*Ibid.*, citing *Caperton*, *supra*, 556 U.S. at p. ___ [129 S.Ct. at p. 2267].) The high court made clear that only the most "extreme facts" would support judicial qualification. (*Cowan*, *supra*, at p. 457, citing *Caperton*, *supra*, 556 U.S. at pp. ___, ___ [129 S.Ct. at pp. 2265, 2266], internal quotation marks omitted.)

As a threshold matter, appellant attempts to import other claims of judicial bias into his argument that the trial court erred in denying his disqualification motion. (AOB 97 ["As set forth in detail in *Arguments II-IV*, *post*, Judge Platt demonstrated prejudice against defense counsel and appellant . . ."].) The issue presented by appellant's first claim concerns the ex parte communications alleged in the disqualification motion. In that regard, as a nonstatutory due process claim, appellant has failed to present this Court with "extreme facts," which demonstrate a probability of actual bias sufficient to overturn the trial court's denial of the motion.

Further, at the hearing on the disqualification motion, defense counsel argued the statutory standard. On at least two occasions, defense counsel cited the "appearance" of bias or impropriety on the part of the judge. (1 RT 137, 141.) As stated above, the appearance of bias does not suffice to

establish judicial bias under the due process clause of the Constitution. (*Cowan, supra*, 50 Cal.4th at p. 456.)

Applying the correct standard, appellant has failed to show the probability of actual bias. As the hearing court did, Judge Platt's conversations with Lester Fleming and Judge Demetras, on the issue of a possible venue change, should be considered in the context of the hearings, which preceded the conversation. At the August 7 hearing, Judge Platt expressed his concerns to the parties about expending taxpayer funds for jury selection in the county, if the case was ultimately moved. (1 RT 18-20.) The court attempted to ascertain the defense and prosecution positions on a change of venue because it would impact not only funding issues, but also scheduling. (1 RT 19-22.) The prosecutor told the court that the District Attorney was not prepared to commit to a position at that time. (1 RT 26.) The court expended considerable effort to secure some agreement from the parties on how to litigate the issue in an efficient manner. (1 RT 27-56.) On August 17, the court and parties revisited the issue. During the course of the dialogue, Judge Platt, responding to the prosecutor's consternation with the defense position on the matter, stated:

> I think Mr. Fox [defense counsel] has an obligation to do what he has to do. If he can convince or put together some facts and figures that even if I disagree with it he's established a record, that's still his obligation. And in a case of this magnitude, that is absolutely what is mandated. And I [] don't have a problem with it. I don't like it, but I don't have a problem with it. That's what we have to do.

(1 RT 62.)

As viewed against this factual backdrop, there was nothing about Judge Platt's conversation with Lester Fleming, which would suggest the probability of actual bias. Instead, the relevant declarations and the transcripts demonstrate that Judge Platt, as the presiding judge of a high-profile capital case, was trying to assess the likelihood of a contested venue

motion and the implications for the expenditure of taxpayer funds and for the trial schedule. Judge Platt made clear that, regardless of his personal views on the matter, he would ensure that defense counsel was able to fulfill his obligations to appellant.

Nor was there anything about the content of the communications with Judge Demetras and Patrick Piggott that indicated the probability of actual bias. Judge Platt merely responded to Judge Demetras's question and told him that the prosecution intended to oppose a motion to change venue. (3 CT 805.) As for the conversation with Piggott, the attorney approached the judge to give him advance notice about Carol Peoples's intention to invoke her privilege not to testify at the preliminary hearing so that the matter could be handled appropriately. (3 CT 805-806.)

Moreover, in all three instances, the conversations were brief (3 CT 805-806; 4 CT 872, 877), and those involving Judge Demetras and Lester Fleming were chance encounters—in the courthouse hallway and outside the courthouse, respectively (3 CT 804-805; 4 CT 872). In the case of Piggott, it was Piggott who approached the judge and initiated the conversation. (3 CT 805-806.) In short, there was nothing in these limited exchanges that indicated a lack of impartiality by Judge Platt. (See *People v. Mendoza* (2010) 24 Cal.4th 130, 196-197 [finding no bias regarding an ex parte meeting between judge and prosecutor on question of jury misconduct]; *People v. Brown*, *supra*, 6 Cal.4th at pp. 328-329, 336-337 [fact that trial judge made ex parte contacts with counsel and investigator, telling them their efforts to contact jurors were a waste of time and money because irrelevant to hearing on modification of death verdict, does not establish bias].)

On the contrary, Judge Platt was mindful to avoid off-the-record discussions so as not to "conduct the case in a telephone booth." (8 RT 1682.) Further, in keeping with the mandate of due process and fairness,

the court disclosed a personal association it had with a police witness. (9 RT 1843-1845.)

In sum, appellant's disqualification motion was properly denied because the record does not establish the probability that Judge Platt was actually biased against appellant. Accordingly, his state and federal constitutional right to due process was not violated. Further, to the extent that appellant contends, in conclusory fashion, that his other state and federal constitutional rights were violated by the denial of his disqualification motion (AOB 97), his contention is unsupported by the record and without merit.

II. APPELLANT'S CLAIM THAT THE TRIAL COURT ERRONEOUSLY DENIED HIS RECUSAL AND MISTRIAL MOTIONS IS BARRED, BUT, IN ANY EVENT, THE CLAIM IS WITHOUT MERIT AS THE MOTIONS WERE PROPERLY DENIED

Appellant next contends that, during the pendency of the first penalty phase, the trial court erroneously denied his motions for a mistrial and for recusal of Judge Platt. The motions were based on Judge Platt's physical condition, the jury's knowledge thereof, and the restrictive effect of this situation on defense counsel's advocacy. Accordingly, appellant contends the errors resulted in violations of his state and federal constitutional rights. (AOB 98-112.)

Respondent disagrees. In the first instance, appellant's claim is moot because it pertains to the first penalty phase trial, which did not produce a verdict. If not moot, the claim is forfeited because appellant's motions were not renewed when Judge Platt returned to preside over the penalty phase retrial. If not moot or forfeited, appellant's claim has no merit because the trial court properly exercised its discretion in denying the motions.

A. Procedural History

On August 18, 1999,[14] at the start of the first penalty phase, in explaining schedule changes, Judge Platt informed the jury that in the previous month he suffered a mild heart attack, which had initially gone undiagnosed. (52 RT 10700-10701.) The judge reassured the jury that it was not a major concern and that everything was fine. (52 RT 10701.) Judge Platt wanted the jury to understand that the scheduling issues were his fault and, by implication, not that of the parties. (52 RT 10701.) He then moved on to discuss the near-term schedule. (52 RT 10701-10705.) Opening statements were presented later that day. (52 RT 10761-10807.)

The next morning, on August 19, defense counsel Fox filed separate motions for a mistrial and for recusal of Judge Platt, the latter pursuant to Code of Civil Procedure sections 170.1, subdivisions (a)(6)(A)(i), (a)(7).[15] (8 CT 2227-2234; 52 RT 10814.)

Fox's affidavit in support of the recusal motion stated that Judge Platt informed counsel that he was on medication and told by his doctor to reduce stress and change his diet. (8 CT 2229-2230.) Fox further stated that he was informed by the court's clerk that Judge Platt's doctor asked the clerk to be aware of certain physical symptoms and to call for medical assistance should they occur. (8 CT 2230.) Since the court had informed the jury about his heart attack, Fox feared that if he disagreed with the court in the jury's presence, the jurors might misperceive him as being insensitive

---

[14] The relevant events for this claim occurred in 1999, unless otherwise noted.

[15] Subdivision (a)(6)(A)(i) provides for disqualification when "[t]he judge believes his or her recusal would further the interests of justice." Subdivision (a)(7) provides for disqualification when "[b]y reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding."

to the court, which would serve to restrict his representation of appellant. (8 CT 2230-2231.)

In the motion for a mistrial, Fox contended that the judge, having informed the jury of his heart attack, put defense counsel in a difficult position when, afterward, the court impermissibly restricted his opening statement. Given what the judge had told the jury about his physical condition, Fox felt he needed to refrain from disagreeing with the court for fear that he would lose credibility with the jury, as the jurors might feel protective of the judge. In short, the issue of the judge's health had a chilling effect on Fox's advocacy on behalf of appellant. (8 CT 2232-2233.)

Judge Platt advised counsel that the recusal motion would need to be heard by the presiding judge. (52 RT 10814, 10816.) However, Judge Platt made clear that, if there were any question about his health impacting the trial, he would recuse himself. He reiterated that his ability to continue to preside over the trial was not compromised in any fashion. (52 RT 10816.)

As for the motion for mistrial, Judge Platt stated that his rulings on the prosecutor's objections during defense counsel's opening statement were correct. (52 RT 10815-10816.) Further, the judge explained that he told the jury about his health issue because he was concerned that the jury may have overheard a discussion the court had with its staff about the matter. The judge wanted to allay any fears on the part of the jury. (52 RT 10815.) Also, the court clarified that to the extent that stress contributed to his health issue, it was stress unrelated to counsel or the trial in general and this was communicated to the jury. (52 RT 10815-10816.) The court denied the motion for a mistrial.

When the trial resumed, Judge Platt reassured the jury that his health was fine and should be of no concern. (52 RT 10825-10826.) Also, during a break in the proceedings, the court advised the parties that his doctor had

faxed a medical clearance, which would be incorporated into the response to the recusal motion. (52 RT 10855.)

At the start of the afternoon session on August 19, the court informed counsel that it had conferred with San Joaquin County Counsel about the recusal motion. Pursuant to Code of Civil Procedure section 170.4, subdivision (b),[16] the court ordered the motion and supporting declaration stricken for failure to state sufficient legal grounds. (52 RT 10865-10866.) Pursuant to Code of Civil Procedure section 170.4, subdivision (c),[17] the court ordered that the trial continue. (52 RT 10866.) The court advised the parties that it was also forwarding the recusal motion to the presiding judge of the Alameda County Superior Court and that the doctor's clearance would be part of the trial court's verified response. (52 RT 10866.) The judge later read the letter into the record. (52 RT 10892.)

On the afternoon of Monday, August 23, the Honorable Alfred Delucchi of the Alameda County Superior Court informed the parties that Judge Platt had suffered a heart attack over the weekend and was scheduled for open heart surgery the next morning. (53 RT 10929.) The presiding

---

[16] Code of Civil Procedure section 170.4, subdivision (b) provides, in relevant part: "[I]f a statement of disqualification is untimely filed or if on its face it discloses no legal grounds for disqualification, the trial judge against whom it was filed may order it stricken."

[17] Code of Civil Procedure section 170.4, subdivision (c)(1) provides, in relevant part: "If a statement of disqualification is filed after a trial or hearing has commenced by the start of voir dire, by the swearing of the first witness or by the submission of a motion for decision, the judge whose impartiality has been questioned may order the trial or hearing to continue, notwithstanding the filing of the statement of disqualification. The issue of disqualification shall be referred to another judge for decision as provided in subdivision (a) of Section 170.3, and if it is determined that the judge is disqualified, all orders and rulings of the judge found to be disqualified made after the filing of the statement shall be vacated."

judge, the Honorable Philip Sarkisian, assigned Judge Delucchi to the case until its completion or until Judge Platt returned. (53 RT 10929.) The next morning, on August 24, Judge Delucchi informed the jury that Judge Platt suffered a heart attack the previous Saturday and that he was taking over for Judge Platt. (54 RT 10977.)

On August 25, Judge Delucchi advised the parties that, due to Judge Platt's medical emergency, Judge Platt was not able to file his verified response to the recusal motion. Therefore, Judge Delucchi ordered that the relevant portions of the transcript, wherein Judge Platt provided a response on the record, be incorporated by reference. (54 RT 11005-11007.) Later in the day, Judge Delucchi advised the parties that San Joaquin County Counsel would file an answer shortly and that Judge Sarkisian would hear the recusal motion, unless there was an objection. (54 RT 11160-11161.) On August 27, County Counsel filed its response to the recusal motion. (8 CT 2256-2286.) In its response, County Counsel first argued that the recusal motion was moot because, after the recusal motion was filed, Judge Platt suffered a heart attack and was replaced by the Judge Delucchi. (8 CT 2256-2257.) Even if not moot, County Counsel argued there was no factual or legal basis to support recusal at the time, citing Judge Platt's responses to the motion on the record.[18] (8 CT 2257-2286.)

On the morning of September 1, Judge Sarkisian heard the recusal motion. Defense counsel conceded the issue was moot given that Judge Delucchi had been assigned to take over for Judge Platt. (56 RT 11337.) Defense counsel stated, "[W]e accept the proceedings that have occurred." However, he noticed his objection should Judge Platt return and replace Judge Delucchi because, citing this Court's decision in *People v. Espinoza*

---

[18] The prosecutor did not observe anything that suggested Judge Platt was impaired. (52 RT 10817.)

[(1992) 3 Cal.4th 806], two judicial substitutions could not be made in the same capital case. (56 RT 11338.) Judge Sarkisian denied the recusal motion as moot due to Judge Platt's physical condition. (56 RT 11338.)

On September 9, after evidence and argument were concluded in the first penalty phase, Judge Delucchi advised the parties that the court would invite Judge Platt to impose sentence, regardless of the jury's verdict. (58 RT 11952.) The court explained that Judge Platt was "on the mend" and would be available in about six weeks. (58 RT 11952-11953.) Judge Delucchi observed that Judge Platt, having heard the guilt phase evidence, was in a better position to weigh the evidence, in the event there were a death verdict and related motions. (58 RT 11953.) Also, Judge Delucchi advised that Judge Platt was reading the dailies and it would be easier for Judge Platt to read three weeks of dailies than it would be for Judge Delucchi to read two and one-half months worth of dailies. (58 RT 11953.)

Defense counsel stated that he erred when he agreed with Judge Sarkisian's ruling that the issue was moot. Fox contended that the issue was not moot and the recusal motion should have been granted. (58 RT 11954.) Fox reiterated that he was objecting to "a double switch," based on *People v. Espinoza*. (58 RT 11954.) Judge Delucchi observed that appellant's due process rights were "more protected by having the [j]udge who head the lion's share of the trial go through the weighing process." (58 RT 11955.) Fox responded that appellant's due process rights were violated by having Judge Platt preside over the case. Judge Delucchi told Fox that he was raising a different issue. (58 RT 11955.)

On September 27, Judge Delucchi declared a mistrial, finding no reasonable probability that the jury could arrive at a verdict. (60 RT 12370-12371.)

The following day, Judge Sarkisian advised the parties that the penalty retrial was pending assignment to a judge. The presiding judge of

the San Joaquin County Superior Court, the Honorable Thomas Teaford, Jr., would decide whether the retrial would be handled by a judge from that county or Alameda County. (60 RT 12376.) Judge Sarkisian advised counsel that Judge Platt would be willing to resume his duties on the case in six to eight weeks, if his doctor allowed. (60 RT 12382.)

After several proceedings on the matter of scheduling and assignment with respect to the retrial, on October 18, the Honorable Terrence Van Oss of the Alameda County Superior Court advised the parties that the penalty retrial was assigned to Judge Platt, given his familiarity with the case. (61 RT 12417.)

On the morning of November 22, Judge Platt returned to the case. (61 RT 12425.)

B. Mootness And Forfeiture

As a threshold matter, appellant's claim is moot because, as raised below, the motions for a mistrial and for recusal pertained to the first penalty phase. However, there was no penalty verdict from this jury. (60 RT 12370-12371.) Therefore, the claim is moot.[19] Appellant's attempt to evade this bar by interjecting unrelated claims (AOB 112) should be rejected.

Further, if not moot, appellant's claim is forfeited with respect to Judge Platt's involvement in the penalty phase retrial. When Judge Platt

---

[19] Whether characterized as mootness or lack of justiciability, the overriding principle is the same: courts will not entertain actions where there is no actual controversy between the parties. (3 Witkin, Cal. Procedure (4th ed. 1997) Actions, § 73, pp. 132-133.) Insofar as appellant may contend that, but for the alleged errors, the first penalty phase jury would have returned a life-without-parole verdict, such an argument would rest on sheer speculation. It would be equally plausible that, had Judge Platt returned to preside over the first penalty phase, the jury would have returned a life-without-parole verdict.

returned to preside over the penalty phase retrial, appellant did not renew either the motion for a mistrial or the recusal motion. At the start of the retrial, defense counsel was fully aware of all the facts appellant now cites in support of his claim. But, defense counsel did not move to have Judge Platt disqualified once he was assigned to preside over the penalty phase retrial. He has, therefore, forfeited his claim to the extent that it encompasses Judge Platt's involvement in the retrial. (*People v. Scott* (1997) 15 Cal.4th 1188, 1207.)

So, in sum, appellant's contention that the mistrial and recusal motions were improvidently denied is moot as to the first penalty phase and forfeited as to the penalty phase retrial. Even if appellant's claim is viable on appeal, it is without merit.

C. The Recusal Motion and Motion for Mistrial Were Properly Denied

The trial court's decision to deny a recusal motion, even in a capital case, is reviewed for an abuse of discretion. (*People v. Gamache* (2010) 48 Cal.4th 347, 361.)

Here, there was no abuse of discretion. As the trial court properly found, the recusal motion was moot because Judge Platt did not return to preside over the first penalty phase. (56 RT 11337.) The basis for appellant's recusal motion had been Judge Platt's health, the jury's awareness of the health issue, and defense counsel's concern that he would lose credibility in the eyes of the jury, if he challenged Judge Platt during the rest of the trial. (8 CT 2230-2231.) As it turned out, Judge Delucchi was substituted in for Judge Platt at the start of the first penalty phase.

Hence, defense counsel correctly conceded the motion was moot.[20] (56 RT 11337-11338.)

Nonetheless, defense counsel later tried to resurrect the motion by reversing position and contending it was not moot, since the possibility existed that Judge Platt could return to preside over the first penalty phase, thereby effecting a "double switch." (58 RT 11954.) This did not occur. Therefore, concerns about a double substitution were unfounded and the motion remained moot. Accordingly, the trial court's denial of the recusal motion was a proper exercise of discretion.

Further, although Judge Platt did return to preside over the penalty phase retrial, it was a different jury and there was no similar concern about a chilling effect on defense counsel's advocacy before this new jury. This explains defense counsel's decision not to renew the recusal motion at the penalty retrial.

Likewise, the trial court's denial of appellant's motion for a mistrial was proper. A trial court's denial of a motion for a mistrial is also reviewed under the deferential abuse-of-discretion standard. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 314.) The gravamen of appellant's motion for a mistrial was essentially the same as his motion for recusal. The only difference was that, in the former, appellant specifically contended the purported chilling effect resulted in an impermissible restriction of defense counsel's opening statement. (8 CT 2232-2233.)

A closer look at the record of defense counsel's opening statement supports the propriety of the trial court's denial of the motion for a mistrial. Defense counsel began his statement as follows:

---

[20] This assumes the motion was still viable since Judge Platt struck the pleadings for failure to state sufficient grounds. (52 RT 10865-10866.)

> My appeal to a jury in a death penalty case is the most difficult thing that a lawyer can do in a career. It may be the most personal thing that one human being [implores] another to do, not to kill. [¶] I have thought what I would say for a long, long time. I am coming to you at a moment when some of you could be favoring the death penalty and are favoring the death penalty. [¶] You're in a position that has faced only a select few, but this question has been put forth since ancient times, the calculated decision to kill. You have Louis's life in your hands now.

(52 RT 10780-10781.) The court sustained the prosecutor's objection based on the argumentative nature of the comments. (52 RT 10781.) Defense counsel continued, "I come to you as a servant comes to a master." The court sustained the prosecutor's objection on the same grounds. (52 RT 10781.) After additional remarks and another sustained objection, defense counsel said:

> Louis sits there by operation of law because of your verdicts, he is condemned to die in prison. He will never, ever get out. [¶] The only question that remains for each and every one of you is, is God going to set the date that Louis departs this earth - -

(52 RT 10781-10782.) This time, the court overruled the prosecutor's objection. (52 RT 10782.)

Shortly afterward, defense counsel continued: "First, I believe that you cannot begin to do the right thing in this case unless you honestly acknowledge your present feelings. You cannot go into this next phase, the penalty phase, with a false sense of impartiality." (52 RT 10783.) The prosecutor objected on argumentative grounds and the trial court, again, sustained the objection. (52 RT 10783.)

Defense counsel persisted, "You are angry, you are outraged, and you are saddened by all of this - -" (52 RT 10783.) The court sustained another prosecution objection and then excused the jury. (52 RT 10783-10784.) The court explained to defense counsel that, in the first five minutes of his opening statement, there were "at least seven points of argument." (52 RT

10784-10785.) The court also pointed out that it had sustained defense objections to several argumentative comments during the entirety of the prosecution's opening statement. (52 RT 10784.) Defense counsel explained his objectionable comments as a "preamble." (52 RT 10784.)

What this record reveals is twofold: 1) the court's rulings were correct and fair to the parties and, 2) defense counsel was, in no way, cowed by any concerns about Judge Platt's health. With respect to the latter point, despite numerous sustained objections, defense counsel persisted in making argumentative comments to the jury during his opening statement. In short, if defense counsel's opening statement was restricted in any fashion, it was in accord with the rules of argument and evidence.[21]

Notably, at the time that Judge Sarkisian advised the parties that a decision had not yet been made about a trial assignment for the penalty retrial, defense counsel accused the prosecution of being unhappy with Judge Platt and forum-shopping for a different judge. (60 RT 12380.) This is a further indication of the absence of bias or prejudice against appellant on the part of Judge Platt.

Since there was no abuse of discretion in denying appellant's motions, there was no federal constitutional error. (See *People v. Staten* (2000) 24 Cal.4th 434, 448, fn. 1 [finding no predicate error on which federal constitutional claims can be based].)

III. JUDGE PLATT ENSURED THAT APPELLANT'S TRIALS WERE FAIR

Appellant argues that Judge Platt, by virtue of his conduct over the course of the trial, "abused the trust of his judicial office, eviscerating appellant's enumerated constitutional rights in the process. (AOB 115.)

---

[21] After complaining that the prosecutor enjoyed more latitude during opening statements, defense counsel conceded that he did not make objections during the prosecutor's statement. (52 RT 10862.)

Specifically, appellant contends that the judge was abusive to defense counsel and engaged in a double standard, which benefitted the prosecution and prejudiced the defense. (AOB 118-135.) Appellant also maintains that the court made defense counsel a party to the prosecutor's alleged improprieties and that this "pattern of transference" amounted to judicial misconduct. (AOB 135-146.) Next, appellant argues that the court denied his trial counsel the opportunity to make a record of the court's alleged abusive practices. (AOB 146-157.) Last, as part of this same claim, appellant contends the trial court was without jurisdiction to impose the death penalty. (AOB 157-164.)

Appellant's claim fails because, when the record is reviewed in its entirety, there was nothing about Judge Platt's conduct that communicated to the jury that he was aligned with the prosecution or that he did not believe the defense evidence. Judge Platt ensured that the guilt phase and penalty phase retrial were conducted in a manner that was fair to appellant. Further, the trial court was within its authority to consider and decide the motion to modify the verdict and impose the death penalty.

A. General Legal Principles

The reviewing court presumes the honesty and integrity of those serving as judges. (*People v. Chatman* (2006) 38 Cal.4th 344, 364.) A claim of judicial bias requires a determination whether a judge officiously and unnecessarily usurped the duties of the prosecutor and created the impression he was allying himself with the prosecution. (*People v. Clark* (1992) 3 Cal.4th 41, 143.) Such judicial misconduct requires reversal when it rises to a level that communicates to the jury that defense evidence is not believed by the judge. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1233.)

The appellate court's 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; the appellate court must decide whether

the judge's behavior was so prejudicial that it denied the defendant a fair trial. (*People v. Snow* (2003) 30 Cal.4th 43, 78.) When a claim of judicial misconduct or bias is made on appeal, the appellate court reviews the record to determine whether "'the appearance of judicial bias and unfairness colors the entire record.' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 614, fn. 16.)

B. Judge Platt's Conduct Did Not Communicate to the Jury that He Disbelieved the Defense Evidence or that He Was Allied with the Prosecution

In this case, when the record is reviewed in its entirety, it demonstrates that Judge Platt's conduct did not serve to communicate to the guilt and penalty retrial juries that the court was aligned with the prosecution or that it disbelieved the defense evidence. (See *People v. Sturm*, *supra*, 37 Cal.4th at p. 1233; *People v. Clark*, *supra*, 3 Cal.4th at p. 143.)

Notably, and dispositively, while appellant cites a number of instances of what he purports to be examples of judicial bias and misconduct, he does not argue that the conduct in question communicated to the jury that the court disbelieved the defense evidence or had otherwise allied itself with the prosecution. Appellant does, however, agree that this is the standard by which his claim is to be assessed. (AOB 163.)

Further, in omitting those equally important parts of the record wherein the court demonstrated even-handed or favorable treatment of the defense, as well as stern or harsh treatment of the prosecutor, appellant presents a skewed and inaccurate impression of the record. When viewed as a whole, the record shows that Judge Platt ensured that appellant received a fair trial. And, while there were instances when the judge's demeanor or remarks—outside the presence of the jury—may have been

imperfect, at the end of the day, the judge's conduct comported with constitutional mandates.

Judge Platt had an obligation to make certain the trial proceedings were completed in an orderly and efficient manner. Moreover, he possessed the authority to make sure this occurred. A trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 951; *People v. Cox* (1991) 53 Cal.3d 618, 700, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.; see Pen. Code, § 1044; Evid. Code, § 765.) On numerous occasions during trial, the court reminded the attorneys about the importance, and necessity, of litigating the case in an efficient and constructive manner. (8 RT 1510/58-1510/59; 9 RT 1946-1950, 1980-1983; 38 RT 7838-7842; 45 RT 9375-9376; 79 RT 16433.)[22]

In his claim, appellant focuses on the trial court's conduct toward defense counsel. However, viewing the record in its entirety, it is clear that the court, in attempting to control the proceedings and administer justice, also specifically lectured, admonished, or sanctioned the prosecutor. (3 RT 413; 4 RT 691 [defense counsel: "Judge, I object to the editorializing of the prosecutor." Court: "Mr. Dunlap, ask the question. If you want to testify, get an attorney and take the stand."]; 5 RT 989-990 [after prosecutor argued defense counsel engaged in a pattern of conduct, court stated: "Stay away from it, Mr. Dunlap."]; 8 RT 1510/22 [court to prosecutor, "[W]ith all due respect, I do not give a damn about what time frame you're concerned about."]; 8 RT 1637 [court to prosecutor: "But that's a bogus argument, Mr.

---

[22] These citations represent just a handful of the numerous instances the court took action to ensure the trial proceeded in an orderly and efficient manner.

Dunlap."]; 9 RT 2010 [court told prosecutor to stop arguing: "Issue's now been addressed, Mr. Dunlap. It is gone."]; 22 RT 4285-4286 [court admonished prosecutor, after defense counsel objected to conduct]; 24 RT 4840-4841[court sanctioned prosecutor for sighing]; 27 RT 5356 [court to prosecutor: "You don't have any standing. Sit down."]; 32 RT 6566-6568 [court makes finding that prosecutor's conduct violated court order]; 34 RT 6987-6989 [court refuses prosecutor's request to rescind admonishment of prosecutor provided to jury],[23] 6995 [court to prosecutor: "It is an absolutely ridiculous argument."]; 38 RT 7838 [court to prosecutor: "[C]hoose your words carefully. This Court has not allowed an inquisition. That is an affront to the Court. [¶] Cross the line again, and I will sanction you. Period."], 7931[court to prosecutor: "Mr. Dunlap, don't play games with me . . . Listen to what I said."]; 50 RT 10341-10342 [court to prosecutor: "Let me tell you Mr. Dunlap, like the theory or not, it will be the last time that I request not to have a physical reaction, whether its throwing the hands in the air, or guffaw, or another audible reaction to the theory of opposition counsel."]; 82 RT 16957 [court sustained defense objection to editorializing]; 92 RT 19348 [court to prosecutor: "Mr. Dunlap, change your attitude, because the record will reflect the Court is getting offended by the tone of voice and the attitude."].) It 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. (*People v. Snow*, *supra*, 30 Cal.4th at p. 78.)[24] Further, on one occasion in particular, the

---

[23] The court advised the jury: "And understand that the question was asked in violation of the Court's order." (33 RT 6881.)

[24] At one point, during a particularly contentious exchange between the attorneys, Judge Delucchi was forced to interject, "Will you children stop arguing?" (60 RT 12325.) Defense counsel's combativeness also

(continued...)

prosecutor complained that the court had instituted a double standard for speaking objections, which favored the defense. (90 RT 18789-18793.)

Thus, given the record on the whole, appellant's contentions that the trial court refused to take action to address the prosecutor's conduct (AOB 140, fn. 84), that any actions taken by the court were "hollow" (AOB 138), and that the court assigned the prosecutor's misdeeds to defense counsel (AOB 135-146)[25] are baseless.

Additionally, in trying to ensure the trial proceeded in a timely fashion, the court not only put pressure on defense counsel to avoid unnecessary delays, as appellant points out (AOB 127-135), it did the same with the prosecutor. (3 RT 604-609; 39 RT 8091 [during guilt phase, when prosecutor said he had knee injury and might need additional time, court told him to rub mud on it]; 51 RT 10683 [court told prosecutor case would proceed even though prosecutor stated he was not prepared]; 61 RT 12428 [at start of penalty phase retrial, court advised that prosecutor's vacation would need to be terminated early to comport with agreed-upon trial schedule].)

At the same time, the court accommodated defense scheduling requests and concerns—for the benefit of defense counsel and defense witnesses—on numerous occasions throughout the trial. (3 RT 409; 4 RT 730; 6 RT 1207; 29 RT 5947; 34 RT 7031-7032; 35 RT 7177-7179 [granting defense one-week continuance between guilt and penalty phases];

(...continued)
prompted Judge Delucchi to make a wry remark about counsel's proclivity for making objections. (60 RT 12314.) Thus, this "veteran jurist" (AOB 132, fn. 81) was also challenged by the conduct of counsel.

[25] On at least one occasion, the court made clear that it was reprimanding the prosecutor and not defense counsel. (36 RT 7574 ["THE COURT: Counsel, that's enough . . . Not you [referring to defense counsel], him [referring to prosecutor].)

39 RT 8133-8134; 47 RT 9760 [scheduling accommodation because defense counsel had headache]; 48 RT 10014 [extra time granted defense counsel to set up for guilt phase argument]; 77 RT 16149 [extra time granted defense counsel for opening statement in penalty retrial]; 84 RT 17446-17448 [court accommodated defense scheduling request for expert witness testimony in penalty retrial], 17590 [defense counsel acknowledged court gave him day off to accommodate defense witnesses], 17707-17714 [at defense request, and over prosecution objection, court permitted defense to present appellant's taped statement in piecemeal fashion over several days]; 94 RT 19751 [court gave defense extra time to review reports].)

Although the trial court may have had disagreements with defense counsel about the efficacy of certain defense tactics, the record establishes the court's support of defense counsel's mandate and obligations in a capital case. For example, during pretrial discussions on the change-of-venue issue, the court expressed its support for defense counsel's right to take positions for the sake of the record, even if those positions were not necessarily meritorious. (1 RT 61-62.) On one occasion during pretrial hearings, when a defense witness who had been scheduled to testify became unavailable, the court made clear that it understood it was not defense counsel's fault and was beyond his control. (5 RT 981.)

In fact, there were instances when the court went beyond the call of duty to protect the defense's interests. (5 RT 1048-1049 [during discussion on jury selection procedures, court cautioned defense counsel about agreeing to prosecution's proposed procedure].) On one occasion, after defense counsel made an impolitic remark about having frontal lobe damage, the court, to assuage counsel's concern, ordered that the record reflect that counsel made the comment in jest during informal discussions. (39 RT 8253.) During the penalty phase, the court defended defense counsel's prerogative not to indicate whether appellant would testify. (49

RT 10265.) In the course of the penalty retrial, after an extended break ensued when the prosecutor objected to defense counsel's questioning of a defense expert, the court made clear to the jury that it was, upon the court's further inquiry, a proper line of questioning by defense counsel. (84 RT 17659-17670.) Also, during the retrial, the court proactively advised defense counsel that he might want to address an issue with a key defense witness, through questioning, because otherwise the witness' credibility could be adversely impacted as far as the jury was concerned. (87 RT 18191-18193.) On another occasion, the court defended defense counsel when the prosecutor accused counsel of purposefully extending his cross-examination of a prosecution rebuttal witness leaving the prosecutor with less time to prepare for closing argument. (94 RT 19860-19864.) Additionally, during the penalty retrial, the court made clear to the jury that a brief hiatus taken to deal with an evidentiary issue, which arose during defense counsel's examination of an important defense witness, was the result of the court's misunderstanding and not the fault of defense counsel. (92 RT 19222-19223.) Last, the court, over prosecution objection, stayed most of the sanctions imposed on defense counsel (97 RT 20704-20705)[26] and, in at least one instance, the court did not impose sanctions on defense counsel when it could have (36 RT 7577).

Notably, at various times during the proceedings, defense counsel thanked the court for its consideration, graciousness, and fairness. (4 RT 806; 17 RT 3279-3280; 47 RT 9799; 49 RT 10255; 82 RT 17020; 84 RT 17706.)[27] Defense counsel also apologized to the court for some of his

---

[26] The vast majority of the sanctions were for discovery non-compliance after repeated admonitions by the trial court. (97 RT 20640-20643.)

[27] Defense counsel admitted to a propensity for "loquaciousness." (9 RT 1881.)

transgressions. (17 RT 3279-3280; 52 RT 10699; 81 RT 16886-16887; 84 RT 17706.)

Contrasting the situation here with that which occurred in *People v. Sturm*, *supra*, 37 Cal.4th 1218, further demonstrates that Judge Platt did not exhibit a bias in favor of the prosecution and did not otherwise abridge appellant's constitutional rights. In *Sturm*, the trial court told prospective jurors during the penalty phase retrial that the issue of premeditation and deliberation was a "gimme" and that the matter was "all over and done with." (*Id.* at p. 1231.) The trial court's comments were especially problematic because the guilt phase jury was unable to reach a decision on whether the murders were premeditated and the focus of the mitigation case was a lack of premeditation. (*Id.* at p. 1232.)

Also, in *Sturm*, the trial court repeatedly belittled defense expert witnesses during their testimony in the second penalty phase. (*Sturm*, *supra*, 37 Cal.4th at pp. 1233-1235.) Further, during the defense presentation of mitigation evidence, the trial court interrupted the testimony over 30 times to interpose its own objection or disallow a question by defense counsel, even though the prosecution had not objected. On the other hand, the court disallowed a question from the prosecutor on only five occasions. (*Id.* at pp. 1235.) Realizing that his actions may have suggested to the jury that it favored the prosecution, the judge gave the jury an admonishment, which only served to highlight the apparent inequities. (*Id.* at pp. 1235-1236.)

This Court found that "under the unique facts" of the case, "the trial judge engaged in a pattern of disparaging defense counsel and defense witnesses *in the presence of the jury*, and conveyed the impression that he favored the prosecution by frequently interposing objections to defense counsel's questions." (*Sturm*, *supra*, 37 Cal.4th at pp. 1238, italics added.)

Also illuminating of the issue here is *People v. Geier* (2007) 41 Cal.4th 555. In *Geier*, the trial court associated one mitigation witness with the "dim-witted fictional character" "'Forrest Gump'" and suggested that the private life of another mitigation witness was of the variety that belonged on the "'Oprah'" show. (*Id.* at p. 612.) Even though these improper remarks could have been perceived by jurors as derogatory comments on the credibility of those witnesses, the comments were brief, isolated incidents that did not rise to the level of intemperate or biased judicial conduct that required reversal. (*Id.* at p. 614.)

Here, in contrast to *Sturm* and *Geier*, there was no conduct on the part of Judge Platt that suggested to the jury that the defense evidence was not believed by the court or that the court was otherwise aligned with the prosecution. (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1233; *People v. Clark*, *supra*, 3 Cal.4th at p. 143). In addition, the court instructed the guilt phase and penalty retrial juries with CALJIC No. 17.30, which includes the following language: "I have not intended by 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." (48 RT 10137; 96 RT 20441-20442). Jurors are presumed to understand and follow the court's instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

Appellant's contention that the court tried to cleanse "the record of rage" (AOB 118, 122, 126) is without merit. On one occasion, the court acknowledged and apologized to the attorneys for an off-color remark. (46 RT 9566.) The court also acknowledged being upset or angry and speaking in a loud tone at times. (7 RT 1417; 61 RT 12521; 92 RT 19222-19223.) In short, the court was not trying to hide anything. To the extent that the

court resisted defense counsel's attempts to supplement the record along these lines, as appellant argues (AOB 146-157), the court's concern was the creation of a misleading record (61 RT 12521).

Further, insofar as frustrations arose between the trial court and the attorneys, this Court recently reiterated that "'such manifestations of friction between court and counsel, while not desirable, are virtually inevitable in a long trial.'" (*People v. Blacksher* (2011) 52 Cal.4th 769, 825, citing *People v. Snow*, *supra*, 30 Cal.4th 43, 78-79.) To help alleviate some of the stress and friction inherent in the long trial, Judge Platt made an effort to lighten the mood in the courtroom, in an appropriate manner, including by poking fun at himself. (7 RT 1342; 9 RT 1882; 10 RT 2033/223; 31 RT 6283; 38 RT 7925; 39 RT 8199; 41 RT 8504-8505; 42 RT 8665; 43 RT 9027-9028; 47 RT 9841.)

With particular regard to appellant's contention regarding prosecutor George Dunlap's temporary absence from the proceedings (AOB 119-124), considered in context, the court's handling of the matter was not inappropriate or suggestive of a biased attitude against the defense. Dunlap's absence immediately followed the defense and prosecution's stipulation to a change of venue, which occurred on March 1, 1999. (8 RT 1510/11-1510/31.) The resulting reassignment could have taken several months to effect, a situation that did not sit well with Dunlap, who was prepared to start the trial and which, seemingly, put the prosecutor at odds with his office. (8 RT 1510/20-1510/23.)

The next morning, Tuesday March 2, the prosecution's representative, Ms. Verber, advised the court that Dunlap would not be available until the following Monday, March 8. (8 RT 1510/34.) The colloquy between the court and Verber suggested that Dunlap's temporary absence may have been connected to discussions that involved San Joaquin County District Attorney Phillips and the head of the office's homicide unit, Lester Fleming.

(8 RT 1510/35-1510/36.) Defense counsel, Michael Fox, did not complain about Dunlap's absence. In fact, the defense had previously submitted a motion to continue the trial, which was denied. (6 RT 1205.)

On March 3, while the court made mention of using the remainder of the week to address pretrial motions, it was on an opportunistic basis, while the case was pending reassignment. The motions were not previously scheduled. (8 RT 1510/39, 1510/54.) That same day, defense counsel advised that he had medical and dental appointments on March 8 and would not be available. Consequently, the court set the next proceeding for Tuesday, March 9, at which time pretrial motions would begin. (8 RT 1510/42, 1510/49.) Also that day, Fox submitted additional information in support of his motion to continue the penalty retrial and asked that the motion be considered a continuing motion. (1510/37.)

On March 9, Fox asked the court to inquire into the reasons behind Dunlap's absence, observing that pretrial motions had been set for the previous week. (8 RT 1510/54.) The court declined to inquire and corrected counsel, pointing out that pretrial motions were not set for the previous week. (8 RT 1510/54.)

Given the circumstances at the time of Dunlap's brief absence—the case was pending reassignment, the defense was still seeking a continuance of the trial, defense counsel needed a day off for personal appointments, and no schedule had been set for pretrial motions, Judge Platt's handling of the matter was not inappropriate and did not indicate a double standard that prejudiced appellant.

At the same time he ignores the considerable portions of the record that illustrate Judge Platt's even-handed treatment of the attorneys, appellant equates the court's conduct with the extraordinarily oppressive atmosphere that civil rights lawyers endured in the "'deep south'" in the 1960s. (AOB 154-155.) As evidence of this, appellant points to the trial

court's rulings on the issue of appellant's remorse, the court's purported whitewashing of the record pertaining to his treatment of defense counsel, and the court's unwillingness to permit defense counsel to videotape the proceedings. (AOB 146-155.)

First, the court's rulings on the issue of remorse and the attorneys' arguments on the issue, to which appellant cites, pertain to the first penalty phase that did not produce a verdict. As such, this argument is nothing more than a red herring.

Next, the court did not attempt to create a misleading record by cleansing it of the court's purported abuse of counsel. As stated earlier, the court acknowledged being angry and speaking in a loud tone at times. (7 RT 1417; 61 RT 12521; 92 RT 19222-19223.)

Also, appellant neglects to mention that Alameda County Deputy Sheriff Ken McCullum and San Joaquin County Deputy Sheriffs Rick Adams and Willis Smith—all present in court on December 20, 1999—provided declarations that directly refuted defense counsel's assertions that the court yelled at counsel on December 20, 1999 (10 CT 2766-2768), which was the primary basis for the motion to videotape the proceedings (10 CT 2672-2673).[28] In its opposition to the motion, the prosecution also pointed out that the California Rules of Court expressly prohibited videotaping as a replacement or augmentation to the official record. (10 CT 2734-2735.)

Appellant's last contention under this claim, is that the trial court was without jurisdiction to impose the death penalty. His first argument in this

---

[28] Earlier in the proceedings, the court denied the prosecution's motion to videotape the proceedings. The stated purpose was to capture appellant's "jocularity" in the courtroom so as to rebut anticipated defense mitigation evidence characterizing appellant as remorseful. (20 RT 3877-3883.)

regard is that Judge Platt's alleged bias against appellant prevented the court from impartially weighing the evidence and from reliably determining the propriety of imposing the death penalty, as required by Penal Code section 190.4, subdivision (e). (AOB 157-160.) His second argument is that the trial court had no authority to impose sentence in San Joaquin County since the trial proceedings occurred in Alameda County, pursuant to a stipulated change of venue. (AOB 160-161.)

As we have argued, Judge Platt did not exhibit bias against appellant that compromised constitutional mandates. Therefore, the court had the requisite independence and, accordingly, jurisdiction to impose the death penalty. Notably, appellant does not cite to any portion of the August 4, 2000 sentencing record—in particular, the court's findings on the motion to modify the death verdict (97 RT 20664-20670)—in support of his argument that the court was not able to independently weigh the evidence and determine the propriety of imposing the death penalty.

Likewise, appellant's argument that the trial court did not have jurisdiction to impose the death penalty, because it sentenced appellant in San Joaquin County, is without merit. During the colloquy with defense counsel on July 7, 2000, on the subject of where appellant was to be sentenced, the court explained that, at its request, the assistant court administrator contacted the Judicial Council to determine whether final proceedings in the case must be conducted in Alameda County or if the court could sit in San Joaquin County for post-trial proceedings. (97 RT 20593.) The Judicial Council advised that the court had authority to sit where it designated and that, regardless, it would still be under Alameda County jurisdiction and authority. (97 RT 20593.) The court made clear that the case was not removed from Alameda County to San Joaquin County, the latter being the court of original jurisdiction. (97 RT 20593.) Instead, the court was sitting in San Joaquin County as an Alameda County

Superior Court. (97 RT 20593.) The court explained that it made the decision to hold post-trial proceedings in San Joaquin County based on the location of defense and prosecution witnesses, family members, the court's other obligations, and considerations related to court staff and personnel. (97 RT 20594.)

Citing Penal Code sections 1033 and 1036,[29] appellant's objection to being sentenced in San Joaquin County was based on the potential for harm or danger and that, when he was transferred from the Alameda County jail to the San Joaquin County jail, his personal property was not returned to him. (97 RT 20594-20595.) The court made clear that appellant would be provided with whatever personal items, including legal materials, to which he was entitled. (97 RT 20595.)

Appellant characterizes this portion of the record as an example of "judicial tyranny." (AOB 162.) He is wrong. The venue change to

---

[29] Penal Code section 1033 provides: "In a criminal action pending in the superior court, the court shall order a change of venue: [¶] (a) On motion of the defendant, to another county when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county. When a change of venue is ordered by the superior court, it shall be for the trial itself. All proceedings before trial shall occur in the county of original venue, except when it is evident that a particular proceeding must be heard by the judge who is to preside over the trial. [¶] (b) On its own motion or on motion of any party, to an adjoining county when it appears as a result of the exhaustion of all of the jury panels called that it will be impossible to secure a jury to try the cause in the county."

Penal Code section 1036 provides: "(a) Unless the court reserves jurisdiction to hear other pretrial motions, if a defendant is incarcerated and the court orders a change of venue to another county, the court shall direct the sheriff to deliver the defendant to the custody of the sheriff of the other county for the purpose of trial. [¶] (b) If the defendant is incarcerated and the court orders that the jury be selected from the county to which the venue would otherwise have been transferred pursuant to Section 1036.7, the court shall direct the sheriff to deliver the defendant to the custody of the sheriff of that county for the purpose of jury selection."

Alameda County pertained only to the selection of the jury and the trial proceedings. The plain language of Penal Code section 1033 states, in relevant part, that "[w]hen a change of venue is ordered by the superior court, it shall be for the trial itself." The statute expressly provides that pretrial proceedings are to be held in the county of original jurisdiction. (Pen. Code, § 1033.) Taken together, these provisions suggest there is no obligation on the part of the trial court to conduct post-trial proceedings in the venue where the trial proceedings were conducted.

Even if the court's actions in sentencing appellant in San Joaquin County could be reasonably construed as a change of venue and jurisdiction, as appellant contends, he had the opportunity to petition the appellate court, as the trial court observed. (97 RT 20594.) Appellant did not. Nor did he provide support for his contention that the potential for physical harm was greater in San Joaquin County than in Alameda County. Therefore, considering the absence of persuasive reasons for sentencing appellant in Alameda County, and the existence of persuasive reasons for sentencing appellant in San Joaquin County, the trial court's decision was an appropriate exercise of its discretion.

Last, to the extent that appellant imports separate legal claims in support of his present claim of prejudicial judicial bias (AOB 159 ["Judge Platt's improper instructions, admission of the prosecutor's exhibits to the retrial jury, while excluding defense exhibits . . . ."]) respondent addresses those contentions *post*, separately and cumulatively.

In sum, although the trial court's conduct may have been imperfect on occasion, it did not deprive defendant of a fair trial, the effective assistance of counsel, or a reliable penalty determination. (See *People v. Snow*, *supra*, 30 Cal.4th at p. 82.)

IV. THE TRIAL COURT DID NOT COERCE A DEATH VERDICT

In this claim, appellant contends the death judgment must be set aside because of trial court errors which, separately and cumulatively, resulted in a coerced death verdict in the penalty retrial. Accordingly, appellant argues, he was denied certain state and federal constitutional rights. (AOB 165-166.)

Specifically, appellant assigns error to the trial court as follows: 1) failing to poll the jurors as to whether there was a reasonable probability of reaching a verdict (AOB 193-198); 2) implying that deliberations would continue for an additional month or until a verdict was reached (AOB 198); 3) characterizing the jury's efforts as "a drop in the bucket" (AOB 199-200); 4) telling the jurors to "roll up your sleeves and go back to work" (AOB 199-200); 5) suggesting to the jury that they reverse role-play during their deliberations (AOB 200-203); 6) permitting certain of the prosecution's charts, used in penalty phase argument, to be used in deliberations (AOB 181-185); 7) excluding the jury's use of one defense chart, used in argument, during deliberations (AOB 185-193); and 8) refusing to grant a mistrial (AOB 165, 204).

Appellant's claim fails because none of the trial court's actions in assisting the jury during deliberations constituted error. The trial court was not obligated to ask the jurors whether there was a reasonable probability of reaching a verdict. Further, the trial court's instructions and suggestions did not, individually or taken together, constitute a coercive charge to the jury. Nor was there anything erroneous about the trial court's decisions concerning the jury's use of the prosecution and defense charts during deliberations. Last, the trial court's denial of appellant's motion for a mistrial was a proper exercise of discretion. If there was error, there is no reasonable probability it affected the penalty verdict.

A. Procedural Background

After the trial court instructed on the afternoon of Tuesday, May 16, 2000,[30] the jury received the case. (96 RT 20445.) Since it was approximately 3:15 p.m., the court suggested to the jurors that they not address any issues that afternoon, but decide what time they wanted to return the following morning to start deliberations. (12 CT 3167; 96 RT 20445-20448.)

The jurors began deliberations at 10:00 a.m. on Wednesday, May 17, and were excused for the day at approximately 3:30 p.m. (12 CT 3172; 96 RT 20470.)

The jury reconvened at 10:00 a.m. on Thursday, May 18. (12 CT 3176; 96 RT 204.) As Judge Platt prepared to send the jurors to resume their deliberations, he said, "All right. Thank you. Time to go to work." (96 RT 20477.) The jury was excused at 3:00 that afternoon and ordered to return on Monday, May 22 at 10:00 a.m. (12 CT 3176; 96 RT 20479.)

Deliberations resumed at approximately 10:15 a.m. on May 22. (12 CT 3180; 96 RT 20481-20482.) The jurors were excused for the day about 15 minutes earlier than usual. For this reason, the court ordered the jury back at 9:45 a.m. the following day stating, "I'm going to try and steal that 15 minutes back on the other side. 9:45, please." (12 CT 3180; 96 RT 20484.)

On Tuesday, May 23, the jury resumed deliberations in the morning and was excused in the afternoon. (12 CT 3184; 96 RT 20487-20488.)

Deliberations continued the next morning, May 24, at 10:00 a.m. (12 CT 3188; 96 RT 20477.) Before the jury resumed deliberations, the court said, "We will send you back out to go to work." (96 RT 20490.) The

---

[30] The events at issue took place in 2000, unless other noted.

court excused the jury for the day at 2:45 p.m. (12 CT 3188; 96 RT 20490-20491.)

The jury deliberated for a shortened period of time on Thursday, May 25, because certain jurors had family members who were visiting. (12 CT 3192; 96 RT 20493-20494.) Outside the presence of the jury, the court advised counsel that based on the previously agreed-upon schedule, which was communicated to the jury, deliberations could continue until the end of June. (96 RT 20495.) The court indicated its intention to substitute alternates if sitting jurors could not continue to serve after that time. (96 RT 20495.) The court did not anticipate dealing with the potential of a hung jury in the near-term, although the court acknowledged that it did not know "whether or not they have issues" and "how close they are or not." (96 RT 20495.) The court advised counsel that they should plan to use the time during deliberations to certify the record. (96 RT 20495 ["I don't intend to sit here idly and not work while they're working"].) The jury was excused at 1:00 p.m. and ordered to return at 10:00 a.m. on Tuesday, May 30 because it was a holiday weekend. (12 CT 3192; 96 RT 20497.)

At approximately 2:00 p.m., on Tuesday, May 30, the jury foreperson advised the court that the jury was at an impasse and needed further instructions. (12 CT 3196, 3208; 96 RT 20500.) Pursuant to the court's request, the foreperson chronicled the number of ballots taken and the breakdown of the votes, without specifying the direction of the split. (96 RT 20500.) The jury voted six times. Each vote occurred on a different day. The first vote occurred on the first day of deliberations and was six and two, with four undecided. (96 RT 20500-20501.) The next vote was eight and two, with two undecided. (96 RT 20501.) The third vote was taken on May 23. The breakdown was seven and three, with two undecided. (96 RT 20501.) On May 24, the breakdown was eight and two, with two undecided. (96 RT 20501.) On May 25, the vote was nine and two, with

one undecided. (96 RT 20501.) That day, May 30, the breakdown was nine and three. (96 RT 20501.)

The court asked the foreperson to be more specific about the jury's request for further instruction. The foreperson only replied that they were at an impasse. (96 RT 20501.) The court told the jurors that they had been in deliberations for approximately 20 hours and had "come a very long way." (96 RT 20502.) The court explained that the issues they were grappling with were "literally life and death issues." (96 RT 20502.) The court continued:

> And the only instruction that I can give you at this point in time is 20 hours of discussion does not amount to an impasse that we cannot justify going further and having further discussion. [¶] At what point that is or is not the case, I don't know. But I think you owe it to yourselves to continue to talk about the matter and see if there is further discussion. See if there is any change in any fashion. Before we decide whether or not we are truly at an impasse. [¶] So my instruction to you at this point in time is, as I said this morning - - it's time again to roll up your sleeves and go back to work.

(96 RT 20502.)

After the jury left, defense counsel, Michael Fox, recounted for the court what Judge Delucchi did when the first penalty phase jury reached a similar point. Fox told the court that after the second impasse, Judge Delucchi asked the jurors if further deliberations would be helpful. (96 RT 20503.) Fox requested the court do the same if the jury came back a second time and stated they were at an impasse. (96 RT 20504.) He also asked the court to let the jurors know that a non-verdict was "something that the law embraces." (96 RT 20504.) The court responded that the law accepted a non-verdict and that each judge, in his or her estimation, had to decide when that point was reached. (96 RT 20504.) Responsive to Fox's request, the court stated it would poll the jurors if the jury came back a second time indicating an impasse. (96 RT 20505.) The court characterized 20 hours of

deliberation as "a drop in the bucket" on a life and death issue. (96 RT 20505.)

Further, the court explained that if deliberations continued until the end of June—the timeframe the jury was provided for when the trial would conclude—the court would have to consider replacing jurors that might need to be released. The court also contemplated the possibility of having to declare a mistrial before that time. (96 RT 20506.) The court observed, "And quite frankly, I would hope that in 20 hours, someone cannot decide a life and death issue." (96 RT 20506.)

Before excusing the jury on the afternoon of May 30, the court reread certain instructions to the jury: CALJIC numbers 17.30 (Jury Not To Take Cue From The Judge), 17.31 (All Instructions Not Necessarily Applicable), 17.40 (Individual Opinion—Duty to Deliberate), and 17.41 (How Jurors Should Approach Their Task). (96 RT 20507-20509.)

Judge Platt also told the jurors that just because he encouraged them to continue deliberating, he was not suggesting that any juror should change his or her position. (96 RT 20507.) He added, "That is entirely up to you as individuals . . . I have no position other than to move you along until and if you can reach a verdict." (96 RT 20507.) The court also noted that in light of the issues the jurors were dealing with, the time they had spent in deliberations was "a drop in the bucket." (96 RT 20509.) The court stated that until it decided further deliberations would be futile, "I'll have you continue to roll up your sleeves and go to work as best you can." (96 RT 20509.) The court added:

> One of the ways that I would suggest you do it - - and it is merely a suggestion. Because obviously now there have been some positions taken. During the discussions that you have in the next few days, if you take the other side's position, advocate it as if it were yours, see whether or not that changes your own thoughts about your position. [¶] Discuss it again with the other

> jurors. Do that talking, do that deliberating. And then we'll see where we are.

(96 RT 20509.) The jury was excused for the day. (12 CT 3196; 96 RT 20509.)

After the jury left, Fox moved for a mistrial based on the court's instructions and comments, which Fox argued invaded the province of the jury. (96 RT 20510-20511.) The court denied the motion stating that it carefully construed its comments so as to assist the jury's ability to deliberate. (96 RT 20511-20513.)

The jury returned the next morning on Wednesday, May 31 and resumed deliberations. (12 CT 3200; 96 RT 20515.) At the start of the afternoon session, the court advised counsel that it received two notes from the jurors. (96 RT 20518.) The communication from the foreperson advised the court that the jury decided to recess at 12:30 p.m. the following day, June 1, and return at 1:00 p.m. on June 5 due to a previously acknowledged commitment for one of the jurors. (12 CT 3207; 96 RT 20518.) The other communication was from juror number five requesting several days' absence to accompany her daughter on a school trip. (96 RT 20518.) The court agreed to the first request and took juror number five's request under submission. (96 RT 20520-20521.)

When court resumed on the morning of June 1, the court sent the jurors to the deliberation room stating, "We will send you back out to resume deliberations. Back to work, folks." (97 RT 20524.) Shortly thereafter, the jury requested the prosecution's timeline exhibit used during closing argument. (12 CT 3201, 3206; 96 RT 20522.) Defense counsel objected because, he contended, the exhibit was argument and not evidence. (97 RT 20525, 20528-20529, 20532-20533.) The prosecutor, citing this Court's decisions in *People v. Pride* (1992) 3 Cal.4th 195 and *People v.*

Gordon (1990) 50 Cal.3d 1223,[31] argued the court had discretion to allow the timeline to go back to the jury. (97 RT 20525-20527.)

The court advised counsel that it was going to agree to the jury's request. However, it would instruct the jury that the exhibits were not evidence and could only be used to refresh their memories about the relevant testimony. (97 RT 20528-20529.) The court also stated that it would tell the jury that if there was any other aspect of either attorney's argument they needed, it would be provided, subject to the same limitations. (97 RT 20529.)

Thereafter, the court twice instructed the jury that it was "absolutely critical" that they understand the timeline exhibits[32] were not evidence and could only be used to aid discussions of the evidence. (97 RT 20530-20531.) The jurors nodded, presumably indicating they understood. (97 RT 20535.) The court also asked the jury to speak up if there were other things the court could provide to assist with deliberations. (97 RT 20531.)

After the jury left the courtroom, defense counsel moved for a mistrial. (97 RT 20533-20534.) The court denied the motion stating that it was fulfilling its obligation to assist the jury in their deliberations. (97 RT 20534.)

A little while later, the foreperson requested the defense poster board exhibits, which explained mitigating and aggravating factors. (12 CT 3201, 3205; 97 RT 20536.) It was unclear if the jury wanted the definitions or examples of the factors. The court stated its intention to send in the exhibits that encompassed both. However, the court cautioned the jury that

---

[31] Overruled on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787, 835.

[32] The three boards were marked as Court's Exhibits "OOOO," "PPPP," and "QQQQ." (97 RT 20532.)

the definitions were defense counsel's interpretation of the definitions. (97 RT 20538-20539.)

Outside the presence of the jury, the court reviewed with the parties which of the defense argument exhibits would be provided to the jury. Defense counsel explained that there were three separate sets of boards. The court agreed to provide the jury with the first set, which was compromised of three boards. (97 RT 20540-20541.) Another board, which contained defense counsel's definition of a mitigating factor, was also permitted to go to the jury. (97 RT 20541.) Additionally, there were four boards that discussed mitigating and aggravating factors, as provided for in the CALJIC instructions. (97 RT 20541.) After some debate, the court allowed two of the four boards that it determined were responsive to the jury's request. (97 RT 20541-20544.)

When the jury returned, the court advised that it was sending the defense boards in, although two concerned definitions already provided for in the court's instructions. (97 RT 20544.) The court sent the jury off stating, "Okay. Alright. Get some exercise and go back there and start to work then. [¶] We'll send these back."[33] (97 RT 20544-20545.)

A short while later, the foreperson requested the defense poster board that discussed the manner in which aggravating and mitigating evidence was to be weighed and considered.[34] (12 CT 3202, 3204; 97 RT 20546.)

---

[33] The defense boards were marked as Court's Exhibits "RRRR," "SSSS," "TTTT," and "UUUU." (97 RT 20545.)

[34] This board was marked as Court's Exhibit number "VVVV." (12 CT 3202.) As described by defense counsel, it stated, "You must vote for life if mitigation outweighs aggravation . . . you must vote life if mitigation and aggravation are equal. [¶] You must vote life if aggravation outweighs mitigation, but not substantially. [¶] You must vote life if aggravation substantially outweighs mitigation, but you believe death is not the appropriate punishment . . . [You] may vote for death . . . There is never a

(continued...)

The court distinguished this particular board as "pure argument." Although it was a correct statement of the law, unlike the other boards provided to the jury, it did not reference matters related to the evidence. (97 RT 20547.) The prosecutor reiterated his objection to any defense boards going back to the jury that included defense counsel's interpretation of the law. (97 RT 20547-20548, 20551.) The court explained, in detail, why it permitted certain of the boards to go back and not others. (97 RT 20551.) In short, the court found that the board in question commented on the ultimate issue before the jury and accorded improper significance to defense counsel's argument on the issue. (97 RT 20552.) In the court's view, the board was not an argument or comment about facts or circumstances that would lead them to decide the issue of penalty. (97 RT 20552-20553.)

Before explaining its decision to the jury, the court—responding to defense counsel's concern (97 RT 20550, 20555), corrected the jury's understanding of what the defense board said (97 RT 20554) and, accordingly, what defense counsel had argued. Then, the court explained how the board encompassed the ultimate issue they were to decide in contrast to the other boards that the court had allowed. (97 RT 20554.)

After the jury left the courtroom, defense counsel moved for a mistrial a second time, which the court also denied. (97 RT 20555-20556.) Before adjourning for their extended weekend break, the jury returned to court and the foreperson advised that they decided to take a few days off from deliberations the following week to accommodate one juror's scheduling conflict. (12 CT 3202; 97 RT 20559.)

(...continued)
mandatory vote for death, even if the aggravation substantially outweighs mitigation, and you believe death is appropriate." (97 RT 20548-20549.)

On Monday afternoon, June 5, the jurors continued their deliberations beginning at approximately 1:00 p.m. (12 CT 3213; 97 RT 20562.) Before the jurors left the courtroom for their deliberations, the court said, "All right. Time to go to work." (97 RT 20562.) The jurors left for the day at 3:30 p.m. (12 CT 3213; 97 RT 20565.)

The jurors returned to their deliberations at approximately 10:00 a.m. the next day, Tuesday, June 6. (97 RT 20567.) At the start of the afternoon session, the court announced the jury had reached a verdict. (97 RT 20573.)

B. General Legal Principles

Jurors can be asked to continue deliberating when, in the exercise of its discretion, the trial court finds a reasonable probability they will be able to reach agreement. (*People v. Howard* (2008) 42 Cal.4th 1000, 1029, citing Pen. Code, § 1140.)[35]

> The determination as to whether there is a reasonable probability of agreement rests within the sound discretion of the trial court. [Citation.] "Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency [citation], the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived '"as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered."'" [Citation.]

(*People v. Harris* (2005) 37 Cal.4th 310, 363-364.)

---

[35] Penal Code section 1140 provides, "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

"Any claim that the jury was pressured into reaching a verdict depends on the particular circumstances of the case. [Citations.]" (*People v. Pride* (1992) 3 Cal.4th 195, 265.)

C. The Trial Court Conducted the Requisite Inquiry In Determining Whether There Was a Reasonable Probability the Jury Could Render a Verdict

Appellant argues that after the foreperson advised the jury was at an impasse, the trial court failed to conduct an inquiry to determine if there was a reasonable probability of reaching a verdict. (AOB 193-198.)

On the contrary, this Court has held that a trial court does not have a duty to specifically ask jurors if further deliberations would help. Further, the trial court here conducted the requisite inquiry, the manner of which has been approved by this Court.

In *People v. Bell* (2007) 40 Cal.4th 582, this Court reiterated that "[w]hile the trial court has a duty to avoid coercing the jury to reach a verdict, we have held that inquiry as to the possibility of agreement is 'not a prerequisite to denial of a motion for mistrial.' [Citation.]" (*Id.* at pp. 616-617.) In *Bell*, the defendant argued the trial court erred in its response to the jury's note concerning an 11-to-1 impasse during guilt phase deliberations. (*Id.* at p. 612.) Although the guilt phase was not especially long, the jury heard "extensive and complicated" expert testimony from both sides, which the Court termed a "complex expert debate." (*Id.* at p. 617.) At the point at which an impasse was reached, the jury had deliberated for approximately 10 hours. (*Ibid.*) This Court found the trial court's conclusion that further deliberations were necessary—without having polled the jurors—was not unreasonable based on those circumstances. (*Ibid.*)

Here, the penalty retrial jury heard evidence and argument over a two-month period, which included not only testimony concerning aggravating

and mitigating factors, but also extensive testimony on the facts of the crime—essentially, guilt phase evidence. Like the guilt phase jurors in *Bell*, the jurors in this case heard complicated and highly technical expert testimony from both sides. Yet, unlike the jurors in *Bell*, at the point of impasse, the jurors here were also deliberating the issue of whether the penalty would be life or death. Therefore, it was not unreasonable for the trial court to conclude, without polling the jurors, that further deliberations might produce a verdict.

Further, the inquiry the trial court undertook at the point of the declared impasse was proper. In *People v. Proctor* (1992) 4 Cal.4th 499, during deliberations, the jury advised the trial court that it had reached an impasse and requested guidance as to how to proceed. (*Id.* at p. 538.) The court asked the foreperson for the numerical division of the jurors, without disclosing the breakdown for guilty or not guilty verdicts. (*Ibid.*) This Court approved the trial court's inquiry, finding it was conducted in a neutral manner and in service of determining whether further deliberations would be productive. (*Id.* at p. 539.)

In this case, the trial court conducted the same inquiry utilized in *Proctor*. The court asked for the number of ballots taken and the numerical breakdown. (96 RT 20500.) The jury took six ballots. The first ballot was six and two, with four undecided. (96 RT 20500-20501.) The next vote was eight and two, with two undecided. (96 RT 20501.) The third was seven and three, with two undecided. (96 RT 20501.) On the fourth ballot, the breakdown was eight and two, with two undecided. (96 RT 20501.) The next was nine and two, with one undecided. (96 RT 20501.) The last ballot was nine and three. (96 RT 20501.) Taken together, these ballots strongly suggested the deliberations were progressing. Four jurors, who were initially undecided, had taken positions. Further, the most recent numerical breakdown—nine to three—also suggested a verdict was

reasonably probable. (See *People v. Harris*, *supra*, 37 Cal.4th at pp. 364-365 [record supported trial court's determination that jury had not reached impasse where each successive ballot taken revealed changes in votes].) Moreover, in addition to asking for the numerical breakdown of the ballots, the court asked the foreperson if the jury could be more specific about its request for further instruction. The court then tailored its response to the jury's needs. (96 RT 20501-20502.)

Appellant cites no controlling or persuasive authority for his proposition that, on May 30, when the first—and only—indication came from the jury that deliberations were stalled, the court was required to ask each juror whether he or she felt there was a reasonable probability of reaching a verdict. Instead, he points to Judge Delucchi's handling of the first jury's impasse. (AOB 197.) However, a closer look at that portion of the record only serves to undermine appellant's position.

After deliberations commenced in the first penalty phase on September 17, 1999, the jury sent the court a note asking what would happen "if there's a hung jury." (9 CT 2475; 60 RT 12278-12279.) In the ensuing days, the court replaced a juror who had refused to deliberate. (60 RT 12304-12305.) Thereafter, deliberations continued. On September 22, the foreperson sent a note advising the jurors were "hopelessly deadlocked." (9 CT 2486; 60 RT 12340.) After telling counsel that it was premature to declare a mistrial (60 RT 12340), Judge Delucchi brought the jury in and asked for the number of ballots taken and the split (60 RT 12342). The foreperson advised they had taken eight votes and the most recent split was six to six. (60 RT 12342.) Judge Delucchi instructed the jurors to continue with their deliberations, but he adjourned court early and suggested to the jurors that they go home and sleep on it in the hope that when they returned in the morning, they would have a fresh perspective. (60 RT 12343.)

Deliberations continued until September 27, when the jury advised a second time that they were "deadlocked." (60 RT 12366.) Judge Delucchi asked for the number of ballots taken and the split. The foreperson advised that they had voted a total of 12 to 15 times and the most recent split was eight to four. (60 RT 12368.) At that juncture, the court asked the foreperson if there was anything the court could provide in the way of instructions, readback, or evidence that would assist them. The foreperson said no. (60 RT 12368.) The court then polled the jurors to determine if there was a reasonable probability of reaching a verdict. Each answered in the negative. (60 RT 12368-12369.)

Thus, the record shows that when the first penalty phase jury explicitly advised that the situation was "hopeless," Judge Delucchi conducted the exact inquiry that Judge Platt did with the retrial jury at a similar juncture. Notably, Judge Delucchi did not poll the jurors until they made clear a second time that they were deadlocked. Judge Platt had clearly anticipated polling the jurors, as defense counsel requested, if their deliberations stalled a second time. (96 RT 20504-20505.) So, both judges approached the issue in the same manner.

In short, the record demonstrates the trial court discharged its statutory obligation in determining whether there was a reasonable probability the jury could agree on a verdict. The record further supports the court's determination that the jurors had not become deadlocked and unable to reach a verdict.

D. Taken Alone or Together, the Trial Court's Instructions and Suggestion to the Jury Did Not Amount to an Improper "*Allen* Charge"

Appellant contends the trial court's instructions and suggestion to reverse role-play amounted to an impermissible intrusion during

deliberations. Respondent disagrees. There was nothing intrusive or coercive about the trial court's comments.

Appellant's claim is based on *People v. Gainer* (1977) 19 Cal.3d 835, 852 (*Gainer*) (AOB 199), which held:

> [I]t is error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion on the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried.

This Court explained that such an instruction, known as an "*Allen* charge" (for an instruction upheld in *Allen v. United States* (1896) 164 U.S. 492) or a "dynamite charge" (because it was meant to "blast" a verdict out of a deadlocked jury), "instructed the jury to consider extraneous and improper factors, inaccurately states the law, carries a potentially coercive impact, and burdens rather than facilitates the administration of justice." (*Gainer*, *supra*, 19 Cal.3d at pp. 842-843; see *People v. Barraza* (1979) 23 Cal.3d 675, 682.)

"Coercion has been found where the trial court, by insisting on further deliberations, expressed an opinion that a verdict should be reached." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 775.) The basic question is "whether the remarks of the court, viewed in the totality of applicable circumstances, operate to displace the independent judgment of the jury in favor of considerations of compromise and expediency. Such a displacement may be the result of statements by the court constituting undue pressure upon the jury to reach a verdict, whatever its nature, rather than no verdict at all." (*People v. Carter* (1968) 68 Cal.2d 810, 817.)

Here, the trial court's comments and suggestion to the jury had none of the hallmarks of the type of charge disapproved in *Gainer*. First, there was nothing coercive with respect to the court's characterization of the first 20 hours of the jury's deliberations as a "drop in the bucket" (96 RT 20509)

and telling the jurors to "roll up your sleeves and go back to work" (96 RT 20502). The court's comments were emblematic of the court's work ethic, as well as the court's view of the gravamen of the "life and death issues" the jury was called upon to decide.

Throughout the course of the jury's deliberations, including before the jurors advised that their deliberations had stalled, the court exhorted the jurors to keep their noses to the grindstone.[36] (96 RT 20477 ["Time to go to work"], 20484 ["I'm going to try and steal that 15 minutes back on the other side"], 20490 ["We will send you back out to go to work"], 20509 ["[R]oll up your sleeves and go to work as best you can"];[37] 97 RT ["We will send you back out to resume deliberations. Back to work folks."], 20544-20545 ["Okay. Alright. Get some exercise and go back there and start to work then"], 20562 ["All right. Time to go to work"].)

As for the drop-in-a-bucket characterization, the court repeatedly qualified that comment by referring to the enormity and importance of the task before the jury. On May 30, when the jurors indicated they were at an impasse, the court noted that they had "come a very long way." (96 RT 20502.) In other words, the court acknowledged the efforts the jurors had already expended on the case. However, the court reminded the jurors, and the attorneys, that investing 20 hours in deliberations was not inappropriate or unusual given that they were dealing with "literally life and death issues." (96 RT 20502, 20505.) In light of this record, appellant's contention that the court was demeaning the minority jurors' efforts is baseless.

---

[36] The court held itself, and the attorneys, to the same work standard. It made similar comments to the attorneys while the jury was deliberating. (96 RT 20495 ["I don't intend to sit here idly and not work while they're working]".)

[37] See *People v. Whaley* (2007) 152 Cal.App.4th 968, 975, 982 [words "if you can" suggest jury may reach deadlock and do not tell jurors they must reach verdict].

With respect to the trial court's suggestion that the jurors switch positions and reverse role-play, lower courts have addressed this practice and found that it does not run afoul of *Gainer*. In *People v. Whaley* (2007) 152 Cal.App.4th 968, the Court of Appeal found that this approach to facilitating deliberations comported with *Gainer*.[38] (*Id.* at pp. 982-983; see also *People v. Moore* (2002) 96 Cal.App.4th 1105, 1121.) First, the role playing approach applied to minority and majority jurors alike, in contrast to an improper *Allen* charge, which asks only minority jurors to reassess their positions. (*People v. Whaley*, *supra*, 152 Cal.App.4th at p. 983.) Second, there was nothing about the supplemental instruction that was inherently coercive in light of the trial court having emphasized the necessity for jurors to use their independent judgment. (*Ibid.*) Third, the court's comment about reverse role-playing was a suggestion and not an order. (*Ibid.*) Last, defense counsel failed to object to the supplemental instruction at the time. (*Ibid.*)

Here, the situation is practically identical to that in *Whaley*. The court's comment about reverse role-playing was directed to all of the jurors, not just the minority jurors. (96 RT 20509.) The court reinstructed the jury with CALJIC number 17.40, which made clear the need for each juror to render an individual determination. (96 RT 20508.) The court explicitly stated that its comment about reverse role-playing was a suggestion. (96

---

[38] The trial court's supplemental instruction included the following language: "'May I suggest that since you've been unable to arrive at a verdict using the methods that you have chosen, that you consider to change the methods you have been following, at least temporarily and try new methods. [¶] For example? You may wish to consider having different jurors lead the discussions for a period of time. You may wish to experiment with reverse role-playing by having those on one side of the issue present and argue the other side's positions and vice versa. This might enable you to better understand the other's positions.'" (*People v. Whaley*, *supra*, 152 Cal.App.4th at p. 981.)

RT 20509.) And, while defense counsel objected, it was after the fact. (96 RT 20510.)

In sum, the court's comments and suggestion did not operate—separately or in combination—to displace the independent judgment of the jury in favor of considerations of compromise and expediency. Further, the trial court's explicit admonitions on the purpose of the further instructions and suggestion ensured that the jurors' independent judgment would not be usurped. (96 RT 20507-20509 [including, "And I don't want you to misperceive what the Court's position is. I have no position other than to move you along until *and if* you can reach a verdict," emphasis added].)

E. The Trial Court's Decisions on the Jury's Use of the Prosecution and Defense Charts Constituted a Proper Exercise of Its Discretion

Appellant's challenge to the trial court's rulings on allowing the jury to have certain visual aids during their deliberations should be rejected. The trial court's decisions constituted a proper exercise of its discretion.

"[A] trial court's inherent authority regarding the performance of its functions includes the power to order argument by counsel to be reread to the jury or to be furnished to that body in written form. The exercise of such power must be entrusted to the court's sound discretion." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1260, overruled on another ground in *People v. Edwards* (1991) 54 Cal.3d 787, 835.) A trial court has discretion under Penal Code section 1138[39] to provide a readback of counsel's

---

[39] Penal Code section 1138 states: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

arguments, although it is not required to do so. (*People v. Sims* (1993) 5 Cal.4th 405, 453; see *People v. Gurule* (2002) 28 Cal.4th 557, 649; *People v. Pride*, *supra*, 3 Cal.4th at p. 266.)

In this case, in providing the jury with certain prosecution and defense charts—used during closing arguments—the trial court was responding to the jury's requests. (12 CT 3205-3206.) The majority of the aids provided were defense boards. (97 RT 20532, 20545.) The trial court excluded one requested defense aid, which, in the court's view, accorded too much significance to defense counsel's view on the ultimate question before the jury. (97 RT 20552; Court's Exh. VVVV [repeatedly advising "You must" with respect to a decision favoring life imprisonment and one reference that "[You] may" with respect to voting for death].) The court also explained that this particular board did not comment on facts related to the evidence. (97 RT 20551-20553.) Additionally, the court excluded two other defense boards because they were not responsive to the jury's request. (97 RT 20541-20544.) Under these circumstances, the court's actions were a proper exercise of its discretion in facilitating a verdict, not directing one in particular.

Further, inasmuch as appellant contends the court promised the jury the moon and then reneged on this, given its rulings on three of the defense boards, the court made clear to counsel that any additional request by the jury would be subject to the limitation that it aid in consideration of the evidence. (97 RT 20529.)

Even if the court erred, there was no prejudice.[40] The court expressly, and repeatedly, instructed that the charts were only to be used to aid in

---

[40] Appellant argues for application of a standard of "'heightened scrutiny.'" (AOB 184.) However, the cases from this Court he cites

(continued...)

discussions of the evidence; they were not evidence themselves. (97 RT 20530-20531, 20538-20539.) It is presumed the jury understood and followed the instruction. (*People v. Jablonski* (2006) 37 Cal.4th 774, 834.) Moreover, at the point the charts were provided, the jury had already deliberated for about 21 hours. (96 RT 20509.) After receiving the charts, the jurors deliberated for approximately another six hours before returning a verdict.[41] Therefore, the bulk of the deliberations occurred without benefit of the parties' charts.

F. The Trial Court Properly Denied Appellant's Motion for a Mistrial Because There Was No Merit to Appellant's Contention that the Court Coerced a Death Verdict

As stated above, a trial court's denial of a motion for a mistrial is reviewed under the deferential abuse-of-discretion standard. (*People v. Gonzales*, *supra*, 52 Cal.4th at p. 314.)

Because appellant failed to show that the trial court's actions—individually or in combination—coerced a death verdict, his motions for a mistrial were properly denied. The court's decision to deny the motion for a mistrial was an appropriate exercise of discretion and, accordingly, did not itself serve to coerce a verdict.

Moreover, if any of the court's instructions or rulings, geared toward facilitating the jury's deliberations, were improper, there is no reasonable probability that the outcome was affected. (See *People v. Brown* (1988) 46 Cal.3d 432, 446-448 [error in the penalty phase of capital trial that is not of

---

(...continued)
concern the potential for prejudice in capital cases, which involved issues of joinder and severance of inflammatory charges.

[41] The boards went to the jury early in the afternoon session on June 1. (12 CT 3201.) The jurors returned to deliberations at 1:00 p.m. on June 5 (12 CT 3213) and returned a verdict at the start of the afternoon session on June 6 (97 RT 20573).

federal constitutional dimension is subject to harmless-error analysis under the reasonable-possibility test].)

The prosecution's presentation of evidence on the circumstances of the crimes was incredibly compelling. The gravamen of the evidence was that appellant planned the murders, enjoyed executing his victims, and did so either because he needed money or because he wanted to exact revenge. The jury also heard gripping evidence on how the murders impacted family members of the victims. On the other hand, appellant's call for mercy which argued, in essence, that he carried out the murders because he had a tough childhood and used drugs, fell well short of convincing the jury that his life should be spared. This was not a close question on the issue of penalty.

Further, any error was ameliorated by the trial court's repeated admonitions, which made clear to the jury that they were to render individual opinions on the question of penalty based solely on the evidence presented.

Last, since there was no abuse of discretion in denying appellant's motions, there was no federal constitutional error. (See *People v. Staten*, *supra*, 24 Cal.4th at p. 448, fn. 1 [finding no predicate error on which federal constitutional claims can be based].)

V. THE PROSECUTOR'S ACTIONS DID NOT, SINGLY OR IN COMBINATION, CONSTITUTE PREJUDICIAL MISCONDUCT

Appellant contends that a pervasive pattern of prosecutorial misconduct rendered his trial fundamentally unfair. Accordingly, he seeks reversal of the guilt and penalty judgments. (AOB 205-288.)

Respondent disagrees. None of the instances appellant cites in support of his claim—either singly or in combination—constitute prejudicial misconduct. Thus, reversal of either verdict is unwarranted.

A. General Legal Principles

A prosecutor's conduct violates the federal Constitution when it is "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process," whereas a prosecutor's conduct that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "the use of deceptive or reprehensible methods to persuade either the court or the jury." (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) This Court noted the "critical inquiry on appeal is not how many times the prosecutor erred but whether the prosecutor's error rendered the trial fundamentally unfair or constituted reprehensible methods to attempt to persuade the jury." (*People v. Hinton* (2006) 37 Cal.4th 839, 864.)

An appellate court generally reviews a trial court's ruling on prosecutorial misconduct for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)

B. There Was No Prejudicial Misconduct Related to the Prosecutor's Verbal or Non-Verbal Communication

Appellant complains the prosecutor used prejudicial inflammatory and derogatory language during the entirety of the proceedings. Specifically, appellant points to the prosecutor's repeated use of the following words: "'ludicrous,'" "'ridiculous,'" "'preposterous,'" "'outrageous,'" "'outrage,'" "'offensive,'" "'umbrage,'" "'aghast,'" "'shock,'" and, " bull.'" (AOB 217.)

As a threshold matter, it is axiomatic that vigorous representation is not the equivalent of misconduct. (*People v. Valencia* (2008) 43 Cal.4th 268, 301.) The prosecutor's perceived penchant for descriptive language

falls far short of reprehensible methods constituting prosecutorial misconduct.[42] (See *People v. Stitely* (2005) 35 Cal.4th 514, 559-560 [not improper for the prosecutor to warn the jury not to "fall[] for" defense counsel's "'ridiculous'" efforts to let the defendant "'walk'" free; nor was it improper to describe counsel's attack of victim as "'outrageous'"]; see also *People v. Dykes* (2009) 46 Cal.4th 731, 771-772 [prosecutor's comment during closing argument that he was "'shocked'" that someone of defense counsel's reputation would interject race into the trial was not prejudicial misconduct].)

Appellant also argues that the prosecutor, George Dunlap, derogated and personally attacked defense counsel, Michael Fox, and, in the process, misled the court. (AOB 219.)[43] In support of this contention, appellant cites Dunlap's statements to the court on October 18, 1999, outside the presence of the jury, concerning Fox's ongoing absence from the proceedings and perceived infirmities with a medical excuse Fox proffered in absentia. (AOB 219.) However, when viewed in the proper context, the prosecutor did not inappropriately attack Fox or mislead the court.

The previous two weeks, on October 4 and October 12, Fox was absent from the proceedings due to an undisclosed medical problem. (61 RT 12385, 12392.) On October 12, second-chair defense counsel Slote, who was supposed to appear that day, was also absent. (61 RT 12392.)

---

[42] Of appellant's 30 specific citations to the record (AOB 217), approximately 27 instances occurred outside the presence of the guilt and penalty retrial juries.

[43] Appellant seems to suggest that since Fox had the "enormous responsibility of defending a multiple-murder defendant in [counsel's] first capital case" (AOB 219), the prosecutor—and the court—should have been especially sensitive to Fox's responsibilities and inexperience. This, more than anything appellant accuses the prosecutor of doing, demeans Fox's integrity and apparent abilities.

This prevented the court from setting a date for the penalty retrial. Dunlap expressed his frustration that he was not provided notice about counsel's absence and that there had already been a two and one-half week delay in choosing a trial date. Now, there would be an additional delay until October 18. (61 RT 12392-12934.) Dunlap pointed out that the prosecution team, and the court, traveled two hours to Alameda County for nothing. (61 RT 12394.) The court ordered that Fox personally appear on October 18 or, in lieu of a personal appearance, that he produce a statement from his physician stating when he would be ready to proceed with the retrial. (61 RT 12395-12399.)

On October 18, Slote presented a note to the court from a county health clinic doctor, which stated Fox could return by November 1. (61 RT 12402-12404.) However, Slote was quick to caution the court that the time estimate might not be reliable because the note was only for the purpose of letting "your boss know you're going to be gone for such and such a time. (61 RT 12404-12405.) At that juncture, given that three weeks had passed and there was still no reliable time estimate from the defense, Dunlap questioned—based on his personal knowledge of such clinics—whether the note was, in fact, authored by a doctor or, as was Dunlap's experience, by a nurse practitioner. (61 RT 12405-12406.) This was not an attempt to mislead the court, as appellant contends. Dunlap was trying to get a trial date. He also observed that there was no information in the note about the nature of Fox's illness. (61 RT 12406.) The prosecutor was concerned further delaying closure for the victims' families. (61 RT 12407.) He also expressed frustration with another fruitless two-hour trip to Alameda County. (61 RT 12407.) Based on the circumstance of the previous three weeks, Dunlap believed the defense was purposefully delaying the start of the retrial. (61 RT 12407-12409.)

In light of these circumstances, Dunlap's actions, as well as his views, did not constitute reprehensible conduct. Dunlap, rightfully, questioned the reliability of the medical excuse because it directly impacted the court's ability to set a date for the retrial. This is especially true in light of Slote's accompanying qualification that the date of November 1 was not certain. Also, contrary to appellant's contention (AOB 219), Fox's interests did not go unrepresented during the proceedings. The record demonstrates that co-counsel Slote was present and spoke on Fox's behalf. (61 RT 12410-12411.)

Appellant next challenges the prosecutor's purported prejudicial proclivity for editorializing during questioning of witnesses—defense experts, in particular. (AOB 223-246.) Appellant cites a number of instances where the trial court sustained defense objections to the argumentative nature of the prosecutor's questioning. However, sustained objections do not serve to transmute the questioning into misconduct. (*People v. Mayfield* (1997) 14 Cal.4th 668, 755 [a party generally is not prejudiced by a question to which an objection has been sustained]; see *People v. Pinholster* (1992) 1 Cal.4th 865, 943, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Even if appellant's criticisms of the form of some of the prosecutor's individual questions were valid, there is no showing that, viewed in context, the prosecutor's cross-examination of the defense witnesses constituted misconduct, much less that it was so prejudicial as to deprive appellant of a fair trial. (See *People v. Earp* (1999) 20 Cal.4th 826, 860 [prosecutor's aggressive questions based on evidence admitted at trial not misconduct]; see also *People v. Hinton*, *supra*, 37 Cal.4th at pp. 864-865 [finding no

prejudice from sustained objections to "asked and answered" questions or from "a series of leading questions" on foundational matters].)[44]

Notably, although appellant argues the conduct in question "poisoned the trial" (AOB 246), he does not specifically contend that the prosecutor's examination of any witness resulted in the deliberate production of inadmissible evidence or called for inadmissible and prejudicial answers. On the contrary, a review of the colloquies demonstrates that, to the extent that the witness answered the prosecutor's questions or comments, it was evidence that could properly have been elicited by questions not objectionable in form.

In any event, there was no prejudicial misconduct. Although the prosecutor should have abstained from editorializing, he was entitled to attempt to show that the defense witnesses were biased and that their opinions concerning the reasons why appellant committed the murders—family dysfunction and methamphetamine abuse—should not be given any weight by the jury. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 180, affd. sub nom. *Victor v. Nebraska* (1994) 511 U.S. 1.)

Further, the trial court's charge to the guilt phase and penalty retrial juries ensured that any misconduct was not prejudicial. The instructions included that the jurors were to base their decision on the evidence adduced at trial (48 RT 9889, 9893; 96 RT 20420), that statements of the attorneys were not evidence (48 RT 9890, 9895; 96 RT 20420), that they alone were

---

[44] In *Hinton*, the defendant complained of prosecutorial misconduct based on the prosecution's direct examination of a witness because the trial court sustained 34 defense objections, admonished the prosecution 10 times, ordered a response stricken 5 times, and held 9 sidebar discussions. In response, this Court noted the "critical inquiry on appeal is not how many times the prosecutor erred but whether the prosecutor's error rendered the trial fundamentally unfair or constituted reprehensible methods to attempt to persuade the jury." (*People v. Hinton*, *supra*, 37 Cal.4th at p. 864.)

to judge the credibility of the witnesses (48 RT 9902; 96 RT 20422), if an objection was sustained to a question, not to guess what the answer might have been or speculate as to the reason for the objection (48 RT 9890, 9895; 96 RT 20420), not to assume to be true any insinuation suggested by a question (48 RT 9890, 9895; 96 RT 20420), and not to consider for any purpose evidence that was stricken by the court (48 RT 9890, 9895; 96 RT 20420). It is presumed the jurors followed these instructions. (See *People v. Holt*, *supra*, 15 Cal.4th at p. 662.)

C. The Prosecutor Did Not Engage in Deceptive Practices or Intentionally Ignore the Trial Court's Rulings

Appellant also contends the prosecutor repeatedly flaunted the court's rulings and engaged in other deceptive practices, which resulted in prejudice. (AOB 246-257.)

As an example of misconduct, under this heading, appellant first points to the prosecutor's occasional use of the word "murder," during the guilt phase, to refer to the killings. (AOB 246-247.) First, insofar as the court sustained any defense objection to the prosecutor's use of the word, there was no prejudice. As argued above, a party generally is not prejudiced by a question to which an objection has been sustained (*People v. Mayfield* , *supra*, 14 Cal.4th at p. 755; see *People v. Pinholster*, *supra*, 1 Cal.4th at p. 943.)

Furthermore, the record does not suggest, nor does appellant argue, that these references improperly conditioned the jury to find appellant guilty of the alleged murders. Appellant admitted planning and committing the killings for revenge and for monetary gain and there was overwhelming evidence that corroborated his confession. Also, the jurors were instructed not to assume the truth of "any insinuation" suggested by a question asked of a witness. (48 RT 9890, 9895.) In short, there was no prejudice in the

guilt phase that resulted from the prosecutor's use of the word "murder" in referring to the killings.

Likewise, with respect to that portion of the prosecutor's direct examinations of Rodney Dove and Detective Johnson during the guilt phase (AOB 247-251), which ran contrary in some fashion to the court's rulings, there was no prejudice. Given the overwhelming evidence of appellant's guilt, whether other Charter Way Tow truck drivers passed drug tests or whether police found an inoperable antique shotgun in appellant's possession, in addition to the murder weapon, had no bearing on the verdicts. Further, with respect to the prosecutor's questioning of Detective Johnson that resulted in the shotgun testimony, the court admonished the jury at length:

> [A] moment ago, there [were] questions posed to Detective Johnson, who was going through his inventory in the search. And mentioned a shotgun was found. [¶] That was specifically an order of the Court that that not be mentioned in any fashion. And it was a violation of the Court's order to have the question asked. [¶] What you need to understand is the Court made its ruling because it was a nonfunctional firearm. Had nothing to do with this case. It was of antique value. It was in the house. had nothing to do with evidentiary value, which is why I excluded it. [¶] It was gone through by Detective Johnson, and in an inadvertent fashion, presented in his testimony. That's why I have to deal with that. [¶] You are not to consider it [in] any fashion. And understand that the question was asked in violation of the Court's order.

(33 RT 6881.)

Additionally, appellant's complaint that the prosecutor's questioning of Officer Happel called for prejudicial hearsay evidence regarding the fact that several of the cars in the Cal Spray parking lot had car alarms, is without merit. There was no prejudice. The prosecutor properly elicited the information later through the testimony of Officer Happel (79 RT 16380-16382) and Shayne Goodman (82 RT 16899-16901).

As for the prosecutor's display and use of mannequins to represent the murder victims, there was no prejudice. The mannequins were formally entered into evidence at the guilt phase and used by the prosecution's forensic pathology expert during the guilt phase and penalty retrial to illustrate the location and angle of the victims' wounds. (30 RT 6007-6008; 32 RT 6498 [People's Exh. No. 672, Loper]; 32 RT 6333-6335, 6493 [Exh. No. 673, Chacko]; 33 RT 6663-6664, 6781 [Exh. No. 674, Yu], 6644, 6780 [Exh. No. 675, Gao]; 82 RT 17115-17116 [Loper], 17139 [Chacko], 17159 [Yu], 17168 [Gao].) This evidence was relevant to appellant's intent to kill and the issue of premeditation and deliberation. This Court has approved the use of such evidence. (*People v. Medina* (1995) 11 Cal.4th 694, 754 [finding no trial court error in permitting prosecution to use life-size mannequin during guilt and penalty phases, including allowing mannequin into jury room during deliberations]; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1291 [use of mannequins facilitates jury's understanding of witness testimony or circumstances of crimes]; *People v. Brown* (1988) 46 Cal.3d 432, 442-443.)

As for possible prejudice, the Court has observed that "[t]he trial court was in a far better position than we to assess the potential prejudice arising from the display of such physical evidence." (*People v. Medina* (*Medina I*) (1990) 51 Cal.3d 870, 899.) Here, when defense counsel articulated concerns about the presence of the mannequins, the trial court took reasonable steps to minimize any prejudicial effect on the jurors. (34 RT 6995 [guilt phase]; 79 RT 16433[penalty retrial]; 85 RT 17852 [penalty retrial]; 90 RT 18944 [penalty retrial].)

Last, the prosecutor did not intentionally misrepresent a discovery violation involving Doctor Amen's raw data, as appellant contends (AOB 255-256). During the course of prosecution expert Doctor Mayberg's testimony in the guilt phase, it became clear the defense had raw data

corresponding to Doctor Amen's scans in its possession, which the prosecution did not. (46 RT 9387-9390.) Doctor Mayberg believed the raw data was "quite significant" to her opinion and testimony. (46 RT 9387.) Although defense counsel maintained the information was provided to the prosecution, he could not produce the form the prosecutor would have signed, acknowledging receipt of the discovery. (46 RT 9390.) The court ordered defense counsel to make copies of the data from the defense files. (46 RT 9390.) Defense counsel unsuccessfully attempted to avoid turning over the data. (46 RT 9391-9392.)

Subsequently, at the penalty retrial, defense counsel stated his intention to cross-examine Doctor Mayberg as to why she was prepared to offer an opinion in the guilt phase without having all of the relevant information—the raw data that the defense could not confirm was turned over to the prosecution and which the prosecution never received. (93 RT 19706-19707.) The prosecutor characterized this deceptive tactic as "intentional misconduct" on Fox's part because it would mislead the jury into thinking that Doctor Mayberg had the raw data available to her before she testified, which she simply chose to ignore. (93 RT 19707.) Thus, there was nothing inappropriate about the prosecutor's representations to the trial court about the Fox's machinations involving the raw data discovery.

D. The Prosecutor Did Not Commit Prejudicial Misconduct in His Opening Statement or Closing Arguments

Next, appellant challenges as prejudicial misconduct specific comments the prosecutor made in his opening statement in the penalty-phase retrial and in his closing arguments in all three phases of the trials. (AOB 256-282.)

We disagree. First, appellant has forfeited his right to challenge some of the remarks on appeal. Otherwise, the remarks at issue were not improper. However, if any were, appellant was not prejudiced.

A prosecutor is given wide latitude to vigorously argue the case, make remarks based on the evidence and inferences drawn from the record, and use appropriate epithets and harsh and colorful language. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Arias* (1996) 13 Cal.4th 92, 162; *People v.* Earp, *supra*, 20 Cal.4th at pp. 862-863.) However, the prosecutor should not mischaracterize the evidence, refer to facts not in evidence unless they are matters of common knowledge or drawn from common experience, misstate the law, urge the jury to view the crime through the victim's eyes, or attack the integrity of defense counsel. (*People v. Hill*, *supra*, 17 Cal.4th at p. 823; *People v. Bell* (1989) 49 Cal.3d 502, 538; *People v. Arias*, *supra*, 13 Cal.4th at pp. 160, 162.)

When evaluating the propriety of the prosecutor's comments to the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on other grounds in *People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1.) Appellant specifically contends that, during guilt-phase argument, the prosecutor committed misconduct when he impermissibly vouched for prosecution expert witness Mayberg while, at the same time, denigrating the opinions of the defense experts. (AOB 258-259.) Not so. There was nothing improper about the remarks.

Impermissible "vouching" may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony. (*People v. Heishman* (1988) 45 Cal.3d 147, 195.) Here, considered in context, the examples cited amounted to

permissible argument, derived from facts in the record, and directed to the credibility of expert witnesses, not the personal statement of the prosecutor vouching for his own expert's credibility. "'Harsh and vivid attacks on the credibility of opposing witnesses are permissible, and counsel can argue from the evidence that a witness' testimony is unsound, unbelievable, or even a patent lie.'" (*People v. Valencia* (2008) 43 Cal.4th 268, 305; see also *People v. Huggins* (2006) 38 Cal.4th 175, 253.)

Nor was the prosecutor's reference to the defense "brain science" testimony as "bull," as appellant contends (AOB 259-260). It was fair comment on the evidence. Also, the prosecutor's comments during his guilt-phase rebuttal argument, which characterized the content of defense counsel's closing argument as "two hours of bull," constituted fair comment on the defense evidence. A prosecutor is not limited to "Chesterfieldian politeness" in argument and may use "appropriate epithets." (*People v. Wharton* (1991) 53 Cal.3d 522, 567-568.)

Insofar as appellant contends the prosecutor misstated the law during his argument when he suggested the defense brain science evidence was ill-suited to the guilt phase of the trial, there was no prejudice. Even if improper, the trial court instructed the jury that the statements of the attorneys were not evidence (48 RT 9890, 9895), and that if anything the attorneys said conflicted with the court's instructions, they were to follow the instructions (48 RT 9889). The instructions addressed the brain science evidence and its relevance to the jury's consideration of the charges. (48 RT 9916.) Also, there could be no prejudice given the overwhelming evidence of appellant's premeditation and deliberation and intent to kill.

As for appellant's contentions related to the prosecutor's argument during the first penalty phase (AOB 260-264), they are moot or otherwise irrelevant since the jury did not return a verdict. In any event, the comments were not misconduct. Use of the term "serial killer" was not

inappropriate. (*People v. Maury* (2003) 30 Cal.4th 342, 419 [prosecutor's reference during argument to defendant, who committed three murders, as a "serial killer" was an "apt" description].)[45] As for use of the term "bull," while it may have been impolite, it was not misconduct. (See *People v. Wharton*, *supra*, 53 Cal.3d at pp. 567-568.)

With respect to the penalty retrial, appellant contends the prosecutor impermissibly interjected argument into his opening statement. (AOB 267-269.) However, "[t]he 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.) To the extent that any of the cited examples exceeded these limits, there was no prejudice since the court sustained defense objections as appropriate (77 RT 16010, 10653-10654), and the jury was instructed that the statements of the attorneys were not evidence (96 RT 20420).

Concerning the prosecutor's closing argument in the penalty retrial, appellant cites 10 separate instances of purported misconduct. (AOB 270-

---

[45] As this court recently reiterated in *People v. Garcia* (2011) 52 Cal.4th 706, 759-760:

> Prosecutorial argument "may include opprobrious epithets warranted by the evidence. [Citation.] Where they are so supported, we have condoned a wide range of epithets to describe the egregious nature of the defendant's conduct." (*People v. Zambrano* [2007] [] 41 Cal.4th 1082, 1172 [defendant is "'evil,' a liar, and a 'sociopath'"]; see *People v. Friend* [2009] [] 47 Cal.4th 1, 84 [defendant is an " 'insidious little bastard,' with 'no redeeming social value,' and being 'without feeling'" or " 'sensitivity'"]; *People v. Farnam* (2002) 28 Cal.4th 107, 199–200 [121 Cal. Rptr.2d 106, 47 P.3d 988] [defendant is a "'monster,' an 'extremely violent creature,' and the 'beast who walks upright'"].)

275.) Yet, he concedes that defense counsel did not interpose a contemporaneous objection or make a request for a curative admonition at trial to the last five. (AOB 274, fn. 152.) Therefore, he has forfeited that portion of his claim, which encompasses these comments. (See *People v. Brown* (2003) 31 Cal.4th 518, 553; *People v. Price*, *supra*, 1 Cal.4th at p. 447.)[46]

With respect to the remaining four instances, appellant first argues that the prosecutor's reference to Stephen Chacko's murder as a potential "freebie" was a misstatement of the law as it suggested to the jury that appellant would evade punishment for three of four murders, if their verdict was life imprisonment. (AOB 270-271.) "However, arguments of counsel 'generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.' (*Boyde v. California* (1990) 494 U.S. 370, 384 [108 L. Ed. 2d 316, 110 S. Ct. 1190].)" (*People v. Mendoza* (2007) 42 Cal.4th 686, 703.) Even charitably construing the comment as improper, there was no prejudice given the court's instructions, including that the jury was obligated to follow the court's instructions in the event the attorneys' statements conflicted with the law. (96 RT 20419.)

Next, appellant challenges the prosecutor's use of the term "serial killer" in his penalty retrial argument. (AOB 271.) As we stated above, use of the term "serial killer" was proper argument.

---

[46] Inasmuch as these comments were brought to the trial court's attention in a defense motion for a mistrial, which was denied (96 RT 20228-20231, 20392), the court's decision is entitled to deference. (See *People v. Alvarez*, *supra*, 14 Cal.4th at p. 213.)

As for the prosecution's references to the murder weapon and the victims' fear (AOB 272-273), the comments may have been misconduct had they occurred in the guilt phase, but the comments were not misconduct in the penalty phase. (See *People v. Jackson* (2009) 45 Cal.4th 662, 691-692.)

With regard to the prosecutor's reference to the fact—arguably outside the evidence—that Doctor Rogerson personally knew the prosecutor and defense counsel (AOB 274), the remarks did not prejudice appellant because they were exceedingly brief and the defense objection was sustained.

Last, appellant maintains the prosecutor committed misconduct during his penalty retrial argument when he made improper references to appellant's lack of remorse and a lack of corroboration of remorse to support Doctor Amen's opinion. (AOB 278-282.) Appellant's argument in this regard is based on numerous allegations of judicial error, embodied in Arguments VI, IX, X, and XI, *post*. Because the trial court's rulings were proper, as we argue, *post*, the prosecutor's comments during argument, which were based on these rulings, were appropriate. In any event, if the trial court's rulings were error—in whole or in part—the prosecutor cannot be faulted for abiding by the court's rulings at the time of trial.

E. No Prejudice Resulted from the Prosecutor's Conversations with Victims' Family Members Which Were Overheard by Others

Appellant's last category of purported prejudicial misconduct is that the prosecutor engaged in reckless and prejudicial conduct in the courtroom by talking to victims' family members within earshot of others. (AOB 282-288.)

First, appellant maintains that misconduct occurred, during the guilt phase, as a result of the prosecutor's comments, made within hearing range

of alternate jurors, which were geared toward keeping victims' family members apprised of what had occurred during the trial and what was anticipated to occur. (AOB 282-284.) Although appellant alleges that he was prejudiced (AOB 282), he does not explain how. The trial court found that no one, including the alternate jurors, was affected by the prosecutor's comments. (49 RT 10268-10269.) The trial court's determination is entitled to deference on appeal. (See *People v. Alvarez*, *supra*, 14 Cal.4th at p. 213.)

Next, appellant contends that, during the penalty retrial, the prosecutor committed prejudicial misconduct when he made comments about defense witness Quigel to one victim's family members, which were overhead by the wife of Juror Number 7. (AOB 284-288.)

Defense counsel brought a motion for a mistrial based on the incident. (88 RT 18506-18509.) The trial court conducted an inquiry, including calling the victim's family members, Juror Number 7, and Juror Number 7's wife to testify on the matter. (88 RT 18478-18493.) The juror's wife overheard the prosecutor discussing the timeline for the trial. Although she heard him mention Quigel's name, she tried not to listen. (88 RT 18480-18482.) Juror Number 7 said that his wife remarked to him that the man in the jumpsuit was interesting (referring to witness Quigel, who was in custody), but that they did not discuss anything his wife may have overheard. (88 RT 18484.)

The court denied the motion for a mistrial. (88 RT 18517.) It found there was no prejudice that occurred with regard to Juror Number 7. The court also found that while the transgression was not intentional, it termed the prosecutor's conduct "reckless" and "absolutely inexcusable." (88 RT 18516-18517.) The prosecutor responded: "I sincerely apologize, Your Honor. It will not happen again." (88 RT 18518.) The trial court's denial

of the mistrial motion, finding there was no prejudice, is entitled to deference. (See *People v. Alvarez*, *supra*, 14 Cal.4th at p. 213.)

F. Appellant Has Not Established Prejudice

Appellant asserts that, even if no single incident warrants reversal on its own, the extensive nature of the prosecutor's misconduct contributed to a pattern of unfairness and prejudice that render the guilt and penalty verdicts infirm. (AOB 288-289.)

Appellant's claim of prejudice is without merit and should be rejected. Even if prosecutorial misconduct occurred, reversal is not required unless appellant can demonstrate that a result more favorable to him would have occurred absent the misconduct or with a curative admonition. (*People v. Arias*, *supra*, 13 Cal.4th at p. 161.)

In this case, any reasonable jury would have reached the same verdict in the absence of the alleged instances of prosecutorial misconduct. (*People v. Bolton* (1979) 23 Cal.3d 208, 214.) Despite the guilt phase jury's careful consideration of the capital charges, the evidence of appellant's guilt was ironclad. There was no dispute that appellant carried out the murders. The only conceivable question for the guilt phase jury was whether, due to methamphetamine abuse, appellant could form the requisite intent to kill and premeditate and deliberate. Yet, the evidence overwhelmingly demonstrated that appellant went on a meticulously planned six-month crime binge, which culminated in a series of murders, over a two-week period, carried out for the purposes of revenge and monetary gain. The jury soundly rejected the defense theory that appellant was brain damaged, which caused him to act impulsively. With their verdicts, the guilt phase jury found that appellant murdered methodically and with purpose.

As for the penalty verdict, the evidence in aggravation so substantially outweighed the evidence in mitigation that a death verdict was compelled—

based not only on the evidence, but also on the moral considerations attending that evidence.

Among the horrific circumstances of appellant's crimes, the penalty-phase jury heard evidence that appellant always wanted to know what it would be like to murder someone and go on a crime spree. (83 RT 17376.) The jurors also learned that appellant carefully lured unsuspecting James Loper to his death and ambushed him with a hail of bullets, even as Loper tried desperately to find refuge under his truck. Appellant did so out of revenge because appellant thought Loper was a "goody two-shoes" and an "asshole." (94 RT 19784, 19788.) The jury heard from Loper's mother Hazel that she saw the emergency vehicles at Eight Mile Road on her way to work, not knowing that her son's body lay there riddled with bullets. (84 RT 17456.)

Further, the jury heard evidence that on her way to work, Anice Chacko stopped by the store where her husband worked and saw that it "was covered with plastic tape." (84 RT 17468.) Appellant murdered Stephen Chacko for money. (94 RT 19786.) Appellant's actions left Anice to try and explain to one of their young sons why his dad was in a "special bed" and unable to speak to him. (84 RT 17467.) Anice, pregnant at the time of the murders with the couple's third child, and without financial means, was forced to relocate to India, where Stephen's family lived. (84 RT 17465-17466.)

The jury learned that appellant joked about gunning down Jun Gao and Besun Yu and extinguishing their lives with only a couple of bullets each. (83 RT 17376-17377.) In the case of Gao, he was found with his head laying in a pool of blood and his teeth scattered about his head. Appellant shot Gao through his neck and the bullet traveled through Gao's jugular vein and out his mouth. (82 RT 16970, 17171.) Appellant shot Yu while she helplessly crouched in a fetal position. (82 RT 16973, 17168.)

Among the trail of destruction left in appellant's wake, five children lost their fathers and three lost their mother. (83 RT 17429, 17463-17364, 17470, 17478, 17483.)[47]

On the other hand, the evidence in mitigation, in essence, was that appellant had a dysfunctional childhood—at the hands of his parents and youth counselor—which caused him to be addicted to methamphetamine as an adult. His addiction altered his brain to the extent that he was not thinking correctly when he committed his crimes. This latter contention was an issue that was strongly disputed by the prosecution's experts.

In sum, at best, there may have been several instances where the prosecutor's conduct crossed the lines of appropriate advocacy, but individually or in combination, and judged by any standard of prejudice, the cited instances cannot have influenced either the guilt or penalty outcomes. Therefore, there is no basis for reversal.

VI. THERE WAS NO TRIAL COURT ERROR, OR PROSECUTORIAL MISCONDUCT, WITH REGARD TO THE ISSUE OF REMORSE

Appellant challenges as reversible error the trial court's rulings excluding certain proffered hearsay evidence of appellant's remorse during the penalty phase retrial. (AOB 290-335.) He also argues the prosecutor committed prejudicial misconduct in arguing an absence of remorse. Accordingly, appellant argues the combined effect violated numerous federal constitutional rights, as well as state statutory rights. (AOB 290.)

Appellant's claim is without merit. The trial court's exercise of discretion in excluding certain hearsay evidence of appellant's remorse was proper in that the proffered evidence was lacking in trustworthiness.

---

[47] As stated earlier, victim impact evidence was unavailable for Jun Gao. (49 RT 10306.)

Likewise, the prosecutor's argument on the subject was proper. In any event, any error or misconduct was harmless.

A. Procedural History

1. Testimony of clergy members

During pretrial hearings in the penalty phase retrial, on March 7, 2000, defense counsel argued extensively in support of admitting the testimony of Pastor Kilthau and Reverend Skaggs on the subject of appellant's remorse. (76 RT 15814-15836.)[48] The prosecutor responded and reiterated his opposition to admission of the proffered testimony. (76 RT 15837-15842.)

Before ruling on the issue, the trial court stated that it had reviewed all of the pleadings the defense filed in support of its motion to admit the testimony and motion for reconsideration,[49] as well as the relevant transcripts of previous hearings on the issue. (76 RT 15843.) The court stated that its chief concern was the unreliability of the testimony, as suggested by the timing of the Skaggs and Kilthau's contacts with appellant. (76 RT 15843.) The contacts occurred "long after the defendant was in custody, long after the defense strategy was in progress." (76 RT 15843.)

With particular regard to Pastor Kilthau, the court noted that while the pastor initiated the contact, there was no follow-up on the part of the pastor. (76 RT 15844.) Kilthau visited appellant a couple of months later, at appellant's invitation. (76 RT 15846-15847.) Before that time, defense experts were already meeting with appellant. (76 RT 15847-15848.) The

---

[48] This is but one of numerous instances of the trial court permitting the defense ample time to make its record, contrary to appellant's repeated suggestions to the contrary. Additionally, on a subsequent occasion, second-chair counsel Laub thanked the court for its consideration in permitting the defense to argue a different evidentiary issue at length. (82 RT 17020.)

[49] See 52 RT 10918-10919.

court observed that while this Court's discussion of a similar issue in *People v. Livaditis* [(1992) 2 Cal.4th 759] was dicta, the logic and reasoning inherent in the discussion were compelling. (76 RT 15849.) The court found the particular circumstances attending Skaggs and Kilthau's proffered testimony were not sufficiently reliable to admit their testimony on the matter of remorse. However, the trial court left open the possibility that the defense could introduce evidence of appellant's remorse from a source other than appellant. (76 RT 15849-15851.)

On March 21, upon motion of the defense, the court, again, reconsidered its earlier ruling. The defense presented a new case, *People v. Ervin* [(2000) 22 Cal.4th 48], in support of its argument that Reverend Skaggs be permitted to testify on the subject of remorse. (79 RT 16529.) The court found the case inapposite because it did not concern the question at issue: whether clergy members could testify about a defendant's remorse during the penalty phase. Defense counsel Fox asked the court to delay ruling until co-counsel Laub could argue the issue. The court agreed. (79 RT 16529-16532.)

When the matter was heard again on March 28, Laub argued that *Ervin* compelled the court to reverse its earlier rulings, even though the issue in the case was whether a clergy member could testify to his or her opinion regarding the sincerity of a defendant's religious beliefs. (82 RT 17050-17055.) The court disagreed, observing that this Court's discussion in *Ervin* was dicta, as was the case in *Livaditis*. However, even if *Ervin* was controlling, appellant's argument failed because in *Ervin*, the defendant had far more contacts and, hence a more substantial relationship, with the clergy member. Unlike *Ervin*, the trial court did not find that a substantial relationship existed between appellant and Skaggs sufficient to permit Skaggs to render an opinion on whether appellant was truly remorseful. (82 RT 17050-17055.) Yet, the court advised counsel that it was open to

Skaggs testifying to his view of appellant's character and why the death penalty was not warranted in his case. (82 RT 17062.) The court reiterated its earlier rulings that neither clergy member would be allowed to testify on their opinion of whether appellant was sincerely remorseful. (82 RT 17063.)

2. Letters

Prior to the start of the first penalty phase, the court and parties initially discussed admission of certain letters that appellant wrote to Pastor Kilthau. The court stated that it would take some time to consider the matter. (50 RT 10387-10411.) The court later ruled the letters were inadmissible since they were a de facto form of impermissible allocution, in addition to possessing insufficient indicia of reliability. (51 RT 10665-10668.)

The court and parties also discussed, at length, letters appellant wrote to his family members. The court ordered numerous redactions in the cases of those passages that were unreliable and inadmissible or otherwise prejudicial. (51 RT 10597-10643.)[50]

3. Relevant testimony

The following relevant testimony was adduced during the penalty phase retrial:

During the course of defense witness Doctor George Woods's testimony, Woods stated that, in his opinion, appellant was truly remorseful and had accepted responsibility for his crimes. (90 RT 18936.) Woods's opinion was based, in part, on his interviews of Reverend Skaggs and Pastor Kilthau (90 RT 18872) and his interviews of appellant (90 RT

[50] Appellant cites to the specific redactions in his brief. (AOB 320-322.)

18871). Woods explained that, in the intervening time since appellant's arrest, appellant had gained some clarity and a greater understanding of his crimes. (90 RT 18935-18536.) During the interviews, appellant also exhibited a great deal of emotion and cried frequently. (90 RT 18939.)[51] In Woods's view, appellant was psychologically impaired right up until the day of his arrest. (90 RT 18939.)

Reverend Troy Skaggs testified to the nature and extent of his association with appellant, which began after appellant was incarcerated for his present crimes. Skaggs offered his opinion that appellant's life had value. (92 RT 19293-19298.)

B. General Legal Principles

> The Eighth Amendment to the United States Constitution requires that a capital jury not be precluded from "considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [57 L. Ed. 2d 973, 98 S. Ct. 2954], fn. & italics omitted.) Nonetheless, the trial court still "'determines relevancy in the first instance and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury.'" (*People v. Cain* (1995) 10 Cal.4th 1, 64 [40 Cal. Rptr. 2d 481, 892 P.2d 1224].)

(*People v. Williams* (2006) 40 Cal.4th 287, 320.)

---

[51] During a break in the testimony, the prosecutor maintained that Woods's testimony went beyond the scope of the court's rulings on the issue of remorse and had opened the door to the prosecution's ability to comment on appellant's failure to testify to his lack of remorse, if appellant did not testify. (90 RT 18942.) The court disagreed, but advised that the prosecution could attack and argue the sources of the information concerning remorse. (90 RT 18946.)

The presence of remorse is relevant at the penalty phase of a capital prosecution. (*People v. Marshall* (1996) 13 Cal.4th 799, 855.) However, a capital defendant has no federal constitutional right to the admission of evidence lacking in trustworthiness, particularly when the defendant seeks to put his own self-serving statements before the jury without subjecting himself to cross examination. (*People v. Jurado* (2006) 38 Cal.4th 72, 130.)

C. The Trial Court Acted within Its Discretion When It Found Appellant's Hearsay Expressions of Remorse Lacking in Trustworthiness

Appellant specifically challenges the exclusion of the following proffered evidence of remorse: 1) letters from appellant to Pastor Kilthau; 2) testimony from Pastor Kilthau and Reverend Skaggs; and 3) portions of letters appellant wrote to family members.

The court's rulings on the proffered evidence constituted a proper exercise of discretion. As appellant must concede, his statements—assertions and descriptions of his own feelings and mental state—were hearsay. As the trial court properly found, the timing of appellant's hearsay statements to his family and to the clergy members were made after his arrest and concurrent with the formulation of his defense strategy. This was a time when appellant had a compelling motive to minimize his culpability for the murders and to play on the sympathies of potential defense witnesses. These circumstances indicated a lack of trustworthiness.

In *People v. Livaditis*, *supra*, 2 Cal.4th 759, 780, this Court observed:

> While defendant was in jail awaiting trial he certainly had a motive to claim remorse. His sincerity in telling potential defense witnesses he was sorry was suspect. The need for cross-examination was thus compelling. The court would have had discretion to find a lack of trustworthiness in the claims of remorse, and thus to exclude the evidence if asked to rule on the question. [Citation.] Since the court was never asked to exercise this discretion, the issue is not properly before us.

One of the examples appellant cites illustrates this problematic nexus of hearsay statements and defense strategy. In one letter appellant wrote to his wife, he stated: "I was out of my mind on drugs and overtaken by my addiction and all the rage inside me that I went berserk." (AOB 321.) Like appellant's other self-serving statements, this particular justification for the murders was properly excluded. (See *People v. Williams* (2006) 40 Cal.4th 287, 318 [capital murder defendant's hearsay statement that he went "'crazy all of a sudden,'" was suspect because it tended "to disavow that he committed the murder with premeditation"]; see also *People v. Edwards* (1991) 54 Cal.3d 787, 837-838 [defendant's journal, written after the murder, was hearsay and not sufficiently reliable to compel admission into evidence].)

Further, "[t]he same lack of reliability that makes the statements excludable under state law makes them excludable under the federal Constitution." (*People v. Livaditis*, *supra*, 2 Cal.4th at p. 780.)

Appellant cites this Court's decision in *People v. Bennett* (2009) 45 Cal.4th 577, 604, as supportive of his claim. (AOB 294-295.) He is mistaken. The portion of the opinion to which appellant cites did not concern the issue of hearsay expressions of remorse. Instead, the Court addressed the trial court's erroneous exclusion of mitigation evidence, which regarded the defendant's concern for his family and how they were faring. In this case, the court permitted this type of hearsay evidence through the testimony of appellant's wife (87 RT 18256-18262) and children (92 RT 19357-19361, 19369-19372).

D. The Prosecutor Did Not Commit Prejudicial Misconduct When He Argued the Issue of Appellant's Remorse

Appellant contends the prosecutor committed prejudicial misconduct when he argued to the penalty phase retrial jury that the evidence demonstrated a lack of remorse. (AOB 322-330.)

Appellant's claim is barred because he failed to interpose contemporaneous objections, or request curative admonitions, with regard to the 14 examples of purported misconduct that he presents in support of this claim. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.) In any event, there was no prejudicial misconduct.

"'A prosecutor may properly comment on a defendant's lack of remorse, as relevant to the question of whether remorse is present as a mitigating circumstance, so long as the prosecutor does not suggest that lack of remorse is an aggravating factor.' [Citation.]" (*People v. Blacksher*, *supra*, 52 Cal.4th at p. 843.)

Here, as stated above, appellant presented evidence during the penalty phase retrial that he was truly remorseful and had accepted responsibility for his crimes. (90 RT 18936.) Accordingly, the prosecution properly pointed to appellant's conduct in carrying out the murders, as well as his demeanor and conduct after the murders, as evidence demonstrating a lack of remorse. (95 RT 20042-20044, 20056, 20186, 20195, 20198, 20218.) (See *People v. Crittenden* (1994) 9 Cal.4th 83, 147 [prosecutor properly referred to the defendant's callous behavior after the killings in arguing that the defendant showed a lack of remorse]; *People v. Pollock* (2004) 32 Cal.4th 1153, 1185 [whether the defendant's actions after the murders showed a lack of remorse was a factual issue for the jury to decide].)

Further, insofar as the prosecutor commented on expert testimony that encompassed the issue (95 RT 20183-20186, 20212), it was fair comment

on the evidence. (See *People v. Thomas* (1992) 2 Cal.4th 489, 526 [a prosecutor has a wide-ranging right to discuss the case in closing argument, fully stating his views as to what the evidence shows and what conclusions are proper].)

E. Any Error or Misconduct Was Not Prejudicial

Even if the court erred in its rulings on the issue of remorse, it is not reasonably probable that admission of Reverend Skaggs's or Pastor Kilthau's opinions on appellant's remorse or appellant's statements expressing remorse contained in his letters would have resulted in a verdict more favorable to appellant. (See *People v. Arias* (1996) 13 Cal.4th 92, 156-157; *People v. Watson* (1956) 46 Cal.2d 818, 836.)[52]

Apart from the hearsay that was excluded, the court permitted the jury to hear evidence that appellant was truly remorseful and had taken responsibility for his crimes, as testified to by defense expert witness Doctor Woods. (90 RT 18936.) Additionally, at least one other witness—a correctional officer—also observed that appellant was emotional and crying at times—a state not inconsistent with remorsefulness. (91 RT 19178.) Defense counsel argued the evidence of appellant's remorse and acceptance of responsibility to the jury. (96 RT 20368-20369, 20371-20372.)

In any event, no matter how much evidence of remorse appellant presented, his initial repeated denials of responsibility for the crimes, which he made to law enforcement (83 RT 17349), no doubt undermined his veracity in the eyes of the jury. Therefore, any reasonable juror would have found his hearsay assertions of remorse somewhat hollow.

---

[52] "'Our state reasonable possibility standard is the same, in substance and effect, as the [*Chapman*] harmless beyond a reasonable doubt standard . . . .'" (*People v. Bennett*, *supra*, 45 Cal.4th at p. 605, fn. 13.)

Further, in addition to evidence of remorse, appellant presented considerable evidence of his relationship with his family. His wife and children testified about their love for appellant and his love for them. The letters they read into the record spoke to appellant's character and his relationship with his family. (See *People v. Bennett*, *supra*, 45 Cal.4th at pp. 604-605.)

With respect to the prosecutor's argument, if misconduct occurred, reversal is not required because appellant has not demonstrated that a result more favorable to him would have occurred absent the misconduct or with a curative admonition. (*People v. Arias*, *supra*, 13 Cal.4th at p. 161.)

Last, to the extent that appellant challenges the trial court's denials of his motions for a mistrial and a new trial based on the court's rulings and the prosecutor's argument on the issue of remorse (AOB 331-332), they should be rejected because the rulings were proper exercises of discretion, as argued above. (See *People v. Gonzales*, *supra*, 52 Cal.4th at p. 314; *People v. Guerra* (2006) 37 Cal.4th 1067, 1159, overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

VII. THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S TAPED STATEMENT

Appellant claims his free will was overborne by coercive police tactics when he was interviewed on November 12 and 13, 1997. Based on defense expert testimony at the suppression hearing, appellant contends the length of the interrogation, the detectives' improper interview techniques, and appellant's compromised physical condition, combined to render his statement involuntary and as such violated his rights protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 336-365.)

Appellant is incorrect because there was no coercive conduct by the detectives. The prosecution met its burden and proved appellant's statements were voluntary. Based on a review of the entire record, it is

clear appellant's statements to the detectives were the product of a rational intellect and free will.

A. Procedural History

In two separate pleadings, appellant moved the trial court to suppress his statement—in whole or in part—made during his interview with police on November 12 and 13, 1997. In the first, appellant alleged his statements were involuntary due to psychological coercion and not being afforded adequate sleep and nourishment during the lengthy interview, and, accordingly, his subsequent statements were the fruits of an illegal arrest. (3 CT 729-736.) In the other, appellant argued, in the alternative, portions of his statement were inadmissible under Evidence Code section 352 and should be redacted from the statement. (5 CT 1150-1234.) The prosecution filed an opposition. (3 CT 751-760.)

The trial court read the transcript of the interview, viewed the videotape recordings of the interview, heard defense expert testimony in a suppression hearing, and listened to the arguments of counsel. (5 RT 904-978; 6 RT 1219-1317; 7 RT 1377-1414, 1447-1496; People's Exh. Nos. 64A, 64B.)

Considering everything, the trial court found appellant's statements were voluntary and not induced by any of the allegations raised by appellant and denied the motion to suppress. (13 RT 2530-2531.)In ruling on the motion, the court noted that defense expert Doctor Leo's opinion—that the police interview tactics were coercive—was founded on a social science standard of coercion, not a legal standard. This was dispositive to the court's determination that little weight was to be accorded his testimony, despite Doctor Leo's otherwise impressive credentials. (7 RT 1495-1498.)

As for the totality of the circumstances analysis, the court first acknowledged that it was a lengthy interrogation. (7 RT 1497.) However, that was but one factor to consider. (7 RT 1497-1498.) The court shared

the detailed notes it made during the playing of the tape as it concerned appellant's demeanor. The court observed that, approximately two hours into the interview, when one detective got up to leave the room and told appellant that he would return shortly, appellant quipped: "'I'll be right here.'" (7 RT 1499-1500.) In the court's view, this statement was indicative of appellant's state of mind and suggested his will was not overborne. (7 RT 1500-1501.) Also, during the break, appellant was eating. (7 RT 1501.) Another officer came into the room and brought appellant water. (7 RT 1501.) The court noted that it seemed, as the interviewed progressed, appellant's movements and demeanor indicated that he was starting to realize the gravity of the situation. (7 RT 1500-1501 ["realization is setting in . . . circumstances being laid out are not taking a positive turn, from his perspective"].) The court observed appellant "slouching over a coffee cup" with "his head down on his arm in the sense of resignation." (7 RT 1501.) At one point, appellant asked the detectives if they were trying to get him to incriminate himself. (7 RT 1502.) When the officers raised the subject of involving appellant's family, the court analogized it to the "damn finally giving way." (7 RT 1504.) Referring, again, to the standard Doctor Leo was using to judge the interrogation, the court said what may be coercive to a social scientist is not necessarily coercive according to the relevant law. (7 RT 1504.)

The court specifically found the detectives' comments concerning appellant's stepson Matthew were not coercive. The court noted the officers knew when they questioned appellant that Matthew had discovered the murder weapon and appellant had denied having a gun. (7 RT 1505-1506.) Essentially, the detectives were giving appellant a choice: appellant could spare his family and tell the truth or they would need to involve his family to establish the truth. (7 RT 1506.) The court denied the motion. (7 RT 1506.)

B. General Legal Principles

A defendant's right to due process, as guaranteed by the federal and state constitutions, deny the prosecution the use of a defendant's involuntary confession at trial. (*People v. Massie* (1998) 19 Cal.4th 550, 576.) In deciding whether the prosecution may introduce evidence of a defendant's confession, the issue is whether the defendant's decision to confess was not truly voluntary because his or her will to remain silent was overborne by the police. (*Ibid.*) The standard for determining the voluntariness of a defendant's confession under both federal and state constitutional law is the "totality of circumstances." (*Ibid.*)

A defendant's confession is not freely given when an interrogation includes a promise of some benefit or leniency, whether express or implied, and the inducement and the defendant's subsequent statement are "causally linked." (*People v. Holloway* (2004) 33 Cal.4th 96, 115.) Accordingly, a trial court must address two factors in determining the admissibility of a defendant's confession: 1) did the police use improper questioning, and, 2) did the questioning cause the defendant to give his or her confession. (*Ibid.*) With regard to the first factor, mere language by the police that it would be better for the accused to tell the truth, when unaccompanied by a promise of some benefit or leniency, does not render a confession involuntary. (*People v. Holloway*, *supra*, 33 Cal.4th at p. 115.) The question is whether the police interrogator "cross[ed] the line" from proper advice and encouragement to tell the truth to impermissible promises of some benefit or leniency. (*Ibid.*)

Proper questioning by the police may include disclosure of information, summary of the evidence, an outline of the theories of the crime, confrontation of the defendant with contradictory facts, and exaggerated statements suggesting the police know more about a crime then they actually do. (See *People v. Holloway*, *supra*, 33 Cal.4th at p. 115; and

see also *People v. Jones* (1998) 17 Cal.4th 279, 299.) Even deception is permissible where it is "not of a type reasonably likely to procure an untrue statement." (*In re Walker* (1974) 10 Cal.3d 764, 777.) Courts prohibit "only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." (*People v. Ray* (1996) 13 Cal.4th 313, 340.)

Where the facts are not disputed, the issue whether a defendant confessed voluntarily is reviewed independently on appeal. (*People v. Davis* (2009) 46 Cal.4th 539, 585-586.) The appellate court reviews the totality of circumstances to determine whether a confession is voluntary. (*People v. Williams* (1997) 16 Cal.4th 635, 660.) Among the factors to be considered are "'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.' [Citation.]" (*Ibid.*)

C. The Totality of the Circumstances Demonstrate that Appellant's Statement Was Voluntary

Here, at no point was appellant "promised" leniency for providing a statement or "threatened" with punishment for refusing to do so, and nothing otherwise said or done by the police in the course of interrogating appellant remotely suggests that his statements were not voluntary. Appellant's argument that his confession was impermissibly coerced because the detectives used "implicit threats" to involve appellant's wife and stepson is baseless. (AOB 356.)

Here, six hours into the interview, the detectives disclosed information (i.e., evidence) to appellant in the form of a taped statement by his wife Carol that implicated him in the crimes. Throughout this portion of the interview, while playing portions of the tape for appellant, the detectives repeatedly encouraged appellant to tell the truth and spare his

wife's involvement in the case. (Exh. No. 101, pp. 243- 255.)[53] Despite this inculpatory evidence, appellant maintained that his wife did not know what she was talking about. (Exh. No. 101, p. 244.) He also told the detectives that "[s]he's been known to lie." (Exh. No. 101, p. 253.)

Later, the detectives asked appellant about the location of the murder weapon. They told appellant that if he revealed the location of the murder weapon, appellant could spare the involvement of his stepson Matthew (who the officers knew had seen the gun in the closet). (Exh. No. 101, pp. 376-378.) Shortly thereafter, appellant stated: "Fuck her man! I'm going to prison for the rest of my fucken [*sic*] life, ain't I?" (Exh. No. 101, p. 379.) Presumably, appellant was upset with his wife for talking to the police. Appellant then told the officers where the murder weapon was secreted. (Exh. No. 101, pp. 379-380.) Thereafter, he confessed to the crimes.

There was nothing improper about the detectives letting appellant know that his wife had implicated him in James Loper's murder and that his stepson had come across the murder weapon in a closet at their home. Nor, was there anything improper about the detectives advising appellant that telling the truth would spare his family's involvement in the case. The detectives wanted appellant to know the extent to which he had already been implicated the crimes as inducement for him to be truthful. Appellant confessed because he knew he had been caught, not because he had been coerced. (See *People v. Ludviksen* (1970) 8 Cal.App.3d 996, 1004 [interrogator's "conduct cannot be termed coercive merely because the information which he revealed to defendant may have caused the latter to believe that he was already so deeply implicated in the burglary that he had nothing to lose by discussing it with the officer"].)

---

[53] The transcript was also marked as Court's Exhibit "Z."

Moreover, the detectives made clear to appellant that they had no influence over his punishment. (Exh. No. 101, p. 337 ["[W]e don't have anything to do with penalty at all Louis . . . Zero. Nothing"].) Appellant acknowledged knowing the police had "no fucken [*sic*] power" to go to the District Attorney on the matter. (Exh. No. 101, p. 337.) Thus, the detectives did not promise appellant leniency or other benefits.

Further, consideration of other factors, apart from the nature of the police questioning, demonstrate that appellant's statement was voluntary. For example, contrary to appellant's contention, there were plenty of breaks and sustenance provided to appellant during the interview. At the outset, appellant was offered water, soda, or coffee. Appellant accepted "another" glass of water. (Exh. No. 101, p.1.) Later, he was twice provided with coffee. (*Id.* at pp. 3-4, 20.) Subsequently, after having had two cups of coffee and two cups of water, appellant took a bathroom break. (*Id.* at p. 40.) He later took a cigarette break. (*Id.* at p. 75.) Some time passed and then appellant was provided pizza and two glasses of water (*id.* at p. 128) followed by a bathroom break and a cigarette break (*id.* at p. 129). There were more breaks: water and cigarette (*id.* at p. 177); bathroom (*id.* at p. 185); coffee (*id.* at p. 199); bathroom (*id.* at p. 236); soda (*id.* at p. 260); and bathroom (*id.* at p. 280).[54]

During the hearing, the prosecutor observed that the questioning took place in an interview room, which had a door and window. At times during the interview, the door remained opened. (7 RT 1479-1480.) At one point, the officers asked appellant if he wanted to see his wife, but he declined. (Exh. No. 101, p. 254.)

---

[54] According to the prosecutor, the breaks accounted for approximately 1 hour and 20 minutes of the interview time. (7 RT 1481.)

As appellant implicitly concedes (AOB 358-359), at 35 years old (exh. No. 101, p. 1), his age was not a factor suggestive of involuntariness. In this regard, his citation to *People v. Neal* (2003) 31 Cal.4th 63 and *Doody v. Schiro* (9th Cir. 2010) 596 F.3d 620[55] are not helpful. Additionally, appellant had previous contacts with the criminal justice system dating back to his youth, which suggests a level of sophistication in dealing with law enforcement, as evidenced by the fact that appellant denied involvement in the crimes over 260 times and smiled and bantered with the detectives. (7 RT 1482)

In sum, the detectives acted appropriately and professionally during appellant's interview. The record does not reveal any abusive "psychological coercion" tactics in their questioning of appellant. Nor did they offer promises of help or leniency. Throughout the interview, appellant was offered bathroom breaks, drinks, cigarettes, and food. Based on a review and consideration of the entire record, appellant's statement was voluntary.

Accordingly, because the tree was not poisoned, there was no error in admission of appellant's subsequent statement to investigators on November 13, 1997, as well as the murder weapon (i.e., the fruits of appellant's taped statement). (See e.g., *Wong Sun v. United States* (1963) 371 U.S. 471, 484-486 [under the fruit of the poisonous tree doctrine, evidence that was obtained as a result of unlawful police conduct may have to be excluded].)

---

[55] Vacated by *Ryan v. Doody* (2010) 131 S.Ct. 456, 178 L. Ed. 2d 282.

D. If the Trial Court Erred in Admitting Appellant's Statement, It Was Harmless

Even assuming arguendo that the trial court erred in admitting appellant's statements, the error was not prejudicial. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-310 [federal constitutional "trial error" such as admission of involuntary confession subject to harmless-error analysis of *Chapman*, *supra*, 386 U.S. 18]; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510 [California Constitution does not require stricter standard]; see *People v. Sims* (1993) 5 Cal.4th 405, 447.)

With respect to the guilt phase evidence, among the numerous incriminating items found in appellant's possession at the time of his arrest, was his "Biography of a Crime Spree." Appellant's written words were at least as powerful, if not more so, than his confession to detectives.

Further, there was other compelling evidence of appellant's intent to kill, as well as the premeditation and deliberation he exhibited in carrying out the murders and the shooting at Cal Spray. Among that evidence: appellant's elaborate plan that lured James Loper to a deserted area and to his death; appellant's call to Greg Beal's home telling him there was a fire at the Cal Spray plant; the hole appellant cut in the fence at Cal Spray to facilitate a quick exit; appellant's purchase of additional bullets at Walmart; appellant engineered an entry and exit path next to Mayfair Liquors before he murdered Stephen Chacko; appellant parked his car near the Village Oaks Market, went in, picked up a Dr. Pepper, put it on the counter as if he were going to pay, and then he shot Jun Gao and Besun Yu to death; appellant had a list of targets in is pocket when arrested; and, Carol People's testimony about appellant's admissions and demeanor.

Moreover, contrary to appellant's contention (AOB 362-364), the prosecutor's closing argument does not suggest that appellant's statement was the key to his guilt. Out of approximately 116 transcript pages of

argument (48 RT 9943-10060), only a handful of lines on approximately 10 pages were devoted to some discussion of appellant's statement to the police (48 RT 9997-9999, 10006-10009, 10017, 10069).

The same holds true for the nominal emphasis on appellant's confession during the prosecutor's argument in the penalty retrial. Out of approximately 170 transcript pages of argument (95 RT 20014-20088, 20098-20110, 20120-20163, 20181-20222), approximately 3 pages involve appellant's taped statement (95 RT 20108-20110).

In short, this was not a case that turned on appellant's confession and recovery of the murder weapon. Accordingly, there was no prejudice.

VIII. THE TRIAL COURT'S RULING ADMITTING SOME, BUT NOT ALL, LAY TESTIMONY PERTAINING TO APPELLANT'S METHAMPHETAMINE USE WAS PROPER

Appellant complains the trial court improperly precluded certain lay defense witnesses from giving testimony about how methamphetamine affected them individually. He contends this error compromised his constitutional right to present a defense because the testimony was relevant to appellant's mental state and the proffered lay opinion evidence was consistent with the defense theory of the case. Accordingly, the error undermined the juries' guilt and penalty determinations. (AOB 366-384.)

Appellant's claim is without merit. The proffered evidence was inadmissible because it was not relevant or otherwise probative of appellant's mental state at the time he committed the crimes. To the extent that the exclusion of such testimony was error, the error was harmless because the court admitted extensive evidence, in the form of lay and expert testimony, pertaining to appellant's methamphetamine use and its effect on his mental state.

A. Procedural History

On June 29, 1999, during the guilt phase, the prosecutor advised the court that defense counsel privately shared with him counsel's intention to call defense witnesses who would testify to their personal experiences with methamphetamine. (35 RT 7169.) The prosecutor agreed the witnesses could testify to their individual drug-related contacts with appellant, as well as their observations of appellant's demeanor and physical characteristics in that regard. However, the prosecutor objected to the lay witnesses sharing their views of how methamphetamine affected them individually on relevance grounds. (35 RT 7169-7170.)

The court ruled the proffered testimony was inadmissible and asked defense counsel for authority supportive of counsel's theory of admissibility. Counsel stated that the lay testimony would serve as foundation for expert testimony on the subject. (35 RT 7170-7172.) The court advised counsel that the evidence was inadmissible absent supporting points and authorities and a ruling. Otherwise, eliciting this testimony would be a violation of the court's order. (35 RT 7172-7173 .) The court said to defense counsel:

> I have no problem, Mr. Fox, with an expert or a lay person who observed Mr. Peoples or anybody else while - - after they had taken a controlled substance and were under the influence, to say how fixated they were on a particular subject, or how agitated they became on a particular subject. [¶] But the person under the influence is not the source in a reliable fashion in any means, to my mind's eye. [¶] I'm not precluding the issue, but I'm telling you who it can come from and who it can't come from.

(35 RT 7174.) Defense counsel responded that he needed to research the matter. (35 RT 7174.)

On July 7, 1999, prior to the start of the defense case, the court reiterated its ruling and explained that the defense witnesses could testify to their drug-related contacts with appellant and his wife, but that the

witnesses could not testify to the effects of methamphetamine use. The court warned that, if there was a violation of the order, sanctions would follow. (37 RT 7599-7600.) Defense counsel responded: "I understand." He advised that he would reiterate the court's admonition to the affected witnesses—Quigel, Jack, and Fitzsimmons. (37 RT 7600.) Defense counsel stated that he would convey the court's ruling to these witnesses. (37 RT 7601.)

During direct examination of defense witness Quigel, defense counsel elicited testimony that appellant looked jittery, his face was oily, and his eyes appeared "real pinned and big." Quigel opined that appellant was "always wired,"[56] often moving his lips in a circular motion and expelling his tongue. (37 RT 7629-7630.) On cross-examination, Quigel testified to the effects of methamphetamine and his opinion that the drug made a person "homicidal." (37 RT 7668.)

Afterward, the court and parties took up the issue whether the prosecutor's questioning had opened the door for the defense to elicit testimony on the effects of methamphetamine or whether the witness had purposefully violated the court's order. (37 RT 7674-7679.) During this discussion, defense counsel reiterated his request that he be permitted to ask Quigel about the amount and strength of the methamphetamine Quigel sold to appellant the day before the Village Oaks Market murders. (37 RT 7674-7476.) The court found the testimony would be too speculative because Quigel, as a seller of methamphetamine, could not reliably testify to the actual effects of the substance on appellant. However, it was possible the evidence could be admitted through expert testimony. (37 RT

---

[56] Insofar as appellant contends that Quigel's description of appellant as being "wired" first occurred during cross-examination (AOB 371), he is mistaken.

7675-7676.) After questioning Quigel, the court determined that, while Quigel's testimony violated the court's order, it was not intentional. The court did not find the prosecution opened the door to the defense eliciting lay testimony on the effects of methamphetamine. (37 RT 7680-7685.)

The court struck the offending portions of Quigel's testimony and admonished the jurors. The court's admonition made clear that while an expert could testify generally to the effects of methamphetamine on another person, individuals were not permitted to offer their personal opinions of how methamphetamine affected them. (37 RT 7691-7693.)

During the penalty phase retrial, the court abided by its earlier rulings on the issue. (87 RT 18310.) The court specifically excluded defense witnesses Fitzsimmons and Richards from discussing how methamphetamine affected them personally. With respect to Richards, the court made its ruling pursuant to Evidence Code section 352. (87 RT 18349.) The colloquy concerning Richards's proffered testimony included the following:

> [DEFENSE COUNSEL]: This is a person [referring to Richards] that gets Mr. Peoples the job. He's using drugs at that time. Mr. Peoples is using drugs at the time. He knows that Louis is using drugs. He sees Louis, knows that Louis is - -
>
> [THE COURT]: His personal drug use will not be allowed.
>
> [DEFENSE COUNSEL]: It's like Joanie [*sic*] Fitzsimmons testified that she used drugs with Louis. It just happens that he happens to be a tow truck driver.
>
> [THE COURT]: Did Mr. [] Richards use drugs with Mr. Peoples?
>
> [DEFENSE COUNSEL]: No, they never sat down and used drugs together.

(87 RT 18348.)

B. Appellant Forfeited His Claim by Failing to Object to the Court's Ruling

Appellant failed to object to the court's ruling on the issue. Therefore, he has forfeited his claim on appeal. Objections to rulings on the admissibility of evidence must be explicit, timely, based upon specific grounds, and pursued to a final ruling. (Evid. Code, § 353; *People v. Nelson* (2011) 51 Cal.4th 198, 223.)[57] Even assuming appellant preserved the issue for review, his claim is without merit.

C. General Legal Principles

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) Relevant evidence is "evidence . . . having any tendency in reason to prove or disprove a disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Mayfield* (1997) 14 Cal.4th 668, 749; *People v. Alcala* (1992) 4 Cal.4th 742, 797.)

A trial court's decision to admit or exclude evidence will not be disturbed absent an abuse of discretion that results in a miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

The opinion of a witness who testifies as a layperson rather than an expert must be rationally based on the perception of the witness and helpful to a clear understanding of his testimony. (Evid. Code, § 800.)

The rules of evidence generally do not infringe impermissibly on a defendant's constitutional right to present a defense. (*People v. Frye* (1998) 18 Cal.4th 894, 945, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Fudge* (1994) 7 Cal.4th 1075,

---

[57] During the penalty phase retrial, defense counsel stated his disagreement, but said that he respected the Court's decision and would abide by it. (87 RT 18310.)

1102-1103.) Unless a rule of evidence is itself unconstitutional, a trial court's evidentiary rulings do not violate a defendant's right to present a defense. (*People v. Boyette* (2002) 29 Cal.4th 381, 414.)

D. The Trial Court's Ruling Admitting Some, But Not All, Lay Testimony Regarding Appellant's Use of Methamphetamine Was a Proper Exercise of Discretion

Appellant's contention that he was deprived of admissible evidence highly probative of his mental state defense, and as valuable evidence in mitigation, is without merit.

A review of the record demonstrates that the court properly admitted ample evidence of appellant's methamphetamine use during the relevant time period. In the guilt phase, lay defense witnesses testified, at length, to their observations of appellant's methamphetamine-related demeanor and physical characteristics, as well as their drug-related contacts with him. (37 RT 7628, 7629-7632, 7633-7636, 7696-7697, 7712, 7728 (Quigel); 37 RT 7732-7734, 7740, 7742-7743 (Jack); 37 RT 7770-7772 (Fitzsimmons); 38 RT 7794, 7797-7799, 7807, 7828-7829 (Fitzsimmons); 38 RT 7886, 7889-7891, 7895-7896, 7898 (Carol Peoples).) The same holds true for the penalty phase retrial. (87 RT 18231-18232, 18254-18255, 18295-18296, 18298, 18304 (Carol Peoples); 87 RT 18321, 18324-18325, 18330-18334 (Fitzsimmons); 88 RT 18397-18398 (Fike); 88 RT 18414-18418, 18430-18432, 18442-18443 (Quigel); 88 RT 18469-18470 (Ball); 89 RT 18559-18560 (Carla Hawthorne); 89 RT 18577-18578 (Tosha Hawthorne); 89 RT 18593-18594 (Uybungco); 86 RT 18626 (Jack).)

The trial court also properly excluded testimony from several lay witnesses on how methamphetamine affected them on an individual basis because such testimony was of questionable relevance (Evid. Code, § 210) and probative value (Evid. Code, § 352). As the court, observed there were inherent issues of reliability with an individual attempting to accurately

recount their own drug-altered state of mind and connect it to appellant's mental state at the time of the crimes. (35 RT 7173-7174; 87 RT 18310.)

Further, the excluded testimony was irrelevant in light of the absence of evidence as to when appellant last ingested methamphetamine relative to the time when he committed the crimes. Although Quigel testified that he sold appellant methamphetamine the day before the Village Oaks Market murders, he did not see appellant use the drugs. (37 RT 7634-7636; 88 RT 18420.) Therefore, the trial court acted well within its discretion in precluding this evidence.

Last, although appellant argues he was prejudiced because these lay witnesses would have offered opinions consistent with the defense theory of the case (AOB 366, 382), he does not specify what those opinions would have been. Nor did defense counsel at trial. That is because any proffer in this regard would have been insufficient foundation for a lay opinion on appellant's brain function and capacity to form the mental state necessary for the charged crimes. Therefore, appellant's argument that he was deprived of probative lay opinion testimony should be rejected as speculative.

E. If Exclusion of the Evidence Was Error, It Was Harmless

Even if the court erred in precluding certain lay witnesses from recounting their own experiences with the methamphetamine and thereafter rendering an opinion, it was harmless under any standard.

When a trial court's erroneous exclusion of defense evidence completely prevents the defendant from presenting a defense, the error may violate due process and require application of the harmless beyond a reasonable doubt standard of review. (*People v. Cunningham* (2002) 25 Cal.4th 926, 999; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) On the other hand, if the exclusion merely constitutes a rejection of some

evidence concerning a defense, the error is governed by the reasonable probability of a more favorable outcome standard used for state law error. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 999; *People v. Fudge*, *supra*, 7 Cal.4th at pp. 1103-1104.)

Here, as stated above, there was extensive lay witness testimony in the guilt and penalty retrial phases as to the witnesses' drug-oriented contacts with appellant and appellant's methamphetamine-related demeanor and physical characteristics.

This testimony was supplemented by defense expert Doctor Woods's testimony about methamphetamine, including the nature of the drug, its general physical and psychological effects, the phases of addiction, the connection between methamphetamine use and aggressive impulses, and the role methamphetamine played in appellant's life. (43 RT 9028-9045; 44 RT 9060-9080, 9098-9163, 9180-9191.)

The lay witnesses' observations of appellant's demeanor, their accounts of their drug-related contacts with him, and the defense expert testimony, established an intoxication-related defense to the mental state elements of the charges, as well as evidence in mitigation. It was for the guilt and penalty phase jurors to determine the weight to be accorded this evidence.

In light of this evidence, appellant's contention that the jurors lacked "insight into the often confused and frenetic world of the methamphetamine user" (AOB 383) is without merit.[58]

---

[58] Inasmuch as appellant contends his motion for a mistrial was erroneously denied because it was predicated, in part, on this claim (AOB 377, fn. 195), his contention is without merit. There was no abuse of discretion. (See *People v. Gonzales*, *supra*, 52 Cal.4th at p. 314.)

Accordingly, appellant's constitutional right to present a defense was not implicated or otherwise adversely impacted by the court's ruling. The guilt and penalty determinations are sound.

IX. THE TRIAL COURT DID NOT ERR IN LIMITING DEFENSE COUNSEL'S CROSS-EXAMINATION OF DOCTOR MAYBERG DURING THE PENALTY PHASE RETRIAL OR IN ITS ADMONITION TO THE JURY ABOUT A DEFENSE DISCOVERY VIOLATION

Appellant argues the court impermissibly restricted his right to cross-examine prosecution rebuttal witness Doctor Mayberg during the penalty phase retrial. Appellant further contends the trial court erred when it admonished the jury about a defense discovery violation. In appellant's view, this error was compounded because the court's admonition did not differentiate between defense counsel's misconduct and appellant's lack of responsibility for that conduct. Accordingly, appellant claims his state and federal constitutional and statutory rights to confrontation, due process, a fair trial, to present a defense, to a reliable, individualized sentence determination, and to be free from cruel and unusual punishment, were denied. (AOB 385-427.)

Appellant's claim is without merit. Because the line of questioning defense counsel pursued called for inadmissible hearsay, the trial court was correct in limiting the inquiry of Doctor Mayberg. Further, the court's admonition concerning the defense discovery violation was adequate under the circumstances. Even if the court erred, there was no prejudice.

A. Procedural History

Doctor Monte Buchsbaum, a defense expert witness, testified at the guilt phase trial, but he did not testify before the penalty phase retrial jury.

On May 4, 2000, during the retrial, defense counsel attempted to cross-examine Doctor Mayberg about her review of Doctor Buchsbaum's testimony from the guilt phase trial in preparation for her testimony in that

phase. (93 RT 19619-19620.) The prosecutor objected on relevance grounds pointing out that Buchsbaum had not been a witness in the retrial. The court pointed out that there was a foundational issue. (93 RT 19620-19621.)

Outside the presence of the jury, the court permitted defense counsel the opportunity to question Mayberg to try and establish a foundation for questioning her about Buchsbaum's prior testimony. (93 RT 19621.) Mayberg explained that she did not review Buchsbaum's testimony before the penalty retrial and did not rely on Buchsbaum's testimony from the guilt phase in rendering her opinion in the penalty retrial. She based her opinion on the scans of other defense experts—Doctors Wu and Amen. (93 RT 19622-19624.) Mayberg described Buchsbaum's testimony as irrelevant because he did not perform a scan of appellant. (93 RT 19624-19625.) She explained that her role in the guilt phase was to rebut the defense experts, including Buchsbaum. (93 RT 19626.)

Nonetheless, defense counsel argued that he should be able to cross-examine Mayberg about Buchsbaum's testimony because her opinion between the two trials was the same and, therefore, the basis for the opinions must have been the same. (93 RT 19627-19628.) The court disagreed and denied this line of questioning. (93 RT 19628.)

The next day, May 5, defense counsel raised the issue again and cited various authorities for the proposition that he could question Mayberg about her reliance on Buchsbaum's testimony in the guilt phase. (93 RT 19670-19671.)

The prosecutor explained his view of the defense strategy with respect to cross-examination of Mayberg:

> What Mr. Fox wants to do is have [Doctor Mayberg] testify to the pioneer efforts of Monte Buchsbaum, and then bring out Dr. Buchsbaum's opinion in differentiation between Dr. Mayberg,

> and throw out a third doctor that disagrees with Dr. Mayberg, and yet shield Dr. Buchsbaum from cross-examination.

(93 RT 19672-19673.) The prosecutor pointed out that he had made significant inroads, during his cross-examination of Buchsbaum in the guilt phase, in undermining the reliability of Buchsbaum's theory that abnormal PET scans could be linked to violence. (93 RT 19673.)

Citing one of the authorities presented by the defense, *Jefferson's California Evidence Benchbook, 3rd Edition*, the trial court pointed out that Doctor Mayberg could be cross-examined on "publications, articles, treatises; not testimony." (93 RT 19676.) The court stood by its ruling: "You are not allowed to use prior testimony of an individual for cross-examination purposes without presenting that witness first and/or having it considered . . . ." (93 RT 19677.) The court denied defense counsel's subsequent request to reopen his voir dire of Mayberg and find out why she did not rely on Buchsbaum's testimony in forming her opinion presented during the penalty phase retrial. (93 RT 19677.)

During recross-examination of Mayberg, defense counsel asked her if, during the guilt phase, she termed Doctor Amen's materials "garbage." (93 RT 19699.) In her response, Doctor Mayberg pointed out that her answer had been stricken. (93 RT 19699.) Defense counsel also asked Mayberg about her willingness to come to court and testify without having all of the necessary information: "So last time you were retained by the prosecution, and you came to court, and you didn't even have all the materials necessary to render an opinion; but you came to court nonetheless; is that correct?" (93 RT 19700.) The prosecutor objected and the jury was excused. (93 RT 19700.)

As detailed in Argument V, subsection C, *ante*, since the "garbage" reference was stricken from the record and the defense turned over the raw data only after Doctor Mayberg began her guilt-phase testimony, this line

of questioning by defense counsel gave rise to the court's admonishment to the jury:

> Ladies and gentlemen, before we proceed, I need to advise you of a couple of things.
>
> First involved the question about the prior testimony, that of the doctor referenced Dr. Amen's materials as garbage was stricken from the record.
>
> That means it is [n]on testimony. That means it should not have been referenced in any fashion for any reason. And it was extremely improper for Mr. Fox to do so before you.
>
> It is again stricken. Period. It was improper questioning. Should not have been done.
>
> More importantly, the issue of the information provided the day Dr. Mayberg testified.
>
> What occurs in any criminal matter, [] civil cases for that matter as well - - what occurs is what is called discovery compliance. Where information in one side's possession is ordered to be turned over to the opposition or other side. Either the defense to the prosecution or the prosecution to the defense.
>
> Mr. Dunlap had made numerous discovery requests as to this specific information, which was not provided. It was untimely when it was finally provided after Dr. Mayberg had arrived and was to testify. So it was information that should have been provided earlier and was not.

(93 RT 19707-19708.)

Defense counsel's next question was: "Dr. Mayberg, so you were ready to testify at the last hearing without all of the materials you needed, correct?" (93 RT 19708.) Doctor Mayberg then explained, at length, her repeated requests of the District Attorney's investigator for additional information pertaining to Amen's scans and the investigator responding back, "[T]his is all we're getting." (93 RT 19708-19709.)

B. General Legal Principles

"'[T]he Confrontation Clause only guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (*People v. Schmeck* (2005) 37 Cal.4th 240, 278, quoting *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 53.)

The trial court's discretion to limit cross-examination does not violate the Sixth Amendment right of confrontation unless a defendant can show the prohibited cross-examination would have produced a significantly different impression of witness's credibility. (*People v. Cornwell* (2005) 37 Cal.4th 50, 95.)

C. The Trial Court's Limitation of Cross-Examination of Doctor Mayberg Was Proper As Was Its Admonition Regarding the Discovery Violation

Here, as the prosecutor pointed out, during the penalty retrial, appellant attempted to admit defense expert Doctor Buchsbaum's guilt phase testimony during defense counsel's cross-examination of Doctor Mayberg—a prosecution rebuttal witness—without subjecting Buchsbaum, or his opinion, to the searching and extensive cross-examination Buchsbaum endured during the guilt phase.

Appellant's assignment of error to the trial court in disallowing this line of questioning should be rejected. The rules of evidence do not permit the kind of end run appellant advocates.

Evidence Code section 721 provides:

> (a) Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion.

> (b) If a witness testifying as an expert testifies in the form of an opinion, he or she may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless any of the following occurs:
>
> (1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion.
>
> (2) The publication has been admitted in evidence.
>
> (3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.
>
> If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits.

On direct examination, an expert may explain the reasons for his or her opinions, including the matters the expert considered in forming his or her opinions. (Evid. Code, § 802; see also *People v. Bell* (2007) 40 Cal.4th 582, 608.)

In this case, during the penalty retrial, Doctor Mayberg offered her opinion that appellant's brain scans were consistent with depression or sadness, although she could not confirm this based on the scans alone. (93 RT 19581-19582, 19734.) Further, the scans revealed mild right frontal and right cingulate lobe low metabolism, with no neurobiologic or psychiatric diagnosis indicated. (93 RT 19581-19582.) Throughout her direct testimony, Doctor Mayberg explained the basis for her opinion, as well as her disagreement with the conclusions reached by defense experts Doctors Wu and Amen. (See generally 93 RT 19557-19573, 19581-19617.) Before arriving at her opinion, Mayberg stated that she reviewed, among other materials, the testimony of defense experts Woods, Wu, and Amen. (93 RT 19550.)

Contrary to appellant's assertion, Doctor Mayberg did not base her opinion in the penalty retrial on Doctor Buchsbaum's guilt phase testimony. This is demonstrated by her retrial testimony and her testimony during the hearing on the issue. Mayberg explained that her opinion was based on the scans performed by Doctors Amen and Wu. The only relevance that Buchsbaum's guilt-phase testimony had to Mayberg was in her role as a rebuttal witness during the guilt phase. Therefore, appellant had no legitimate basis for admitting Buchsbaum's prior testimony through cross-examination of Mayberg during the penalty phase retrial. (See *People v. Bell* (1989) 49 Cal.3d 502, 531-532 [expert may be not be cross-examined on matters irrelevant to the import or credibility of his opinion].)

Further, beyond the fact that Doctor Mayberg did not rely on Doctor Buchsbaum's testimony in rendering her opinion in the retrial, the testimony is not a "professional text, treatise, journal, or similar publication" within the meaning of Evidence Code section 721, subdivision (b). Defense counsel did not attempt to ask Mayberg about Buchsbaum's studies or publications. Instead, counsel was seeking to admit Buchsbaum's hearsay opinion, without it being subject to cross-examination.

Additionally, although both parties enjoy wide latitude in the cross-examination of experts in order to test their credibility (*People v. Coleman* (1985) 38 Cal.3d 69, 92), it is constitutionally permissible for a court to exclude, pursuant to Evidence Code section 352, evidence of marginal impeachment value that would result in the undue consumption of time (*People v. Brown* (2003) 31 Cal.4th 518, 545). Here, if the trial court had permitted defense counsel to cross-examine Mayberg with that portion of Buchsbaum's guilt-phase testimony that demonstrated a difference in their opinions, it would have likely resulted in the prosecution seeking to admit large portions of Buchsbaum's cross-examination during which the

prosecutor undermined the reliability of Buchsbaum's views. (See Evid. Code, § 356.) Thus, Buchsbaum's former testimony would have had little effect in impeaching Doctor Mayberg and would have also unduly consumed time. In short, the trial court did not err in excluding this line of questioning.

Appellant cites this Court's decision in *People v. Clark* (1993) 5 Cal.4th 950,[59] in support of his argument. (AOB 414-416.) However, that case is readily distinguishable. In *Clark*, the prosecutor sought to question a defense psychiatrist about an article on malice aforethought authored by another doctor. (*Id.* at p. 1013.) The defense expert had testified that he had a former association with the article's author and was familiar with the author's works, including the article at issue. (*Ibid.*) The Court found the cross-examination of the defense psychiatrist, using the "*scholarly* work," was proper. (*Ibid*; emphasis added.) Here, in contrast, defense counsel did not seek to question Doctor Mayberg about one of Doctor Buchsbaum's scholarly works. Instead, counsel wanted to admit Buchsbaum's hearsay testimony unencumbered by cross-examination. If appellant wanted the benefit of Doctor Buchsbaum's "preeminent reputation" (AOB 419) at the penalty phase retrial, appellant should have called him to the witness stand.

Appellant's somewhat related contention is that the trial court erred by admonishing the retrial jury about a "non-existent discovery violation." (AOB 422.) This claim of error is, likewise, without merit. There was a discovery violation. At the outset of Doctor Mayberg's guilt phase testimony, it was revealed that the defense had raw data corresponding to Doctor Amen's scans in its possession, while the prosecution did not. (46 RT 9387-9390.) The raw data was "quite significant" to Mayberg's

---

[59] Overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.

opinion and testimony. (46 RT 9387.) She had previously made repeated requests of the District Attorney's investigator for additional information pertaining to Amen's scans and the investigator responded back that "this is all we're getting." (93 RT 19708-19709.) Although defense counsel maintained the information was provided to the prosecution, he could not produce the discovery receipt. (46 RT 9390.) Even when the court ordered defense counsel to make copies of the data from the defense files (46 RT 9390), defense counsel unsuccessfully attempted to avoid turning over the data (46 RT 9391-9392). These facts, combined with defense counsel's explicit reference to Mayberg's former testimony about "garbage," which counsel knew had been stricken, constitute substantial evidence supporting the trial court's decision to admonish the jury. (See *People v. Riggs* (2008) 44 Cal.4th 248, 306 [finding trial court's determination of defense discovery violation supported by substantial evidence].)

Moreover, the admonition did not unconstitutionally impute defense counsel's misconduct to appellant, as appellant contends (AOB 423-426.)

Specifically, appellant challenges the court's admonition because it did not guide the jurors as to how to consider defense counsel's violation of the discovery laws. (AOB 426.) However, appellant forfeited a challenge to the completeness of the trial court's admonition by failing to request amplifying or clarifying language. (*People v. Riggs*, *supra*, 44 Cal.4th at p. 309.)

Even if not forfeited, any omission by the trial court in this regard favored appellant. (See *People v. Riggs*, *supra*, 44 Cal.4th at pp. 309-310.) In making his argument, appellant equates the court's admonition with the former discovery violation instruction—CALJIC No. 2.28. However, appellant's argument fails at a fundamental level because the court's admonition here looked nothing like CALJIC No. 2.28, the latter having provided, in part: "[Y]ou may consider [concealment] [and] [or] [delayed

disclosure] as evidence tending to show the [defendant's consciousness of guilt] []." In this case, the point of the court's admonition was to ensure that defense counsel could not mislead the jurors into faulting Doctor Mayberg for not having all of the information necessary for an informed opinion. There was no language in the admonition instructing the jury that the violation could be used as evidence of appellant's consciousness of guilt. (93 RT 19707-19708 ["It was untimely when it was finally provided after Dr. Mayberg had arrived and was to testify. So it was information that should have been provided earlier and was not"].) Given this, appellant's reliance on *People v. Bell* (2004) 118 Cal.App.4th 249 (AOB 425-427), is inapposite. "[T]he lack of a more complete instruction to the jury regarding how to determine whether a discovery violation occurred in no way could have prejudiced defendant in this case." (*People v. Riggs*, *supra*, 44 Cal.4th at pp. 309-310.)

D. If the Trial Court Erred, It Was Harmless

"It is . . . well settled that the erroneous admission or exclusion of evidence does not require reversal except where the error or errors caused a miscarriage of justice. [Citation.] '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.]" (*People v. Richardson* (2008) 43 Cal.4th 959. 1001 [citing harmless error standard announced in *People v. Watson*, *supra*, 46 Cal.2d at p. 836].)

In applying this standard, there is no reasonable probability that appellant would have obtained a more favorable result if the court had permitted defense counsel to inquire further of Doctor Mayberg with respect to Doctor Buchsbaum's opinion. As stated above, what would have certainly followed would have been a request by the prosecution to admit

the corresponding portions of Buchsbaum's cross-examination, which demonstrated that his opinion was founded on questionable science.

Further, during the guilt phase, defense counsel cross-examined Mayberg on her familiarity with Buchsbaum, his work, and his conclusions, including the fact that their conclusions differed. (46 RT 9465-9470, 9477, 9496.) Given the jury's guilty verdicts, it is not reasonably probable that this line of questioning would have resulted in a better outcome for appellant in the penalty phase retrial. This is especially true since Buchsbaum did not testify before the penalty retrial jury.[60]

With respect to the court's admonition concerning the discovery violation, any omission in the instruction, even if erroneous, was harmless under *Chapman v. California*, *supra*, 386 U.S. at page 24, and *Watson*, *supra*, 46 Cal.2d at page 836. As stated above, any infirmity in the instruction was to appellant's benefit. Further, any error was harmless given the substantial evidence in aggravation and moral considerations that supported the jury's penalty determination.[61]

X. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING A PORTION OF THE DEFENSE FORENSIC EXPERT'S TESTIMONY

Appellant next contends his federal and state constitutional rights to present a defense, to confront and cross-examine witnesses, to due process, to a fair trial, to a reliable, individualized determination of death eligibility and sentence, and to be free from cruel and unusual punishment were violated when the trial court impermissibly restricted Brent Turvey's forensic profiling testimony offered during the guilt phase.

---

[60] Nor did Doctor Buchsbaum testify during the first penalty phase trial.

[61] Contrary to appellant's assertion (AOB 427), the court's denial of his motion for a mistrial, based on these grounds, was a proper exercise of discretion. (See *People v. Gonzales*, *supra*, 52 Cal.4th at p. 314.)

Respondent disagrees. The court's rulings on the defense proffer constituted a proper exercise of its discretion. The court permitted the defense to admit that portion of Turvey's testimony that would have directly addressed the testimony of the prosecution's crime scene reconstruction expert. Additionally, the court's ruling allowed for introduction of portions of Turvey's proffered testimony that addressed certain aspects of appellant's behavior, as evidenced by the crime scenes. The portion the trial court otherwise excluded was speculative and unreliable. In any event, if the court erred, it was harmless.

A. Procedural History

On June 28, 1999, during a break in the prosecution's guilt phase case-in-chief, the court and parties discussed the defense proffer regarding witness Turvey. The prosecutor voiced a strong objection to any testimony from Turvey that would involve profiling of appellant's mental state at the time of the crimes. (34 RT 7141-7142, 7146.) However, the prosecutor had no objection to testimony on crime scene reconstruction, including "shot sequence firing." (34 RT 7141-7142.)

As an example of Turvey's anticipated testimony, defense counsel explained that, with regard to the Cal Spray crime scene, Turvey would opine that the evidence indicated accumulated rage on appellant's part. As for the Mayfair Liquors and the Village Oaks Market crime scenes, the evidence suggested limited planning. Turvey's opinion would also be used to refute some of appellant's statements to police about the crimes. (34 RT 7149-7151.)

The court agreed that Turvey's testimony, as it concerned crime scene reconstruction, would be appropriate. However, testimony profiling appellant's state of mind at the time of the crimes was not sufficiently reliable. (34 RT 7152-7153.) After argument by defense counsel, the court further explained that while profiling may have a scientific aspect, like

polygraph tests, that did not mean it was sufficiently reliable under the rules of evidence. (34 RT 7154.) The court was also concerned about that portion of the proposed testimony intended to address appellant's motives in committing the crimes. (34 RT 7156.)

At the request of the prosecution (34 RT 7157), the court conducted an evidentiary hearing pursuant to Evidence Code section 402. Turvey testified at the hearing on July 1, 1999. (36 RT 7366-7379, 7452-7494.) During the course of the testimony, the parties and court, again, debated, at length, that portion of Turvey's testimony, which concerned appellant's state of mind. (36 RT 7379-7451.)

The hearing resumed on July 6, at which time Turvey offered a report he had prepared over the weekend. (36 RT 7497.) Defense counsel suggested that Turvey's testimony would also be foundational to the defense forensic psychiatrist's (Doctor Woods's) anticipated testimony about mental state issues. (36 RT 7498.)

After additional argument, the court reiterated its previous ruling that Turvey could testify to crime scene reconstruction and the factual scenarios presented by the crime scenes. However, the court found that any proposed testimony about appellant's planning abilities deteriorating over time, or appellant engaging in contradictory acts in committing the crimes, was speculative and beyond the realm of crime scene reconstruction. (36 RT 7528-7530.) The court also turned away defense counsel's suggestion that the testimony be limited to foundational purposes. The court reiterated its concerns about speculation and relevance with respect to Turvey comparing the crime scenes in this case to others not involving appellant and then offering an opinion as to appellant's state of mind. (36 RT 7532-7534.) With specific regard to Turvey's report, the court found the first four and a half pages concerned admissible matters, but Turvey's opinions about appellant's state of mind were not admissible. (36 RT 7536-7537.)

Although defense counsel advocated for admission of Turvey's testimony because it would help establish that appellant's thinking was impaired, counsel conceded that some of appellant's so-called "precautionary" or "contradictory" acts, as characterized by Turvey, were not conclusive. (36 RT 7542-7544 ["I think I would preface all of these as maybe"].)

At the conclusion of the hearing, the court ruled that Turvey could testify to the issue of crime scene reconstruction and opine as to what specific crime scene evidence indicated planning, knowledge, or precautionary behavior on appellant's part. (36 RT 7551-7555, 7567.) However, any evidence with respect to profiling was excluded as irrelevant and more prejudicial than probative under Evidence Code section 352. (36 RT 7574-7575.) The court pointed out that, regardless of the court's exclusion of certain proffered testimony by Turvey, the attorneys were free to argue the issues raised by the excluded testimony. (36 RT 7556-7561.)

B. General Legal Principles

Evidence Code section 210, states, in pertinent part, that: "'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evidence Code section 350, states: "No evidence is admissible except relevant evidence."

"'Exclusion of evidence as more prejudicial, confusing or distracting than probative, under Evidence Code section 352, is reviewed for abuse of discretion.' [Citation.] But 'exclusion of evidence that produces only speculative inferences is not an abuse of discretion.'" (*People v. Cornwell* (2005) 37 Cal.4th 50, 81, disapproved on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) The abuse of discretion standard of review also applies to rulings concerning relevance. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) It is settled that a trial court has wide

discretion to exclude expert testimony that is unreliable. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1061.)

C. The Trial Court Properly Excluded Turvey's Mental-State Profiling Testimony

First, it should be noted that the court did not, in any way, restrict appellant's ability to call Turvey to rebut the prosecution's crime scene reconstruction expert. (34 RT 7152-7153.) Therefore, appellant's argument suggesting this to be the case (AOB 439-440) should be rejected. Further, the trial court did not abuse its discretion in ruling that a portion of Turvey's testimony was inadmissible in that it was speculative and more prejudicial than probative under Evidence Code section 352. In *People v. Smith* (2005) 35 Cal.4th 334, 357, this Court explained that "'profile evidence'" is inadmissible if it is irrelevant, lacks foundation, or is more prejudicial than probative. (*Ibid.*)

According to defense counsel, Turvey's testimony was being offered to show appellant's state of mind or intent at the time of the crimes, including issues encompassing motive, planning, modus operandi, and skill level. Turvey's opinions in this regard would be based on evidence obtained at the crime scenes. (34 RT 7149-7151; 36 RT 7384, 7419.) Yet, defense counsel conceded that this profiling-type evidence went beyond the scope of the prosecution's crime scene reconstruction expert. (36 RT 7385.) Further, counsel acknowledged that the evidence was not conclusive; in other words, speculative. (36 RT 7542-7544.)

As the court pointed out, profiling appellant's state of mind at the time of the crimes, as adduced by the crime scene evidence and identity of the victims, was speculative and unreliable. (34 RT 7152-7153.) For example, according to defense counsel, Turvey would have testified that appellant's skill level in committing the crimes deteriorated over time as evidenced by the fact that he went from killing people that he knew to victimizing

strangers. (36 RT 7444-7446.) The court countered that this fact could be readily explained by a difference in motives, as opposed to a deteriorating level of criminal acumen. (36 RT 7446.) Turvey was not a forensic psychiatrist. He did not interview appellant or otherwise attempt to discern appellant's mental health. Thus, the trial court properly found this portion of Turvey's testimony was unlikely to "assist the trier of fact" (Evid. Code, § 801, subd. (a) [expert opinion testimony limited to that which would assist the trier of fact]).

Given that the proffered evidence would not have helped the jurors, the trial court properly excluded the profiling portion of Turvey's testimony—including as foundational to Doctor Woods's testimony. The same potential for misleading or confusing the jury existed in this latter regard.

Moreover, although the court ultimately agreed that Turvey could testify to certain aspects of the crime scenes as indicative of appellant's knowledge and his ability to plan and take precautionary acts (36 RT 7549-7551, 7567), the defense chose not to call Turvey to testify at the guilt phase or penalty retrial.[62]

Accordingly, appellant's state and federal constitutional rights were not violated, including his right to present a defense. As stated previously, the rules of evidence generally do not infringe impermissibly on a defendant's constitutional right to present a defense. (*People v. Frye*, *supra*, 18 Cal.4th at p. 945, disapproved on another ground in *People v. Doolin*,

---

[62] To the extent that appellant challenges the penalty judgment as part of this claim (AOB 440), he did not raise the issue of the admissibility of Turvey's testimony during the penalty phase retrial. His claim in this regard should be deemed forfeited. (See Evid. Code, §§ 353, 354; *People v. Mattson* (1990) 50 Cal.3d 826, 853-854 [on appeal, contention that erroneous admission or exclusion of evidence violated constitutional right not preserved in absence of objection on that ground below].)

supra, 45 Cal.4th at p. 421, fn. 22; *People v. Fudge*, *supra*, 7 Cal.4th at pp. 1102-1103.) Unless a rule of evidence is itself unconstitutional, a trial court's evidentiary rulings do not violate a defendant's right to present a defense. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 414.)

Appellant's reliance on this Court's decision in *People v. Davis* (2009) 46 Cal.4th 539, does not support his argument. The expert testimony at issue in *Davis* was provided by a doctor who was a clinical professor of psychiatry in biobehavioral sciences at the University of California, Los Angeles School of Medicine. The doctor discussed a sexual disorder known as paraphilia and described characteristics typical of individuals who have this disorder. (*Id.* at pp. 562, 605.) Although admission of the doctor's general testimony about the disorder was permissible, the Court termed it "a closer question" whether the trial court erred when it allowed the expert to testify that the defendant's criminal behavior in the pending case was consistent with paraphilia. The Court found the testimony harmless in any event. (*Id.* at p. 605.)

The situation in *Davis* is not a ringing endorsement for admission of Turvey's testimony. First, Turvey was a private consultant with undergraduate degrees in history and psychology and a master's degree in forensic science. (36 RT 7367-7368, 7371.) That hardly qualifies him to render a professional opinion on appellant's state of mind or mental health issues. Further, even if Turvey could be deemed an expert on mental state issues, *Davis* suggests that any opinion Turvey would have rendered on appellant's motives or predisposition to commit the crimes—or lack thereof—may have impermissibly encompassed the ultimate issues for the jury to decide. In short, *Davis* undermines appellant's argument.

D. If the Trial Court Erred, It Was Harmless

Even if the trial court erred in excluding Turvey's state-of-mind profiling evidence, it was harmless under any standard. (See *People v.*

Cunningham, *supra*, 25 Cal.4th at p. 999; *People v. Fudge*, *supra*, 7 Cal.4th at pp. 1103-1104 [explaining applicable harmless error standard depends on whether exclusion was a complete or partial rejection of defense evidence].)

Here, during the guilt phase, the defense presented ample evidence on the issue of appellant's state of mind at the time of the crimes, as provided by expert witnesses Wu, Amen, Buchsbaum, and Woods. This included taking into account the manner in which appellant carried out the crimes, his possible motives, and evidence from the crime scenes. The import of this testimony was that appellant's brain and thinking were impaired at the time of the crimes. Given this, Turvey's testimony was cumulative. This would explain appellant's decision not to call Turvey as a witness.

Further, the court made clear the attorneys were free to argue the issues that Turvey's testimony would have addressed. (36 RT 7556-7661.) Indeed, defense counsel argued along these lines. (48 RT 10087-10091 ["accumulated rage" depicted by Cal Spray crime scene], 10095 [evidence of "explosive anger" at Eight Mile Road crime scene], 10096 ["bizarre behavior" exemplified by Village Oaks Market murder scene and aftermath], 10098 ["absolutely bizarre" statement to detectives after the crimes].)

Therefore, any error was harmless.

XI. THE TRIAL COURT'S PENALTY PHASE RETRIAL RULING REGARDING SEXUAL ABUSE MITIGATION EVIDENCE WAS A PROPER EXERCISE OF DISCRETION

Appellant contends the trial court erred in excluding certain evidence in mitigation, which was intended to corroborate his hearsay statement that his counselor molested him in 1977. Appellant further argues that the prosecutor's penalty phase retrial argument on the molestation evidence contributed to the prejudicial effect of the court's error.

Not so. The trial court properly excluded the evidence because it was more prejudicial than probative and not relevant to defendant's character or record or circumstances of the offense. Moreover, the court admitted ample evidence in mitigation relating to the issue: 1) appellant's hearsay statement that he was molested; 2) certified court records corroborating appellant's statement; 3) statements of other molest victims, which also corroborated appellant's hearsay statement; and 4) expert testimony on the general effects of molestation. Further, the prosecutor's argument on the issue was proper. Therefore, if error occurred, appellant was not prejudiced.

A. Procedural History

During the first penalty phase trial, on August 12, 1999, the court and parties discussed a defense motion to admit the testimony of two men—Lamson and Portbury—who, like appellant, were molested by John Fry, a counselor in the juvenile justice system in Florida. (8 CT 2216-2219.)[63] According to defense counsel, the testimony was intended to corroborate appellant's statement that Fry molested him, as well as to establish the effects of the molestation on Lamson and Portbury's own development and, by extension, appellant's development. (50 RT 10336, 10354.) The defense also wanted to admit the testimony of law enforcement officers—Bessler and Doolittle—who investigated other cases involving Fry. (50 RT 10332-10333.)

After considerable argument on the issue, the court ruled the testimony inadmissible because it was not relevant and was more prejudicial than probative. However, the court stated it would permit

---

[63] Appellant first revealed that he was molested by Fry when he was interviewed by defense witness and social historian Doctor Gretchen White. The molest occurred in 1977. (50 RT 10329.) Doctor White testified to appellant's hearsay statements about the molest in the first penalty phase. (57 RT 11574-11578.)

expert testimony on the effects of molestation, as well as introduction of certified court documents from Florida, intended to corroborate appellant's statements to White. (50 RT 10356-10358, 10370, 10373.) One set of documents related to Fry's conviction for a sex-related offense involving a minor and the other established that Fry was appellant's counselor during the relevant time period. (50 RT 10373; Defense Exh. No. 806.)[64]

Over the next several days, the court considered supplemental offers of proof and additional argument on the matter. Ultimately, the court abided by its earlier ruling excluding the testimony. (51 RT 10590-10591.)

During the course of the penalty retrial, on March 27, 2000, the court and parties, again, took up the issue. However, this time, the defense sought admission of Lamson and Portbury's hearsay statements, as presented in Doctor White's testimony, to bolster the credibility of appellant's statement to White about the molest. (82 RT 17000-17001, 17005.) Defense counsel argued that additional corroboration was necessary because the prosecutor's questioning and argument during the first penalty phase suggested that appellant was not truthful about the molest. (82 RT 17006.)

After considering further offers of proof and argument, the court ruled that Doctor White, in addition to relating appellant's hearsay statements about the molest, would be permitted to state that her discussions with Portbury and Lamson confirmed her opinion that appellant's statements to her about the molest were truthful. (82 RT 17013, 17019.) Otherwise, permitting Portbury and Lamson to testify to their experiences with Fry would result in two trials within a trial. (82 RT 17013.) The court noted that Fry's certified conviction (defense exh. no. 806) carried Portbury's

---

[64] Doctor White testified to Fry's prior conviction for procuring a child under 16 years of age for prostitution. (57 RT 11574-11577.)

name as being the victim, which served as additional corroboration. (82 RT 17013-17014.) Before leaving the issue, defense counsel stated: "To the extent that the defense might still differ, thank you for allowing the opportunity to argue it fully." (82 RT 17020.)

B. General Legal Principles

The right to present mitigating evidence in the penalty phase does not trump or override ordinary rules of evidence. Trial courts retain authority to exclude evidence that has no bearing on a defendant's character or record or the circumstances of the offense. (*People v. Thornton* (2007) 41 Cal.4th 391, 454.)

Indeed, the trial court determines the relevancy of mitigating evidence and retains discretion to exclude evidence where the probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1145; overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) Evidence that is irrelevant or incompetent is inadmissible in a penalty phase. (*People v. Gay* (2008) 42 Cal.4th 1195, 1220.)

C. The Trial Court's Ruling Admitting Some, But Not All, Corroborating Evidence of Sexual Abuse Was a Proper Exercise of Discretion

As a threshold matter, insofar as appellant challenges the trial court's first penalty phase ruling excluding the direct testimony of Portbury, Lamson, and the investigators, the claim is moot since the jury did not return a verdict.

Additionally, that portion of appellant's claim that attacks the court's penalty retrial ruling excluding this testimony, including that of Fry's former roommate (AOB 468), should be deemed forfeited. During the retrial, appellant sought to admit detailed hearsay statements Portbury and

Lamson made to Doctor White, not their direct testimony. (11 CT 3018-3025.) Therefore, the only viable question is whether the trial court erred in excluding Portbury and Lamson's detailed hearsay statements to White.

Appellant argues this evidence was "critical" because it corroborated his statement to Doctor White and confirmed that appellant endured an abusive juvenile justice system while a youth in Florida. (AOB 465.) However, appellant did not advance this latter ground at trial as a basis for admission of the statements.

In any event, the trial court did not err in excluding the detailed hearsay statements of Portbury and Lamson. These statements concerned their troubled backgrounds, the manner in which Fry molested them, and an absence of contact with appellant. (11 CT 3019-3020.) As purported mitigation evidence, their statements had little, if any, bearing on appellant's character or record or the circumstances of the offense. (See *People v. Thornton*, *supra*, 41 Cal.4th at p. 454.) Any probative value as potential corroboration was far outweighed by the potential for distracting or confusing the jury, as the court found.

Moreover, the trial court permitted appellant to introduce not only his hearsay statement that he was molested by Fry (90 RT 18778-18779, 18781),[65] but also corroborating evidence in the form of Portbury and Lamson's statements to Doctor White that they, too, were molested by Fry (90 RT 18779-18780). Also, the court allowed the introduction of certified court records from Florida that corroborated appellant's statement that Fry

---

[65] Appellant likens the issues raised by this claim to those involved in Claims V and VI, *ante*, regarding evidence of remorse. (AOB 458.) To a certain extent, appellant is correct. The claims are spawned by his success in introducing his self-serving hearsay statements to the penalty retrial jury—that he was sexually abused as a youth and that he was remorseful about his crimes—without having to subject himself to cross-examination.

was his counselor, as well as Fry's conviction related to his molestation of Portbury. (90 RT 18780-18781; Defense Exhs. Nos. 806, 824.) Therefore, appellant's contention that the jury was left "with an uncorroborated presentation" of appellant's molestation by Fry (AOB 469) is baseless.

Appellant argues that his case is similar to that of *In re Lucas* (2004) 33 Cal.4th 682. (AOB 466-467.) In that case, this Court held that the defendant's trial counsel rendered ineffective assistance because counsel failed to conduct an adequate investigation with respect to potential mitigation evidence. As a consequence, counsel failed to present any evidence of mitigation, although such evidence existed. (See *In re Lucas*, *supra*, 33 Cal.4th at pp. 722-728.) The Court noted that "[a]lthough '[i]n some cases, counsel may reasonably decide not to put on mitigating evidence, . . . to make that decision counsel must understand what mitigating evidence is available and what aggravating evidence, if any, might be admissible in rebuttal.' [Citation.]" (*Ibid.*)

The circumstances here could not be more dissimilar. Defense counsel presented considerable evidence in mitigation, presumably derived from a thorough investigation of appellant's background. In addition to evidence of sexual abuse, the jury learned that appellant suffered emotional abuse at the hands of his parents, verbal and physical abuse by his school friends, and verbal and emotional abuse by his wife.

Appellant's citation to *People v. Lucero* (1988) 44 Cal.3d 1006 (AOB 469-470), is also distinguishable. In *Lucero*, the erroneously excluded corroboration evidence would have been provided by an expert with "specialized training in the diagnosis and treatment of posttraumatic stress syndrome, particularly in Vietnam veterans." (*People v. Lucero*, *supra*, 44 Cal.3d at p. 1029.) This expert had also conducted a three-and-one-half-hour examination of the defendant and was prepared to testify that the

defendant exhibited symptoms of the disorder dating back a number of years. (*Ibid.*)

This Court found that, although another expert had testified to the defendant's mental condition in this regard, this additional expert testimony was not cumulative because: 1) there was "considerable debate" about whether the Vietnam posttraumatic stress syndrome existed; 2) the prosecution called into question the reliability of the first expert's assessment; and 3) the second expert was not susceptible to attack as "a mere 'hired gun'" professional witness, as was the first expert. (*People v. Lucero*, *supra*, 44 Cal.3d at pp. 1030-1031.)

Thus, *Lucero* suggests that if Portbury and Lamson were experts on the subject of child sexual abuse, if they had interviewed appellant, and if appellant either related that he was molested or exhibited symptoms associated with having been molested as a youth, the exclusion of such testimony would have been error. Furthermore, the court here did not exclude corroborating evidence in its entirety, as the trial court did in *Lucero*. Therefore, the case is inapposite.

D. Appellant Has Not Demonstrated Prejudice

If the trial court erred in excluding Portbury and Lamson's detailed statements to Doctor White, the error was harmless under any standard.

As stated above, in addition to evidence in mitigation regarding molestation, including how childhood sexual abuse generally affects adult men (Doctor Lisak's testimony), appellant presented ample evidence of his dysfunctional upbringing and the physical, verbal, and emotional abuse inflicted by his wife, parents, and childhood friends. While this might have elicited some sympathy from the jury, appellant showed no causal connection between his disadvantaged childhood and his calculated and cold-blooded decisions to murder four people for money and, in one case,

for revenge. Instead, the defense attempted to establish this causal link by emphasizing the damage methamphetamine had done to appellant's brain.

Even if appellant's childhood was less than optimal, it was not so deplorable as to render him unable to function as a law-abiding member of society. Evidence at the penalty phase retrial demonstrated that appellant was a good father and husband and was gainfully employed for much of his adult life. Further, appellant was not an immature or naïve youth when he committed the murders; he was an adult man in his mid-30s.

As for appellant's contention that the prosecutor exacerbated the effects of the trial court's error (AOB 470-472), it is without merit. Generally speaking, the prosecutor argued the evidence relating to appellant's childhood and upbringing had little mitigating force and did not justify sympathy (95 RT 20127-20131), which was permissible. (*People v. Dennis* (1998) 17 Cal.4th 468, 547-548.)

The particular portion of the prosecutor's argument to which appellant points (AOB 471) is taken out of context. The prosecutor was arguing the inconsequential nature of Doctor Lisak's testimony and highlighting the fact that the doctor could not relate his testimony about sexual abuse to appellant's case, in particular. Therefore, according to the prosecutor, it was of no value. (95 RT 20153-20154.) The comments were within the bounds of acceptable argument since they were based on the evidence and inferences drawn from the record. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Arias*, *supra*, 13 Cal.4th at p. 162; *People v. Earp*, *supra*, 20 Cal.4th at pp. 862-863.) The trial court's denial of appellant's motion for a mistrial (96 RT 20392) was a proper exercise of discretion. (See *People v. Alvarez*, *supra*, 14 Cal.4th at p. 213.)

Accordingly, appellant did not suffer a violation of his constitutional rights to present a defense, to confrontation, to due process, to a fair trial, to

a reliable, individualized determination of death eligibility and sentence, and to be free from cruel and unusual punishment.

XII. THE TRIAL COURT PROPERLY ADMITTED AUTOPSY PHOTOS AT THE GUILT PHASE AND PENALTY PHASE RETRIAL

Appellant challenges the trial court's admission of autopsy photos at the guilt phase and penalty phase retrial arguing the photos prejudicial impact far outweighed their probative value. As a result, he argues their admission, and the prosecutor's purported improper use of the photos, violated his state and federal rights to present a defense, to confrontation, to due process, to a fair trial, to a reliable, individualized determination of death eligibility and sentence, and to be free from cruel and unusual punishment. (AOB 473-477.)

Appellant's claim lacks merit. The photos were relevant and significantly more probative than prejudicial on the issues of intent to kill and premeditation and deliberation. They were likewise relevant and more probative than prejudicial with respect to appellant's defense at trial that he was impaired by methamphetamine use at the time of the crimes. In any event, appellant has not demonstrated prejudice.

A. Procedural History

During the guilt phase, the defense filed a motion to exclude "certain inflammatory photographs depicting the bodies of the victims in pools of blood (Village Oaks), at the scene of the homicide where the body had been moved (Loper), and at the autopsy examinations . . . ." (5 CT 1434.)

On March 26, 1999, the prosecutor advised that he had a box of photos, with each photo having been marked in sequential order. (9 RT 1884.) Defense counsel requested time to review the contents of the box with appellant, to which the court agreed. (9 RT 1885.)

When the court and parties discussed the photos on April 2, 1999, defense counsel objected to those photos which depicted James Loper after

his body had been removed from under the tow truck. (9 RT 2017; People's Exhs. Nos. 85-87.) After argument from counsel, the court admitted number 85 as relevant as to whether the victim was fleeing appellant at the time appellant shot him. (9 RT 2020-2021.) The court excluded photo number 86 as cumulative to number 85 and number 87 as inflammatory because it showed the victim's blood-covered face. (9 RT 2021.) The court indicated it would admit photos numbered 91 and 92, which showed Loper's legs and hands. (9 RT 2021.)

The discussion moved to the autopsy photos of Loper. (9 RT 2022; People's Exhs. Nos. 101-116.) Defense counsel contended the photos were cumulative to the mannequins. (9 RT 2023.) The prosecutor pointed out that the photos were relevant to establish appellant's aim and accuracy in light of the anticipated defense theory that appellant was under the influence of methamphetamine when he committed the crimes. (9 RT 2024.) The court found photo number 101—a photo of James Loper on the autopsy table still clothed—relevant because it showed dirt and mud on Loper's face and clothes. (9 RT 2025.) Over prosecution objection, the court temporarily excluded the remaining autopsy photos of Loper until it heard the related testimony. (9 RT 2025-2029.)

On June 8, 1999, Doctor Fitterer testified to her autopsy of James Loper, including describing what was depicted in certain autopsy photos. (30 RT 6039-6051; People's Exhs. Nos. 101-105, 108, 110.) She did the same with respect to her autopsy of Stephen Chacko (32 RT 6346-6350; People's Exhs. Nos. 180-182, 185, 187, 189), Jun Gao (33 RT 6646-6647; People's Exhs. Nos. 228-230), and Besun Yu (33 RT 6665; People's Exh. No. 232).

On June 9, 1999, defense counsel entered "a blanket objection" to admission of the autopsy photos. (31 RT 6317.) The court overruled the

objection and admitted the photos. (31 RT 6318-6319 (Loper); 32 RT 6493 (Chacko); 33 RT 6780 (Gao and Yu).)

On March 28, 2000, during the penalty phase retrial, defense counsel objected to admission of Doctor Fitterer's testimony in its entirety. Counsel argued the testimony was irrelevant to the question of whether aggravating factors substantially outweighed mitigating factors. (82 RT 17086.)[66] The court disagreed, finding the autopsies illuminated the manner of death, which was relevant as facts and circumstances of the crimes. The court also found the objection untimely given that defense counsel waited until the day of the doctor's testimony to lodge an objection. (82 RT 17087.)

B. General Legal Principles

Admission of photographs is discretionary, and a trial court's ruling will not be disturbed on appeal unless the probative value of the photographs is clearly outweighed by their prejudicial effect. (*People v. Moon* (2005) 37 Cal.4th 1, 34; *People v. Sanchez* (1995) 12 Cal.4th 1, 64, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

In determining whether there was an abuse of discretion, the Court considers: (1) whether the photographs were relevant, and (2) whether the trial court abused its discretion in finding that the probative value of each photograph outweighed its prejudicial effect. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1282.)

Photographs supporting aggravation of the crime for penalty purposes are admissible. (*People v. Moon*, *supra*, 37 Cal.4th at p. 35; *People v. Raley* (1992) 2 Cal.4th 870, 914; *People v. Benson* (1990) 52 Cal.3d 754, 786; *People v. Thompson* (1990) 50 Cal.3d 134, 182.) Indeed, crime scene

---

[66] In its filed motion, the defense lodged a general objection to admission of the autopsy photos. (10 CT 2704.)

and autopsy photos are part of the circumstances of the crime and are not barred by either the Eighth or Fourteenth Amendment. (*People v. Hart* (1999) 20 Cal.4th 546, 648; *People v. Clair* (1992) 2 Cal.4th 629, 682.)

C. The Autopsy Photos Were Relevant and Clearly More Probative Than Prejudicial

Here, assuming that appellant's claim was preserved by defense counsel's blanket objections at trial, it is without merit. As utilized by Doctor Fitterer, the photos demonstrated the number, location, and size of the victims' various bullet wounds, as well as how far the victims were from appellant when he shot them. The photos also depicted related injuries, including bone fractures, abrasions, scrapes, and bruises. Using the photos, Fitterer explained which wounds and injuries were post-mortem or pre-mortem. Given this testimony, the photos were highly relevant to the issues of intent to kill and premeditation and deliberation and supported the prosecution's theory that appellant shot to kill repeatedly and mercilessly. Also, as the prosecutor argued, the photos showed appellant's aim and accuracy and were thus relevant to appellant's defense that he was methamphetamine-impaired at the time of the crimes.

Further, while it is axiomatic that "[m]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant" (*People v. Moon*, *supra*, 37 Cal.4th at p. 35, internal citations & internal quotation marks omitted), the photographs in this case, as described by Doctor Fitterer, were largely antiseptic and clinical in nature. There was nothing "gruesome" about them, as appellant suggests. (AOB 473.) The photographs were relevant and "not of such a nature as to

overcome the jury's rationality." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 212.) Therefore, their prejudicial impact was de minimis.[67]

Appellant's suggestion that a stipulation to the cause of death would have conveyed the same quantum of probative evidence (AOB 475) is simply wrong. The prosecution was not obligated to "accept antiseptic stipulations in lieu of photographic evidence." (*People v. Pride* (1992) 3 Cal.4th 195, 243.) Jurors are entitled to see details of the victims' bodies to assess whether the prosecution's evidence supports its theory of the case. (*People v. Gurule* (2002) 28 Cal.4th 557, 624.)

Also, to the extent that appellant argues the photographic evidence was cumulative to introduction of the mannequins (AOB 475), his contention should be rejected. The detailed findings Doctor Fitterer derived from the photographs could not be gleaned from the mannequins, since use of the latter was limited to showing the trajectory or angles at which the bullets entered and exited the bodies, as stated in Argument V, section C, *ante*. (See also *People v. Hinton* (2006) 37 Cal.4th 839, 896 [finding no error or prejudice in prosecution's use of mannequins and photographic evidence]; *People v. Cain* (1995) 10 Cal.4th 1, 29 [photographs of murder victim should not be excluded as cumulative if offered to prove facts established by testimony].)

As for Doctor Fitterer's testimony and use of the photos during the penalty phase retrial, evidence that illustrates the particular nature of the crime is admissible under Penal Code section 190.3, factor (a). (*People v. Box* (2000) 23 Cal.4th 1153, 1200, overruled on other grounds in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.) Indeed, if the photographs admitted at the guilt phase were not unduly prejudicial, they could not be at

---

[67] The trial did exclude as inflammatory one crime scene photo of James Loper that showed his head and face covered in blood. (9 RT 2021.)

the penalty phase retrial, as the "trial court's discretion to exclude circumstances-of-the-crime evidence as unduly prejudicial is more circumscribed." (*Id.* at p. 1201.)

D. The Prosecutor's Argument Was Proper

Appellant challenges that portion of the prosecutor's penalty phase argument, which referenced autopsy photos in conjunction with one of appellant's letters to his wife. (AOB 477.) There is no merit to appellant's argument.

The prosecutor read a brief passage from one letter and argued that any humanity appellant exhibited in the letters to his family was more than eclipsed—displaying the victims' photos—by the murders he committed. (95 RT 20146.) Also, the record suggests the prosecutor did not continue to display the photos after making his point. (95 RT 20146.)

When defense counsel raised the issue, before argument, counsel's concern was that the prosecutor would use the photos and letters in combination to suggest that appellant felt remorse only for his own family and not the victims' families. The court made clear that this would be improper argument in light of the court's redactions of appellant's letters. (95 RT 20113-20115.) The prosecutor abided by the court's ruling. The prosecutor's argument—that appellant did not deserve mercy or sympathy based on the balance of aggravating and mitigating evidence—was proper. (See *People v. Vieira* (2005) 35 Cal.4th 264, 296; *People v. Ochoa* (1998) 19 Cal.4th 353, 464-465; *People v. Arias* (1992) 13 Cal.4th 92, 176-177.)

Instructive is *People v. Riggs* (2008) 44 Cal.4th 248, 324, wherein this Court approved the prosecutor's argument that the defendant's rough childhood was not much consolation or solace for the victim's mother when she is visiting her daughter's grave because the comments "permissibly contrasted the potential mitigating effect of defendant's past against the significant impact the murder had on [the victim's] family."

E. Any Error Was Harmless

Even where a photograph of the victim is improperly admitted during the guilt phase, reversal is not warranted unless it is reasonably probable that the outcome would have been more favorable to the defendant had the photograph been excluded. (*People v. Wash* (1993) 6 Cal.4th 215, 246-247; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1230; *People v. Anderson* (1990) 52 Cal.3d 453, 474-475.)

Given the compelling evidence that appellant methodically planned and carried out the murders for financial profit and revenge and then afterward joked about it, it is not reasonably probable that he would have benefited from exclusion of the autopsy photos at the guilt phase or penalty retrial.

XIII. THE TRIAL COURT PROPERLY PERMITTED THE PROSECUTOR TO QUESTION DEFENSE WITNESSES ABOUT THEIR KNOWLEDGE OF THE FACTS OF APPELLANT'S CRIMES

Appellant contends the trial court committed prejudicial error in permitting the prosecutor to engage in irrelevant, cumulative and inflammatory cross-examination of witnesses during both phases of his trial, in violation of appellant's state and federal constitutional rights. (AOB 478-504.)

We disagree. The prosecutor's cross-examination about the facts of appellant's crimes was proper, therefore, the trial court did not err in permitting the questioning. Regardless, any error was harmless.

A. Procedural History

During the guilt phase, on direct examination, the defense experts—Doctors Wu, Amen, and Buchsbaum—all testified to mental disease or defects in appellant's brain, of various origin, which impaired his ability to use proper judgment, to plan, and to inhibit aggressive impulses, thereby making him more prone to engaging in aggression and violence. (38 RT

8006, 8011-8013, 8018-8019 (Wu); 40 RT 8298, 8324-8325, 8337 (Amen); 41 RT 8560-8561, 8578 (Buchsbaum).)

Near the end of Doctor Wu's direct examination, the trial court sustained the prosecutor's objections to defense counsel's line of questioning, which concerned whether appellant had irrational thoughts and whether his crimes were the result of irrational behavior. The prosecutor argued the questioning violated Penal Code sections 28 and 29 because it called for Wu to address whether appellant had the requisite mental state at the time he committed the crimes. (40 RT 8343.) After the jury was excused, and after the parties argued the issue at length, the court decided it would admonish the jury by reading Penal Code sections 28 and 29. (40 RT 8339-8351.) The court did so. (40 RT 8351-8353.)[68]

With particular regard to the direct examination of Doctor Buchsbaum, defense counsel asked the following:

> [DEFENSE COUNSEL]: Are your findings - - are the results of the PET and the SPECT [scans], the statistical analysis, the abnormalities you found in Mr. Peoples' brain, is it consistent with what you know about the crimes in these cases?
>
> [WITNESS]: Yes, they are.

(41 RT 8578.)

During the penalty retrial, on direct examination, Amen and Wu testified largely in accord with their guilt phase testimony. (84 RT 17494-17574 (Amen); 85 RT 17717-17781 (Wu).) Buchsbaum was not called as a witness.

Doctor Lisak, an expert on the psychological effects of sexual abuse, offered the opinion, among others, that a person with low self-esteem, who

---

[68] Defense counsel maintained that his questioning was in accord with an earlier ruling. (40 RT 8340.) His assertion was false (40 RT 8347-8348), although the court found it was not made in bad faith (40 RT 8351).

was molested as a youth, would feel anger and resentment as an adult. (91 RT 19122-19123.) Lisak also stated that 35 percent of men, who had been sexually abused, went on to commit violence. (91 RT 19120.)

Doctor Woods testified that appellant's abuse of methamphetamine induced paranoia, which, in turn, caused a misperception of reality. (90 RT 18893-18894.) Woods opined that appellant was suffering from paranoid ideations and aggressions at the time he committed the crimes. (90 RT 18930.) The crime reports were among the materials he reviewed in preparation for his testimony. (90 RT 18872.)

Guy Lazarro, a former co-worker of appellant's, testified on direct examination that he never observed appellant to be violent or threaten anyone. (86 RT 18067.)

As appellant lays out in detail (AOB 480-499), the trial court was called upon, in response to defense counsel's objections and motions, to rule on the propriety of the prosecutor's cross-examination of defense expert witnesses, during the guilt phase and penalty retrial. The questioning at issue concerned the witnesses' knowledge of the facts of the crimes.

The court consistently found the questioning proper because it was relevant. In certain instances, the court made a further explicit finding that the questioning called for testimony that was more probative than prejudicial. (39 RT 8160-8161[questioning addressed Wu's opinion on issue of impulse control]; 40 RT 8420 [questioning concerned Amen's opinion regarding appellant's state of mind]; 41 RT 8460 [questioning appropriate given Amen's opinions expressed on lack of planning, impaired thinking, ability to plan or premeditate, and relevant to intent to kill]; 42 RT 8727 [questioning relevant to Buchsbaum's knowledge of crime facts].)

B. General Legal Principles

> An expert witness may be cross-examined about "the matter upon which his or her opinion is based and the reasons for his or her opinion." (Evid. Code, § 721, subd. (a).) The scope of this inquiry is broad and includes questions about whether the expert sufficiently considered matters inconsistent with the opinion. (*People v. Ledesma* (2006) 39 Cal.4th 641, 695 [47 Cal.Rptr.3d 326, 140 P.3d 657].) Thus, an adverse party may bring to the attention of the jury that an expert did not know or consider information relevant to the issue on which the expert has offered an opinion. (*People v. Bell* (1989) 49 Cal.3d 502, 532 [262 Cal. Rptr. 1, 778 P.2d 129].)

(*People v. Doolin* (2009) 45 Cal.4th 390, 434.)

In cross-examining an expert witness, a party may question the witness "'more extensively and searchingly than a lay witness, and the prosecution is entitled to attempt to discredit the expert's opinion.'" (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1325.)

A prosecutor may bring in facts beyond those introduced in the testimony of an expert witness on direct examination in order to explore the grounds and reliability of the expert's opinion. (*People v. Lancaster* (2007) 41 Cal.4th 50, 105.)

C. The Trial Court Properly Permitted the Prosecutor to Cross-Examine Defense Witnesses About the Facts of Appellant's Crimes

In this case, the trial court properly permitted the prosecution to cross-examine the expert witnesses about their knowledge of the facts of the crimes, as well as the import—or not—of those facts to their expert opinions.

First, appellant's claim rests on a fundamental flaw. The experts' testimony on direct encompassed much more than interpreting the scan results, as appellant suggests. (AOB 499 ["The issue presented by the brain science witnesses was whether the PET and SPECT scans showed brain

damage; . . . ."].) Defense counsel's examination of its experts not only thoroughly explored the issues of mental disease and defect, as represented by the brain scans, it also encompassed their opinions on how these defects affected appellant's behavior. The gravamen of the testimony in the guilt phase was that appellant's brain abnormalities made him vulnerable to impulsive aggression and violence. Appellant's attempt to cast the scope of direct examination in narrower terms is not supported by the record. (38 RT 8006, 8011-8013, 8018-8019 (Wu); 40 RT 8298, 8324-8325, 8337 (Amen); 41 RT 8560-8561, 8578 (Buchsbaum).)

Further, as the record shows, the trial court did not bar expert opinion on issues relating to appellant's mental state, as appellant contends. (AOB 501.) Instead, it properly excluded expert testimony on the ultimate question: whether appellant possessed the requisite mental state at the time he committed the crimes. (40 RT 8339-8353.) Thus, the prosecutor's guilt phase cross-examination must be considered against the expansive nature of this direct testimony.

The same holds true for the retrial of the penalty phase. In addition to Wu and Amen's testimony that suggested appellant's brain defects compromised his judgment, ability to plan, and to control violent impulses (84 RT 17494-17574 (Amen); 85 RT 17717-17781 (Wu)), Doctor Lisak offered a general, yet expert, opinion on how child sexual abuse manifested itself in adult behavior. Lisak explained that, in many cases, it resulted in violence (91 RT 19120-19123). Additionally, Doctor Woods's testimony was, in essence, that methamphetamine altered appellant's reality and drove him to kill. (90 RT 18893-18894, 18930.) Further, Woods stated the crime reports were among the materials he reviewed in preparation for his testimony. (90 RT 18872.)

On this record, the prosecutor was entitled to cross-examine the experts about the facts of the crimes to refute the inference presented by the

expert testimony, which was that appellant did not have the requisite intent to be guilty of the crimes and that he did not deserve to be put to death for those crimes. A prosecutor may attempt to show intent by focusing on a defendant's acts and asking how a defendant could perform such acts without intending to do them. (*People v. Smithey* (1999) 20 Cal.4th 936, 961.) In at least two instances, the defense opened the door by referring to the witness' familiarity with the facts of the crimes. (41 RT 8578; 90 RT 18872.)

Further, the prosecutor was entitled to attempt to discredit the experts' opinions (*People v. Alfaro*, *supra*, 41 Cal.4th at p. 1325), which suggested that appellant could not plan his crimes because he was driven by uncontrollable aggressive urges or fixations and, even if he could plan, his planning was based on an altered reality. One way to discredit those opinions was to demonstrate for the jury that the experts had not considered the facts of appellant's crimes. (*People v. Lancaster*, *supra*, 41 Cal.4th at p. 105 [prosecutor may bring in facts beyond those introduced in direct testimony of expert].) Alternatively, if the witness did have knowledge of the facts, the prosecutor could pursue whether the witness considered a contrary interpretation that would have supported the prosecution's theory of the case. (*People v. Doolin* (2009) 45 Cal.4th 390, 434 [scope of inquiry includes questions on whether "expert sufficiently considered matters inconsistent with the opinion"].)

This Court's decision in *People v. Samayoa* (1997) 15 Cal.4th 795, is helpful. In that case, during cross-examination of the defense doctor, the prosecutor asked the witness whether she had received police reports or photographs of physical evidence from the crime scene. When the witness responded that she had not, the prosecutor asked if information concerning the circumstances of the crimes would be important to her diagnosis of the defendant's mental health. The prosecutor also asked the witness why she

had not endeavored to correlate her test results with this information. (*Id.* at p. 835.) The Court found the prosecutor's line of questioning did not constitute misconduct, even though the defense had not presented evidence of the defendant's mental condition at the time of the crimes. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 837.)

Therefore, if the prosecutor's questioning of an expert about the facts of a crime were not improper in a case where there was no defense evidence presented on the defendant's mental condition at the time of the crimes, then the questions could not have been improper here as there was a tremendous amount of defense expert testimony on appellant's mental condition at the time of the crimes, as well as the attendant behavioral ramifications.

As for the prosecutor's questioning of Guy Lazarro, a lay witness, during the penalty phase retrial (AOB 499), appellant has forfeited his right to complain on appeal because he failed to object the questioning as improper on the grounds he now asserts. (86 RT 18070; see *People v. Davenport* (1995) 11 Cal.4th 1171, 1214.) Although appellant may argue that an objection would have been futile, this is not necessarily true since Lazarro was not testifying as an expert witness. Had defense counsel objected on these grounds, the trial court may well have restricted the prosecutor's line of inquiry. Indeed, as appellant points out (AOB 488-490), Judge Delucchi cut off the prosecutor's questioning of Lazarro during the first penalty phase. The court observed that Lazarro's opinion was limited to the fact that appellant was a good worker and that Lazarro would hire him again. (56 RT 11406-11407.)

In any event, in the penalty retrial, Lazarro testified that appellant was not a violent person. (86 RT 18067.) Therefore, the prosecutor was free to question him about the crimes as they related to the appellant's character. "When a defendant places his character at issue during the penalty phase,

the prosecution is entitled to respond with character evidence of its own. 'The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it undermines defendant's claim that his good character weighs in favor of mercy.' [Citation.] Once the defendant's 'general character [is] in issue, the prosecutor [is] entitled to rebut with evidence or argument suggesting a more balanced picture of his personality.' [Citation.] The prosecution need only have a good faith belief that the conduct or incidents about which it inquires actually took place." (*People v. Loker* (2008) 44 Cal.4th 691, 709.)

Insofar as appellant impliedly concedes the prosecutor's questioning of defense witnesses concerned relevant issues (AOB 502), he nonetheless contends it was cumulative and inflammatory. However, appellant confuses cumulative and inflammatory with the prosecutor's prerogative to cross-examine an expert "extensively" and "searchingly." (*People v. Alfaro*, *supra*, 41Cal.4th at p. 1325.) Undoubtedly, the prosecutor's pointed cross-examination of the defense experts was an uncomfortable experience for the witnesses. However, the prosecutor was merely carrying out his obligation to vigorously test, and undermine, the credibility of their opinions. This was not improper, as we explained in Argument V, section B, *ante*.

D. If the Cross-Examination Was Improper, It Was Nonetheless Harmless

In light of the overwhelming evidence of appellant's guilt, the questioning, as it occurred during the guilt phase, was harmless.

Further, the jurors were instructed that the attorneys' questions themselves were not evidence. (48 RT 9890; 96 RT 20420; CALJIC No. 2.42; see also *People v. Doolin* (2009) 45 Cal.4th 390, 435.) Here, the prosecutor's questions were not so inflammatory that the jury could not be

expected to follow the court's instructions. Therefore, any prejudicial effect was cured by the court's instructions.

As for the penalty phase retrial, appellant's attempt to minimize his moral culpability for the crimes and garner sympathy by blaming his heinous conduct on brain damage, methamphetamine abuse, sexual abuse, and a dysfunctional upbringing, was easily eclipsed by his acknowledged affinity for murder, the heartless and calculated manner in which he committed the crimes, and his self-satisfaction and lack of empathy in the immediate aftermath of his crime spree.

Thus, there is no reasonable possibility that appellant was prejudiced by the prosecutor's questions, which were not evidence, and the jury was so instructed. (See *People v. Riggs* (2008) 44 Cal.4th 248, 320.)

XIV. THE TRIAL COURT'S ADMISSION OF EVIDENCE IN AGGRAVATION WAS PROPER

Appellant contends that his state and federal constitutional rights to a fair and reliable penalty determination were violated as the result of the trial court's erroneous admission of certain evidence in aggravation. He challenges admission of photographs, mannequins, and evidence of the impact of appellant's shooting of victim Harrison. Appellant also contends the prosecutor made use of the erroneously admitted evidence in the prosecutor's argument to the penalty retrial jury. (AOB 505-515.)

Appellant's contentions are without merit. The trial court's admission of the victim impact evidence at issue was statutorily and constitutionally authorized. For this reason, the prosecutor's reference to this evidence during closing argument was also proper.

A. Procedural History

Prior to the start of the penalty retrial, appellant filed a motion to exclude certain evidence in aggravation. As relevant here, the motion specified the following evidence: 1) evidence pertaining to Cal Spray

victim Thomas Harrison; 2) photographs of James Loper while he was alive, as well as photos of his family members; 3) photographs of Stephen Chacko's funeral; 4) photographs of Besun Yu's family and her early life; and, 5) the mannequins. The motion also included a general objection to any testimony that was not proper victim impact evidence, as dictated by case law. (10 CT 2699-2711.) The prosecution filed an opposition. (10 CT 2736-2740.)

The court and parties discussed the motion on March 6, 2000. After confirming with the prosecutor that there would be no new testimony anticipated from Harrison, the court abided by its earlier ruling. Harrison's testimony would be limited to the facts that he was shot, injured, was hospitalized for a period of time, and underwent rehabilitation. (75 RT 15681-15683.) Defense counsel responded, "Okay." (75 RT 15681.) As for the victims' family members' testimony, defense counsel explained that, essentially, he was objecting to "the whole testimony." (75 RT 15688.)

After reviewing the relevant case law, the court excluded two photos pertaining to victim James Loper. (75 RT 15702.) The court also pointed out that it had excluded a significant number of the approximately 100 photos the prosecution originally submitted. (75 RT 15703.) The court found the photo of Stephen Chacko's funeral admissible (75 RT 15707), as well as Besun Yu's wedding photo and baby picture (75 RT 15708). In summarizing its rulings on the family members' testimony, the court stated:

> The Court finds specifically that the testimony allowed is not inflammatory, is not a eulogy to the jury; and does in fact have a relevant basis for reasonable consideration about the depth and breadth of harm and injury caused by the defendant for them to reasonably consider in determining whether to or not exercise sympathy [] and mercy . . . .

(75 RT 15712.)

Defense counsel objected to the "wood dolls," particularly that which depicted Thomas Harrison. (76 RT 15759.) The court found the exhibits "very dispositive" of appellant's state of mind and the issues pertaining to premeditation and deliberation, as evidenced by the entry and exit wounds represented on the mannequins. (76 RT 15760-15761.)

During his penalty retrial testimony, using the mannequin, Harrison explained that appellant shot him in the right thigh, with the path of the bullet striking his pelvic bone and exiting on the left side of his leg. (78 RT 16259; People's Exh. No. 671.) Harrison was in the hospital for nine days. He still experienced numbness on the inside of leg and back pain. (78 RT 16260.)

B. General Legal Principles

Victim-impact evidence is admissible during the penalty phase of a capital trial because Eighth Amendment principles do not prevent the sentencing authority from considering evidence of "the specific harm caused by the crime in question." The evidence, however, cannot be cumulative, irrelevant, or "so unduly prejudicial that it renders the trial fundamentally unfair." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825, 829.)

Penal Code section 190.3, subdivision (a), permits the prosecution to establish aggravation by the circumstances of the crime. The word "circumstances" does not mean merely immediate temporal and spatial circumstances, but also extends to those which surround the crime "materially, morally, or logically." Factor (a) allows evidence and argument on the specific harm caused by the defendant, including the psychological and emotional impact on surviving victims and the impact on the family of the victim. (*People v. Edwards* (1991) 54 Cal.3d 787, 833-836; see also *People v. Brown* (2004) 33 Cal.4th 382, 398; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171; *People v. Mitcham* (1992) 1 Cal.4th 1027,

1063; *People v. Pinholster* (1992) 1 Cal.4th 865, 959, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Under section 190.3, factor (b), aggravating evidence at the penalty phase may include "[t]he presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence . . . ," but section 190.3 generally prohibits the introduction of "evidence of prior criminal activity . . . ."

C. The Trial Court's Evidentiary Rulings Were Proper

Appellant raises several challenges to the introduction of victim impact evidence at the penalty phase retrial. None of them have merit.

One such challenge is to the trial court's admission of a number of photographs of the victims while they were alive. (AOB 512, fn. 227.)

Admission of photographs is discretionary, and a trial court's ruling will not be disturbed on appeal unless the probative value of the photographs is clearly outweighed by their prejudicial effect. (*People v. Moon* (2005) 37 Cal.4th 1, 34; *People v. Sanchez* (1995) 12 Cal.4th 1, 64.)

Moreover, photos of the victim alive are generally admissible in the penalty phase. A photo of a victim, while alive, constitutes a "circumstance of the offense." (*People v. Anderson* (2001) 25 Cal.4th 543, 594; *People v. Lucero* (2000) 23 Cal.4th 692, 714; *People v. Edwards* (1991) 54 Cal.3d 787, 832.)

Here, each family member's testimony was brief and within the limits provided for such evidence, including their respective references to photos of the victims while their loved ones were alive. (See *People v. Boyette* (2002) 29 Cal.4th 381, 444 [family members spoke of their love for the victims and how they missed them; photographs were presented of the victims while alive].)

Likewise, admission of the photo of Stephen Chacko's funeral in India was proper. This Court rejected a similar claim in *People v. Garcia*

(2011) 52 Cal.4th 706, 752. In so doing, the Court cited its cases in support of the admission of funereal-related evidence, which are equally applicable here:

> [] *People v. Brady* (2010) 50 Cal.4th 547, 570, 579-581 [113 Cal.Rptr.3d 458, 236 P.3d 312] [testimony and videotape of slain police officer's memorial and funeral services, including flag-draped casket in church, attendance by 4,000 uniformed police officers and other mourners, motorcade that stretched for miles, and bagpipe procession to gravesite]; *People v. Verdugo* [(2010)] 50 Cal.4th 263, 296-297 [testimony and photographs of funeral service of two teenage murder victims, including the release of two doves and a child's act of kissing the coffin]; see *id.* at p. 297 [photographs of birthday observance for slain teenage victim at cemetery several months after murder].[]

(*Ibid.*; see also *People v. Dykes* (2009) 46 Cal.4th 731, 780 ["moving" description of ordering the victim's casket properly admitted].)

Nor did the trial court err in its admission of the mannequins during the penalty phase retrial, which were used primarily by the forensic expert to show the entry and exit wounds (82 RT 17115-17170). (See *People v. Medina*, *supra*, 11 Cal.4th at pp. 753-754 [not error to admit life-size mannequin representing murder victim, including permitting mannequin to remain in jury room during guilt and penalty phase deliberations]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1291 ["Mannequins may be used as illustrative evidence to assist the jury in understanding the testimony of witnesses or to clarify the circumstances of a crime"].)

Insofar as appellant specifically challenges the prosecution's use of the mannequin depicting James Loper during his mother's testimony (AOB 513), such use may well have pushed the limits, but it was harmless. The prosecutor's reference to the mannequin was fleeting and the statement elicited from Hazel Loper was admissible victim impact evidence that could just as easily have been adduced without use of the mannequin. (84 RT 17458.)

With respect to appellant's argument that the trial court erroneously admitted victim impact evidence regarding Thomas Harrison (AOB 514), he has forfeited this portion of his claim. Although appellant initially objected to such evidence in his written motion, when the court and parties discussed the parameters of such evidence, defense counsel did not renew or otherwise pursue his objection. (75 RT 15681-15683.) Nor, was there any defense objection during the prosecutor's examination of Harrison. (78 RT 16241-16262.) Appellant must have objected to introduction of factor (b) evidence to preserve the issue for appeal on either statutory or constitutional grounds. (*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1052.) The only objection was to use of the mannequin depicting Harrison. (76 RT 15759.) Even if his claim is preserved, Harrison's testimony and use of the mannequin were appropriately permitted, pursuant to Penal Code section 190.3, subdivision (b).

Under Penal Code section 190.3, subdivision (b), a jury may hear facts surrounding prior criminal activity involving force or violence. (*People v. Jurado* (2006) 38 Cal.4th 72, 135; *People v. Zapien* (1993) 4 Cal.4th 929, 987; *People v. Mickle* (1991) 54 Cal.3d 140, 187; *People v. Melton* (1988) 44 Cal.3d 713, 754.)

Factor (b) embraces not only the existence of the activity, but the pertinent circumstances as well, including the results of the conduct and impact on victims. (*People v. Price* (1991) 1 Cal.4th 324, 479; *People v. Ashmus* (1991) 54 Cal.3d 932, 985; *People v. Mickle*, *supra*, 54 Cal.3d at p. 187.)

In this case, Harrison's testimony was admissible because he described being shot by appellant—an act of violence—and further explained his injuries and course of treatment that resulted from the shooting—the results of the conduct and impact on the victim. The

prosecutor's use of the mannequin to illustrate the path of the bullet, which struck Harrison, was also proper.

D. The Prosecutor's Argument to the Jury Concerning the Victim Impact Evidence Was Proper

Appellant contends the prosecutor improperly argued the victim impact evidence because the prosecutor made repeated references to the photographs and mannequins. (AOB 510-512.) However, appellant does not point to any offending instances. His argument seems to be because admission of the evidence was error, it was error for the prosecutor to argue that evidence to the jury.

We disagree. Because admission of the evidence at issue was proper, the prosecutor was free to argue the evidence. Further, the immediate effects of a capital crime on the victim's family constitute circumstances of the crime which the prosecutor may elicit and argue at the penalty phase of a capital trial. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

XV. THE TRIAL COURT'S RULINGS REGARDING EVIDENCE IN MITIGATION, MOTIONS TO CONTINUE, AND EVIDENCE IN AGGRAVATION WERE PROPER

Appellant contends that, as a result of the exclusion of certain mitigation evidence, the admission of certain aggravation evidence, and the denial of his motions to continue, his state and federal constitutional rights to due process, a fair trial, to confrontation, to present a defense, to a reliable, individualized sentence determination, and to be free from cruel and unusual punishment, were denied. (AOB 516-531.)

Each of appellant's three separate claims, raised in this argument, is without merit. The trial court's rulings constituted a proper exercise of its discretion.

A. Procedural History

1. Mitigation evidence

On February 28, 2000, prior to the start of the penalty phase retrial, appellant filed a motion to admit testimony of four jurors from the first penalty phase trial. In the motion, defense counsel argued the jurors would testify to their observations of appellant's demeanor at the first trial, which was relevant mitigation and character evidence to demonstrate appellant's remorseful state of mind. (11 CT 2896-2911.)

On March 7, 2000, the court heard extensive argument on the issue. (76 RT 15761-15806.) Afterward, the court first expressed its concern as to the prejudicial nature of having only 4 of the 12 previous jurors present their views, while omitting the others. (76 RT 15806.) Second, the court observed that, based on the defense rationale for admitting the testimony, the courtroom staff, including bailiffs, could also be called as witnesses. (76 RT 15806-15807.) Third, calling former jurors as witnesses would violate the sanctity of jury deliberations because a juror's courtroom observations would necessarily have been factored into deliberations. (76 RT 15807-15808.) Fourth, the court reiterated that under Evidence Code section 352, such testimony would result in a "monumental retrial" of the first trial, including the likelihood the prosecution would endeavor to call those jurors that voted for death. (76 RT 15808-15810.) Fifth, the court noted that while the law favored an expansive approach to admission of mitigation evidence, that did not mean that all evidence should be presented without regard to issues of relevance and reliability. (76 RT 15811-15812.)

Before the start of the penalty retrial, appellant filed a motion to restrict the prosecution's right to cross-examine him should he testify. Appellant sought to limit his testimony, including any testimony that might

be elicited during cross-examination, to specific background information. (10 CT 2718-2723.)

The court stated that it would not make a ruling limiting the prosecution's cross-examination until it heard the scope of the evidence adduced on direct examination. (75 RT 15624-15626.) The court pointed out that several of the cases the defense cited in support of its motion, involved rulings which were made during the course of the relevant testimony, not before. (75 RT 15625.) Nonetheless, the court made clear it would limit the prosecution's cross-examination of appellant in a manner that comported with the law and the evidence adduced during direct examination. (75 RT 15626-15627.) The court laid out three specific scenarios to illustrate its point. (75 RT 15628.) Defense counsel stated: "No, I understand. And I know you haven't heard anything so you can't rule. But basically you're in agreement with the motion that it is limited to what you hear on direct." (75 RT 15628-15629.) The court agreed to hold a hearing, prior to the prosecutor's cross-examination, to specifically draw the boundaries for questioning. (75 RT 15630.)

The procedural facts concerning the defense motion to videotape the proceedings, are set forth in Argument III, section B, *ante*.

2. Defense motions to continue guilt phase and penalty retrial

Appellant filed two motions to continue the start of the guilt phase of the trial. (4 CT 935-942, 1110-1145.) On February 25, 1999, the trial court heard argument on the second of these motions. (6 RT 1150-1180.) Before making its findings and ruling, the court detailed the chronology of the case. (6 RT 1183-1187.)

The court observed that in the motion to continue, filed on January 5, 1999, the defense, while seeking a five-month continuance, did not request appointment of second counsel. (6 RT 1187.) The court noted that it had

assigned a second investigator to the case, as the defense requested, but there was no similar request for second counsel. (6 RT 1188.) It was not until February 22, 1999, nine days before the most recent trial setting, that appellant requested second counsel. (6 RT 1192.) The court found the Public Defender's Office's decision to defer its request for second counsel until after the change of venue motion was granted to be "improvident." (6 RT 1199.)

Further, the court found troubling defense counsel's assertion that he had inadequate time to prepare because, having entered the case in December 1997, he filed an affidavit just the following month and declared that his work on the case was proceeding slowly because he needed time to develop a relationship of trust with appellant. (6 RT 1188.)

The court noted that defense counsel, Michael Fox, was one of the best, if not the best, trial attorney in the Public Defender's Office. The court observed consistently exemplary representation by Fox of his clients, including Fox's representation of appellant. (6 RT 1193.)

The court found defense counsel's more "generic comments" in support of the motion insufficient to establish good cause. (6 RT 1189-1190.) The court pointed out that the case had been pending for 14 months and that for the previous nine months, defense counsel had been working exclusively on this case. (6 RT 1190.) Although the court read and considered the declarations of other defense counsel in support of the motion, none stated that they had worked exclusively on their respective capital cases, as did Fox in appellant's case. (6 RT 1190-1191.)

Additionally, the court found "disingenuous" defense counsel's suggestion that he did not realize the March 1999 trial date was firm, in light of the procedural history. (6 RT 1194.) Nor did the court agree with counsel's characterization that appellant's case was complex because it

involved four homicide victims. (6 RT 1194.) In fact, counsel had made contrary statements in the past. (6 RT 1194-1195.)

The court was also not persuaded by the fact that there were further defense motions to be pursued because these motions could be litigated as the court and parties proceeded with jury selection. (6 RT 1196.)

Ultimately, the court found the defense had failed to meet its burden to show good cause. (6 RT 1204.) However, the court stated it would consider the issue again when the case moved closer to presentation of evidence. (6 RT 1205.) The court confirmed there were two attorneys working on appellant's behalf and stated that, if necessary, a third would be appointed. (6 RT 1205.) The motion was denied without prejudice. (6 RT 1205.)

About a week later, on March 3, 1999, the court denied appellant's motion for reconsideration of its February 25 ruling. The court found there was nothing new presented in the motion for reconsideration to warrant revisiting its earlier ruling. (8 RT 1510/42-1510/43.)

The defense motion pertaining to the penalty retrial was filed on December 28, 1999, just prior to the scheduled start date of January 3, 2000. (10 CT 2685-2698.) The court heard argument on the continuance, the primary basis for which was possibly needing additional time to prepare for potential new prosecution rebuttal experts. (62 RT 12605-12610.) The court denied the motion, finding an insufficient showing of good cause. The prosecution did not notice its intention to call new witnesses. Therefore, the court stated it would not grant a continuance until such time that it became clear that the defense needed time to address the issue of new prosecution witnesses. (62 RT 12610-12614.) At the defense request, the court also conducted an in camera hearing on the issue. The court abided by its earlier ruling. (62 RT 12641.)

On March 7, 2000, the defense filed another motion to continue the penalty retrial. (11 CT 2967-2978.) The motion included a declaration under seal. The court also conducted an in camera hearing on the motion. (76 RT 15857.) Defense counsel explained that "[b]asically, the body of the motion is similar to the motion we filed on January 3rd." (76 RT 15857.) The court denied the motion, but did alter the schedule in "a minor fashion." (76 RT 15865.)

3. Evidence in aggravation

During the penalty retrial, appellant objected to the presentation of testimony and physical evidence that related to the non-capital offenses. (10 CT 2703.) He also objected to introduction of his taped statement and evidence pertaining to his "Biography of a Crime Spree." (10 CT 2702-2703.)

The court disagreed with defense counsel's view that no nexus existed between the burglary of Michael King's van, the Bank of the West robbery, appellant's statement, and the murders. The burglary and robbery were part of the circumstances of appellant's crimes because they were a part of an ongoing and connected series of events. (76 RT 15720.)

As for the evidence pertaining to appellant's "Biography of a Crime Spree," defense counsel acknowledged that it discussed the circumstances of the crimes, but counsel contended that it was written sometime after the offenses and was, therefore, inadmissible. (76 RT 15720.) Again, the court disagreed. It found appellant's writings relevant to appellant's state of mind and whether he enjoyed committing the crimes. (76 RT 15721.) Further, the evidence could be used to rebut defense evidence suggesting appellant was remorseful about his crimes. (76 RT 15721-15722.)

B. Argument

1. The court's rulings on mitigation evidence were proper

Appellant contends the trial court erred in excluding certain mitigation evidence: 1) observations as to his demeanor at the first trial, as witnessed by four former jurors; 2) evidence of his background, to which appellant would have testified; and, 3) evidence of the court's demeanor to be captured on videotape. (AOB 518-524.)

We disagree. The court's rulings on each of these issues comported with statutory and constitutional mandates.

The right to present mitigating evidence in the penalty phase does not trump or override ordinary rules of evidence. Trial courts retain authority to exclude evidence that has no bearing on a defendant's character or record or the circumstances of the offense. (*People v. Thornton* (2007) 41 Cal.4th 391, 454.)

"'[T]he concept of relevance as it pertains to mitigation evidence is no different from the definition of relevance as the term is understood generally.' [Citation.] Indeed, 'excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense.' [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 353.)

First, with respect to the proffered testimony from the four previous jurors, the trial court properly excluded this evidence because the probative value, if any, was substantially outweighed by the prejudicial effect of such testimony. The trial court determines the relevancy of mitigating evidence and retains discretion to exclude evidence where probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1145; overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Even assuming the relevance and reliability of such testimony, as the trial court pointed out, admitting such testimony would open the door to the prosecution calling other witnesses, whether it was courtroom staff or previous jurors, to rebut this demeanor evidence. (76 RT 15806-15807.) During the guilt phase, the court denied the prosecution's motion to videotape the proceedings. The prosecution's stated purpose was to capture appellant's "jocularity" in the courtroom so as to rebut anticipated defense mitigation evidence characterizing appellant as remorseful. (20 RT 3877-3883.) Therefore, the court was correct to anticipate the prosecution's response to admission of this demeanor evidence would be to call its own witnesses in rebuttal.

Further, such testimony would have been difficult, if not impossible, to limit in the manner suggested by the defense. The potential for invading the province of the first jury's deliberations was considerable, as the court found. (76 RT 15807-15808.)

Moreover, appellant does not explain how the four previous jurors—each of whom voted for prison over death—were in a better position to judge appellant's demeanor, and whether he appeared remorseful in the courtroom, than the penalty phase retrial jurors themselves. (See *People v. Lanphear* (1984) 36 Cal.3d 163, 167 [sympathy for defendant may be based on jury's in-court observations].)

With respect to appellant's second sub-claim, his contention that the trial court deprived him of his right to testify to certain evidence of his background, it is not justiciable. Defense counsel stated the purpose of the motion which was, in essence, to make sure the prosecutor's cross-examination of appellant was limited to the scope of direct examination. Counsel acknowledged the court not rule on the matter until appellant testified. (75 RT 15628-15629.) Given this, appellant failed to meet the "ripeness requirement," which "prevents courts from issuing purely

advisory opinions, or considering a hypothetical state of facts in order to give general guidance rather than to resolve a specific legal dispute." (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 998.) Thus, this portion of his claim should be rejected at the outset.

Even if appellant has a viable claim in this regard, it is without merit. The trial court made clear that it would hold a hearing and endeavor to delineate the boundaries of the prosecution's cross-examination before it took place. (75 RT 15630.) In short, there was nothing in the court's rulings on the issue that had a chilling effect on appellant's right to testify on his own behalf.

As for appellant's last argument concerning the videotape of the court's demeanor, he fails to show how the court's conduct was relevant mitigation evidence that addressed appellant's character or record or the circumstances of the offense. In any event, the jurors were free to observe the court's demeanor for themselves. His argument should be rejected.

2. The trial court did not abuse its discretion in denying appellant's motions to continue the trials

Next, appellant argues the trial court erroneously denied his motions for continuing both trials. (AOB 524-527.)

Not so. Because appellant failed to show good cause, the trial court's rulings constituted a proper exercise of discretion.

> "The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion. In the lack of a showing of an abuse of discretion or of prejudice to the defendant, a denial of his motion for a continuance cannot result in a reversal of a judgment of conviction. [Citations.]" (*People v. Laursen* (1972) 8 Cal.3d 192, 204; see also *People v. Ainsworth* (1988) 45 Cal.3d 984, 1030.)

(*People v. Zapien* (1993) 4 Cal.4th 929, 972.)

The party challenging the ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is "seldom successfully attacked." (*People v. Beames* (2007) 40 Cal.4th 907, 920; *People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

There is no mechanical test for deciding when a denial of a continuance is so arbitrary as to violate due process. Instead, the answer must be found in the circumstances present in each case, particularly the reasons presented at the time the request is denied. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118; *People v. Beames*, *supra*, 40 Cal.4th at p. 921.)

Here, as the court laid out in considerable detail, as of February 1999, the case had been pending for 14 months. Fox was assigned the case in December 1997 and had been working exclusively on the case for the previous nine months. (6 RT 1188-1190.) When the defense asked for a second investigator to be assigned, the court readily complied (6 RT 1188), which certainly suggested that the court would ensure appellant had the assistance his case demanded. However, as the court observed, the defense did not request second counsel until after it became clear there would be a change of venue. (6 RT 1199.) This is somewhat anomalous given Fox's repeated assertions that he was ill-prepared for trial, coupled with the defense's apparent recognition that the court made certain the defense received the help it needed or requested. In fact, the court saw to it that appellant had second counsel and, at one point, the court appointed a third attorney.

With particular regard to the motion brought during the penalty retrial, because the defense motion was predicated on the *possibility* the prosecution would call new witnesses in rebuttal, it was properly denied.

The court clearly indicated its willingness to revisit the issue if warranted by the circumstances. For these reasons, the court's decision was proper.

Moreover, appellant cannot demonstrate prejudice. He has not pointed to a single instance during the guilt phase or penalty retrial when the defense was compromised in its ability to present its case or attack the prosecution's case as result of a lack of preparedness. Instead, appellant continues to rely on the first jury's inability to reach a verdict on penalty, as well as the length of the second jury's deliberations. (AOB 527.) Neither of these circumstances suffices to show prejudice. On the contrary, the circumstances demonstrate the dispassionate consideration of the evidence by both juries, especially in light of the significance of the question before them.

Additionally, as stated in Argument III, section B, *ante*, the court generally accommodated defense scheduling requests and concerns—for the benefit of defense counsel and defense witnesses—on numerous occasions throughout the trial, including delaying the start of jury selection in the guilt phase for three weeks to accommodate the defense request for a suppression hearing (4 RT 895) and granting the defense a one-week continuance between guilt and penalty phases (35 RT 7177-7179).

In short, the trial court's detailed findings demonstrate that appellant failed to meet his burden to show good cause. Denial of a motion for a continuance, when no good cause is demonstrated, is not an abuse of discretion. (Pen. Code, § 1050; *People v. Zapien*, *supra*, 4 Cal.4th at p. 972.)

3. The court's admission of certain guilt phase evidence comported with the relevant statutory provisions

Appellant argues the trial court erroneously admitted prosecution evidence from the guilt phase at the penalty retrial. This evidence included

his taped statement to the detectives and his self-titled "Biography of a Crime Spree." Appellant contends such evidence was not within the ambit of Penal Code section 190.3. (AOB 527-530.)

Not so. The trial court properly found the evidence at issue relevant as circumstances of appellant's crimes, as provided for in Penal Code section 190.3, subdivision (a).

"[A] State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." (*Payne v. Tennessee* (1991) 501 U.S. 808, 824.)

"The same facts (e.g., felony murder) may be used for conviction, special circumstance, and aggravating purposes given the distinct role such facts play at each phase." (*People v. DePriest* (2007) 42 Cal.4th 1, 59.)

Appellant's statements about his crimes, as conveyed to detectives and as memorialized in his "Biography of a Crime Spree," were properly admitted as circumstances of the crimes because they addressed appellant's state of mind. Evidence that bears directly on the defendant's state of mind contemporaneous with the capital murder is relevant under factor (a) as circumstances of the crime. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1154; overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) "The defendant's overt indifference or callousness toward his misdeed bears significantly on the moral decision whether a greater punishment, rather than a lesser, should be imposed. [Citation.]" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232.)

Further, any guilt phase evidence that pertained to the burglary of Michael King's van and the Bank of the West robbery was also properly admitted at the penalty retrial as circumstances of appellant's crimes, given their temporal and substantive connection to the murders. Appellant stole the gun, which he used to commit the murders, from King's van. The

timing of the burglary and bank robbery, relative to the murders, was relevant to appellant's state of mind and motives in committing the murders.

Additionally, to the extent that any such evidence was used by the prosecution in rebuttal to defense evidence in mitigation suggesting appellant was remorseful, the evidence need not have related to any specific aggravating factor. (Pen. Code, § 190.3; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 109; *In re Ross* (1995) 10 Cal.4th 184, 206-207.)

Even if the trial court erred in admitting this evidence, introduction of non-statutory aggravating evidence is not, by itself, reversible error; there must be an independent showing of prejudice. (*People v. Wright* (1990) 52 Cal.3d 367, 425-429, overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Appellant has failed to demonstrate prejudice. Again, he resorts to unfounded speculation based on the inability of the first jury to reach a penalty verdict and the second jury's considered deliberations. (AOB 530.) This is insufficient to carry his burden of persuasion.

The error was not prejudicial under any applicable standard. Apart from appellant's statements to the detectives or in his biography, the penalty retrial jury heard incredibly damaging testimony on appellant's callous views of the murders from his wife and Doctor Rogerson. Additionally, Thomas Harrison testified that appellant smiled as he shot at him. This, along with the overwhelming evidence that appellant methodically planned and carried out the murders, demonstrate there is no basis for believing admission of his taped statement or biography—or any other guilt phase evidence for that matter—affected the penalty verdict.

XVI. THE TRIAL COURT PROPERLY INSTRUCTED THE PENALTY PHASE RETRIAL JURY

Appellant contends the trial court erroneously rejected the vast majority of the 22 special jury instructions the defense proposed during the penalty retrial. He argues these instructions were necessary to clarify vague and confusing terms in the standard instructions, to restrict use of aggravating factors to statutory limits, and to pinpoint and expand on defense theories of mitigation not adequately addressed by the standard instructions. In rejecting these instructions, appellant contends the trial court violated his state and federal constitutional rights to due process, a fair trial, a reliable, individualized sentence determination, and to be free from cruel and unusual punishment. (AOB 532-557.)

We disagree. The court properly instructed the jury. To the extent the court rejected defense proposed instructions, the decisions were correct. The instructions at issue were argumentative, superfluous, or both. The court's instructions accurately reflected the law and, therefore, it was not reasonably likely the jurors were misled. Accordingly, appellant's state and federal constitutional rights were not violated.

A. Procedural History

During the retrial of the penalty phase, on May 3, 2000,[69] the court conducted an initial instruction conference, including review and discussion of the defense proposed special instructions. (12 CT 3312-3339, 3342-3347; 92 RT 19388-19500; 93 RT 19503-19504.)

On May 8, the court held an additional conference on the instructions. (94 RT 19898-19928.)

On May 9, the court and parties finalized the instructions. (94 RT 19961-19968.)

---

[69] The relevant events occurred in 2000, unless otherwise indicated.

On May 15, the court and parties discussed one instruction, which was not previously vetted. (95 RT 20276-20284.)

On May 16, after argument was concluded, the court read the finalized instructions to the jury. (12 CT 3217-3276; 96 RT 20418-20445.)

B. General Legal Principles

In assessing whether the jury was adequately guided under the Eighth or Fourteenth Amendment, the court determines how it is reasonably likely the jury understood the instruction, and whether the instruction, so understood, accurately reflects applicable law. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1161.)

The standard CALJIC penalty-phase instructions are adequate to inform the jurors of their sentencing responsibilities under federal and state constitutional standards. (*People v. Gurule* (2002) 28 Cal.4th 557, 659.)

C. The Trial Court's Rejection of the Instructions at Issue Was Proper

1. Proposed instructions regarding normative function of jury

Appellant contends the jurors needed additional guidance on their duties and responsibilities beyond that which was provided in the standard instructions. (AOB 537-538.)

His argument is without merit. The court's instructions adequately covered these issues. Further, his proposed instruction was argumentative.

The defense proposed special instruction No. 1, as a modification to CALJIC No. 1.00,[70] so the jury would be guided on how to approach its task. (12 CT 3313; 92 RT 19400-19405.) The proposed language included,

---

[70] The court accommodated defense counsel's other objection to CALJIC No. 1.00 as not being sufficiently tailored to a penalty phase trial. In response, the court excised certain language from the instruction and added its own instruction (No. 8.88A). (94 RT 19909-19911.)

"Your responsibility in the penalty phase is not merely to find facts, but also—and most important—to render an individualized, moral determination about the penalty appropriate for the particular defendant—that is, whether he should live or die. (12 CT 3313.)

The court found that CALJIC No. 8.88 addressed the issues. (12 CT 3264-3265; 92 RT 19406.) The court's decision was correct. "CALJIC No. 8.88 properly instructs the jury on its sentencing discretion and the nature of its deliberative process." (*People v. Valencia* (2008) 43 Cal.4th 268, 310.) No more was needed.

Further, the court found the instruction was argumentative because it elevated the jury's duty to determine penalty above its duty to find the facts. (92 RT 19406.) A trial court may refuse a proffered instruction that is an incorrect statement of law, is argumentative, is duplicative, or might confuse the jury. (*People v. Gurule*, *supra*, 28 Cal.4th at p. 659.)

2. Proposed instructions limiting use of factors in aggravation

Appellant next argues the court improperly rejected other proposed instructions on the limitations of factors in aggravation. (AOB 538-540.)

These instructions were argumentative and superfluous. The court's instructions adequately guided the jury on how they were to consider the factors in aggravation. In fact, the court crafted its own instruction to ensure the jury's consideration of the factors in aggravation did not exceed statutory parameters.

Specifically, proposed instructions Nos. 7 and 8 stated that the guilt phase verdicts and special circumstance findings could not be used as aggravating factors and had no significance in determining penalty. (12 CT 3319-3320; 92 RT 19429-19430.)

The court refused the instructions because they were argumentative. (92 RT 19431.) Further, the court found CALJIC No. 1.00 adequately

covered the issue since it explained that the fact of being arrested, charged, or brought to trial was not evidence and could not be considered. (92 RT 19431.)

Beyond the limiting language in CALJIC No. 1.00, CALJIC Nos. 8.85 and 8.88 (12 CT 3249-3250, 3264-3265), along with the court's addition of No. 8.88(A) (12 CT 3266), provided proper guidance on the factors in aggravation. CALJIC No. 8.85 sets forth the applicable factors, including factors in aggravation, derived from Penal Code section 190.3 factors (a) through (k), to be weighed by the jury to reach a penalty determination. (*People v. Farnam* (2002) 28 Cal.4th 107, 191.) Indeed, the court's own instruction—No. 8.88(A)—emphasized that "only" factors A, B, and C could be considered in aggravation. Therefore, looking at the instructions as whole, there was no reasonable likelihood the jurors considered the special circumstance findings themselves as aggravating factors.

Further, the proposed instructions were unnecessary since no extraneous aggravating evidence was introduced. (*People v. Espinoza* (1992) 3 Cal.4th 806, 827.)

3. Proposed instructions on mitigation evidence

Appellant contends the court erred in rejecting his proposed pinpoint instructions pertaining to factors in mitigation. These instructions were also intended to expand upon the standard sympathy and mercy instructions. (AOB 540-547.)

Not so. The trial court properly rejected appellant's instructions because they were either argumentative, covered by other instructions, or both.

The proposed instructions at issue are Nos. 11-14 (12 CT 3321-3324), 16-18 (12 CT 3326-3328), and 21 (12 CT 3329).

First, appellant has forfeited his claim as it concerns proposed instruction No. 11. Initially, defense counsel argued that No. 11 was a necessary expansion of standard instructions on mitigation because it pointed out that mitigating factors were unlimited. (92 RT 19436.) The court found that No. 11 was covered by CALJIC No. 8.85, but the court indicated it would consider fashioning an additional instruction. (92 RT 19436.)

During the second conference on the instructions, the court explained that it found the proposed additional language concerning the unlimited nature of mitigation evidence to be "extremely argumentative" and more appropriately limited to argument. (94 RT 19923.) Agreeing with the court, defense counsel said, "I'll argue it." (94 RT 19923.) Therefore, appellant has forfeited his claim with respect to this instruction.

As for Nos. 12 through 14, the gravamen of the defense argument in favor of the instructions was that they were necessary to dispel any confusion among the jurors about mitigation evidence. (92 RT 19440.)

The court properly found CALJIC Nos. 8.85 and 8.88 covered the issues raised in the proposed instructions. (92 RT 19441-19444.) As CALJIC No. 8.85 was both correct and adequate, a pinpoint instruction regarding mitigating evidence was not required. (*People v. Valencia*, *supra*, 43 Cal.4th at p. 309.) Further, the court reiterated that the defense was free to argue the points raised in the instructions. (92 RT 19444.) It is generally the task of defense counsel in closing argument, rather than the trial court in its instructions, to make clear to the jury which penalty phase evidence or circumstances should be considered extenuating under factor (k). (*People v. Vieira* (2005) 35 Cal.4th 264, 299.)

With respect to Nos. 16 through 18, the court properly refused the instructions as argumentative. (92 RT 19450-19451, 19458.) This is especially true with respect to No. 18, which, by excluding reference to

evidence in aggravation as being equally applicable to the stated concepts, skewed the instruction in favor of the defense. Additionally, the issues raised by No. 18 were covered a number of times in the other instructions, as the court stated. (92 RT 19458.) Indeed, CALJIC Nos. 8.85, 8.88, and 17.40, together, conveyed a non-argumentative version of proposed instruction No. 18. Like the proposed instruction, the standard instructions made clear that both parties were entitled to the independent judgment of each individual juror and that unanimity was not required for findings of mitigation.

As for No. 21, the trial court, citing this Court's decisions in *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1270 and *People v. Hines* (1997) 15 Cal.4th 997, 1069, correctly rejected the instruction, which proposed instructing the jurors that if they had a reasonable doubt as to penalty, it should be resolved in favor of life in prison without parole. (92 RT 19460-19461.)

4. Proposed instructions on weighing of aggravating and mitigating factors

Appellant argues the trial court improperly rejected other proposed instructions, which would have provided guidance on weighing factors in aggravation and mitigation. (AOB 547-554.) The instructions at issue are Nos. 15 (12 CT 3325), 22 (12 CT 3330), 23 (12 CT 3331), 24A-C (12 CT 3333-3335), 27(12 CT 3338), and 29 (12 CT 3338, 3342-3344).

We disagree and set our arguments as to each in the order presented by appellant.

As concerned No. 22, defense counsel acknowledged that it was contrary to California law, as embodied in CALJIC No. 8.87, but in accord with federal law. (92 RT 19461.) Citing this Court's decisions in *People v. Jones* (1998) 17 Cal.4th 279, 314 and *People v. Fudge* (1994) 7 Cal.4th 1075, the court correctly found the instruction in contravention of state law

because it required the jury to find beyond a reasonable doubt that factors in aggravation outweighed factors in mitigation. (92 RT 19462.) Moreover, as for federal constitutional implications, "[n]either the federal nor the state Constitution requires that the penalty phase jury make unanimous findings concerning the particular aggravating circumstances, find all aggravating factors beyond a reasonable doubt, or find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors." (*People v. Jennings* (2010) 50 Cal.4th 616, 689.)

The court properly rejected No. 23 (92 RT 19463) because CALJIC No. 17.40 adequately advised the jurors not to decide any issue by chance.

Numbers 24 and 24A were also properly refused (92 RT 19463-19464) because there was no requirement that the court instruct on the possibility of a hung jury and the resulting consequences. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1352 ["a trial court is not required to educate a jury concerning the consequences of a deadlock"].)

Regarding instruction No. 24B, which proposed use of the word "justified" in place of "warranted" in CALJIC No. 8.88, the court's rejection of the instruction was likewise proper.

> [D]efendant has focused upon specific terms and ignores the instructions as a whole. This instruction informs the jury that "[t]he weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (CALJIC No. 8.88.) "As we have explained, CALJIC 8.88 properly describes the weighing process as '"merely a metaphor for the juror's personal determination that death is the appropriate penalty under all of the circumstances."' (*People v. Jackson*, *supra*, 13 Cal.4th at p.

1244, quoting *People v. Johnson* (1992) 3 Cal.4th 1183, 1250 [14 Cal. Rptr. 2d 702, 842 P.2d 1].)" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1161 [124 Cal. Rptr. 2d 373, 52 P.3d 572].)

(*People v. Page* (2008) 44 Cal.4th 1, 56-57; see also *People v. Mendoza* (2011) 52 Cal.4th 1056, 1097 [use of the term "'warranted'" instead of "'appropriate'" not impermissibly vague or ambiguous].)

Proposed instruction No. 24C was, in defense counsel's words, "just an alternative definition to 'mitigating circumstances.'" (92 RT 19465.) The court correctly found the definition of mitigating circumstances was adequately covered by the explanations provided in the standard instructions. (92 RT 19465.)

As for No. 26, it was intended to modify CALJIC No. 17.50, the concluding instruction prior to the start of deliberations. The court correctly refused the instruction as superfluous in light of the adequacy of the standard instructions, specifically CALJIC No. 8.88. (92 RT 19468.)

With respect to No. 27, a modified version of CALJIC No. 17.49, the trial court viewed the proposed instruction as mandating a special finding or statement of reasons for the verdict and properly rejected the instruction, citing this Court's decisions in *People v. Sanchez* (1995) 12 Cal.4th 1, [82] and *People v. Pride* (1992) 3 Cal.4th 195, 268. (92 RT 19469.)

The trial court also properly refused instruction No. 29, a modified version of CALJIC No. 8.85, which proposed striking factors that had no relevance to the case in addition to including 33 specific mitigating factors.[71] The ruling was proper because there is no requirement to delete inapplicable factors from CALJIC No. 8.85. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1179.) Nor is there a requirement to provide the jurors with a detailed list of evidence presented in mitigation, as the court properly found

[71] Defense counsel referred to this as the "*Sears*" [*People v. Sears* (1970) 2 Cal.3d 180] instruction. (92 RT 19478.)

(92 RT 19479-19480), citing this Court's decisions in *People v. Noguera* (1992) [4] Cal.4th 599 [648] and *People v. Benson* (1990) 52 Cal.3d 754 [806], which rejected such instructions.

Last in this group of instructions is No. 15, which proposed advising the jury that any mitigating evidence standing alone could be the basis for a verdict of life without the possibility of parole. As appellant points out, the court agreed to modify CALJIC No. 8.88 to include such language, but, ultimately, did not. (AOB 553-554.) The court was not required to do so. "CALJIC No. 8.88 properly instructs the jury on its sentencing discretion and the nature of its deliberative process," and there is no need to elaborate how the jury should consider any particular type of penalty phase evidence. (*People v. Valencia*, *supra*, 43 Cal.4th at p. 310.) Therefore, there was no error.

5. Proposed *Ochoa* instruction

Appellant argues the court also erred in refusing proposed instruction No. 28 (12 CT 3339), which appellant claims is supported by this Court's decision in *People v. Ochoa* (1998) 19 Cal.4th 353, 456 [a capital jury cannot consider, as mitigation, sympathy for a defendant's family, but "family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character"]. (AOB 554-556.)

As with each of the other rejected proposed defense instructions, the court properly rejected No. 28, as well. The court observed that the testimony of appellant's brother on the impact of an execution on his family was properly admitted because it was for the purpose of illuminating some positive quality of appellant. (92 RT 19472.) However, that did not mean the proposed instruction was warranted, as the court found it to be argumentative. (92 RT 19473.)

This Court's decisions support the trial court's ruling on instruction No. 28. In *People v. Taylor* (2001) 26 Cal.4th 1155, 1180-1181, the defendant claimed, among other things, that the trial court erroneously failed to instruct the jury to consider the role sympathy for the defendant and his family should play in their deliberations. The Court found no error because the jurors were instructed they could consider "'any sympathetic or other aspect of the defendant's character or record." The jury was similarly instructed in this case. (96 RT 20434; CALJIC No. 8.85.)

In *People v. Romero* (2008) 44 Cal.4th 386, 425-426, the defendant argued trial court error because a supplemental instruction did not explain to the jury that his family's feelings for him were relevant as evidence of his character. This Court did not find error, citing *People v. Ochoa*, *supra*, 19 Cal.4th at p. 456.

Appellant's reliance on *People v. Bennett* (2009) 45 Cal.4th 577, 601, in support of his argument (AOB 556) is misplaced. Nothing in *Bennett* suggests proposed instruction No. 28 was warranted.

D. Any Error Was Harmless

If the court erred in rejecting any of the defense special instructions, it was harmless under any standard given the overall strength of the evidence in aggravation, defense counsel's closing argument (*People v. McPeters* (1992) 2 Cal.4th 1148, 1191 [correct view of the law regarding mitigating factors in penalty phase trial was reinforced by the parties' closing arguments]), and the other jury instructions.

With specific regard to defense counsel's argument, counsel discussed, at length, the factors in mitigation and the weighing process. He explained the law concerning factors in aggravation and the limited nature of such evidence. (96 RT 20286-20291, 20299-20313, 20394-20401.)

Additionally, counsel argued the prospect of execution as it would impact appellant's family members (96 RT 20337-20339), the need for

individual moral determinations by each juror (96 RT 20371, 20402-20403, 20412-20413), and that the law recognized they might not be able to reach a verdict (96 RT 20408)—all areas addressed in the rejected instructions.

XVII. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR A NEW TRIAL, BASED ON JUROR MISCONDUCT, WAS A PROPER EXERCISE OF DISCRETION AS WAS ITS DECISION NOT TO REMOVE JUROR NUMBER 7

Appellant contends he is entitled to reversal of the penalty judgment due to juror misconduct, which violated his rights to an impartial and unbiased jury, to due process, to a fair trial, to a reliable and individualized determination of punishment based upon material facts and evidence adduced at trial, and to be free from cruel and unusual punishments. (AOB 558-575.)

There was no juror misconduct. Therefore, the trial court's decision denying appellant's motion for a new trial, which was partially based on allegations of juror misconduct, was a proper exercise of discretion. So, too, was the court's decision not to discharge Juror Number 7. In any event, appellant has failed to demonstrate a substantial likelihood of juror bias.

A. Procedural History

Appellant's motion for a new trial was based, in part, on allegations of juror misconduct. (13 CT 3381-3390.) Specifically, he argued the trial court should have removed Juror Number 7 because the juror refused to deliberate. Further, appellant argued that other jurors injected extraneous matter into the deliberations by discussing the future of the death penalty as it concerned a possible appeal, as well as the jurors' own individual experiences with drugs. (13 CT 3386-3387.) The defense presented statements from several jurors, taken by a defense investigator, in support of the motion. Three of the six were sworn statements prepared by the

defense investigator and signed by the respective jurors. (13 CT 3392-3411.) The prosecution filed a written opposition. (13 CT 3414-3417.)

In ruling on the motion, the court stated that, despite the unsworn nature of several of the statements, it read and considered all of them.[72] (97 RT 20654-20655.) The court did not find that Juror Number 7 had refused to deliberate. The fact that Juror Number 7 may have been an early advocate for a verdict of death was not the equivalent of a refusal to deliberate. "He just had a position about the penalty based on the evidence, as far as the Court can see." (97 RT 20655.)

Further, with respect to the jurors' discussions about the future viability of the death penalty and their own experiences with drug use, the trial court found "an insufficient basis . . . that it impacted or affected their decision-making process." (97 RT 20659.)

B. General Legal Principles

"'A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion. " (*People v. Lewis* (2001) 26 Cal.4th 334, 364.)

When the motion is based upon juror misconduct, the reviewing court should accept the trial court's factual findings and credibility determinations if they are supported by substantial evidence, but must exercise its independent judgment to determine whether any misconduct was prejudicial. (*People v. Tafoya* (2007) 42 Cal.4th 147, 192.)

---

[72] "Presumably, a trial court would have discretion to view an unsworn report by a defense investigator as lacking in sufficient credibility." (*People v. Dykes* (2009) 46 Cal.4th 731, 810.)

C. There Was No Juror Misconduct

As a threshold matter, appellant seems to take the trial court to task for not conducting an evidentiary hearing into the allegations of juror misconduct. (AOB 561.) Notably, appellant did not request one. Moreover, it was within the court's discretion not to hold a hearing. (*People v. Collins* (2010) 49 Cal.4th 175, 249.) Indeed, an evidentiary hearing "'should not be used as a "fishing expedition" to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing.'" (*People v. Avila* (2006) 38 Cal.4th 491, 604, quoting *People v. Schmeck* (2005) 37 Cal.4th 240, 295.) A trial court's decision whether to conduct an evidentiary hearing regarding juror misconduct will be reversed only if the defendant can demonstrate an abuse of discretion. (*People v. Dykes* (2009) 46 Cal.4th 731, 809.) As will be shown, a hearing was unnecessary because there was no evidence demonstrating a strong possibility of misconduct.

Further, a trial court does not abuse its discretion when it declines to conduct an evidentiary hearing into juror misconduct when the evidence offered in support constitutes hearsay. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 810.)

1. Extraneous material

Appellant argues the jurors' discussions about their own experiences with drugs and the future of the death penalty in relation to appellant's sentence constituted misconduct. (AOB 563-570.)

Not so. The limited discussions about the death penalty and the political climate in California did not amount to misconduct. First, the comments were inadmissible indications of the jurors' mental processes. (See *People v. Dykes*, *supra*, 46 Cal.4th at p. 812 ["The purported statements by jurors concerning the effect on them of the possibility of defendant's release from prison and the probability of an execution constituted indications of juror mental processes that are made inadmissible by Evidence Code section 1150, subdivision (a)."][73]

Second, even if admissible, the comments did not amount to misconduct. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 307 [no juror misconduct during the penalty phase when jurors briefly discussed possibility defendant would be released despite LWOP verdict since the possibility of a change in the law is a matter of common knowledge appreciated by jurors who must choose between sentence of death or LWOP]; *People v. Mendoza* (2000) 24 Cal.4th 130, 195 ["[J]urors in capital case did not commit misconduct by discussing briefly the possibility of parole during the course of penalty phase deliberations that otherwise properly focused on facts of the case and aggravating and mitigating circumstances"]; *People v. Cox* (1991) 53 Cal.3d 618, 696, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22. [no

---

[73] Evidence Code section 1150, subdivision (a) provides:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

misconduct where juror, referring to former Chief Justice Rose Bird, opined that death penalty not likely to be carried out].)

In *People v. Riel* (2000) 22 Cal.4th 1153, the defendant moved for a new trial based on juror misconduct. During deliberations, one juror stated the trial judge would likely commute a death sentence to life in prison. (*Id.* at p. 1219.) In finding the trial court did not abuse its discretion in denying the motion for a new trial, this Court observed: "A prediction that the court would commute a death verdict, if in fact made, was merely the kind of comment that is probably unavoidable when 12 persons of widely varied backgrounds, experiences, and life views join in the give-and-take of deliberations." (*Ibid.*)

The Court further explained the inherent challenges in deliberations:

> Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. '[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors.' [Citation.] Moreover, under that 'standard' few verdicts would be proof against challenge." (*People v. Marshall*, *supra*, 50 Cal.3d at p. 950; see also *People v. Cox* (1991) 53 Cal.3d 618, 696 [280 Cal. Rptr. 692, 809 P.2d 351].)

(*People v. Riel*, *supra*, 22 Cal.4th at p. 1219.)

Likewise, the jurors' discussions about their own experiences with drugs did not constitute misconduct. While a jury's verdict in a criminal case must be based on evidence presented at trial, jurors nevertheless may rely on their own experiences in evaluating the testimony of witnesses. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1414.) That is precisely what the jurors did in this case. As is revealed in the jurors' statements to the

defense investigator, sharing their personal experiences was directly related to discussion of the defense evidence regarding appellant's methamphetamine use. According to the statements, the jurors discussed the absence of evidence that appellant was under the influence, the absence of evidence of drug paraphernalia found on his person or in his home, the unpersuasiveness of defense expert testimony on the issue, and the view that taking drugs was a matter of free will and choice. (13 CT 3392, 3394-3395, 3398-3399, 3404, 3407-3408.) The jurors were free to discuss their experiences in this regard. (*In re Lucas* (2004) 33 Cal.4th 682, 696 [jurors may properly bring their individual backgrounds and experiences to bear on the deliberative process].)

2. Juror number 7

Appellant also alleges, as juror misconduct, the refusal by Juror Number 7 to deliberate. (AOB 570-575.) However, there was no competent evidence adduced that supports appellant's claim.

Appellant relies on the double hearsay assertion of Juror Number 1 that Juror Number 7 said he would never vote for a life sentence. (13 CT 3992.) The court would have acted within its discretion not to consider this statement because it was not competent evidence. (See *People v. Dykes*, *supra*, 46 Cal.4th at p. 810.)

Even so, the statement was not persuasive. On the contrary, according to Juror Number 11, it was Juror Number 1 that maintained an intractable position—in favor of prison—from the beginning. (13 CT 3403.) None of the other interviewed jurors attributed such a statement to Juror Number 7.

Further, the trial court heard no credible evidence that suggested Juror Number 7 refused to speak to other jurors or to consider other points of view. (See *People v. Wilson* (2008) 43 Cal.4th 1, 25-26.)

The trial court found Juror Number 7's position in favor of death was based on the evidence adduced at trial. That is not misconduct. (*In re Bolden* (2009) 46 Cal.4th 216, 226, citing *People v. Leonard*, *supra*, 40 Cal.4th at p. 1412 ["[I]t is not prejudging for a juror to form an opinion about the proper verdict before deliberations begin, provided that the juror's opinion is based on the evidence presented at trial and not on extrinsic matters"] .)

Accordingly, the trial court's decision, denying appellant's motion for a new trial based on Juror Number 7's purported refusal to deliberate, was proper.

Nor did the trial court abuse its discretion in declining to remove Juror Number 7, as appellant contends (AOB 570-575).

> Although decisions to investigate juror misconduct and to discharge a juror are matters within the trial court's discretion (e.g., *People v. Maury* (2003) 30 Cal.4th 342, 434 [133 Cal.Rptr.2d 561, 68 P.3d 1]), we have concluded "a somewhat stronger showing" than is typical for abuse of discretion review must be made to support such decisions on appeal. (*People v. Wilson* (2008) 44 Cal.4th 758, 821 [80 Cal.Rptr.3d 211, 187 P.3d 1041].) In *People v. Barnwell*, *supra*, 41 Cal.4th at page 1052, we held that the basis for a juror's disqualification must appear on the record as a "demonstrable reality." This standard involves "a more comprehensive and less deferential review" than simply determining whether any substantial evidence in the record supports the trial court's decision. (*Ibid.*) It must appear "that the court as trier of fact did rely on evidence that, in light of the entire record, supports its conclusion that bias was established." (*Id.* at pp. 1052-1053.) However, in applying the demonstrable reality test, we do not reweigh the evidence. (*Id.* at p. 1053.) The inquiry is whether "the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Ibid.*)

(*People v. Lomax* (2010) 49 Cal.4th 530, 589-590.)

As set forth in Argument V, section E, *ante*, Juror Number 7 acknowledged that he and his wife had a brief discussion about defense

witness Quigel, the gravamen of which was limited to the juror having been surprised at Quigel wearing a prison jumpsuit. Juror Number 7 and his wife did not discuss anything she overheard the prosecutor tell one victim's family members. (88 RT 18484.) Because there was no indication of bias, the trial court had no reason to discharge Juror Number 7.

Additionally, insofar as Juror Number 7's account of his interaction with his wife may have differed from hers, it was the juror who was more forthcoming—a further indication of a lack of bias.

Moreover, appellant's description of Quigel as "a key witness for the defense" is readily undermined by the very statements appellant presented in support of the motion for a new trial. The defense theory that appellant's actions were the result of drug impairment was readily rejected by the jurors (13 CT 3392, 3394-3395, 3398-3399, 3404, 3407-3408), as stated above.

D. Appellant Has Failed to Demonstrate a Substantial Likelihood of Juror Bias

Misconduct by a juror raises a rebuttable presumption of prejudice but a verdict will not be set aside unless "there is a substantial likelihood of juror bias." Such bias will be found only "if the misconduct is inherently and substantially likely to have influenced the jury;" or, even if the misconduct is not inherently prejudicial, bias will be found if, "after a review of the totality of the circumstances, a substantial likelihood of bias arose." The determination of the existence of prejudice is a mixed question of law and fact, where the trial court's credibility determinations and factual findings will be accepted on appeal when supported by substantial evidence. (*People v. Bennett* (2009) 45 Cal.4th 577, 626.)

Here, even if juror misconduct occurred, appellant has failed to establish prejudice. Appellant concedes the timing is unclear as to when during deliberations the jurors discussed their individual drug use or what

persuasive force the discussions had on other jurors. (AOB 568.) Further, as evidenced by the jurors' statements, the relevant discussions did not concern the effects of methamphetamine, which is the basis for appellant's claim of prejudice. (AOB 566 [referring to the subject discussions as "the very lay opinions on methamphetamine the trial court refused to allow as mitigation evidence . . . .".)

With respect to the jurors' discussions of the appeals process and future of capital punishment, appellant has not demonstrated a sufficient causal and, hence, prejudicial connection, which prompted the jurors to overcome their impasse. In fact, Juror Number 11 stated "there was a turning point when the evidence pointing toward a death verdict was overwhelming," which was followed by other jurors changing their votes. (13 CT 3405.)

In short, the record demonstrates the jurors were motivated to render a death verdict based on the evidence and not as a result of bias. Accordingly, reversal of the death judgment is unwarranted.

XVIII. APPELLANT'S PENALTY RETRIAL UNDER PENAL CODE SECTION 190.4, SUBDIVISION (B) DID NOT VIOLATE HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS

Appellant raises several muddled, but interrelated, challenges with regard to his penalty phase retrial under Penal Code section 190.4, subdivision (b). (AOB 576-592.)

Not only does appellant misapprehend certain fundamental aspects of state and federal constitutional law as they apply to his penalty phase retrial, thus overstating his case, he also pays scant attention to the fact that this Court has previously addressed similar claims and denied relief. To the extent that petitioner misapprehends state and federal constitutional law as it applies to the facts of his case, he fails to present a claim worthy of relief. With regard to appellant's challenges that are factually and legally similar

to prior holdings of this Court, he offers no compelling reason to revisit them.

A. Procedural History

On Monday, September 27, 1999, during the first penalty trial, the trial judge advised that he had, for the second time, received a note from the jury reporting they were deadlocked as to penalty. (60 RT 12366-12367.)[74] The jury foreperson reported that they had taken 12-15 votes on penalty and the last vote was split eight-to-four. (60 RT 12368.) After questioning each juror if there was a reasonable possibility that further deliberations might result in a penalty verdict and receiving a unanimous negative response, the trial judge, sua sponte, declared a mistrial. (60 RT 12368-12370.)

Appellant subsequently moved to bar a penalty retrial, claiming that, if a second penalty jury were to render a death verdict, such a verdict would be arbitrary and capricious and would violate due process. (9 CT 2509-2518.) After argument, the motion was denied on December 20, 1999. (61 RT 12487-12496.)

In his motion for a new trial following the second penalty jury's death verdict, appellant once again argued that his penalty retrial violated the Eighth and Fourteenth Amendments. (13 CT 3382-3383; 97 RT 20610-20613.) The motion for a new trial was denied on August 4, 2000. (13 CT 3424; 97 RT 20635-20638.)[75]

---

[74] The first report of deadlock as to penalty occurred the previous Wednesday, September 22, 1999. At that time, the jury had taken at least eight votes regarding penalty. (60 RT 12342.) The trial judge ordered the jury to continue its deliberations, feeling it was "a little premature" to declare a mistrial, since the jury had been deliberating on penalty about only ten hours. (60 RT 12343-12344.)

[75] In his recitation of the supposed factual background supporting his claim, appellant cites to numerous instances of what he describes as

(continued...)

B. There Was No Double Jeopardy Bar to Appellant's Penalty Retrial Because of Pervasive, Prejudicial Prosecutorial Misconduct

In *People v. Batts* (2003) 30 Cal.4th 660, this Court considered the circumstances under which a prosecutor's *intentional* misconduct would preclude a defendant's retrial on double jeopardy grounds under both the federal and state constitutions. (*Id.* at p. 665.) Under the federal standard, as announced by the United States Supreme Court in *Oregon v. Kennedy* (1982) 456 U.S. 667, "retrial is prohibited following the grant of a defendant's mistrial motion only if the prosecution committed the misconduct *with the intent to provoke a mistrial*." (*People v. Batts*, *supra*, 30 Cal.4th at p. 665, italics in original.)[76] Finding the federal standard "unduly narrow and as not fully protective of the interest the double jeopardy clause was intended to safeguard," this Court announced the following standard under the state constitution:

(...continued)
"pervasive" prosecutorial misconduct that allegedly occurred at the first penalty trial. (See generally AOB 577-581.) Respondent is unable to find anything in the record before this Court containing a judicial determination of prosecutorial misconduct, much less any judicial determination of reversible prosecutorial misconduct that occurred at the first penalty trial and somehow contaminated the second penalty trial. Respondent submits that appellant's irrelevant hyperbole should be seen as that and nothing more.

[76] In announcing this standard, the high court noted that where a mistrial is declared at the defendant's behest, "quite different principles come into play" because the defendant has elected to terminate the proceedings against him. (*Oregon v. Kennedy*, *supra*, 456 U.S. at p. 672.) Accordingly, "the classical test for lifting the double jeopardy bar to a second trial" the "'manifest necessity' standard has no place in the application of the Double Jeopardy Clause." (*Ibid.*) The court also noted that "the most common form of 'manifest necessity'" occurs where a mistrial is declared by the trial judge following the jury's declaration that it was unable to reach a verdict. (*Ibid.*)

> Accordingly, with regard to the state constitution double jeopardy issue, we conclude that *when prosecutorial misconduct results in a defendant's successful motion for mistrial*, the double jeopardy clause of the California Constitution bars retrial in two circumstances. First, as under the federal Constitution, retrial is barred by the state double jeopardy clause when the prosecution intentionally commits misconduct for the purpose of triggering a mistrial. Second, the state double jeopardy clause also may bar retrial when the prosecution, believing (in view of the events that occurred during trial) that a defendant is likely to secure an acquittal at the trial, knowingly and intentionally commits misconduct in order to thwart such an acquittal. In the latter circumstance, however, retrial is barred under the state double jeopardy clause only if a court, *reviewing all of the circumstances as of the time of the misconduct*, finds not only that the prosecution believed that an acquittal was likely and committed misconduct for the purpose of thwarting such an acquittal, but also determines, from an objective perspective, that the prosecutorial misconduct deprived the defendant of a reasonable prospect of an acquittal.

(*Id.* at pp. 665-666, emphasis supplied.)

First, as the record clearly shows, appellant never moved for a mistrial due to the jury being hopelessly deadlocked at the first penalty phase. Rather, the mistrial occasioned by that deadlock was declared sua sponte by the trial judge after appropriate inquiry of all jury members, thus "the most common form of 'manifest necessity.'" (*Oregon v. Kennedy*, *supra*, 456 U.S. at p. 672; see *People v. Gurule* (28 Cal.4th 557 , 646 [concluding that defendant's penalty retrial did not violate double jeopardy principles where the trial court was "well justified in declaring a mistrial" due to the first penalty jury's failure to come to a unanimous decision on penalty]; see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 108-110 [holding that double jeopardy principles did not bar penalty retrial after appellate reversal of the capital defendant's conviction, notwithstanding the fact that

defendant had been sentenced to LWOP, in accordance with Pennsylvania law, following juror deadlock at the original penalty phase].)

Second, based on the record before this Court, there is simply no evidence demonstrating that the prosecution intentionally committed misconduct for triggering a mistrial at the first penalty phase. Nor is there any evidence demonstrating that during the first trial, and especially at the penalty phase of that trial, when the alleged misconduct to which appellant refers occurred, the prosecution believed that appellant was likely to secure an acquittal, i.e., a verdict other than death, and thus knowingly and intentionally committed the acts of which appellant complains in order to thwart such a verdict.

Accordingly, appellant's penalty retrial was not barred due to double jeopardy principles.

C. Appellant's Penalty Retrial Violated Neither the Eighth Amendment's Prohibition Against Cruel And Unusual Punishment nor the Fourteenth Amendment's Rights to Due Process and Fundamental Fairness of His Trial nor His Sixth Amendment Right to a Fair Trial

Appellant raises a jumble of claims "separate and apart" from double jeopardy considerations based on his previously mentioned allegations of prosecutorial misconduct. (AOB 585-588; see also AOB 577-581 [listing of alleged acts of prosecutorial misconduct].) He offers no compelling reason for this Court to depart from its prior rulings upholding a penalty retrial under section 190.4, subd. (b).

First, he alleges that his penalty retrial violates the Eighth Amendment and our state constitution's provisions requiring heightened reliability in death penalty cases. The only authority he cites is *Woodson v. North Carolina* (1976) 428 U.S. 280, 305. *Woodson* is totally inapposite to the argument he makes. In *Woodson*, the United States Supreme Court held that the defendants' death sentences that were imposed under North

Carolina's mandatory death sentence statute violated the Eighth and Fourteenth Amendments. (*Ibid.*) This Court has repeatedly held that a penalty retrial, such as the one appellant received, does not violate the Eighth Amendment or analogous provisions of the state constitution and appellant offers no compelling reason to revisit this holding. (See, e.g., *People v. Davenport* 11 Cal.4th 1171, 1192, abrogated on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536.; *People v. Hawkins* (1995) 10 Cal.4th 920, 966, overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

Second, with regard to his allegation that his Sixth Amendment right to a fair trial has been violated, appellant cites no authority to support his claim. This Court has repeatedly rejected similar claims and appellant provides no compelling reason to revisit this holding. (See, e.g., *People v. Gurule*, *supra*, 28 Cal.4th at p. 646; *People v. Davenport*, *supra*, 11 Cal. 4th at p. 1192.)

Last, with regard to his due process and fundamental fairness allegations, the only authority appellant cites is *State v. Baker* (1998) 310 N.J. Super. 128 [708 A.2d 429]. (AOB 585-588.) However, this court is not bound by decisions of other states' courts. (*J. C. Penny Casualty Ins. Co. v. M. K.* (1991) 52 Cal.3d 1009, 1027.)

Further, to the extent that this Court might choose to look to out-of-state authority to inform its decisions, *Baker* is of no value because it is factually distinguishable. *Baker* was a case where the defendant was found guilty of capital murder after a six-week trial. After returning the guilt phase verdict, the jury was not discharged since it was to proceed with the penalty phase one week later. (*Baker*, *supra*, 310 N.J. Super. at pp. 130-131 [708 A.2d at p. 430].) Two days later, "an article appeared in the local newspaper reporting the substance of the jury's guilt deliberations." (*Id.* at p. 131 [708 A.2d at p. 430].) On the date that had been set for a pre-penalty

phase conference, the trial judge advised "counsel that he was conducting an inquiry to determine how the press had obtained access to the jury material, material that he described as 'records prepared by the jury, lists setting forth the manner in which deliberations had proceeded and the manner in which they arrived at the conclusion they arrived at.'" (*Ibid.* [708 A.2d at p. 431].) The results of the judge's inquiry revealed that, during its guilt phase deliberations, the jury prepared charts "'crystallizing its thought processes and the factual findings underpinning its conclusion." (*Id.* at p. 132 [708 A.2d at p. 431].) After the jury returned its guilt phase verdict, they left these charts on the jury room wall during their weeklong excusal between the guilt and penalty phases. Shortly after the jury was temporarily excused, the assistant prosecutor asked the court for permission to take possession of the state's exhibits that had been provided to the jury during their deliberations, pending the start of the penalty phase. The court granted permission but told the assistant prosecutor that he must first allow the court clerk to go into the jury room and see that everything was in order. (*Id.* at pp. 132-133 [708 A.2d at pp. 431-432].) While the court clerk was in the process of assembling the exhibits for return to counsel, but before the clerk could remove and secure the charts prepared by the jury, they were observed by "the head of the Prosecutor's Office." (*Ibid.*) That individual's observations were shared with the reporter who prepared the article that appeared in the newspaper. (*Ibid.*)

Accordingly, when the defendant moved for a mistrial, the court granted the motion. The court also instructed the prosecution to "consider its position" and advise the court if they would seek to impanel a new penalty phase jury. In due course, the prosecution advised the judge that they would seek penalty retrial with a new jury and that the state attorney general was taking over the prosecution from the county prosecutor. At this point, defendant moved to preclude the death penalty on double

jeopardy grounds. The trial judge granted defendant's motion "on double-jeopardy and fundamental fairness grounds, finding that defendant would be prejudiced by proceeding to a penalty phase trial with a new jury. (*Id.* at pp. 133-134 [708 A.2d at p. 432].)[77] The state appealed the trial judge's order to the intermediate appellate court.

In affirming the order precluding a penalty phase retrial, the appellate court stated, "we have doubts that mistrial/double jeopardy principles apply at all or offer here a relevant analytical framework." (*Id.* at p. 137 [708 A.2d at p. 434].) "The issue before the court on defendant's first motion was, simply, whether the guilt-phase jury should be discharged. There was no mistrial actually involved since there was nothing that could have been the subject of a retrial." (*Ibid.*) "The real question" "was only whether, in the extraordinary circumstances of this case, a penalty phase with a new jury should ensue." (*Id.* at p. 138 [708 A.2d at p. 435].) The issue was one of fundamental fairness, i.e., did fundamental fairness prohibit the state "from taking advantage of unlawful or unconscionable acts by the Prosecutor that prejudice the defendant's right to a fair trial." (*Ibid.*) The

---

[77] The trial judge made specific findings as to the nature of the prejudice defendant would suffer as a result of a penalty retrial. They included concerns related to the number of African-Americans on the first jury (the defendant was also African-American) and the ability to achieve a similar jury composition based on the county's demographics; current defense counsel who was "highly competent and experienced" would not be able to continue his representation; there were problems with the state's guilt phase case, including witnesses that were less than truthful and some shoddy police work of which the new jury would not be aware, i.e., lingering doubt; the prosecution's conduct was "'an act of inexcusable neglect which invaded the jury's deliberative process' committed by a person 'who should have known better,'" thus offending "principles of fundamental fairness" by putting the defendant in the position of having to endure a penalty retrial with a new jury. (*Id.* at pp. 134-136 [708 A.2d at p. 433].)

court concluded that there was no other alternative, under the circumstances, than to preclude the impaneling of a new penalty phase jury, "because toleration of such conduct 'would erode public confidence in the impartiality and fairness of the judicial process.'" (*Ibid.*, quoting *State v. Sugar* (1980) 84 N.J. 1 [417 A.2d 474].)

Even if one were to assume that the prosecutor in appellant's case was guilty of some or all of the alleged instances of misconduct during the first penalty trial, such misconduct certainly does not rise to level present in *Baker* which, if unremedied, "'would erode public confidence in the impartiality and fairness of the judicial process.'" (*Ibid.*; see *Sons v. Superior Court* (2004) 125 Cal.App.4th 110, 120-121 [holding that defendant's due process claim that retrial should be barred where prosecution suppressed *Brady* material[78] that "was relevant and very dangerous to the prosecution" and argued to the jury that such evidence was absent did not require retrial].)

Accordingly, appellant's due process and fundamental fairness claims do not entitle him to relief.

D. Appellant's Penalty Retrial Does Not Constitute Cruel and Unusual Punishment Because California's Statute Permitting Such a Retrial Is the Minority View of Jurisdictions Having a Death Penalty and Because Subsequent Inquiry Showed that the Deadlocked Jury Voted Eight-Four in Favor of LWOP

Appellant first argues that because California is among the minority of death penalty jurisdictions that permits a penalty retrial following a hung jury, its procedure is "an anomaly and contrary to . . . 'evolving standards of decency that mark the progress of a maturing society.'" (AOB 589.) This Court has previously rejected this claim and appellant offers no

---

[78] *Brady v. Maryland* (1963) 373 U.S. 83.

compelling reason why this holding should be revisited. (See *People v. Gonzales* (2011) 52 Cal.4th 254, 311; *People v. Taylor* (2010) 48 Cal.4th 574, 634.)

Appellant's second argument concerning the numerical vote(s) of the first penalty jury that deadlocked has likewise been repeatedly rejected by this Court and he offers no compelling reason why this holding should be revisited. (See, e.g., *People v. Hawkins*, *supra*, 10 Cal.4th at p. 968; *People v. Anderson* (1990) 52 Cal.3d 453, 467; *People v. Thompson* (1990) 50 Cal.3d 134, 178.)

Based on the foregoing, appellant's claims that his penalty phase retrial under section 190.4, subdivision (b), should be denied.

XIX. APPELLANT'S TRIAL WAS NOT FUNDAMENTALLY UNFAIR DUE TO THE CUMULATIVE EFFECT OF THE ERRORS HE ALLEGES

Appellant complains that even if this Court should not conclude any individual guilt phase or penalty phase error he alleges mandates reversal of either his conviction or sentence or both, the cumulative effect of these alleged errors does. (AOB 593-598.)

As demonstrated elsewhere in respondent's brief, appellant's claims of error are meritless or, to the extent any error was assumed, it was non-prejudicial. Such claims are no more compelling or prejudicial when considered together. (See, e.g., *People v. Garcia* (2011) 52 Cal.4th 706, ___ [2011 WL 3715535 at *40]; *People v. Booker* (2011) 51 Cal.4th 141, 195; *People v. Mincey* (1992) 2 Cal.4th 408, 475.)

Accordingly, appellant's cumulative error claim should be denied.

XX. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND AS APPLIED AT APPELLANT'S TRIAL, VIOLATES NEITHER THE UNITED STATES CONSTITUTION NOR INTERNATIONAL LAW

Appellant raises a number of "'routine'" challenges (AOB 599-604), to California's death penalty statute, all of which have previously been rejected by this Court—a fact he readily admits. Although he urges this Court to reconsider its well-reasoned and well-established rejection of these challenges, appellant fails to provide any legitimate reason for this Court to do so, thus making a minimalist effort to preserve these challenges for federal review. (AOB 599-604.)

A. Delay in the Process and Execution of Sentence

Appellant claims the delay in carrying out his death sentence constitutes cruel and unusual punishment and, therefore, actually executing him would serve no legitimate "penological ends." (AOB 600.) This Court has repeatedly rejected these claims and appellant provides no reason why these holdings should be revisited. (See, e.g., *People v. Vines* (2011) 51 Cal.4th 830, 892 [delay is not cruel and unusual punishment]; *People v. Salcido* (2008) 44 Cal.4th 93, 166 [same]; *People v. Young* (2005) 34 Cal.4th 1149, 1230 [delay does not prevent fulfillment of legitimate purposes of punishment]; *People v. Brown* (2004) 33 Cal.4th 382, 404 [delay is not cruel and unusual punishment]; *People v. Lenart* (2004) 32 Cal.4th 1107, 1131-1132 [delay does not prevent fulfillment of legitimate purposes of punishment]; *People v. Anderson* (2001) 25 Cal.4th 543, 606 [delay is not cruel and unusual punishment; *People v. Barnett* (1998) 17 Cal.4th 1044, 1182-1183 [same].)

B. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant claims that section 190.2 fails to meaningfully narrow the number of death-eligible murder cases in California. (AOB 601.) This

claim has been repeatedly rejected by this Court and appellant provides no reason to revisit this holding. (See, e.g., *People v. Moore* (2011) 51 Cal.4th 1104, 1144; *People v. Carrington* (2009) 47 Cal.4th 145, 199; *People v. Salcido*, *supra*, 44 Cal.4th at p. 166; *People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Beames* (2007) 40 Cal.4th 907, 933; *People v. Demetrulias* (2006) 39 Cal.4th 1, 43; *People v. Stitely* (2005) 35 Cal.4th 514, 573.)

C. Penal Code Section 190.3, Factor (a) Is Not Impermissibly Overbroad

Appellant claims that because it is permissible to rely upon the circumstances of the crime under section 190.3, factor (a), including victim impact evidence, factor (a) is, therefore, overbroad. (AOB 601-602.) This claim has been repeatedly rejected by this Court and appellant provides no reason to revisit this holding. Because the factors in section 190.3 do not perform a narrowing function, they are not subject to the Eighth Amendment standard used to define death-eligibility criteria. They violate the Eighth Amendment only if they are insufficiently specific or if they direct the jury to facts not relevant to the penalty evaluation. California's factors suffer no such deficiencies. (*People v. Thomas* (2011) 52 Cal.4th 336, 365; *People v. Lee* (2011) 51 Cal.4th 620, 653; *People v. Hartsch* (2010) 49 Cal.4th 472, 516; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 228; *People v. Harris* (2005) 37 Cal.4th 310, 365; *People v. Hughes* (2002) 27 Cal.4th 287, 404-405; *People v. Cain* (1995) 10 Cal.4th 1, 68-69; *People v. Bacigalupa* (1993) 6 Cal.4th 457, 478-479.)

D. CALJIC No. 8.88 Is Not Impermissibly Vague And Ambiguous

Appellant claims that CALJIC No. 8.88 is impermissibly vague and ambiguous because "it permits the death penalty to be imposed whenever the jurors are 'persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants

death instead of life without parole.'" (AOB 602.) He argues that the phrase "'so substantial'" is "impermissibly vague" and leaves the jurors with "untrammeled discretion" in their sentencing decision. (AOB 602.) This claim has been repeatedly rejected by this Court and appellant provides no reason to revisit this holding. (See, e.g., *People v. McKinnon* (2011) 52 Cal.4th 610, ___ [2011 WL 3658915 at *53]; *People v. Rogers* (2009) 46 Cal.4th 1136, 1179; *People v. Parson* (2008) 44 Cal.4th 332, 371; *People v. Salcido*, *supra*, 44 Cal.4th at p. 163; *People v. Chatman* (2006) 38 Cal.4th 344, 409; *People v. Moon* (2005) 37 Cal.4th 1, 43; *People v. Boyette* (2002) 29 Cal.4th 381, 465; *People v. Arias* (1996) 13 Cal.4th 92, 170; *People v. Sully* (1991) 53 Cal.3d 1195, 1244-1245.)

E. The Use of Restrictive Adjectives in Mitigating Factors Did Not Impermissibly Bar Consideration of Mitigation in Appellant's Case, Nor Did the Failure to Instruct that Mitigating Factors Are Only Potential Preclude Fair, Reliable and Evenhanded Application

Appellant raises two claims concerning factors in Penal Code section 190.3, and the language of CALJIC No. 8.85 (AOB 602-603), all of which have been previously rejected by this Court. Each is addressed separately below.

Appellant first alleges that inclusion of the adjective "extreme" in factor (d), as read in CALJIC No. 8.85, acted as a bar to its meaningful consideration in mitigation. (AOB 602-603.) This claim has been repeatedly rejected by this Court and appellant provides no reason to revisit this holding. (See, e.g., *People v. Lee* (2011) 51 Cal.4th 620, 653; *People v. Gamache* (2010) 48 Cal.4th 347, 406; *People v. Davis* (2009) 46 Cal.4th 539, 627; *People v. Perry* (2006) 38 Cal.4th 302, 319; *People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Weaver* (2001) 26 Cal.4th 876, 993; *People v. Lucero* (2000) 23 Cal.4th 692, 727-728; *People v. Holt* (1997) 15 Cal.4th 619, 698-699.)

Appellant next contends that, because factors (d), (e), (f), (g), (h) and (j) each "includes the qualifiers 'whether or not'" "a reliable, individualize capital sentencing determination as required by constitutional law." (AOB 603.) This claim has been repeatedly rejected by this Court and appellant provides no reason to revisit this holding. (See, e.g., *People v. Lee*, *supra*, 51 Cal.4th at p. 653; *People v. Bramit* (2009) 46 Cal.4th 1221, 1249; *People v. Tafoya* (2007) 42 Cal.4th 147, 198; *People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Morrison* (2004) 34 Cal.4th 698, 730.)

F. There Are No Constitutional Requirements that the Jury Unanimously Find Aggravating Factors, Make Written Findings Regarding Aggravating Factors or Find Aggravating Factors beyond a Reasonable Doubt

Appellant raises three claims regarding the jury's findings as to aggravating factors under California's death penalty statute and jury instructions (AOB 603-604), all of which have been previously rejected by this Court. Each is addressed separately below.

Appellant first argues that the jury's findings regarding the presence of aggravating factors must be unanimous. (AOB 603-604.) This Court has repeatedly held that the jury need not achieve unanimity as to specific aggravating factors and appellant provides no reason to revisit this holding. (See, e.g., *People v. McKinnon*, *supra*, 52 Cal.4th at p. ___ [2011 WL 3658915 at *56]; *People v. Brasure* (2008) 42 Cal.4th 1037, 1068; *People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Boyette*, *supra*, 29 Cal.4th at p. 465; *People v. Taylor*, (1990) 52 Cal.3d 719, 749; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-778.)

Appellant next contends that to pass constitutional muster, the jury must have rendered specific written findings regarding aggravating factors. (AOB 603-604.) This Court has repeatedly held that such written findings are not constitutionally mandated and that the lack of such written findings does not preclude meaningful appellate review, and appellant provides no

reasons for revisiting these holdings. (See, e.g., *People v. McKinnon*, *supra*, 52 Cal.4th at p. ___ [2011 WL 3658915 at *56]; *People v. Wilson* (2008) 43 Cal.4th 1, 32; *People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Brown*, *supra*, 33 Cal.4th at p. 402; *People v. Nakahara* (2003) 30 Cal.4th 705, 721; *People v. Williams* (1997) 16 Cal.4th 153, 276; *People v. Visciotti* (1992) 2 Cal.4th 1, 79; *People v. Thompson* (1988) 45 Cal.3d 86, 143; *People v. Allen* (1986) 42 Cal.3d 1222, 1285.)

Last, appellant alleges that, in order to pass constitutional muster, aggravating factors must be found to exist by the jury beyond a reasonable doubt. (AOB 603-604.) This Court has repeatedly held that the absence in Penal Code section 190.3 and CALJIC No. 8.88 of any burden of proof except as to prior criminal acts under factor (b) is not unconstitutional and appellant provides no reason to revisit this holding. See, e.g., *People v. McKinnon*, *supra*, 52 Cal.4th at p. ___ [2011 WL 3658915 at *56]; *People v. Wilson*, *supra*, 43 Cal.4th at p. 31; *People v. Elliot* (2005) 37 Cal.4th 453, 487-488; *People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Brown*, *supra*, 33 Cal. 4th at pp. 401-402; *People v. Prieto* (2003) 30 Cal.4th 226, 275; *People v. Michaels* (2002) 28 Cal.4th 486, 541; *People v. Lucero*, *supra*, 23 Cal 4th at p. 741; *People v. Samayoa* (1997) 15 Cal.4th 795, 862; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 595.)

G. California's Death Penalty Does Not Violate Either the Eighth and Fourteenth Amendments or International Law

Finally, appellant contends that his death sentence under California's death penalty statute violates both the Eighth and Fourteenth Amendments to the U. S. Constitution as well as international law. (AOB 604.) This Court has repeatedly that a "[d]efendant's death sentence violates neither international law nor his rights under the Eighth and Fourteenth Amendments to the federal Constitution, as no authority 'prohibit[s] a

sentence of death rendered in accordance with state and federal constitutional and statutory requirements'" and appellant provides no reason to revisit this holding. (*People v. McKinnon*, *supra*, 52 Cal.4th at p. ___ [2011 WL 3658915 at *57], citing *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; accord *People v. Thomas*, *supra*, 51 Cal.4th at p. 507; *People v. Hawthorne* (2009) 46 Cal.4th 67, 104; *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Hoyos*, *supra*, 41 Cal.4th at p. 925; *People v. Perry* (2006) 38 Cal.4th 302, 322; *People v. Brown*, *supra*, 33 Cal.4th at 403-404; see also *People v. Mendoza* (2007) 42 Cal.4th 686, 708 [California's imposition of death does not offend international norms of humanity and decency]; *People v. Beames*, *supra*, 40 Cal.4th at p. 935 [same].)

Based on the foregoing, appellant's claim that California's death penalty statute as interpreted and applied at his trial is both violates the U. S. Constitution and international law must be denied.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: December 22, 2011 Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
GLENN R. PRUDEN
Supervising Deputy Attorney General

DONNA M. PROVENZANO
Deputy Attorney General
Attorneys for Respondent

SF2000XS0004
20485870.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 87,984 words.

Dated: December 22, 2011

KAMALA D. HARRIS
Attorney General of California

DONNA M. PROVENZANO
Deputy Attorney General
Attorneys for

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Louis James Peoples***
No.: **S090602; Alameda County Superior Court No. 13520, *on change of venue from* San Joaquin County Superior Court No. SP062397A**

I declare:

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

On December 22, 2011, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Phillip H. Cherney
214 South Johnson Street
Visalia, CA 93291
(2 copies)

The Honorable Nancy O'Malley
District Attorney
Alameda County District Attorney's Office
1225 Fallon Street, Room 900
Oakland, CA 94612-4203

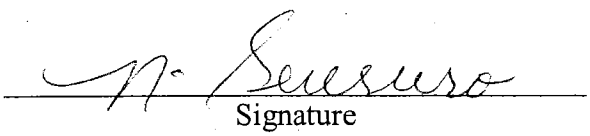
Alameda County Superior Court
Criminal Division
Rene C. Davidson Courthouse
1225 Fallon Street, Room 107
Oakland, CA 94612-4293

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

The Honorable James P. Willett
District Attorney
San Joaquin County District Attorney's Office
P.O. Box 990
Stockton, CA 95201

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 22, 2011, at San Francisco, California.

Nelly Guerrero
Declarant


Signature

SF2000XS0004
40502997.doc