

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

SEAN VENYETTE VINES,

Defendant and Appellant.

S065720

CAPITAL CASE

Sacramento County Superior Court No. 94F08352
The Honorable James L. Long, Judge

RESPONDENT'S BRIEF

SUPREME COURT
FILED

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.
SEAN VENYETTE VINES,
Defendant and Appellant.

S065720

**CAPITAL
CASE**

STATEMENT OF THE CASE

On June 17, 1997, the Sacramento County District Attorney filed an amended information charging appellant, Sean Venyette Vines, with 24 felonies, as follows: one count of murder, in violation of Penal Code^{1/} section 187, subdivision (a), (count 18); eight counts of robbery, in violation of section 211 (counts 1-4 and 19-22); five counts of assault with a deadly weapon (firearm), in violation of section 245, subdivision (a)(2), (counts 13-16 and 23); four counts of kidnaping to commit robbery, in violation of section 209, subdivision (b), (counts 5-8); four counts of false imprisonment, in violation of section 236 (counts 9-12); and two counts of felon in possession of a firearm, in violation of section 12021, subdivision (a), (counts 17 and 24)^{2/}. As a special circumstance within the meaning of section 190.2, subdivision (a)(17), the amended information alleged that the murder was committed while appellant was engaged in the commission or attempted commission of a robbery.

1. All further statutory references are to the Penal Code unless otherwise indicated.

2. Co-Defendant, William Proby, who was also named in the amended information, was tried separately (*People v. Proby* (1998) 60 Cal.App.4th 922) and is not a party to this appeal.

Regarding counts 1-12 and 18-24, the amended information alleged that appellant personally used a firearm (sawed-off rifle), within the meaning of section 12022.5, subdivision (a), during the commission or attempted commission of the crimes. Regarding counts 5-8, 13-16, 18, and 23, the amended information alleged that the crimes were serious felonies within the meaning of section 1192.7, subdivision (c). Additionally, the amended information alleged that appellant suffered one prior conviction within the meaning of sections 667 and 1170.12, and another prior conviction within the meaning of section 667.5, subdivision (b). (CT 467-481.) On the same date, appellant pleaded not guilty to all of the charges and denied all of the special allegations. (CT 466.)

On August 6, 1997, the jury was sworn, and, on August 11, 1997, the prosecution began presenting evidence in the guilt phase portion of the trial. (CT 613, 784-793.) On September 9, 1997, the jury found appellant guilty of all 24 counts, found true the special circumstance allegation that the murder (count 18) was committed while appellant was engaged in the commission of a robbery, and found true the special allegation that appellant personally used a firearm (sawed-off rifle) during the commission of the crimes charged in counts 1-12 and 18-24. (CT 848-859.) On the same date, a court trial occurred regarding the two prior conviction allegations, and the court found both allegations to be true. (CT 858.)

On September 16, 1997, the penalty phase of the trial began. (CT 888-891.) On September 19, 1997, the jury determined the appellant's punishment for the murder conviction (count 18) should be death. (CT 950-952.)

On November 7, 1997, the trial court imposed judgment and sentence and ordered that as a penalty for the murder conviction (count 18), appellant "shall suffer the Death Penalty." (CT 1070.) Additionally, as punishment for

the other counts, the court also imposed four consecutive life terms and a total aggregate determinate state prison term of 55 years and 4 months. (CT 1073.)

On November 12, 1997, the Clerk's Office for the Sacramento County Superior Court executed a notice of automatic appeal. (CT 1080-1081.)

STATEMENT OF FACTS: GUILT PHASE

Introduction

This case involves two separate robberies that occurred 11 days apart in the Sacramento area. On September 17, 1994, the McDonald's restaurant located at 5707 Watt Avenue was robbed (the "Watt Avenue robbery"). Appellant was an employee of the restaurant at the time of the robbery. On September 28, 1994, the McDonald's restaurant located at 2980 Florin Road was also robbed (the "Florin Road murder and robbery"). Appellant previously had worked at this restaurant as well. During that robbery, one of the employees, Ronald Lee, was killed when appellant shot him in the back of the head.

The Watt Avenue Robbery

In September 1994, appellant and William Proby both worked at the Watt Avenue McDonalds. (RT 3209.) Two to three weeks before the robbery, while working the closing shift (from 5:00 p.m. until after midnight), appellant asked one of the managers, Charles Ruby Jr., what the procedures were for a robbery. (RT 3208, 3213-3215.) Appellant asked about the procedures for both a drive-thru robbery and an in-store robbery. (RT 3215.) Ruby explained that the employees and/or managers were supposed to give the robber(s) the money without any resistance. (RT 3215.) Appellant kind of chuckled and then said, "We are going to get robbed." (RT 3215-3216, 3226.)

On September 17, 1994, appellant was supposed to work the closing shift at the restaurant. However, appellant called that day and indicated that he would not be able to make it in to work. (RT 3212.)

The manager who worked the closing shift that night was Stanly Zaharko. (RT 3236.) Along with Zaharko, the other employees that worked the closing shift that night were John Burreson, Michael Baumann, and Leticia Aguilar. (RT 3237.) Zaharko was the only employee working that evening that had access to the safe. (RT 3240.)

The restaurant was scheduled to close at midnight. (RT 3241.) At about 11:45 p.m., Baumann saw someone enter the restaurant and head to the bathroom. Baumann only got a quick glance at the side of the person's face, but he was certain that it was appellant. (RT 3397-3399, 3451, 3457, 3470.)

Just after midnight, Zaharko closed the restaurant and began securing the place by locking the doors and making sure that no one other than the employees were inside. (RT 3243-3244.) However, when he checked the men's restroom, Zaharko realized that someone was in the stall, and he learned that it was not one of the employees when he saw them all in the grill/front counter area a few moments later. (RT 3244-3245.)

At about 12:15 a.m., Zaharko headed toward the restroom to tell the person to leave. As he rounded the corner of the lobby, Zaharko saw a man walking out of the restroom with a gun in his hand. (RT 3246-3248.) Zaharko, who believed the restaurant was being robbed, raised his hands, and the robber raised the gun and pointed it at him. (RT 3248.) The robber was wearing faded jeans, a green jacket with a hood over his head, and what appeared to be a green scarf wrapped around his face. He was an African-American male who appeared to be approximately 6 feet tall, around 200 pounds, and between the

ages of 18 and 25. (RT 3249-3250.) The gun, which was about two to two and half feet long, appeared to be a sawed-off rifle or shot gun. (RT 3253-3254, 3404-3405.)

Initially, the robber was about 15 to 20 feet away from Zaharko. (RT 3247, 3252.) However, the robber closed the distance to about three feet (the length of the gun plus an extra foot or so), and Zaharko started walking backward away from the robber but still facing him. (RT 3252.) The robber walked Zaharko directly to the front counter area where the safe was located. (RT 3255-3256.) As they were walking by the front counter, Zaharko heard a click that sounded like the rifle was being cocked, and, after getting a closer look, Zaharko believed appellant was the robber. (RT 3251, 3255-3256.) While Zaharko was not absolutely 100 percent certain appellant was the robber, absent evidence to the contrary, Zaharko felt certain it was him. (RT 3333-3335, 3385.)

When they reached the safe, appellant ordered Zaharko to open it. (RT 3256-3257.) At this time, appellant had the gun pointed right in the back of Zaharko's head. (RT 3257, 3402.) Appellant's voice sounded low, gravelly, and unnatural (i.e., disguised). (RT 3256-3257.) After Zaharko opened the safe, appellant told him to hand over the keys, and Zaharko placed both his personal set of keys and his store set of keys on top of the safe. (RT 3257-3258.) Appellant then directed Zaharko to the back of the restaurant where the other employees were standing by a sink. (RT 3259-3261.)

Again using a low-pitched disguised voice, appellant ordered all the employees to go downstairs. At this time, appellant had the gun pointed at all of the employees, and they all headed down the stairway, which was not visible from the customer side of the front counter. (RT 3261-3263, 3403, 3406-3407,

3602.) Aguilar, who had previously worked with appellant about 10 to 12 times, including the day before, recognized appellant as the robber because of his eyes. (RT 3603-3606.)

As they went downstairs, the gun was pointed right at the back of Baumann's head. (RT 3403.) Once everyone was downstairs, appellant ordered the employees to get into the freezer. Before entering the freezer, Baumann turned around and faced appellant with thoughts of trying to take the gun away. (RT 3408, 3467, 3470.) He was only one or two feet away from appellant, and, after looking into appellant's eyes, Baumann was even more certain that appellant was the robber.^{3/} (RT 3446, 3467-3468, 3470-3471, 3479-3480.) Appellant then pointed the gun toward Baumann's head, and Baumann entered the freezer. (RT 3408.)

After everyone was inside, appellant slammed the freezer door closed. (RT 3266.) Almost immediately (i.e., within a few seconds), appellant also locked the door. Because the doorlock on the freezer did not function properly, locking it required the use of a prefabricated, metal bar that had been made specifically for this freezer and an eyelet on the freezer wall. (RT 3266-3268, 3391.) Appellant had previously locked this freezer using the prefabricated latch several times. (RT 3271.)

After waiting approximately 10 minutes, Zaharko and the employees used a fire ax that was stored in the freezer to break through the freezer door and escaped. (RT 3270-3272.) In the process of escaping, Zaharko cut his hand. (RT 3272.) One of the employees called 911, and they all waited in the

3. At one point during direct examination, Baumann indicated that he did not recognize appellant as the robber. (RT 3408-3410.) However, Baumann later testified that he had not been truthful during that portion of his testimony because he was afraid "of losing [his] family." (RT 3429.) Baumann further stated that he was "very certain" that appellant was the robber. (RT 4375.)

basement for the police to arrive. (RT 3272-3273.) When the police showed up, they went upstairs and saw that the safe had been ransacked. (RT 3273.) Approximately \$2,000 had been stolen. (RT 3489.) Additionally, Zaharko's Dodge Dakota truck, which he drove to work every day and routinely parked in the same parking spot, and his "attache type bag" were also stolen. (RT 3236-3237, 3308.) A month or so before the robbery, Zaharko had given appellant a ride home using the same truck. (RT 3258-3259.) Zaharko told the officers that he believed appellant was the robber, and he described the robber as being a black male, about 21 years old, six feet tall, 210 pounds, and very dark complected. (RT 3331-3332.)

After the robbery, appellant and Proby picked up Proby's girlfriend, Vera Penilton, and her baby from her mother's house and headed to a motel, the Rodeway Inn, on Watt Avenue.^{4/} They were driving a truck, and Penilton saw a name tag with the name Stanly on the floor of the vehicle. (RT 3525-3527.) Later, appellant and Proby told Penilton about the robbery. (RT 3530.) Appellant told her that he committed the robbery by himself because Proby got scared and waited in the car. He described how he waited in the bathroom before robbing the restaurant and indicated that he locked the employees in the freezer. (RT 3530-3532.) He also told her that he did not like his manager, "Stan," and that he was going to shoot him, but did not do so. (RT 3531.) Appellant was laughing while he was telling this to Penilton, as if he did not care. (RT 3532-3533.) Penilton also saw that appellant and Proby had "a lot of money" and a small silver handgun. (RT 3533-3534.) Previously, appellant and Proby had told Penilton that they were going to rob the McDonalds on Watt Avenue where they worked. (RT 3523-3524.)

4. Appellant's roommate, Ulanda Johnson, testified that appellant was not home during the weekend of September 17 and 18, 1994. (RT 3752-3754.)

At some point in time, appellant and Proby attempted to clean up the truck and wipe off any fingerprints. (RT 3534-3536.) They threw some things from the truck into a trash can behind a restaurant and tried to burn the truck. They then left the truck near a Denny's restaurant in the Target shopping center on Mack Road in south Sacramento. (RT 3534-3536, 3691-3695, 3698-3699.)

Appellant also took the car phone that was in Zaharko's truck. (RT 3537.) Telephone records revealed that between 4:53 a.m. and 4:57 a.m. on September 18, 1994, that phone was used to call Ulanda Johnson's home telephone number and pager number and Sonya Williams' home telephone number. (RT 3068, 3755; CT 4739, 4983-4987.) Appellant had relationships with both Johnson and Williams. (RT 3068-3070; 3751.)

Also that night, appellant picked up Williams from her home, and they headed to the Roadway Inn to meet up with Proby and Penilton. (RT 3072-3076, 3148-3150, 3190-3197.) Williams had met appellant near the end of April 1994, and, at least from her perspective, they were boyfriend and girlfriend. (RT 3068-3070.)

As they drove to the motel, Williams noticed that appellant had a small silver gun in his lap. (RT 3082-3083, 3821; CT 4910, 4912, 4917.) Appellant told Williams "that he did what he said he was going to do or what he talked about," and he pulled a wad of money (about 50 bills) out of his pocket and showed it to her.^{5/} (RT 3077-3078, 3082-3083, 3089, 3821; CT 4911.) Two

5. On September 30, 1994, Detective Danny Minter of the Sacramento County Sheriff's Department interviewed Williams regarding the Watt Avenue robbery. (RT 3818.) Detective John Cabrera of the Sacramento Police Department, who was investigating the Florin Road homicide, was also present. (RT 3818-3819.) During the interview, Williams described various statements that appellant had made to her regarding that robbery as they drove to the Roadway Inn. (RT 3819-21, 3828.) At trial, Williams claimed that she could not remember many of the same details about that conversation and/or denied that appellant ever made such statements. (RT 3079-3089.) The court then allowed the prosecution to play portions of the videotaped interview as

to three weeks earlier, appellant had told Williams that he and Proby were going to rob the McDonald's restaurant where he worked. (RT 3085-3087, 3089, 3110, 3135-3136, 3820, 3828; CT 4911-4913.) Specifically, appellant admitted to Williams that he had committed the robbery with Proby and that his share of the stolen money was about \$900 and Proby's share was about \$700. (RT 3819-3821, 3828; CT 4914.) Appellant indicated that they had used Proby's car, and he told Williams that during the robbery, he came out of the bathroom, put a gun to a man's face, put everyone in the freezer, and took the money. (RT 3821, 3828; CT 4914-4915.) When Williams asked appellant something to the effect of "What if you would have killed those people that were in the freezer," appellant responded in a real calm manner "So."^{6/} (RT 3119-3121.)

When they arrived at the motel, appellant presented his identification and filled out the necessary paperwork to register for a room. (RT 3190-3197, 3816-3817.) After checking in, Williams counted the wad of money that appellant had shown her earlier, and it was approximately \$260 in all \$5 and \$1 bills. (RT 3112-3113.) On September 20, 1994, they checked out of the motel, and appellant paid the bill in cash for the three night stay. (RT 3195.)

impeachment evidence of Williams' prior inconsistent statements. (RT 3100A-3106.) Even after seeing the videotape excerpts, Williams often responded that she could not remember making those earlier statements during her interview with Minter. (RT 3108-3131.) The prosecution also called Minter as a witness to impeach Williams' testimony about her statements during the interview. (RT 3819-21, 3828.) On cross-examination, Williams contended that she made up all of the statements by appellant describing details of the robbery because she was mad at him. (RT 3160-3169, 3184.)

6. During her interview with Minter and Cabrera, Williams told the detectives that appellant had responded "They just would have died." (CT 4916.) When asked about this discrepancy at trial, Williams responded, "I don't remember me saying that. I probably did tell [the detectives] that, but he didn't really say it in those words." (RT 3120.)

The day after the robbery, September 18, 2004, appellant showed up at the restaurant to work the closing shift. (RT 3491.) Ruby, who had learned of the robbery, told Lisa Lee, the general manger for the restaurant, about his earlier conversation with appellant. (RT 3216-3217.) That night, Lee purposefully said so appellant could hear her that the police had an idea about who robbed the restaurant and that they were coming back that night to talk to some people. (RT 3493.) Appellant then dropped a basket of fries and became “very fidgety and very nervous like.” (RT 3494.) After that night, appellant never worked at the restaurant again. (RT 3495.)

On that same day, Zaharko’s truck was found in the Target shopping center at 6133 Mack Road. (RT3698-3699.) Appellant had worked at the Denny’s restaurant in that same shopping center during the time that he worked at the Florin Road McDonald’s. (RT 3736-3737.) When Zaharko got the truck back, he noticed that some things were missing, including his cellular telephone. (RT 3309.) He also found a bullet behind his seat, which he turned over to the police. (RT 3310, 3815.) The bullet was a .25 caliber ACP (automatic cartridge for pistol). (RT 3816.)

Sean Gilbert worked with appellant and Proby at the Watt Avenue McDonalds. (RT 3279-3281.) A week or two before the robbery, appellant told Gilbert that he owned a rifle or a shotgun. (RT 3282-3283.) Additionally, Proby showed Gilbert a chrome .25 caliber semiautomatic handgun no more than a week before the robbery. (RT 3285-3287.)

The day after the robbery, Gilbert saw appellant at work with a new Starter team jacket and a new Walkman. (RT 3287-3289.) A couple of days after the robbery, Ruby also saw appellant with what appeared to him to be a new red leather team jacket, a new pair of shoes, and a new portable CD player. (RT 3218-3219, 3227-3230.)

Appellant's Defense Re The Watt Avenue Robbery

John Burreson, who was working in the restaurant at the time of the robbery, testified that appellant walks with a limp and that he did not notice the robber walking with a limp. (RT 4081-4082.) He also indicated that he did not recognize appellant as being the robber. (RT 4085.) However, on cross examination, Burreson admitted that he never looked at the robber's face, and was not saying that appellant was not the robber. (RT 4096-4097.) Additionally, he only saw the robber take three or four steps, and Zaharko, Baumann, and Aguilar were all between him and the robber when that occurred. (RT 4086-4087.)

Additionally, Officer Jeffrey Morace interviewed Baumann the night of the robbery. (RT 4210.) During the interview, Baumann indicated that he thought appellant was the robber, but he did not say so for sure. (RT 4211-4212.) However, when Baumann spoke with Detective Minter, he positively identified appellant as the robber. (RT 3814, 3835-3836.)

Marilyn Mobert, an investigator for the defense, was present during a March 1, 1995 interview with Baumann. During the interview, Baumann indicated that the robber kind of looked like appellant. (RT 4218.) Mobert showed Baumann a photograph of Penilton's cousin, Anthony Edwards, and Baumann indicated that the nose, mouth, and complexion of Edwards were similar to that of the robber. (RT 4219.) However, neither Baumann, Zaharko, Aguilar, nor Burreson, who were all shown the photograph, identified Edwards as the robber or even indicated that they had ever seen him before. (RT 4248-4251.) Instead, Baumann identified appellant as the person who went into the bathroom that night and as the robber. (RT 4250, 4255.) Aguilar also positively identified appellant as the robber. (RT 4258.)

The Florin Road Murder and Robbery

After the Watt Avenue robbery, appellant told Proby and Penilton that he “wanted to do another lick,” which, according to Penilton, meant “he was going to do something again” (i.e., commit another robbery). (RT 3552.)

According to appellant’s roommate, Ulanda Johnson, appellant saw Proby every day during the month of September 1994. (RT 3751.) Johnson viewed appellant and Proby as “good friends,” and she used to tease appellant that Proby was his “girlfriend” because they spent so much time together. (RT 3752.)

On Tuesday, September 27, 1994, or Wednesday, September 28, 1994, appellant went with one of Johnson’s friends, Deborah Allen, to retrieve some belongings from her house.^{7/} (RT 3713-3716.) While they were at the house, Allen saw appellant holding a small silver handgun. (RT 3716-3718, 3733.)

On September 28, 1994, Proby and appellant were together before the robbery at both Penilton’s house and Johnson’s house. (RT 3553-3554, 3760-3761, 3771.) Appellant, who carried a black backpack with him everyday, had it with him when he left. (RT 3756, 3762.)

That night, Jeffrey Hickey was the manager in charge of the closing shift at the Florin Road McDonalds. (RT 3849-3850, 3855.) Ron Lee, Pravinesh Singh, and Jerome Williams also worked the closing shift that night. (RT 3856.) Previously, from October 1993 to April 1994, appellant had worked at that same restaurant. (RT 3851-3854.) From February 1994 (when Hickey started working at this location) until appellant left in April, appellant, Lee and

7. Allen told the police during one interview that this incident occurred on Tuesday, the 27th, but, in a later interview, she stated that the incident happened on Wednesday, the 28th. (RT 3715.) At trial, she testified that she and appellant went to her house on Tuesday, the 27th. (RT 3716.) Johnson testified that the incident occurred on Wednesday, the 28th. (RT 3759-3760.)

Hickey all worked the same shift together approximately a dozen times. (RT 3854, 3914.)

The restaurant was scheduled to close at 11:00 p.m. that night. (RT 3855.) About 20 minutes before closing time, Hickey went into the men's restroom, propped the door open, and began scrubbing some graffiti off of a wall. (RT 3858-3859.) A loud fan was on in the men's room, which made it difficult to hear anything outside of the bathroom. (RT 3858-3859.) As Hickey was cleaning, Proby appeared in the bathroom doorway wearing a baseball cap, a scarf that covered the lower portion of his face (only his eyes and the bridge of his nose were visible), an Army style jacket, slacks, and tennis shoes. (RT 3859-3860, 3864.) Proby was pointing a gun at Hickey that was about two feet long and looked like a sawed-off rifle, and he ordered Hickey to lay down on the floor. (RT 3860-3864.) After Hickey complied, Proby left the bathroom area and headed toward the main area of the restaurant. (RT 3864.)

Proby returned about two minutes later and asked Hickey if he could open the safe. (RT 3865.) Hickey said he could and then got up and walked to the office area of the restaurant. (RT 3865-3866.) As he approached the office, Hickey saw Lee laying on the ground just outside the office doorway. (RT 3866-3867.) Appellant was standing above Lee, within a foot or two of him, holding a small semi-automatic handgun.^{8/} (RT 3867-3871.)

As Hickey was opening the safe, appellant told him to "hurry up" three times, using a gruff, unnatural sounding voice that was lower than normal. (RT 3875-3876.) The robbers then directed Hickey to get out of the office and lay back down on the floor facing the back of the restaurant, which he did. (RT

8. Hickey did not specifically identify appellant as the second robber. (RT 3916.) However, Hickey described the second robber as a black man who was approximately six feet two inches tall, 185 to 200 pounds, and 20 to 25 years old. (RT 3871-3872.) He further indicated that the second robber's physical features were consistent with appellant. (RT 3873, 3899.)

3876-3877.) The robbers then spent a few minutes going through the safe. They took approximately \$550 in cash and a small steel locked box that contained gift certificates. (RT 3877-3879, 3881-3882.) A few minutes after the robbers left, Hickey got up to check on the employees and contact the police. At this time, Hickey realized that Lee had been shot in the back of the head. (RT 3879-3880.)

After the robbery, Proby and appellant were again seen together at both Penilton's house and Johnson's house. (RT 3553-3555, 3762-3763.) When Johnson saw appellant, she noticed that he was carrying his backpack on his right shoulder. (RT 3957.) When appellant and Proby arrived at Penilton's house, she was in her bedroom. Appellant and Proby asked her to leave and then shut the bedroom door. (RT 3556-3557, 3682.)

Penilton, who had gone to the kitchen, thought appellant and Proby were talking about girls, so she went toward the bedroom and put her ear against the door to listen. (RT 3562, 3682.) As she was doing this, Penilton heard Proby say that he and appellant had robbed another McDonald's. (RT 3557, 3561-3562.) She also heard appellant admit that "he had killed his friend." (RT 3563.) Penilton then entered the bedroom and appellant said that "he had killed his friend because the boy had said his name," and appellant was concerned that Lee "would tell on him" if he did not shoot him. (RT 3563-3564, 3566-3567, 3584, 3666.) Appellant indicated that he had killed Lee by shooting him in the back of the head. (RT 3564.) Appellant also had rolls of coins with him and a box that contained McDonald's gift certificates. (RT 3567-3569.)

On September 29, 1994, appellant deposited \$212 into his share account at the Safe Federal Credit Union. The deposit, which occurred at 3:17 p.m., was made in cash and consisted of 26 five-dollar bills and 82 one-dollar bills. (CT 4760, 4966-4967; RT 3546-3549.) Less than 20 minutes later, Proby opened an account at the same credit union. (CT 4757; RT 3549-3550.)

Later that day, Penilton, appellant, and Proby were in Proby's car when the police tried to stop the vehicle. (RT 3570-3574.) Appellant was telling Proby not to stop, and Proby kept driving. (RT 3575.) When they got into the parking lot of Johnson's apartment complex, appellant and Proby jumped out of the car while it was still moving and tried to flee. (RT 3575-3576.) However, the police were able to capture and arrest both of them. (RT 3576.)

When appellant and Proby were arrested, Penilton was also taken to the police station and interviewed. (RT 3576.) Penilton did not want to talk to the police and she did not tell them everything she knew about the robberies because she was afraid of being labeled a "snitch" and getting hurt. (RT 3576-3577, 3683.) However, she did tell the police about the conversations where appellant admitted to killing Lee. (RT 3577-3578.) Over the next few days, Penilton gave the police permission to search her bedroom twice, and the police found the box containing the McDonald's gift certificates, some money, and Zaharko's car phone. (RT 3578-3579, 4053-4055.) Penilton then interviewed with the police again and told them what she knew about the robberies. (RT 3581.)

The cause of death was a gunshot wound to the back right side of Lee's head. (RT 4031-4032, 4039.) The bullet recovered from Zaharko's truck and the bullet that killed Lee were both copper jacketed .25 auto caliber cartridges that are designed to operate in a .25 caliber semiautomatic weapon. (RT 4047-4050.) At the crime scene, police observed what appeared to be blood spatter on some of the kitchen equipment and tile walls of the restaurant that was about five feet above the floor. (RT 3961-3962.) Blood was also observed on the floor. (RT 3961-3962.)

Appellant's Defense Re The Watt Avenue Robbery

Near closing time, Pravinesh Singh was by the sink in the back of the restaurant when he looked up and saw one of the robbers pointing a gun at him. (RT 4101.) The robber, who was holding a small silver semi-automatic or automatic handgun, did not say anything to Singh, but motioned with the gun for him to get down on the ground. (RT 4102-4103, 4136-4137, 4170, 4180.) Singh, who was scared for his life, got down on the ground within one to three seconds with his head facing toward the storage room and away from the robber. (RT 4136-4138, 4142.) After being down on the ground for about a minute, Singh heard a gunshot. (RT 4142.)

Singh only saw one of the robbers that night, and he believed that robber was a dark complected black person who was between five feet eight and five foot eleven inches tall. (RT 4102-4103, 4140, 4171.) Singh testified that the person he saw was not appellant, but he also indicated that he did not see the robber's face. (RT 4112, 4186.) Additionally, Singh, who is near-sighted and who admits that his eyesight is "bad," was not wearing his glasses that night. (RT 4143, 4172.)

STATEMENT OF FACTS: PENALTY PHASE

The Prosecution's Case

During the penalty phase of the trial, the prosecution offered victim impact testimony from four witnesses. Lee's former girlfriend, Andrea Clayton, indicated that they met each other while they were both in high school. They began dating during the summer of 1993, and, eleven months later, in May 1994, Clayton gave birth to their son. (RT 4638-4641.) Their relationship was off and on, but Clayton considered Lee her soul mate. (RT 4642-4648.) When Clayton returned to school in September 1994, Lee would take care of

their son while Clayton was in class. (RT 4648-4649.) Clayton stated that she misses Lee's companionship and friendship and she wonders what their family would be like. (RT 4652.)

Littell Williams, Sr., who was the uncle of Lee's mother, knew Lee throughout Lee's entire life. (RT 4654.) They had a very close relationship, and Lee lived with Williams on occasion. (RT 4655.) Lee went to church with Williams every Sunday, where Lee played drums and sang in the choir. (RT 4655, 4657.) According to Williams, Lee was trying to save enough money to go to school to become a radiologist. (RT 4657.)

Diane Williams and Lee's birth mother were first cousins. (RT 4659.) Ms. Williams became Lee's legal guardian when Lee was 11 years old, and Lee referred to her as his mother. (RT 4659.) Ms. Williams thinks about and misses Lee virtually every day, and she has never been able to really deal with what happened to him. (RT 4662-4663.) Lee's death has left a void in her family. (RT 4663-4664.)

Littell Williams, III, Lee's cousin, indicated that a really strong bond existed between the two of them and that they were raised together as brothers. (RT 4665-4668.) They were inseparable, and they did everything together. (RT 4667.) Littell has had a hard time accepting Lee's death, and Littell has lost the only person who he ever would open up to on a personal level. (RT 4671.)

Appellant's Defense

Renee Vines, one of appellant's paternal uncles, testified that he saw appellant off and on throughout appellant's whole life. (RT 4689, 4692.) Renee indicated that appellant went to high school at L.A. Jordan High School in Watts and that the gang violence (i.e., shootings and killings) at the school when appellant was a student was "crazy" and in "full force." (RT 4691.)

Renee described appellant as a “jokester” and “just a big kid.” (RT 4693.) He also said that appellant must be “streetwise” to grow up and finish high school in a rough area like Watts. (RT 4694.) Renee indicated that he has never known appellant to get mad or have a temper or to get into any serious trouble. (RT 4694.) Renee testified that he did not want appellant to be executed because he doesn’t believe appellant killed Lee. (RT 4696.)

Kevin Vines, another of appellant’s paternal uncles, testified that Watts is a more violent place than Compton because it contains low income housing projects such as the Jordan Down Housing Project. (RT 4698-4699.) He indicated that appellant lived in that housing project while growing up. (RT 4699.) Kevin, who went to high school just a few years before appellant did and who is a former gang member, testified that high school age kids would be considered “nobod[ies]” or “nerds” if they did not get involved with gangs and drug activity. (RT 4700-4703.) Kevin indicated that just walking the streets in that area was dangerous and that most people joined gangs. (RT 4705-4706.) However, Kevin testified that appellant never joined a gang because “[h]e was too quiet, ... didn’t have the heart, wasn’t cut out for it. [H]e had opportunity, but he didn’t choose it.” (RT 4706-4707.)

Luther Diamond went to high school with appellant. (RT 4714-4715.) They both were part of the school marching band. (RT 4716.) They also were part of the “future teacher” program, where the participants would go to elementary schools and help teach the younger students, and the “peer counseling” program, where they tried to help fellow students work through their problems. (RT 4719-4720.) Additionally, they both volunteered for a program that made 250 lunches every Thursday and provided them to homeless people downtown. (RT 4720.) To Diamond’s knowledge, appellant was not involved with any gangs, and he did not engage in fist fights or other physical confrontations. (RT 4722-4723.)

Myeisha Vines, appellant's sister, recalled living in the Jordan Downs Housing Project as a child and watching appellant and his friends perform hip hop dances. (RT 4726-4728.) When Myeisha was around 16 years old, appellant moved out of the house for a while. When that happened, Myeisha was told not to let appellant into the house unless their mother was home, because their mother, Sonia Evette Pearson,^{9/} wanted to speak with him. (RT 4731-4732.) One day, Myeisha was cleaning the house with the door open and appellant came in. (RT 4732-4733.) Myeisha yelled and screamed for appellant to leave, but appellant headed up the stairs. Myeisha then took the broom that she was holding and began hitting appellant with it. Appellant grabbed the broom from his sister and pinned her on the bed so she could not hit him anymore. (RT 4733-4734.) Someone called the police, and a neighbor also came over. According to Myeisha, appellant never hit her or beat her up during that incident. (RT 4734-4735.)

Myeisha described appellant's temperament as quiet and calm. (RT 4735.) She stated that appellant was good to her, that he was warm hearted, and that children loved him because he was like a big brother to everyone. (RT 4736.)

Sharon Booker, who is a cousin of appellant's mother, Evette, has known appellant his whole life. (RT 4750.) When appellant was a baby, Booker and another relative spent a lot of time with him, because Evette was still just a teenager and wanted to have a "nice time." Booker wanted to make sure that appellant was well taken care of, and she did not want appellant to be around strangers. (RT 4751.)

9. Throughout the record, Pearson is referred to as both Sonia and Evette. In the opening brief, appellant has referred to her as Evette. For the sake of consistency, respondent will do the same.

When appellant was in high school, Booker saw appellant and his family, but not a whole lot. (RT 4752.) According to Booker, Evette was hanging around people who used drugs. (RT 4752-4753.) However, things changed for the better when Evette became involved with the Jehovah's Witness religion. (RT 4753.)

Appellant's mother, Evette, was 15 years old and living with her mother when appellant was born. (RT 4757.) Appellant's father, Roger Vines, was in and out of jail at that time. (RT 4757.) When appellant was around three or four years old, Roger and Evette got married. (RT 4757-4758.) They had ups and downs during their marriage, and, according to Evette, Roger was sometimes physical with her. (RT 4758-4759.) Evette also stated that Roger would sometimes beat appellant unnecessarily (i.e., hit appellant in the back with a belt and leave marks on his body). Evette felt this was child abuse, and it ultimately led to their break up. (RT 4759-4761.) However, Evette felt that Roger and appellant had a good relationship when Roger was not disciplining him. (RT 4761.)

When appellant was four years old, his sister, Myeisha, was born. (RT 4761.) According to Evette, Roger started treating appellant differently after that. (RT 4762.) Roger would ignore appellant and give all of his attention to Myeisha. (RT 4763.)

Eventually, Roger and Evette got divorced, and Evette moved back to the Los Angeles area, while Roger stayed in Sacramento. (RT 4763.) Evette had custody of the kids during the school year, and Roger had custody during the summer months. (RT 4764.) However, Roger decided not to return the kids one year because he did not want to pay any more child support. (RT 4764.) After getting a job and saving enough money, Evette and her grandmother then went to Sacramento and "literally snatched the kids off the streets." (RT 4764-4765.) Evette and the kids moved into the projects in Watts

because that is all they could afford. (RT 4765.) Appellant was in junior high school and Myeisha was in elementary school when this occurred. (RT 4765.)

Evette described living in the projects as “awful.” (RT 4766.) She was afraid of all the gunfire, of getting killed, and of Roger finding out where they lived. (RT 4766.) During this time period, Evette described appellant as sweet and respectful. (RT 4767.) Evette and her family dealt with living in the projects by turning to religion. (RT 4767-4768.)

When appellant was 16 years old, he and his mother did not get along so well. (RT 4768.) One night, appellant asked his mother if he could spend the night at a friend’s house, but she told him no because she did not know the person. Apparently not happy with her answer, appellant left and moved out of the house for awhile. (RT 4768-4769.) At some point, appellant took his mother’s car without her permission. (RT 4769.) Evette was furious with appellant, and she got a restraining order against him. (RT 4769.)

Ann Divers-Stamnes was a teacher at Jordan High School from 1986 through June of 1990. (RT 4776.) Divers-Stamnes described the high school as “terribly run-down,” with “bars on all the windows” and “graffiti across the walls in the buildings.” (RT 4779-4780.) She stated that the campus was not secure, and she taught with her classroom door locked because she was not “quite sure who was on campus at any given time.” (RT 4781, 4796.)

Divers-Stamnes started both the peer counseling program and the future teacher program while there. (RT 4778.) Appellant was one of her students. (RT 4776-4777.) In the peer counseling class, Divers-Stamnes was able to observe appellant frequently, and she thought he was an incredibly articulate, engaging, and caring young man. (RT 4790-4791, 4798.) Appellant did extremely well in the peer counseling class, and he exhibited “a great deal of

empathy and caring and warmth with the other students involved in the program.” (RT 4792.) In fact, Divers-Stamnes described appellant as a “stellar student.” (RT 4804.)

According to Divers-Stamnes, there was tremendous pressure on the kids, especially the boys, to join gangs. (RT 4796.) However, she was not aware of appellant ever being involved with a gang. (RT 4797.)

Appellant’s father, Roger Vines, testified that appellant was a mild kid while growing up. (RT 4821.) Roger stated that he provided appellant with both the “sternness of a father” and the “very gentle touch of a mother.” (RT 4821-4822.) Regarding his marriage with his ex-wife, Evette, Roger indicated that they had their share of problems and disagreements, some verbal and some physical. (RT 4822-4823.)

As appellant got older, he remained a “big kid” who had many friends and who enjoyed playing sports. (RT 4823-4824.) According to Roger, appellant remained mild mannered, never had a temper, and was not a fighter. (RT 4824.)

Appellant’s great grandmother, Lillian Richardson, was unable to attend the trial in person because of health reasons, so she testified via videotaped examination.^{10/} Richardson recalled that Evette was a teenager when she met Roger and gave birth to appellant. Roger had a temper, and he went to prison when appellant was very young. Evette and appellant lived with Richardson during the time that Roger was incarcerated, which lasted until appellant was three or four years old. After Roger was released, he and Evette got married.

Richardson stated that Roger was physically abusive to Evette. She indicated that Roger would “jump on [Evette] and beat her,” and she recalled

10. As noted by appellant in the opening brief, the videotape of Richardson’s testimony was introduced at trial as Exhibit 101B. (AOB 49, fn. 10.) However, no written transcript of Richardson’s testimony was ever made.

an incident where Roger allegedly broke Evette's arm. Richardson also recalled hearing from Evette that Roger once knocked Evette through a window, causing a cut on her foot that required stitches.

As for the kids, Richardson testified that Roger treated appellant and his sister differently. She indicated that Roger would "cater to Myeisha" but insult or beat appellant. One time when Richardson was visiting, appellant came home late from school. It was raining that day, and appellant had gotten off at the wrong bus stop. When appellant came home, Roger called him "stupid" and then whipped him with a belt.

Richardson never saw appellant angry or resentful. She thought he was smart and well-mannered, and he was always good with children and elderly people.

ARGUMENT

I.

APPELLANT'S CLAIM OF BATSON/WHEELER ERROR MUST BE REJECTED

A. Factual And Procedural Background

The initial venire consisted of four groups of 60 persons each. (RT 2120.) After hardship removals there were 134 persons remaining. (RT 2282, 2289-2291; CT 531-533.) Those jurors filled out questionnaires. (See CT 734.) Of those filling out questionnaires, there were at least eight who identified themselves as Black or African-American. (CT 1783, 1867, 2069, 2531, 2993, 3310, 3600, 3836.)

After the cause challenges and a late hardship excusal, there remained 82 persons in the venire. (CT 535, 589, 599, 605-606, 611, 612; RT 2943, 2965.)

On August 6, 1997, the day the parties were set to exercise their peremptory challenges, prospective juror Mark Hopkins arrived late. (CT 612; RT 2964.) When he and two other jurors were not present for roll call, a short recess was held, after which the trial court announced that “there are a couple of prospective jurors that all of the sides feel need to be present” and so another short recess was called. (RT 2964-2965.) Immediately, prior to the commencement of formal exercise of peremptory challenges, the prosecutor informed the court that he intended to excuse Prospective Juror Hopkins (Hopkins):

Mr. Gold: Your Honor, could I also say one thing. If Mr. Hopkins is not here by 9:45, I would agree that we can treat him as if he were here. [¶] I know Mr. Bigelow expressed a desire that he not be excused, but I can tell the court I was going to excuse him anyway, so I could count that as one of my challenges if he doesn't show up.

(RT 2965-2966.) A short while later, Hopkins and another juror arrived. (RT 2966; CT 612.)

When the peremptory challenges finally began, the People excused a total of 14 prospective jurors. (CT 613.) The defense made a *Wheeler* motion as to two: Betty Hernandez and Hopkins. The trial court found that prospective juror Hernandez was African American (RT 2974), but after reviewing the *Hovey* examination and the juror's questionnaire, did not find a prima facie case. (RT 2975.) On appeal, appellant only challenges the ruling with respect to Hopkins. (AOB 57, fn. 14.) As to Hopkins, the trial court asked the prosecutor to state his reasons. (RT 2975.)

The prosecutor stated his reasons as follows:

MR. GOLD: As to Mr. Hopkins, on page 18 and question 65, I had inserted a question about the Simpson trial. To me I feel that that is a major issue these days in criminal justice, how people felt about that case.

Of the 140 questionnaires that I read I would say that only two people felt that that was a good case, and something good came out of it.

One of them is Mr. Hopkins, and his answer shocked me. He said that case restored his faith in the system. My personal belief, and most people that I know feel that was a travesty, and that was unjust, and that concerns me having someone with Mr. Hopkins' state of mind, having that belief about that case and this system, because I strongly disagree with that.

He also on questions 69 and 70 on page 19, there is a question 70, if the prosecution brings someone to trial, that person is probably guilty. There is 4 responses.

The most extreme response is I disagree strongly, and he checked that box. Some people would say I disagree somewhat. Some people would say I agree somewhat. I can live with those responses.

But anyone who is in the strong to me is a question mark, and I believe that anyone who believes strongly that if the People bring someone to trial, and they feel that they are not probably guilty, he disagrees strongly to me, that's a problem.

I think most people, the way our system works in America, if the police arrested somebody, most people believe there is going to be something to it.

They are not going to disagree strongly. That shows a bias in my mind for Mr. Hopkins. He also felt that it was better for society to let some guilty people go free rather than risking convicting an innocent person.

He checked I agree somewhat. That didn't concern me as much as number 70, but that does concern me, he has that belief. He is entitled to it, but as someone who is picking a jury, I would rather have people oriented the other way.

On the death penalty views, he put that in his belief about the death penalty, his opinions, he would only impose it if he were required to, and a number of other people put it in those terms, and I excused those people as well.

I think some people were feeling that they'd only do it if His Honor told them to do it, and that's not the law. They are going to be faced with a choice, and nobody is going to tell them that they have to do anything.

In fact, the law tells them the opposite. You don't have to do it, and you can only do it if it's substantially outweighed, and then only then you have your choice.

And he is of the frame of mind, I feel someone is going to have to force him or require him to do it, and I don't believe on this type of a decision I want someone with that frame of mind, because it is a major decision in someone's life, and I think they have to feel comfortable about it, and I don't feel he felt comfortable about it.

He also felt on page 24, number 90-B, although he qualified his answer, he said originally he felt that the death penalty is imposed unfairly against African Americans, and now he is not sure. The key word in that question is unfairly.

I understand people saying that there is a disproportionate amount of African Americans, but what concerns me is when people feel it's unfair.

And Miss Hernandez, who I will talk about in a moment, also strongly believed that there is something unfair about that, and someone of that frame of mind I don't feel comfortable with because of those views.

If he said disproportionate, I'd still feel somewhat concerned, but he felt unfairly, and now he is not sure. And I also felt that as a death juror as opposed to the guilt phase where Mr. Simpson concerns would arise, I did not feel that he would impose the death penalty.

I didn't feel that he would have the strength to do that, even if he felt that it was right. That's why I excused Mr. Hopkins.

(RT 2976-2978.)

After the prosecutor stated his reasons, defense counsel submitted the issue without any additional argument. The trial court then denied the motion as to both prospective jurors. (RT 2979.)

The jury that was sworn to try the case consisted of eight people who identified themselves as white, Caucasian, or Anglo-Saxon, one person who identified herself as Black, one person who identified herself as Spanish, one person who identified himself as Caucasian/Hispanic, and one person who identified herself as Caucasian/Asian. (CT 3805, 3836, 3867, 3898, 3929, 3960, 3991, 4022, 4053, 4084, 4115, 4146.) At the time the jury was sworn, the prosecutor had used only 14 of the 20 peremptory challenges to which he was entitled. (See Code Civ. Pro. § 231.)

B. Applicable Law

Exercising peremptory challenges to remove prospective jurors solely because of group bias, for example, on racial grounds, violates both the California Constitution (*People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*)) and the United States Constitution (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*)). Both *Wheeler* and, later, *Batson* established procedures for courts to follow when one party objects to the other party's peremptory challenges.

This Court has explained the governing analytical process for such claims:

The United States Supreme Court has set out a three-step process that is required when a party claims that an opponent has improperly discriminated in the exercise of peremptory challenges. The first step is

for the complaining party to make out a prima facie case of racial discrimination. If the complaining party does so, in step two the burden of production shifts to the opponent to advance a race-neutral explanation. If a race-neutral reason is tendered, in step three the court decides whether the complaining party has proved purposeful racial discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 767).

(*People v. Cash* (2002) 28 Cal.4th 703, 724.)

Thus, in step two, after the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion.” (*Batson, supra*, 476 U.S. at pp. 93-94.) In step three, the trial court must decide whether the defendant has carried the burden of proving purposeful discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 767.) And, “the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.” (*Id.* at 768.) The trial court’s ruling on this issue is reviewed for substantial evidence. (*People v. Alvarez* (1996) 14 Cal.4th 155, 196.) As this Court has noted,

Although we agree that it is generally preferable to have individual reasons and individual findings for each challenged juror, we have never required them. “When the prosecutor’s stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings.” [Citation.]

(*People v. McDermott* (2002) 28 Cal.4th 946, 980.) And it is of course well-established that “[j]urors may be excused based on ‘hunches’ and even ‘arbitrary’ exclusion is permissible, so long as the reasons are not based on impermissible group bias. [Citation.]” (*People v. Turner* (1994) 8 Cal.4th 137, 165.)

C. Analysis

1. The Trial Court Correctly Applied The *Batson* Standard

Appellant's primary argument is that the trial court failed in conducting the third step of the *Batson* analysis.^{11/} (AOB 54.) In particular, he criticizes the court for failing to make detailed findings regarding the prosecutor's reasons. (See AOB 59-60.) He relies principally upon this Court's decision in *People v. Silva* (2001) 25 Cal.4th 345, 385. He argues that despite the trial court's denial of the motion, he is nevertheless entitled to per se reversal. (AOB 61.) He is incorrect.

Respondent notes that it is well-established that "[a] ruling on a motion implies a finding by the court of every fact necessary to support the ruling." (*Trapasso v. Superior Court* (1977) 73 Cal. App. 3d 561, 568.) Thus, despite the fact that the trial court denied the motion without amplification of its thought processes, the ruling by the court is indeed a finding that the prosecution's reasons were sincere, genuine, and race neutral.

Appellant argues that detailed, on-the-record findings were mandatory in this case because the record affirmatively contradicted the prosecutor's proffered reasons. This prong of his argument fails for two reasons. First, none of the alleged contradictions were brought to the attention of the trial court. Rather, after hearing the reasons, and indeed having been previously forewarned that the prosecutor intended to excuse Hopkins, defense counsel simply submitted the matter. Although appellant does not say so expressly, the logical conclusion of his argument is that trial courts must take on the role of adversary, combing the record to look for any and all possible contradictions which might conflict with or undermine the prosecutor's proffered reasons, and then specifically resolve the conflicts in the evidence. Obviously, this Court has

11. The first and second steps are not at issue in this case. (AOB 55.)

never propounded such a rule, in *Batson* or in any other context, and to do so would be entirely improper. Once a defendant has been appointed competent counsel, it is incumbent upon counsel to bring facts and legal arguments to the attention of the trial court. Any other approach is an unacceptable attempt to “rewrite the duties of trial judges and counsel in our legal system.” (*Estelle v. Williams* (1976) 425 U.S. 501, 512.)

Second, the alleged contradictions identified by appellant are greatly exaggerated. Appellant takes issue with the prosecutor’s characterization of Hopkins’ views on the death penalty. (AOB 62.) The prosecutor, referring to the questionnaire, said that Hopkins had indicated “he would only impose it if he were required to.” (RT 2977.) On Hopkins’ questionnaire, on page 23, question #90, when asked to describe his opinions about the death penalty, Hopkins wrote “death penalty should only be applied under certain circumstances, only after fair trail [sic] if I were required to impose it I would.” (CT 2548.) In other words, Hopkins used the qualifying word “only” twice in his response, saying that the death penalty should *only* be applied under certain circumstances, and *only* after a fair trial. He then said “if I were required to impose it I would.” It is admittedly true that the prosecutor’s paraphrasing of his answer inserted the qualifier “only” into this portion of Hopkins’ response, when in fact it appeared in two earlier parts of his response to the same question. (See AOB 63.) However, this was not a material misrepresentation; indeed, it was not a misrepresentation at all.

Setting aside the fact that the prosecutor’s paraphrasing of Hopkins’ answer may have been nothing more than an innocent misrecollection or misreading of the questionnaire, the fact is that viewed in context, it was in no way unreasonable to interpret Hopkins’ answer in precisely the manner the prosecutor did. Hopkins stated initially that the death penalty should only be applied in certain circumstances. He then proceeded to list what those

circumstances were, and he only identified two. The first was “only after a fair [trial].” The second was “if I were required to impose it I would.” Since the prosecutor could fairly presume that the defendant would get a fair trial, that really only left the one other circumstance identified by Hopkins. And since Hopkins had already said the death penalty should *only* be applied in certain circumstances, it was fair to interpret the response as a whole as indicating that he would *only* impose it if he were required to.

Moreover, even reading the clause in question in isolation leads to the same interpretation. If a person is asked about the death penalty, and their response is “if I were required to impose it I would,” it tends to suggest that that is the only circumstance in which they would impose it. True enough, the statement in and of itself does not expressly preclude the possibility that there might be other circumstances in which the person would impose the death penalty. But the very nature of the response is such that it tends to connote exactly such a limitation. If one is open to a wide number of possible circumstances in which they might impose the death penalty, they would not typically respond with a very narrow and categorical circumstance in which they would impose it. They might say, “I would impose it *for example*, in a case where I was required to do so.” Such phrasing indicates that the specific circumstance identified is not the entire universe of circumstances they have in mind. But the phrasing used by Hopkins was quite suggestive of a very limited universe, i.e. those cases where he was required to impose death. In light of the language used on the questionnaire, the prosecutor cannot be said to have ascribed a false belief to Hopkins.

Appellant quotes the entire individual voir dire of Hopkins in an effort to suggest that his views were not as the prosecutor had represented. (See AOB 63-65.) However, the individual voir dire only demonstrates that Hopkins was not subject to removal for cause. It in no way diminishes the propriety of the

prosecutor relying on an answer in the questionnaire as a basis for exercising a peremptory challenge. Indeed, while lawyers may debate the tactical wisdom, it is not per se unreasonable for an attorney to place significant weight on the juror's initial, "knee jerk" answer on the questionnaire, and less reliance on an answer made after the court has instructed on the applicable law. Peremptory challenges can properly be exercised on people who may have an initial, built in bias. This same reasoning explains why it was proper for the prosecutor to explain that he "didn't feel that he would have the strength to [impose the death penalty.]" (RT 2978.) Having stated the he could impose it if he was required certainly could rationally cause the prosecutor to doubt Hopkins' fortitude on this issue.

Moreover, the prosecutor's statement that he excused other jurors who had put their reservations in similar terms was also correct. Although appellant argues that none of the other 13 peremptorily challenged individuals put it in those terms (see AOB 67-68), he overlooks the fact that several jurors were excused *for cause* on the prosecutor's motion, based on similarly narrow views of the death penalty. (See RT 2391-2396 [Prospective Jurors Sarkis and Stamper].) Thus, the prosecutor's representation to the court was supported by the record.

Finally, although appellant identifies in his brief six separate reasons proffered by the prosecutor to justify the challenge of Hopkins (see AOB 58), he only attacks the trial court for failing to find contradictions as to the first two. While those "contradictions" have been addressed above, even if this Court were to agree with appellant's hyperbole as to the extent of the contradictions, there remain four other valid and concededly race neutral reasons for exercising the challenge. (See AOB 58-59.) It must be remembered that in *Batson*, the Supreme Court only invalidated strikes based "solely" on race. (479 U.S. at p. 88.) At best, appellant can show that the prosecutor's challenge was based on

four valid, race-neutral reasons and two other race-neutral reasons that are arguably contradicted by the record. Accordingly, the challenge was not based “solely” on race, and the trial court’s denial of the motion was proper.

2. Appellant’s Comparative Juror Analysis Should Not Be Entertained

Seeking to undermine the other race-neutral reasons offered by the prosecutor, appellant engages in comparative juror analysis to show that Hopkins was excused based solely on race. (AOB 73.) The comparative juror analysis should not be engaged in on appeal since it was not utilized in the trial court. Moreover, the comparisons are invalid.

This Court has recently explained that using comparative analysis for the first time on appeal is unreliable. (*People v. Johnson* (2003) 30 Cal. 4th 1302, 1318.) Appellant offers nothing to this Court to undermine the logic and rationale of this Court’s opinion in *Johnson*. Instead, he argues that *Johnson* should be overruled because subsequent Supreme Court decisions have “swept away” the “analytic underpinnings” of this Court’s conclusion. (Supp. AOB 12.) He is mistaken.

In *Miller-El v. Dretke* (2005) 545 U.S. ___, 125 S.Ct 2317, the United States Supreme Court granted habeas corpus relief on a *Batson* claim. In the majority opinion, the high Court did indeed base its decision, at least in part, on a comparison of Black jurors who were challenged with white jurors who remained on the jury panel. (*Id.* at p. 2325.) However, contrary to appellant’s argument, *Miller-El* does not stand for the general proposition that appellate courts must engage in comparative juror analysis regardless of whether it occurred at trial. (See Supp. AOB 8-12.) In *Miller-El*, the high Court was reviewing a federal habeas corpus case. As such, it was concerned with the evidence developed in the federal district court, where such matters are heard. And it was in district court that the evidence regarding comparative juror

analysis was developed. (*Id.* at p. 2335, fn. 15.) While appellant is correct that the same evidence was not presented to the trial court, he makes an unwarranted leap of logic by concluding that the decision means comparative analysis is required when it was not utilized at trial.

Appellant misunderstands habeas corpus procedure. In a federal habeas corpus proceeding, petitioners are required to first present their claims, and the factual support for those claims, to the state courts. (28 U.S.C. § 2254, subds. (d) and (e).) As a reviewing court, of course, the Supreme Court in *Miller-El* was limited to the record from the courts below, in this case, the district court. So the decision in *Miller-El* was based on evidence that had already been developed prior to the appellate court (either the Fifth Circuit or the United States Supreme Court) deciding the issue. Thus, the case was *not* an example of an appellate court engaging in comparative analysis for the first time on appeal. In fact, the opinion said nothing about the propriety of engaging in such analysis for the first time on appeal.

Indeed, there is some question about whether the factual development which occurred in the district court was proper under the governing habeas corpus statutes. As appellant points out in his supplemental brief, there was strong disagreement between the majority and the dissent about the propriety of looking at material that had never been presented to the district court. (See Supp. AOB 4.) The majority, however did not need to decide the matter because neither party had objected to its inclusion as part of the habeas record. (*Miller-El*, 125 S.Ct. at pp. 2326, fn. 2, 2335, fn. 15, 2348-49.) Accordingly, *Miller-El* stands merely for the proposition that a federal court, sitting in review of a judgment from a habeas corpus proceeding may properly review evidence presented at the trial court¹² level, so long as there is no objection from the

12. In a very real sense, the federal district court is the “trial court” for federal habeas corpus proceedings, even though the conviction under attack

parties about the propriety of the admission of the evidence. *Miller-El* says nothing about whether state appellate courts, sitting in direct review of a criminal judgment, should consider on appeal evidence for the first time which was not presented or argued to the trial court.

The logic of this Court's decision in *Johnson* regarding the unreliability of comparative juror analysis on appeal holds true today. Had appellant below identified the various similarities between Hopkins and Juror No. 7, as he does in his brief (see AOB 73-77), the prosecutor would have had an opportunity to explain why, in his *subjective* opinion, the two prospective jurors were in fact not similar. Now, however, because appellant failed to make the arguments now presented on appeal, the parties can simply engage in speculation as to why the prosecutor preferred one juror over the other. While appellant quite readily leaps to the conclusion that the only explanation is that the prosecutor was motivated by race, respondent believes an affirmative finding that a member of the bar is a racist should be based on more than post-hoc speculation. At a minimum, the alleged racist should be allowed an opportunity to offer his actual explanations, and the trial court should have an opportunity to judge the alleged racist's credibility. Engaging in comparative juror analysis for the first time on appeal allows for none of these opportunities, and requires appellate courts to make factual determinations (i.e. was the challenge motivated solely by race?) which they are ill equipped to do.

Moreover, although appellant has identified a number of similarities between Juror No. 7 and Hopkins, he has overlooked an equal or greater number of differences, any one of which could have easily motivated this particular prosecutor to exercise a challenge on Hopkins while keeping Juror No. 7. For example, Juror No. 7 had heard about the case, and specifically had heard that an employee was shot (CT 3988), whereas Hopkins knew nothing

may have originated in state court.

about the case. (CT 2528.) Juror No. 7 was 51 years old (CT 3991), had been in the military (CT 3993), had a spouse who was employed (CT 3994), and been married for 26 years (CT 3994) and had raised a child to adulthood. (CT 3995.) In contrast, Hopkins was only 34 years old (CT 2531), had not been in the military (CT 2533), had been married for only 5 years (CT 2534), had an unemployed spouse (CT 2534), and only had an 8 month-old infant. (CT 2535.) Thus, Juror No. 7 and Hopkins were at two different stages in life, with vastly different life experiences.

Furthermore, prospective juror Hopkins identified himself as religious (CT 2538), whereas Juror No. 7 did not (CT 3998). It would not be unreasonable for a prosecutor to use that as a basis for distinguishing between two jurors, especially in a death penalty case. In addition, Juror No. 7 had a daughter who had worked at a fast food restaurant (CT 3992), which could make him more sympathetic to the victim in this case. Hopkins had no one in his family with fast food experience. (CT 2532.) Juror No. 7 had a close friend who was a victim of crime (CT 3999), whereas Hopkins did not know anyone who had ever been victimized. (CT 2539.) These facts also may have led the prosecutor to believe that Juror No. 7 would be a more favorable juror and therefore worth keeping.

Juror No. 7 was a supervisor, with the power to hire and fire people (CT 3992), whereas Hopkins did not have that authority or experience. (CT 2532.) It is entirely possible that the prosecutor was looking for someone who had experience making significant decisions about other people's lives.

Whereas Juror No. 7 had never personally witnessed a crime (CT 3999), Hopkins had witnessed a bank robbery and was interviewed by the police. (CT 2539.) The prosecutor may have felt that Hopkins would draw adverse inferences about police interviewing techniques based on his prior experience. Finally, Hopkins indicated he had previously gone to court to contest a traffic

ticket (CT 2540), which the prosecutor could have viewed as indicative of a person who is more likely to “buck the system.”

Any one of these differences could rationally have accounted for the prosecutor’s decision to challenge Hopkins. Litigants may exercise peremptory challenges based on any number of preconceived notions and biases. For example, courts in this state have recognized that prosecutors often exercise peremptory challenges against teachers on the belief that they are somewhat liberal. (*People v. Reynoso* (2001) 94 Cal. App. 4th 86, 93.) Similarly, it has been observed that some prosecutors think that “various professional people are unacceptable because they may be too demanding or they look for certainty.” (*People v. Barber* (1988) 200 Cal.App.3d 378, 394.) The problem is we will never know what may have motivated the prosecutor, because appellant, who had the burden of persuasion below, failed to make the argument he is making now. As a result, this Court has no way of determining with any certainty whether the prosecutor’s reasons would have been deemed credible by the factfinder in the best position to assess credibility - the trial court.

This Court has explained the importance of deferring to the trial court on these matters:

As the United States Supreme Court has observed: “Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding ‘largely will turn on evaluation of credibility.’ 476 U.S., at 98, n. 21. In the typical peremptory challenge inquiry, the decisive question will be whether counsel’s race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor’s state of mind based on demeanor and credibility lies ‘peculiarly within a trial judge’s province.’ [Citations.]” (*Hernandez v. New York* (1991) 500 U.S. 352, 365.)

(*People v. Jones* (1997) 15 Cal. 4th 119, 162.) Accordingly, even if this Court were to engage in comparative juror analysis, there is simply no basis upon

which to conclude that appellant has carried his heavy burden of demonstrating purposeful discrimination. (See *Purkett v. Elem, supra*, 514 U.S. at p. 767.)

II.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR SEVERANCE

A. Overview

Appellant contends the trial court violated his rights under state law and his federal due process rights when it denied his motion to sever the charges arising out of the Florin Road murder and robbery (counts 18 through 24) from the charges arising out of the Watt Avenue robbery (counts 1 through 17). More specifically, appellant claims that the trial court erred by allowing the allegedly weaker Florin Road charges to be tried with the relatively stronger Watt Avenue charges. (AOB 80-102.) Appellant is incorrect.

B. Analysis

“Because consolidation ordinarily promotes efficiency, the law prefers it.” (*People v. Ochoa* (1998) 19 Cal.4th 353, 409; *People v. Manriquez* (2005) 37 Cal.4th 547.) Consolidation obviates the need to select an additional jury, avoids the waste of public funds, conserves judicial resources, and benefits the public due to the reduced delay in the disposition of criminal charges. (*People v. Mason* (1991) 52 Cal.3d 909, 935; *People v. Bean* (1988) 46 Cal.3d 919, 935-936, 939-940.)

Under Penal Code section 954, “two or more different offenses of the same class of crimes or offenses” can be tried together “provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately. . . .” (Pen. Code § 954; see *People v. Bradford* (1997) 15 Cal.4th 1229, 1315.) Here, the offenses involved murder, robbery, kidnapping to commit robbery, assault with a deadly weapon, false imprisonment, and felon in possession of a firearm. (CT 467-481.) Since these

offenses were unquestionably of the same class of crimes and the court had the discretion to sever the counts, the statutory requirements for joinder were satisfied. (*Ibid.*)

The next question is whether severance was required. In *Bradford*, this Court described in detail the applicable standard of proof, burden of proof, and relevant criteria for severance issues:

“The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.’ [Citation.] [¶] ‘The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial.’ [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a ‘weak’ case has been joined with a ‘strong’ case, or with another ‘weak’ case, so that the ‘spillover’ effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]” [Citations.]

(*People v. Bradford, supra*, 15 Cal.4th at p. 1315.)

This Court has also observed that the aforementioned criteria “are not equally significant.” (*People v. Bradford, supra*, 15 Cal.4th at p. 1315.) “[T]he first step in assessing whether a combined trial [would have been] prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others. If so, any inference of prejudice is dispelled. [Citations.]” (*Id.* at pp. 1315-1316.) However, while cross-admissibility negates prejudice, “it is not essential for that purpose.” (*Id.* at p. 1316.) Specifically, this Court

“ha[s] never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice. [Citation.]” (*Ibid.*) Furthermore,

[a]s the four-part test is stated in the conjunctive, joinder may be appropriate even though the evidence is not cross-admissible and only one of the charges would be capital absent joinder. [Citation.] Even where the People present capital charges, joinder is proper so long as evidence of each charge is so strong that consolidation is unlikely to affect the verdict. [Citations.]

(*People v. Manriquez, supra*, 37 Cal.4th 547.)

Evidence Code section 1101, subdivision (b) provides that evidence of a prior crime or bad act is admissible if relevant to prove a fact in issue other than character, such as motive, identity, opportunity, intent, plan or knowledge. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1240.) In *People v. Thompson* (1980) 27 Cal.3d 303, this Court held “[a]s with other types of circumstantial evidence, . . . admissibility [of other crimes evidence] depends upon three factors: (1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence.” (*Id.* at p. 315; see *People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *People v. Rowland* (1992) 4 Cal.4th 238, 261; *People v. Robbins* (1988) 45 Cal.3d 867, 879.)

1. The Evidence Was Cross-Admissible

As noted above, evidence of other crimes is admissible if relevant to prove various facts in issue other than character, such as motive, identity, opportunity, intent, plan, or knowledge. (Evid. Code § 1101, subd. (b); *People v. Gordon, supra*, 50 Cal.3d at p. 1240.) According to this Court, the greatest degree of similarity between the uncharged act and the charged offense is

necessary in order for evidence of uncharged misconduct to be relevant to prove identity. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) As explained by this Court:

Other-crimes evidence is admissible to prove the defendant's identity as the perpetrator of another alleged offense on the basis of similarity when the marks common to the charged and uncharged offenses, considered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses. [Citations.] *The inference of identity, moreover, need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together.*

(*People v. Miller* (1990) 50 Cal.3d 954, 987, emphasis added; *People v. Ewoldt, supra*, 7 Cal.4th at p. 403.)

Here, there are sufficient common marks between the Watt Avenue robbery and the Florin Road murder and robbery to suggest that the crimes were committed by the same individuals: (1) Appellant had worked at each McDonald's restaurant; (2) Appellant had knowledge of the layout and operation of each restaurant; (3) Two weeks before the first robbery, appellant asked Charles Ruby, a manager at the Watt Avenue McDonalds, about the restaurant's procedures for robberies; (4) Proby was involved in each robbery; (5) Appellant and Proby were close friends; (6) Appellant and Proby were seen together the night of the Florin Road murder and robbery; (7) Both robberies occurred around closing time; (8) The manager of each restaurant was ordered at gunpoint to open the safe; (9) The employees at each location were held at gunpoint; (10) One of the robbers spoke in an unnatural sounding, disguised voice; (11) The robbers wore masks and bulky clothes; (12) Appellant made statements to witnesses acknowledging his involvement in both robberies; and (13) Items taken from both robberies were recovered from Penilton's home.

When considered together, these marks “yield a distinctive combination” that helped prove the issue of identity.

Furthermore, many of the aforementioned marks also helped establish appellant’s intent to commit the crimes. Evidence of intent requires “[t]he least degree of similarity (between the uncharged act and the charged offense). . . .” (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) “In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant “probably harbor[ed] the same intent in each instance.” [Citations.]’ [Citation.]” (*Ibid.*)

In this matter, evidence of the Watt Avenue robbery (i.e., appellant’s conversation with Ruby regarding the robbery procedures) would have been admissible in a separate trial to prove that appellant “probably harbored the same intent” during the Florin Road murder and robbery. Additionally, the fact that appellant locked the Watt Avenue employees in the freezer (presumably for the rest of the night) would have been admissible to show his intent regarding the murder of Lee at Florin Road. (See *People v. Gray* (2005) 37 Cal.4th 168, 204.) Thus, for the reasons stated above, the evidence of the Watt Avenue robbery and the Florin Road murder and robbery was cross-admissible.

2. Even If Evidence Was Not Cross-Admissible, The Court’s Ruling Was Within Its Discretion

Given that the evidence was cross-admissible, this Court may end its inquiry at this point. (See *People v. Bradford, supra*, 15 Cal.4th at p. 1317.) However, even if the evidence was not cross-admissible, denial of the severance motion was not an abuse of discretion. As discussed above, this Court has repeatedly made clear “that cross-admissibility is not the sine qua non of joint trials. [Citations.] Whether charged counts are cross-admissible in separate trials is only one of the factors to be considered in determining whether potential prejudice requires severance” (*Frank v. Superior Court* (1989)

48 Cal.3d 632, 640; see *People v. Arias* (1996) 13 Cal.4th 92, 127 [“joinder is often permissible even when cross-admissibility is not present.”].) None of the remaining three factors favor severance.

a. None Of The Charges Were Unusually Likely To Inflamm The Jury Against Appellant

The conduct at issue in both incidents was very similar in nature. Both robberies involved violent behavior that could have led to tragic results. For instance, the employees at both restaurants, including the managers, had guns pointed at their heads. At the Florin Road location, which did not have a basement, the employees were forced to lay down on the ground in the kitchen area. At the Watt Avenue location, the employees were ordered down into the basement and then forced to enter the walk-in freezer. The door to the freezer was then shut and locked, with the employees presumably locked inside for the night. This conduct, which easily could have led to multiple deaths, was no more or no less inflammatory then the shooting of Ronald Lee in the back of the head at the Florin Road restaurant. Thus, because none of the charges were unusually likely to inflame the jury against appellant, this factor weighed against severance.

b. The Relative Strength Of The Cases Was Comparable

Contrary to appellant’s assertion, this was not a case where the evidence of appellant’s guilt on the Florin Road offenses was weak, while the evidence of his guilt on the Watt Avenue charges was substantially much stronger. Regarding the Florin Road counts, the evidence revealed that, on the night of the murder and robbery, appellant and Proby showed up together at Penilton’s house sometime after 11:30 p.m. Penilton was in her bedroom, and Proby and appellant asked her to leave so that they could talk. (RT 149-150.) Penilton wanted to hear what they were saying, so she walked down the hallway to

eavesdrop. She overheard appellant say “I think I killed somebody tonight.” (RT 150.) Additionally, gift certificates and a metal box from the Florin Road McDonalds were subsequently recovered from Penilton’s home. (RT 377-378.) Taken together, all of this was very compelling evidence of appellant’s guilt regarding the Florin Road charges.

As for the Watt Avenue charges, the evidence of appellant’s guilt was similar. Again, there was a witness, Sonya Williams, who heard appellant admit to committing the crimes. (RT 144-145.) Additionally, unlike the Florin Road crimes, some of the employees who were present during the Watt Avenue robbery identified appellant as the robber. (RT 43-44, 135, 139.) However, as this Court has previously held, this distinction in the type of evidence available does not establish that the Watt Avenue case was any stronger than the Florin Road case:

That the evidence against defendant on some of the counts consisted of eyewitness statements and on other counts was circumstantial does not establish improper consolidation of charges. *Direct evidence is neither inherently stronger nor inherently weaker than circumstantial evidence.*

(*People v. Mendoza* (2000) 24 Cal.4th 130, 162, emphasis added.) Accordingly, the evidence was so strong in both matters that denial of the severance motion did not affect any of the verdicts.

c. The Death Penalty Was Not The Result Of Joinder

The death penalty was the result of the charges arising out of the Florin Road murder and robbery and was not the result of joinder. In other words, this did not become a capital case by virtue of joining the Watt Avenue charges with the Florin Road charges. (See *People v. Mendoza, supra*, 24 Cal.4th at p. 162; *People v. Sandoval* (1992) 4 Cal.4th 155, 173.)

Considering the factors set forth above, including the cross-admissibility of the evidence, the overwhelming evidence of appellant’s guilt on all charges,

the relative strength of the charges, and the preference for joinder, appellant has failed to establish that the trial court abused its discretion in denying his severance motion.

C. Even If The Trial Court Erred, The Error Was Harmless

Even if the charges were improperly joined, it is not reasonably probable that the jury would have reached a more favorable verdict for appellant on the Florin Road counts in the absence of the alleged error. (See *People v. Lucky* (1988) 45 Cal.3d 259, 278; *People v. Watson* (1956) 46 Cal.2d 818, 836.) As set forth above, the evidence against appellant for those charges was strong. On the night of the Florin Road murder and robbery, appellant and Proby were together at Penilton's house sometime after 11:30 p.m. (RT 149-150.) While there, Penilton overheard appellant say "I think I killed someone tonight." (RT 150.) Additionally, gift certificates and a metal box from the Florin Road McDonalds were subsequently recovered from Penilton's home. (RT 377-378.) In light of the strength of this evidence, appellant has failed to establish prejudice. Accordingly, appellant's claims must be rejected.

D. Appellant Was Not Denied Due Process

Appellant also asserts that the trial court's denial of his severance motion violated his due process rights and resulted in an unfair trial. (AOB 95-101.) Again, appellant is incorrect.

The legal standard for a due process claim in this context is as follows:

Even if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the "defendant shows that joinder actually resulted in 'gross unfairness' amounting to a denial of due process.

(*People v. Mendoza, supra*, 24 Cal.4th at p. 162, quoting *People v. Arias, supra*, 13 Cal.4th at p. 127.)

However, as discussed above, appellant did not suffer any prejudice as a result of joining the Florin Road claims with the Watt Avenue claims. Accordingly, denial of the severance motion could not have been “grossly unfair.” (See *People v. Valdez* (2004) 32 Cal.4th 73, 120-121.)

III.

THE TRIAL COURT'S RULING WAS PROPER REGARDING THE ADMISSIBILITY OF PROBY'S STATEMENTS ABOUT THE FLORIN ROAD MURDER AND ROBBERY

Appellant contends that he was impermissibly forced to choose between two constitutional rights: his right to present a defense (third party culpability) and his right to confront and cross-examine a witness against him. (AOB 103-155.) At the core of appellant's argument is the trial court's ruling regarding the admissibility of statements made by co-defendant William Proby concerning the Florin Road murder and robbery. However, because the trial court's ruling was proper under Evidence Code section 356, appellant's claim is without merit.

A. No Error Occurred Under Evidence Code Section 356

Evidence Code section 356 provides that “[w]here part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . . when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.” (Evid. Code § 356, emphasis added.) The purpose of section 356 “is to prevent the use of selected aspects of a conversation, act, declaration, or writing so as to create a misleading impression on the subjects addressed.” (*People v. Arias* (1996) 13 Cal.4th 92, 156, emphasis added.) “By its terms, section 356 allows further inquiry into otherwise inadmissible matter only, (1) where it relates to the same subject, and (2) it is necessary to make the already introduced conversation understood.” (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192; see *People v. Pride* (1992) 3 Cal.4th 195, 235 [the requirement that the whole of the same subject be

admitted is “to place the original excerpts in context”].) Furthermore, the “subject matter” of the statements at issue is construed broadly:

In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. “In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence. . . .” [Citations.]

(People v. Zapien (1993) 4 Cal.4th 929, 959, quoting People v. Hamilton (1989) 48 Cal.3d 1142, 1174, emphasis added.)

Here, appellant wanted to introduce a portion of Proby’s confession to the police which inculpated a third party, “Blackie,” regarding the Florin Road murder and robbery. (CT 764-765; RT 2102-2111.) In particular, Proby told the police that “Blackie” brought a sawed-off rifle to the robbery and that he drove the getaway car. (CT 764-765.) However, in his confession, Proby also incriminated appellant by indicating that appellant went into the McDonalds with him and that appellant was the person who shot and killed Lee. (RT 2105, 2109, 2681-2684.)

Appellant’s contention that these two statements made by Proby are not part of the same subject matter defies logic. Both statements were part of Proby’s description of what happened during the Florin Road murder and robbery. The statements described who was involved in robbing the restaurant, as well as what each person’s role was that night, and they clearly had “*some bearing upon, or connection with*” each other. (*People v. Zapien, supra*, 4 Cal.4th at p. 959.) In fact, the introduction of one statement without the other would have certainly “*create[d] a misleading impression*” for the jury regarding Proby’s statement of who was involved in the murder and robbery. Thus, the trial court’s ruling regarding the admissibility of these statements was correct, and appellant’s claim should be rejected.

B. No Constitutional Error Occurred

Perhaps realizing that the trial court's ruling under Evidence Code section 356 was unassailable, appellant attempts to cast his claim as a violation of constitutional rights. However, appellant's claim that he was impermissibly forced to choose between two constitutional rights is equally unavailing.

As this Court has previously recognized, defendants are sometimes faced with the hard choice of having to choose between the protections and benefits of one constitutional right at the expense of sacrificing the protections and benefits of another such right. (*People v. Frye* (1998) 18 Cal.4th 894, 940 [concerning the trade-off that exists between the right to a speedy trial and the right to be represented by competent, adequately prepared counsel].) "For example, a criminal defendant has a right to remain silent and a right to testify on his own behalf. He cannot do both, and *hard choices are not unconstitutional.*" (*Ibid.*, emphasis added.)

Here, appellant asserts that the trial court impermissibly forced him to choose between his right to present a defense (third party culpability) and his right to confront and cross-examine an adverse witness (Proby).^{13/} (AOB 103-155.) However, as noted above, the trial court's Evidence Code section 356 ruling regarding Proby's confession was at the core of appellant's argument. In other words, appellant's alleged constitutional error argument is really just an attempted "end run" around the court's proper evidentiary ruling.

Furthermore, as discussed above, a ruling which would have allowed appellant to introduce Proby's statements about Blackie but precluded the prosecution from introducing Proby's statements about appellant would have impermissibly created a misleading impression for the jury. (*People v. Arias, supra*, 13 Cal.4th at p. 156.) The jury would have heard only half of Proby's

13. Proby invoked his rights under the Fifth Amendment and was, thus, unavailable to testify at appellant's trial. (RT 2089-2094.)

story regarding the Florin Road murder and robbery (Blackie's alleged involvement), and the other half of the story (appellant's involvement) would have gone untold. In other words, a critical portion of the whole story would have been omitted. Certainly, there is no right, constitutional or otherwise, that would permit a defendant to tell such a misleading half-truth. (*People v. Arias, supra*, 13 Cal.4th at p. 156; see *Nix v. Whiteside* (1986) 475 U.S. 157, 173 ["[T]here is no right whatever – constitutional or otherwise – for a defendant to use false evidence."]; *United States v. Nobles* (1975) 422 U.S. 225, 241 ["The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth."].) Thus, appellant's claim should be rejected.

C. Any Error Was Harmless

Assuming, arguendo, that error occurred, it was harmless because appellant has not established that he suffered any resulting prejudice. Regardless of the applicable standard, there was more than sufficient evidence for the jury to conclude that appellant committed the murder and the robbery at the Florin Road McDonalds. For instance, on the day of robbery, appellant and Proby were together both before and after the crimes occurred. (RT 3553-3555, 3760-3763, 3771.) The manager, Jeffrey Hickey, described the second robber as a black man who was approximately six feet two inches tall, 185 to 200 pounds, and 20 to 25 years old. (RT 3871-3872.) He further indicated that the second robber's physical features were consistent with appellant. (RT 3873, 3899.) Most importantly, appellant told Vera Penilton that he robbed the McDonalds and that he shot and killed Lee "because the boy had said his name," and appellant was concerned that Lee "would tell on him" if he did not shoot him. (RT 3557, 3561-3564, 3566-3567, 3584, 3666.) Accordingly, appellant's claim should be rejected on this basis as well.

IV.

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INTRODUCE INTO EVIDENCE JEROME WILLIAMS' HEARSAY STATEMENT

During the preliminary hearing, Homicide Detective Richard Overton of the Sacramento Police Department testified as a witness for the prosecution. (RT 372-419.) As part of his testimony, Overton described his interview with Jerome Williams, one of the employees who was present during the Florin Road murder and robbery. On cross-examination, the following exchange occurred between Overton and defense counsel:

Q: And what was the description that Jerome Williams gave you of the suspect that he saw that night with the handgun?

A: A male black in his late 20's to early 30's, approximately five foot seven, 140 to 160 pounds wearing a dark green homemade mask with one large eye hole cut out. The mask was possibly made of a sweater and was tied around the back of his head. [¶] He was a dark complected male, black male, was wearing a dark colored short-sleeved shirt and dark grey or brown colored cloth gloves and was armed with a small silver semiautomatic handgun, possibly a .22 caliber.

(RT 400.) When asked about Williams' demeanor during the interview, Overton responded, "Upset, frightened, sad, concerned." (RT 416-417.) Appellant now claims that his trial counsel was ineffective for not introducing the aforementioned statements into evidence. (AOB 156-167.) Appellant's claim lacks merit.

The rules governing ineffective assistance of counsel claims are well settled. In order for appellant to establish that his trial counsel's assistance was ineffective, he must show (1) that his counsel's performance was deficient, and (2) that he has suffered prejudice as a result of his counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-692; *People v. Pope* (1979) 23 Cal.3d 412, 423-425.) The burden of proving both

incompetent performance by counsel and resulting prejudice in this matter falls squarely upon appellant. (*Id.*)

To meet the burden of showing incompetent performance, appellant must demonstrate that his “counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms.” (*People v. Kelly* (1992) 1 Cal.4th 495, 519-520; accord *Strickland v. Washington, supra*, 466 U.S. at p. 688.) To meet the burden of showing prejudice, appellant must show a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citations.]” (*In re Harris* (1993) 5 Cal.4th 813, 833, internal quotations omitted.)

Furthermore, “[r]eviewing courts defer to counsel’s reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437, internal quotations omitted.) Consequently, the California Supreme Court has noted that the aforementioned burden is “difficult to carry on direct appeal,” and a conviction will be reversed on direct appeal “only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.” (*Id.* at p. 437, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 980.) Moreover, the Supreme Court has “repeatedly stressed that *[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] ... unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim on appeal must be rejected.* [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.” (*People v. Mendoza*

Tello (1997) 15 Cal.4th 264, 266-267, internal quotation omitted, emphasis added.)

In this matter, appellant has not met his burden of establishing that defense counsel's performance was deficient. The statement that appellant asserts should have been introduced at trial was inadmissible hearsay. Specifically, Williams' alleged out of court statement regarding the height and weight of the robber was made to Overton, who then relayed the substance of that statement during the preliminary hearing. In an effort to overcome this evidentiary barrier, appellant claims that Williams' statement was admissible as a spontaneous statement within the meaning of Evidence Code section 1240, which provides:

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

In support of his argument, appellant relies on *People v. Brown* (2003) 31 Cal.4th 518. In *Brown*, the relevant factual scenario was as follows:

At the time of the crime, Julie Bender was married to Perry Bender. She testified that one night she saw defendant in a red pickup truck. Around midnight that same night, Mark Bender, her brother-in-law, came into her house. Mark was upset and started crying. He shook his head back and forth, and his body was shaking. He then said: "I know he shot her. I know she is hurt bad." When asked to whom he was referring, Mark replied, "Bam." "Bam" is defendant's nickname.

(*People v. Brown, supra*, 31 Cal.4th at p. 540.) This Court determined that the trial court's finding that the above evidence was admissible under the spontaneous utterance exception to the hearsay rule was supported by substantial evidence. (*Id.* at p. 541.)

Moreover, there is no persuasive evidence that Williams was still under the emotional influence of the crime at the time he gave his statement. In *Brown*, this Court relied upon the fact that the declarant "could not stop his

body from shaking nor stem the flow of tears” to support its decision. (*Id.* at p. 541.) In this case, although Overton testified that Williams appeared “upset, frightened, sad, and concerned” there is nothing to suggest that his emotions held such control on him as to prevent deliberation. (See, e.g., *People v. Farmer* (1989) 47 Cal. 3d 888, 903 [“spontaneous” means without deliberation or reflection].) Since the statement was made a substantial period of time after the events in question, at a police station, in response to detailed questioning, the inference that Williams lacked the capacity to deliberate and reflect on the events is unsupported. Furthermore, the level of detail in his statement suggests a person who is quite able to synthesize details of the event. The statement does not appear to be a mere stream of consciousness recitation of the crime. Rather, it was a detailed response to a question by the officer full of descriptive information. As such, it would not appear to be a statement made “spontaneously.”

Furthermore, appellant has also failed to show any prejudice. The jury had already heard evidence from the other eyewitnesses about the second robber. Singh had testified that the man was 5'8". (RT 4102-4103, 4141.) Hickey could only say that the features of the second robber were consistent with appellant, but did not identify appellant as the perpetrator. (RT 3873, 3898-3899, 3916, 3939-3940.) Given this testimony from the live eyewitnesses, introducing the hearsay statement of Williams would have been cumulative and significantly less persuasive than the evidence already before the jury. Accordingly, appellant’s claim must be rejected.

V.

THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY THAT THE TESTIMONY OF A WITNESS TESTIFYING UNDER A GRANT OF IMMUNITY SHOULD BE VIEWED WITH DISTRUST

Appellant next argues that the trial court was required to instruct the jury that Vera Penilton's testimony should be viewed with distrust because she testified under a grant of use immunity. (AOB 168.) In fact, the trial court was under no such obligation.

A. Procedural History

On August 6, 1997 the prosecutor sought and obtained an order granting Vera Penilton use immunity under Penal Code section 1324. (CT 614, 616-617.) During trial, the jury was informed that Penilton was testifying under a grant of immunity. (RT 3514-3515.) Appellant offered an instruction to the effect that jurors be instructed to view the testimony of immunized witnesses with distrust. (CT 825.) The trial court denied that request, but did instruct the jury as part of CALJIC No. 2.20 that the jury could consider "anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness," including "[w]hether the witness is testifying under a grant of immunity." (CT 647-648.)

B. Applicable Law

In *People v. Hunter* (1989) 49 Cal.3d 957, 976-978, this Court addressed an identical claim as that raised by appellant, and found it to lack merit. In *Hunter*, the defendant requested the trial court instruct the jury that the testimony of immunized witnesses be viewed with "suspicion" and "greater care and caution." (*Id.* at p. 977.) Instead, the trial court gave a modified version of the instruction directing jurors to determine whether a witness' testimony was affected by the immunity agreement, and also gave CALJIC No.

2.20, directing the jurors weigh the existence of bias or other motive in evaluating witness credibility. (*Ibid.*)

This Court rejected the defendant's claim of error by citing Evidence Code section 411, which provides that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." This Court observed that in the context of accomplices, corroboration was required by statute. (Pen. Code § 1111.) However, absent such a statutory requirement, this Court found that the general rule of Evidence Code section 411 applied. Citing and quoting this Court's earlier decision in *People v. Alcala* (1984) 36 Cal.3d 604, 623-624, this Court observed that "an interested witness' entitlement to full credit under section 411 is a matter for the trier of fact." (*People v. Hunter, supra*, 49 Cal.3d at p. 977, internal quotes and brackets omitted.)

In *Alcala*, this Court was quite clear that absent a few well delineated exceptions,¹⁴ the general rule applies, and the credibility of witnesses is a question left to the jury. (36 Cal.3d at pp. 623-624.) This Court rejected the argument that jailhouse informants should be subject to the same sort of "cautionary" instruction as accomplices, noting that unlike accomplices who have a compelling motive to lie and shift the blame away from themselves, jailhouse informants have no such motive. (*Id.* at p. 624.)

In reliance upon the decision in *Alcala*, this Court in *Hunter* likewise rejected the argument that immunized witnesses are analogous to accomplices:

No California authority supports defendant's contention that an immunized witness, unlike an informant, is so analogous to an accomplice that a trial court must, upon request, give cautionary instructions as to the trustworthiness of immunized witness testimony.

14. At the time *Alcala* was decided, Penal Code sections 1103, 1103a, and 1110 were still extant, and had various requirements for more than one witness in various contexts. Those sections have since been repealed.

(*People v. Hunter, supra*, 49 Cal. 3d at p. 977.) This Court also observed that in *People v. Leach* (1985) 41 Cal. 3d 92, 106, this Court held that a trial court was not required, sua sponte, to give cautionary instructions of the type reserved for accomplices to witnesses testifying under grants of immunity. However, this Court accurately recognized that the decision in *Leach* did not address a court's duty to give such instructions upon request. (*People v. Hunter, supra*, 49 Cal. 3d at p. 977.)

This Court in *Hunter* also rejected the defendant's reliance on federal authority, noting that the type of immunity available in the federal system was limited to use immunity, whereas in California it was limited to transactional. (*Id.* at p. 978.) This Court concluded by holding

The general instruction on witness credibility, coupled with the modified instruction specifically directing the jury to determine whether the immunized witness's credibility had been affected by the grant of immunity, adequately informed the jury of the necessity to weigh the motives of the immunized witnesses.

(*Ibid.*)

C. Discussion

This Court's decision in *Hunter* would seem to be the end of the matter, as it resolved the question squarely against appellant. However, seizing upon this Court's rejection of the argument based upon the federal authorities in *Hunter*, appellant argues that because California's immunity statute (Penal Code section 1324) was amended in 1996 to permit either transactional or use immunity, the rationale of this Court's decision in *Hunter* has evaporated. (AOB 170.) Accordingly, he argues, the federal authorities should now be persuasive. (AOB 171-173.)

While this Court has not addressed the issue resolved in *Hunter* after the 1996 amendment to Penal Code section 1324, at least one lower court has. In *People v. Hampton* (1999) 73 Cal.App.4th 710, 721-724, the court addressed

the identical argument appellant now raises in this Court. The defendant in *Hampton* had requested an accomplice-like instruction as to an immunized witness, i.e. that her testimony should be viewed with distrust. (*Id.* at p. 721.) The court rejected the argument, concluding that “[n]o statute requires that nonaccomplice testimony of an immunized witness be viewed with distrust” and observing that the general rule, as determined by the Legislature, is embodied in Evidence Code section 411. (*Id.* at p. 722.)

The court in *Hampton* went on to address the significance of the change to Penal Code section 1324. The court first observed that “[t]here is no requirement that California courts follow the federal court practice, absent any authority that the federal practice is compelled by federal constitutional law.” (*Id.* at p. 723.) This point still holds true today. The court then noted that the different types of immunity in the state and federal systems was only *one* of the bases upon which this Court’s decision in *Hunter* was grounded. The court in *Hampton* then immediately noted that this Court relied upon Evidence Code section 411, and quoted verbatim this Court’s holding that

The general instruction on witness credibility, coupled with the modified instruction specifically directing the jury to determine whether the immunized witness’s credibility had been affected by the grant of immunity, adequately informed the jury of the necessity to weigh the motives of the immunized witnesses.

(*Id.* at p. 723, quoting *People v. Hunter, supra*, 49 Cal.3d at p. 978.)

Thus, the Court in *Hampton* determined that 1) federal authorities were not binding; 2) the statutory scheme did not permit the type of instruction the defendant requested; and 3) this Court’s holding in *Hunter* was that the instructions given were adequate. Appellant fails to discuss or even cite *Hampton* in his brief. The reasoning of *Hampton* is quite persuasive. While it is true that California now permits prosecutors to grant use immunity as well as transactional immunity, that fact alone does not alter the applicable rules. The Legislature did not amend Evidence Code section 411, which still states the

general rule. And no argument is made as to why this Court's conclusion in *Hunter* (i.e. that a general instruction that immunity is something that can be considered in assessing credibility) has any less force today than it did in 1989.

Appellant argues at length that immunized witnesses generally, and Penilton specifically, had such great motives to lie that they should be deemed the equivalent of accomplices. (AOB 171-173.) But this Court already expressly rejected that proposition in *Hunter*. (49 Cal.3d at p. 977.) In this case, while Penilton may have had some theoretical liability as an accessory, even appellant acknowledges she was not an accomplice. (AOB 177, fn. 47.) More importantly, however, there was no danger that she would untruthfully shift the blame from herself to appellant. There was no evidence whatsoever that a woman perpetrated any of the crimes. There was nothing to suggest that Penilton's description of her observations was a product of an effort to falsely inculcate appellant.

The trial court in this case gave the type of instruction that this Court held was sufficient in *Hunter*. There was no error. The California Constitution, Article VI, section 13, provides:

No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury. . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

Since this Court has previously held that instructions virtually identical in substance to those given in this case were sufficient, appellant's argument must be rejected. Moreover, the notion that the prosecutor's argument, based on legally proper instructions, was somehow misconduct (see AOB 179, fn 49) is not deserving of comment.^{15/}

15. When an appellant places an argument in a footnote, appellate courts may presume from such casual treatments of arguments that appellant does not place much reliance on the argument. (*In re Keisha T.* (1995) 38 Cal.App.4th 220, 237, fn. 7.) Appellate briefs must contain appropriate

VI.

THE PROSECUTOR DID NOT PRESENT PERJURED TESTIMONY

Appellant claims the prosecutor knowingly presented perjured testimony by allowing Vera Penilton's testimony that Proby had not fathered any of her children to go uncorrected. (AOB 180.) This allegation is based on a gross misrepresentation of the record and borders on irresponsible advocacy.

A. The Facts

In a videotaped interview with police, Sonya Williams gave a statement. Early in that statement, she related a conversation that took place between herself and appellant. Present in the car were appellant, Vera Penilton, and Williams. (CT 4900-4901.) Williams concluded the story with the following:

And then we got to the end, he [appellant] dropped off me and Vera, and then he went to go get Sean from work, cuz Sean worked at McDonald's too. I mean, not Sean, but Deon worked at McDonald's too. So he went to go pick him up and me and, um, - - me and Vera, we was just talking about babies, *cuz she just had a baby by, um, Deon.* And she thinks pregnant again, and we was just talking and stuff.

(CT 4902, emphasis added.) As is clear from the transcript, Williams told Detectives that Penilton had just had a baby by Deon (Proby). However, Williams did not say how she came to believe that Proby had fathered Penilton's child. Williams did not specify whether she had personal knowledge of the fact, whether Penilton had told her, or whether Williams was merely making an inference or guess about the paternity.

At trial, Penilton twice denied that Proby fathered any of her children. (RT 3516, 3684.) Despite the fact that the videotape and transcript of Williams'

headings on each point raised. (*People v. Ladd* (1982) 129 Cal.App.3d 257, 262.) If not, the point is deemed waived. (*Live Oak Publishing Co v. Cohagen* (1991) 234 Cal.App.3d 1277, 1291.)

police interview was available to the defense, defense counsel did not question Penilton about the paternity of her children.

B. The Law

Appellant is correct that the constitution is offended when a prosecutor knowingly presents perjured testimony. (*Mooney v. Holohan* (1935) 294 U.S. 103.) Likewise, due process prohibits a prosecutor from allowing evidence or testimony he knows to be false to go uncorrected. (*Napue v. Illinois* (1950) 360 U.S. 264, 269.)

C. Discussion

In his brief, a public document, appellant accuses the prosecutor of one of the most egregious forms of prosecutorial misconduct, impugning the ethics of a member of the bar without the merest shred of evidence. To violate the constitutional provisions cited above, a prosecutor must *knowingly*^{16/} present, or allow to go uncorrected, false or perjurious testimony. Appellant's argument fails for two reasons.

First, there is no evidence whatsoever that Penilton's testimony was false. She testified twice that Proby was not the father of any of her children, and there is nothing in the record to show whether that was empirically false. In fact, she is in the best position to know who fathered her children.

Second, there is no evidence that the prosecutor knew her testimony was false. All that the record contains to contradict the best source of paternity evidence - Penilton - is Williams' statement that "she (Penilton) just had a baby by, um, Deon." (CT 4902.) Nothing in the record explains that Williams is

16. Appellant's citation to *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1208 for the proposition that perjured testimony is a constitutional violation regardless of the prosecutor's knowledge is a proposition that the United States Supreme Court has never accepted. *Briscoe v. Lahue* (1983) 460 U.S. 352, 327, n.1.)

competent to make such a statement. She could be lying; she could be guessing; she could be completely confused. There is no reason anyone would automatically assume her unsworn and unsubstantiated assertion of fact should be believed, while the sworn testimony of the mother of the children in question should be assumed to be false. Yet appellant not only engages in such baseless assumptions, he faults the prosecutor for not also indulging in such fantastic supposition. The claim is devoid of merit.

VII.

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO IMPEACH PENILTON REGARDING THE PATERNITY OF HER CHILDREN

Following up on the previous frivolous argument, appellant contends that he was denied the effective assistance of counsel because trial counsel failed to impeach (or attempt to impeach) Vera Penilton by showing that she lied to the jury about whether she had had a child with Proby. (AOB 187.) Appellant continues his tortured reading of the record to fabricate a factual basis for the claim, but ultimately, this claim fares no better than the last.

A. The Facts

The factual basis for this claim is the same as for the previous claim. Vera Penilton testified at trial that Proby was not the father of any of her children. (RT 3516, 3684.) In a videotaped interview, Sonya Williams said “me and Vera, we was just talking about babies, cuz she just had a baby by, um, Deon.” (CT 4902.)

B. The Law

The standard governing claims of ineffective assistance of counsel is well-established:

First, a defendant must show his or her counsel’s performance was “deficient” because counsel’s “representation fell below an objective standard of reasonableness [¶] ... under prevailing professional norms.” [Citations.] Second, he or she must then show prejudice flowing from counsel’s act or omission.

(*People v. Gurule* (2002) 28 Cal.4th 557, 611, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692.)

C. Discussion

Appellant's claim fails both prongs. First, it is not ineffective to fail to attempt to impeach a witness when there is no admissible basis to do so. Sonya Williams' statement to police contained *absolutely nothing* to explain the basis for her assertion that Penilton had just had a baby with Proby. There is nothing to demonstrate whether her statement is the product of a guess or inference on Williams' part, a comment Penilton made to her, or perhaps even based on personal knowledge of the fact (although that it is admittedly unlikely.) In the absence of some evidence as to the basis of Williams' statement, her testimony on this point would have been excluded under Evidence Code section 702.¹⁷ It is axiomatic that it is not ineffective to fail to attempt impeachment of a witness with evidence that is not admissible.

While it is possible that Williams did in fact have a sufficient factual basis for her assertion to make her a competent witness, the problem is that there is nothing in the record to suggest that. To the extent any information on this point does exist outside the record, this claim must be presented on habeas corpus. However, on the present state of the record, there is no way to determine whether counsel determined that there was no basis to admit the evidence of Williams' statement. If the reason for counsel's omission does not appear on the record (as this one does not), courts "may therefore reject defendant's claim of ineffective assistance of counsel out of hand." (*People v. Haskett* (1990) 52 Cal.3d 210, 249.) Such inquiries are best addressed in habeas corpus proceedings. (*People v. Mendoza Tello, supra*, 15 Cal.4th at p. 267; *People v. Pope* (1979) 23 Cal.3d 412, 426.) "[U]nless counsel was asked

17. Evidence Code section 702, subdivision (a), provides, in pertinent part: "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter."

for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal. [Citation.]” (*Pope, supra*, 23 Cal.3d at p. 426, fn. omitted.)

There is another reason that counsel’s “failure” in this case did not satisfy the “deficiency” prong of *Strickland*. This issue was extremely collateral. Whether Proby was the father of none, one, or all of Penilton’s children was hardly a matter of consequence in this litigation. Counsel was successful in impeaching Penilton on a number of fronts.

Trial counsel got Penilton to admit that she was Proby’s girlfriend, and that she and Proby were “pretty close.” (RT 3588.) He established that Proby stayed in Penilton’s bedroom and kept clothes at her house. (RT 3593.) He got Penilton to admit that she and Proby were more than good friends, and in fact that they slept together every night. (RT 3619.) He got her to admit that she knew Proby was on parole and could not have guns. (RT 3620.) He also got her to admit that she had committed numerous petty thefts - “I don’t know how many times.” (RT 3620.)

Penilton admitted on cross-examination that she had been convicted for six such offenses, but acknowledged she had committed more. (RT 3621.) She also admitted that Proby drove her and a friend to Bakersfield to commit a petty theft. (RT 3621.) Counsel even got Penilton to lash out at him, perhaps revealing to the jury her lack of judgment and temperament. (RT 3621.)

Counsel got Penilton to admit that she did not tell the police the truth initially. (RT 3623.) Counsel got Penilton to admit that she had visited Proby at jail, and that she may have spoken with him prior to her giving her second statement to police. (RT 3627.) He exposed a number of inconsistencies between her trial testimony and her prior statements to police and investigators. (See, e.g., RT 3632, 3639, 3667-3668, 3676, 3680.) Finally, counsel got Penilton to admit that the reason she spoke to police at all was because they led

her to believe that she might not get to see her baby if she did not cooperate. (RT 3687.)

In light of the damaging cross-examination counsel was able to present, including especially the bias that Penilton obviously had in favor of Proby, with whom she slept every night, trying to impeach Penilton on the relatively tangential issue of the paternity of her children cannot be considered deficient performance. This is especially true when one considers that the impeachment counsel was able to achieve was accomplished largely out of Penilton's own mouth. The impeachment appellant now complains was lacking would have had to come from another witness, and, as explained above, it is not at all clear that that other witness (Sonya Williams) had the requisite personal knowledge to testify competently to the impeachment material. Thus, it was not deficient to fail to pursue of path of inquiry that could have at best led to marginal impeachment with questionably admissible evidence.

Even assuming appellant could show that counsel was somehow deficient under the first prong of *Strickland*, the failure was in no way prejudicial. For all of the reasons recounted above, Penilton was adequately impeached. There can be no question that Penilton was subjected to the adversarial testing contemplated by the Constitution. (See *Strickland, supra*, 466 U.S. at p. 700 [prejudice implies the proceedings were "rendered unreliable by a breakdown in the adversary process"].) The claim must be rejected.

VIII.

THERE WAS NO PROSECUTORIAL ERROR DURING CLOSING ARGUMENT

In his next argument, Petitioner again claims there was prosecutorial misconduct, where - again - none appears. (See Arg. VI, *supra*.) In this version of the claim, he alleges that the prosecutor, during closing argument, informed the jury of evidence not properly before them. (AOB 196.) Specifically, he claims that prosecutor told the jury that witness Michael Baumann was actually in danger as a result of his testimony. (AOB 198.) The record does not support this claim.

A. The Facts

During his testimony, Baumann revealed that one of his relatives worked at McDonalds with appellant. (RT 3444-3445.) Baumann refused to tell the police the name of the relative, and refused to divulge the name while on the witness stand. (RT 3445.) Baumann testified that he was afraid of testifying in court because appellant knew where his family lived, and that that fear influenced his testimony. (RT 3446.)

The trial court instructed the jury that the evidence was offered only to show the state of mind of the witness, and specifically instructed the jury that the testimony was “in no way offered to show that Mr. Vines either directly or indirectly threatened this witness and/or any of his family members.” (RT 3445.) When specifically asked if they all understood the admonition, the jurors answered affirmatively. (*Ibid.*)

Immediately after the admonition, the prosecutor asked Baumann a direct question:

Q (By Mr. Gold) Mr. Vines did not directly threaten you, is that true?

A Yes, that's very true.

(RT 3445.)

In his redirect examination, the prosecutor engaged in the following colloquy with Baumann.

Q (By Mr. Gold) What does it mean to you if you testify against somebody?

A You could die.

Q What's that?

A You could die.

(RT 3479.) Defense counsel immediately objected and asked that the answer be stricken. The trial court refused to strike the testimony, but did admonish the jury a second time that the question was relevant only as to the state of mind of the witness. (*Ibid.*) When the prosecutor asked another question along the same line, the trial court interposed its own objection and directed the prosecutor to move on to another topic. (*Ibid.*)

During closing argument, the prosecutor said the following about Baumann:

Michael Baumann, number nine, he is positive Sean Vines robbed him. Michael Baumann as a little more street awareness about himself. He knows what he saw, and he was scared to death to say it and you saw it. Michael Baumann was the one, if you remember before lunch, basically saying I don't know who did it. Sean doesn't know anybody that worked with my relatives at Florin Road, and then after lunch when he realized that this is just not going to work, I have been subpoenaed, I'm here, I'm going to get it out. And he told the truth, and that's what he told Detective Minter, also, because he has to sit here and look at Mr. Vines face-to-face, and he did it. And he is a person of strong character.

We submit Michael Baumann is somewhat of your quiet hero. He is in a tough jam, but he came up on it. And he said you know what, after lunch he said I saw Sean coming in at the side door. I know it was him. Then I looked right back at him before he puts me in the freezer.

I was going to take the gun from him because what would you be thinking if someone you know is locking you in a freezer with a gun?

(RT 4433.)

During the defense closing argument, counsel said the following about Baumann:

His answers were pretty much all over the place. For some reason he wants you to think he was afraid of something. This gets a bit dicey, *and please, you must keep in mind that there is absolutely no evidence and there is no argument from the prosecution and the Court, I wouldn't say, instructed you, he called it an admonishment when he went through this bit, but there is no evidence that Mr. Vines has done anything directly, indirectly, or otherwise to cause Mr. Baumann fear of anything.* This Court made that very clear to you.

(RT 4475, emphasis added.)

Later, in his rebuttal argument, the prosecutor returned to the topic of Mr. Baumann:

Mr. Bigelow talks about Mr. Baumann and his fear and says what did he really have to be afraid of? Just look at his face, look at his anguish. That's why we call people live so you can see them. That's why we don't want hearsay. You can see them, size them up, look at them and you can tell all over his face he is scared to death to sit in front of this man and say these things.

For one thing, he has a pretty good reason to be afraid of him. He put a gun right to his face. That's a real good reason to be afraid of him. *No evidence he directly threatened him. I'm not saying that,* but he put a gun to his face, and he was a squeeze away from killing him. That's good reason to be afraid. And he put him in the freezer, and he knows where his family lives. And he cares about his family, and he doesn't want his family to get hurt. Wouldn't even tell us the name of the family member that works with Mr. Vines because maybe he is hoping Mr. Vines forgot. He was afraid.

(RT 4529, emphasis added.)

And when Mike Baumann has to come in here like any other witness, look at this man and put a gun to his head and shot Ron Lee in the back of the head and have to say he is the one, that takes a lot of courage. It would be real easy for him to say I don't know who it was,

and he is off the hook. He puts himself into jeopardy and risk by saying it is him. He gets nothing out of it.

(RT 4530.)

Thus, the record reveals the following. Baumann testified that he was afraid to testify, and concerned about his family, one of whom worked with appellant at McDonald's. (RT 3444-3446.) The trial court twice instructed the jury during Baumann's testimony that Baumann's testimony about his fear was relevant only to Baumann's state of mind, and not to show that appellant had made any threats to Baumann, directly or indirectly. (RT 3445, 3479.) During argument, defense counsel told the jury that there was no evidence that appellant had threatened Baumann, and further stated that the prosecutor had not argued that there was any such evidence. (RT 4475.) During rebuttal argument, the prosecutor reiterated that point, saying there was no evidence appellant had threatened Baumann. (RT 4529.)

B. Discussion

It is correct that improper argument by a prosecutor can "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642.) Moreover, even if the prosecutor's action does not render the trial fundamentally unfair under the federal constitution, the defendant may be able to show error under state law if he demonstrates that the prosecutor used deceptive or reprehensible methods to persuade either the court or the jury. (*People v. Hill* (1998) 17 Cal. 4th 800, 819; *People v. Berryman* (1993) 6 Cal. 4th 1048, 1072.)

However, "as a general rule, to preserve a claim of prosecutorial misconduct, the defense must make a timely objection and request an admonition to cure any harm. The rule applies to capital cases." (*People v. Frye* (1998) 18 Cal. 4th 894, 969.) In this case, appellant made no objection to

the prosecutor's comment. Accordingly, the claim is waived. This Court has repeatedly applied this waiver rule. (*People v. Medina* (1995) 11 Cal.4th 694, 741; *People v. Stanley* (1995) 10 Cal.4th 764, 831; *People v. Price* (1991) 1 Cal.4th 324, 481.) This Court should do so again.

Even if the claim is cognizable, appellant's claim fails on the merits. This is so because

To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citation.] *In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.*

(*People v. Frye* (1980) 18 Cal. 4th 894, 970, emphasis added.)

From this record, appellant argues that the prosecutor's statement later in argument that "He puts himself into jeopardy and risk by saying it is him" was the equivalent of testifying to the jury that, in fact, Baumann was actually at risk. (AOB 198.) It is indeed difficult to fathom how appellant could think there is the slightest chance that the jury could interpret that comment in the manner appellant suggests. After being told repeatedly by the trial court, the prosecutor, and the defense counsel, that there was no evidence of any actual threats, appellant contends that when the jury heard the statement about Baumann, they suddenly threw out all the prior admonishments and arguments to the contrary, and interpreted the prosecutor's statement as a veiled reference to some unseen evidence of actual threats emanating from appellant toward Baumann.

Appellant fails to explain how the jury would not simply understand that the prosecutor was articulating Baumann's perspective, i.e. that Baumann believed he was at risk, just as Baumann had testified. Indeed, for purposes of evaluating Baumann's state of mind (which was the only issue for which the evidence was relevant), it did not matter at all whether Baumann was *in fact* in

jeopardy; for purposes of Baumann's state of mind, perception was reality; as long as Baumann believed he was in jeopardy, his testimony could be evaluated with that in mind. Whether he was in actual jeopardy or not would not have changed Baumann's perspective, because his belief was already established.

The claims has been waived, and in any event fails on the merits. It should be rejected.

IX.

THE TRIAL COURT PROPERLY ADMITTED WILLIAMS' TESTIMONY ABOUT APPELLANT'S INCULPATORY STATEMENT

Appellant contends the trial court abused its discretion and violated due process by admitting evidence to impeach the testimony of Sonya Williams. (AOB 211.) The claim fails for lack of a premise.

At trial, Williams was called as a prosecution witness, although the trial court noted she was not particularly friendly to the prosecution. (RT 3101.) During his direct examination, the prosecutor questioned Williams about the events immediately after appellant picked her up to drive her to the motel. After eliciting the fact that appellant had told Williams that he had robbed McDonalds like he had previously said he planned to do, the prosecutor asked Williams:

Q Did he tell you anything else to explain what he did while you were in the car.

A I don't - - no.

THE COURT: Could you speak into the mike?

THE WITNESS: No, he didn't.

Q. So your answer is I don't know?

A. Yeah.

(RT 3085.) In this first exchange, it is difficult to tell whether the witness' answer was "I don't know" or simply, "No." There was a persistent problem with the witness speaking in a low voice. (See, e.g., 3067, 3074, 3076, 3079.) Fortunately, this ambiguity was clarified a short while later.

Q Did you ever have any other conversation with him after he picked you up to take you to the hotel about what he did as far as the robbery at the Watt Avenue McDonald's?

A No.

Q So, it is your testimony here that he never told you what he did as far as his role in the robbery of the Watt Avenue McDonald's; is that correct?

A Yes.

(RT 3088-3089.) And, lest there be any doubt, the prosecutor gave Williams a third chance to tell the truth.

Q So, to be clear, he tells you he is going to rob McDonald's, right?

A Yes.

Q Picks you up, tells you he did what he told you he was going to do, right?

A Yes.

Q Shows you a group of bills, correct?

A Yes.

Q You see him with a gun, correct?

A Yes.

Q And that's all that is ever said about a robbery again?

A Yeah.

Q You didn't talk about it anymore?

A I was too mad.

(RT 3089.) Thus, Williams repeatedly denied that there had been any additional discussion about the robbery, and specifically, about what appellant did as far as his role in the robbery.

At the next recess, the prosecutor explained that he wanted to impeach Williams with a sanitized version of her videotaped interview with police. (RT 3093.) The prosecutor explained that Williams had just testified that she had a very brief conversation with appellant, and that appellant did not say what he did, how he did it, or what his role was. (RT 3096.) After the lunch break, the parties returned to the admissibility of the video. The prosecutor again explained that the video directly contradicted Williams' testimony that there had

been no conversation about the details of the robbery. (RT 3103.) The trial court ruled that the prosecutor would be allowed to impeach Williams on that point. (RT 3104.) The trial court also specifically found that the probative value of the impeachment outweighed any prejudicial effect of the impeachment. (RT 3104, 3106.)

When the jury was reassembled, the prosecutor gave Williams yet another chance to tell the truth:

Q Let me ask a different question. Did Sean tell you what he did as far as how he conducted and perpetrated the robbery.

A No.

Q That's your testimony?

A Yeah.

(RT 3116.) The prosecutor then commenced playing snippets of the videotape in which Williams told police that appellant gave very detailed statements about how he perpetrated the robbery. (RT 3117.) Then, the prosecutor gave Williams one final chance to tell the truth:

Q No. Did you ever have a conversation with Sean Vines in your car on the way to the hotel, or in this car that he was driving on the way to the hotel, after he told you that he put some people in the freezer, well, what if you would have killed those people that were in the freezer? Did you ask him that?

A I think, yeah. I remember something like that, something. I said something like that.

Q What do you remember?

A I can't remember how it came about, but I remember asking him something similar to that question.

Q What question?

A About the freezer.

Q What did you ask him?

A About if they would have died, what would you do or something.

Q What did he say?

A I can't remember.

Q You don't remember?

A No, I don't.

(RT 3119-3120.)

The prosecutor then played a portion of the videotape, in which Williams has the following exchange with police:

WILLIAMS: of, when I was at the hotel. I asked him, I said, "What if those people are –" No. We was in the car driving to the hotel. And I was, like, "What if those – what if you would have killed those people?" Was it in the hotel? I don't remember.

CABRERA: But, essentially, you asked him, you said –

WILLIAMS: (Unintelligible)

CABRERA: – "What if those people would have – what if you would have killed those people?"

WILLIAMS: I said, "What if they would have died? Whatcha gonna do?" He said, "They just would have died."

(CT 4916.)

As is apparent, the videotape directly impeached Williams' repeated assertion that appellant had not told her anything about the details of the robbery. In fact, he told her many details, including the facts about putting people in the freezer, and his concern, or lack thereof, for their lives. Appellant's claim that there was no testimony that could be directly impeached (AOB 213 and fn. 51) is a disingenuous reading of the record. The portion of the video in question directly impeached Williams' repeated untruthful denials.

As the foregoing demonstrates, the admission of the statements on the videotape were entirely proper because they directly impeached Williams' trial testimony. As to appellant's claim regarding relevance (see AOB 213, fn. 51),

the evidence was in fact quite relevant. As the court recognized, this statement was relevant with respect to appellant's intent or state of mind for crimes other than the robbery counts. For instance, in establishing the asportation element of the kidnaping to commit robbery charges, as discussed in detail *infra*, the prosecution needed to establish that the movement of the victims (1) was not merely incidental to the commission of the robbery and (2) substantially increased the risk of harm over and above that necessarily present in the crime of robbery itself. (*People v. Rayford* (1994) 9 Cal.4th 1, 12.) Appellant's statement was relevant in proving that when he moved the employees downstairs and locked them in the freezer, he did so for a purpose above and beyond completing the robbery. In other words, the statement helped establish that the movement of the employees into the freezer was not "merely incidental to the commission of the robbery." Additionally, appellant's statement also helped show that he possessed the requisite intent for the false imprisonment charges. Thus, the trial court properly exercised its discretion in admitting appellant's statement into evidence.

In any event, assuming *arguendo* that the statement was inadmissible, appellant has failed to establish that he suffered any prejudice. The jury heard first hand accounts of what happened from the employees who were forced by appellant to enter the freezer. During that testimony, Zaharko, Baumann, and Aguilar all described having appellant point his gun right at their heads as he robbed the restaurant and locked them in the freezer. (RT 3260, 3319, 3402-3404, 3408, 3467-3468, 3602.) Given the strength of this eyewitness testimony, appellant certainly cannot establish that he suffered any appreciable prejudice as a result of the trial court's evidentiary ruling. Thus, appellant's claim should be rejected on this basis as well.

X.

THE TRIAL COURT PROPERLY ADMITTED THE LETTER FROM APPELLANT TO GILBERT

Appellant argues that the trial court erred in permitting the prosecution to introduce a redacted version of a letter appellant sent to witness Sean Gilbert while both were in jail. (AOB 221.) The contention fails, as the letter was properly admissible as showing consciousness of guilt.

Sean Gilbert testified that he worked at the Watt Avenue McDonald's with appellant, and considered him a friend. (RT 3279-3281.) Outside of work they would socialize, and appellant frequently walked with Gilbert back to Gilbert's group home. (RT 3280.) Gilbert related to the jury various statements appellant had made regarding a tranquilizer gun and possessing a shotgun. (RT 32-82-3284.) Gilbert was not working the night of the robbery, but worked the following day, along with appellant. (RT 3287.) He observed appellant with a brand new Walkman and a brand new Starter jacket, neither of which appellant had had before. (RT 3287-3289.)

Shortly before his release from jail on unrelated charges, Gilbert received a letter from appellant. The letter was redacted to exclude gang references, and was admitted to the jury. (RT 3291-3293.) The letter contained various threats, including:

You ain't never seen me in no leather jacket, new or old, nor a starter jacket. I don't know why you told them that. Nor a shotgun or tranquilizer gun. I'm seriously thinking about beating your ass on sight.

(CT 4878; RT 3292.)

The trial court understood that the prosecutor was offering it as evidence of admissions, and the prosecutor affirmatively offered it as evidence of threats. (RT 2989.) The admission of the evidence was correct because the threats were admissible as evidence of consciousness of guilt. As this Court has held, "such

evidence is clearly admissible to show consciousness of guilt.” (*People v. Pinholster* (1992) 1 Cal. 4th 865, 945.)

Appellant’s attempt to distinguish *Pinholster* fails. He argues that unlike in *Pinholster*, the threats in the letter showed a consciousness of innocence rather than guilt. (AOB 225.) However, there really is no distinction. In *Pinholster*, the defendant telephoned a witness and told him that if he testified, he would be killed. (*Id.* at p. 945.) In this case, appellant sent a letter to the witness and told him he would beat his ass because of the various statements (and ultimately testimony) of the witness. There is no material difference between the threats.

Moreover, logic fails to aid appellant. Every threat against a witness could in theory be construed as consciousness of innocence, in that an innocent person might be angry and might threaten someone who had made false inculpatory statements or who had given false inculpatory testimony. But if appellant’s logic were controlling, then *all threats* would have to be deemed to be consciousness of innocence rather than guilt, and that simply is not the law.

In any event, there is simply no prejudice for the very reasons appellant articulates. If in fact the threats in the letter suggest consciousness of innocence, then there is no danger that the jury drew an inference adverse to appellant upon hearing the threats. It is entirely possible that the jury interpreted the letter as consistent with statements an innocent man would make. Accordingly, any error in the admission of the statements was manifestly harmless. Pursuant to Evidence Code section 353^{18/} there can be no reversal

18. "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the

unless appellant can demonstrate a miscarriage of justice. Here he cannot meet this high standard.

error or errors complained of resulted in a miscarriage of justice." (Evid. Code, § 353.)

XI.

THE RECORD DOES NOT SUPPORT APPELLANT'S CONTENTION THAT THE TRIAL COURT IMPERMISSIBLY RESTRICTED HIS ATTEMPT TO SHOW THAT HE WAS IDENTIFIED AS PART OF A "CONSENSUS"

According to appellant, he "sought to defend against the Watt Avenue charges by showing that the eyewitness identifications of him as the robber were unreliable, and were based, not on the individual witnesses' separate identifications of [him] as the robber based on their own direct observations, but on conversations between the eyewitnesses and others which led to a *consensus identification* of [appellant]." (AOB 232, emphasis in the original.) However, appellant asserts that the trial court impermissibly thwarted his effort to do so by refusing to allow him "to introduce two key pieces of evidence that supported the defense of an unreliable consensus identification: (1) evidence that eyewitness Leticia Aguilar had a conversation with Watt Avenue McDonald's manager Lisa Lee in which Lee encouraged Aguilar to identify [appellant] as the robber, and (2) evidence that before Detective Danny Minter interviewed Michael Baumann, he learned that employees were talking among themselves and repeating rumors about the robbery. (AOB 232-233.) The record does not support appellant's argument.

A. Factual Background

Defense investigator Marilyn Mobert testified on behalf of appellant at trial. According to Mobert, she interviewed Aguilar prior to trial and, during that interview, Aguilar talked about a conversation between herself and Lisa Lee. Regarding this subject, the following exchange occurred during direct examination:

Q: Now, during that interview with Ms. Aguilar, did she indicate to you that Ms. Lee, she had a conversation with Ms. Lee?

A: Yes.

[Prosecution]: I'm going to object as leading and hearsay.

[Defense Counsel]: Again, I'm certainly not offering this next statement for the truth of the matter.

[Prosecution]: Then what's the relevance?

The Court: I don't know what you have.

[Defense Counsel]: All right.

Q: During the – did Ms. Lee tell Ms. Aguilar – according to Ms. Aguilar, did Ms. Lee –

[Prosecution]: Your Honor, I'm going to object as hearsay.

The Court: Yeah, the objection is sustained.

[Defense Counsel]: All right.

(RT 4277.)

Additionally, during defense counsel's cross-examination of Detective Danny Minter, the following exchange occurred:

Q: All right. Did you go back out to the McDonalds?

A: Oh, eventually yes, sir.

Q: Eventually you did, you talked to a lot of people at the McDonalds, a lot of employees?

A: Several, yes sir.

Q: And did you learn in your interviews with those people that – the day after the robbery, couple of days after the robbery, I mean, there were rumors flying all over the place, right?

[Prosecution]: I am going to object to rumors.

The Court: Objection is sustained.

Q: People were talking, employees were talking among themselves about what happened?

The Court: Still Sustained.

(RT 3829-3830.)

B. Analysis

Evidence Code section 354, which concerns the effect of erroneously excluded evidence, provides:

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:

(a) *The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;*

(b) The rulings of the court made compliance with subdivision (a) futile; or

(c) The evidence was sought by questions asked during cross-examination or recross-examination.

(Evid. Code § 354, emphasis added.)

In this case, appellant contends that the employees of the Watt Avenue McDonalds who identified him as the robber did so as part of a “consensus” spearheaded by the manager, Lisa Lee, and/or because of rumors spread among the employees. (AOB 232-238.) However, nothing in the record supports appellant’s claim. As is evident from the excerpts quoted above, “the substance, purpose, and relevance” of the alleged excluded evidence “was not made known to the court by the questions asked, an offer of proof, or by any other means.” (Evid. Code § 354, subd. (a).) Appellant should have made an offer of proof or informed the court in some other manner regarding the substance of the evidence that he sought to introduce. Because he did not do so, the record is incomplete, and this Court is not in a position to decide the merits of appellant’s argument on direct appeal.

Furthermore, given the strength of the direct testimony of the employees regarding their identifications of appellant as the robber, any such error would be harmless. Specifically, Aguilar, who had previously worked with appellant

about 10 to 12 times, including the day before, recognized appellant as the robber because of his eyes. (RT 3603-3606.) Additionally, Baumann, who at one point was only one or two feet away from appellant, positively identified appellant as the robber. (RT 3446, 3467-3468, 3470-3471, 3479-3480, 4375.) Thus, appellant's claim must fail.

XII.

THERE WAS NO PREJUDICIAL ERROR REGARDING THE FLORIN ROAD CHARGES, SO THERE CAN BE NO “SPILLOVER” EFFECT ONTO THE WATT AVENUE CHARGES

In this claim, appellant reasserts the same errors that he set forth in arguments III through VII of the opening brief regarding the Florin Road charges. However, he now contends that because of the “spillover” effect of those alleged errors, the verdicts on the Watt Avenue charges must also be reversed. (AOB 239-240.) Appellant’s claim is without merit.

Interestingly, appellant asserts in this claim that the case against him regarding the Watt Avenue crimes “was not a strong one,” and he makes reference to the “vacillating, uncertain identifications” of him by Zaharko and Baumann. (AOB 239.) However, appellant’s position on this issue is much different and inconsistent with the argument he raised in the second claim. There, appellant asserted that the evidence against him on the Watt Avenue charges was “substantially stronger” than the evidence against him on the Florin Road charges. (AOB 92-93.) Regardless of this inconsistency, respondent has shown in arguments III through VII, *supra*, that no prejudicial error occurred regarding the Florin Road counts. Thus, because no error occurred, there was no “spillover” effect onto the Watt Avenue charges. Accordingly, appellant’s claim should be denied.

XIII.

THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT APPELLANT'S CONVICTIONS FOR KIDNAPING TO COMMIT ROBBERY

Appellant contends that his four convictions for kidnaping to commit robbery (counts five through eight) should be overturned because of a lack of sufficient evidence to support the guilty verdicts. (AOB 241-244.) Specifically, appellant contends “there is insufficient evidence of asportation, an essential element of the crime of kidnaping for the purpose of robbery.” (AOB 242.) Respondent disagrees.

A. Standard of Review

In *People v. Ochoa* (1993) 6 Cal.4th 1199, the California Supreme Court explained the limited role that a reviewing court plays regarding an insufficiency of the evidence claim:

We first observe that our role on appeal is a limited one. “The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] ¶ Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder. [Citations.]” [Citation.]

(*Id.* at p. 1206, emphasis added.)

More specifically, the reviewing court must affirm the judgment if, “after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements . . . beyond a

reasonable doubt.” (*People v. Holt* (1997) 15 Cal.4th 619, 667, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [emphasis in original].) Additionally, a judgment will not be set aside unless it is shown “that upon no hypothesis whatever is there sufficient substantial evidence to support [the jury’s finding].” (*People v. Bolin* (1998) 18 Cal.4th 297, 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

B. There Was Sufficient Evidence To Support The Convictions

The crime of kidnaping to commit robbery is proscribed by Penal Code section 209.^{19/} One of the necessary elements of this crime is asportation or movement of the victim(s). To establish the asportation requirement, the prosecution must show substantial movement of the victim that (1) is not merely incidental to the commission of the robbery and (2) which substantially increases the risk of harm over and above that necessarily present in the crime of robbery itself. (*People v. Rayford* (1994) 9 Cal.4th 1, 12, citing *People v. Daniels* (1969) 71 Cal.2d 1119, 1139 and *In re Earley* (1975) 14 Cal.3d 122, 127-128.) These two prongs are interrelated rather than mutually exclusive. (*Ibid.*)

Regarding the first prong, the jury considers the “scope and nature” of the movement, including the actual distance that the victim is moved. (*People v. Rayford, supra*, 9 Cal.4th at p. 12.) “There is no minimum number of feet a defendant must move a victim in order to satisfy the first prong. [Citation.]” (*Ibid.*) Additionally, “the context of the environment in which the movement

19. At the time the offenses at issue in this matter were committed, Penal Code section 209 provided in pertinent part:

(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with possibility of parole.

occurred” must also be considered. (*Ibid.*) In that regard, this Court has previously observed:

Indeed, when in the course of a robbery a defendant does no more than move his victim around inside the premises in which he finds him--whether it be a residence, as here, or a place of business or other enclosure--his conduct generally will not be deemed to constitute the offense proscribed by section 209. Movement across a room or from one room to another, in short, cannot reasonably be found to be asportation ‘into another part of the same county.’ [Citation.] [Citation.]

(*Id.* at pp. 12-13.) However, “[w]here movement changes the victim’s environment, it does not have to be great in distance to be substantial.” (*People v. Aguilar* (2004) 120 Cal.App.4th 1044, 1048; *People v. Shadden* (2001) 93 Cal.App.4th 164, 169.) Futhermore,

“where a defendant moves a victim from a public area to a place out of public view, the risk of harm is increased even if the distance is short.” (*People v. Shadden, supra*, 93 Cal.App.4th at p. 169 [defendant moved rape victim from front area of a store in public view nine feet into a closed back room]; *People v. Jones* (1999) 75 Cal.App.4th 616, 629-630 [kidnaping for robbery affirmed where defendant moved victim 40 feet into a car “no longer in public view”]; *People v. Smith* (1995) 33 Cal.App.4th 1586, 1594 [defendant moved victim 40 to 50 feet from a driveway “open to street view” into a camper at the rear of the house]; *People v. Salazar* (1995) 33 Cal.App.4th 341, 348 [conviction for kidnaping with intent to rape affirmed where defendant moved victim 29 feet from outside walkway into a motel bathroom].)

(*People v. Aguilar, supra*, 120 Cal.App.4th at pp. 1048-1049.)

Regarding the second prong of the test, relevant factors include “the decreased likelihood of detection, the danger inherent in a victim’s foreseeable attempts to escape, and the attacker’s enhanced opportunity to commit additional crimes.” (*People v. Rayford, supra*, 9 Cal.4th at p. 13.) However, “the fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased.” (*Id.* at p. 14.)

In this matter, the record contains substantial evidence to establish the asportation requirement. The initial movement involved the manager, Stanley

Zaharko. Specifically, when Zaharko headed toward the restroom to tell the person in the stall to leave, he encountered appellant, who raised a gun and pointed it at him. (RT 3248.) Appellant came within approximately three feet of Zaharko (the length of the gun plus an extra foot or so) and walked him directly to the front counter area where the safe was located. (RT 3252, 3255-3256.) When they reached the safe, appellant ordered Zaharko to open it. (RT 3256-3257.) At this time, appellant had the gun pointed right in the back of Zaharko's head. (RT 3257, 3402.) After Zaharko opened the safe, appellant told him to hand over the keys, and Zaharko placed both his personal set of keys and his store set of keys on top of the safe. (RT 3257-3258.) Appellant then directed Zaharko to the back of the restaurant where the other employees were standing by a sink. (RT 3259-3261.)

Subsequently, appellant ordered all the employees to go downstairs. At this time, appellant had the gun pointed at all of the employees, and they all headed down the stairway, which was not visible from the customer side of the front counter. (RT 3261-3263, 3403, 3406-3407, 3602.) As they went downstairs, the gun was pointed right at the back of Baumann's head. (RT 3403.) Once everyone was downstairs, appellant ordered the employees to get into the freezer. (RT 3264, 3407, 3470.) After everyone was inside, appellant slammed the freezer door closed and locked it. (RT 3266.)

Respondent concedes that the initial movement of Zaharko, standing alone, would not be sufficient to establish the asportation element. By directing Zaharko (the only employee present who had access to the safe) to move from the area by the restrooms to the area near the front counter where the safe was located, appellant demanded movement that was merely incidental to the underlying robbery. Specifically, appellant needed Zaharko to open the safe so he could gain access to the contents inside of it. The same is also true of appellant's demand that Zaharko move to the back of the restaurant by the other

employees. By having Zaharko move away from him, appellant reasonably could have emptied the safe without fear of interruption.

However, when appellant ordered all of the employees downstairs and locked them inside the freezer, the movement was substantial and not merely incidental to the robbery. Specifically, the “environment” for Zaharko and the other employees was certainly changed, because they were moved from the main floor of the restaurant down to the freezer in the basement. This was a critical change because they were moved from a location that was in public view to one that was hidden and, thus, profoundly more dangerous. (CT 4857-4858; RT 3320-3323.) Furthermore, the total distance of the movement was also significant. Zaharko estimated that he was moved at gunpoint “in the neighborhood of a hundred and fifty feet [to] two hundred feet” and that the other employees were moved “about eighty or ninety feet.” (RT 3320.) Accordingly, there was more than sufficient evidence in the record to establish the asportation element.

XIV.

APPELLANT'S CLAIMS OF INSTRUCTIONAL ERROR HAVE BEEN WAIVED AND IN ANY EVENT LACK MERIT

A. The Lack Of Objection To The Instructions Now Complained Of Render The Claim Waived

Appellant claims that certain instructions were erroneous. (See AOB 245, 251.) However, at the hearing regarding jury instructions, appellant specifically stated on the record that he had no objection to these instructions. (RT 4636-4638.) His argument must be deemed waived based on the failure to object, and the specific assent to the instructions given.

Respondent expects that appellant may argue that despite his failure to object below, the issue is preserved for appeal by the provisions of Penal Code Section 1259 (see AOB 24) which provides:

Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

However, several cases have at least recognized that there are some limits to the applicability of Penal Code section 1259. (*People v. Dennis* (1998) 17 Cal.4th 468, 534-535 [notwithstanding Penal Code section 1259, failure to object bars contention based on unfair surprise arising from instruction]; *People v. Beeler* (1995) 9 Cal.4th 953, 983.)

A proper reading of Penal Code section 1259 indicates that the section was not intended to completely obviate the need to preserve objections below. With the requirement that the claimed instructional error affect the defendant's

substantial rights, the Legislature has built in a limitation to the section, and it is improper for appellants to invoke it for every claimed instructional error for which they failed to object. Moreover, appellant's mere allegation that his substantial rights are at risk is insufficient to invoke Penal Code section 1259. It could be argued that every instruction impacts in some way the deliberation of the jury, and thus may affect a criminal defendant's due process rights. However, if that were the case, the exception embodied in Penal Code section 1259, allowing review in some extreme cases where review would not otherwise be proper, would swallow the rule.

Respondent urges this Court to follow the dictates of the statute and determine, as a preliminary matter, whether the issue is cognizable on appeal. This inquiry requires a determination of whether the defendant's substantial rights are implicated by the claimed error. Respondent submits they are not. Although appellant alleges his constitutional rights were implicated, the mere allegation does not make it so.

Respondent recognizes the somewhat tautological reasoning required by the approach now urged, in that a determination of whether a defendant's substantial rights were affected may require an analysis very similar to a determination on the merits. Nevertheless, such a preliminary determination is necessary for those cases in which, although there may actually be a technical error which is not "harmless," the error itself relates to a matter that does not, in a general sense, affect the defendant's substantial rights, and thus is not cognizable due to a failure to object.

A defendant in a criminal trial is entitled to a fair trial, but not a perfect one. (*People v. Osband* (1996) 13 Cal.4th 622, 702.) Thus, not every error affects his substantial rights. Accordingly, it is imperative that an initial determination be made as to whether the claimed error in a given case is truly worthy of appellate consideration under Penal Code section 1259, before an

in-depth analysis of the merits is undertaken. It is also imperative that this initial determination be qualitatively different, albeit subtly so, than a harmless error type of analysis. Otherwise, answering the question of whether the error affected substantial rights, and thus is cognizable, will often be dispositive of the claim on appeal. Thus, respondent suggests this Court should review the claimed error as pled, along with the facts of each case, to determine whether, in the abstract, the claimed error affects a defendant's substantial rights. Respondent recognizes that this may not always be easy to do, especially since defendants often press their claims in the context of dire constitutional violations. However, it is incumbent upon the courts to give effect to the words of the Legislature, as "a construction making some words surplusage is to be avoided." (*People v. Superior Court (Pomilia)* (1991) 235 Cal.App.3d 1464, 1468.)

Respondent recognizes that the practical effect of such an approach may be to simply require defendants to raise such claims in habeas under the guise of ineffective assistance of counsel for failure to object. However, that result would not merely be a difference in form. Rather, the nature of the argument would fundamentally change, as defendants would then have to satisfy both prongs of *Strickland* rather than merely demonstrate the error. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687.)

Consistent with the aforementioned approach, respondent submits that no substantial rights of appellant are affected by the giving of the challenged instruction. The mere possibility that a jury might feel inhibited in their deliberations by an instruction which told them of their duty to follow the law and to report a juror who specifically refused to follow the law is very speculative, and simply cannot be said to implicate substantial rights of a defendant.

Respondent requests that this Court rule on the waiver argument in this brief. Appellant's failure to raise a specific and timely objection below means his claim is waived and is the subject of procedural default. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Garceau* (1993) 6 Cal.4th 140, 173; see also *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371-372, noting alternate terminology.) Imposition of state procedural bars advances important institutional goals in the state criminal justice system (*In re Robbins* (1998) 18 Cal.4th 770, 778, fn. 1) and precludes subsequent federal habeas review of the claim, except under a narrow class of exceptions. (*Coleman v. Thompson* (1991) 501 U.S. 722, 750.) Accordingly, respondent requests that this Court explicitly rule on the waiver argument, even if this Court decides, alternatively, that appellant's contention fails on the merits or that any error was harmless. (*Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10.)

B. Assuming The Claim Of Instructional Error Is Cognizable, It Lacks Merit

1. Circumstantial Evidence Instructions

Appellant complains that portions of two instructions dealing with circumstantial evidence (CALJIC Nos. 2.01 and 8.83)^{20/} undermined the requirement of proof beyond a reasonable doubt. (AOB 246.) Appellant

20. The challenged language of both instructions is virtually identical:

Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt. If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(See CT 639, 706-707.)

candidly acknowledges that this Court has repeatedly rejected this claim. (AOB 249.) As this Court observed in *People v. Jennings* (1991) 53 Cal.3d 334, 386:

The plain meaning of these instructions merely informs the jury to reject unreasonable interpretations of the evidence and to give the defendant the benefit of any reasonable doubt. No reasonable juror would have interpreted these instructions to permit a criminal conviction where the evidence shows defendant was “apparently” guilty, yet not guilty beyond a reasonable doubt.

This Court reaffirmed this principle in *People v. Freeman* (1994) 8 Cal. 4th 450, 506. Appellant’s only argument in support of overruling these decisions is that they were wrong with respect to the plain meaning of the instructions. (AOB 249.) However, he offers nothing to support this assertion. The challenged language of the instructions only applies in situations where there are two (and only two) interpretations of circumstantial evidence, one of which appears reasonable, and the other of which appears unreasonable. Respondent is at a loss to understand how directing the jury, in this limited situation,^{21/} to accept the reasonable interpretation, is anything other than entirely consistent with the reasonable doubt standard. Indeed, to accept an unreasonable interpretation, which is the only alternative allowed in the narrow circumstance in which this language has any application, would seem to flatly contradict the reasonable doubt standard.

Moreover, the instructions contain, in the paragraph immediately preceding the challenged language, the following admonition:

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant’s guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

21. In situations where there are two or more reasonable interpretations, or two or more unreasonable interpretations, the instructions offer no guidance as to how to choose between them.

(See CT 639, 706.) In light of the fact that every component of the circumstantial evidence must be found true beyond a reasonable doubt, appellant's argument that the reasonable doubt standard is diluted is untenable.

2. Other Instructions

Appellant complains of other instructions as well, again claiming that they permitted the resolution of factual issues by some standard other than the reasonable doubt standard. (AOB 251.) Specifically, he complains of CALJIC Nos. 2.21.2,^{22/} 2.22,^{23/} and 2.27.^{24/} Again to his credit, appellant acknowledges

22. CALJIC No. 2.21.2 was read to the jury as follows:

A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars.

(CT 649.)

23. CALJIC No. 2.22 was read to the jury as follows:

You are not required to decide any issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which you find more convincing. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(CT 650.)

24. CALJIC No. 2.27 was read to the jury as follows:

You should give the uncorroborated testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact whose testimony about that fact does not require corroboration is sufficient for the proof of that fact. You

that his arguments have generally been rejected by this Court. (See AOB 253, fns. 62, 63 and AOB 254.) Appellant's claims should be rejected.

With respect to CALJIC No. 2.21.2, it is imperative to note that it is permissive; it instructs the jury that they "may reject" the testimony of a witness under a certain condition. It does not compel them to reject any testimony. Accordingly, it does nothing to undermine the ultimate burden of proof. As this Court has previously observed:

The instruction at no point requires the jury to reject any testimony; it simply states circumstances under which it may do so. (*People v. Johnson* (1986) 190 Cal.App.3d 187, 194 [237 Cal.Rptr. 479].) The qualification attacked by defendant as shifting the burden of proof ("unless from all the evidence you shall believe the probability of truth favors his testimony in other particulars") is merely a statement of the obvious -- that the jury should refrain from rejecting the whole of a witness's testimony if it believes that the probability of truth favors any part of it.

(*People v. Beardslee* (1991) 53 Cal. 3d 68, 95.) There is no error in this instruction.

As to CALJIC No. 2.22, appellant complains only about the last sentence: "The final test is not in the relative number of witnesses, but in the convincing force of the evidence." He argues that the reference to the "final test" would be confused with the ultimate question of guilt or innocence, and would be decided based on relative convincing force rather than the beyond a reasonable doubt standard. (AOB 251-252.) This argument is strained.

The test on appeal is not whether there is some possible reading of the instructions which might constitute error; rather, the test is whether there is a reasonable likelihood that the jury misunderstood the instruction. (See *People*

should carefully review all the evidence upon which the proof of that fact depends.

(CT 658.)

v. Avena (1996) 13 Cal.4th 394, 417.) And, it is well settled that “[w]e presume that jurors comprehend and accept the court’s directions. [Citation.] We can, of course, do nothing else. The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.” (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.)

The final sentence of CALJIC No. 2.22 quite reasonably refers back to the proposition in the first sentence: deciding an issue of fact. The instruction cannot reasonably be read such that at the last sentence it mutates from an instruction referring to deciding issues of fact to an instruction governing the resolution of the ultimate factual and legal question of guilt. Moreover, in light of the fact that CALJIC No. 2.01 informs the jury that all facts must be found beyond a reasonable doubt anyway, the prejudice appellant fears could never come to pass even if the jury adopted such an incredible reading of the instruction in question.

As to CALJIC No. 2.27, appellant argues that it erroneously suggests the defense has a burden to prove facts. (AOB 253-254.) The error in this argument is that in order for there to be a burden of proof, there must be some consequence for failing to meet the burden. However, in this instruction, even indulging appellant’s argument that it suggests a burden of any kind, there is no consequence whatsoever for failing to meet it. The instruction merely tells the jury to carefully review the evidence, and to give it whatever weight it deserves. They are not instructed to reject the evidence if it does not meet some hypothetical burden. Accordingly, there is no burden whatsoever. The more relevant “burden” instruction was given to the jury in CALJIC No. 2.90 (CT 661), and in light of that instruction, this Court has previously found that the generalized reference to “proof” of “facts” in CALJIC No. 2.27 would not be

construed by a reasonable jury to undermine the much-stressed principles of CALJIC No. 2.90. (*People v. Turner* (1990) 50 Cal. 3d 668, 697.)

In light of the foregoing, there was no error. Accordingly, the instructional claim must be rejected.

XV.
**THE TRIAL COURT PROPERLY DENIED
APPELLANT'S *MARSDEN* MOTION**

Appellant claims the trial court erred in denying his *Marsden*^{25/} motion because it should have been apparent to the court that trial counsel had provided inadequate representation. (AOB 258, 262.) Appellant concedes that his motion may not have been “optimally precise,” (AOB 263) but nevertheless contends that the trial court should have realized that appellant’s reference to trial counsel’s failure to call Jerome Williams witness was in fact a reference to an error relating to a misunderstanding of the hearsay rule. (AOB 262-263.) The claim is specious.

A. Factual Background

On September 5, 1997, appellant sent a letter to the trial court in which explained that he was “not pleased with my lawyer’s cross examinations of the witnesses in my trial.” (CT 4634.) Buried amid a list of witnesses to whom appellant had wanted to ask additional questions, appellant included the following sentence: “[A]lso he did not call 2 witnesses that would’ve helped me in the watt ave case.” (*Ibid.*)

On September 16, 1997, the matter was addressed in court. After a brief colloquy, the trial court concluded he would treat the letter as a *Marsden* motion. (RT 4615.) The courtroom was cleared, and a hearing was held. Appellant informed the court that trial counsel had failed to call Jerome Williams and Tina Villanueva as witnesses, and further that trial counsel had failed to ask specific questions of certain witnesses. (RT 4617.) Trial counsel responded as follows: “Jerome Williams we looked for, tried to find, tried to subpoena, we were unable to do so.” (RT 4619.) Trial counsel also explained

25. *People v. Marsden* (1970) 2 Cal.3d 118

that he had not called Villanueva because she would have committed perjury, and because she would have been impeached to the detriment of appellant. (RT 4619.) Trial counsel also explained he had tactical reasons for refraining from asking various questions put forth by appellant. (*Ibid.*) Appellant was asked if he had anything more to say, and he answered in the negative. (RT 4620.) The trial court thereafter denied the motion. (*Ibid.*; CT 888-889.)

Neither the letter nor anything adduced at the hearing made even the slightest reference to the substance of Jerome Williams' testimony that appellant believed was lacking. Similarly, neither made any reference to the hearsay rule or the excited utterance exception.

B. Applicable Law

As this Court has noted, "Defendants in capital cases often express dissatisfaction with their appointed counsel." (*People v. Roldan* (2005) 35 Cal. 4th 646, 681.) Because of the frequency with which such claims are made,

The rule is well settled. "When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result."

(*Ibid.*) On appeal, the applicable standard of review of the denial of a *Marsden* motion is abuse of discretion. (*People v. Berryman* (1993) 6 Cal. 4th 1048, 1070.)

C. Discussion

Appellant's argument is that the trial court abused its discretion in denying the *Marsden* motion because it should have realized that when appellant complained about trial counsel's failure to call Jerome Williams, that

was not truly appellant's complaint. The trial court should have realized that appellant's true complaint was that trial counsel failed to adduce evidence of Williams' statement to police at the police station a few hours after the Florin Road murder and robbery. Whether that evidence should have come from Williams' trial testimony, or the testimony of another witness via an applicable hearsay exception apparently mattered not to appellant.

As should be obvious, this argument borders on the ridiculous, inasmuch as appellant completely failed to alert the trial court to the issues he is complaining about now. The general rule on appeal is that only the evidence before the trial court at the time it was called upon to rule on the motion is considered by the reviewing court. (*People v. Gibbs* (1971) 16 Cal.App.3d 758, 761; see also *People v. Scott* (1993) 17 Cal.App.4th 405, 407.)

Appellant complained about the failure to call Jerome Williams as a witness. (RT 4617.) Trial counsel explained that he had tried, but had been unable to locate Williams. (RT 4619.)^{26/} The inability to locate a witness is a reasonable basis upon which to fail to call that witness. (*People v. Diaz* (1992) 3 Cal. 4th 495, 574.) Accordingly, the trial court did not abuse its discretion.

Appellant's argument that the trial court should have realized that counsel had provided inadequate assistance rests on a chain of inferences that even the most prescient trial court could not have been expected to make. To demonstrate inadequate representation, appellant would have had to show both that (1) "counsel's performance was deficient;" and (2) "the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) To demonstrate prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the

26. As trial counsel explained to the court that "we" had been unable to find Williams, the record fairly suggests that trial counsel was referring to the efforts of his investigator and the rest of the defense team.

proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

Appellant's case for inadequate representation is in fact *not* that counsel failed to call Jerome Williams as a witness, but that he failed to adduce Williams' testimony from the preliminary hearing. (AOB 262-263.) The trial court was apparently expected to have gleaned that this was appellant's theory despite the lack of any such indication on the record. Under appellant's logic, the trial court should have been on notice that he was referring to the preliminary hearing testimony. Moreover, appellant apparently believes that the trial court should have been fully aware of the entirety of the preliminary hearing transcript, despite the fact that a different judge presided over the preliminary hearing.

But assuming the trial court should have somehow become aware of the true nature of appellant's complaint, and assuming the showing offered by appellant at the *Marsden* hearing somehow put the court on notice regarding the preliminary hearing, appellant's claim still fails. This is so because, despite appellant's insistence to the contrary, the testimony of Jerome Williams was not necessarily admissible as a spontaneous statement under Evidence Code section 1240. The preliminary hearing transcript reveals that Jerome Williams was interviewed at the police station approximately two and one-half hours^{27/} after the robbery. (RT 398.) Despite appellant's unsupported assertion to the contrary (see AOB 262), the preliminary hearing contains no reference to Williams being frightened or upset during the interview.^{28/}

27. The robbery occurred at 10:55 p.m. according to Williams. (RT 374.) The interview was at 1:20 a.m. (RT 398.) There is no indication in the record as to how long the interview lasted.

28. The fact that appellant fails to cite a page reference to the preliminary hearing transcript to support his assertion is telling.

As this Court has repeatedly observed, the relevant factor in determining the admissibility of spontaneous statements under Evidence Code section 1240 is whether it “appears that they were made under the stress of excitement and while the reflective powers were still in abeyance. (*People v. Poggi* (1988) 45 Cal. 3d 306, 319.) There is nothing whatsoever in the record identified by appellant which suggests Jerome Williams was still so shaken by the event at the time he gave his statement to police two and one-half hours later that it is inherently reliable. (See, e.g. RT 374-376, 397-403, 418.) Thus, the record fails to demonstrate an essential prerequisite to admissibility of the statement appellant faults counsel for failing to adduce. (See, *ante*, Arg. IV.)

At the hearing, appellant referred only to the failure to call Jerome Williams. He did not explain what Williams would testify to, he did not refer to the preliminary hearing testimony, he did not refer to the specific statement Mr. Williams gave to police regarding the height of the robber he saw, and he did not refer to Evidence Code section 1240 in any way. Yet his claim that there was inadequate representation depends on him demonstrating all of the above. He failed to do so, and the trial court properly denied his motion.

XVI.

THE TRIAL COURT PROPERLY EXCUSED JUROR OLGA AYALA FOR CAUSE

Appellant contends the trial court erred by excusing Juror Olga Ayala for cause due to her views concerning the death penalty, thereby violating his right to an impartial jury under the Sixth, and Fourteenth Amendments to the United States Constitution. (AOB 265.) Appellant is incorrect.

The United States Supreme Court has established the legal standard for excusing jurors due to their views on the death penalty, first in *Witherspoon v. Illinois* (1968) 391 U.S. 510, and then in *Wainwright v. Witt* (1985) 469 U.S. 412. In *Witt*, the Supreme Court explained that a prospective juror may be excused in a capital case if “the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’” (*Id.* at p. 424.) This Court applies the same standard under the state Constitution. (*People v. Jones* (2003) 29 Cal.4th 1229, 1246.)

In fact, in *Jones* this Court observed that:

Generally, the qualifications of jurors challenged for cause are matters within the wide discretion of the trial court, seldom disturbed on appeal. [Citations.] There is no requirement that a prospective juror’s bias against the death penalty be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror. [Citations.]

(29 Cal. 4th at pp. 1246-1247.) Moreover, this Court has also held:

A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror’s responses in deciding whether to remove the juror for cause. The trial court’s resolution of these factual matters is binding on the appellate court if supported by substantial evidence.

(*People v. Weaver* (2001) 26 Cal. 4th 876, 910.)

In this case, Juror Ayala gave what could best be described as conflicting answers with regard to her views on the death penalty. In her questionnaire,^{29/} which was signed under penalty of perjury (CT 2379) and in which she was expressly advised that she was answering under oath (CT 2353), Juror Ayala responded to question #90 (the first death penalty question) by writing “I could not agree on a death penalty. I could agree with life in prison.” (CT 2374.) She wrote that the death penalty is imposed too often (question #90(a)), and when asked what purpose the death penalty serves (question #91), she wrote “none.” (CT 2375.) When asked about the types of cases in which the death penalty should be imposed (question #92), she again wrote “none.” (CT 2375.) She also stated that she would automatically refuse to vote for the death penalty during a penalty phase (question # 93(c)). (*Id.*) She also stated, in response to question #93(f), that she would automatically always vote for life in prison without parole in a penalty phase. (CT 2376.) In response to question #100, after responding affirmatively that family or friends express strong feelings about the death penalty, when asked what effect those feelings would have on her, she wrote “I believe it to be unreasonable.”^{30/}

During individual voir dire, at the very outset, when asked if she could fairly consider both penalties, she responded “No, I don’t think I can.” (RT 2783.) When the trial court asked her if that meant that she was predisposed to the one penalty, she stated unequivocally, “Yes.” When asked what that penalty was, she stated “Life imprisonment.” (RT 2783.) Later, after the court essentially tried to rehabilitate her by referring to the court’s instructions, she

29. Although appellant sets out the complete voir dire of Juror Ayala in his brief (AOB 266-270), he fails to mention her questionnaire at all. It is unclear whether this was intentional or inadvertent.

30. The “it” to which Juror Ayala was referring to could be construed as the death penalty, or possibly the views of her friends and family about the death penalty.

stated very equivocally, “I think that I would probably follow the court’s instructions.” (RT 2784.) When asked if, after evaluating all the evidence, and concluding that the death penalty was appropriate, she would vote for death, she stated, “Probably. I think so, yes.” (RT 2784.)^{31/} When asked what she meant by “probably” and “I think so,” and whether she could vote for death, she responded “I think reason [sic] I am hedging because more is because I feel that - - I would have a difficult time doing it, but I would follow the court’s instruction.” (RT 2785.)

When the prosecutor was given an opportunity to ask questions, Juror Ayala explained that based on her personal beliefs, she felt that the death penalty is “not right.” (RT 2787.) She believed that only God has that type of power. (RT 2787.) When asked if she could make a decision (for death) knowing that she does not believe it to be right, from the religious standpoint, she said she could not, and said so twice. (RT 2787.)

With liberal use of boldface font, appellant identifies various passages from the voir dire that he believes demonstrate that Juror Ayala was impartial, and otherwise able to carry out her oath. (See AOB 267-270.) For example, he refers to the following statements, among others:

1) “I think that I would probably follow the court’s instructions.” (RT 2784);

2) When asked if she would vote for death after concluding that death was the more appropriate penalty, she stated, “Probably. I think so. Yes.” (RT 2784-2785);

31. Of course, as this question by the trial court was phrased, it presupposed that Juror Ayala had concluded that death was an appropriate penalty, even though she had previously indicated that the death penalty served no purpose and should not be applied in any case. It is thus questionable whether the hypothetical posed by the trial court have had any utility in determining her ability to serve as a juror, because it assumed that she could reach a conclusion which she quite likely could never have reached.

3) When asked for clarification of the previous statement, she stated “I would have a difficult time doing it, but I would follow the court’s instruction.” (RT 2785);

4) When asked if she would vote for death if appropriate, even if it was difficult and even if she did not like it, she responded “Yes” and “That’s true.” (RT 2785).

Assuming that appellant has chosen to use boldface type for the passages that best demonstrate Juror Ayala’s impartiality and ability to serve, he fails. This is so for three reasons. First, Juror Ayala’s answers were qualified at best. She indicated that she *thought* she would *probably* follow the court’s instructions. (RT 2784.) She thought she could *probably* vote for death. (RT 2784.) These statements in no way inspire any confidence that Juror Ayala could carry out her oath. A juror who expresses doubt about her ability to follow the court’s instructions is not the type of person that our system deems suitable for making weighty decisions about a criminal defendant’s life. (See, e.g., *People v. Samuels* (2005) 36 Cal. 4th 96, 111 [upholding removal for cause of juror who was uncertain he could follow the law as set forth by the court]; *People v. Roldan* (2005) 35 Cal. 4th 646, 697 [acknowledging that a juror’s equivocation and hesitancy maybe considered in determining the propriety of their removal]; *People v. Wash* (1993) 6 Cal. 4th 215, 255 [same].)

Second, all of the responses which appellant suggests indicates that Juror Ayala could faithfully carry out her oath proceeded from a false premise. The trial court asked whether, after hearing all of the evidence, instructions, and arguments, if she “conclude[d] after reasoning and thinking about everything, that the death penalty is the more appropriate penalty, would you vote for death?” Her very tentative response (“Probably”) must be viewed in light of the question, which assumed that she had already concluded that death was appropriate. However, she had earlier, in her questionnaire, stated in no uncertain terms that the death penalty served no purpose and should not be applied in any case. (CT 2375.) Thus, it is difficult to imagine how the

hypothetical posed by the court (i.e. a scenario in which she had already concluded that death was appropriate) could ever come to pass. While Juror Ayala dutifully tried her best to answer the court, rather than fighting the hypothetical posed to her, it cannot be overlooked that the question posed did not truly rehabilitate her. It simply asked her to assume that her debilitating beliefs had somehow been bypassed or overcome. As such, her answer to the questions did little to rebut the fact that, based on her initial answers in the questionnaire, her “views would prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath.” (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.)

Third, and most important, even viewing the voir dire in the light most favorable to appellant^{32/} it is quite apparent that Juror Ayala’s answers were conflicting. She stated that she could not agree on a death penalty, and that she would automatically refuse to vote for death and would automatically vote for life. (CT 2374-2376.) Later, she stated that she could “probably” follow the law and could “probably” vote for death. As this Court has recognized,

[W]e pay due deference to the trial court, which was in a position to actually observe and listen to the prospective jurors. Voir dire sometimes fails to elicit an unmistakably clear answer from the juror, and there will be times when “the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. ... [T]his is why deference must be paid to the trial judge who sees and hears the juror.”

(*People v. Cain* (1995) 10 Cal.4th 1, 60, quoting *Wainwright v. Witt*, *supra*, 469 U.S. at p. 426.) Indeed, even if this were a close case, any ambiguities are

32. It bears repeating that this is *not* the standard of review on appeal. Quite the opposite, the test is whether the trial court’s determination is supported by substantial evidence, under which courts review the evidence in the light most favorable to the judgment below. (*People v. Slaughter* (2002) 27 Cal. 4th 1187, 1203.)

resolved in favor of the trial court's assessment. (*People v. Howard* (1988) 44 Cal.3d 375, 417-418.) Accordingly, appellant has failed to demonstrate any error in the removal of Juror Ayala.

Appellant's subsidiary argument regarding disparate application of the *Witherspoon-Witt* standard (see AOB 274-276) is also unpersuasive. Appellant argues that the trial court used a more liberal standard to deny a defense challenge for cause of an allegedly pro-death juror (Juror Schottle) than was used in removing Juror Ayala. Respondent notes at the outset that this aspect of the claim is procedurally defaulted. It is settled that in order "[t]o preserve a claim of error in the denial of a challenge for cause, the defendant must either exhaust its peremptory challenges and object to the jury as finally constituted or justify the failure to do so." (*People v. Lucas* (1995) 12 Cal.4th 415, 480.) In this case, Juror Schottle, although present in the venire during jury selection (RT 2963) was never called into the box. Moreover, appellant used only eleven of his 20 peremptory challenges. (CT 613; Code of Civil Procedure section 231.) Accordingly his challenges were not exhausted. In addition, appellant never objected to the constitution of the jury, either at the conclusion of the selection of the panel (RT 2974), nor at the conclusion of the selection of alternates, when the panel was sworn. (RT 2983.) And appellant has failed to even attempt to justify the failure to exhaust his challenges and object to the jury. Accordingly, any complaint about the allegedly improper denial of his challenge to Juror Schottle must be rejected.

In any event, his claim of disparate treatment fails on the merits as well. Unlike Juror Ayala, Juror Schottle stated unequivocally that he could honestly and truthfully consider both penalties, and Juror Schottle promised to follow the court's instructions. (RT 2587.) He stated without hesitation that he could impose either penalty. (RT 2587.) He repeatedly explained that while his religious views might be different, he could follow the law. (RT 2590.)

Appellant refers to a passage where Juror Schottle discussed his views prior to hearing the judge's explanation of California law regarding penalty. (See AOB 274.) After stating that it was his belief that the death penalty should be imposed if the murder was intentional, defense counsel asked him "Automatically?" Juror Schottle responded, "According to my beliefs, yeah. *But now what I heard the judge say according to the law in California, that might not necessarily be true.*" (RT 2591.)

Thus, Juror Schottle unequivocally demonstrated that he could set aside his beliefs and follow the law as explained by the court. He amplified this point shortly thereafter when he explained "Now, I did not know that prior to that so I have to evaluate it. I mean, I'm not an unlawful citizen. So, I wouldn't go against the law of California. . . ." (RT 2591.) While he acknowledged that his "belief system says that if somebody intentionally murders someone, my feeling is it should be the death penalty" he also stated that he could set that belief aside. (RT 2591.)

Juror Schottle's answers on voir dire are so different from those of Juror Ayala as to make any comparison useless. Juror Schottle was quite unequivocal in his belief that he could follow the law. Juror Ayala was exactly the opposite. There was no disparate application of the *Witt* standard, and appellant's claim to the contrary must be rejected.

XVII.

THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTION TO PLAY A VIDEOTAPE DURING THE PENALTY PHASE WHICH SHOWED THE VICTIM, LEE, SINGING AND DANCING

As part of the victim impact testimony that was presented during the penalty phase of the trial, the prosecution played a five minute videotape that showed Lee and others performing various song and dance routines. (Exhibit 130.) Appellant claims that the use of this tape by the prosecution was so unfair and inflammatory as to deprive him of fair penalty phase trial. (AOB 277-290.) Respondent disagrees.

In *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720], the United States Supreme Court partially overruled its prior decisions in *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440] and *South Carolina v. Gathers* (1989) 490 U.S. 805 [109 S.Ct. 2207, 104 L.Ed.2d 876], and held that victim impact evidence is admissible at the sentencing phase of a capital trial. “[I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar.” (*Id.* at p. 827.)

[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. “[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.” [Citation.]

(*Id.* at p. 825.) Victim impact evidence “is designed to show [] *each* victim’s ‘uniqueness as an individual human being.’” (*Id.* at p. 823, emphasis in original; see *United States v. McVeigh* (10th Cir. 1998) 153 F.3d 1166, 1219 [“the unique qualities of a murdered individual and his or her life

accomplishments constitute the core impact evidence describing a victim's 'uniqueness as an individual human being' allowed by *Payne*".)

In *People v. Edwards* (1991) 54 Cal.3d 787, this Court held that although victim impact is not expressly enumerated as a statutory aggravating factor, such evidence is generally admissible as a circumstance of the crime under section 190.3, factor (a). (*People v. Edwards, supra*, at p. 833; *People v. Brown* (2004) 33 Cal.4th 382, 396.)

"The word 'circumstances' as used in factor (a) of section 190.3 does not mean merely the immediate temporal and spatial circumstances of the crime. Rather it extends to '[t]hat which surrounds materially, morally, or logically' the crime. [Citation.] The specific harm caused by the defendant does surround the crime 'materially, morally, or logically.'" [Citation.] "[A]t the penalty phase the jury decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience. [Citations.]" [Citations.] In sum, "the injury inflicted is generally a circumstance of the crime as that phrase is commonly understood. We need not divorce the injury from the acts." [Citation.]

(*People v. Brown, supra*, at p. 396, quoting *People v. Edwards, supra*, at p. 834.)

[T]he United States Supreme Court in *Payne* acknowledged that just as the defendant is entitled to be humanized, so too is the victim: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

(*People v. Brown, supra*, at p. 398, quoting *Payne v. Tennessee, supra*, 501 U.S. at p. 827.) "The characteristics of the murder victim relate directly to the harm the defendant did by killing that person, an important circumstance of the crime." (*People v. Riel* (2000) 22 Cal.4th 1153, 1221, fn. 11.)

Generally, photographs of a murder victim are admissible at the penalty phase of a capital trial, as they are relevant as a "circumstance of the crime" and

show the victim as seen by the defendant before the murder. (*People v. Anderson* (2001) 25 Cal.4th 543, 594; *People v. Lucero* (2000) 23 Cal.4th 692, 714.)

Like all evidence, the admission of victim impact evidence is subject to Evidence Code section 352, and the evidence must not be admitted if it is unduly prejudicial or inflammatory. (See *People v. Edwards, supra*, 54 Cal.3d at p. 836 [“irrelevant information or inflammatory rhetoric that diverts the jury’s attention from its proper role or invites an irrational, purely subjective response should be curtailed”]; *People v. Brown, supra*, 33 Cal.4th at p. 397 [“we find nothing in the particular [victim impact] testimony unduly inflammatory or otherwise prejudicial”]; see also *Payne v. Tennessee, supra*, 501 U.S. at p. 825 [due process prohibits the introduction of victim impact evidence “so unduly prejudicial that it renders the trial fundamentally unfair”].) However, a court’s discretion to exclude section 190.3, factor (a), evidence under Evidence Code section 352 is limited:

We emphasize . . . that at the penalty phase, the trial court’s discretion to exclude circumstances-of-the-crime evidence as unduly prejudicial is more circumscribed than at the guilt phase. During the guilt phase, there is a legitimate concern that crime scene photographs such as are at issue here can produce a visceral response that unfairly tempts jurors to find the defendant guilty of the charged crimes. Such concerns are greatly diminished at the penalty phase because the defendant has been found guilty of the charged crimes, and the jury’s discretion is focused on the circumstances of those crimes solely to determine the defendant’s sentence. Indeed, the sentencer is expected to subjectively weigh the evidence, and the prosecution is entitled to place the capital offense and the offender in a morally bad light.

(*People v. Box* (2000) 23 Cal.4th 1153, 1201.)

A. The Videotape Was Properly Admitted

The five minute videotape of Lee and others performing song and dance routines constituted proper victim impact evidence under *Payne v. Tennessee*,

supra, 501 U.S. 808, and was admissible under factor (a) of section 190.3 as a “circumstance of the crime.” The evidence provided information about the life of Lee and was designed to show that Lee was a unique and individual human being whose death represented a unique loss to society and to his family. (*Payne v. Tennessee, supra*, 501 U.S. at pp. 823, 825.) The evidence was properly admitted because Lee, like appellant, was entitled to be “humanized.” (*People v. Brown, supra*, 33 Cal.4th at p. 398.) Indeed, the record shows that the defense offered substantial evidence at trial that “humanized” appellant. At the penalty phase, several of appellant’s family members testified about appellant’s background and life history, and appellant’s personal characteristics and school experiences. In light of this evidence, numerous family members and friends, as well as a former high school teacher, testified about the prosecution was entitled to “humanize” appellant’s victim “to keep the balance true.” (*Payne v. Tennessee, supra*, 501 U.S. at p. 827; *People v. Brown, supra*, 33 Cal.4th at p. 398.)

Prior to admitting the evidence, the trial court viewed the videotape with counsel and noted that “all they are doing is a little singing and a little rapping.” (RT 4631.) The court then denied appellant’s motion to exclude the tape after determining that it contained “nothing inflammatory that would divert the jury from [its] proper function.” (RT 4631.) As such, the trial court properly exercised its discretion in allowing the prosecution to play the tape for the jury.

In support of his argument that the videotape was unduly prejudicial, appellant relies, in part, on a state court case from Texas, *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330. (AOB 284-285.) In *Salazar*, a 17-minute victim impact video montage was introduced at the sentencing phase of a non-capital murder trial. Almost half of the 140 photographs in the video depicted the victim’s infancy and early childhood. Music accompanied the photographs, including a song from the movie *Titanic*. The music was

“appropriately keyed to the various visuals, sometimes soft and soothing, then swelling to a crescendo chorus.” (*Id.* at pp. 333-334.) The Texas appellate court held that the video was unduly prejudicial, in large part because of the undue emphasis on the adult victim’s “halcyon childhood.” (*Id.* at p. 337.)

Unlike *Salazar*, the videotape in the instant case included *no* images of Lee as an infant. Instead, as appellant acknowledges (AOB 283), the tape contained footage of Lee when he was a senior in high school, which was just a couple of years before the murder. Additionally, unlike *Salazar*, the tape in this case was not a choreographed production with a professional soundtrack that was purposely keyed to visual images. It was just a short compilation of home movies excerpts that helped “humanize” Lee by showing him doing what he loved, singing and dancing. Furthermore, appellant also introduced evidence of his own hip hop dancing through the testimony of his sister. (RT 4726-4728.) Thus, the videotape was appropriate and properly admitted.

B. Any Error In Admitting The Evidence Was Harmless

Assuming *arguendo* that the trial court erred in admitting the videotape, appellant has failed to show that the error was prejudicial under the “reasonable possibility” standard of prejudice. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1232 [reasonable possibility test is the proper test for state-law error in penalty phase]; *People v. Hardy* (1992) 2 Cal.4th 86, 200 [any error in admitting prejudicial photographs of victims’ dead bodies during penalty phase was harmless since it was not reasonably possible that the admission of the photographs altered the result of the penalty phase]; see also *People v. Ochoa*, *supra*, 19 Cal.4th at p. 479 [reasonable possibility standard is the same in substance and effect as the beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]].)

XVIII.

THE VICTIM IMPACT TESTIMONY OFFERED BY LEE'S FAMILY MEMBERS DURING THE PENALTY PHASE WAS PROPER

In addition to his argument about the admissibility of the videotape discussed in the previous section, appellant asserts that the victim impact testimony in this matter was so prejudicial that it rendered the penalty phase of his trial fundamentally unfair. (AOB 291-301.) Appellant is incorrect.

Preliminarily, respondent submits that appellant's claim is not cognizable on appeal. In capital cases, as in other criminal cases, a verdict may not be set aside for erroneous admission of evidence, even if the evidence is prejudicial, absent a timely and specific objection. (*People v. Cain* (1995) 10 Cal.4th 1, 28; *People v. Champion* (1995) 9 Cal.4th 879, 918; *People v. Clark* (1992) 3 Cal.4th 41, 127-128; *People v. Green* (1980) 27 Cal.3d 1, 22, fn. 8.) In this matter, appellant contends for the first time on appeal that the victim impact testimony (other than the videotape previously discussed) was improper (i.e., highly emotional, unduly prejudicial, and excessive). Other than an objection to testimony by Littell Williams, III, regarding one of his dreams,^{33/} defense counsel did not raise any objections regarding the victim impact testimony presented at trial. Accordingly, appellant has waived his objections to this evidence, and his claim should be dismissed on that basis.

In any event, appellant's claim should be rejected on the merits as well. As discussed in detail in the previous argument section, both the United States Supreme Court and this Court have ruled that victim impact evidence is admissible at the sentencing phase of a capital trial. (*Payne v. Tennessee*, *supra*, 501 U.S. 808; *People v. Edwards*, *supra*, 54 Cal.3d 787.) As stated in

33. The trial court sustained appellant's objection regarding the dream. (RT 4670-4671.)

the previous section, the prosecution was entitled to “humanize” appellant’s victim “to keep the balance true.” (*Payne v. Tennessee, supra*, 501 U.S. at p. 827; *People v. Brown, supra*, 33 Cal.4th at p. 398.)

Here, none of the testimony offered by the witnesses was unduly inflammatory or prejudicial. Instead, the witnesses merely described the nature of their relationships with Lee and the resulting impact his death has had on their lives. Andrea Clayton, the mother of Lee’s child, testified about the “off and on” relationship that she shared with Lee, how she learned of his death, and the lingering unanswered question in her mind of what their lives would be like if Lee were still alive. (RT 4638-4653.) Littell Williams, Sr., testified mostly about the closeness of their relationship and their common involvement with church. (RT 4653-4658.) Dianne Williams, Lee’s surrogate mother, described Lee’s childhood and family life and discussed the big void that Lee’s murder has left in her family. (RT 4658-4664.) Littell Williams, III, testified about the tight bond that existed between him and Lee, their common involvement in singing and dancing, and the difficulty he has had in accepting Lee’s death. (RT 4665-4674.) This type of testimony, which helped humanize Lee “to keep the balance true,” was certainly admissible to describe the impact Lee’s death has had on his family and friends. Additionally, this testimony, which consumed only about 40 pages of a nearly 5000 page reporter’s transcript, certainly was not excessive or disproportionate to the rest of the trial. Thus, appellant’s claim should be denied on this basis as well.

Lastly, assuming *arguendo* that the trial court erred in admitting any of the victim impact testimony, appellant has failed to show that the error was prejudicial under the “reasonable possibility” standard of prejudice. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1232 [reasonable possibility test is the proper test for state-law error in penalty phase]; *People v. Hardy* (1992) 2 Cal.4th 86, 200 [any error in admitting prejudicial photographs of victims’ dead

bodies during penalty phase was harmless since it was not reasonably possible that the admission of the photographs altered the result of the penalty phase]; see also *People v. Ochoa*, *supra*, 19 Cal.4th at p. 479 [reasonable possibility standard is the same in substance and effect as the beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]].)

XIX.

APPELLANT HAS FAILED TO DEMONSTRATE INEFFECTIVE ASSISTANCE REGARDING THE FAILURE TO PRESERVE THE BASIS FOR VARIOUS OBJECTIONS

Appellant argues his trial counsel was ineffective for failing to preserve various constitutionally based objections. (AOB 302.) The claim fails for lack of a factual predicate.

At trial, appellant successfully moved to have his various objections the admissibility of evidence, jury selection procedures, and other matters to be deemed based on various provisions of the state and federal constitutions, in addition to the express grounds stated at the time of the objection. (CT 360-361, 527; RT 2041-2042.) Without commenting on the propriety of the trial court's granting of the motion, respondent notes that this Court has indicated that timely and specific objections are required in capital cases. (See *People v. Jones* (2003) 29 Cal. 4th 1229, 1255-1256, criticizing and distinguishing, but not expressly overruling *People v. Frank* (1985) 38 Cal.3d 711, 729 fn. 3.) While respondent welcomes clarification regarding the lingering confusion caused by the footnote in *Frank*, respondent admits that it is not necessary for this Court to reach that issue in this case.

As has been previously explained, to prevail on a claim of ineffective assistance of counsel, appellant must demonstrate both deficient performance and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-694.) Here, appellant can show neither. Appellant's claim expressly depends upon the assumption that the trial court's order granting the motion was insufficient to preserve the constitutional arguments. (AOB 302.) In other words, the claim depends upon the existence of one or more claims of error for which there was an objection below which was not sufficiently specific. There do not appear to be any such claims. While respondent has asserted waiver and/or failure to

object in response to various claims of error, that defense was asserted because *there was no objection at all*, not because there was an objection but an insufficient objection.

In short, there are no claims of error to which the motion in question would apply, and thus there are no claims of error for which reliance upon the motion could be challenged as ineffective. Since there are no such claims, appellant cannot show how his counsel's performance was deficient, nor can he demonstrate prejudice.

XX.

APPELLANT'S CUMULATIVE ERROR ARGUMENT HAS NO MERIT

Appellant argues that even if no single alleged error is sufficiently prejudicial to require reversal, the cumulative prejudice of the trial court's alleged errors requires reversal. (AOB 306-307.) Appellant is incorrect.

Appellant is entitled to a fair trial, but not a perfect one, even where he has been exposed to substantial penalties. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Cooper* (1991) 53 Cal.3d 771, 839; *People v. Marshall* (1990) 50 Cal.3d 907, 945; *People v. Hamilton* (1988) 46 Cal.3d 123, 156; see also *Schneble v. Florida* (1972) 405 U.S. 427, 432; see, e.g., *United States v. Hasting* (1983) 461 U.S. 499, 508-509 ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial."].)

When a defendant invokes the cumulative error doctrine, "the litmus test is whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) Therefore, any claim based on cumulative errors must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid.*) Applying that analysis to the instant case, appellant's contention is without merit. Notwithstanding appellant's arguments to the contrary, the record does not reveal the existence of any errors, let alone prejudicial error. Furthermore, to the extent any error arguably occurred, the effect was harmless. Review of the record, as discussed in detail in response to the other claims, shows that appellant received a fair and untainted trial, and it is not reasonably

probable that, absent the alleged errors, appellant would have received a more favorable result. Thus, appellant's claim should be rejected.

XXI.

THE DEATH PENALTY IS NOT IMPOSED IN AN ARBITRARY MANNER

Relying expressly on *Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530-532, appellant contends that the fact that each of the 58 district attorneys in California exercise their own discretion in determining whether to seek the death penalty means that capital punishment is imposed arbitrarily and capriciously. (AOB 308.) The argument lacks merit.

As an initial matter, it is settled that prosecutorial discretion to select from eligible cases those in which the death penalty will be sought does not, in and of itself, violate equal protection, due process, or cruel and unusual punishment. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1179; *People v. Williams* (1997) 16 Cal.4th 153, 278; *People v. Ray* (1996) 13 Cal.4th 313, 359.)

In *Bush*, the Supreme Court found a violation of equal protection in “a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.” (*Id.* at p. 532.) Procedural safeguards in the area of death penalty prosecutions have been developed over decades, and there is no credible claim here that the state ran afoul of them.

The notion that the uniformity required for a court-ordered recount of votes can somehow be applied to criminal prosecutions is wholly without support. In *Bush* the High Court cautioned that its “consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” (*Ibid.*) Accordingly, the Court distinguished the issue before it from “whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.” (*Ibid.*) An equal protection holding that is expressly limited to a

narrowly defined aspect of election law cannot reasonably be used to rewrite the well-developed law of equal protection in a wholly different area.

None of the opinions in *Bush*, a voting rights case, purport to suggest that prosecutorial discretion must be strictly circumscribed by a state in order to ensure uniform application of the death penalty laws. It is fundamental that a case is not authority for an issue neither raised, briefed, nor considered. (*People v. Wells* (1996) 12 Cal.4th 979, 984, fn. 4.) Rather, in *Bush*, the court majority carefully distinguished the election contest before it from the ordinary case in which a jury evaluates evidence at a criminal trial: “The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment.” (*Bush v. Gore, supra*, 531 U.S. at p. 106.) Here, the determination of whether to seek the death penalty in a given murder case is necessarily based on factors too numerous to list and quantify, and more reasonably has to be determined on the basis of factors oftentimes unique to the case being considered. Indeed, petitioner fails to suggest what uniform factors should be mandated to be considered in the determination of whether to seek death in a given case.

In sum, *Bush v. Gore* is completely inapposite to the case at hand. This Court has consistently upheld prosecutorial discretion in the determination of whether to seek the death penalty in a given case. Indeed, it is the jury that makes the ultimate penalty determination, and that determination is guided by California law as embodied in Penal Code section 190.3. Accordingly, this claim must also be rejected.

XXII.

THE DELAY IN APPOINTING APPELLATE COUNSEL DID NOT VIOLATE ANY OF APPELLANT'S RIGHTS

Appellant argues that the five and one-half year delay in the appointment of appellate counsel in this case violated his equal protection and due process rights. (AOB 311.) This Court has previously rejected this claim, and should do so again.

In support of this claim, appellant relies upon a variety of lower federal court decisions which in turn find a “speedy appeal” right by analogy to a criminal defendant’s right to a speedy trial under the Sixth Amendment (see *Barker v. Wingo* (1972) 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101), and hold that excessive delay in the criminal appellate process can give rise to a due process claim. (see AOB 312-313, fn. 73.) As this Court has recognized, on federal constitutional questions, the decisions of the United States Supreme Court control, while the decisions of lower federal courts may be “persuasive but not controlling.” (*People v. Camacho* (2000) 23 Cal.4th 824, 837.) Thus, appellant has failed to cite controlling authority in support of his claim. Indeed, as this Court has observed,

Neither this court, nor the United States Supreme Court, has extended the Sixth Amendment right to speedy trial to appeals in the manner suggested by defendant. Assuming, but not deciding, that such a right exists, defendant fails to demonstrate that the delay inherent in the procedures by which California recruits, screens, and appoints attorneys to represent capital defendants on appeal, is not necessary to ensure that competent representation is available for indigent capital appellants. Moreover, defendant fails to suggest any impact that the delay could have had on the validity of the judgment rendered before that delay occurred.

(*People v. Holt* (1997) 15 Cal.4th 619, 709; accord, *People v. Welch* (1999) 20 Cal.4th 701, 775-776.) Also, the federal decisions cited by appellant lose any persuasive impact they might otherwise possess since each and everyone of the

cases cited by appellant arose in a non-capital context and therefore did not address the “unique demand of appellate representation in capital cases” like this one. (See *Holt, supra*, 15 Cal.4th at p. 709.)

If one were to accept the proposition that a criminal appellant’s constitutional rights could be violated by an excessive delay in the processing of his or her direct appeal, the test articulated in the cited federal authorities for determining whether a given appellate delay rises to the level of a constitutional violation involves a transposition of the four-factor test – announced by the United States Supreme Court in *Barker v. Wingo, supra*, 407 U.S. 514 -- that is used in determining whether a defendant’s constitutional rights to a speedy trial have been violated. (*Coe v. Thurman* (9th Cir. 1991) 922 F.2d 528, 531; see *Barker v. Wingo, supra*, 407 U.S. at p. 532.)

The factors for consideration are: (1) the length of the delay; (2) the reason for the delay; (3) the petitioner’s assertion of his right to a timely appeal; and (4) prejudice to the petitioner. (*United States v. Mohawk* (9th Cir. 1994) 20 F.3d 1480, 1485; *United States v. Tucker* (9th Cir. 1993) 8 F.3d 673, 676; *Coe v. Thurman, supra*, 922 F.2d at p. 531.) Of these factors, “[t]he fourth inquiry is the most important: a due process violation cannot be established absent a showing of prejudice to the appellant.” (*Mohawk, supra*, 20 F.3d at p. 1485, quoting *Tucker, supra*, 8 F.3d at p. 676.) Even assuming *arguendo* that the first three factors militate in favor of appellant, the final and most significant factor does not. As this Court has indicated, the primary concern is that indigent capital defendants get competent appellate representation, and that takes time. (See *People v. Holt, supra*, 15 Cal.4th at p. 709.) In light of the fact that this Court has been exceedingly diligent in ensuring that all capital defendants get quality representation, and in light of the fact that the instant proceeding demonstrates that appellant is getting a fair hearing on his claims,

and in light of the fact that none of appellant's claims suffer from staleness, appellant cannot possibly demonstrate prejudice. Accordingly, this claim should be rejected.

XXIII.

THE DELAY INHERENT IN CAPITAL POST-CONVICTION LITIGATION DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

Appellant claims that his lengthy pre-execution delay constitutes cruel and unusual punishment in violation of the federal and state constitutions and also of international law. (AOB 320.) This Court has previously rejected this claim.

This Court rejected the notion that “psychological brutality” during a prolonged wait for execution violates the Eighth Amendment or certain decisions^{34/} from foreign jurisdictions. (*People v. Frye* (1998) 18 Cal.4th 894, 1030; see also *People v. Anderson, supra*, 25 Cal.4th at p. 606; *People v. Massie* (1998) 19 Cal.4th 550, 574; *People v. Hill* (1992) 3 Cal.4th 959, 1016.) This Court also noted that federal courts have rejected this claim:

The reasoning of the Ninth Circuit Court of Appeals in *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, and of the Fifth Circuit Court of Appeals in *White v. Johnson* (5th Cir. 1996) 79 F.3d 432, persuades us that prolonged confinement prior to execution does not constitute a violation of the Eighth Amendment. In *McKenzie v. Day, supra*, 57 F.3d 1461, the defendant sought a stay of execution on the ground that he would likely succeed on his claim that over 20 years on death row was cruel and unusual punishment. A majority of the three-judge panel concluded the claim was unlikely to succeed, and denied the stay request. (*Id.* at p. 1463.) The court determined that the cause for the delay in executing the defendant was due to the defendant's having "availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances." (*Id.* at p. 1467.) In the court's view, the delay was thus "a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and

34. This Court specifically noted and rejected one of the same supporting authorities cited by appellant (see AOB 325), i.e., *Pratt v. A-G for Jamaica* (1993 P.C.) 4 Eng.Rep. 769 [in bank]. (*People v. Frye, supra*, 18 Cal.4th at p. 1030.)

sentences." (*Ibid.*) As the court observed, a defendant sentenced to death need not have excessive review prior to execution, but the Constitution requires certain procedural safeguards before execution to prevent arbitrary or erroneous executions. In the court's view, the delays caused by satisfying the Eighth Amendment cannot violate it. (*Id.* at p. 1467.)

The Fifth Circuit applied similar reasoning in *White v. Johnson*, *supra*, 79 F.3d 432, to reject the defendant's claim that inordinate delay in carrying out an execution is cruel and unusual punishment under the Eighth Amendment. Recognizing a tension between the state's interest in deterrence and swift execution and its interest in ensuring that those who are executed receive fair trials with constitutionally mandated safeguards, the court found compelling reasons for the length of time between conviction and execution. (*Id.* at p. 439.)

(*People v. Frye*, *supra*, 18 Cal.4th at pp. 1030-1031.) Indeed, this Court noted the virtual impossibility in finding pre-execution delay cruel and unusual, since the delay will result in either reduction of the sentence or a fortunate temporary extension of life:

Indeed, the inherent-delay argument is untenable in a capital case, like this one, in which the judgment as to the defendant's guilt and death-eligibility, i.e., a statutory special circumstance, are affirmed on appeal. Such a defendant faces only two possible outcomes as to penalty-death or life in prison without parole. If the death sentence is set aside, there is no conceivable basis on which to claim that a delay - no matter how lengthy - resulted in prejudice to the defendant. "By common understanding imprisonment for life is a less penalty than death." (*Biddle v. Perovich* (1927) 274 U.S. 480, 487 [71 L.Ed. 1161, 1164, 47 S.Ct. 664, 52 A.L.R. 832].) Conversely, if the death sentence is affirmed, the delay - again, no matter how long - benefitted defendant rather than prejudiced him because the delay prolonged his life.

(*People v. Hill*, *supra*, 3 Cal.4th at pp. 1015-1016.) It would certainly strain reason to find that time allotted to a defendant to pursue ultimately meritless claims resulted in a constitutional violation.

As the court in *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, aptly observed,

'It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into

a substantive claim to the very relief that had been sought and properly denied in the first place.’ (*Id.* at p. 1466, quoting *Richmond v. Lewis* (9th Cir. 1990) 948 F.2d 1473, 1491-1492, revd. on other grounds, *Richmond v. Lewis* (1992) 506 U.S. 40 [113 S.Ct. 528, 121 L.Ed.2d 411], vacated, 986 F.2d 1583 (9th Cir. 1993), adopted in bank in *McKenzie v. Day, supra*, 57 F.3d at p. 1494.)

(*People v. Frye, supra*, 18 Cal.4th at p. 1031.)

Appellant’s claim is meritless and should be rejected.

XXIV.

CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

In his final argument, appellant makes a number of constitutional challenges to California's death penalty statute, which he concedes have all previously been rejected by this Court. (AOB 328.) They will be dealt with in the order presented in the opening brief.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant argues Penal Code section 190.2 is overly broad and fails to adequately narrow the class of murders eligible for the death penalty. (AOB 329-330.) He is mistaken. This Court has repeatedly rejected appellant's claim and should do so again. (*People v. Wader* (1993) 5 Cal.4th 610, 669; *People v. Stanley*, *supra*, 10 Cal.4th at pp. 842-843; *People v. Frye*, *supra*, 18 Cal.4th at pp. 1028-1029; *People v. Box*, *supra*, 23 Cal.4th at p. 1217.)

Defendant acknowledges we have previously held that the "special circumstances" provisions of our capital sentencing scheme sufficiently narrow the class of death-eligible murderers. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 465-468) But he argues, in light of the broad interpretation of the lying-in-wait special circumstance and the expansive sweep of the felony-murder special circumstance, virtually all first degree murderers are death eligible, and thus the special circumstances perform no narrowing function at all. [¶] Defendant's argument notwithstanding, the special circumstances "are not overinclusive by their number or terms." (*Arias*, *supra*, 13 Cal.4th at p. 187) Nor have they been construed in an overly expansive manner. (*Ibid*; see also *People v. Morales* (1989) 48 Cal.3d 527, 557-558 [lying-in-wait]; *People v. Marshall* (1990) 50 Cal.3d 907, 946 [felony murder]; *People v. Anderson*[,] [*supra*,] 43 Cal.3d [at p.] 1147 [felony murder].) Defendant's statistics do not persuade us to reconsider the validity of these decisions.

(*People v. Frye*, *supra*, 18 Cal.4th at p. 1029.)

B. Penal Code Section 190.3, Subdivision (a) Does Not Result In Arbitrary Imposition Of The Death Penalty

Appellant argues that Penal Code section 190.3, subdivision (a), the “circumstances of the crime” factor, permits arbitrary and capricious imposition of the death penalty, because various circumstances have at times been argued by prosecutors to militate in favor of death. (AOB 333-340.)

This Court has already considered and rejected this claim in *People v. Jenkins* (2000) 22 Cal.4th 900, 1051-1053. (See also *Tuilaepa v. California* (1994) 512 U.S. 967, 976; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137-1138.)

C. California’s Death Penalty Statute Is Constitutional Even Though It May Not Contain Procedural Safeguards Employed By Other States

Appellant argues that the absence of procedural safeguards “common to other death penalty sentencing schemes” renders this state’s law unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 340-341.) This Court has held otherwise. (E.g., *People v. Lawley* (2002) 27 Cal.4th 102, 169; *People v. Sully* (1991) 53 Cal.3d 1195, 1251-1252.)

1. There Is No Requirement That The Jury Find That Aggravating Factors Outweighed Mitigating Factors Beyond A Reasonable Doubt

Appellant contends that California’s death penalty statute is unconstitutional because it does not require the jury to find beyond a reasonable doubt: (1) the factors it relied upon to impose a death sentence; (2) that aggravating factors outweigh mitigating factors; and (3) that death is the appropriate sentence. (AOB 341.) Appellant’s claim is without merit, as this Court has held

there is no constitutional requirement that aggravating factors be proven beyond a reasonable doubt, that aggravating factors be proven to

outweigh mitigating factors beyond a reasonable doubt, or that the jury find that death is the appropriate punishment beyond a reasonable doubt.

(*People v. Sapp* (2003) 31 Cal.4th 240, 316-317, citing *People v. Bolden* (2002) 29 Cal.4th 515, 566; *People v. Barnett, supra*, 17 Cal.4th at p. 1178; *People v. Bradford* (1997) 14 Cal.4th 1005, 1059; accord, *People v. Mickey, supra*, 54 Cal.3d at p. 701.)

Appellant argues, however, that this Court's decisions are invalid in light of *Ring v. Arizona* (2002) 536 U.S. 584 and *Apprendi v. New Jersey* (2000) 530 U.S. 466. (AOB 343-351.) This Court has considered and rejected appellant's argument by finding that neither *Ring* nor *Apprendi* affect California's death penalty law. (*People v. Prieto* (2003) 30 Cal.4th 226, 262-263, 271-272; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; see *People v. Smith, supra*, 30 Cal.4th at p. 642.) This Court has also repeatedly held that California's capital sentencing scheme is constitutional despite the fact that it does not require jurors to agree unanimously on the presence of particular aggravating factors, or that particular factors outweigh mitigating factors. (*People v. Boyette* (2002) 29 Cal.4th 381, 466; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1150-1151; *People v. Bolin* (1998) 18 Cal.4th 297, 335-336; *People v. Medina* (1995) 11 Cal.4th 694, 782; *People v. Pride, supra*, 3 Cal.4th at p. 268; *People v. Hardy, supra*, 2 Cal.4th at p. 214; *People v. Taylor* (1990) 52 Cal.3d 719, 749.)

2. No Burden Of Proof Is Required

Appellant argues that California's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it does not require that, before rendering a verdict of death, jurors must find the presence of one or more specific aggravating factors beyond a reasonable doubt, that those specific factors outweigh the mitigating factors beyond a reasonable doubt, and that death is the appropriate penalty beyond a

reasonable doubt. (AOB 356.) In the alternative, appellant argues that even if the beyond a reasonable doubt standard of proof is not constitutionally required, the trial court is required to instruct the jury on some burden of proof or persuasion such as proof by a preponderance of the evidence. (AOB 361.) Finally, appellant argues that even if it is proper for the trial court to refrain from specifying any burden of proof or persuasion, it still prejudicially errs by failing to articulate to the jury that there is no such burden. (AOB 364.) Respondent disagrees with all of appellant's claims.

As set forth in the preceding arguments, this Court has repeatedly upheld the constitutionality of California's capital sentencing scheme despite the fact that it does not require jurors to find the presence of one or more specific aggravating factors beyond a reasonable doubt, that those specific factors outweigh the mitigating factors beyond a reasonable doubt, or that death is the appropriate penalty beyond a reasonable doubt. (*People v. Burgener* (2003) 29 Cal.4th 833, 884; *People v. Boyette, supra*, 29 Cal.4th at p. 466; *People v. Hillhouse* (2002) 27 Cal.4th 469, 510; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79; *People v. Berryman, supra*, 6 Cal.4th at pp. 1101-1102, *overruled on other grounds in People v. Hill, supra*, 17 Cal.4th 800; *People v. Alcalá* (1992) 4 Cal.4th 742, 809; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779; *People v. Pride, supra*, 3 Cal.4th at p. 268; *People v. Hardy, supra*, 2 Cal.4th at p. 214; *People v. Taylor, supra*, 52 Cal.3d at pp. 748-749.)

This Court has also rejected appellant's alternative contention the trial courts are at least required to instruct the jury on some burden of proof or persuasion such as proof by a preponderance of the evidence. (*People v. Hayes supra*, 52 Cal.3d at p. 643; *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.) The sentencing function in capital cases is inherently moral and normative, not factual. Because of this, instructions associated with the usual fact-finding process are not necessary. (*Ibid.*)

This Court has also rejected appellant's contention that there should be a "tie-breaker rule." (AOB 363.) The absence of such a rule does not violate the constitution. (*People v. Arias, supra*, 13 Cal.4th at p. 190; see also *People v. Kipp, supra*, 26 Cal.4th at p. 1137, and *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064 [no requirement to instruct the jury that there is a presumption of life].)

Appellant's contention that even if it is proper for the trial court to refrain from specifying any burden of proof or persuasion, it still prejudicially errs by failing to articulate to the jury that there is no such burden, is also without merit. The trial court in the instant case gave the core penalty phase instruction (CALJIC No. 8.88) which directed the jury to "weigh" the applicable factors in aggravation and mitigation, and determine the "appropriate" penalty under the totality of the circumstances. That instruction specifically told the jury that in order to return a judgment of death, each juror had to be persuaded that the aggravating circumstances were "so substantial" in comparison with the mitigating circumstances that death instead of life without parole was warranted. (CT 935-936.)

As stated by this Court in *People v. Millwee* (1998) 18 Cal.4th 96, 162-163, that instruction adequately describes "when the balance of factors warrants the more serious penalty." The words "so substantial" clearly convey "the importance of the jury's decision and emphasize that a high degree of certainty is required for a death verdict." (*People v. Jackson, supra*, 13 Cal.4th at pp. 1242-1244.) Nothing more is required.

3. There Is No Requirement Of Written Jury Findings

Appellant argues there can be no meaningful appellate review because juries are not required to make written findings regarding the aggravating factors. (AOB 365.) This Court has previously found the absence of such written findings and jury unanimity does not violate the constitution. (*People*

v. Gutierrez, supra, 28 Cal.4th at p. 1151; *People v. Koontz* (2002) 27 Cal.4th 1041, 1095; *People v. Hillhouse, supra*, 27 Cal.4th at p. 507.) By this very appeal, appellant is receiving meaningful appellate review of the death verdict.

4. There Is No Constitutional Requirement For Inter-Case Proportionality Review

Appellant claims a violation of his rights to be free from arbitrary and/or unreviewable proceedings resulting in a death sentence and to due process, a fair jury trial, and reliable penalty determination by the failure to require inter-case proportionality review. (AOB 369.) There is no constitutional requirement for inter-case proportionality review. (*People v. Gurule, supra*, 28 Cal.4th at p. 663; *People v. Michaels* (2002) 28 Cal.4th 486, 541; *People v. Koontz, supra*, 27 Cal.4th at p. 1095; *People v. Hillhouse, supra*, 27 Cal.4th at p. 511.)

5. There Is No Requirement To Instruct That Some Factors Are Solely Mitigating

Appellant claims that the trial court committed constitutional error by failing to instruct the jury that statutory mitigating factors were relevant solely as potential mitigators. (AOB 373.) Similar claims have been repeatedly rejected by this Court. (*People v. Catlin* (2001) 26 Cal.4th 81, 178 [“The trial court need not instruct the jury as to which factors under section 190.3 are aggravating and which are mitigating.”]; *People v. Cunningham* (2001) 25 Cal.4th 926, 1041 [noting previous rejection of such claims]; *People v. Ochoa, supra*, 19 Cal.4th 353, 458.) Thus, appellant’s claim is meritless.

D. California’s Death Penalty Statute Does Not Violate Equal Protection

Appellant claims that California’s death penalty statute violates his equal protection rights because it provides fewer procedural safeguards for persons facing a death sentence than are afforded to those charged with non-capital

in any humane society, that claim was specifically rejected by the United States Supreme Court in *Gregg v. Georgia* (1976) 428 U.S. 153, 168-187, and should be rejected here as well.

Dated: December 29, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 39847 words.

Dated: December 29, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

MICHAEL DOLIDA
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Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Sean Venyette Vines**

No.: **S065720**

I declare:

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

On December 29, 2005, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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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 29, 2005, at Sacramento, California.

Declarant