IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CHRISTOPHER CHARLES LIGHTSEY,

Defendant and Appellant.

S048440

CAPITAL CASE

Kern County Superior Court No. 56801A
The Honorable John I. Kelly, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On October 21, 1993, the Kern County District Attorney's Office filed complaint number 68274 in the Kern County Municipal Court, charging appellant Christopher Charles Lightsey in count 1 with the murder of William Compton (Pen. Code, § 187, subd. (a))[1/], in count two with robbery (§ 212.5, subd. (a)), and in count three with burglary (§ 460, subd. (a)). As to the murder, two special circumstances were alleged: (1) appellant committed the murder during the commission or attempted commission of a robbery (§ 190.2, subd. (a)(17)(i)[2/]); and (2) appellant committed the murder during the commission or attempted commission of a burglary (§ 190.2, subd. (a)(17)(vii)[3/]). (II CT 463-465.)

On November 30, 1993, appellant appeared for arraignment on the complaint, and Stanley Simrin was appointed to represent appellant. (1 SCT 4; RT [11/30/93] 3.) Appellant pled not guilty and denied the special

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1. Unless otherwise indicated, all further section references are to the Penal Code.

2. Now section 190.2, subd. (a)(17)(A).

3. Now section 190.2, subd. (a)(17)(G).

allegations. (1 SCT 4; RT [11/30/93] 3-4.)

On January 20, 21, and 24, 1994, the preliminary hearing was held, and appellant was held to answer in superior court, case number 56801. (RT [1/20-21/94]; RT [1/24/94] 47-48.)

On January 24, 1994, appellant made a motion to represent himself under *Faretta v. California* (1975) 422 U.S. 806 and to retain defense counsel Simrin as cocounsel. (RT [1/24/94] 3-4, 6.) After a hearing, the court denied appellant's motions. (RT [1/24/94] 13-14.)

On February 4, 1994, amended information number 56801A was filed in the Kern County Superior Court, charging appellant in count 1 with the murder of William Compton (§ 187, subd. (a)), in count two with robbery (§ 212.5, subd. (a)), in count three with burglary (§ 460, subd. (a)), and in count four with possession of a firearm by a felon (§ 12021.1, subd. (a)). As to the murder, three special circumstances were alleged: (1) appellant committed the murder during the commission or attempted commission of a robbery (§ 190.2, subd. (a)(17)(i)); (2) appellant committed the murder during the commission or attempted commission of a burglary (§ 190.2, subd. (a)(17)(vii)); and (3) the murder was intentional and involved the infliction of torture (§ 190.2, subd. (a)(18)). As to counts one, two, and three, it was alleged that appellant personally used a sharp instrument during the commission of the offenses (§ 12022, subd. (b)) and that appellant was released on bail when he committed the offenses (§ 12022.1). As to all counts, it was alleged that appellant served three prior prison terms (§ 667.5, subd. (b)). (III CT 649-658.)

On February 7, 1994, appellant was partially arraigned but refused to waive time for trial, and defense counsel Simrin declared a conflict because he was unable to prepare for trial within the statutory period. (RT [2/7/94] 2.) Upon the court's motion, defense counsel Simrin was relieved; and appellant's arraignment was continued so the court could contact defense counsel who

would be willing to proceed to trial within the statutory period. (III CT 681; RT [2/7/94] 3.)

On February 8, 1994, the court appointed Donnalee Huffman to represent appellant. (III CT 682; RT [2/8/94] 2.) That same day, appellant pled not guilty to and denied the allegations of the information. (III CT 682-683; RT [2/8/94] 2-3.)

On February 22, 1994, appellant refused to waive time for trial, the court granted defense counsel Huffman's motion to withdraw, and attorney Edward Brown was appointed to represent appellant. (III CT 694; RT [2/22/94] 2-5.)

On March 3, 1994, defense counsel Brown filed a motion to suspend the criminal proceedings and to determine appellant's mental competence (§ 1368, subds. (b) & (c)). (III CT 711.) On March 7, 1994, Judge Lee Felice granted defense counsel Brown's motions and appointed Dr. Richard E. Burdick, a psychiatrist, to examine appellant. (III CT 712, 791.)

On March 28, 1994, pursuant to defense counsel Brown's motion, Judge Richard J. Oberholzer appointed James Sorena as cocounsel. (III CT 763; Unsealed Ex Parte Motion RT [3/28/94] 3.) Later that morning, based on Dr. Burdick's report, Judge Felice found appellant presently competent to stand trial and reinstated criminal proceedings. (III CT 766; RT [3/28/94] 2.) Appellant then filed motions to disqualify Judge Felice (Code Civ. Proc., § 170.6) and to substitute defense counsel Brown. (III CT 757-762, 766; RT [3/28/94] 3-4].) Judge Oberholzer held a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 and denied appellant's motion to substitute defense counsel Brown. (RT [3/28/94] 2; III CT 764, 768.)

On April 7, 1994, appellant, defense counsels Brown and Sorena appeared before Judge James Stuart for a hearing on appellant's "Motion For Defendant's Self-representation." (RT [4/7/94] 2.) Because his cousin was a potential witness in the case, Judge Stuart disqualified himself, and the case

was reassigned to Judge John Kelly. (III CT 816; RT [4/7/94] 17.) After a *Marsden* hearing held on April 7, 1994, Judge Kelly denied the motion. (III CT 817-818; RT [4/7-8/94] 12, 49; Unsealed *Marsden* Motion RT [4/7/94].) On April 8, 1994, the judge denied defense counsel's request for further psychiatric evaluation of appellant. (RT [4/8/94] 85.)

After a hearing on April 11, 1994, Judge Kelly granted appellant's *Faretta* motion and relieved defense counsels Brown and Sorena from representing appellant. (III CT 819; RT [4/11/94] 159-160.)

On April 13, 1994, the court appointed Ralph McKnight as advisory counsel to appellant, acting in propria persona. (III CT 828; RT [4/13/94] 169.)

On July 7, 1994, the court held a hearing on the motion of advisory counsel McKnight, not joined by appellant, to terminate appellant's pro se status and to appoint counsel to represent appellant. (RT [7/7/94] 2.) The court suspended criminal proceedings pending a competency evaluation of appellant under section 1368 and appointed Dr. Luis Velosa, a psychiatrist, to evaluate appellant. (IV CT 951-952, 972-973; RT [7/7/94] 32-34, 38, 48, 53; see RT [7/11/94] 58.)

On July 8, 1994, the Court of Appeal, Fifth Appellate District, denied appellant's petition for writ of mandate/prohibition (case number F021825). (IV CT 979.)

On July 11, 1994, the parties appeared in court; but the court was unable to contact Dr. Lynne Hall. (IV CT 977.)

On July 12, 1994, pursuant to appellant's request, the court contacted the office of Dr. Sakrepatna Manohara, a psychiatrist, regarding a second competency evaluation of appellant under section 1368. (IV CT 980, 988; RT [7/12/94] 86, 95.) On July 13, 1994, the court advised appellant that Dr. Manoharo had agreed to examine him. (IV CT 995, 1055-1056.)

On July 28, 1994, the court reviewed Dr. Manohara's competency evaluation finding appellant competent to stand trial but not competent to represent himself and Dr. Velosa's competency evaluation finding appellant able to understand the nature and purpose of the proceedings but unable to cooperate in a rational manner with counsel in presenting a defense and not competent to represent himself. (IV CT 1074-1082; RT [7/28/94] 100-104.) Pursuant to the mental evaluations and appellant's assertions that he was competent to stand trial, the trial court found appellant competent to stand trial and lifted the stay of the criminal proceedings. (IV CT 1024, 1082-1083; RT [7/28/94] 104-109.)

On the same day, the court granted appellant's motion to substitute advisory counsel McKnight and appointed Michael Sprague as advisory counsel for appellant. (IV CT 1024, 1101-1102; RT [7/28/94] 127-128.)

On August 2, 1994, advisory counsel Sprague was relieved due to a conflict. (IV CT 1110; RT [8/2/94] 135.) That same day, after a hearing, the court held appellant competent to represent himself, granted appellant's *Faretta* motion, and appointed James Gillis as appellant's advisory counsel. (IV CT 1110-1111; RT [8/2/94] 281.)

On September 12, 1994, advisory counsel Gillis filed a motion to terminate appellant's pro se status and to appoint counsel to represent appellant. (IV CT 1129.) At the hearing on the motions on September 27, 1994, appellant expressly waived his right to self-representation and requested the court to appoint attorney William Dougherty to represent him. (RT [9/27/94] 7-9, 13-14, 26-27.) The court set aside its previous order granting appellant's motion for self-representation and appointed attorney Dougherty as counsel and attorney Gillis as cocounsel. (IV CT 1113; RT [9/27/94] 27-29.)

On January 17, 1995, after a hearing, the court denied appellant's motion to strike and/or correct the preliminary hearing transcripts. (VI CT

1603; RT [1/17/95] 35-36.)

On March 22 and 23, and April 4 and 5, 1995, the court held a hearing on appellant's motion to dismiss the information under section 995 on the ground of multiple hearsay at appellant's preliminary hearing. (VI CT 1689-1690; RT [3/22/95].) On April 7, 1995, the court denied the motion. (RT [4/7/95] 425-427.)

On March 23 and April 4 and 5, 1995, the court held a hearing on appellant's motions to quash and traverse the search warrants and to suppress the evidence seized pursuant to the search warrants under section 1538.5. (VI CT 1691.) On April 5, 1995, the court found appellant had no standing and denied the motions. (VI CT 1718-1719, 1722; see RT [4/7/95] 425.)

On April 7, 1995, the court denied the People's motion for in-camera review and discovery of appellant's psychiatric records. (VI CT 1722; RT [4/7/95] 424.) On the same day, the court denied appellant's section 995 motion and found sufficient cause to hold appellant to answer. (VI CT 1722; RT [4/7/95] 426-427.)

On April 12, 1995, after a hearing, the court denied appellant's *Marsden* motion to replace defense counsels Dougherty and Gillis and defense investigator Parker. (VI CT 1736; Unsealed Marsden Motion RT [4/12/95] 499-500.)

On April 24, 1995, the information was amended, deleting two of the prior prison term allegations of counts one through four, and filed. (III CT 822-826; VII CT 1880; 1 RT 33.) Appellant pled not guilty and denied the special allegations. (1 RT 33-34.) The court denied appellant's motion to sever count 4 (possession of a firearm by a felon; § 12021.1, subd. (a)). (VII CT 1881; 1 RT 93.)

On April 25, 1995, as to count 4, appellant withdrew his not guilty plea, pled nolo contendere, and admitted the prior prison term allegation. (VII CT 1883; 1 RT 167-169.)

On May 15, 1995, the Court of Appeal, Fifth Appellate District, denied appellant's petition for writ of prohibition (case number F023735). (III CT 861.)

On May 18, 1995, a jury was impaneled to try the case. (VII CT 1974; 14 RT 3201, 3203.)

On June 14, 1995, the court denied appellant's motion for entry of judgment of acquittal for insufficient evidence (§ 1118.1). (VII CT 2084; 26 RT 5695-5696.)

On June 15, 1995, appellant waived his constitutional right to testify. (VII CT 2085; 27 RT 5717-5719.)

On June 20, 1995, the jury found appellant guilty of first degree murder, robbery in an inhabited house, and first degree burglary. The jury also found true the special circumstance, personal deadly weapon use, and prior prison term allegations. (VIII CT 2203-2212, 2221-2222; 28 RT 6143-6144, 6150-6156, 6189-6191.) On the People's motion, the court struck the on-bail allegations. (VIII CT 2221; 28 RT 6167-6168.)

On June 26, 1995, the penalty phase commenced. (VIII CT 2241; 29 RT 6232.)

On June 28, 1995, after a hearing, the court denied appellant's *Marsden* motion. (Sealed *Marsden* Motion 31 RT 6628-6648; 31 RT 6649.)

On June 30, 1995, the court found appellant competent (§ 1368). (VIII CT 2333; 33 RT 6941-6944.) The court denied appellant's motion for a directed penalty verdict (§ 1118.1). (VIII CT 2333; 33 RT 6946.) On the same day, the jury returned the death penalty verdict. (VIII CT 2331-2332, 2334; 33 RT 6947-6949.)

On August 15, 1995, the court denied appellant's motion for a new trial. (VIII CT 2379; 34 RT 6978-6979.) The court then denied appellant's motion to modify the judgment under section 190.4. (VIII CT 2379; 34 RT 6985-6989.) On the same day, the court sentenced appellant to death for the

murder. (VIII CT 2380, 2415, 2417-2421, 2424-2428; 20 SCT 5947-5251; 34 RT 7019-7028.) For the robbery and burglary, the court imposed the upper term of six years each, plus one year each for the personal weapon use enhancement, the sentences stayed pursuant to section 654. (VIII CT 2380-2381, 2415, 2429; 34 RT 7021-7022.) For the possession of a firearm by a felon, the court imposed the upper term of three years, plus one year for the prior prison term, the sentence stayed pursuant to section 654. (VIII CT 2381, 2415-2416, 2429; 34 RT 7022.)

On March 1, 2000, the Supreme Court appointed the State Public Defender to represent appellant on appeal. (20 CT 5958.)

STATEMENT OF FACTS

William Compton owned and lived alone in a house at 428 Holtby Road in Bakersfield, California. (15 RT 3300, 3330, 3388, 3394; 16 RT 3513, 3573.) Compton was 76 years old, weighed 115 pounds, and was five feet, four inches tall. (19 RT 4222, 4249.) He had metastatic cancer of the abdomen, moderate to severe coronary artery disease, and emphysema. (19 RT 4249, 4251-4252.) He was a member of the National Rifle Association. (16 RT 3539-3540.) He owned a gun collection, a National Rifle Association belt buckle, his deceased father's Masonic ring, and video cameras. (15 RT 3409; 16 RT 3458-3460, 3462-3466, 3554-3555; 23 RT 4970-4976.) He usually ate at the Pantry Restaurant between 9:00 a.m. and 10:30 a.m. (16 RT 3611-3613.)

Between February and May 1993, Compton purchased a Winchester shotgun from gunsmith and licensed gun dealer David J. Wells. (23 RT 4867, 4870-4874, 4881, 4928-4929.) On April 21, 1993, Compton bought a Chinese SKS semiautomatic assault rifle with a bayonet and 1200 rounds of SKS ammunition from Wells. (23 RT 4884, 4887-4889, 4891, 4928, 4933-4934,

4895-4896.) On May 6, 1993, Compton telephoned Wells at his shop and ordered a target barrel for his Thompson Center black powder rifle. (23 RT 4939-4941.)

On May 15, 1993, Compton went to Wells's shop, dropped off some guns for Wells to clean, and picked up a Marlin rifle, which Wells had repaired. (23 RT 4867, 4873-4874, 4880-4881, 4883, 4889-4890, 4893, 4915, 4923-4926, 4941-4942.) One of the guns that Compton brought for Wells to clean was a Remington XP 100, which was in a case. (23 RT 4915, 4933.) Compton showed Wells a Charter Arm gun in a holster, which he carried in his truck. (23 RT 4927-4928.) Later that day, Wells delivered the SKS rifle and ammunition to Compton at his house. (23 RT 4888, 4890-4893, 4898-4899, 4913, 4915, 4934-4935.) The SKS rifle was in a box. (23 RT 4894, 4896.) In his bedroom, Compton showed Wells his gun collection, and they talked about guns for about two and one-half hours. (23 RT 4899, 4913, 4933.) They talked about a P-38 German gun, which was in a holster. (23 RT 4916-4917, 4923, 4945.) Compton described shooting a Remington 03-A3 rifle. (23 RT 4946.) Compton took an Ithaca 1911 .45, which was stamped "U.S. Army" and in a tan holster, out of the dresser drawer and showed it to Wells. (23 RT 4917-4919, 4922.) Compton took a Ruger rifle out of a case and showed it to Wells. (23 RT 4919-4922.) Compton retrieved a Remington Field Master rifle from under his bed and showed it to Wells. (23 RT 4922-4923.) Compton showed Wells a Thompson Center muzzle rifle, which was a reproduction of an antique rifle. (23 RT 4940-4941.) Compton had a large assortment of reloading equipment and gun paraphernalia. (23 RT 4933.) There was a briefcase next to Compton's bed. (23 RT 4934-4936.) Compton took bullets that he had made out of the briefcase. (23 RT 4935.) Compton showed Wells a Winchester repeating rifle similar to an old West rifle and a Winchester model 52 rifle that had a hole in the top and was not functional. (23 RT 4944.)

One weekend after May 15, 1993, Wells brought Compton brochures for Winchester and Ruger guns and ammunition. (23 RT 4901, 4914, 4942.) The Winchester brochure was stamped California Gun Speciality, one of Wells's wholesalers. (23 RT 4937-4938.)

Appellant's mother Rita Lightsey lived in a house at 115 Holtby Road. (17 RT 3830;22 RT 4736.) The house was about five-tenths of a mile or about three blocks from Compton's house at 428 Holtby Road. (20 RT 4377; 22 RT 4763.) In January 1992, appellant, then 38 years old, renewed his relationship with Beverley Westervelt and moved into her Bakersfield apartment. (20 RT 4297, 4311-4313, 4478, 4491; 22 RT 4736.) Appellant told Westervelt that he liked and was interested in guns. (20 RT 4370, 4474-4475.) He owned a pellet gun, a BB gun, two pistols, and ammunition for the pellet gun and pistols. (20 RT 4371, 4413.)

Approximately one month after appellant moved into Westervelt's apartment, appellant and Westervelt began looking for a house in southwest Bakersfield near the Holtby Road house of appellant's mother. (20 RT 4314, 4320-4324; 21 RT 4596.) During the summer of 1992, appellant told Westervelt that he had seen a house that he wanted her to look at with him. (20 RT 4324-4326, 4330.) About one week later, appellant took Westervelt and her children to look at a house at 515 Holtby Road. (20 RT 4326-4331, 4333-4335, 4339, 4382; 21 RT 4571, 4584, 4595.) They knocked on the front door of the house, and an elderly woman opened the door. (20 RT 4331, 4341.) Appellant asked the woman if she remembered him and if they could come into and look at the house. (20 RT 4331-4332.) The woman allowed them to enter the house. (20 RT 4331-4332, 4334-4335.) With the woman's permission, they walked through and looked around the house. (20 RT 4332-4333, 4336-4337.) Appellant repeatedly asked the woman if she was interested in selling the house. (20 RT 4337, 4339.) She adamantly stated that she was not interested in selling the house. (20 RT 4337, 4339.) She told

appellant that the owner of the house across the street at 428 Holtby Road might be interested in selling his house. (20 RT 4337-4340, 4343.)

In August or September 1992, at about 6:00 p.m., appellant drove Westervelt and her children to Compton's house at 428 Holtby Road and parked in the driveway in back of the house. (20 RT 4342, 4344-4346, 4369, 4382; 21 RT 4571, 4584, 4595, 4597-4598.) Appellant stated it would be okay if they went to the back door. (20 RT 4345, 4347.) They walked to the back door, and appellant knocked on the screen door. (20 RT 4345-4347, 4849.) Compton came to the door, and appellant asked if the house was for sale. (20 RT 4347-4350.) Compton stated that the house was not for sale. (20 RT 4350.) Appellant asked if they could look at the house anyway. (20 RT 4350.) Compton let them into the house, which was cluttered and being remodeled. (20 RT 4350-4351, 4355-4356, 4363.) They walked through the house. (20 RT 4351; 21 RT 4615.)

In Compton's bedroom, appellant saw a rifle with a wooden stock and mentioned it to Compton. (20 RT 4358, 4360-4362, 4364-4366, 4444; 21 RT 4599.) Appellant picked up and looked at the rifle. (20 RT 4367-4368.) Appellant and Compton talked about Compton's gun collection, and Compton showed him about three other rifles. (20 RT 4357, 4365-4366, 4369, 4381; 21 RT 4599.) For about 20 minutes, appellant and Compton discussed guns and the remodeling of Compton's house. (20 RT 4368-4369.) After being in the house for about 45 minutes, appellant, Westervelt, and her children left Compton's house. (20 RT 4369, 4374.) Westervelt told appellant that she liked Compton's house and that it had potential with some work. (20 RT 4374-4375.)

One night about one week later, appellant drove Westervelt back to Compton's house to look at the back yard. (20 RT 4375-4376, 4379.) Appellant drove up the driveway of the adjacent apartment building, and they looked over the fence at Compton's back yard. (20 RT 4375-4379.) Appellant

said it had a big back yard. (20 RT 4376.)

In September 1992, appellant purchased a house at 3001 Oak Tree Avenue in northeast Bakersfield; and in October 1992, he, Westervelt, and her children moved into the house. (20 RT 4237-4238, 4344, 4381, 4382-4386.) Appellant quit his job on April 7, 1993. (20 RT 4406.) Westervelt and her children moved out of appellant's Oak Tree Avenue house on April 10, 1993; and Westervelt did not have any contact with appellant until June 1993. (20 RT 4387, 4400, 4406-4407.)

On June 29, 1993, appellant was arrested and jailed. (20 RT 4428; 24 RT 5114-5115.) Pursuant to appellant's request, Westervelt arranged bail for appellant from a Lancaster bondsman. (20 RT 4426.) At about midnight on July 1, 1993, appellant's friend Karen Lehman obtained money from her brother Brian Ray to pay appellant's bail bond; and appellant was released on July 2, 1993. (19 RT 4070, 4086-4088, 4094-4095; 20 RT 4426, 4428; 24 RT 5161-5165.) Lehman introduced Brian Ray to appellant. (19 RT 4121.)

In July 1993, while living at the Oak Tree Avenue house, appellant asked his younger sister Janell Catron if he could borrow her video camera. (22 RT 4736, 4751.) She refused and never saw appellant in possession of a video camera. (22 RT 4752.)

On or shortly before July 4, 1993, Lehman spoke to appellant on the telephone and asked about his plans for July 4th. (19 RT 4089-4091, 4128.) Appellant stated that he was going to check on an old friend, who was 72 or 76 years old, because the man was sick. (19 RT 4091-4094, 4128-4129, 4152.) Appellant specifically mentioned going to an old man's house on Holtby, down the street from his mother. (19 RT 4129.)

In the meantime, in June 1993, Compton underwent cancer treatments. (15 RT 3404; 16 RT 3461; 23 RT 4983.) He was admitted to San Joaquin Hospital on June 20, 1993, and discharged on June 28, 1993. (23 RT 4866-4867, 4988.) During the afternoon of Thursday, July 1, 1993, he underwent

his first radiation treatment at the Bakersfield Community Radiation Center. (23 RT 4985-4987.) He returned to the center and underwent additional radiation treatments the next day Friday, July 2, 1993, and the following Tuesday, July 6, 1993. (23 RT 4988-4990, 4993.) Compton's fourth radiation treatment was scheduled for the next day, Wednesday, July 7, 1993, at 11:30 a.m. (23 RT 4991, 4993.) Compton did not cancel and did not appear at the appointment. (23 RT 4991, 4993-4994.)

On July 7, 1993, appellant's attorney Dominic Eyherabide was scheduled to represent appellant on a case on the 8:30 a.m. criminal calendar of Judge McGillivray in Department 10, Kern County Superior Court. (23 RT 5022, 5027.) Before the first case was called and the judge took the bench, appellant and an older lady with gray or white hair, walked into the court room. (23 RT 5036-5039, 5045, 5056.) Appellant wore a black or gray blue, silky-type shirt. (23 RT 5037-5038, 5045, 5066.) Judge McGillivray thereafter called appellant's case. (23 RT 5022, 5025-5026.) The bailiff announced on the record, "Mr. Eyherabide is in trial right now. He said he would be down at his break, at about 10:45." (23 RT 5025, 5036, 5063.) Eyherabide was not in the court room. (23 RT 5027.) Judge McGillivray excused the prosecutor John Somers until 10:30 a.m. (23 RT 5026, 5030, 5064.) After the morning recess, Judge McGillivray called appellant's case a second time. (23 RT 5030-5031, 5057-5058.) Eyherabide was present in the court room and stated that his client was outside, that he was probably down in the coffee shop. (23 RT 5031-5033, 5036, 5057-5058.) Judge McGillivray told Eyherabide to get appellant. (23 RT 5034.) Judge McGillivray called appellant's case a third time. (23 RT 5035.) Both Eyherabide and appellant were in the courtroom. (23 RT 5035-5036, 5039-5040, 5046.) Appellant wore a white pullover sweatshirt, which had two stripes around the mock turtleneck collar and either full or three-quarter length sleeves. (23 RT 5046-5050.) Appellant's mother was not with him. (23 RT 5050.) During the

proceedings, Eyherabide advised the court that he would be unavailable at 1:30 p.m. that day. (23 RT 5041.)

At about 7:45 a.m. that morning, Compton's neighbor Elva Cantu saw, waved at, and said good morning to Compton, who was standing by his truck in his backyard. (15 RT 3297-3298, 3300, 3303-3304, 3307-3309, 3318-3320.) Compton said good morning to Cantu. (15 RT 3309, 3319.) He wore a beige shirt, khaki pants, and a hat. (15 RT 3310, 3372, 3376.) Compton's friend George Miller telephoned Compton's house at 8:01 a.m.; but Compton did not answer the telephone. (15 RT 3399-3400, 3428, 3435, 3443, 3445, 3447-3448.) At about 8:49 a.m., Compton's friend Jerry Johnson telephoned Compton's house; but Compton did not answer the telephone. (16 RT 3497-3499.) At about 9:30 a.m., Compton's other neighbor Alice Toole saw a man, who Toole believed was Compton and who was wearing khaki pants, walk behind Compton's motor home, which was parked in his driveway in front of his house. (15 RT 3385, 3388-3395, 3397.) Miller telephoned Compton's house a second time at 11:05 a.m.; but Compton did not answer the telephone. (15 RT 3428, 3443, 3445, 3448.) When Cantu returned home at about 11:30 a.m., Compton's truck was parked in the same location Cantu had seen it earlier that morning. (15 RT 3311, 3313, 3320, 3322-3323, 3371-3372, 3376.) Miller telephoned Compton's house a third time at 1:35 p.m. (15 RT 3428, 3443, 3446, 3448, 3451.) Miller telephoned the radiation treatment center, who advised that Compton did not show up for his 11:30 a.m. appointment. (15 RT 3429, 3449-3450.)

At about 1:45 p.m., Miller, his wife Kathleen, and Johnson arrived at Compton's house to check on Compton. (15 RT 3411-3412, 3428-3429, 3451; 16 RT 3454, 3500-3501.) There was no response to their knocks on the doors, which were locked. (15 RT 3332-3333, 3412-3413; 16 RT 3455, 3501.) The doors of Compton's pickup truck, which was parked in back of Compton's house, were locked. (15 RT 3345, 17 RT 3676-3677; 18 RT 3991.) One of

the bedroom windows was open about six inches at the top. (15 RT 3413-3414, 3416; 16 RT 3504.) Kathleen looked through the window and saw Compton's body lying on the floor between the bathroom and bedroom. (15 RT 3414-3415, 3419-3421, 3424; 16 RT 3455-3456, 3504-3505.) He appeared to be dead, and blood was coming out of his mouth. (15 RT 3415, 3425; 16 RT 3505.) The bedroom was in disarray with books scattered about the room. (15 RT 3421-3422, 3425.) There were papers scattered on the floor. (15 RT 3423.) At about 1:45 p.m., Kathleen telephoned 911. (15 RT 3416-3417; 16 RT 3456, 3505.)

At 2:07 p.m., firemen arrived at Compton's house. (15 RT 3314-3315, 3330-3331, 3395; 16 RT 3505.) At about 2:12, they pried open Compton's bedroom window and entered the house. (15 RT 3332-3337, 3341, 3358, 3362-3363; 16 RT 3505-3506; 17 RT 3680.) It was very hot inside the house. (15 RT 3338, 3344; 17 RT 3685-3686; 18 RT 3920.)

The firemen found Compton's body faceup on the floor between the bedroom and bathroom. (15 RT 3335, 3337, 3350-3351, 3359; 16 RT 3645, 3649; 17 RT 3682, 3698.) Compton's body was in full rigor mortis. (15 RT 3337-3338, 3341, 3343, 3353.) There were multiple wounds on Compton's torso. (15 RT 3338, 3342, 3355, 3357.) Compton's body was clothed only in brief style underwear. (16 RT 3632, 3645; 17 RT 3683-3684, 3698, 3701, 3708; 18 RT 3877-3878.) There was a pair of clean folded underwear next to the bathroom sink. (19 RT 4198.) A pair of pants, which contained Compton's wallet, was hanging on the towel bar. (19 RT 4198.) There was no evidence that anybody had recently bathed or showered. (19 RT 4198.) There was no sign of a forced or an attempted forced entry into the house. (16 RT 3658, 3665-3666; 18 RT 3879-3881, 3896-3901, 3930, 3946-3947, 3949-3950, 3982, 4044-4045.) Not knowing the cause of Compton's death, the police did not seize any evidence and sealed the house. (16 RT 3657-3659, 3667; 17 RT 3672-3673, 3687.)

On July 8, 1993, Compton's sister-in-law Margaret Compton and her son Anthony obtained the keys to Compton's house from the coroner's office and went to the house. (16 RT 3508-3509, 3516, 3519, 3546, 3563, 3567; 19 RT 4185-4186.) From the kitchen table, Margaret removed a notebook[4/] containing a list of gun serial numbers. (16 RT 3521-3522, 3534.) Anthony searched for Compton's gun collection and found a nonworking Winchester 1890 rifle, a Hawkins 50 caliber muzzle loader, a nonworking .22 caliber Colt diamond back long rifle, a .22 caliber revolver, and a .44 caliber Winchester, all of which he took from the house. (16 RT 3524-3530, 3568, 3572, 3580-3586, 3593; 18 RT 3903-3904; 26 RT 5666-5667.)

On or about July 8, 1993, Karen Lehman went to appellant's house, and appellant asked if he could store some things in the trunk of her car. (19 RT 4096-4099, 4101-4102.) She agreed, and after telling her that she did not need to help him, he put some items in her car trunk. (19 RT 4097-4098, 4102.) He asked Lehman to store her car at her vacant house across town on Wilson Road. (19 RT 4065, 4102-4103.) She agreed and parked her car in the garage at the Wilson Road house. (19 RT 4102-4103.) Using his own lock, appellant locked the garage door. (19 RT 4104.)

Sometime between a couple days and a week later, Lehman told appellant that she needed her car. (19 RT 4105-4106.) Appellant drove her to the Wilson Road house; and she drove her car, followed by appellant in his car, to his house. (19 RT 4106-4107.) He removed the items from the trunk of her car and placed them in his bedroom. (19 RT 4107-4108.) Appellant thereafter telephoned Lehman and asked her to come to his house. (19 RT 4108-4109.) Appellant had been drinking and was belligerent. (19 RT 4109-4110, 4130.) He showed her about 20 guns and boxes of ammunition, which

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4. On September 9, 1993, Detective Boggs received Compton's notebook from Margaret. (16 RT 3523, 3537; 17 RT 3700, 3757-3758, 3844; 18 RT 3873.)

were all around his bedroom. (19 RT 4079, 4108-4112.) There were handguns and rifles leaning against the walls and on the bed. (19 RT 4109-4110.) He stated that he collected guns, he got some guns from his father when he passed away, and he got some guns out of the newspaper. (19 RT 4111-4112.) Later that day, appellant was drunk, choked her with his arm around her neck, and whispered in her ear that if she "pointed the guns toward him that [she] would wake up with a shank in [her] neck." (19 RT 4113-4115, 4130, 4152.) Appellant further stated that he did not have to be there to do it. (19 RT 4115.)

An autopsy of Compton's body was conducted on July 9, 1993, at 1:30 p.m. (17 RT 3731; 19 RT 4218-4220.) The cause of Compton's death was cardiorespiratory arrest due to exsanguination or bleeding to death resulting from 43 stab wounds; the manner of death was homicide. (17 RT 3734-3735; 19 RT 4252-4253.) The stab wounds were not visible before Compton's body was cleaned. (17 RT 3735.) The stab wounds were in three clusters on the front of Compton's neck and upper chest, face, and abdomen. (19 RT 4223-4224, 4231, 4243.) There were 21 stab wounds on Compton's neck, some extending to the back of the mouth, and upper chest, some extending to the heart. (19 RT 4232-4233, 4236-4237.) The deepest stab wound was five inches long in Compton's upper chest. (19 RT 4235-4236.) The stab wound penetrated Compton's anterior and posterior heart walls and extended to the backbone. (19 RT 4236, 4245.) A second chest wound penetrated the anterior heart wall. (19 RT 4245.) There were twelve stab wounds on Compton's chin and face. (19 RT 4232-4233.) There were nine stab wounds on Compton's abdomen. (19 RT 4232-4233.) There was one stab wound in Compton's right armpit. (19 RT 4233.) All of the wounds were between three-eighths to one-half inch in width, symmetrical, and not serrated. (19 RT 4238-4240, 4271.)

The two chest wounds, which extended to the heart, and the neck wounds, which severed the left jugular vein and left carotid artery, were

individually life-threatening. (19 RT 4244, 4248, 4271-4272.) All of the wounds were inflicted contemporaneously by a stabbing instrument which was about one-half inch wide and more than five inches long. (19 RT 4239, 4251.) The wounds were consistent with being inflicted by a letter opener, screwdriver, or nonserrated metal file. (19 RT 4239-4240.) The similarity in size and length of the wounds was consistent with one weapon being used. (19 RT 4240, 4271.) All of the wounds were inflicted prior to death. (19 RT 4240-4241.) Once the heart was stabbed and the carotid artery was lacerated, Compton would have lost consciousness and died within fifteen minutes. (19 RT 4250-4251.)

There was a bruise on the side of Compton's mouth next to one of the stab wounds. (19 RT 4238.) There were two superficial vertical abrasions, about one-sixteenth inch deep, on Compton's forehead and one abrasion on Compton's chin. (19 RT 4227-4230, 4269.) The abrasions on the forehead were caused by contacting some object. (19 RT 4227-4228.) The abrasion on the nose could have been caused by eyeglasses. (19 RT 4228.) The abrasion on the chin could have been caused by contacting an object, including a fist. (19 RT 4230.)

The coroner opined that it was consistent that an individual could have been killed at 11:00 a.m. if he was a 115-pound male, the ambient air temperature was 97 degrees Fahrenheit, the temperature where the body was located was greater than 97 degrees Fahrenheit, and the body was in full rigor mortis at 2:15 p.m. (19 RT 4256-4257, 4274.)

On July 10, 1993, Bakersfield Police Detective R. N. Boggs directed Margaret and Anthony Compton to return the guns and property they had removed from Compton's house. (17 RT 3738-3739.) Compton's property and house were searched and processed for fingerprints. (17 RT 3741.) Based upon his conversation with Margaret, the detective ascertained that some of Compton's guns, including a Chinese SKS rifle, a Marlin rifle, and a

Winchester rifle, were missing. (17 RT 3743, 3745-3749.) The detective believed that Compton's two video cameras were missing because there were empty, new video camera boxes but no video cameras in the house. (16 RT 3597-3599; 17 RT 3786-3787; 18 RT 3960-3961.)

On July 26 and 28, 1993, Margaret Compton faxed to Detective Boggs lists and serial numbers of Compton's guns, which were listed in Compton's notebook but were not in Compton's house on July 8, 1993. (16 RT 3528, 3535-3539; 17 RT 3754, 3816.) Margaret also gave the detective a receipt for a US Springfield Armory .30 caliber rifle purchased by Compton on May 5, 1993, and picked up on June 1, 1993. (17 RT 3797-3798.) On August 9, 1993, the detective entered the serial numbers of Compton's guns into the California Department of Justice stolen property computer system. (17 RT 3755-3757, 3815-3816.)

On July 30, 1993, appellant agreed to stay away from the Oak Tree Avenue house[5]; and he began moving to a cottage behind a house on La Cresta Drive. (19 RT 4116, 4118; 20 RT 4407-4409, 4449; 21 RT 4522-4523, 4629.) Karen Lehman and Beverly Westervelt helped him move. (19 RT 4116-4118.) On or about July 30 or 31, 1993, he gave Westervelt a list of items, including video cameras, that he wanted moved out of the house to the cottage. (20 RT 4449-4450.) Appellant had never owned video cameras while living at his previous residences on Real Road and Oak Tree Avenue. (20 RT 4450, 4452-4453.) Westervelt asked appellant when he had gotten the cameras. (20 RT 4453.) He stated that he had gotten them at a bargain or a sale. (20 RT 4453.) Westervelt moved two video cameras in camera cases out of appellant's

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5. Real Estate broker Dutler Dauwalder testified that appellant's Oak Tree Avenue house was listed for sale on April 13, 1993, and sold on about August 13, 1993; that escrow closed on September 20, 1993; and that the house was never in foreclosure. (27 RT 5726, 5728.)

bedroom closet and stored them in her apartment. (20 RT 4450-4453, 4474, 4486; 21 RT 4566-4567, 4600-4601.) Appellant told her to use the cameras to take pictures of her kids. (20 RT 4451-4452, 4486.) She moved a 35 millimeter camera from the house. (20 RT 4452.) She took items, including small tools and ammunition, from appellant's top dresser drawer, put them into a garbage bag, and moved them. (20 RT 4455-4456.) She took an ammunition belt from the closet and moved it. (20 RT 4458.) Although she did not see any guns in the rooms and closets of the house, she did not look in the crawl space above one of the closets. (21 RT 4523-4524.)

A day or two after agreeing not to return to the Oak Tree Avenue house, appellant asked Westervelt to leave open one of the house doors and to leave off the house alarm when she left the house. (21 RT 4525.) On her last visit to the house, Westervelt left open the patio door and left the alarm off pursuant to appellant's request. (21 RT 4524-4525.)

Appellant thereafter asked Westervelt to move some of his property out of the La Cresta Drive cottage and to store the property. (20 RT 4473.) She moved a letter opener with a brown handle, a second letter opener, an NRA belt buckle, and a light blue toolbox, all of which she had never seen before, out of the cottage and stored them in her apartment. (20 RT 4472-4474, 4487; 21 RT 4586-4587.)

Westervelt visited appellant daily at the La Cresta Drive cottage. (20 RT 4410.) On August 10, 1993, appellant and his mother rented a car for appellant. (20 RT 4418-4420, 4454-4455.) Before nightfall on August 10, 1993, appellant and Westervelt drove the rental car to an area where he shot at beer cans and bottles. (20 RT 4417-4418, 4420, 4423, 4437; 21 RT 4612.) He had a .45 caliber gun in the car and removed a couple of other guns one at a time from the car trunk and shot them. (20 RT 4420-4422, 4431.) The other guns were "unusual," "fancier," and did not look like regular pistols. (20 RT 4422.) Westervelt had never seen any of the guns previously in appellant's

possession. (20 RT 4421, 4423, 4443, 4449.) She asked appellant where he had gotten the guns. (20 RT 4423-4424; 21 RT 4614.) He stated that he had gotten them "for a bargain out of the newspaper or out of the bargain box or bargain section." (20 RT 4423-4424; 21 RT 4614.)

Appellant was scheduled to go into custody on an unrelated conviction on August 12, 1993. (20 RT 4429.) Before that date, he repeatedly asked Westervelt to store some guns for him, but she refused. (20 RT 4429-4430.) He tried to find someone to store the guns. (20 RT 4430.) At about 10:00 p.m. on August 11, 1993, he went to Westervelt's apartment and again asked her to store the guns. (20 RT 4429- 4430, 4437.) Westervelt told him to ask Brian Ray, the brother of Karen Lehman, to store the guns. (19 RT 4063-4064; 20 RT 4430, 4483; 21 RT 4637.)

That same day, appellant telephoned Brian Ray and asked him to help him clean some guns because appellant was going into custody the next day, and he wanted to store them. (20 RT 4429, 4430; 21 RT 4637, 4649; 22 RT 4660, 4667, 4681.) Ray agreed and told appellant to meet him at the house of his cousin Dane Palmer on Royal Coach. (20 RT 4431; 21 RT 4648-4649.) Appellant asked Westervelt to get directions to Palmer's house. (20 RT 4431.) Westervelt wrote the directions down on a piece of paper. (20 RT 4432.) At about 11:00 p.m., appellant and Westervelt transported the guns in appellant's rental car to Palmer's house and contacted Ray and Palmer. (20 RT 4432-4434; 21 RT 4648-4651; 22 RT 4658, 4712.) A .45 caliber gun was sitting in the car. (20 RT 4434.) Appellant backed the car into the garage, and they closed the garage door. (20 RT 4434-4435; 21 RT 4652; 22 RT 4728.) Appellant exited the car, opened the trunk, and they removed about twelve guns and gun cases from the trunk. (20 RT 4436, 4438, 4445-4446; 21 RT 4653.) Westervelt had never seen so many guns in appellant's possession. (20 RT 4439, 4443, 4486.) She asked appellant why he had all of the guns. (20 RT 4475.) He stated that they were an investment and a hobby and that

he liked guns. (20 RT 4475.)

About five or six of the guns were similar to guns which Ray had seen at appellant's house on La Cresta Way after July 2, 1993, and which appellant claimed had been passed down in the family. (21 RT 4644-4647; 22 RT 4659-4770, 4663-4665, 4722, 4725.) Ray asked appellant where he had gotten the guns. (21 RT 4654.) Appellant stated that "they were passed down through family," the guns really meant a lot to him, and he had paperwork for the guns in the glove box. (21 RT 4654; 22 RT 4668-4669, 4721.) For about two hours, the men cleaned the guns with cleaning equipment from a little zippered suitcase which was in the car trunk. (20 RT 4436, 4438; 21 RT 4648, 4652-4655; 22 RT 4658-4660, 4684-4686, 4689-4691, 4728-4729.) They put the cleaned guns back into the car trunk. (20 RT 4439-4440; 22 RT 4660.)

During the early morning hours, appellant and Westervelt left Palmer's house and drove to Westervelt's apartment. (20 RT 4439; 22 RT 4661.) Appellant did not want Ray to store the guns because he was afraid that something would happen to them. (20 RT 4440.) Frantic and desperate to do something with the guns, he again asked Westervelt to store the guns, but she refused. (20 RT 4440-4441.) At about 1:00 a.m., appellant telephoned Ray and asked if he would store the guns, and Ray agreed. (20 RT 4440-4441; 22 RT 4661-4662, 4666.) Appellant told Westervelt that he was going to give Ray the guns at the La Cresta Drive cottage and that Ray was going to store them in Ray's father's storage. (20 RT 4441-4442.) Appellant left Westervelt's apartment. (20 RT 4442.)

Ray drove to appellant's La Cresta Drive cottage, backed into the driveway next to appellant's rental car, and transferred 22 weapons, ammunition, and other weapon-related items from the rental car to his car. (22 RT 4705-4706.) These weapons, ammunition, and weapon-related items included: a suitcase containing a .221 target pistol; boxes of Winchester Wild

Cat .22 shells; a zippered suitcase containing cleaning equipment; a briefcase containing a .22 pistol with a scope; a briefcase containing a pistol, two guns in holsters, an Ithaca .45, a gun in a case; ten guns; a brown pouch containing .22 shells; .a 44 magnum Blackhawk in a holster; a rifle in a case; ten guns; a .24 magnum in a black case; a .44 magnum 30-30 rifle; an orange-brown colored suitcase containing a couple of green containers and a box of Remington shells; a briefcase containing three boxes of 7.62 by 39 millimeter ammunition; a box for ammunition with "nine M.M. Luger 124 gram metal case" written on the outside; a box for ammunition with "Army gun" and "removed primer and new Winchester No. 8-120 stainless" written on the outside; a scope; and magazines, and empty magazines. (22 RT 4662-4665, 4686-4692, 4694-4705.) Ray drove to his house, where he unloaded the items into his bedroom and living room. (22 RT 4669.) Ray thereafter moved the items to his father's storage locker. (22 RT 4675, 4703.)

After an absence of about 30 minutes, appellant returned to Westervelt's apartment and stated that he had met Ray at the cottage and had given him the guns. (20 RT 4443.) Appellant and Westervelt agreed to refer to his guns as his "books" in their written correspondence. (20 RT 4481-4482.)

Appellant went into custody on August 12, 1993. (20 RT 4409-4410.) After August 15, 1993, he gave Westervelt the keys to a filing cabinet, which appellant had moved from his Oak Tree Avenue house to his mother's garage, so his mother could remove money from the cabinet. (20 RT 4470-4471, 4476-4477; 22 RT 4738-4742 .) When Westervelt unlocked the cabinet, she saw a Masonic ring laying loose in the top drawer. (20 RT 4475-4477, 4488.)

Between August 14 and 19, 1993, appellant placed seven collect telephone calls to Brian Ray's house. (22 RT 4671-4673, 4675.) During the telephone calls with Brian, appellant referred to his guns as his "books." (22 RT 4666, 4669-4670, 4673-4674.) Brian moved the weapons and other items, including three of his father's guns, out of his father's storage locker.

(22 RT 4706-4707, 4675-4676.)

On August 16, 1993, four days after appellant had given Ray the guns, Ray's friend Jeffrey Mahan pawned one of the guns, a Winchester rifle for $75, pursuant to Ray's request, at the Ace Jewelry and Loan pawn shop. (22 RT 4677-4683, 4715, 4723; 23 RT 4952-4956, 4959.) On August 18, 1993, Ray's friend Dane Palmer pawned a second gun, a Ruger Black Hawk revolver in a holster pursuant to Ray's request. (22 RT 4681-4683, 4699-4700, 4702, 4723.)

On August 19, 1993, Detective Boggs was advised that a Winchester rifle with a serial number matching a number listed in Compton's notebook, was pawned at the Ace Jewelry and Loan in Bakersfield on August 16, 1993. (17 RT 3761-3765, 3779; 22 RT 4786-4789, 4791-4792, 4804-4805.) The pawn shop receipt identified Jeffrey Scott Mahan as the person who had pawned the rifle. (17 RT 3777-3778, 3780; 22 RT 4787, 4803-4805.) On August 27, 1993, the detective recovered the rifle from the pawn shop. (17 RT 3763-3765, 3779, 3781; 18 RT 3967.) Pawn shop records indicated that on June 1, 1993, Compton picked up a refurbished Springfield Armory M1 rifle, which he had purchased. (17 RT 3823; 22 RT 4810-4815, 4817-4820.)

On August 30, 1993, the police executed a search warrant of Mahan's Bakersfield residence and seized from Mahan's bedroom expended and live cartridges and bullets similar to the ammunition missing from Compton's house. (17 RT 3780-3781, 3783-3784.) That same day, the detective interviewed and arrested Mahan for possessing stolen property[6]. (17 RT 3782-3783, 3789; 23 RT 4959-4960.) Mahan gave the detective information implicating Brian Ray. (17 RT 3787-3789.)

That same evening, the police executed a search warrant of Brian Ray's

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6. The charges against Mahan were dismissed on October 29, 1993. (23 RT 4960-4961; 25 RT 5341.)

house. Twenty-four weapons, including the three shotguns belonging to Ray's father, ammunition, and weapon-related items were seized from Ray's person, truck, and house. (17 RT 3792-3797, 3799-3812, 3823, 3853-3862, 3874-3876; 18 RT 3867-3872, 3876, 3903; 22 RT 4707, 4858-4862.) Seventeen of the guns were identified as Compton's guns[7]; and five of the guns were identified as appellant's guns. (17 RT 3808-3811, 3818-3823; 28 RT 5945-5948, 5950-5951.) Handwriting on a piece of white paper and a cardboard box seized from Ray's house was subsequently identified as Compton's handwriting. (22 RT 4824, 4830-4837, 4842-4849, 4852-4855.)

Ray was arrested and charged with murder, armed robbery, and receiving stolen property[8]. (17 RT 3790-3791, 3823; 22 RT 4706, 4708.) Ray told Detective Boggs that he got the weapons from appellant. (17 RT 3824-3825.) Dane Palmer, who was at Ray's house, was arrested. (22 RT 4708-4709.)

On August 31, 1993, Detective Boggs was advised that a Ruger Blackhawk revolver with a serial number listed in Compton's notebook was pawned at the Ace Jewelry and Loan pawnshop on August 18, 1993, by Dane Palmer. (17 RT 3826-3827; 22 RT 4789-4792, 4806.) The detective recovered the revolver on September 1, 1993. (17 RT 3828-3829.) On August 30, 1993, Dane Palmer was arrested and charged with possessing stolen property. (17 RT 3823, 3828.)

Detective Boggs thereafter ascertained that appellant was in custody on unrelated charges. (17 RT 3834.) On September 9, 1993, the detective spoke

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7. The serial numbers of fourteen of the guns were listed in Compton's notebook; gun dealer records memorialized Compton's purchase of two of the guns; and the serial numbers of three of the rifles matched the serial numbers of empty rifle boxes found in Compton's house. (17 RT 3808-3811, 3818-3823.)

8. Ray thereafter pled guilty to receiving stolen property and was placed on felony probation. (22 RT 4709-4710, 4720.)

to appellant's mother Rita Lightsey. (17 RT 3830-3831.) The detective looked at appellant's property which was stored at Rita Lightsey's house. (17 RT 3831, 3833.) That same day Rita Lightsey told Westervelt that a detective had come to her house and asked about appellant and stolen video equipment and guns. (20 RT 4483-4485; 21 RT 4521-4522, 4565.) She asked if Westervelt knew if appellant had any video equipment or guns. (20 RT 4484-4485.) Westervelt lied and said that she did not. (20 RT 4485.) Westervelt later received a telephone message from Brian Ray's attorney stating that Ray had been arrested and requesting that she contact the attorney. (20 RT 4482-4483, 4487; 21 RT 4521.) On September 13, 1993, Westervelt learned that appellant was a suspect in a murder. (20 RT 4482-4483; 21 RT 4614.)

On September 14, 1993, Westervelt telephoned Detective Boggs, who came to her apartment. (17 RT 3835-3836; 18 RT 3883; 20 RT 4486-4487; 21 RT 4542, 4565, 4589-4590, 4614.) She gave the detective two Sony video cameras, a National Rifle Association belt buckle, two letter openers, an ice pick, and a serving knife. (17 RT 3836, 3841-3843; 18 RT 3925, 3927; 20 RT 4455, 4487-4488; 21 RT 4522, 4541, 4566, 4624.) Both of the cameras were in carrying cases and contained a video tape. (17 RT 3838-3840.) The serial numbers of the cameras matched the serial numbers on the video camera boxes found in Compton's house. (17 RT 3837, 3839-3840.) The videotapes contained Compton's voice and footage of his van; mobile home; the front, back, and inside of his Holtby Road house; family outings; and a barbecue on July 4, 1993, with George and Kathleen Miller. (16 RT 3600-3604.)

Pursuant to Detective Boggs's request, Westervelt did not tell appellant about her interview with the detective and the investigation. (21 RT 4522, 4542, 4618.) But she told appellant that his mother had told her that an investigator or somebody had come by his mother's house. (21 RT 4564.) Westervelt thereafter gave a light blue tool box, which she had not seen when

she lived with appellant, to the district attorney's investigator. (20 RT4505; 21 RT 4587.)

On September 15, 1993, Detective Boggs interviewed Karen Lehman, who stated that appellant had several guns. (17 RT 3845; 19 RT 4132.)

During early October 1993, Beverly Westervelt and appellant's mother Rita Lightsey unlocked appellant's filing cabinet, which was in Rita Lightsey's garage, and removed the Masonic ring. (22 RT 4738-4742.) They returned the ring to the cabinet and locked the cabinet. (22 RT 4741.) On October 7, 1993, appellant's sister Janell Catron contacted Detective Boggs. (17 RT 3846.) On October 11, 1993, Catron took the Masonic ring from appellant's filing cabinet and gave it to Detective Boggs, who determined that the ring had been issued to Compton's then deceased father. (17 RT 3847-3848; 22 RT 4742-4744; 23 RT 4973-4976.)

On October 21, 1993, Rita Lightsey asked Catron to move a jar of coins from a bedroom closet in Rita Lightsey's house to Catron's house. (22 RT 4745-4748.) Catron moved the jar of coins to her home. (22 RT 4747-4748.) The next day, October 22, 1993, Rita Lightsey told Detective Boggs that Catron had the jar of coins. (22 RT 4748.) That same day, Catron gave the jar of coins to the detective. (17 RT 3850-1851; 22 RT 4745-4748; 23 RT 5076.)

On October 25, 1993, Beverly Westervelt gave Detective Boggs handwritten letters which appellant had written to Westervelt from prison. (17 RT 3843-3844; 18 RT 3883-3885.) Westervelt believed appellant's references in his letters to books, encyclopedias, babies, and secrets were to the guns; friends were to Brian Ray or Karen Lehman; cigarette friend and homeless friend were to Lehman; and bookkeeper and accountant were to Ray. (20 RT 4501-4502, 4508-4509; 21 RT 4526, 4528, 4530, 4533-4534, 4540-4541, 4544, 4550, 4552, 4557-4558, 4561.)

In a letter dated August 24, 1993, appellant asked Westervelt "to call

periodically to see how my books are." (20 RT 4500-4501; 21 RT 4526.) In a letter dated August 30, 1993, he states, "And what has been and what is between us must one hundred percent remain a secret, period, end trans, you know what I'm talking about." (20 RT 4501-4502.; 21 RT 4526) In a second letter dated August 30, 1993, he states, "When you are at my mom's make sure that my little red box is way right in the corner, way right in the corner and buried and not tampered with." (20 RT 4502-4504; 21 RT 4526.)

In a letter dated September 2, 1993, appellant referred to his "books." (20 RT 4508-4509; 21 RT 4526.) He referred to their secrets in a letter dated September 3, 1993. (20 RT 4509-4510; 21 RT 4526.) In a five-page undated letter to her, he wrote, "You mentioned my friends. I hope they are who are reading my books. Don't do that anymore. Periodically just drop by and face-to-face ask if everything is all right. I don't want them used at all unless I'm with them. A lot of $ tied up." (21 RT 4527-4528, underlining in original.) Appellant further wrote:

> I'll end this page with one more thing you can do for me. Very important. Once again go in person one on one and talk to my bookkeeper and sincerely express my most deepest concerns that my property (hobbies) a man's doll house are not being used but they are like mummies in an Egyptian tomb pyramid, preserved in time, untouched, uncontaminated and no chances to be viewed by any eyes or even discussed in ANY circle of friend or associate.
>
> He is an expert in the field so his private, absolute private moments with himself indoors at home providing maintenance, lubrication, cleaning to reassure their quality preservation is very much in good order and well appreciated, but no movement at all would be best except to be sure that all springs are at rest.
>
> [¶. . .¶]
>
> But if you truly want me, there is something you must do. You must play my bookkeeper real close and make sure that my books are truly locked in time and space, dust free and motionless, not to be read at all. I can't believe how fast time was up on me. . . .

(21 RT 4528-4530, underlining in original.)

In the letter appellant told her "to play my bookkeeper" and that if

anyone asked her about anything, "it's no, no, no. I know nothing about that. No, I've never seen him with a book." (21 RT 4530-4531, underlining in original.) In a letter dated September 8, 1993, appellant asked if she had done what he had written about in his last letter, "[checking] on my bookkeepers condition, state of mind, honest projection, eye to eye contact, et cetera, the books are being in a 'frozen state/place in time.' Me have much $ invested." (21 RT 4532-4533.) Appellant wrote, "I like playing with my books. I'll be very angry if anything happened to any one of them. The bookkeeper will be rewarded for a job well done, and you can pass that on. Nothing less than perfect will be acceptable. . . ." (21 RT 4534.)

In a letter dated September 8, 1993, appellant wrote, "You never saw me with any books." (21 RT 4542-4543.) In that same letter, he claimed, "I'm glad I don't have any guns. My brother Joe has the only two guns left that weren't stolen years ago. I never asked him for them, though. They're just there. (21 RT 4543.) In a letter dated September 9, 1993, appellant discussed Westervelt's visit to Brian Ray's house and wrote, "I just want my things, books, and be gone." (21 RT 4534-4536.) In a letter dated September 10, 1993, appellant indicated that the only fear he had was losing his freedom, mother, "books," and Westervelt. (21 RT 4539-4541.) He wrote that he could not write the "bookkeeper" but that he would like to hear from Ray. (21 RT 4544.) He wrote that Ray was to use Westervelt's return address and that he had to watch what he wrote. (21 RT 4544.)

In a letter postmarked September 16, 1993, appellant repeatedly referred to his "babies." (21 RT 4551-4553.) He told Westervelt not to share his letters "with anyone else due to certain materials. By the way, if you plan on keeping these letters, which I think you probably are, lock them up." (21 RT 4554-4555, underlining in original.) In a letter dated September 17, 1993, he wrote that Karen Lehman "was helpful and not a snitch" and that "her bookkeeper is family." (21 RT 4556-4558, 4561.) He told Westervelt to lock

his letters in her file cabinet. (21 RT 4558.)

In a letter postmarked September 21, 1993, appellant wrote, "Someone came by mom's you said. I do not have any video equipment. I don't even have a camera. The only gun I have is that old pellet gun, and now I can't have that. You got it? Okay. So I (we) need to put distance on this. I agree, no, I can't have any books." (21 RT 4562-4564, 4566-4567.) In a letter postmarked September 21, 1993, he wrote that he had no video equipment and that he did not even own a camera. (21 RT 4568-4569.) He wrote "the accountant needs to clean house" and "[c]igarette friend and friends need to know that they have seen nothing and know nothing about me." (21 RT 4569.) He wrote, "I no longer own any guns. My mom's house got broke into about ten years ago. They were hand-me-downs and my dad's." (21 RT 4570.) He told Westervelt to clean out his "tool box," to get rid of "anything that looks like it might be bad," and to "burn all my letters I have written you and my mom, because I am ashamed of the language I used in them." (21 RT 4570-4571.) He wrote, "You know, I'm still glad that I never even looked for a house to buy in my mom's side of town. . . . I don't know anybody around my mom's house anyway except that John guy across the street who has all that trashy Oildale traffic." (21 RT 4571-4572.)

In a letter dated September 21, 1993, appellant told Westervelt, "Go to my old bedroom closet and retrieve my jar (plastic) of coins. Roll 'em, spend 'em and deposit some. I'm curious if I counted right." (21 RT 4577-4578.) In a letter dated September 22, 1993, he asked her to marry him. (21 RT 4579.) He indicated that the jar of coins was on the floor in the back right corner of his mother's bedroom and that she was to get them and roll them. (21 RT 4580.) He wrote, "Need to talk to cigarette friend and go over time and dates of graffiti watch." (21 RT 4581.) He wrote, "Accountant should clean the books out. So we have no lingering bills." (21 RT 4583.) He told her to "organize my tool box and clean out any resembling artifacts of no use to me

anymore." (21 RT 4585.) In another letter dated September 22, 1993, appellant wrote, "I adore every characteristic about you, trust you and make good judgment decisions and say no and in questioning require an attorney to be present or refuse where in question or uncomfortable." (21 RT 4589.)

Prison inmate and informant Robert Rowland[9/] was serving a 13-year prison sentence for assault with a deadly weapon (two counts) and attempted grand theft auto. (24 RT 5177-5182, 5198-5199, 5239-5243, 5249.) While at the Kern County correctional facility, appellant talked to Rowland about killing an old man for guns. (24 RT 5202-5205, 5208, 5212-5213.) The first time appellant discussed the murder with Rowland was in the exercise yard in January 1994 before January 13, 1994. (24 RT 5207, 5214-5215.) Appellant told Rowland that "he had killed some old man" "for his guns" and that "he was down going to court for killing some old man for his guns." (24 RT 5207-5208.) Rowland asked appellant what kind of guns. (24 RT 5209.) Appellant stated "some different guns," including semiautomatics, handguns, target pistols, a Winchester 30-30, an Ithaca, and a M1. (24 RT 5209-5210, 5244-5245, 5255-5256.) Appellant talked about guns a couple of different times. (24 RT 5210.) Appellant stated "he was out shooting his guns or something up in the hills and gave 'em to some guy to clean for him or something, and he was accusing that guy of snitching on him." (24 RT 5211-5212.) Appellant stated that he thought "he'd beat the case." (24 RT 5208, 5212.)

Rowland told the correctional facility staff that appellant was talking about killing this old guy. (24 RT 5213-5214.) The facility staff contacted the district attorney's office, and investigator Tom Mireles interviewed Rowland

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9. Rowland had prior felony convictions for armed robbery, sodomy, oral copulation, escape (two counts), and possession of a weapon by a prisoner and was incarcerated periodically from 1977 to January 1992. (24 RT 5178, 5225-5226, 5239, 5245-5246.)

on January 13, 1994[10/]. (24 RT 5214.) Within thirty days, Rowland was transferred to another institution. (24 RT 5216.) Rowland was interviewed by a second investigator on March 17, 1995. (24 RT 5217-5218.) Rowland did not ask for any type of consideration or promise in exchange for testifying against appellant. (24 RT 5218.) On April 23, 1995, an inmate from a different housing unit slit Rowland's throat, and 12 stitches were required to repair the wound. (24 RT 5218-5219, 5221, 5254.) Angry about the assault, Rowland did not want to testify and wanted his personal safety insured. (24 RT 5220-5223, 5246-5249, 5251-5252.) On June 2, 1995, prosecutor Lisa Green went to the institution and told Rowland that in exchange for his testimony she would write a letter to the prison and ask for Rowland's transfer to an out-of-state facility. (24 RT 5223-5225.)

At trial, gun dealer David J. Wells identified some of Compton's guns and gun-related items which appellant had entrusted to Brian Ray. Wells identified the serial numbers and boxes of the Winchester 12-gauge shotgun and SKS rifle as those of the guns he had sold to Compton. (23 RT 4884-4886, 4894-4897.) Wells identified the SKS ammunition as similar to the ammunition he had sold to Compton. (23 RT 4933-4934.) The boxes containing the SKS ammunition were identical to the boxes he had sold to Compton. (23 RT 4934.) Wells identified the Remington XP 100 as the gun Compton had brought to his shop to be cleaned on May 15, 1993, and its case as that containing the gun. (23 RT 4914-4916). Wells identified the Marlin rifle as the rifle that he had repaired for Compton and that Compton had picked up on May 15, 1993. (23 RT 4925-4926.) Wells identified the P-38 German gun and the holster as the gun and holster Compton had shown Wells at Compton's home on May 15, 1993. (23 RT 4916-4917.) Wells identified

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10. A portion of the audiotape of Rowland's interview with investigator Mireles was played for the jury. (25 RT 5339-5340.)

the Ithaca .45 caliber. (23 RT 4917-4918.) Well testified he could not identify the Ruger and the Remington Field Master as the rifles that Compton showed him on May 15, 1993, because they were too common. (23 RT 4919-4920, 4922.) Wells identified the gun and ammunition brochures as the brochures he had brought to Compton after May 15, 1993. (23 RT 4937-4938.)

Beverly Westervelt testified that she had never seen in any of appellant's residences the jar of coins that appellant's sister Janell Catron gave to Detective Boggs and items recovered from Brian Ray's house, including a sack of coins, suitcases, a leather pouch, briefcases, bags of ammunition, a blue wooden box containing gun-related objects, and a wooden box containing stamps and folders. (20 RT 4411-4417, 4438; 21 RT 4578.) She had no knowledge of appellant being a member of the National Rifle Association. (20 RT 4474.) She had seen one of the gun cases seized from Ray's house when it was removed from the rental car trunk at Palmer Dane's house on August 11, 1993. (20 RT 4445; 21 RT 4616.) The Ithaca .45 caliber automatic pistol seized from Ray's person house looked like the .45 caliber gun that appellant had possessed in the rental car on August 11, 1993, and that she had fired on August 10, 1993. (20 RT 4448-4449.)

Anthony Compton identified a .44 lever action rifle as looking "very familiar" and a .357 automatic revolver as looking "mighty familiar." (16 RT 3559-3562.)

Detective Boggs testified that a vehicle parked behind Compton's house would not be visible from Holtby Road, which ran along the front of the house. (17 RT 3674, 3689.) About two to four World War II M-1 style rifles or Remington model 1917 rifles, which were listed in Compton's notebook were not accounted for. (18 RT 3918-3919.) Between April 20, 1990, and April 19, 1995, there were no reported thefts of guns or property from Compton or his residence. (20 RT 4284-4285, 4289-4292.) Between April

20, 1990, and April 19, 1995, there were no reported misdemeanor or felony offenses, except the instant murder, committed at Compton's residence. (20 RT 4287-4288, 4290.)

Kern County District Attorney Investigator Kevin Clerico testified that attorney Dominic Eyherabide's office at the corner of 14th and L Streets was 1.9 miles from appellant's mother's house at 115 Holtby Road. (22 RT 4763-4764.) At both 8:00 a.m. and 3:00 p.m., it took about five minutes to drive the 1.9 miles. (22 RT 4765.) Compton's house at 428 Holtby Road was 7.5 miles from appellant's house at 3001 Oak Tree Avenue. (22 RT 4765.) At 11:54 a.m., it took about fourteen minutes to drive the 7.5 miles. (22 RT 4766.)

Defense

Appellant's mother Rita Lightsey was 75 years old at the time of trial. (26 RT 5527, 5663.) She stated that her memory was not that good any more. (26 RT 5663.) She stated that on July 7, 1993, she went to court with appellant. (26 RT 5527.) At about 7:45 a.m., she and appellant drove her brown 1982 Volvo to the office of appellant's attorney Dominic Eyherabide. (26 RT 5527-5530, 5551.) She parked in front of the office. (26 RT 5530.) A man named Lorenz was in the waiting room. (26 RT 5530-5531.) Eyherabide told appellant and Rita that he had an appointment with Lorenz, they should go to the court and wait, and he would see appellant later. (26 RT 5530-5531.) Appellant and Rita followed Eyherabide and Lorenz across the tracks behind the courthouse. (26 RT 5531-5532, 5652.) Eyherabide and Lorenz went to another building, and appellant and Rita walked to the courthouse. (26 RT 5532.) Appellant and Rita sat a few minutes outside Department 10, which was not open. (26 RT 5533.) Eyherabide told appellant and Rita that they could go to the cafeteria since it was just down the hall. (26 RT 5533.) Appellant and Rita went to the cafeteria and sat at a table.

(26 RT 5532, 5534-5536.)

Appellant introduced Rita to Fred McAtee. (26 RT 5534, 5537-5538.) Shortly thereafter, a sheriff's deputy told appellant that he was supposed to be in the courtroom. (26 RT 5533, 5537-5538.) Appellant jumped and ran. (26 RT 5533, 5538.) Rita stayed in the cafeteria for about 20 minutes and never went into the Department 10 courtroom. (26 RT 5532-5533, 5538.) Appellant returned to the cafeteria. (26 RT 5539.) Rita and appellant left the cafeteria about 10:00 a.m., walked back to her parked car, and drove to her house. (26 RT 5533, 5539-5541, 5646-5647, 5652.) Appellant ate something and left the house at about 11:30 a.m. or noon. (26 RT 5542-5543, 5645.)

Rita claimed that, except for the time that appellant was in the courtroom, he was in her presence. (26 RT 5538, 5540.) She claimed that appellant never owned or wore a black silk shirt and that he always wore a white shirt, usually with a tie and dress pants. (26 RT 5543-5544, 5632-5633, 5644.) She testified that prior to trial, she and defense counsel Gillis timed with a stopwatch how long it took it took to get to her house. (26 RT 5545.) At about noon, it took about nine minutes and thirty seconds to walk from the cafeteria to her car parked in front of Eyherabide's law office and to start her car. (26 RT 5545-5548.) It took seven minutes and forty-five seconds to drive from Eyherabide's office and to park her car in her garage. (26 RT 5548-5549, 5647.)

Rita claimed that in December 1993 she did not remember going to court with appellant on July 7, 1993, because "Detective Boggs had been there and told me things that I had no idea had happened." (26 RT 5552-5554.) She claimed that she remembered the events clearer at trial than she did in December 1993. (26 RT 5553, 5662.)

Under cross-examination, Rita admitted that she had told defense investigator Susan Peninger on December 13 and 30, 1993, that she did not even remember being in court with appellant on July 7, 1993; she could not

pinpoint the day; and she did not believe she could have been in court with appellant. (26 RT 5555, 5557, 5561, 5563-5564, 5619, 5623, 5627-5628, 5664.) She admitted that she did not have a complete recollection or personal knowledge of everything that she had testified to. (26 RT 5567.) She admitted that she did not have an independent recollection of appellant coming into her house and having a sandwich and drink on July 7, 1993. (26 RT 5568-5569.)

Rita testified that she and appellant had "been arguing about those days for months" that "it was an arguable point all summer long" between her and appellant. (26 RT 5568, 5640-5641, 5662.) She stated that appellant was wrong because he thought the long day was on July 7th. (26 RT 5641.) She admitted that during her visits with appellant at Tehachapi during the summer of 1994 and in his letters to her, appellant told her that they were in court all day on July 7, 1993, and that she and Richard were wrong because she did not go to Richard's birthday party that day. (26 RT 5558, 5566, 5648-5649, 5653, 5655, 5662.)

Rita identified a copy of a page of a letter which she had written to appellant. (26 RT 5653.) The copy was sent by appellant to Rita in an envelope that was postmarked September 20, 1994. (27 RT 5805-5806.) In her letter to appellant, Rita wrote that July 7th was the day that they were there all morning but no longer and that they sat on opposite sides of the door with the Epps on the long day. (26 RT 5655.) She testified that she later determined that July 9th was the long day, when they were at the courthouse from 8:00 a.m. to 5:30 p.m. (26 RT 5659.) She did not remember seeing the Epps by the courtroom during the early morning on July 7th. (26 RT 5659.) She claimed she did not go into the courtroom. (26 RT 5660.) The hearing was continued to Friday, July 9th. (26 RT 5660.) She claimed that on July 9th, she and appellant went to court for a readiness conference at 8:00 a.m. and sat there all day until the late afternoon; Eyherabide did not go to court;

and nothing was handled. (26 RT 5660-5661.) On a Monday, the judge ordered that $1,000 of the bail premium be returned to appellant. (26 RT 5661.) She did not go to the cafeteria on Monday. (26 RT 5661.) She claimed she was in the cafeteria on only one occasion. (26 RT 5658.) She claimed that she wrote in the letter that she and appellant were sitting in the cafeteria when the officer came and told appellant to get into court down the hall, that it was the day she was introduced to Fred McAtee, and that she went to Richard's in the afternoon. (26 RT 5656-5659.) She admitted that appellant had made a copy of the letter and sent it back to her with underlining and notes written on it. (26 RT 5654.)

Rita admitted that she only remembered being in superior court with appellant on three occasions in July and August 1993. (26 RT 5559, 5562, 5623.) She admitted that she could not distinguish one date from another. (26 RT 5559.) She remembered that the third and last day she went to court was a Monday; appellant and Beverly picked her up; they went to Dominic's; they walked to court; the Epps were there; she sat for a long time before going before the judge; and the judge divided the bail money half and half. (26 RT 5559-5560, 5562, 5565.) Rita claimed that Eyherabide said he would be late, he was going upstairs in another department, and he had another case with Lorenz; and Eyherabide suggested they could spend time in the coffee shop. (26 RT 5636.) She claimed that she did not see Eyherabide at the courthouse and that she never entered the courtroom. (26 RT 5635-5636, 5652-5653.) She claimed that appellant never left her alone in the coffee shop. (26 RT 5636.) She claimed that she and appellant arrived at her house at about noon. (26 RT 5637-5638.)

Rita denied telling the defense investigator on December 13, 1993, that if she was in court with appellant on July 7th, she would have taken her own car, met appellant at Dominic's, and then walked to the court. (26 RT 5561-5562.) She denied stating that the only day she was in the courtroom with

appellant was the day the bail money was returned. (26 RT 5565.)

Rita admitted that she was interviewed by Detective Boggs on two occasions in January 1994. (26 RT 5566, 5624.) She admitted that on January 24, 1994, she told the detective that she could not specifically remember being with appellant on July 7, 1993, because all the court appearances ran together since she had been with him so many times. (26 RT 5566-5567, 5628.) She admitted that she could have told the detective that she could not have been with appellant all day on July 7, 1993, because she remembered going to her son Richard's birthday party on that date. (26 RT 5626, 5648.) Rita admitted that in February 1994 she told prosecutor Lisa Green that she did not remember anything about July 7, 1993. (26 RT 5643-5644.) Rita claimed that she "couldn't put dates together at that time." (26 RT 5643.) She did not remember telling the prosecutor that she did not believe she was even with appellant on July 7, 1993. (26 RT 5644.) Rita admitted that although she went to appellant's preliminary hearing in January 1994, she never testified because she did not remember anything about July 7, 1993. (26 RT 5624-5625, 5650, 5663-5664.)

Rita claimed that her son Richard helped her to remember the specific dates that she was in court. (26 RT 5619-5620, 5628, 5663-5664.) She admitted that her testimony that she had met McAtee after 10:00 a.m. and left court after 11:00 a.m. on July 7, 1993, was based on the investigator's report of McAtee's interview, which the defense counsel provided to her. (26 RT 5626-5627, 5628-5630.) She stated that she saw McAtee during the middle of the morning. (26 RT 5631.) After McAtee left, the bailiff came in, and appellant went to the courtroom. (26 RT 5631-5632, 5642.) Rita sat at the table for a while and then got something to eat. (26 RT 5631.) She admitted that she did not remember which route they took when they walked out of the courthouse. (26 RT 5633-5634.) She admitted that she did not see appellant again after he left her house on July 7, 1993. (26 RT 5622-5623.) She stated

that one day Darrell Epps and his wife walked either ahead or behind of her and appellant as they walked from the courthouse. (26 RT 5634-5635.) Rita stated that defense counsel Gillis told her that Lorenz was the name of the man she had met at Eyherabide's office. (26 RT 5650-5651.)

Attorney Dominic Eyherabide testified that his office was at 1313 L Street in Bakersfield. (25 RT 5391-5392.) His personal notes and the court records indicated that he represented Robin Lorenz in municipal court before 9:02 a.m. on (Wednesday) July 7, 1993. (25 RT 5421-5423.) He acknowledged that court records established he represented appellant in Department 10 in an unrelated case that day. (25 RT 5392, 5394.) The reporter's transcript indicated that he was not present in court when appellant's case was first called in Department 10. (25 RT 5399-5401.) His personal trial notes indicated that from 9:02 a.m. to 10:30 a.m., he was in Department 4 on the second floor of the courthouse representing Corvin Emdy in an unrelated case. (25 RT 5393, 5397-5398, 5408-5410, 5415, 5421.) His personal trial notes and the reporter's transcripts of appellant's case indicated that the Emdy case resumed after a recess at 10:55 a.m.; and that between 10:30 and 10:55 a.m. Eyherabide appeared in Department 10 on appellant's case, but appellant was not present. (25 RT 5401-5402, 5404, 5409-5411, 5416.) The reporter's transcript indicated that Eyherabide said that he thought appellant was probably down in the coffee shop. (25 RT 5402.) The judge told Eyherabide to get appellant. (25 RT 5402.) The reporter's transcript indicated that appellant, Eyherabide, Deputy District Attorney Somers, and Epps (the bail bondsman) were present the third time appellant's case was called. (25 RT 5403-5405.) After a few minutes in court, appellant's case was continued to the following Friday (July 9, 1993). (25 RT 5407, 5412, 5416.) The reporter's transcript indicated that Eyherabide represented appellant at a bond premium hearing on August 2, 1993, in Department 10 before Judge McGillivray. (25 RT 5417-5418.)

Eyherabide did not remember whether appellant's mother was in court on July 7, 1993. (25 RT 5405-5406.) He admitted that Epps had a right to cross-examine appellant's mother at the bond hearing scheduled for that date. (25 RT 5406-5407.) He did not know where appellant was between 9:02 and 10:30 a.m. and after 10:55 a.m. (25 RT 5413.)

Robin Lorentz testified that attorney Eyherabide represented him in a municipal court criminal case. (25 RT 5347-5348.) At about 8:00 a.m. on July 7, 1993, appellant and a gray-haired woman who was subsequently identified as appellant's mother were at Eyherabide's office at the corner of L and 14th Streets. (25 RT 5343, 5349, 5357.) Appellant wore a white dress shirt, with either short-sleeves or rolled-up long sleeves and possibly pin stripes, no tie, and dress slacks. (25 RT 5346, 5355-5356.) At about 8:15 a.m., appellant, his mother, Eyherabide, and Lorentz walked to the courthouse. (25 RT 5345, 5348.) A brown Volvo was parked in front of Eyherabide's office. (25 RT 5345, 5358.) At about 8:20 a.m., Eyherabide and Lorentz went to the municipal courthouse at 1215 Truxtun, and appellant and his mother went to the superior court. (25 RT 5346, 5348-5349, 5359.) Eyherabide told appellant and his mother that he would meet them at the superior court. (25 RT 5346.) Eyherabide stayed at the courthouse when Lorenz's court appearance ended between 9:00 and 9:30 a.m. (25 5358-5362.) When Lorenz drove away from Eyherabide's office at about 9:30 a.m., the Volvo was still parked in front of the office. (25 RT 5356, 5359-5360.)

Under cross-examination, Lorentz admitted that he was first interviewed over the telephone by a defense investigator after May 23, 1995. (25 RT 5352-5355.) He admitted that at trial appellant's hair was not blond but that he told the district attorney's investigator about five times that appellant had blond or brownish-blond hair. (25 RT 5353-5354.) He admitted that, if Eyherabide was in Department 10 at 9:00 a.m., he (Lorentz) would have already driven away. (25 RT 5361-5362.)

Attorney Fred McAtee testified that based upon information from his personal calendar, he believed that he saw appellant and his mother in the courthouse cafeteria sometime between 9:30 and 10:10 a.m. on July 7, 1993. (25 RT 5427-5433, 5435, 5440-5442, 5444-5446.) He thought appellant wore a light-colored collared shirt with no tie. (25 RT 5434.) Appellant introduced McAtee to his mother. (25 RT 5432, 5446.)

Kern County Deputy Sheriff Michael Forse testified that on July 7, 1993, he was the bailiff for Judge McGillivray, who was presiding over the criminal calendar in Department 10. (25 RT 5449.) The reporter's transcript indicated that he stated. "Mr. Eyherabide is in trial right now; he said he would be down at his break at about 10:45." (25 RT 5450.) Deputy Forse testified that Eyherabide came to Department 10 after taking care of something in another courtroom. (25 RT 5455.) When appellant's case was called the second time, the deputy went to the cafeteria in the basement to call appellant. (25 RT 5451-5454.) Appellant, who was seated at one of the tables, stood up. (25 RT 5451-5453.) The deputy believed that attorney Eyherabide may have accompanied him to the cafeteria. (25 RT 5452.) The deputy testified that it was possible that he went to the cafeteria sometime between 9:00 and 10:30 a.m. or 10:30 and 10:35 a.m. (25 RT 5454-5455.) The deputy admitted that when interviewed in February 1994, he pinned it down the best he could to between 9:00 and 10:30 a.m. (25 RT 5456.)

Deputy District Attorney John Somers testified that he appeared in Department 10 about 8:30 a.m. on July 7, 1993. (25 RT 5460-5462, 5485.) The calendar was not called until about 8:45 or 8:50 a.m. (25 RT 5462, 5481.) While seated in the courtroom, attorney Eyherabide whispered to Somers that he was in trial in the Emdy matter and that he needed to be back in Department 4 where the case was being tried no later than 9:00 a.m. because they were planning to start. (25 RT 5466-5467.) Somers told Eyherabide that he hoped they got to him before then. (25 RT 5467.) When appellant's case was called

at about 9:05 a.m., the judge ordered Somers to return at 10:30 a.m. (25 RT 5465-5468, 5480-5481.) Somers and Eyherabide returned to the courtroom at about 10:30 a.m., but appellant was not present. (25 RT 5468, 5471-5472, 5481-5482, 5485.) The court had just started or was about to start the session after a recess. (25 RT 5470-5471, 5481.) At about 10:35 a.m., the court called appellant's case, Eyherabide walked out of the courtroom to get appellant, and returned almost immediately with appellant. (25 RT 5472, 5482-5483.) The court called and continued appellant's case, which took about two or three minutes, concluding at 10:40 a.m. at the very latest. (25 RT 5472-5473, 5483-5485.)

Vaughn Lehman testified that he was married to Karen Lehman for 22 years and that he had known Brian Ray for about 25 years. (27 RT 5731.) He opined that both Karen and Ray had "bad" reputations for truth and veracity in the community. (27 RT 5731.) Under cross-examination, Vaughn admitted that he had known appellant for all of his life, had attended high school with appellant, had liked appellant "at times," and had received letters from appellant in 1994 or 1995. (27 RT 5733-5735.) Vaughn claimed that he had placed the letters on his desk but had not seen them since. (27 RT 5735-5736.) Vaughn admitted that he never advised law enforcement that he had received appellant's letters. (27 RT 5735-5736.)

Detective Boggs testified that he wrote in his report that the coroner indicated that the time of the victim's death was between 8:30 and 11:00 a.m. on July 7, 1993. (26 RT 5667-5668.) The detective stated that when he first talked to Karen Lehman on the telephone on August 31, 1993, she stated that she had seen some weapons in appellant's possession but not as many as the detective was speaking of. (26 RT 5668-5669.) During an interview with Lehman on September 15, 1993, she stated that during a telephone conversation, appellant told her that he had to go check on a little old man who had been sick. (26 RT 5673-5674.) Lehman asked appellant how old the man

was, and she thought appellant said "somewhere around seventy-two or seventy-six years old. (26 RT 5674.) The detective confirmed that in his report of August 27, 1993, he wrote that Anthony Compton had found three weapons. (26 RT 5671-5672.)

Darren Howard testified that during the summer of 1992, he placed a regular ad in the Bakersfield Californian to sell a Ruger .22 caliber carbine rifle and an Itasco scope. (26 RT 5497-5498, 5501-5504, 5506.) Howard identified the Ruger .22 caliber carbine rifle seized from Brian Ray's house as the rifle he had sold. (17 RT 3799; 26 RT 5522-5523.) He sold the gun and scope to a man who was more than six feet tall and slender. (26 RT 5499.) He gave the man some shells for the rifle. (26 RT 5506.) The man looked a lot younger than appellant and had almost black-colored hair. (26 RT 5499-5500.)

Alfred Stone testified that in 1992 or 1993 he placed an ad in the Bakersfield Californian to sell a Remington Army rifle; and he sold the rifle to a man. (26 RT 5509-5514, 5524-5525.) He identified Compton's rifle as the rifle he had sold. (26 RT 5524.) The ad was not in the bargain box section of the newspaper. (26 RT 5515.)

Rebuttal

Detective Boggs testified that after appellant's preliminary hearing on January 24, 1994, he interviewed Rita Lightsey at her house. (26 RT 5675.) Rita indicated that she had been in court with appellant on so many different occasions she could not specifically remember July 7, 1993. (26 RT 5676-5677.) She indicated she might have been in court with appellant all day on the following Friday (July 9, 1993). (26 RT 5677.) After determining that she had written a $50 birthday check for her other son, she remembered going to her other son's East Bakersfield house for the birthday. (26 RT 5676.) Rita

was very vague about the times and specifically stated she was unable to remember the times because she had been to court so many times with appellant. (26 RT 5676-5677.)

Detective Boggs testified that he and prosecutor Lisa Green interviewed Rita on February 9, 1994. (26 RT 5677.) Rita's memory had not improved. (26 RT 5676.) She indicated that her daughter-in-law Val Joe had picked her up and taken her to her other son's home in East Bakersfield for a birthday "luncheon." (26 RT 5678.) Rita indicated that Val Joe would be able to give the detective a better time than she could because she could not remember. (26 RT 5678.) Rita concluded the interview saying she did not even believe she had been in court on July 7, 1993. (26 RT 5678.)

Private investigator Susan Peninger testified that in late 1993 and early 1994, she worked on appellant's case for appellant's then defense attorney Stan Simrin. (27 RT 5743-5744.) On December 13, 1993, Peninger interviewed Rita Lightsey about her activities on July 7, 1993. (27 RT 5744-5747.) The interview lasted for more than one hour. (27 RT 5746.) Rita told Peninger that she was not sure what she did on July 7, 1993. (27 RT 5747, 5751.) Peninger testified that Rita was confused about the different days that she was in court and gave conflicting stories regarding court days. (27 RT 5747-5749, 5759-5760.) Rita stated that if she was in court on July 7th, she would have taken her own car, met appellant at Eyherabide's office, and walked to the court. (27 RT 5748.) Rita indicated the day that appellant and Beverly Westervelt picked her up was a Monday and was the day the judge divided the bail money half and half. (27 RT 5749.) Pursuant to Peninger's suggestion, Rita looked at her checkbook, determined that she had written a couple of checks on July 7th, and stated she possibly was not in court because she only writes checks in the morning. (27 RT 5750-5751, 5758-5759.)

Peninger interviewed Rita a second time on December 30, 1993, about her whereabouts on the morning of July 7, 1993. (27 RT 5752.) Rita's

daughter Janell was present during the interview. (27 RT 5752.) The interview lasted a couple of hours. (27 RT 5752.) Rita told Peninger that the only days she was in court with appellant was the day the bail money was returned to him. (27 RT 5753.) Peninger stated in her report that although the scenario spelled out by appellant with regard to his recollection of his activities and whereabouts on July 7th sounded familiar to Rita, Rita did not believe they occurred on July 7th. (27 RT 5753-5754.)

Peninger further testified that she interviewed Kathleen and George Miller on December 29, 1993. (28 RT 5898.) Peninger's report stated that George Miller said that he spoke with the victim on the afternoon of July 6th and he was with the victim earlier in the day when he transported him to his radiation treatment. (28 RT 5898-5899.) Miller further stated that the victim stated he would be able to drive himself on the 7th. (28 RT 5899.)

PENALTY PHASE

People's Case

John Turner testified that he and about ten other people went to Roxanne's, a Bakersfield nightclub, at about 9:30 p.m. on December 5, 1991. (29 RT 6237-6238.) As he walked to the bar, appellant, a stranger to Turner, stood in his path. (29 RT 6238-6240.) Attempting to get past appellant, Turner said "excuse me" about ten times; but appellant pushed him and told Turner "to go around." (29 RT 6239-6241.) Turner was about five feet, seven inches tall and weighed about 155 pounds. (29 RT 6242.) Appellant asked Turner to go outside, and Turner agreed. (29 RT 6239, 6241.) As Turner walked out the door in front of appellant, he was struck and knocked unconscious. (29 RT 6241-6242, 6248-6249.) Turner's lip and chin were bleeding when he regained consciousness. (29 RT 6242-6245.) His chin was permanently scarred. (29 RT 6242-6244.) About two weeks later, appellant,

his girlfriend, and two children went to Turner's apartment. (29 RT 6246-6247, 6249.) Appellant admitting hitting Turner, apologized, and stated that he was sorry, he had gotten arrested for driving under the influence immediately after hitting Turner, and his job was in jeopardy. (29 RT 6247-6248, 6250.) Appellant asked Turner to sign an affidavit or to testify regarding the incident. (29 RT 6247.) Turner agreed to sign an affidavit. (29 RT 6247-6248.)

Beverly Westervelt testified that on December 17, 1990, appellant, who then lived in her apartment, came home early in the morning. (29 RT 6252, 6255-6256.) When she asked where he had been, he got angry, picked up the ironing board, and smashed it over her. (29 RT 6252.) Yelling loudly, he punched the sliding closet doors, knocking them to the ground. (29 RT 6253.) He grabbed her neck, dragged her to the front door, and punched her chest. (29 RT 6253.) She fell to the floor. (29 RT 6253.) She told him to get out. (29 RT 6253.) A few days later, he apologized and said that if he wanted to hurt her, he could have put his fist right straight through her. (29 RT 6254, 6256.) Still in pain on December 24, 1990, she went to the hospital and had her chest x-rayed. (29 RT 6254-6256.)

California Department of Corrections Lieutenant Donald Kimbrell testified that on November 12, 1993, he was on duty at Folsom State Prison. (29 RT 6258.) Appellant and inmate Quintera, who was about five feet, eight inches tall and weighed about 150 pounds, engaged in a fist fight in the cell block. (29 RT 6260-6263.) After the officer repeatedly ordered them to lie down, they complied. (29 RT 6261.) Appellant refused to attend the disciplinary hearing, and he was found guilty. (29 RT 6266.) The disciplinary charges against the other inmate were dismissed, indicating that he had acted in self-defense against appellant. (29 RT 6264-6265.)

Kern County Sheriff's Detention Officer Cristobal Juarez testified that on April 2, 1995, he was on duty at the Lerdo pretrial jail. (29 RT 6269-

6271.) The officer observed contraband clothing in appellant's cell. (29 RT 6271-6272.) The officer entered the cell and asked appellant, who was lying on the bunk, to stand up and face the wall so the officer could search the bunk. (29 RT 6273.) Appellant stated that he did not do anything and that was all the clothing. (29 RT 6273, 6278.) The officer stated that he wanted to make sure and twice asked appellant to face the wall. (29 RT 6273-6274, 6278.) Appellant turned and "squared up" to the officer by facing the officer with his fists clenched at his sides. (29 RT 6273-6274, 6277-6278.) Appellant stood about one foot away from the officer. (29 RT 6274-6275.) The officer perceived that appellant had taken a "combative stance." (29 RT 6275.) For his and appellant's safety, the officer restrained appellant, placed him on the floor, and handcuffed his wrists. (29 RT 6275, 6278-6279.) Pursuant to procedure, the officer took appellant to the infirmary. (29 RT 6275, 6279.) The officer filed an incident report. (29 RT 6276.)

Anthony Compton, the victim's nephew, testified that the victim was very energetic and thoughtful. (29 RT 6282, 6284.) The victim was always involved in activities and projects, including electronics, reloading guns, and metal detecting. (29 RT 6282, 6284.) When diagnosed with cancer, the victim never gave up hope. (29 RT 6284.) About a week before he was murdered, the victim told Anthony that "everything was looking good." (29 RT 6288.)

Certified copies of appellant's prior convictions were admitted into evidence. (29 RT 6291; see 29 RT 6297-6298 [stipulation regarding appellant's identity].)

Defense

Over the defense counsels' objections, appellant invoked his right to testify. (29 RT 6316, 6321-6322, 6326-6328, 6330, 6335-6338.) Appellant claimed that most of the People's witnesses, including Karen Lehman, Beverly

Westervelt, Darrell Epps, lied while testifying at trial. (30 RT 6450-6453, 6458, 6500-6501, 6508, 6514, 6551-6555, 6557-6561; 31 RT 6652-6655.) He claimed that on the day the victim was murdered, he and his mother were in court until 5:45 p.m. and never left the courthouse. (30 RT 6488-6489, 6492-6493, 6495, 6510.) He claimed that the telephone bill documenting a 11:50 a.m. telephone call from his home to the Lancaster jail bondsman was "fraudulent." (30 RT 6495-6496, 6498.)

Appellant claimed that John Turner first punched his chest, and he punched Turner once in self-defense. (29 RT 6340; 30 RT 6501, 6508.) Appellant claimed that on the night he assaulted Westervelt, she accused him of lying. (29 RT 6343-6344, 6346.) He grabbed the ironing board to push her away from him, and he hit the closet doors, which fell down. (29 RT 6344-6345.) He denied striking Westervelt with the ironing board but admitted hitting her with an open hand and pushing her because she was "all over" him. (29 RT 6345-6346; 30 RT 6467-6468, 6499, 6507.) Appellant claimed that inmate Quintera first struck appellant's shoulder, and he fought back. (29 RT 6350-6351; 30 RT 6504, 6507.) Regarding the incident with Officer Juarez, appellant claimed that his prior cell mate left clothing in the cell. (29 RT 6353-6354.) After the officer found the clothing, he locked appellant's cell but later returned and ordered appellant to get up and put his hands on the wall. (29 RT 6354-6355.) Although appellant complied, the officer grabbed appellant's hand and pulled it behind his back, pushed him to the floor, twisted his arm, kicked him in the ribs, and handcuffed him. (29 RT 6355-6356.)

Appellant admitted writing letters to Westervelt about the guns. (30 RT 6429-6430.) He admitted that he and Westervelt went to the victim's home and that he saw two rifles in the house. (30 RT 6434, 6436, 6479.) He claimed that he bought the guns and video cameras, which were identified as those of the victim, during the evening of July 17 for $2,800. (30 RT 6430-6431, 6436, 6487, 6543.) The items were in the trunk of a car parked across

the street from his mother's house. (30 RT 6543.) He did not know the names of the people from whom he bought the guns. (30 RT 6432, 6436.) In the alley behind his mother's house, he took the items out of the trunk. (30 RT 6543.) He took the items to his house at 3001 Oak Tree Avenue and stored them. (30 RT 6544.) On about July 20, he looked at the guns and video cameras at the house. (30 RT 6430-6432, 6550-6551.) He found cancelled checks of the victim inside a zippered compartment of the video camera case. (30 RT 6431-6432, 6477.) At about that same time, he put the items in Karen Lehman's car trunk and had her park the car at Wilson Road. (30 RT 6451, 6483, 6535, 6545-6546.) About four days later, he drove Lehman's car to his Oak Tree Avenue house and took the items into his bedroom. (30 RT 6546-6547.) Sometime later, he read the victim's obituary and realized the guns belonged to the victim. (30 RT 6434-6436, 6477.) He did not go to the police because he was concerned for the safety of himself and his mother and being charged with receiving stolen property. (30 RT 6436, 6481, 6486.) He put the items back into the trunk of Lehman's car, which was parked at his house. (30 RT 6547-6548.) After July 29, Lehman drove her car, which contained the items in the trunk, to Dauwalder's house. (30 RT 6549-6550.)

Under cross-examination, appellant acknowledged testifying at the preliminary hearing on March 23, 1995, that he first looked at the video cameras on August 3, 1993, when he was living at Dauwalder's house. (30 RT 6519.) He acknowledged that he never testified that he looked at the video cameras at the Oak Tree Avenue house. (30 RT 6522.) He claimed that although he found the checks earlier at the Oak Tree Avenue house, he did not look at the video cameras. (30 RT 6520-6522.)

Appellant claimed that Karen Lehman moved the video cameras from the Oak Tree Avenue house to Dutler Dauwalder's house on La Cresta on July 30, 1993; he denied sneaking back into the Oak Tree Avenue house but admitted telling Westervelt to turn off the house alarm. (30 RT 6511-6513,

6542.) He acknowledged testifying on March 23, 1995, that he possessed the video cameras from July 17 to August 3 but claimed it was an error because they were in Lehman's car trunk. (30 RT 6537-6538.)

Appellant claimed that on July 30, he told Dutler Dauwalder about the guns and where he bought them. (30 RT 6438-6439.) He claimed that in August, he told Brian Ray about the guns. (30 RT 6439.) He claimed that he bought three of the guns from newspaper advertisements. (30 RT 6440.) He denied threatening to shank Karen Lehman if she ever connected his name with the guns. (30 RT 6509-6510.)

Appellant admitted that he had felony convictions for selling marijuana and methamphetamine in 1976 for which he was placed on probation but claimed he was not guilty of selling methamphetamine. (30 RT 6441-6444, 6470-6471, 6531.) He admitted that he was arrested for possessing cocaine in 1985, convicted in 1987, sentenced to two years in prison in 1987, paroled in August 1988, and returned to prison for a parole violation. (29 RT 6365-6368; 30 RT 6466.) He admitted a prior conviction for child molestation in 1993; but he denied molesting any children. (30 RT 6468-6470, 6506, 6509.) He admitted possessing cocaine but claimed he was not guilty of the charges of possessing cocaine of which he was convicted. (30 RT 6509.)

Appellant testified that while living at the Oak Tree Avenue house with Westervelt and her children, he was charged with molesting a neighbor's daughter. (29 RT 6380-6381, 6383.) Eyherabide represented appellant, who pled no contest to the charges and was sentenced to three years in prison. (29 RT 6384-6385; 30 RT 6468.) The house was vandalized with graffiti that accused him of being a child molester. (29 RT 6381-6383.)

Appellant testified that after his parents separated, his father read the Bible and went on a hunger strike. (30 RT 6422-6423.) When his father committed suicide in 1978, appellant found the body. (29 RT 6377-6379.) Appellant had four brothers (two older and two younger) and one younger

sister. (29 RT 6379-6380; 30 RT 6426.)

Appellant testified that he refused to allow Dr. Burdick to conduct a psychiatric examination on March 18 and 23, 1994. (30 RT 6416-6418.) He was examined by Dr. Manohara on July 19, 1994, for about one hour. (30 RT 6418-6419.) He was examined by Dr. Velosa on July 13 for about one hour and on July 19 for about forty-five minutes. (30 RT 6420-6421.)

Appellant's younger brother Richard (then 35 years old) testified that he was a minister. (31 RT 6661-6662.) Appellant's older brothers John and Joe were a chemist and accountant, respectively. (31 RT 6662, 6670.) Appellant's younger brother David was a sports medicine physiologist. (31 RT 6662, 6674.) Appellant's younger sister Janell was a teacher. (31 RT 6662, 6674.) During the summer of either 1969 or 1970, their father physically attacked their mother. (31 RT 6662, 6664, 6670.) Appellant did not witness the attack. (31 RT 6670.) Their father then went on a fast of bread and water and moved into a separate room of the house. (31 RT 6662.) Their father, who weighed about 250 pounds, lost about one hundred pounds, became malnourished, and went to the hospital, where he recovered. (31 RT 6662-6663.) In 1977, their father again physically assaulted their mother. (31 RT 6664-6665, 6670-6671.) Appellant did not witness the attack. (31 RT 6671.) Their mother and Richard moved into the house on Holtby Road, and appellant continued to live with their father. (31 RT 6665, 6671.) One night in December 1977, their father cried, moaned, asked for mercy, and was "wrestling with himself but showing signs of both physical and mental anguish." (31 RT 6665.) On the day their father died in June of 1978, appellant cried hysterically and banged his head and fists on the garage wall. (31 RT 6666.) Appellant's life returned to normal, and appellant never indicated that their father's suicide had impacted his life. (31 RT 6667.)

Richard testified that it was his personal experience that appellant was not a person who accepts responsibility for his actions. (31 RT 6675-6676.)

Richard admitted that he told the defense investigator that appellant seemed very paranoid and scary when he was paroled. (31 RT 6678.)

Clinical psychologist William Pierce testified that in June 1994, appellant's then-advisory counsel Ralph McKnight hired him to develop a psychosocial profile of appellant. (31 RT 6680, 6746.) Pierce testified that he interviewed appellant, then 41 years old, on October 12 and 27, 1994, at the state prison in Tehachapi. (31 RT 6694-6695, 6747.) At the first interview with Pierce, appellant refused to take psychological tests. (31 RT 6702.)

Pierce reviewed the Bakersfield Police and Kern County Coroner's reports; the reporter's transcripts of the preliminary hearing, the court proceedings of July 1994 and June 26, 1995; the defense investigator's background report; interviews with appellant's brothers Richard, and Joseph and appellant's sister Rita; and three psychiatric evaluations written by Drs. Burdick, Manohara, and Velosa. (31 RT 6694-6695, 6721-6722, 6730, 6732, 6747-6748, 6754-6755.) Based thereon, he diagnosed appellant as suffering from a persecutory paranoid delusional disorder and a narcissistic personality disorder with depressive features. (31 RT 6695, 6723-6729, 6732, 6734, 6760-6761, 6767; 32 RT 6814.) Appellant began developing these emotional and mental disturbances during late adolescence or early adulthood. (31 RT 6734.) On the day of the murder, appellant was suffering from these mental and emotional disturbances. (31 RT 6734.) Pierce testified that appellant was overly verbose with pressured speech and disorganized thought disorder (fragmented, disordered, tangential thinking, and loose associations). (31 RT 6696-6697, 6729-6733, 6759.) Appellant demonstrated a labile affect (moodiness) and religiosity (appeal to God). (31 RT 6697-6698, 6731.) He believed both he and his family were persecuted. (31 RT 6698.)

Pierce opined that appellant identified with his father, minimized his father's alleged psychotic behavior, and developed a defensive psychological system to deal with his father's suicide. (31 RT 6714-6715, 6718-6719, 6726-

6727.) The difficulties between appellant's parents, the physical abuse by his father, and the trauma of his father's psychotic break and suicide effected appellant's personality development. (31 RT 6734-6735, 6772, 6807-6808.)

Pierce testified that appellant's mother stated that the father was physically abusive toward her and her children. (31 RT 6705.) Other family members related that the father physically attacked the mother in 1972 when appellant was 19. (31 RT 6710-6711.) When he was an adult college student, appellant sold marijuana and was convicted of selling marijuana in about 1974. (31 RT 6711, 6715; 32 RT 6808.) After the father was hospitalized for a back operation, his behavior changed, with increased drinking and ingesting of pain medication. (31 RT 6712-6713.) The father became more violent and twice was admitted to the psychiatric ward. (31 RT 6713.) He went on a starvation diet and developed scurvy. (31 RT 6714.) On June 11, 1978, the father shot himself in the head, and appellant found his body. (31 RT 6716.) Appellant was extremely upset. (31 RT 6717.)

Pierce testified that there were several allegations that appellant molested children when he worked as a substitute teacher while on parole. (31 RT 6720; 32 RT 6810, 6812-6813.) In about 1987, appellant was convicted of possessing cocaine and sentenced to prison for two years. (31 RT 6720-6721.) He was paroled in 1990. (31 RT 6721.) In 1993 he was charged with molesting a neighbor's child and Westervelt's child. (31 RT 6721.)

Pierce opined that a sentence of life without the possibility of parole would deter appellant's criminal behavior. (32 RT 6814.) He opined that appellant was under extreme emotional disturbance when he committed the murder and that appellant's family background could be a mitigating circumstance. (32 RT 6818.)

Under cross-examination, Pierce admitted testifying for the defense in the capital murder cases of *People v. Ray*, *People v. Berryman*, and *People v. Holt* and the special circumstances murder cases of *People v. Eddington,*

People v. Tramble, and *People v. Gore,* which was charged as a capital case. (31 RT 6741-6744, 6746.) Pierce claimed that he did not disagree with the death penalty. (31 RT 6744.) He admitted that defense investigator John Purcell reported that appellant's family members feared retribution from appellant and that Joseph Lightsey harbored resentment toward appellant regarding the effects of appellant's criminal conduct on their mother. (31 RT 6756-6757.) He admitted that a person with disorganized thought order was able to understand the difference between right and wrong; that appellant could understand the difference between right and wrong; and that having thought disorder did not mean the person would commit murder by stabbing someone 43 times. (31 RT 6759.) He admitted that having thought disorder was not necessarily an excuse for committing murder. (31 RT 6760.) He admitted that appellant exhibited aggression, deceit, and impulsivity. (31 RT 6768.) He admitted that appellant was committing felony crimes, including selling marijuana and methamphetamines, before his father's suicide. (32 RT 6808.) He admitted that between 1976 and 1985, appellant was arrested for possession of cocaine and that appellant's service of prison terms between 1987 and 1990 did not deter him from committing crimes. (32 RT 6809, 6813.) He claimed that with psychiatric treatment, it was possible that appellant's narcissistic personality disorder could go into remission. (32 RT 6815.) He claimed that appellant's delusional paranoid disorder was treatable. (32 RT 6815.) He acknowledged that appellant's three brothers and sister led productive, law-abiding lives despite their father's alleged psychosis. (31 RT 6771.)

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING APPELLANT MENTALLY COMPETENT TO STAND TRIAL

Appellant contends his convictions and death sentence must be reversed because he was incompetent to stand trial and because the competency proceedings were tainted by procedural errors. He alleges violations of his state and federal constitutional rights to a fair trial, due process, and a proportionate and reliable death verdict (U.S. Const., Amends. V, VI, VIII, & XIV; Cal. Const., art. I, §§ 7, 15, 17, & 28). He further alleges a violation of his federal constitutional due process "liberty interest" under California law competency provisions. (AOB 63-118.)

Section 1367, subdivision (a), provides:

> A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.

This statute embodies the federal constitutional principle that a defendant "may not be put to trial unless he '"has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him."' [Citation.]" (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 354; see *Pate v. Robinson* (1966) 383 U.S. 375; *People v. Lawley* (2002) 27 Cal.4th 102, 136.) Whether a person is competent to stand trial is a jurisdictional question, which cannot be waived by the defendant or counsel. (*People v. Marks* (1988) 45 Cal.3d 1335, 1340.)

Section 1368 implements the principles of section 1367:

> (a) If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent . . . .
>
> (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369.

A court is required to hold a competency hearing when substantial evidence of the accused's incompetence has been introduced. (*People v. Stankewitz* (1982) 32 Cal.3d 80, 91-92; *People v. Laudermilk* (1967) 67 Cal.2d 272, 283.) Thus, a competency hearing is required

> [i]f a psychiatrist or qualified psychologist [citation omitted], who has had sufficient opportunity to examine the accused, states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel . . . .

(*People v. Pennington* (1967) 66 Cal.2d 508, 519; see *Pate v. Robinson, supra,* 383 U.S. at pp. 385-386.) "[A] defendant must exhibit more than bizarre, paranoid behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his [or her] defense counsel" (*People v. Ramos* (2004) 34 Cal.4th 494, 508) before the trial court is obligated to order a competency hearing. Once the competency hearing is ordered, all proceedings are suspended until the question of the defendant's present mental competence has been determined. (§ 1368, subd. (c).)

A defendant is presumed competent unless proved otherwise by a preponderance of the evidence. (§ 1369, subd. (f); *People v. Medina* (1990) 51 Cal.3d 870, 881-886.) The reviewing court determines "whether substantial evidence, viewed in the light most favorable to the verdict, supports

the trial court's finding" of competence under section 1368. (*People v. Lawley, supra,* 27 Cal.4th at p. 131; *People v. Marshall* (1997) 15 Cal.4th 1, 31.) ""'An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper.'" [Citations.]" (*Marshall, supra,* at p. 33.)

A. Judge Lee Felice's March 7, 1994, Finding Of Mental Competence

The complaint charging appellant with the instant offenses was filed on October 21, 1993. (II CT 463-465.) On January 24, 1994, the court denied appellant's motions to represent himself under *Faretta v. California, supra,* 422 U.S. 806 and to retain then defense counsel Stanley Simrin as cocounsel. (RT [1/24/94] 3-4, 6, 13-14.)

In support of his motions, appellant stated:

> . . . [B]ut my reason for going pro per, and using the authority of Feretta [sic] versus California, 1975, and more if you would to hear, is because I have relived 7-7-93, very minute of it, and I know who was with me, where they stood, if they turned left or if they turned right. Everything about that day I know. And I would want to recall some of them who have already testified, and we also have some documentation that needed to be touched on which can make the difference of life and death in which mine is that concern at this time. So being seriously compelling that it is, I would like to not just trust my life in somebody else's hands as I certainly feel comfortable and educated enough, I have a degree at CSUB in English and I have had Business Law 1 and Business Law 2 and I have been in court before and I have been on the jury and I will overcome the inequities of being nervous or having to get a drink of water every once in a while – I am cottonmouth – in all respects to your Court and I will conduct myself in a professional manner at all times and listen for any direction from you or my co-counsel, to continue to use proper language and anything else that I might be learned on [sic] when the time comes.

(RT [1/24/94] 6.)

The court denied appellant's motions. (RT [1/24/94] 3-4, 6, 13-14, 16-17.)

On February 7, 1994, defense counsel Simrin declared a conflict because he was unable to prepare for trial within the statutory period; and Simrin was relieved. (III CT 681; RT [2/7/94] 2-3.)

On March 3, 1994, then defense counsel Edward Brown filed a motion to suspend the criminal proceedings and to determine appellant's mental competence (§ 1368, subds. (b) & (c)). (III CT 711.) Defense counsel Brown did not state that appellant was not seeking a finding of incompetence. (*Ibid.*) On March 7, 1994, Judge Lee Felice granted the defense counsel's motions and appointed Dr. Burdick, a psychiatrist, to examine appellant:

> THE COURT: . . . The record will reflect that Mr. Lightsey is now present with counsel, Mr. Brown. The People are represented by Miss Green. This is case number 56801. [¶] This matter is on for a number of motions, but given the 1368 motion that has been made by Mr. Brown, at this time the Court is going to suspend criminal proceedings, appoint a doctor and set the matter for further hearing on a doctor's report.
>
> MR. BROWN: Thank you, your Honor.
>
> **THE DEFENDANT: Your Honor, I would like to make a record at this time that I'm exercising constitutional rights to self-representation. My authority is Foretta [sic] versus California, 1975.**
>
> **I have a [M]arsden motion to present today.**
>
> THE COURT: I have just suspended criminal proceedings. [¶] We'll appoint a doctor and set the matter for further hearing.
>
> THE DEFENDANT: How can you suspend criminal proceedings without giving me an opportunity to speak?
>
> THE CLERK: Mr. Burdick. March 28.
>
> **THE DEFENDANT: Cancel the doctor's appointment. I don't need a doctor. I refuse.**
>
> MS. GREEN: Your Honor, I need to lodge some records with the Court that I have subpoenaed. They delivered them to my office. There is a company declaration, indicates confidential records and in camera view needed to determine whether any or all records would be --
>
> THE COURT: Are they sealed?

MS. GREEN: The outside envelope isn't. The inside envelope is.

THE COURT: Very well, the record will reflect that the Court is in receipt of these records as described by Miss Green, and ordered [sic] them not to be opened unless the Court conducts an in camera hearing at this point.

MR. BROWN: Thank you, your Honor.

(III CT 791-792; emphasis added.)

Dr. Burdick met with appellant at the jail on March 23, 1994. (III CT 809.) Based upon his meeting with appellant, Dr. Burdick opined that appellant was competent. (III CT 810; III Supp. Conf. CT 398.)

Based on the doctor's report, Judge Felice found appellant presently competent to stand trial and reinstated criminal proceedings on March 28, 1994. (III CT 766; RT [3/28/94] 2.) At the hearing, neither appellant nor the defense counsel objected to the doctor's report, and the defense counsel submitted the issue of appellant's competence on the report:

THE COURT: From the 8:30 a.m. calendar, People of the State of California versus Christopher Lightsey, case number 56801. [¶] Mr. Lightsey is present with counsel, Mr. Brown. Miss Green is here representing the People. [¶] This matter is on calendar for a hearing on a doctor's report. [¶] Mr. Brown.

MR. BROWN: I have received and read the report, your Honor, and submit it on the report.

THE COURT: Miss Green?

MS. GREEN: I have received and read the report and the People are willing to submit it, also.

THE COURT: All right. Based on the doctor's report, the Court finds the Defendant is presently competent to stand trial. The criminal proceedings will be reinstated. [¶] We'll need to reset this matter for readiness and -- motions, readiness, and trial.

(RT [3/28/94] 2.)

After the court announced its competence finding, appellant filed a notice of motion and motion to disqualify the judge for cause under Code of Civil Procedure section 170.6, which was granted, and a notice of motion and *Marsden* motion. (III CT 757-762, 766; III Supp. Conf. CT 356-360; RT [3/28/94] 3-4.)

At his *Marsden* hearing held that same day before Judge Richard J. Oberholzer, appellant primarily complained that then defense counsel Brown had not provided "Brady Ferguson"[11] material. (Unsealed *Marsden* Motion RT [3/28/94] 4-5, 7, 9, 12, 18; see III CT 760.) Attorney Brown stated that appellant "is extremely difficulty [sic] to get along with, does not want to cooperate with counsel, has his own agenda, wants to represent himself, has made this clear to me ever since I first was assigned this case on the 22nd of last month." (Unsealed *Marsden* Motion RT [3/28/94] 19.) Regarding appellant's ability to represent himself, attorney Brown stated, "Although he is certainly intelligent enough to do this, the question is one of perspective of training." (*Id.* at p. 21.)

Judge Oberholzer denied appellant's *Marsden* motion, stating, "I think this is more of an issue of cooperation between counsel and the defendant. And the court is concluding very quickly that the defendant is not cooperating with his counsel." (Unsealed *Marsden* Motion RT [3/28/94] 21-22.)

1. Judge Felice Was Not Required To Appoint Two Evaluators To Examine Appellant Under Section 1369, Subdivision (a), Because Neither Appellant Nor The Defense Counsel Expressly Informed The Court That Appellant Was Not Seeking A Finding Of Incompetence

Appellant contends that Judge Felice erred by not appointing two competency evaluators under section 1369, subdivision (a) before finding him competent. (AOB 69-70.) This statute provides in pertinent part that

> [t]he court shall appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant.

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11. Appellant's reference apparently is to *Brady v. Maryland* (1963) 373 U.S. 83 and *In re Ferguson* (1971) 5 Cal.3d 525, which hold that the prosecution has a sua sponte obligation, pursuant to the due process clause of the United States Constitution, to disclose to the defense information within its custody or control and which is material to, and exculpatory of, the defendant.

> In any case where the defendant or the defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists, licensed psychologists, or a combination thereof.

(§ 1369, subd. (a), italics added.) The statute requires the appointment of two experts in such situations to provide "minimum protection for the defendant against being incorrectly found incompetent to stand trial." (*People v. Harris* (1993) 14 Cal.App.4th 984, 996.)

Appellant does not assert that either he or his counsel expressly informed the court that he was not seeking a finding of incompetence, thus triggering the statutory requirement that the court appoint two evaluators. Relying upon his comments to Judge Felice, as set forth *ante* (III CT 791-792), he argues that he "vehemently opposed the competency proceedings, tried to fire Brown, and moved to represent himself . . . then demanded a hearing on the competency issue." (AOB 67, 69.) Respondent submits that appellant's reliance is misplaced. Appellant never stated that he opposed the competency proceedings and never demanded a competency hearing.

In *People v. Lawley, supra,* 27 Cal.4th at page 133, this Court rejected an interpretation of section 1369, subdivision (a) that required the appointment of two mental health evaluators based on the defendant's "insistence on a court trial, a new lawyer, or the right to proceed in propria persona." The court reasoned that "[s]ection 1369, subdivision (a) plainly requires 'defendant or the defendant's counsel' to 'inform[ ] the court' that the defense is not seeking a finding of incompetence in order to trigger the required appointment of a second mental health expert." (*Lawley, supra,* at p. 133, fn. omitted.)

The reasoning of *People v. Lawley, supra,* 27 Cal.4th 102 applies here. The statute requires an affirmative expression by the defendant or his counsel to the court that the defendant is not seeking a finding of incompetence before the requirement of a second evaluator is triggered. Appellant's statements to the trial court do not meet the statutory threshold that the defendant or his

counsel must inform the court that a finding of incompetence is not being sought. Appellant's statements, "Cancel the doctor's appointment. I don't need a doctor. I refuse," are easily susceptible of meanings other than that he was not seeking a finding of incompetence. When the statements are read in context, it is apparent the trial court reasonably and properly interpreted the statements to reflect appellant's frustration with the court's refusal to entertain his *Marsden* and *Faretta* motions during the pendency of the competency proceedings. Appellant wanted the court immediately to dismiss attorney Brown and to either appoint a new attorney or allow appellant to represent himself. Section 1369, subdivision (a)'s requirement that a second mental health evaluator be appointed to assess appellant's competence to stand trial was accordingly never triggered.

Further, appellant was not prejudiced by the failure of the court to appoint a second evaluator. Appellant adamantly refused to be formally interviewed by the one psychiatrist appointed by the court to examine him. Appointing a second mental health evaluator would have been a futile act. At the competency hearing, appellant made no objection to the issue of his competence being submitted to the court based on the sole psychiatrist's report.

The statutory requirement of appointing a second evaluator protects the contesting defendant "against being incorrectly found *incompetent* to stand trial." (*People v. Harris, supra,* 14 Cal.App.4th at p. 996, italics added.) Since Dr. Burdick found appellant competent, appellant did not require the benefit of a second opinion, as he was not in danger of being found incompetent to stand trial. Certainly a second expert would have been required had Dr. Burdick found appellant incompetent, and appellant, or his attorney, then informed the court that appellant was not seeking a finding of incompetence. Pursuant to Dr. Burdick's evaluation, Judge Felice found appellant competent. Since, as appellant wished, he was found competent to stand trial, the statutory protection was not required.

Any alleged violation of procedures specified in section 1369 was invited by appellant and clearly harmless beyond a reasonable doubt. (See *People v. Lang* (1989) 49 Cal.3d 991, 1031-1032 ["[T]he doctrine of invited error operates to estop a party from asserting an error when the party's own conduct has induced its commission [citation], and from claiming to have been denied a fair trial by circumstances of the party's own making [citation]."]; *People v. Leonard* (2007) 40 Cal.4th 1370, 1390-1391 [trial court's failure to appoint director of regional center for developmentally disabled to evaluate defendant under section 1369, subdivision (a), did not prejudice defendant, did not deprive defendant of a fair trial to determine his competency, and did not require reversal of defendant's murder convictions and death sentence]; *People v. Grieg* (1939) 14 Cal.2d 548, 558-560 [failure to follow statutory rules regarding order of proof under section 1369 harmless error]; cf. *People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24.)

Appellant notes that, after Judge Felice found him competent, he "reiterated his denial of incompetence and his opposition to the proceedings in his motion to recuse" the judge. (AOB 69, citing 3 CT 757-762.) Statements made by appellant after the court's finding of competence are irrelevant to the determination of whether the judge was required to appoint two mental health evaluators. The trial court's finding of competence is reviewed for correctness at the time it was made and not by reference to evidence produced at a later date. (See *People v. Welch* (1999) 20 Cal.4th 701, 739; *People v. Turner* (1984) 37 Cal.3d 302, 312; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 336.)

2. Judge Felice's Finding That Appellant Was Competent Was Supported By Substantial Evidence

Appellant contends that Judge Felice abused his discretion in finding

him mentally competent to stand trial based on Dr. Burdick's psychiatric report. (AOB 70-72.) At the time the trial court declared appellant competent to stand trial, it had before it a "Psychiatric Evaluation And Consultation Report" to the court dated March 23, 1994, prepared by Dr. Burdick, a psychiatrist. (III CT 809-810.) Dr. Burdick stated that he met with appellant at the jail on March 23, 1994. (III CT 809.) Appellant immediately identified the doctor, asked for a business card, and stated he was not going to answer any of the doctor's questions. (*Ibid.*) After sitting down, appellant stated that he had recently initiated a *Marsden* and had been trying to fire his attorney and get a different one. (*Ibid.*) He stated he would only talk to the doctor in court and would not answer any of his questions. (*Ibid.*) He then was apologetic and stated that it was nothing personal but he had to protect his rights. (III CT 810.)

Dr. Burdick opined that appellant was competent, explaining:

> It is not possible from this brief encounter to complete a formal psychiatric evaluation but it is pertinent to note that the subject was not behaving in any peculiar manner. His speech was organized and well modulated. He was obviously in control of his thoughts and was aware of the situation and was obviously making a free choice to not be cooperative to a psychiatric evaluation. He did indicate awareness spontaneously as I was leaving his presence that he knew he was to be seen for a 1368 evaluation. It would seem apparent at this point that this man is in control of his faculties and is not demonstrating a psychiatric illness at this point. Suggestions from the confinement staff of some of his behavior suggests that he is deliberately disruptive and a trouble maker but nothing to suggest from their comments that he was exhibiting psychotic behavior. From this brief encounter it is my opinion that the defendant is able to understand the nature and purpose of the proceedings taken against him and if he so chooses, he is capable of cooperating in a rational manner with counsel in presenting a defense.

(III CT 810.)

Based on the doctor's report, Judge Felice found appellant presently competent to stand trial and reinstated criminal proceedings on March 28,

1994. (III CT 766; RT [3/28/94] 2.) At the hearing, neither appellant nor the defense counsel objected to the doctor's report, and the defense counsel did not present any evidence and submitted the issue of appellant's competence on the report. Although Dr. Burdick was unable "to complete a formal psychiatric evaluation" as a result of appellant's refusal to cooperate, the psychiatrist was able to conclude from his encounter with appellant that he "is able to understand the nature and purpose of the proceedings taken against him and if he so chooses, he is capable of cooperating in a rational manner with counsel in presenting a defense." (III CT 811.) The psychiatrist based his finding on his observations that: (1) appellant "was not behaving in any peculiar manner"; (2) appellant's "speech was organized and well modulated"; (3) appellant "was obviously in control of his thoughts and was aware of the situation and was obviously making a free choice to not be cooperative to a psychiatric evaluation"; (4) appellant "did indicate awareness spontaneously as [the psychiatrist] was leaving his presence that he knew he was to be seen for a 1368 evaluation"; (5) appellant "is in control of his faculties and is not demonstrating a psychiatric illness at this point." (*Ibid.*; see *People v. Leonard, supra,* 40 Cal.4th at p. 1393 [substantial evidence supported trial court's competency determination; although court-appointed psychiatrist expressed uncertainty as to whether defendant had experienced religious hallucinations and said it "wasn't easy to try to assess" whether defendant's behavior resulted from a "severe delusional disturbance driven by a psychiatric disorder" or whether he was merely "very religious," psychiatrist unequivocally expressed his view that defendant "is competent to stand trial"].) Dr. Burdick's opinion was supported by that of the jail staff who indicated that "some of [appellant's] behavior suggests that he is deliberately disruptive and a trouble maker but nothing to suggest from their comments that he was exhibiting psychotic behavior." (*Ibid.*)

Neither the defense counsel nor appellant presented any evidence at the competency hearing to challenge Dr. Burdick's opinion that appellant was competent. The trial court was not presented with expert opinion, or any other evidence that appellant *currently* suffered from any mental illness or developmental disability that rendered him incapable of assisting in his defense.

Contrary to appellant's argument, Judge Felice was not aware of any substantial evidence suggesting appellant's incompetence. (AOB 71.) Appellant proffered his notice of motion and motion to disqualify Judge Felice for cause after the judge announced his competence finding. (RT [3/28/94] 3-4.) Prior to the competency hearing before Judge Felice that morning, defense counsel Brown proffered his ex parte motion for second counsel to Judge Oberholzer, who granted the motion. (III CT 763.) Judge Felice's finding of competence is reviewed for correctness at the time it was made and not by reference to evidence produced at a later date. (See *People v. Welch, supra,* 20 Cal.4th at p. 739; *People v. Turner, supra,* 37 Cal.3d at p. 312; *People v. Greenberger, supra,* 58 Cal.App.4th at p. 336.) Dr. Burdick's opinion constitutes substantial evidence, which supports the trial court's finding that appellant was competent to stand trial. (*People v. Lawley, supra,* 27 Cal.4th at p. 131; *People v. Marshall, supra,* 15 Cal.4th at p. 31.)

B. Judge Kelly's Rulings Regarding Appellant's Competence

1. Judge Kelly Properly Denied Defense Counsels' Request To Initiate Competency Proceedings On April 8, 1994

Appellant contends that Judge Kelly erred in refusing the requests of defense counsels Brown and Sorena to order a competency hearing on April 8, 1994. (AOB 74-75.) After Judge Felice found appellant presently competent to stand trial and reinstated criminal proceedings, appellant filed a motion to disqualify Judge Felice, and appellant's case was thereafter assigned

to Judge Kelly. (III CT 757-762, 766, 814; RT [3/28/94] 3-4]; RT [4/7/94] 17.) On April 8, 1994, after a *Marsden* hearing held on April 7, 1994, Judge Kelly denied the motion and prepared to proceed on appellant's *Faretta* motion. (III CT 815, 817-818; RT [4/7-8/94] 12, 49-76; Unsealed *Marsden* Motion RT [4/7/94].) Defense counsel Sorena complained that only one psychiatrist (Dr. Burdick) was appointed during the competency proceedings before Judge Felice and that Dr. Burdick "really did not perform an examination" of appellant. (RT [4/8/94] 77-79.) The defense counsels requested Judge Kelly to initiate competency proceedings and appoint two doctors. (RT [4/8/94] 78-79.) After further discussion, Judge Kelly denied defense counsels' request for further psychiatric evaluation of appellant, finding that appellant was intelligent and able to express himself well and that "if he settles down, he can cooperate with his attorneys so they can properly represent him." (RT [4/8/94] 85.)

A trial court is required to conduct a competency hearing under section 1368 only if "substantial evidence of incompetence is introduced"; "evidence 'that does no more than form the basis for speculation regarding possible current incompetence is not sufficient. [Citation.]' (*People v. Hayes* [(1999) 21 Cal.4th 1211, 1281].)" (*People v. Ramirez* (2006) 39 Cal.4th 398, 430-431.) "Once a defendant has been found competent to stand trial, a second competency hearing is required only if the evidence discloses a substantial change of circumstances or new evidence is presented casting serious doubt on the validity of the prior finding of the defendant's competence." (*People v. Medina* (1995) 11 Cal.4th 694, 734; see *People v. Leonard, supra,* 40 Cal.4th at p. 1415.) A trial court may rely on its own observations in determining whether the defendant's mental state has significantly changed during the course of trial to necessitate a new competency hearing. (*People v. Jones* (1991) 53 Cal.3d 1115, 1153.) The defense counsel's opinion that his client may be incompetent to stand trial is

not, by itself, sufficient to compel the court to hold a hearing to determine the defendant's competence. (*People v. Howard* (1992) 1 Cal.4th 1132, 1163-1164.)

Judge Kelly properly refused to initiate competency proceedings. The trial court was not presented with expert opinion or any other evidence demonstrating a substantial change of circumstances or that appellant *currently* suffered from any mental illness or developmental disability that rendered him incapable of assisting in his defense. (See *People v. Leonard, supra,* 40 Cal.4th at p. 1415; *People v. Hayes* (1999) 21 Cal.4th 1211, 1281; *People v. Ramirez, supra,* 39 Cal.4th at pp. 430-431.) Judge Kelly could rely on personal observations made during the *Marsden* hearing discussions with appellant on April 7, 1994, (Unsealed *Marsden* Motion RT [4/7/94]) in determining that a second competency proceeding was not required. (*People v. Jones, supra,* 53 Cal.3d at p. 1153.)

In *People v. Hayes, supra,* 21 Cal.4th at page 1281, the defense counsel asserted that his client was incompetent and moved for a hearing pursuant to section 1368. The trial court denied the motion, declaring that no doubt had arisen in the court's mind concerning the defendant's competence because it appeared the defendant understood the nature of the proceedings and was able to assist counsel. (*Ibid.*) This Court found the trial court properly refused to initiate competency proceedings. (*Ibid.*)

In *People v. Ramirez, supra,* 39 Cal.4th at page 431, this Court found no substantial evidence the defendant was mentally incompetent and that "[d]efense counsel's request for a 'psychiatric evaluation' of defendant, standing alone, does not require the court to appoint such an expert or conduct a competency hearing. (See *People v. Panah* (2005) 35 Cal.4th 395, 433 . . . ; *People v. Howard* (1992) 1 Cal.4th 1132, 1164 . . . .)" This Court noted that the trial court's observations of the defendant raised no question in the court's mind about the defendant's competence and rejected the defendant's argument

that the trial court erred in failing to order a competency hearing sua sponte:

> Defendant relies upon "the bizarre nature of the criminal acts charged, [defendant]'s bizarre and abnormal behavior following his arrest, and the court's own questions at various court hearings regarding [defendant]'s competence." But none of these circumstances raised a question as to defendant's ability to understand the nature of the proceedings or assist counsel in his defense. "[M]ore is required to raise a doubt [as to a defendant's competence] than mere bizarre actions [citation] or bizarre statements [citation] or statements of defense counsel that defendant is incapable of cooperating in his defense [citation] or psychiatric testimony that defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense [citation]." (*People v. Laudermilk* (1967) 67 Cal.2d 272, 285 . . . .)

(*Ramirez, supra,* at p. 431.)

Judge Kelly properly refused to initiate a second competency proceeding on April 8, 1994.

2. Judge Kelly Properly Found Appellant Competent On July 28, 1994

Appellant contends that the second competency proceedings conducted on July 28, 1994, were jurisdictionally defective and that Judge Kelly's competency finding was constitutionally deficient because: (a) Judge Kelly allowed appellant to represent himself during the competency proceedings; (b) Judge Kelly believed that both experts had found appellant competent to stand trial; (c) Judge Kelly allowed appellant to waive his right to a jury trial on the issue of his competence; and (d) the cumulative effect of the alleged errors occurring during the competency proceedings violated his due process right not to be tried while incompetent. (AOB 75-92.)

After a hearing on April 11, 1994, Judge Kelly granted appellant's *Faretta* motion and relieved attorneys Brown and Sorena from representing appellant. (III CT 819; RT [4/11/94] 159-160.) On April 13, 1994, the court appointed attorney Ralph McKnight as advisory counsel to appellant. (III CT

828; RT [4/13/94] 169.) On July 7, 1994, the court held a hearing on the motion of attorney McKnight, not joined by appellant, to terminate appellant's pro se status and to appoint counsel to represent appellant. (RT [7/7/94] 2.) Finding a doubt regarding appellant's competence, the court suspended criminal proceedings pending a competency evaluation of appellant under section 1368 and appointed Dr. Luis Velosa as one of the mental health evaluators. (IV CT 972-973; RT [7/7/94] 32-34, 38, 48, 53; see RT [7/11/94] 58.) The court allowed appellant to pick the second evaluator by July 11, 1994. (RT [7/7/46] 38-41, 46-47, 53-55.)

On July 11, 1994, appellant advised the court that he had picked psychologist Lynn Hall as the second evaluator. (RT [711/94] 62, 65.) On July 12, 1994, Judge Kelly advised appellant that Hall was unable to evaluate appellant. (RT [7/11/94] 82-83.) Pursuant to appellant's request, the court contacted the office of Dr. Sakrepatna Manohara regarding a second competency evaluation of appellant under section 1368. (IV CT 980, 988; RT [7/12/94] 86, 95.) On July 13, 1994, the court advised appellant that Dr. Manohara had agreed to examine him. (IV CT 995, 1055-1056; RT [7/13/94] 95-97.)

Dr. Manohara's letter to Judge Kelly dated July 19, 1994, states that appellant was "alert and oriented to time, place and person" and that appellant was generally cooperative but was quite manipulative." (III Supp. Conf. CT 393.) The doctor found "no symptoms or signs of hallucinations"; that appellant "did not appear to be really delusional although he was highly mistrustful of the system and the attorneys"; and that "his intellectual functioning seems to be average to above average." (III Supp. Conf. CT 393-394.)

Dr. Velosa's letter to Judge Kelly dated July 24, 1994, states that appellant "at present is suffering from a psychiatric disorder best classified as bipolar disorder (manic type) or a paranoid disorder. The defendant at present

is exhibiting psychotic symptoms characterized by a thought disorder in which the defendant experiences racing thoughts, looseness of associations, rambling of thoughts, sometimes without logical connections. In addition, the defendant experiences paranoid thinking, persecutory delusions, a false belief that there is a conspiracy against him." (III Supp. Conf. CT 401.) Dr. Velosa stated that "[t]he defendant, although he is not an attorney, has the vast knowledge of the legal proceedings and because of his mental disorder, he is not only unable to cooperate with "advisory counsels" but is also attempting to represent himself, and because of his mental disorder, he has the tendency to disrupt the whole proceedings by rambling inappropriately, calling the proceedings 'totally unconstitutional and illegal' or moving to disqualify the judge." (*Ibid.*) Dr. Velosa found that appellant "is at present able to understand the nature and purpose of the proceedings taken against him. However, because of his psychiatric symptoms, the defendant at present is unable to cooperate in a rational manner with counsel in presenting a defense. Furthermore, despite of [sic] the fact that the defendant has a vast knowledge of the legal system and legal proceedings, because of his psychiatric symptoms, the defendant is not able to represent himself." (*Ibid.*)

In court on July 28, 1994, the court stated that it had reviewed Dr. Manohara's July 19, 1994, competency evaluation finding appellant competent to stand trial and able to assist in his defense but not competent to represent himself:

> And it appears to the Court that Dr. Manohara has made a determination that – let me see. Let me read from his report. Dr. Manohara states that this person, referring to the defendant, does not have any clear-cut psychotic disorder although he seems to be excessively mistrustful of the system. He does not have any diagnosable mental disorder on the axis one based on the Diagnostic Statistical Manual of Mental Disorder, Revised Edition, published by the American Psychiatric Association; however, he exhibits a personality disorder and uses a lot of rationalization in order to justify personal deficits or irresponsible behavior.

His intellectual functions are intact. He seems to have a fairly good grasp of the legal system. His personality disorder makes it difficult to work with him as an attorney but, in my opinion, he is competent to stand trial.

I think that's the meat and potatoes of Dr. Manohara's report. It goes on to make an observation that he doesn't feel that you're competent to represent yourself because of the lack of objectivity and grandiose sense of self-importance and tendency to be circumstantial with a sense of entitlement. He may overreact to criticism with feelings of rage.

And he states in my professional opinion the above characteristics of his personality as well as his interactions with me during the interview make him incompetent to represent himself.

Mr. McKnight has sent me copies of transcripts of the last two court appearances by Mr. Lightsey which I have reviewed. And it's signed by S. A. Manohara, M.D., Board Certified by the American Board of Psychiatry and Neurology.

Bottom line of all that is that Dr. Manohara has opinioned [sic] that you are not competent [sic] to stand trial, that you're able to cooperate in your own defense and that you have an understanding as to the legal system; and, therefore, he concludes that you are not incompetent to assistant [sic] trial in this matter.

(RT [7/28/94] 101-102, underlining added.)

The court stated that it had reviewed Dr. Velosa's July 24, 1994, competency evaluation finding appellant able to understand the nature and purpose of the proceedings but unable to cooperate in a rational manner with counsel in presenting a defense and not competent to represent himself:

Dr. Velosa's report, dated July 24th, on page two in the category entitled Psychiatric Opinions, states that on the basis of the psychiatric examination I find the defendant, Christopher Lightsey, suffering from a psychiatric disorder which impairs his thinking process. The defendant at present is suffering from a psychiatric disorder best classified as bipolar disorder, manic type, or a paranoid disorder.

The defendant at present is exhibiting psychotic symptoms characterized by a thought disorder in which the defendant experiences racing thoughts, looseness of associations, rambling of thoughts sometimes without any logical connection.

In addition, the defendant experiences paranoid thinking, persecutory delusions, a false belief that there is a conspiracy against him.

The defendant, although he is not an attorney, has vast knowledge of the legal proceedings and, because of his mental disorder, he's not only unable to cooperate with advisory counsel but is also attempting – let me reread that. The defendant, although he is not an attorney, has the vast knowledge of the legal proceedings and, because of his mental disorder, he is not only unable to cooperate with advisory counsel but is also attempting to represent himself and because of his mental disorder he has the tendency to disrupt the whole proceedings by rambling inappropriately, calling the proceedings totally unconstitutional and illegal or moving to disqualify the Judge.

Number two in that category, that is psychiatric opinion category, on the basis of the psychiatric examination I find the defendant is at present able to understand the nature and purpose of the proceedings taken against him; however, because of his psychiatric symptoms, the defendant at present is unable to cooperate in a rational [manner] with counsel in presenting a defense.

Furthermore, despite of [sic] the fact that the defendant has a vast knowledge of the legal system and legal proceedings, because of his psychiatric symptoms the defendant is not able to represent himself.

There is substantial additional detail contained in the report from Dr. Velosa outlining in some detail the interviews and the contacts that he had with Mr. Lightsey.

(RT [7/28/94] 102-104, underlining added.)

Appellant stated that he had no doubt that he could present his own defense and demanded a jury trial on the issue of his competence. (RT [7/28/94] 104-105.) The court responded:

THE COURT: Let me see if I can clarify this for you a little bit. We have got two issues really, Mr. Lightsey. One of the issues has to do with whether or not you are competent to stand trial.

MR. LIGHTSEY: Well, there is no doubt I'm competent to stand trial, your Honor.

THE COURT: Well, that's what we're here about basically today is to determine that. And Dr. Velosa, although he reflects what I would suggest to be some reservation in that regard, he does indicate that you are able to understand the nature and purpose of the proceedings.

And as it relates to other facets of his observations, it appears to be addressing the second issue, which is a separate issue, that is the issue of whether or not you are competent to stand trial and cooperate and participate in your own defense.

MR. LIGHTSEY: So we are not to discuss that issue; is that correct?

THE COURT: We are not going to discuss them together. We're going to get to that in a minute, because these reports address that there should be some discussion of it here today.

It's apparently the position of the People that they would not find it necessary to contest in any way the reports if the Court interprets those reports to conclude that you are in fact competent to stand trial. That's your position, I believe; is that correct?

MR. LIGHTSEY: That's correct.

THE COURT: And I believe, in addition, Dr. Manohara has in his report indicated the same conclusion. And on the last page of Dr. Manohara's report, page four, he makes the observation, referring to the defendant, his intellectual functions are intact. He seems to have a fairly good grasp of the legal sometime [sic]. His personality disorder makes it difficult to work with him as an attorney, but in my opinion he is competent to stand trial.

So at least on the issue of whether or not you're competent to stand trial Dr. Manohara has expressed his opinion unqualifiedly that you are competent to stand trial.

And we get these matters from both directions, Mr. Lightsey. Occasionally we have a defendant in court who wants to be found incompetent and, therefore, insists on a jury trial on that issue. The case before the Court, of course, we have the other side of that coin, but that's why we're kind of crawling into this situation a little bit.

I want to make sure that you feel comfortable with this Court following the recommendation of the doctors, most particularly Dr. Manohara, that you're competent to stand trial. You don't take any issue with that, apparently; is that correct?

(RT [7/28/94] 105-106.)

Appellant reiterated his belief in his competence and waived his right to a jury trial on the issue of his competence:

THE COURT: You're entitled to have a jury trial on this issue, as you know.

MR. LIGHTSEY: Yes, your Honor.

THE COURT: What Ms. Humphrey [assisting prosecutor] has suggested is invite [sic] you to waive a jury trial on that issue so the Court can go ahead and follow Dr. Velosa's -- Dr. Velosa and Dr. Manohara's determination that you are competent to stand trial.

MR. LIGHTSEY: Yes, your Honor. I'm all for --

THE COURT: You're not contesting that issue, right?

MR. LIGHTSEY: Not at all.

THE COURT: You waive a jury trial on that issue so we can get

on with the show; is that correct?

MR. LIGHTSEY: Yes, your Honor.

THE COURT: The Court's going to make a finding, pursuant to the reports of the doctors, that the defendant is in fact competent to stand trial based upon the opinions expressed by the two doctors. And the stay which was previously imposed as a result of this Court's observation that the 1368 evaluation should be made, that stay is lifted, and we will proceed.

(RT [7/28/94] 107-109; see *id.* at p. 131; IV CT 1024, 1082-1083.)

a. Judge Kelly Properly Allowed Appellant To Continue To Represent Himself During The Second Competency Proceedings

Appellant contends that Judge Kelly erroneously allowed him to continue to represent himself during the second competency proceedings. (AOB 76, 82-88.) Appellant essentially argues the court was required to terminate appellant's pro se status and to appoint counsel to represent appellant during the competency proceedings. Section 1368, subdivision (a) provides:

> If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. If the defendant is not represented by counsel, the court shall appoint counsel.

Under this section, the trial court has a duty to appoint counsel to determine whether or not a hearing under section 1368 is necessary. In this case, the court had already determined the necessity of a hearing. The court was not statutorily or constitutionally required to appoint counsel to represent appellant during the competency proceedings. Appellant was presumably competent and entitled to represent himself. (§ 1369, subd. (f); *People v. Lawley, supra,* 27 Cal.4th at p. 131; *People v. Medina, supra*, 51 Cal.3d at pp. 881-886.) If the court appointed defense counsel to represent appellant, it risked violating appellant's right to self-representation. (*Faretta v. California*, 422 U.S. 806.)

The Legislature has not made the section 1368 procedure mandatory. Section 1404 acts to modify all procedural provisions of the Penal Code, and section 1404 explicitly permits a California judge to depart from such standard procedure and to adopt any procedure which is adequate to ensure protection of the defendant's substantial rights. (See § 1404.) Section 1404 gives notice that the standard procedural provisions of the Penal Code may be departed from "unless" such departure tends to prejudice a defendant's substantial rights. In so doing, the Legislature has made plain that a defendant has no substantial right to adherence to such standard procedures. Indeed, were the case otherwise, any departure would ipso facto amount to a denial of a substantial right, and the word "unless" would simply be read out of the statute. (Cf. *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476 ["We must presume that the Legislature intended 'every word, phrase and provision . . . in a statute . . . to have meaning and to perform a useful function.'"].) Further, because the term "unless" establishes an exception to Penal Code section 1404's general rule that a departure is permissible, it would appear to allocate to the defendant the burden of proving the inadequacy of the alternate method adopted by a court. (Cf. *Norwood v. Judd* (1949) 93 Cal.App.2d 276, 282 ["One claiming an exemption from a general statute has the burden of proving that he comes within the exemption."].) Only upon such proof can a defendant claim that the departure was error at all, such that he may attempt to meet his further burden to prove affirmatively that the error was not harmless (*People v. Watson, supra,* 46 Cal.2d at p. 836).

Thus, there is no violation of even statutory dimension if a trial judge follows a course other than that set forth in sections 1367 through 1374, so long as the procedure followed by the trial judge was adequate to protect the defendant's right not to be tried while incompetent. Even if some trial court procedure amounted to a statutory violation, there is no basis for concluding that ipso facto the judgment is void. It is hardly the province of the

Legislature, through its enactments of statutes, to determine what the constitutional guarantee of due process requires. After all, the mandates of the United States Constitution do not vary with the enactment or repeal of statutes by the Legislature of the State of California. (Cf. *North Carolina v. Butler* (1979) 441 U.S. 369, 376 ["a state court can neither add to nor subtract from the mandates of the United States Constitution"].) Even if it were the intent of the Legislature to compel adherence to a given procedure as a means of determining competency in all criminal cases, that would mean nothing in the context of the Constitution; rather, variance from that procedure would amount only to a violation of statute. (See *People v. Leonard, supra,* 40 Cal.4th at p. 1391 ["notwithstanding the trial court's failure to obtain an evaluation from the director of regional center for the developmentally disabled, defendant's competency trial protected his right not to be tried or convicted while incompetent].)

Nor would it matter if the Legislature even intended that any judgment be void if it followed a variance in such procedure. Notwithstanding any contrary intent by the Legislature (which contrary intent has yet to appear), the California Constitution flatly forbids the setting aside of a judgment merely because of some variance in procedure. Rather, actual prejudice to the defendant's substantial rights must be shown before a judgment may be set aside. (Cal. Const., art. VI, § 13; see also § 1258.)

In support of his argument that the failure to appoint counsel to represent a defendant whose competence is in question potentially violates the defendant's Sixth Amendment right to counsel, appellant cites three federal district court opinions, *United States v. Klat* (D.C. Cir. 1998) 156 F.3d 1258, *United States v. Boigegrain* (10th Cir. 1998) 155 F.3d 1181, and *United States v. Purnett* (2nd Cir. 1990) 910 F.2d 51. (AOB 83-86.) The United States Supreme Court has never held that the defendant must be represented by counsel during competency proceedings. Decisions of the lower federal courts

interpreting federal law are not binding on state courts. (See *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352; *People v. Bradley* (1969) 1 Cal.3d 80, 86.)

Moreover, there is doubt regarding any precedential value of the federal district court cases cited by appellant. In *United States v. Purnett, supra,* 910 F.2d at page 56, the court held that "where a trial court has sufficient cause to doubt the competency of a defendant to make a knowing and intelligent waiver of the right to counsel, it must appoint counsel -- whether defendant has attempted to waive it or not -- and counsel must serve until the resolution of the competency issue." (Accord *United States v. Klat, supra,* 156 F.3d at p. 1263; *United States v. Boigegrain, supra,* 155 F.3d at pp. 1185-1186.) However, the same court that decided *Purnett* thereafter distinguished it and refused to extend its application in *United States v. Nichols* (2nd Cir. 1995) 56 F.3d 403. The *Nichols* court found that appointment of counsel was not required where the district court held a hearing as a precautionary measure after making an initial determination of the defendant's competence based on psychiatric reports and the court's own observation. (*Id.* at pp. 414-415.) In *United States v. Morrison* (2d Cir. 1998) 153 F.3d 34, the same court stated, "We do not require a trial court to reappoint counsel to a pro se defendant every time it revisits the issue of competency." (*Id.* at p. 47, citing *Nichols, supra,* at p. 415 ["We decline to extend *Purnett* into an automatic adjournment rule every time the district court inquires further into competency. Such a rule would allow a manipulative defendant (as Judge Korman suspected Mason to be) to bring the trial to a halt at his whim."].)

Accordingly, in *Wise v. Bowersox* (8th Cir. 1998) 136 F.3d 1197, the court held that where the defendant was already properly representing himself after a fair determination of his competency, the trial court did not err in allowing him to continue to represent himself at a second hearing on his competency. (*Id.* at p. 1203.) In this case, as in *Wise*, appellant properly

represented himself during the second competency proceedings after the trial court had made a fair and proper determination of his competency.

In *People v. Hill* (1967) 67 Cal.2d 105, the Court held that the defense counsel could validly waive the defendant's right to a jury trial on the issue of his present sanity. In so holding, the Court remarked,

> When evidence indicates that the defendant may be insane it should be assumed that he is unable to act in his own best interests. In such circumstances counsel must be free to act even contrary to the express desires of his client. . . . Conducting the trial according to the dictates of a defendant who, evidence indicates, may be insane, can result in prejudicial error. . . . Obviously, where the attorney has doubts as to the present sanity of the defendant he should be able to make decisions as to how the proceedings should be conducted.

(*Id.* at p. 115, fn. 4.) *Hill* is distinguishable because the defendant in that case had not previously been found competent and was not properly representing himself prior to the competency proceedings. Unlike defendant Hill, it could not be assumed that appellant was unable to act in his own best interests.

Even assuming the trial court was required to appoint counsel to represent appellant during the competency proceedings, reversal of appellant's convictions is not required. A denial of a Sixth Amendment right to counsel is reversible per se only when it results in a complete and pervasive denial of the right to counsel. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 342-343; *Satterwhite v. Texas* (1988) 486 U.S. 249, 257-258; see *People v. Wilder* (1995) 35 Cal.App.4th 489, 499-500.) Any denial of counsel in this case was harmless beyond a reasonable doubt. (*Satterwhite, supra,* at p. 256 citing *Chapman v. California, supra,* 386 U.S. at p. 24.)

For practical purposes under section 1368, appellant was essentially "represented" by advisory counsel McKnight. On June 29, 1994, McKnight instigated the competency proceedings by filing a motion to terminate appellant's pro se status and to appoint counsel due to appellant's mental incompetence. (III CT 906-909.) McKnight filed a declaration in support of

the motion, stating the factual basis for his opinion that appellant was mentally incompetent. (III CT 910-913.) Consistent with McKnight's motion, on July 7, 1994, the court suspended criminal proceedings pending a competency evaluation of appellant under section 1368 and appointed Dr. Luis Velosa one of the mental health evaluators. (IV CT 972-973; RT [7/7/94] 32-34, 38, 48, 53; see RT [7/11/94] 58.) Pursuant to appellant's request, Dr. Sakrepatna Manohara was thereafter appointed to conduct a second competency evaluation of appellant under section 1368. (IV CT 980, 988, 995, 1055-1056; RT [7/12/94] 86, 95; RT [7/13/94] 95-97.) McKnight performed exactly as appointed defense counsel would have performed, assuming the defense counsel shared McKnight's opinion that it was in appellant's best interest to be found incompetent.

Appellant fails to explain how he was prejudiced during the proceedings. Advisory counsel McKnight was present during the competency proceedings. (RT [7/28/94] 100.) In his declaration, McKnight fully informed the court of the factual basis for his belief that appellant was mentally incompetent. Appellant was independently examined by two psychiatrists. The court, not the defendant's counsel, has the obligation and authority to determine the defendant's competency. The court's finding of appellant's competence was properly based on the doctors' evaluations and its own observations of appellant, which constituted substantial evidence in support of appellant's competence. The court's finding of competency would not have been different had McKnight been acting as appellant's defense counsel rather than his advisory counsel. The alleged error was clearly harmless. (*Chapman v. California, supra,* 386 U.S. at p. 24; compare with *White v. Maryland* (1963) 373 U.S. 59 [absence of counsel from arraignment that affects entire trial because defenses not asserted were irretrievably lost]; *Holloway v. Arkansas* (1978) 435 U.S. 475 [conflict of interest in representation throughout entire proceeding].)

In *People v. Jenan* (2007) 148 Cal.App.4th 1144, the trial court twice expressed a doubt during the defendant's preliminary hearing about the defendant's mental competence and warned of a hearing but never ordered one. (*Id.* at pp. 367-373.) The appellate court found the trial court's failure to appoint counsel at the preliminary hearing constituted reversible error because "[t]he doubt as to mental competence that arose in the court's mind at the preliminary hearing imposed on the court the duty to appoint counsel to represent [the defendant] on that issue at that time . . . ." (*Id.* at pp. 373-374.) Unlike *Jenan*, reversible error did not occur in this case. The trial court here held a hearing on appellant's competence. The court's finding of appellant's competence was properly based on the doctors' evaluations and its own observations of appellant, which constituted substantial evidence in support of appellant's competence. There was not a complete deprivation of appellant's right to counsel. (See *White v. Maryland*, *supra*, 373 U.S. 59 [absence of counsel from arraignment that affects entire trial because defenses not asserted were irretrievably lost]; *Holloway v. Arkansas*, *supra,* 435 U.S. 475 [conflict of interest in representation throughout entire proceeding]; *Gideon v. Wainwright*, *supra*, 372 U.S. at pp. 342-343 [total deprivation of counsel throughout entire proceeding].)

Moreover, on September 27, 1994, prior to trial, appellant waived his right to self-representation, and the trial court appointed attorney William Dougherty as counsel and attorney James Gillis as cocounsel. (IV CT 1113; RT [9/27/04] 27-29.) Thereafter on June 26, 1995, and then on June 30, 1995, while appellant was represented by appointed counsel and cocounsel, the trial court affirmed its finding of appellant's competency to stand trial. (29 RT 6217-6225, 6305-6306; 33 RT 6941-6942.) Appellant was not prejudiced by the court's failure to appoint counsel to represent appellant during the competency hearing.

b. Judge Kelly Did Not Believe That Dr. Velosa Had Found Appellant Competent To Stand Trial

Appellant essentially contends that Judge Kelly erroneously believed that Dr. Velosa had found appellant competent to stand trial. (AOB 80, 90-91.) The record rebuts this contention. The court knew and accurately described Dr. Velosa's opinion that appellant was able to understand the nature and purpose of the proceedings but unable to cooperate in a rational manner with counsel in presenting a defense and not competent to represent himself. (RT [7/28/94] 103-104, 106.) The court indicated that it was following Dr. Manohara's "opinion unqualifiedly that [appellant] was competent to stand trial." (RT [7/28/94] 107.) To the extent the court also relied upon Dr. Velosa's opinion that appellant was able to understand the nature and purpose of the proceedings, no error occurred.

c. Judge Kelly Properly Allowed Appellant To Waive His Right To A Jury Trial On The Issue Of Competency

Appellant apparently contends that Judge Kelly erroneously allowed him to waive his right to a jury trial and to submit to the court, the issue of his competence. (AOB 76, 88-89.)

The defendant is entitled to a hearing, and by statute, is entitled to have a jury determine his competence. (§ 1368; *People v. Lawley, supra,* 27 Cal.4th at p. 131 [right to jury trial in section 1368 proceeding is derived from statute rather than constitution]; *People v. Masterson* (1994) 8 Cal .4th 965, 969.) Over the defendant's objections, the defense counsel may waive the defendant's right to a jury trial on the issue of competence, forego the right to present live witnesses, and submit the competency determination on the psychiatric reports filed with the court. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1169; *Masterson, supra,* at p. 974.) "The statutory references to a 'hearing' (§ 1368, subd. (b)) or a 'trial' (§ 1369) simply mean that a

determination of competency must be made by the court (or a jury if one is not waived) . . . ." (*People v. Weaver* (2001) 26 Cal.4th 876, 904.)

Because appellant properly represented himself during the competency proceedings, he properly waived his right to a jury trial thereon. Appellant received an independent judicial determination of his competence to stand trial based on the stipulated evidence. (*People v. Cisneros* (1973) 34 Cal.App.3d 399, 406-407.) Appellant cites no authority holding that submission to the court of the issue of competence to stand trial based on psychiatric reports is per se unconstitutional or a violation of statute. (*People v. McPeters, supra,* 2 Cal.4th at p. 1169.) There was substantial evidence of appellant's competence; and as explained *ante*, the trial court properly found appellant competent. Appellant makes no showing that the hearing was incomplete or unfair. (See *ibid.*) Any error arising from appellant's waiver of his right to a jury trial was harmless because it is not reasonably probable that a jury would have found him incompetent. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Notably, a jury determination of the defendant's competence is not necessarily in the defendant's best interest. (See *People v. Samuel* (1981) 29 Cal.3d 489, 505-506 [jury finding of incompetence is accorded less deference than usual because: (1) "the right to a jury in section 1368 hearings is a creature of statute, rather than a mandate of our Constitution as is the jury right at trial"; (2) the demeanor of the witnesses was an insignificant factor in resolving the question of competence; and (3) competence proceedings do not "affect the question of guilt or the penalty to be imposed"].)

d. There Is No Cumulative Effect Of The Alleged Errors Occurring During The July 28, 1994, Competency Proceedings

Appellant essentially contends the cumulative effect of the alleged errors occurring during the July 28, 1994, competency proceedings violated his due process right not to be tried while incompetent. (AOB 92.) No errors

occurred; and when evaluated collectively, any errors that may have possibly occurred were harmless.

3. Judge Kelly Was Not Required To Institute Competency Proceedings Sua Sponte On September 27, 1994

Appellant contends that Judge Kelly abused his discretion in failing to institute competency proceedings sua sponte on September 27, 1994, because "[t]he need for a hearing was obvious from the materials filed by Gillis" with his September 12, 1994, motion to revoke appellant's in propria persona status. Appellant relies upon then advisory counsel Gillis's statements regarding appellant's alleged "obsessive fixation on his theories that a grand 'conspiracy' was using 'forged transcripts' against him" and appellant's alleged "paranoid delusions." (AOB 97-99.)

When the defendant asserts on appeal that the trial court should have ordered a second competency hearing on its own motion, the reviewing court will not reverse the conviction unless persuasive and virtually uncontradicted evidence shows circumstances had substantially changed and created serious doubts over the validity of the prior finding of competence. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1063-1064 [court may sua sponte order competency hearing where trial court entertains substantial doubt regarding competence]; also *People v. Marshall, supra,* 15 Cal.4th at p. 31; *People v. Kelly* (1992) 1 Cal.4th 495, 542.) "[M]ore is required to raise a doubt [as to a defendant's competence] than mere bizarre actions [citation] or bizarre statements [citation] or statements of defense counsel that defendant is incapable of cooperating in his defense [citation] or psychiatric testimony that defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense [citation]." (*People v. Laudermilk, supra,* 67 Cal.2d at p. 285; see *People v. Ramirez, supra,* 39 Cal.4th at p. 431.) A trial court may rely on its own

observations in determining whether the defendant's mental state has significantly changed during the course of trial to necessitate a new competency hearing. (*People v. Jones, supra,* 53 Cal.3d at p. 1153.) The reviewing court will not disturb the trial court's action in not holding a new competency hearing if the action is supported by substantial evidence. (*People v. Huggins* (2006) 38 Cal.4th 175, 220.)

Gillis's statements did not raise a question as to appellant's ability to understand the nature of the proceedings or assist counsel in his defense. Gillis failed to present the trial court with evidence that appellant's conduct was due to a mental disorder or developmental disability that rendered him incapable, as opposed to unwilling, to assist in his defense. (See *People v. Laudermilk, supra*, 67 Cal.2d at p. 287 [record revealed counsel's statements that client unable to assist in his defense was merely "the lawyer's conclusion from an experience with an uncooperative client"].) Judge Kelly was not required to institute competency proceedings sua sponte. Appellant had already had two competency hearings, most recently about two months earlier on July 28, 1994, and no substantial change of circumstances, warranting yet another competency inquiry, had occurred. (*People v. Lawley, supra,* 27 Cal.4th at p. 136.) Moreover, at the hearing held on September 27, 1994, Judge Kelly expressly found appellant competent to represent himself based on his observations of appellant and the psychiatrists' reports and testimony. The same competence standard is applied whether the question for the trial court is the competence to stand trial or the competence to waive counsel and represent oneself: the defendant must have "'a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and . . . a rational as well as a factual understanding of the proceedings against him.'" (*Dusky v. United States* (1960) 362 U.S. 402; also *Godinez v. Moran* (1993) 509 U.S. 389, 399-400; *People v. Blair* (2005) 36 Cal.4th 686, 711; *People v. Stewart* (2004) 33 Cal.4th 425, 513.) The psychiatrists' reports and

testimony constitute substantial evidence in support of the trial court's implicit finding that appellant was competent to stand trial.

During the competency proceedings of July 28, 1994, the court noted that "the observations of the doctors would reflect that -- both doctors would reflect that in their opinion Mr. Lightsey needs to have counsel and is not competent to act as his own counsel." (RT [7/28/94] 111.) Appellant stated that he wanted to represent himself with advisory or cocounsel. (RT [7/28/94] 113.) The court stated that it had reviewed the *Marsden* hearing transcripts regarding attorneys Brown and Sorena and noted that appellant had previously been represented by attorneys Simrin and Huffman. (RT 7/28/94] 114.) The court stated its intent to have a hearing on appellant's competence to represent himself:

> . . . I have observed those comments from the doctors.
>
> I have recalled what I reviewed previously when I made an evaluation and made a determination at the request of Mr. Lightsey to not only relieve his further or previously appointed counsel but I also made a determination pursuant to his request that he could go ahead and represent himself, and we went through quite a lengthy process, so-called Faretta hearing I guess you call it.
>
> And I am now convinced that, after having spent some period of time in the same courtroom with Mr. Lightsey and his presenting himself, he's lucid, he understands what's happening, he knows the nature of the proceeding, but I think that, due to the nature of the charges, due to the nature of the fact that this is a death penalty situation and has been pled at least as such, it's important that Mr. Lightsey be given the benefit of the best possible counsel and that he is in need of more than just his common sense, which he has a lot of, and the understanding that he has of the law, which is not an educated position but rather apparently gleaned from his self-teaching and reviewing of documents and publications.
>
> So the Court, based upon those comments and based further on the remarks of the doctors in their reports, the Court's going to reopen the issue as to whether or not you should be allowed to continue to represent yourself, Mr. Lightsey, in light of the fact that it's understood by this Court that you wish to continue to represent yourself. I think that issue needs to be further visited, and I'm going to reconsider it.

(RT [7/28/94] 115-116.)

The court listened to attorney McKnight's statements regarding his relationship with appellant and granted appellant's request to relieve McKnight as advisory counsel. (IV CT 1024; RT [7/28/94] 121-127.) The court appointed attorney Michael Sprague as advisory counsel for appellant. (IV CT 1024, 1101-1102; RT [7/28/94] 128.) The court scheduled a hearing on appellant's *Faretta* motion. (RT [7/28/94] 129, 131.)

At appellant's August 2, 1994, *Faretta* hearing, attorney Sprague was relieved as appellant's advisory counsel due to a conflict; and attorney James Gillis sat at the defense counsel's table. (IV CT 1110; RT [8/2/94] 135, 144.) The court allowed appellant to represent himself. (RT [7/28/94] 144-145.)

At the hearing, Dr. Manohara, a board-certified psychiatrist, testified that he had practiced psychiatry since 1980; he had testified as an expert in the field of psychiatry in the state and federal courts between 10 and 15 times; he had completed an American Psychiatric Association course on forensic psychiatrists who specialized in testifying or evaluating patients for the court; and he had performed one prior court evaluation. (RT [8/2/94] 146, 148, 194.) He acknowledged that he was not on the panel of court-appointed psychiatrists. (*Id.* at p. 152.) He interviewed appellant for one hour on July 19, 1994; conducted a mental status examination to assess appellant's concentration, memory, intellectual functioning, and ability to abstract and make judgments; made a diagnosis; and wrote a report. (*Id.* at pp. 153, 155, 160-161.) Appellant appeared to be intelligent and to possess a college degree, clearly articulated his beliefs as to why he was innocent, and explained that he had an alibi. (*Id.* at pp. 157-159, 151.) He told the doctor that he had a bachelor of arts degree from California State University, did well in school, and was on the All-American swim team. (*Id.* at p. 158.) He stated that he had worked for two-and-one-half years for Texaco in the oil field and refinery and that he was "a very dedicated and loyal worker." (*Id.* at p. 159.) He stated that he had worked as a substitute teacher. (*Ibid.*)

Dr. Manohara stated that appellant was articulate and communicated his thoughts in a discernible manner although his speech was circumstantial because he stated a lot of irrelevant details in answering questions. (RT [8/2/94] 161-162, 177.) He performed very well on concentration and immediate memory tests. (*Id.* at pp. 162-163.) Appellant's memory, concentration, and intellectual functioning appeared to be good. (*Id.* at pp. 162-164, 173.) He answered general judgment questions quite well, and his judgment was fairly adequate in terms of day-to-day functioning. (*Id.* at pp. 163, 173.) His performance on tests measuring general intellectual functioning and general funds of information indicated that his intelligence was within normal and he could adequately perform intellectual tasks. (*Id.* at pp. 164-166, 173.) He denied experiencing any hallucinations or feelings of depression or anxiety. (*Id.* at pp. 166-167, 171.) He felt that he could represent himself better than any of the attorneys because he knew his case better and the attorneys were not competent; he felt that the court had to give him some special consideration. (*Id.* at pp. 167-169.) He felt frustrated and insulted that he had to be judged for competency. (*Id.* at p. 167.)

Dr. Manohara concluded that appellant's intellectual functioning was average to above average and that appellant tried to manipulate and impress the doctor to give a good impression. (RT [8/2/94] 167.) The doctor concluded that appellant did not have any clear-cut psychotic disorder, fixed delusions, or diagnosable mental disorder on the Axis I of the Diagnostic Statistical Manual of Mental Disorder. (*Id.* at pp. 171-172.) The doctor concluded that appellant had an Axis II narcissistic personality disorder which was probably present from early childhood, adolescence, or adulthood and that he used a lot of rationalization to justify personal deficits or irresponsible behavior. (*Id.* at pp. 169, 171-173.) This disorder sometimes could impair appellant's exercise of reasonable judgment; but it would not impair his intellectual functioning. (*Id.* at p. 170.)

Appellant adequately answered Dr. Manohara's questions as to why he was incarcerated, why he was not able to find an attorney, and why he wanted to represent himself. (RT [8/2/94] 174-175.) He was able to understand and use relevant information rationally and could prepare and process information to formulate an alibi defense. (*Id.* at p. 176.) The doctor concluded that appellant was competent to stand trial, but his personality disorder made it difficult to work with him as an attorney. (*Id.* at p. 173.) The doctor stated that appellant knew the functions of the judge and jury, appreciated the nature and penalty of the capital murder charges against him, and understood his case and that he had to cooperate with his attorney. (*Id.* at pp. 174-176.) The doctor found that appellant was not competent to represent himself because of his personality disorder causing his lack of objectivity, grandiose sense of self-importance, and tendency to be circumstantial with a sense of entitlement. (*Id.* at p. 174.) The doctor believed that appellant had no insight into his psychiatric condition, might overreact to criticism with feelings of rage, and would not have the necessary legal skills to successfully defend himself. (*Id.* at pp. 174-176.)

Dr. Manohara opined that appellant was probably capable of making a knowing and intelligent waiver of a constitutional right; but the doctor conceded that he may not be able to make a full, accurate judgment from a one-hour interview. (RT [8/2/94] 177.)

Appellant cross-examined Dr. Manohara. (RT [8/2/94] 178.)

Dr. Burdick, a psychiatrist, testified that he had practiced psychiatry since 1964 and had testified in court as an expert in the field of psychiatry many times a year for the past 25 years. (RT [8/2/94] 196-197.) He had receiving training and taken courses in evaluating psychiatric patients and the competency of defendants to stand trial in the criminal justice system. (*Id.* at pp. 197-198.) He met with appellant on March 23, 1994; but appellant indicated that he did not want to be evaluated and did not want to talk to the

doctor because he had initiated a *Marsden* and was trying to change attorneys. (*Id.* at pp. 199-200.) Appellant did not give the doctor any information or history. (*Id.* at p. 200.) He sounded rather rational, articulated the reasons he did not want to meet with the doctor, and did not exhibit any unusual thought processing or behavior. (*Ibid.*)

In his report to the court, Dr. Burdick stated that appellant's speech was organized and well modulated, meaning that the things that appellant said were framed intelligently and in an organized fashion; they made sense and were coherent; he was neither loud nor soft; and he did not demonstrate any unusual emotional experience. (RT [8/2/94] 202.) The doctor stated there did not seem to be a psychiatric illness or obvious psychosis present on the basis of what the doctor had seen. (*Id.* at pp. 202-203.) The doctor concluded in his report, "From this brief encounter, it is my opinion that the defendant is able to understand the nature and purpose of the proceedings taken against him and, if he so chooses, he is capable of cooperating in a rational manner with counsel in preparing a defense." (*Id.* at p. 203.) At the hearing, the doctor explained that "[t]here was no evidence of anything interfering with his ability to participate in his own defense and to be cooperative with counsel. Just because he didn't want to speak to me was not an indication that he couldn't cooperate with his own counsel." (*Ibid.*) The doctor testified that he had no way of knowing whether appellant could capably make a knowing and intelligent waiver of a right. (*Id.* at p. 204.)

Appellant cross-examined Dr. Burdick. (RT [8/2/94] 204.)

Dr. Velosa, a board-certified psychiatrist, testified that he had practiced psychiatry since 1974 and had testified in the state and federal courts as an expert in the field of psychiatry once or twice a month for over ten years. (RT [8/2/94] 206-210.) He had taken courses in evaluating psychiatric patients for forensic purposes. (*Id.* at pp. 210-211.) The majority of his court testimony had been for the defense. (*Id.* at p. 211.) He interviewed appellant

for about one hour on July 13 and 19, 1994, to assess his competency to stand trial. (*Id.* at pp. 212-213, 226.) He received a letter from then advisory counsel McKnight on July 13, 1994, alerting him to the issue of whether appellant was competent to represent himself. (*Id.* at pp. 213-215.)

During the first interview, appellant was suspicious and wanted to control the examination. (RT [8/2/94] 217.) Oftentimes his speech was pressured (very rapid), and his answers to the doctor's questions included inappropriate and irrelevant data and minutiae. (*Id.* at pp. 217-220.)

Before his second interview of appellant, Dr. Velosa reviewed the reporter's transcripts of the July 1 and 7, 1994, proceedings, which were sent to him by McKnight. (RT [8/2/94] 223, 225-226.) The doctor testified that during the second interview, appellant was slightly more disjointed, and his associations were very loose, i.e., he would jump from subject to subject without any specific reason. (*Id.* at p. 226.) Appellant's thinking process was "so disjointed and so rapid and so pressured that that's a sign of the psychiatric disorder." (*Id.* at p. 227.) The doctor stated that appellant had some understanding of the legal process. (*Id.* at p. 230.) Appellant believed that the reporter's transcripts had been changed and there was a conspiracy against him. (*Id.* at pp. 228-230.)

The doctor testified that appellant was a highly articulate "very, very intelligent man" with no apparent intelligence disorders. (RT [8/2/94] 241.) The doctor believed that appellant understood the charges; the nature of the penalties for capital murder, i.e., death or life without parole; and the nature and purpose of the proceedings. (*Id.* at pp. 221, 233, 243.) Appellant was not suffering from any hallucinations or other psychoses or from paranoid schizophrenia or personality disorders. (*Id.* at pp. 241-242.)

The doctor believed that appellant suffered from bipolar and paranoid disorders. (RT [8/2/94] 233-234.) He concluded that as a result of his bipolar disorder, appellant sometimes did not listen, his judgment might be impaired,

he had no insight into and was not aware of his mental disorder, and he "has the tendency to disrupt the whole proceedings by rambling inappropriately." (RT [8/2/94] 235, 237-239, 242-243.) The doctor explained that because the content and rapidity of appellant's speech did not allow the other individual to listen or reply, there was no communication process. (*Id.* at pp. 240-241.) He did not believe that appellant could cooperate in a rational manner with counsel in presenting a defense:

> In the first place let me say that in my opinion Mr. Lightsey actually suffers from a psychiatric disorder. The best way to classify the psychiatric disorder would be a bipolar disorder. [¶] Bipolar disorder is a specific psychiatric disorder in which the thinking process could be altered. The defendant was experiencing racing thoughts, looseness of association, jumping from subject to subject, rambling of thoughts and sometimes without any, in my opinion, logical connections.
>
> In addition, the defendant was experiencing paranoid thinking, the fact that there is a conspiracy against him and that there is a threat or some sort of a set-up happening in Tehachapi prison.
>
> With this in the background, as far as my psychiatric opinion, I do believe that Mr. Lightsey indeed understands the nature and purpose of the proceedings taken against him; however, because of his thinking process and his disorder, the defendant actually is unable to cooperate in a rational manner with counsel in presenting a defense.

(*Id.* at pp. 232-233.)

The doctor opined that as a result of his bipolar disorder, appellant was able to understand but unable to use relevant information rationally in order to fashion a response to the charges against him. (RT [8/2/94] 244.) The doctor testified that appellant was coherent but his ideas had a "rambling quality." (*Ibid.*) The doctor acknowledged that he did not have any familiarity with the legal standards used to adjudge whether or not a person may competently waive his rights to counsel and act as his own attorney. (*Id.* at pp. 244-245.) His opinion regarding appellant's fitness to represent himself did not take into account the applicable legal standards. (*Ibid.*)

Appellant cross-examined Dr. Velosa. (RT [8/2/94] 246.)

The court admonished appellant regarding his right of self-

representation, clarified that appellant wanted to represent himself, found appellant competent to represent himself, and granted appellant's motion for self-representation:

> As indicated by the psychiatrists who testified at length here today, you're intelligent, you're literate, you're able to express yourself, and you're able to logically think through these matters. There are some shortcomings with regard to a novice being in the arena, so to speak, and I'm sure that some of this fast talk – you get excited about things. You have a tendency to address other issues in response to a question.
>
> As Dr. Velosa indicated at some length, there would be a question asked of you in his interview and you wouldn't answer the question, but rather you were so anxious to convey some other thought or idea to him you would take off on that tangent. I'm sure much of that will settle down when you're in a trial situation, and I don't think that that in any way would indicate to this Court that you cannot make a knowledgeable and intelligent waiver as to your right to represent yourself and retain your constitutional right under the Sixth Amendment.
>
> So far as the Farretta [sic] issue is concerned, the Court's going to reiterate – as it did before, after listening to arguments both sides, the Court's going to make a finding that you're competent to act as your own counsel.

(IV CT 1111; RT [8/2/94] 278-281.)

Thereafter, on September 27, 1994, appellant waived his right to self-representation, and pursuant to appellant's request, the court appointed attorney William Dougherty to represent appellant and attorney Gillis as Dougherty's cocounsel. (IV CT 1113; RT [9/27/94] 7-9, 13-14, 18-20, 26-29.)

Judge Kelly did not abuse his discretion in not initiating competency proceedings sua sponte on September 27, 1994. Two of the three psychiatrists concluded that appellant was not suffering from a mental disorder. Judge Kelly also properly relied on his own observations in determining that appellant was competent. (See *People v. Jones, supra,* 53 Cal.3d at p. 1153.) This is particularly true here because appellant actively participated in the court proceedings; and the trial court had an opportunity to observe, and converse with, appellant. (*Ibid.*)

In view of the opinions of the two psychiatrists and his personal observations of appellant, the trial court reasonably rejected Dr. Velosa's opinion that appellant's alleged bipolar disorder rendered him unable to cooperate in a rational manner with counsel in presenting a defense (RT [8/2/94] 232-233). (See *People v. Ramos, supra,* 34 Cal.4th at pp. 510-511 [defense psychiatrist testified that defendant's paranoid personality disorder did not render him mentally incompetent to understand proceedings or assist defense in any way]; *People v. Blair, supra,* 36 Cal.4th at p. 715 [trial court's "use of the term 'psychopath' in describing defendant apparently did not indicate belief that defendant was psychotic, out of touch with reality, or otherwise unable to understand the proceedings against him"]; *People v. Marshall, supra,* 15 Cal.4th at p. 31 [jury did not have to accept opinion of experts].)

4. Judge Kelly Was Not Required To Initiate Additional Competency Proceedings Before And During Appellant's Trial

Appellant contends Judge Kelly erroneously failed to institute additional competency proceedings before and during trial. (AOB 98.) Appellant claims that after defense counsels Dougherty and Gillis were appointed to represent him, he became more disruptive during the trial by making faces and comments while witnesses were testifying and by having verbal outbursts. (*Ibid.*) Appellant specifically contends that Judge Kelly erred in refusing defense counsels' request to institute competency proceedings on June 26, 1995. (AOB 103-109.)

Judge Kelly was not required to institute additional competency proceedings before and during trial. Appellant fails to proffer persuasive and virtually uncontradicted evidence showing circumstances had substantially changed and created serious doubts over the validity of Judge Kelly's two findings that appellant was competent to stand trial and his finding that

appellant was competent to represent himself. (See *People v. Koontz, supra,* 27 Cal.4th at pp. 1063-1064.) As explained *ante*, Judge Kelly's determinations that appellant's allegedly bizarre behavior did not render him incompetent to stand trial are supported by substantial evidence. Furthermore, after appellant's convictions, Judge Kelly properly rejected the defense counsels' claim that appellant was incompetent to stand trial and refused to institute competency proceedings.

On June 26, 1995, after the jury found appellant guilty on June 20, 1995, the defense counsels filed a motion to institute mental competency proceedings. (VIII CT 2227-2240.) Defense counsel Gillis stated, outside the presence of the jury:

> [MR. GILLIS:] Following the last court proceedings Mr. Dougherty and I have had several discussions in regards to Mr. Lightsey and his current mental status, and that is the reason we provided the Court a copy this morning. We provided a [sic] Ms. Green a copy.
>
> Most of the information in the particular motion is not new. What's essentially been added in this particular motion is basically our opinion that over a period of time Mr. Lightsey has progressively gotten worse, to the point where at the end of trial things were occurring that were completely detrimental to the proceedings as they went on as far as Mr. Lightsey, things that he was doing. And we learned of things, that because of his particular distrust for us, that we both feel we would have proceeded differently in this case had we been aware of those particular items. [¶] I believe the motion is self-explanatory. I don't want to go into it any more, because I just would be repeating those things which I said in the motion.
>
> I would make an offer, as an attorney, for the Court, in my opinion, that Mr. Lightsey has become incompetent to the point that he is -- in fact hurts counsel in presenting his defense, never mind assisting counsel in presenting the defense. That includes the penalty phase. [¶] And we have strong questions as to whether Mr. Lightsey understands the gravity of the seriousness of the charges for [sic] which he is facing, and we would like to have him examined pursuant to 1368 prior to proceeding. [¶] If the Court has any questions, we would be willing to talk with the Court ex parte and inform the Court of certain things that -- if we can get to the point of not violating attorney-client privilege in regards to our conversations with Mr. Lightsey over the

past week or so. [¶] But with that in mind I submit it based on the motion that I provided the Court.

(29 RT 6199-6200; see 29 RT 6211-6214.)

After discussion with counsel, the court found appellant was mentally competent to assist in his defense:

[THE COURT:] According to my understanding of the Penal Code and the issue of competency, the matter of competency of the defendant must arise in the mind of the judge in order for the judge to proceed with the matter of having suspension of proceedings and setting the matter for a hearing with the appointment of a doctor or doctors, whatever the case may be, to have some kind of a judicial determination as to this question of competency.

The Court has been involved in this case for over a year with preliminary proceedings and motions and appointment of counsel, dismissal of counsel, further appointment of counsel. Certainly I've had ample exposure to the defendant, to his comments.

I've allowed him in some instances to talk to the court about various matters. I've observed him here during the trial of this proceeding in a matter of assisting counsel. He has written out extensive notes, provided them to his attorneys from time to time. He's had -- they have worked with him during the recesses and the breaks in times when they could converse with him.

It just -- to me it is quite apparent that to make a motion such as this motion that I received this morning, which I haven't even read completely -- I have thumbed through it, I've looked at 1368 in the code. [¶] I've looked back to transcripts back to August 2nd, 1994, when there was a hearing regarding the defendant's competency to assist in his trial. Dr. Manohara, Dr. Burdick, Dr. Velosa all testified in that proceeding, and this Court concluded at that time that the defendant was competent to proceed to stand trial.

The matter of bringing a noticed motion at this point in time and relating back to what the doctors said about the defendant at that point in time to me has no particular relation to what we're doing here today, because what we're doing here today apparently, based upon defense counsels' comments I gather, is attempt to create in this Judge's mind such doubt as to the competence of Mr. Lightsey. [¶] Notwithstanding his irresponsible outbreaks and comments, he is fully capable of, and has displayed clearly to this Court, an ability to assist his attorneys in proceeding with his defense. [¶] We have had in the past some Marsden motions, going back to Mr. Sorena and Mr. Brown, who were his attorneys at one point in time after Mr. Simrin and after Donnalee

Huffman had been involved as attorneys for the defendant in this case.

I am fully convinced that Mr. Lightsey has a mental capacity -- he may not have a mental discipline, but he's got a mental capacity to be fully aware of what is happening, what's going on with what the procedures are. I think his past remarks in this proceeding and when he was even counsel for himself in this proceeding for a short period of time would indicate that he has a pretty good grasp, especially for a lay person as to the aspects of this case. [¶] I find it surprising for Mr. Gillis to get up and tell this Court that Mr. Lightsey doesn't know what's going on, didn't appreciate the gravity of the proceeding. In my observations he's been fully aware of what's going on. He's been fully aware of the potential consequences of this matter. [¶] He's been fully aware of the evidence from the past, from so-called fraud as it relates to his contentions regarding the transcripts prepared in the past. [¶] There was evidence in this case of Diane Daulong taking the stand and testifying regarding what she did with respect to the preparation of the transcripts.

And I even -- in anticipation of some kind of a penalty hearing, I went back to the proceedings back in -- during the pretrial on March 23rd, 1995. Mr. Lightsey chose to take the stand in this proceeding in a motion hearing and waived his right to remain silent for the limited purpose of establishing standing in the proceeding. [¶] It's clear to the Court that even back at that time and prior thereto, based on his testimony for that limited purpose, that he was fully aware of the circumstances in this matter.

I'd like to bring to counsel's attention my review of Section 1368 of the Penal Code. That section says that if, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, then it goes on to state what procedure shall be followed if there is that doubt in the mind of the judge. [¶] In the next portion of that code section, that code provision, it says if counsel informs the court that he believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369.

When I related back to the August 2nd, 1994, proceeding, it was in fact at that point in time that the Court, on its own motion, determined that there was question regarding the competency of the defendant, and there were doctors then appointed. And there was a hearing and it was determined that the defendant was to [sic] competent to proceed, stand trial and assist in his own defense. [¶] Now, I guess what's got the Court a little bit off balance here, if that's the right term, I read the People versus Jackson case, which is a 1991 decision which in that

decision the appellate court said that the doubt mentioned in his section is one which must arise in the court's discretion, whether or not the judge passing on the question presided at the trial. Of course, the last portion of that reference is not relevant in this case. [¶] It goes on to say, in citing the Dennis case, 1959, strong showing is required before abuse of discretion is deemed to result in the trial court's failure to order determination of present sanity. [¶] Doubt as to the defendant's sanity requiring trial of such issue under this section must arise in the mind of the trial judge rather than in the mind of defendant's counsel or in that of any third person. That's [I]n re Dennis case, 51 Cal.[]2d 666.

The People versus Pennington case in 1967 in part stated that although the doubt referred to in Penal Code 1368 requiring the determination of defendant's sanity [if] doubt arises during the pendency of the action or prior to judgment is doubt in the mind of the trial judge rather than in the mind of counsel for the defendant or any third person. Such doubt must exist as a matter of law where the defendant comes forward with substantial evidence of his incompetence to stand trial. [¶] We don't have that kind of a situation here. We don't have any substantial showing. We have little, if any, showing, or at least argument, that there is some reference here by Mr. Gillis'[s] pleadings, but there is no reason for this Court to have any doubt regarding the competency of Mr. Lightsey to assist in his defense.

Sometimes the Court has noted in other situations where there is a problem between the attorneys and their clients in criminal cases where the communication has ceased. There is just such differences that the disagreement between the attorney and defendant as it relates to the tactics that are going to be employed or the strategies that are going to be employed in a trial process are so -- that that difference is so deep that it cuts off communication. We don't have that here. [¶] We have a situation here where Mr. Lightsey is constantly talking to his attorneys. As a matter of fact, I think probably his attorneys would indicate maybe he talks too much to them, interrupts their thinking process. [¶] He has a tendency, for instance, to attempt to communicate with them in the middle of a sentence or in the middle of an expression of thought. I've noted that. [¶] I've noted that the counsel have constantly referred him to the use of a note pad and his pen as we had discussed earlier, which would be the acceptable procedure of communication so that there would not be disruption by talking between Mr. Lightsey and his attorneys.

I guess if there has been any disagreement between the attorneys and the defendant as it appeared to this court in that regard is merely the fact that his emotions or his overzealousness, if that is the right term, were expressed to the point that they, with the forefinger,

pounded on his yellow pad to give him the information and message to utilize the previously discussed acceptable method of communication between counsel and their client. [¶] But there has been free communication, not just from Mr. Lightsey to the attorneys but from the attorneys back to Mr. Lightsey. He has impacted on the manner on which they have asked questions. [¶] For instance, I've noted as witnesses appeared here, almost in every instance -- maybe not every, but almost every instance when a witness was on the stand Mr. Lightsey provided some direction, request, suggestion to his attorneys who utilized that information, it appeared, in further questioning those witnesses.

THE DEFENDANT: It only appeared, but it didn't happen that way.

THE COURT: Mr. Lightsey, please.

So I don't think we have a situation where there's been any breakdown of the communication between the defendant and his attorneys. [¶] Certainly it would seem that one who has been convicted of first degree murder with special circumstances is going to probably make whatever effort they can make to avoid, if that's the right word -- to avoid that jury that made a decision on that case from dealing with the penalty phase, and that's not what the law anticipates. [¶] The law anticipates that the same jury will review the evidence and make a determination as to whether the defendant is going to be put to death or whether the defendant is going to spend the balance of his life in prison without parole.

(29 RT 6217-6225.)

That afternoon, the court reiterated its finding of appellant's mental competence:

[THE COURT:] There's one thing I think I should put on the record right now while it's fresh in my mind. And that is this morning defense filed this notice of motion and a motion for the defendant to be examined pursuant to Section 1368 of the Penal Code. And we discussed that. [¶] And I want to make sure the record's clear on my ruling on that. We kind of danced around there. I did, and apologize for that. [¶] I think it was quite apparent what my determination was, but I didn't really make it real formal on the record.

So, for the record, the Court has fully reviewed the request of the defendant and his request to be examined pursuant to Penal Code Section 1368. [¶] Based upon my comments earlier in the record this morning, and my comments now, the Court is going to deny the request to examine the defendant concerning his competency to stand trial in

this matter. And we're going to proceed. [¶] So the record's clear, that's my order.

(29 RT 6305-6306.)

As explained in the prior sections, Judge Kelly's determinations that appellant's allegedly bizarre behavior did not render him incompetent to stand trial are supported by substantial evidence. (See *People v. Huggins, supra,* 38 Cal.4th at p. 220.) Appellant fails to proffer persuasive and virtually uncontradicted evidence of substantially changed circumstances creating serious doubts over the validity of Judge Kelly's two findings that appellant was competent to stand trial and his finding that appellant was competent to represent himself. (See *People v. Koontz, supra,* 27 Cal.4th at pp. 1063-1064; *People v. Jones, supra,* 53 Cal.3d at p. 1153.) Judge Kelly was not required to institute additional competency proceedings sua sponte before and during trial. Judge Kelly properly denied the defense counsels' June 25, 1995, motion to initiate competency proceedings.

5. Judge Kelly Was Not Required To Initiate Competency Proceedings During The Penalty Proceedings

Appellant contends that Judge Kelly erroneously failed to initiate competency proceedings during the penalty phase of his trial. (AOB 113.)

On June 26, 1995, the penalty phase commenced. (VIII CT 2241; 29 RT 6232.) Before appellant testified, the court stated:

> [THE COURT:] There's no doubt in my mind that Mr. Lightsey understands that he has a right to remain silent. He may not -- he may not agree with his attorneys. And certainly that's not always a good thing for the criminal defense party to disagree with his -- with the advice he gets from his counsel. [¶] But be it neither here nor there, he has elected in spite of their advice to choose to make a statement, respond as a witness in this case.

(29 RT 6330.)

After the closing arguments of the prosecutor and defense counsel Dougherty on June 29, 1995, the court recessed, and appellant was removed

from the courtroom because of his verbally disruptive conduct:

> THE COURT: All right. We're going to take a recess. The court's going to set up a television camera outside of the courtroom. [¶] Mr. Lightsey will observe the balance of this trial. He has an entitlement to know what's being said in the trial. [¶] The Court has the prerogative to deal with the interruptions that he has continually imposed here on all of us and is now -- in the closing phase of this process he's interfering with his own attorney's presentation in his behalf. . . .

(32 RT 6875-6876.)

Appellant was placed under guard in the jury room. (32 RT 6880.) He observed and heard the court proceedings via a remote monitor. (32 RT 6880.) Defense counsel Gillis completed his argument to the jury. (32 RT 6895-6903.)

The next morning, June 30, 1995, the trial court advised counsel that the jury had reached a verdict. (33 RT 6940.) The defense counsel stated that appellant wanted to return to the courtroom, and the trial court ordered that appellant be returned to the courtroom. (33 RT 6940-6941.) Defense counsel Dougherty made a motion to suspend the criminal proceedings "on the basis that Mr. Lightsey's demonstrations yesterday and the day before, where the Court had to remove him where he interrupted counsel, where he interrupted the witness -- clearly that he is incapable of aiding his counsel in the defense of his case." (33 RT 6941.) The court found appellant competent, stating:

> [THE COURT:] We have reviewed this subject of a 1368 motion regarding his competence to continue with cooperating in his defense, assisting his attorneys and understanding the nature of the proceedings. Mr. Lightsey has been examined several times by several mental health experts, and the problem basically is not his incompetence as it relates to this matter but rather the condition and the situation as the Court has viewed it, is Mr. Lightsey has chosen by his own volition to not cooperate with his counsel, not respond and comply with his attorneys' admonitions and instructions, even to the point of interfering with his own attorneys' presentation in closing. And this isn't because he has any kind of a mental health condition that would interfere with that. It's because he has intentionally acted in that regard.

Mr. Lightsey has continually reflected a desire to tell his own story, so to speak, in this case. Even during the penalty phase of the trial he wanted to provide evidence through his own remarks as to what the facts were in this case and present his own defense as to the not guilty, guilt phase of this process. [¶] So it's not a condition that is based upon some kind of a mental health deficiency that Mr. Lightsey has. It's an attitude, if you will, unfortunately. [¶] Mr. Lightsey has it all together. He understands what's going on. He understands the nature of this proceeding. He understands the charges that were filed. [¶] He has provided numerous pages of yellow sheets of paper, just as he has just now to you, with notes on them to assist you in his defense. You, as his counsel, have the right to choose the manner in which you proceed to determine the tactical aspects of your presentation of his defense.

There is no doubt whatsoever in this Court's mind that Mr. Lightsey is playing with a full deck. No doubt at all, he is playing with a full deck. [¶] He has demonstrated to this Court on numerous occasions, too many to count, over the last year and a half that he's been in this courtroom -- year and three months, I guess -- that he has an understanding of the nature of the charges in this case, that he has the ability. [¶] In fact, at one point, as you all know, I made an order to allow him to represent himself as his own attorney, because I was persuaded at that point in time, in response to his request that he represent himself, that he had the capacity, the basic lay person capacity, to represent himself. I didn't think it was a wise choice on his part to make a request of that nature, but even at that point I allowed him to do so. [¶] Of course, it changed subsequently with his request to have you appointed. And I had appointed Mr. Gillis as an advisory counsel to him in this matter.

I guess the point of all these remarks is there is no basis -- there is no doubt in this Court's mind as to the competence of Mr. Lightsey, none whatsoever. I couldn't -- I can't make it any clearer than that I guess. [¶] Mr. Dougherty, I know you're doing what you feel is required to be done, but there is no basis for any such contention on the part of the defense.

So as far as a 1368 is concerned, there is not a showing -- and the Court will make a clear finding to that effect -- there is not a showing of any incompetence on the part of the defendant.

(33 RT 6941-6942; see VIII CT 2333.)

Respondent submits Judge Kelly did not abuse his discretion in denying the defense counsels' motion to institute competency proceedings. As Judge

Kelly noted, the record is replete with evidence of activity by appellant demonstrating he understood the nature of the legal proceedings and rationally participated in conducting his defense. Appellant has not shown there was persuasive and virtually uncontradicted evidence of a substantial change in circumstances casting doubt on the validity of Judge Kelly's prior findings of defendant's competence to stand trial and to represent himself. Although appellant quotes snippets from the record to support his assertion of incompetence, the cited comments considered in context did not provide uncontradicted evidence of a substantial change in circumstances casting doubt on his rationality. Many of appellant's remarks cited on appeal as showing he was delusional are equally explicable either as hyperbole or as the comments of a layperson confused about and frustrated by the limits imposed by legal principles.

An appellate court must accord great deference to a trial court's decision not to order a competency hearing because the trial court is uniquely situated to observe the defendant's conduct and demeanor and relative ability to understand the nature of the proceedings and rationally conduct a defense. (*People v. Danielson* (1992) 3 Cal.4th 691, 726-727, disapproved on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Judge Kelly was aware of the psychiatrists' conclusions regarding appellant's competence and was able to observe appellant's conduct during the pretrial and trial proceedings as a whole and in context. Judge Kelly properly denied defense counsels' motion to initiate competency proceedings on June 30, 1995. (See *People v. Jones, supra,* 53 Cal.3d at p. 1153.)

II.

APPELLANT HAS FORFEITED HIS EVIDENTIARY CLAIMS REGARDING THE ADMISSION OF THE REPORTER'S TRANSCRIPTS OF THE UNRELATED CASES; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS IN RESTRICTING THE DEFENSE COUNSEL'S CLOSING ARGUMENT BECAUSE IT WAS NOT SUPPORTED BY THE EVIDENCE

Appellant contends his convictions and death sentence must be reversed because the trial court erroneously excluded alibi evidence, specifically the reporter's transcripts of every case on the July 7, 1994, Department 10 morning calendar, and erroneously restricted the defense counsel's argument "that the length of the transcript indicated the passage of a certain amount of time in the courtroom." He alleges violations of his state and federal constitutional rights to raise a defense, present evidence in support of his defense, a fair trial, due process, and a proportionate and reliable death verdict (U.S. Const., Amends. V, VI, VIII, & XIV; Cal. Const., art. I, §§ 7, 15, 17, & 28). He further alleges a violation of his federal constitutional due process "liberty interest" under the California Evidence Code. (AOB 119-133.)

Appellant has forfeited his evidentiary claims regarding the admission of the reporter's transcripts of the unrelated cases in Department 10 on July 7, 1994, because the defense counsels ultimately did not request the trial court to admit the reporter's transcripts; and the trial court never issued a ruling excluding the transcripts of the unrelated cases. The trial court did not abuse its discretion in restricting the defense counsel's argument because it was not supported by the evidence. There was no violation of appellant's statutory or constitutional rights.

A. Relevant Proceedings

The prosecutor argued to the jury that appellant murdered victim Compton about 11:00 or 11:05 a.m. (28 RT 5978.) Appellant had no alibi for that time. (28 RT 5979.) The prosecutor argued that the evidence established that victim Compton was alive at about 10:00 a.m. (28 RT 5913-5920.) Between about 10:30 and 11:00 a.m., the victim began to get ready for his 11:30 a.m. radiation treatment appointment. (28 RT 5914, 5920-5923.) He undressed and prepared to either shower or change clothing. (28 RT 5914, 5920, 5923.)

In the meantime, appellant and his mother arrived at the courthouse at approximately 8:30 a.m. (28 RT 5959, 5966-5967, 5969.) Appellant's case was first called in Department 10 at about 9:05 to 9:10 a.m. (28 RT 5967.) It was trailed or continued to 10:30 a.m. because Eyherabide, appellant's attorney, was in trial in Department 4[12/]. (28 RT 5967.) Appellant and his mother went to the coffee shop in the courthouse basement. (28 RT 5970-5971.) At about 10:30 a.m., appellant's case was called in Department 10, and Eyherabide informed the court that appellant "is outside, he may be in the coffee shop." (28 RT 5967-5968.) With appellant present, his case was called a second time and continued to Friday at 1:30. (28 RT 5968.) The hearing took from two to five minutes. (28 RT 5968.) It was no later than 10:40 a.m. when appellant and his mother left the courthouse. (28 RT 5968-5969, 5979.) Appellant and his mother walked to his mother's car and drove to his mother's house, arriving at about 10:50 to 11:00 a.m. (28 RT 5979.)

Appellant drove his car the one-half mile to the victim's house and parked his car in back of victim's house. (28 RT 5904-5905, 5914, 5924-5925, 5978.) He entered through the unlocked screen and kitchen doors. (28 RT

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12. Attorney Eyherabide's case in Department 4 was *People v. Corbin Emby*. (RT [3/22/95] 55.)

5914, 5922.) Between about 11:00 and 11:05 a.m., he surprised the victim, who was preparing for his 11:30 a.m. radiation treatment appointment in his bedroom, knocked him down, and stabbed him 43 times. (28 RT 5911, 5914, 5920, 5923-5924, 5926.) Between 11:05 and 11:30 a.m., appellant removed from the victim's house and loaded into the trunk of his car the victim's property, including 17 guns, gun-related equipment (ammunition and cleaning equipment), a National Rational Association belt buckle, two video cameras, a jar of coins, and a Masonic ring. (28 RT 5915, 5920, 5924.) No later than 11:30 a.m., appellant locked the door of the victim's house and left. (28 RT 5915, 5926-5927.) He drove for about 15 minutes to his house at 3001 Oak Tree Avenue. (28 RT 5915.) At 11:50 a.m., he telephoned bail bondsman Richard Herman in Lancaster. (28 RT 5915, 5972-5973, 5979-5980.)

The prosecutor argued an alternative theory that appellant murdered the victim between 9:00 a.m. (when his case was called the first time) and 10:30 or 10:35 a.m. (when his case was called the third time). (28 RT 5976-5977.) The prosecutor stated that she personally did not believe that appellant murdered the victim at this time because she believed the victim's neighbor Alice Toole saw the victim between 9:30 and 10:00 a.m. and attorney Fred McAtee saw appellant and his mother in the coffee shop between 9:30 and 10:10 a.m. (28 RT 5977-5978.)

During discussions on March 22, 1995, between Judge Kelly and counsel regarding the defense motion to dismiss the information (§ 995[13]), the defense counsels sought to admit the reporter's transcripts of every case on the July 7, 1994, morning calendar before Judge McGillivray in Department 10. (RT [3/22/95] 3.) Prior to that day, the transcripts had been prepared. (RT [3/22/95] 108.) Defense counsel Dougherty argued to the court that at

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13. The court denied the section 995 motion on April 7, 1995. (RT [4/7/95] 426-427.)

about 9:00 a.m. on July 7, 1994, Eyherabide told the bailiff or clerk in Department 10 that he was doing a murder case upstairs in Department 4 and that he would return to Department 10 at 10:45 a.m. when Department 4 was in its morning recess. (RT [3/22/95] 56.) Appellant's case was the thirteenth called by Judge McGillivray. (*Ibid.*) When it was called, the bailiff told the judge that Eyherabide was in trial in Department 4 and would be back at 10:45 a.m. (*Ibid.*) The judge told Deputy District Attorney John Somers he was excused to 10:30 a.m. just in case appellant's case started early. (RT [3/22/95] 56-57.) The judge called four more cases and called appellant's case a second time. (RT [3/22/95] 57.) Eyherabide told the court that appellant was right outside and indicated he would go get him. (*Ibid.*) Eyherabide went out to the hallway and got appellant. (RT [3/22/95] 57; see *id.* at 111.) After a recess, the court called another case. (RT [3/22/95] 57; see *id.* at 112.) The court called appellant's case (the twentieth case on the calendar) a third time. (*Ibid.*) Appellant, Eyherabide, Somers, and bail bondsman Epps were present. (*Ibid.*) After a short discussion, appellant's case was continued to 1:30 p.m. on July 9, 1994. (*Ibid.*) Epps saw appellant and his mother in the courthouse parking lot. (RT [3/22/95] 58.) Eyherabide was in Department 4 at 10:55 a.m. (RT [3/22/95] 57; see *id.* at 112; II CT 114-115 [Eyherabide preliminary hearing testimony].)

Defense counsel Dougherty argued to the court that "there is no way that anyone would know at what time case number 13 would be called for the first time." (RT [3/22/95] 58.) Later during the hearing, the defense counsel requested the court to judicially notice the reporter's transcripts of the Department 10 calendar proceedings on July 7, 1993, to show "exactly what happened on that day." (RT [3/22/95] 103.) The prosecutor objected to the admission of the entire transcripts for purposes of the defense counsels' section 995 motion because it was not admitted at appellant's preliminary hearing. (RT [3/22/95] 103-104, 109.) The prosecutor did not object to the

admission of the transcripts pertaining to appellant's case in Department 10 on July 7, 1993, which were admitted at the preliminary hearing. (RT [3/22/95] 106, 109.) The defense counsel argued that admission of the transcripts of every case on the Department 10 morning calendar was required to show that appellant's case was called three times and appellant was in court from about 10:45 to 10:55 a.m. (RT [3/22/95] 109-110; RT [3/23/95] 118-119.) The trial court did not rule on the defense counsels' motion to admit the reporter's transcripts of every case on the morning calendar.

On May 17, 1995, the prosecutor objected to the admission of the reporter's transcripts of every case on the morning calendar on the ground the unrelated transcripts were not relevant to the instant case:

> MS. GREEN: My objection is this, there is a transcript of the Department 10 calendar. This court is familiar with that. It's the entire transcript. If I understand correctly, the defense's intention, Mr. Dougherty's intention is to admit the entire transcript of every case that was on calendar on July 7th, 1993, in the morning. [¶] From that, he's asking the jury to infer or speculate, is my opinion, as to how long each hearing took, so that he can in terms of establishing time frames. There is [sic] no times, as the court knows, on the transcripts from Department 10 as to when the court called a matter. As the court knows, the court can call a case, sit there, not say anything for a few moments. That wouldn't be reflected. So they can't look at three pages of transcript and say, oh, this hearing took two minutes and look at ten pages of transcript say, oh, this hearing took six minutes.
>
> So I'm objecting to any portion of that transcript of July 7th other than the part that's relate [sic] to Mr. Lightsey's case. I have no objection to that. I won't object on authentication grounds. [¶] I do object to all the other hearings that are on calendar that morning the defense counsel is seeking to put before the jury.
>
> I'd ask before the court rules on this motion to look at a copy of the transcript and see -- maybe you don't need to look at a copy of the transcript. You are well familiar with Department 10's calendar. I know Mr. Dougherty is not. But I think that could be very misleading for a jury to ask them to speculate as if there is ten pages of transcript, then that was a ten minute long hearing. That would be total speculation. It's not relevant. It's our position if they wanted to call a witness, if there was a witness such as the reporter who say, well, this hearing took five minutes, this hearing took ten, that's a whole other

story.

My understanding to mark the entire transcript of the July 7th a.m. proceedings in Department 10 and have it admitted to the jury, I'm objecting at this point. I would be objecting to counsel discussing those other -- anything other than there were other hearings going on that day in his opening statement.

(14 RT 3145-3147; see 14 RT 3153-3156.)

Defense counsel Dougherty argued that although there were no times mentioned anywhere in the transcripts "the jury by looking at the other proceedings that happened in that court can deduce certain timing, that certain times as to when cases were called." (14 RT 3147-3148.)

Judge Kelly disagreed with the defense counsel and discussed the relevance of the reporter's transcripts of the unrelated cases:

THE COURT: How would the jurors know that information, Mr. Dougherty? I would challenge your projection of what jurors understanding [sic] unless we have people on the jury who are attorneys and who are familiar with the proceedings in that courtroom. If there is an arraignment, if there is a taking of a plea, oftentimes in the taking of a plea, as an example, there are vast delays while the attorney talks to the client about the [c]onstitutional rights that are involved that he must waive in order to have the court accept his plea. And you think that just by presenting a transcript of what went on in that department, that the jurors are going to be able to say, well, first off, it says 8:30 calendar, 8:30 a.m. calendar, there is -- I gather from what I heard there is no indication that the 8:30 calendar was called at 8:30, No. 1.

As a matter of fact, when I used to call that calendar, occasionally I would start earlier than 8:30 to try to accommodate some of the attorneys who happen to get there a little early, maybe have pro per clients because generally those who are in custody would not be brought into the courtroom until pretty close to that 8:30 time. But if other attorneys were in court at ten after 8:00 with their clients, we whisk them through. It made our job a little easier, spread it out a little more and it helped the courtroom personnel dealing with these matters, like the District Attorney, the probation officer, whoever else happen[ed] to be involved in a particular case.

Some of those are sentencings. Some of those sentencings involve plea bargains. And sometimes involve situations in which the court may indicate that it's not going to follow the terms of the plea bargain or maybe the probation officer's report and recommendation [and]

would recommend something other than being within the terms of a plea bargain, as an example. And those matters, I can recall, occasionally would take substantial times of that court. While even sometimes we would have the attorney and the client, his or her client, go out in the jury room and talk things over, do we want to go ahead with this now or do we want to withdraw our plea or whatever, those kinds of processes. They are just a variety of them. There is too numerous to mention. I guess in explaining them. I'm not sure how it would be relevant to a jury to say, okay, Mr. and Mrs. Juror, here's a transcript of the 8:30, July 7th, 1993, calendar, and this proves that Mr. Lightsey was the thirteenth -- his case was the thirteenth case called.

(14 RT 3148-3149.)

Defense counsel Dougherty argued that from the transcripts the jury could get "an idea of what happened in that courtroom on that morning." (14 RT 3151.) He further argued inter alia:

[MR. DOUGHERTY:] And I fail to see where its any prejudice to the prosecution. It's a fact as to what happened. And the jury can look at it and see if it's a long case the jury knows it took five minutes or ten minutes by looking at the length of the discourse. You don't have to be a lawyer to know that. Anybody who know -- who knows anything about television, and I know very little about it, knows everybody works on script in television, their time for such and such a time, I say so many words in such and such a time.

As I understand it, a regular size non-legal paper, double spaced, takes about ten minutes, excuse, me six pages double spaced takes about ten minutes to read a loud.

(14 RT 3151-3152.)

During further discussion, the prosecutor noted that the testimony of defense attorney Dominic Eyherabide that his other case recessed at 10:30 a.m. and the testimony of deputy district attorney John Somers that he was in Department 10 at 10:30 a.m. provided a time frame for the jury. (14 RT 3154.) The trial court explained his concerns regarding the admission of the transcripts of every case:

THE COURT: Well, I have a tendency to think that the District Attorney is correct in objecting on the basis of relevance to the jurors being provided with a copy of the transcript of the entirety of the proceedings in Department 10 from that particular date, if your

intention to do that [sic] to try to urge them to speculate on a certain time frame 'cause that's all they can do. Unless you are going to call some witnesses in and find out from those witnesses how long these things take and so forth. But still it would probably be basically generalizations rather than specifics on just exactly what time this particular Line 18 on Page 72 of the transcript took place unless, unless [sic], it's related to one of those times in the transcripts unless it said we will recess until 10:30 or whatever. But --

(14 RT 3157-3158.)

Defense counsel Dougherty stated he would "be willing to settle" for admission of the transcripts of the cases immediately preceding and following the calling of appellant's case. (14 RT 3158.) The trial court told the defense counsel, "I'm not sure what you are suggesting you are willing to settle for, Mr. Dougherty." (14 RT 3158.) The prosecutor requested a copy of the transcripts which the defense counsel sought to admit, and the defense counsel agreed to meet with the prosecutor. (14 RT 3159-3160.) The trial court did not rule on the defense counsel's request, stating:

THE COURT: Let's do it that way. I think that might be helpful. Mrs. Green seems to be amenable to some kind of a process wherein part or portions of that transcript will be acceptable to the People to being presented as a partial record of what went on in Department 10 on July 7th, 1993. [¶] So why don't you get together with Mrs. Green about that and we'll resolve it hopefully in that manner.

(14 RT 3159.)

During the People's case-in-chief, the prosecutor questioned court reporter Diana Daulong regarding the reporter's transcripts of the July 7, 1994, Department 10 proceedings. The prosecutor showed Daulong all of the transcripts but did not have them marked. (23 RT 5020-5021.) The prosecutor then marked page 42 (exhibit number 168) and the pages of the transcript related to appellant's case (pages 55 through 60; exhibit numbers 169 and 169A through E):

Q. [MS. GREEN:] I know these pages are paginated. [¶] That

was page 42 we just had marked[,] 169, and then 169A through E[14] beginning at page 55. [¶] I'm showing this to counsel, pages 43 through 54 -- asking you in the dark. [¶] Pages 43 through 54 of this transcript that previously showed you are matters on totally unrelated cases; isn't that right?

A. [DIANE DAULONG:] Yes.

[Q.] So you indicated that page[s] 43 through 54 are unrelated to Mr. Lightsey's case?

A. Yes.

Q. Can you look at a printed page of a transcript -- I'll take page two, which is complete -- and tell us how long it took for attorneys and the judge to make these statements?

A. No.

Q. Why is that?

A. It depends on the speed they're talking, the pauses in between people talking.

Q. Does it happen that the Court will make a comment and then be silent for a matter of seconds or minutes and that won't be reflected in the transcript?

A. That's correct.

(23 RT 5027-5028; see VII CT 2073.)

After a recess, the prosecutor continued her questioning of Daulong:

Q. I think I was just about to start in with what we've -- yes -- had marked as 169, 169A through E, but I did want to ask you one question. [¶] In reference to People's 168 for identification, which is this transcript that we have already gone over, do you know what time or approximately what time Judge McGillivray first called the Lightsey case on July 7th?

A. I have no idea.

Q. Okay. And your transcripts do not -- or at least at that time back on July 7th of 1993 do not reflect the time in any way unless the Judge or one of the attorneys stated a time?

A. Correct.

Q. So, for example, in the one transcript where Mr. Somers asked the Judge if he could come back at 10:45 and then the judge says why not 10:30, that would reflect the words spoken by both Mr. Somers and Judge McGillivray?

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14. The reporter's transcripts of pages 42 and 54 through 60 were admitted into evidence. (23 RT 5069; VII CT 2073, 2075; People's exhibit numbers 168, 169, and 169A through E; defense exhibit letters F and J)

A. Correct.

Q. But there is nothing in the transcript of any hearing on that date where you indicate 8:53 or 9:27 or anything of that nature?

A. That's correct.

Q. Okay. All Right. Now, the case -- Judge McGillivray called Mr. Lightsey's case on July 7th, 1993, a second time, correct?

A. Correct.

Q. Do you have any idea how much time went by between the first calling of the case by Judge McGillivray and the second call of the case?

A. No.

Q. So beginning at 161, which is page 55, there is again a reference to the court. And who would be speaking at that point?

A. Judge McGillivray.

Q. He says People versus Chris Lightsey, number 13 on the court's calendar. And that refers to -- number 13 refers to what?

A. That was the number Mr. Lightsey was on the calendar that day.

Q. So I'd asked you earlier, for example, if there were 30 cases scheduled for the criminal calendar, they would be numbered one through thirty?

A. Correct.

Q. There is no particular order, is there?

A. I believe it's alphabetical.

Q. So there might have been twelve cases ahead of Mr. Lightsey's starting with the letter A, People versus, and A through whatever the letter before L is?

A. Correct.

Q. And then there is a reference to Mr. Eyherabide. [¶] And that's reflecting then at this time Mr. Eyherabide is present on the second call of the case, correct?

A. Correct.

Q. And he indicates my client is outside?

A. Correct.

[¶ . . . ¶]

Q. And there Mr. Lightsey says -- or you attribute to him I think he's probably down in the coffee shop?

A. Correct.

[¶ . . . ¶]

Q. So Mr. Eyherabide indicates I think he's probably in the coffee shop.

And then there is another reference to the court. Again would that be Judge McGillivray speaking?

A. Yes.

Q. The judge says: I'm trying to accommodate you. You just go ahead, get him. I'll try to handle something else here.

A. Correct.

Q. So is 169 an accurate reflection of the second time the Lightsey case was called on the July 7th, criminal calendar?

A. Yes, it is.

Q. You have no idea of what time the judge called the case on the second occasion, correct?

A. That's correct.

Q. I kept these pages because they were so close. [¶] Moving from page 55, 56, and 57, the court called -- indicates Peel versus Carmen Rivero Wicker. Is that supposed to be people?

A. People.

Q. Again that's Judge McGillivray calling the next case, which is People versus Wicker?

A. That's correct.

Q. That really doesn't relate to the case other than these are paginated sequentially at this point?

A. That's correct.

Q. They don't relate to the Lightsey case --

A. That's correct.

Q. -- 55 and 56. [¶] And the Court -- there is a reference to Mr. Coker saying thank you to the Court. [¶] Mr. Coker is who?

A. He is a public defender.

Q. And then on page 58 it says the Court, correct?

A. That's correct.

Q. That's Judge McGillivray?

A. That's correct.

Q. He again calls the case, People versus Christopher Charles Lightsey, court number is 54140. And the Court goes on to discuss the motions that were on calendar that morning, the reason why the case was in Department 10, including a motion for the return of bail bond bringing him in, correct?

A. That's correct.

Q. Then the next -- the Court asked -- end this statement by saying Mr. Eyherabide?

A. That's correct.

Q. Mr. Eyherabide then says: Your Honor, I am present, so is Mr. Lightsey?

A. That's correct.

Q. So I take it then that at this third call there is a reflection in the record that Mr. Lightsey was present, correct?

A. That's correct.

Q. At the second call there is nothing in the record to reflect that Mr. Lightsey was present. That's when Mr. Eyherabide said: [¶] I think he's in the coffee shop?

A. That's correct.

(23 RT 5029-5036.)

The prosecutor then confirmed Eyherabide's statement to Judge McGillivray:

I'm in trial in Department 4. I ran down here on the break actually expecting that this would trail till some other time later in the day. [¶] I would be prepared to submit that issue with leave to file the two additional declarations that go to the issue of what the agreement was in terms of bond premium. [¶] If the issue is going [to] take any additional time -- for example Mr. Epps has my presentation -- I would have to ask for some other time today, tomorrow or Friday, because I am due back up. We're on a recess.

(23 RT 5040.)

Daulong confirmed that the transcript indicated that Judge McGillivray, Eyherabide, and Deputy District Attorney Somers agreed to continue appellant's hearing to 1:30 p.m. on Friday, July 9, 1994. (23 RT 5041-5043.)

The prosecutor continued to examine Daulong:

Q. Was that the conclusion of the third call of the Lightsey case on July 7th?

A. Yes.

Q. Was that the last time that you transcribed anything relating to the People versus Lightsey case on July 7th?

A. Correct.

Q. Do you have any recollection or personal knowledge of when this particular -- this last hearing that occurred on July 7th that I just finished going over with you concluded?

A. The time?

Q. Yes?

A. No.

Q. Is this an accurate -- this transcription that I've gone over with you an accurate transcription based on the notes that you took at the time of these three hearings on July 7th?

A. Yes.

(23 RT 5043-5044.)

Defense counsel Gillis cross-examined Daulong regarding non-record

events:

Q. [MR. GILLIS:] Now, Ms. Daulong, we discussed -- you discussed with Ms. Green a couple of the things that aren't shown on the record. I believe one of them was the pauses that are routinely made in the courtroom in between people talking; is that correct?

A. Yes.

Q. Another thing that occurs routinely would be that a judge would ask to look at a file or -- I'm sorry -- the judge would ask to look at a file and take a moment or two to look at the file. That time would not be recorded either, would it?

A. That's correct.

Q. Also, when an interpreter is sworn in, you would only note that the interpreter was being sworn in and you wouldn't type the actual swearing in of the interpreter?

A. That's correct.

Q. Then, in addition to that, when interpreters are used, the courtroom normally goes a little slower?

A. Correct.

Q. To allow for the interpreter; is that right?

A. Correct.

[¶ . . . ¶]

Q. For the record, what I'm showing Ms. Daulong is a copy of her 7/7 transcript. It's the entire transcript for that day. And I'm showing her page 54, which is the page preceding the one that she just referred to. [¶] Could you review that for me, please?

A. Okay.

Q. Is there any indication on that page of a recess?

A. Yes. The bottom of the page 54.

Q. And what would that seem to indicate?

A. It says a recess was taken.

Q. Okay. And above that is the Court talking?

A. Yes.

Q. What does the Court say about the recess?

A. Let's take our mid morning break now.

Q. And that event occurred prior to the second call of Mr. Lightsey?

A. Yes.

Q. Do you know how long that morning recess was?

A. No, I don't.

Q. Now, there were questions about you didn't put down any times on any of the proceedings that day, on 7/7/93?

A. That's correct.

[¶ . . . ¶]

Q. Now when the judge takes the mid morning recess, is there an average that he normally takes as a normal practice?

A. Not in criminal calendar.

Q. Would he normally -- I take it by the way you're answering there are occasions that he would take a two to three minute recess?

A. During criminal calendar?

Q. Yes.

A. I don't remember any two or three minute recesses -- usually at least a ten minute recess.

Q. At least ten minutes?

A. Sometimes longer, depending on if somebody gave him something to read during that time.

Q. Right. Because the judge -- that's his responsibility, to review each case that he has got in front of him so he has some awareness of what's going on with that case, right?

A. Right.

Q. And then once the priority list is put up, other than the attorneys, the judge is going to keep track of the priority list, and nobody knows when that particular case would be called except that those that knew what number it was on the priority list, right?

A. Correct. The Judge and the clerk.

(23 RT 5055-5062.)

On June 15, 1995, outside the jury's presence, defense counsel Dougherty reminded the trial court, "Also we have the situation of the transcript, your Honor." (27 RT 5740.) Later that day, during the defense's case in chief, defense counsel Gillis advised Judge Kelly that the defense and the prosecutor had agreed to a stipulation that the reporter's transcripts of the Department 10 proceedings before appellant's case was called the third time were sequentially numbered from page two to page sixty. (27 RT 5784.) The prosecutor retracted her agreement to that stipulation and stated that she would not stipulate to the number of pages but only to the fact that the pages were sequential. (27 RT 5785-5786.) The prosecutor indicated that the factual issue was established by witness Diane Daulong's testimony that the transcript began with the first case on the calendar and went through the last case. (27 RT 5787.) Defense counsel Gillis stated that in view of Daulong's testimony, there was no need for a stipulation because "all we're wanting to show is that

the transcript began on page two and continues sequentially through page sixty." (27 RT 5787-5789.) The defense counsel stated that he wanted "to show the number of pages that occurred prior to [appellant's] first calendar call and the number of pages that occurred between his first calendar call and the second calendar call." (27 RT 5788.) The defense counsel agreed to review Daulong's testimony during the lunch recess. (27 RT 5789.)

Later that day, defense counsel Gillis requested the court to take judicial notice of the fact that the transcripts were numbered sequentially from page two to page sixty and that the jury could infer that forty pages of transcript (pages two to forty-one before appellant's case was called the first time) would take longer than thirteen pages (pages forty-two to fifty-five when appellant's case was called the second time). (27 RT 5798-5800, 5802.) The prosecutor essentially argued the fact was not relevant because the jury could not infer time from the length of the transcripts and that the evidence established that Department 10 resumed proceedings after the recess at about 10:30 a.m. (27 RT 5798, 5802-5803.) The court took judicial notice of the number of pages of the reporter's transcripts but ruled that the defense counsel could not argue regarding the alleged relationship between the number of pages and time:

> THE COURT: I think it's pretty clear what the position of the court is. I'm not going to allow for any argument to be made that equates numbers of pages in the transcript to amounts of time 'cause there's no evidence to support that.
>
> Further, the Court's not going to allow forty-two pages versus thirteen pages of transcript to be argued that takes longer or shorter, whatever. There's no evidence about that.
>
> I'm going to take judicial notice of the number of pages but not going to allow any argument as related to these time factors.

(27 RT 5803.)

During his argument to the jury, defense counsel Dougherty stated that appellant's case was the thirteenth case on the calendar, it was first called sometime between 8:45 and 8:55 a.m. and it was on page 42 of the transcript.

(28 RT 6024.) He argued that appellant's case was called a second time after the recess, but appellant was not there; and appellant had to be in court until 10:55 a.m. (28 RT 6024, 6026.) The prosecutor argued there was no evidence that attorney Eyherabide came to Department 10 at 10:45 a.m., that appellant's hearing ended later than 10:40 a.m., or that appellant was with Eyherabide in court until 10:55 a.m. (28 RT 6035-6036, 6044-6045.) She argued the evidence was that Eyherabide came to Department 10 at 10:30 a.m. and that appellant walked out of the courthouse after his hearing ended. (28 RT 6035-6036, 6045.)

B. Alleged Exclusion Of Reporter's Transcripts Of Unrelated Cases In Department 10 On July 7, 1994

Respondent first submits that appellant's evidentiary claims regarding the admission of the reporter's transcripts has been forfeited because the defense counsels ultimately did not request the trial court to admit the reporter's transcripts of the unrelated cases in Department 10 on July 7, 1994; and the trial court never issued a ruling excluding the transcripts of the unrelated cases. After ongoing discussions between the court, the defense counsels, and the prosecutor and between the defense counsels and the prosecutor, defense counsel Gill advised the court that "all we're wanting to show is that the transcript began on page two and continues sequentially through page sixty." (27 RT 5787-5789.) The defense counsel stated that he wanted "to show the number of pages that occurred prior to [appellant's] first calendar call and the number of pages that occurred between his first calendar call and the second calendar call." (27 RT 5788.) The court took judicial notice of the number of pages of the reporter's transcripts but ruled that the defense counsel could not argue regarding the alleged relationship between the number of pages of the reporter's transcript and time. (27 RT 5803.)

Penal Code section 1259 provides:

> Upon an appeal taken by the defendant, the appellate court may . . . 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.

As a general rule, "'the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights. (*People v. Barnum* (2003) 29 Cal.4th 1210, 1224, fn. 2 . . .; *People v. Saunders* (1993) 5 Cal.4th 580, 590 . . .; see also *Peretz v. United States* (1991) 501 U.S. 923, 936-937 . . . .)" (*In re Seaton* (2004) 34 Cal.4th 193, 197-198.)

Moreover, under Evidence Code section 354, subdivision (a) a judgment may not be reversed due to the erroneous exclusion of evidence unless, inter alia, "[t]he 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[.]"[15] (See *People v. Morrison* (2004) 34 Cal.4th 698, 711; *People v. Ramos* (1997) 15 Cal.4th 1133, 1178.)

Here, the defense counsels ultimately did not request the admission of the reporter's transcripts of the unrelated cases. Accordingly, the trial court never ruled that the transcripts of the unrelated cases were excluded. "A motion is an application to the court for an order. (Code Civ. Proc., § 1003.) The applicant must, in some way, communicate to the court what order is desired and upon what grounds. (See *People v. Sirhan* (1972) 7 Cal.3d 710, 740 []; *People v. DeSantiago* (1969) 71 Cal.2d 18, 22 []; Witkin, Cal.Criminal

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15. There are exceptions to the latter requirement but they do not apply here. (See Evid. Code section 354, subdivisions (b) [court rulings made compliance with (a) futile] and (c) [evidence was sought by questions asked during cross-examination or recross examination].)

Procedure (1965) § 22.)" (*Smith v. Superior Court* (1978) 76 Cal.App.3d 731, 734.) Furthermore, the defense counsels never objected to the trial court's ruling granting their request for judicial notice of the number of pages of the reporter's transcripts of the unrelated cases. Appellant's evidentiary claim has been forfeited. (See *People v. Lewis* (2001) 26 Cal.4th 334, 375 ["[T]he absence of an adverse ruling precludes any appellate challenge."]; also *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1302-1304.) To consider on appeal a defendant's claims of error that were not objected to at trial "would deprive the People of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal.'" (*People v. Rogers* (1978) 21 Cal.3d 542, 548.)

For the first time on appeal, appellant asserts that the trial court's evidentiary ruling violated his federal constitutional rights to raise a defense, present evidence in support of his defense, a fair trial, due process, and a proportionate and reliable death verdict (U.S. Const., Amends. V, VI, VIII, & XIV; Cal. Const., art. I, §§ 7, 15, 17, & 28). He further alleges a violation of his federal constitutional due process "liberty interest" under the California Evidence Code.

"A party forfeits the right to claims of violations of fundamental constitutional rights as grounds for reversal on appeal when he or she fails to raise the objection in the trial court." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221-222; *In re Seaton, supra,* 34 Cal.4th at p. 198.) By failing to make federal constitutional objections at trial, appellant has forfeited his right to review on those grounds. (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

And, if the defense counsels had proffered the reporter's transcripts of the unrelated cases, the trial court would have properly excluded them. Evidence possessing any tendency in reason to prove or disprove any disputed

material fact is relevant. (Evid. Code, § 210; *People v. Garceau* (1993) 6 Cal.4th 140, 177.) Evidence is relevant if it "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" (*Garceau, supra,* at p. 177.) Evidence is irrelevant, however, if it leads only to speculative inferences. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1035; also *People v. Morrison*, *supra*, 34 Cal.4th at p. 711.) Furthermore, trial courts have the discretion to exclude evidence pursuant to Evidence Code section 352 "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1097.) A ruling excluding evidence under Evidence Code section 352 will be overturned on appeal only if the trial court "exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Here, there was no evidence of a correlation between the pages of the reporter's transcripts and the passage of time. The trial court would have properly concluded the reporter's transcripts had minimal, if any, probative value and that their admission would create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. The trial court would not have abused its discretion in excluding the reporter's transcripts of the unrelated cases.

Excluding the transcript would not have violated appellant's right to due process because he would not have been prevented from presenting a defense. "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.'" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Since the transcript would have been properly excluded under the "ordinary rules of evidence," appellant would not have been denied his right to present a defense.

Where a "trial court's ruling did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense," the ruling does not constitute a violation of due process and the appropriate standard of review is whether it is reasonably probable that the admission of the evidence would have resulted in a verdict more favorable to the defendant. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325; *People v. Watson, supra,* 46 Cal.2d at p. 836; see *People v. Cash* (2002) 28 Cal.4th 703, 727.) The alleged exclusion of the reporter's transcripts was not "critical" to appellant's defense and their exclusion did not amount to the exclusion of a defense rather than the exclusion of evidence concerning a defense. There was no evidence of a correlation between the pages of the reporter's transcripts and the passage of time. Through other evidence, the jury was apprised of the known facts regarding the timing of appellant's court appearances. The defense counsel argued that appellant's case was the thirteenth case on the calendar, it was first called sometime between 8:45 and 8:55 a.m., and it was on page 42 of the reporter's transcript. (28 RT 6024.) He argued that appellant's case was called a second time after the recess, but appellant was not there; and appellant had to be in court until 10:55 a.m. (28 RT 6024, 6026.) "[T]he trial court's ruling did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense." (*Bradford, supra,* at p. 1325.) In this context, it is not reasonably probable that the admission of the reporter's transcripts of the unrelated cases would have resulted in a verdict more favorable to appellant. Hence, even assuming the trial court had excluded the reporter's transcripts of the unrelated cases, any alleged error would not have prejudiced appellant.

Appellant cites *People v. Linder* (1971) 5 Cal.3d 342 for the proposition that the "exclusion of [a] transcript supporting [an] alibi defense requires reversal of [the] conviction." (AOB 126.) In *Linder,* the court addressed the diligence that must be demonstrated to secure the attendance of

a witness before it is proper to admit the witness's prior testimony as an exception to the hearsay rule. (*Linder, supra,* at pp. 347-348.) The witness's prior testimony was the only evidence corroborative of the defendant's alibi. (*Ibid.*) The Supreme Court found the trial court's peremptory exclusion of the testimony on the ground that the defendant's delivery of the subpoena occurred only the day before the trial, without a consideration of the cumulative efforts made by his attorney to locate the witness, constituted prejudicial error under *People v. Watson, supra,* 46 Cal.2d at page 836. (*Ibid.*) Appellant's case is distinguishable from *Linder*. The reporter's transcripts of the unrelated cases did not corroborate his alibi defense. There was no evidence of a correlation between the pages of the reporter's transcripts and the passage of time. Any correlation would have been based on mere speculation. The jury could not reasonably infer from the reporter's transcripts that appellant was in court at the time of the murder.

Appellant also relies upon *Rosario v. Kuhlman* (2nd Cir. 1988) 839 F.2d 918. (AOB 128-129.) Decisions of the lower federal courts interpreting federal law are not binding on state courts. (See *Raven v. Deukmejian*, 52 Cal.3d at p. 352; *People v. Bradley, supra,* 1 Cal.3d at p. 86.) In any event, *Kuhlman* is distinguishable from appellant's case. In that case, the federal court found the trial court's erroneous exclusion of an unavailable witness's prior testimony deprived the defendant of his fundamental right to a fair trial because it directly contradicted the "sole identification evidence" against the defendant and "was to be [the defendant]'s only witness" and "[w]hen the defense made a final effort, at the end of the prosecution's case, to introduce [the witness's testimony] and was precluded from doing so, it rested without introducing any evidence." (*Id.* at pp. 920, 926-927.) Here, in contrast, the reporter's transcripts did not contradict the evidence against appellant and did not corroborate his alibi defense. (See *Gonzales v Lytle* (10th Cir. 1999) 167 F.3d 1318, 1321 [violation of defendant's right to fair trial resulted from

erroneous exclusion of unavailable witness's testimony recanting her preliminary hearing testimony identifying defendant as shooter because preliminary hearing testimony was only evidence directly linking defendant to shooting]; *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062-1065 [violation of defendant's right to present defense resulted from erroneous exclusion of victim's journal and defendant's testimony that she had read journal because exclusion precluded defendant from testifying fully about her state of mind and from presenting evidence that would have corroborated her testimony].)

In support of his argument that neither the reporter's transcripts of the unrelated cases nor the defense counsel's excluded argument were speculative, appellant cites the trial court's admission of Deputy District Attorney John Somers's testimony regarding his estimates of the amount of time between the second and third times that the trial court called appellant's case. (AOB 126-127.) The defense called Somers, who testified on direct examination that he arrived in Department 10 at about 8:30 a.m. on July 7, 1994; court proceedings commenced at about 8:45 to 8:50 a.m.; appellant's case was first called at about 9:05 a.m.; the bailiff advised the court that attorney Eyherabide had said he would be back on his break at 10:45 a.m.; and the judge ordered Somers to return at 10:30 a.m. in case Eyherabide 's break was a little bit early. (25 RT 5462, 5465, 5467-5468.) Somers returned at about 10:30 a.m., and the court started back in session within minutes and called appellant's case the second time. (25 RT 5468, 5470-5472.) Eyherabide stated that he believed appellant was in the coffee shop and walked out of the courtroom. (25 RT 5471-5472.) The court called "a very brief matter." (25 RT 5472.) As Eyherabide walked out, he either met appellant in the entry way or just outside the courtroom, and they "almost immediately" walked into the courtroom. (25 RT 5472-5473.) The court called appellant's case the third time. (25 RT 5472.) Appellant's case took about two or three minutes and was continued until Friday

afternoon. (25 RT 5473.) The defense counsel further examined Somers regarding the timing of the calendar in Department 10:

> Q. [MR. GILLIS:] Now part of your job as a District Attorney takes you into Department 10 a lot, doesn't it?
>
> A. [MR. SOMERS:] Yeah. I would say on average I'm probably there at least once a week, if not more.
>
> Q. And one of the things that you can probably say about a case being called in Department 10 is you don't know -- it may [sic] 30 seconds or 10, 15 minutes. Would that be accurate?
>
> A. Well, it sort of depends. In some cases you really don't have any idea, but you can generally make an educated guess based on the nature of what particular type of matter that you are appearing are [sic]. Some types of things take longer than others.
>
> Q. Let me give you a hypothetical. If you're number 13 on calendar, do you have any way of knowing when your case will be called in five minutes or one hour?
>
> A. In that particular department, generally speaking, on the morning calendar, it wouldn't take an hour to get to it, because there are generally relatively short matters in there, but some of the matters do take longer than others. And depending on what's in front of you, the length of time it could take -- before they would get to number 13 on the calendar would vary.
>
> Q. There are a lot of things that causes it to vary, aren't there?
>
> A. Yeah. There are a number of factors that can cause that to vary.
>
> Q. Some of those factors might be the use of an interpreter?
>
> A. The use of an interpreter would be one factor that would effect it to some degree, yes.
>
> Q. Another thing would be if the judge had to review a particular case when it was called just to make sure he was aware of the [sic] all the facts that were going on that were being discussed?
>
> A. Yeah, that's something that could also effect the length of time it would take.
>
> Q. And, obviously, some attorneys are much more long-winded than other attorneys, and that has a play in it, too?
>
> A. All attorneys are probably long-winded but in varying degrees.

(25 RT 5475-5476.)

On cross-examination, the prosecutor sought Somers's opinion regarding the length of time of the hearing preceding the third calling of appellant's case. (25 RT 5482-5483.) The defense counsel objected that the question called for speculation, and the court overruled, stating Somers could

"draw on his experience." The prosecutor's cross-examination continued:

> THE WITNESS [MR. SOMERS:] I'm familiar with not only practicing with transcripts, but I'm familiar with the speech patterns, if you will, of Judge McGillivray and this particular defense attorney involved in this case. And given that, it would have taken more than a minute for the Wicker matter to be handled.
>
> BY MS. GREEN:
>
> Q. So would it be fair, overly fair, to say that when the Court called the Lightsey case for the third time, it was called approximately 10:35 on July 7th, 1993?
>
> A. Yes, I would say that would be an accurate estimate.
>
> Q. To be overly fair, five minutes or less as far as the entire hearing, continuing the Lightsey motions until July 9th, correct?
>
> A. I'm sorry. I don't quite understand the question.
>
> Q. The hearing in which the motions were continued from the 7th to the 9th, I think you've testified, was two to three minutes, and then Mr. Gillis asked you when it could have been five minutes. You said if it was, it was under five minutes, correct?
>
> A. Yes. I would say five minutes, an absolute max. I think less.
>
> Q. So then, again to be overly cautious, would it be a fair statement to say that all matters involving Christopher Lightsey, July 7th, 1993, were concluded at the latest, 10:40 A.M.?
>
> A. Yes, I would say that would be accurate.

(25 RT 5483-5484.)

The defense counsel then elicited Somers's testimony that he had testified at the preliminary hearing that he was in court "from approximately 10:30 to approximately 10:45 or so." (25 RT 5485.)

The trial court properly determined that Somers's testimony was not speculative and was admissible because it was based on his personal experience. Evidence Code section 702[16] provides that, with the exception of

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16. Evidence Code section 702 provides:

> (a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.
>
> (b) A witness' personal knowledge of a matter may be

expert witnesses, no witness may testify about a particular matter except on the basis of "personal knowledge," which in turn may be demonstrated by the witness's own testimony. Evidence Code section 800[17] permits the admission of the opinion of a lay nonexpert witness so long as it is "[r]ationally based on the perception of the witness" and "[h]elpful to a clear understanding of his testimony." "Lay opinion testimony is admissible where no particular scientific knowledge is required, or as 'a matter of practical necessity when the matters . . . observed are too complex or too subtle to enable [the witness] accurately to convey them to court or jury in any other manner.' [Citations.]" (*People v. Williams* (1988) 44 Cal.3d 883, 915.) In all cases, "[i]t is fundamental that a trial judge has wide discretion to admit or reject opinion evidence, and that a court of appeal has no power to interfere with the ruling unless there is an obvious and pronounced abuse of discretion on his part [citation]." (*People v. Clark* (1970) 6 Cal.App.3d 658, 664.)

Somers's testimony was admissible as having been rationally based on the witness's own perceptions and experience. Somers testified that he had been a deputy district attorney for about ten and one-half years (25 RT 5460); he had appeared in Department 10 an average of once a week, if not more (25 RT 5475); and he was "familiar with not only practicing with transcripts, but I'm familiar with the speech patterns, if you will, of Judge McGillivray and

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shown by any otherwise admissible evidence, including his own testimony.

17. Evidence Code section 800 provides:

If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:
(a) Rationally based on the perception of the witness; and
(b) Helpful to a clear understanding of his testimony.

this particular defense attorney involved in this case" (25 RT 5483). Somers's opinion was helpful to a clear understanding of his testimony regarding the timing of the proceedings in Department 10. As such, it was admissible lay opinion, and there was no abuse of discretion in its admission. (Evid. Code, § 800.)

The evidentiary theory supporting the trial court's admission of Somers's testimony is distinguishable from the defense theories proffered for the admission of the reporter's transcripts of the unrelated cases and the defense counsel's argument. The reporter's transcripts were not relevant and the defense counsel's argument was improper speculation because there was no evidence of a correlation between the pages of the reporter's transcripts and the passage of time. Contrary to appellant's argument, the jury could not "easily use the transcript and Somers's testimony about the length of the single hearing as shown by the transcript to estimate the amount of court time reflected in that sixty pages." (AOB 127-128.) Somers's testimony was admissible because it was based on his own perceptions and experience regarding the court proceeding which he witnessed. Somers could not testify regarding any court proceedings unless he had personal knowledge. There was no evidence that Somers witnessed the other court proceedings.

C. Restriction of Defense Counsel Dougherty's Closing Argument

Appellant contends that the trial court erroneously restricted defense counsel Dougherty's closing argument to the jury "that the length of the transcript indicated the passage of a certain amount of time in the courtroom." (AOB 119.) The trial court did not abuse its discretion in restricting the defense counsel's argument because it was not supported by the evidence.

A criminal defendant has a well-established constitutional right to have counsel present closing argument to the trier of fact. (*People v. Marshall* (1996) 13 Cal.4th 799, 854.) Closing argument "may be based on matters in

evidence or subject to judicial notice. It may also refer to matters of common knowledge or illustrations drawn from experience, history, or literature. (*People v. Love* (1961) 56 Cal.2d 720, 730. . . ..)" (*People v. Farmer* (1989) 47 Cal.3d 888, 922, overruled on other grounds as noted in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) "Trial judges have the duty to responsibly and fairly control the proceedings to prohibit argument which is not supported by substantial evidence." (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1390; *People v. Nails* (1963) 214 Cal.App.2d 689, 693; see *People v. Rodrigues, supra,* 8 Cal.4th at p. 1184; § 1044.) To be considered "substantial," evidence must be reasonable in nature, credible, and of solid value. (*People v. Olmsted* (2000) 84 Cal.App.4th 270, 277.) An argument based on facts not in evidence is improper. (*People v. Boyette* (2002) 29 Cal.4th 381, 463-464; *People v. Pitts* (1990) 223 Cal.App.3d 606, 722.) A "defendant's failure to take the stand does not entitle his attorney to engage in purely speculative argument, substituting his own testimony for that of the defendant in order to insulate the theory of the defense from the scrutiny of cross-examination." (*People v. Modesto* (1967) 66 Cal.2d 695, 708, overruled on other grounds in *People v. Sedeno* (1974) 10 Cal.3d 703, 720-721, and *Maine v. Superior Court* (1968) 68 Cal.2d 375, 383, fn. 8.)

Here, there was no evidence presented at trial to show that a page of the reporter's transcript was equivalent to a length of time. The defense counsel's proposed argument that the jury could infer a length of time from the number of pages of the reporter's transcript was without evidentiary support and was based on mere speculation. Since the argument was based on speculation rather than on facts presented at trial, the trial court properly precluded it. In the absence of substantial evidence supporting a defense argument, the trial court had a duty and a right to preclude the defense counsel from pursuing the argument. (*People v. Ponce, supra,* 44 Cal.App.4th at p. 1390.)

Even if the trial court erred in the manner in which it limited defense

counsel's closing argument, there was no prejudice. Because the defense counsel's argument was speculative with no evidentiary basis, appellant was not prejudiced by the court's restriction thereof. Given the defense counsel's argument based on the evidence, it is not reasonably probable that appellant would have received a more favorable outcome had defense counsel been permitted to discuss the possible timing of the unrelated cases as reflected in the reporter's transcript. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Moreover, there was overwhelming evidence of guilt; therefore, any alleged error was harmless under any conceivable standard. (*Cf. People v. Watson, supra,* at p. 836; *Chapman v. California, supra,* 386 U.S. at p. 24.)

For the first time on appeal, appellant asserts that the trial court's ruling restricting his closing argument violated his federal constitutional rights to raise a defense, present evidence in support of his defense, a fair trial, due process, and a proportionate and reliable death verdict (U.S. Const., Amends. V, VI, VIII, & XIV; Cal. Const., art. I, §§ 7, 15, 17, & 28). He further alleges a violation of his federal constitutional due process "liberty interest" under the California Evidence Code. By failing to make federal constitutional objections at trial, appellant has forfeited his right to review on those grounds. (*People v. Partida, supra,* 37 Cal.4th at p. 435; *In re Seaton, supra,* 34 Cal.4th at p. 198; *In re Dakota H., supra,* 132 Cal.App.4th at pp. 221-222.) In any event, no constitutional error occurred. The defense counsel was able to argue, based on other testimony elicited by him and the prosecutor, that appellant's case was the thirteenth case on the calendar, it was first called sometime between 8:45 and 8:55 a.m. and it was on page 42 of the reporter's transcript. (28 RT 6024.) He argued that appellant's case was called a second time after the recess, but appellant was not there; and appellant had to be in court until 10:55 a.m. (28 RT 6024, 6026.) "[T]he trial court's ruling did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense." (*People v. Bradford, supra,* 15

Cal.4th at p. 1325.)

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS IN EXCLUDING THE DRUG USE AND MISDEMEANOR CONVICTION IMPEACHMENT EVIDENCE OF KAREN LEHMAN

Appellant contends his convictions must be reversed because the trial court erroneously excluded impeachment evidence of prosecution witness Karen Lehman. The defense counsels sought to impeach Lehman with evidence of her misdemeanor conviction of assault with a deadly weapon against her husband (§ 245, subd. (a)(1)(17)) and her alleged past and current narcotics use. He alleges violations of his state and federal constitutional rights to raise a defense, due process, and a proportionate and reliable death verdict (U.S. Const., Amends. V, VI, VIII, & XIV; Cal. Const., art. I, §§ 7, 15, 17, & 28). He further alleges a violation of his federal constitutional due process "liberty interest" right to attack the credibility of witnesses under the California Evidence Code. (AOB 134-146.)

The trial court properly excluded the impeachment evidence of Lehman's alleged past and present drug use and Lehman's misdemeanor conviction. There was no violation of appellant's statutory or constitutional rights.

A. Relevant Proceedings

Prosecution witness Karen Lehman, who was 41 years old at the time of trial, testified that she was Brian Ray's sister and that she introduced Ray to appellant. (19 RT 4063-4064, 4121.) In about June 1993, Lehman began to house sit at appellant's house. (19 RT 4073-4074, 4077, 4084-4085, 4134.) She went to the house about three times a week and sometimes spent the night. (19 RT 4074-4076, 4079-4080.) She had sexual intercourse with appellant on

about three occasions in his house. (19 RT 4080-4081.) Lehman house sat only a few times in July 1993 after appellant was arrested on an outstanding warrant on June 29, 1993. (19 RT 4083-4084, 4089, 4116, 4128, 4134.) Pursuant to appellant's request, she and Brian Ray's wife, Stacy, contacted a bail bondsman; and when appellant was released from jail on July 2, 1993, Lehman drove appellant to appellant's house. (19 RT 4086-4089, 4094-4095.)

On or shortly before July 4, 1993, Lehman spoke to appellant on the telephone and asked about his plans for July 4th. (19 RT 4089-4091, 4128.) Appellant stated that he was going to check on an old friend, who was 72 or 76 years old, because the man was sick. (19 RT 4091-4094, 4128-4129, 4152.) Appellant specifically mentioned going to an old man's house on Holtby, down the street from his mother. (19 RT 4129.)

Lehman saw appellant at his house the following week on about July 8 or 9, 1993. (19 RT 4096-4099.) Appellant asked Lehman if he could store some things in the trunk of her car. (19 RT 4097-4099.) He stated that he was "going through some kind of court hearings or something like that, and they would be discriminating again him or something -- ." (19 RT 4101-4102.) She agreed, and after telling her that she did not need to help him, he put some items in her car trunk. (19 RT 4097-4098, 4102.) He asked her to store her car at her vacant house across town on Wilson Road. (19 RT 4065, 4102-4103.) She agreed and parked her car in the garage at her house. (19 RT 4102-4103.) Using his own lock, appellant locked the garage door. (19 RT 4104.)

Sometime between a couple days and a week later, Lehman told appellant that she needed her car. (19 RT 4105-4106.) Appellant drove her to her house on Wilson Road, and she drove her car, followed by appellant in his car, to his house. (19 RT 4106-4107.) He removed the items from the trunk of her car and placed them in his bedroom. (19 RT 4107-4108.)

Sometime later, appellant telephoned her and asked her to come to his

house. (19 RT 4108-4109.) At his house, appellant, who had been drinking and was belligerent, told her he would show her something. (19 RT 4109-4110, 4130.) He showed her about 20 guns and boxes of ammunition, which were all around his bedroom. (19 RT 4079, 4108-4112.) There were handguns and rifles leaning against the walls and on the bed. (19 RT 4109-4110.) He stated that he collected guns, he got some guns from his father when he passed away, and he got some guns out of the newspaper. (19 RT 4111-4112.) Later that day, appellant was drunk, choked her with his arm around her neck, and whispered in her ear that if she "pointed the guns toward him that [she] would wake up with a shank in [her] neck." (19 RT 4113-4115, 4130, 4152.) Appellant further stated that he did not have to be there to do it. (19 RT 4115.) Lehman knew that appellant thereafter gave Brian Ray the guns. (19 RT 4152.)

On July 31, 1993, Lehman and Beverly Westervelt helped appellant move from his house to a studio apartment. (19 RT 4116-4118.) Lehman did not see or talk to appellant after he moved. (19 RT 4116, 4119.)

Prior to his cross-examination of Lehman on May 30, 1995, defense counsel Gillis advised the court that he intended to question Lehman regarding her misdemeanor conviction for assault with a deadly weapon for purposes of impeachment. (19 RT 4122-4123.) The prosecutor objected, and the court agreed to defer ruling on the issue until counsel had an opportunity to do further research. (19 RT 4124-4126.)

The defense counsel then cross-examined Lehman, asking whether she had taken drugs that day and when she had last taken drugs:

Q. [MR. GILLIS:] Have you taken any drugs today?
A. [MS. LEHMAN:] Excuse me?
Q. Have you taken any drugs today?
A. No.
Q. When was the last time you used drugs?
A. Oh, gosh, I don't remember. It's been a long time.
Q. Have you found that the use of drugs has effected your memory?

A. No. I would say I haven't had a good memory since I can remember, which hasn't been a long time.

MS. GREEN: Your honor?

THE COURT: Yes.

MS. GREEN: Could we take up that one matter with the Court that the [Court] indicated we would take up at the conclusion of cross-examination?

THE COURT: Sure.

(19 RT 4134-4135.)

Out of the jury's presence, the prosecutor objected to the defense counsel's questioning of Lehman regarding her past drug use on the ground that it was irrelevant. (19 RT 4135-4136.) Defense counsel Gillis's offer of proof was that "drug usage currently relates directly to memory as the witness is testifying to; two, that drug usage in the past reflects directly on a person's memory of particular incidences." (19 RT 4138.) Gillis claimed that he had information, not from appellant, that Lehman used drugs over the past four or five years. (19 RT 4139-4140.) Gillis conceded that he had not named any witness on the witness list but that he did "have an individual that I might consider as a rebuttal witness, but I haven't done anything in regards to that." (19 RT 4141.) The prosecutor argued that Lehman's past drug use was irrelevant and improper character evidence. (19 RT 4141-4142.) Gillis reiterated his argument that Lehman's past drug use was admissible to attack her credibility and her memory of events. (19 RT 4142.) The prosecutor countered that Gillis was on a fishing expedition and that he had no personal knowledge or any facts to substantiate Lehman's past drug use. (19 RT 4143.) After further discussion with counsel (19 RT 4144-4147), the court admonished Gillis from further questioning Lehman regarding drug use:

Well, I think it's out of line, Mr. Gillis, to launch into those kinds of areas of inquiry with a witness when apparently you had information before this witness was called here today, and I gather you have failed to disclose any of that information by way of discovery or in response to the discovery order that was made in this case to the District Attorney.

And now you're still playing the game of keeping one foot on each side of the line, telling me you're not sure whether you're going to call this witness or not. So I think you're blowing hot and cold with this issue.

I don't think it's proper to ask a witness the questions that you have asked this witness regarding drug usage or have you used drugs today. It's not relevant to this proceeding and is not a proper means of impeaching the witness.

The Court would make a finding that it's much more prejudicial than probative to bring this kind of a process up when it relates to the narrow issue of memory.

So the Court's going to admonish you not to pursue this further as it relates to drug use by this particular witness.

I'm going to advise the jurors they're to disregard the reference to the inquiries regarding drug usage.

(19 RT 4148-4149.)

The court then agreed not to admonish the jurors with regard to the questions already asked by the defense counsel because the prosecutor believed it would look like she was trying to hide something from them. (19 RT 4149-4150.)

On June 7, 1995, the prosecutor filed a motion to exclude impeachment evidence of Lehman's misdemeanor conviction for assault with a deadly weapon (§ 245, subd. (a)(1)(17)), which resulted from Lehman's act of throwing a rock at her ex-husband on February 6, 1992. (VII CT 2050-2053; 24 RT 5083; see 25 RT 5314-5316.) In the motion, the prosecutor argued that the evidence should be excluded under Evidence Code section 352 as unduly prejudicial. (VII CT 2052-2053.) The court deferred ruling on the issue. (24 RT 5084.) After further discussion with counsel the next day (25 RT 5314-5318), the court excluded the impeachment evidence:

[THE COURT:] . . . That the court [referring to *People v. Wheeler* (1990) 4 Cal.4th 284] was really not addressing [sic] they were trying to eliminate from consideration, as I understand it, the admission of the conviction for impeachment and then went on to talk a bit about the conduct itself which is the underlying basis. [¶] The court's reviewed this and reviewed the comments of the defense. The court's going to disallow the effort to impeach on the basis of the misdemeanor or the

action related thereto underlying that conviction on the basis of a 352 evaluation.

It's quite clear to the court that potential [sic] is much more prejudicial [than] probative to bring that into the picture about something throwing a rock at her ex-husband. [¶] So the court's going to disallow that effort to impeach Ms. Lehman's testimony by that comment that's underlying that conviction and further by the conviction itself.

(25 RT 5320-5321; see VII CT 2058.)

Defense counsel Gillis thereafter proffered the testimony of Vaughn Lehman, Karen's ex-husband, to impeach Karen's credibility. (26 RT 5688-5689.) The court explained that the defense sought to admit Vaughn's testimony, inter alia, that several years prior to trial, Vaughn "witnessed an assault wherein Karen Lehman attempted to use a car to run over a Kern County Sheriff's Deputy Kurt Boeshell, phonetic spelling, after she had attempted to stab him in the hand following an argument. I'm not sure who she attempted to stab in the hand whether it was Deputy Boeshell or whether it was Mr. Lehman." (26 RT 5691.) The court excluded the evidence, finding it more prejudicial than probative "as it relates to the issue of integrity, reliability and so forth," unless the defense counsel could show at an Evidence Code section 402 hearing "that there's other considerations for the court to make." (26 RT 5693.) Vaughn testified that he was married to Karen for 22 years and that he had known Lehman's brother Brian Ray for about 25 years. (27 RT 5731.) He testified that the Karen's and Brian's reputation for truth and veracity was "bad." (*Ibid.*) Defense counsel Gillis never requested an Evidence Code section 402 hearing to establish the admissibility of Vaughn's testimony regarding the alleged assault.

B. Impeachment With Alleged Past and Present Drug Use

Trial courts have the discretion to exclude evidence pursuant to Evidence Code section 352 "if its probative value is substantially outweighed

by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; *People v. Bittaker, supra,* 48 Cal.3d at p. 1097.) A ruling excluding evidence under Evidence Code section 352 will be overturned on appeal only if the trial court "exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodrigues*, *supra,* 8 Cal.4th at p. 1124.)

The trial court did not abuse its discretion under Evidence Code section 352 by restricting the defense counsel's cross-examination of Lehman regarding her alleged past and present drug use. That Lehman may have used drugs in the past had no relevance to the issues in the case. After the prosecutor objected to defense counsel Gillis's cross-examination of Lehman regarding her past and present drug use, defense counsel Gillis claimed that he had information, not from appellant, that Lehman had been and was using drugs. (19 RT 4139-4140.) Defense counsel Gillis conceded that he had not named any witness but that he had "an individual that I might consider as a rebuttal witness, but I haven't done anything in regards to that." (19 RT 4141.) Defense counsel Gillis further stated, "I have not, even now, formulated a desire to call this individual as a witness." (19 RT 4147.) The defense counsel made no offer of proof to indicate that Lehman was under the influence at any critical time or that her mental faculties were actually impaired by reason of addiction. The defense counsel failed to produce the necessary expert testimony regarding the effect of Lehman's alleged drug use. The whole line of questioning Lehman regarding her alleged drug use was prejudicial and could only have the effect of degrading Lehman. Although evidence tending to impugn the witness's "capacity to perceive, to recollect, or to communicate any matter about which he testifies" is relevant for purposes of impeachment (Evid. Code, § 780, subd. (c)), the court is required

"to protect the witness from undue harassment or embarrassment." (Evid. Code, § 765, subd. (a)[18].) The evidence amounted to collateral impeachment, having minimal tendency to show that overall Lehman was not a law-abiding person, she was being untruthful, and she had a faulty memory. (See *People v. Castro* (1985) 38 Cal.3d 301, 317 [simple possession of heroin does not necessarily involve moral turpitude; possession for sale involves moral turpitude but trait involved is not dishonesty but intent to corrupt others].) Permitting appellant to prove Lehman's alleged illicit drug use would be a time-consuming matter, involving the testimony of one or more witnesses to prove the claim and possibly other witnesses to refute the claim. Given that the evidence was not relevant to the issues at trial and had little probative value, the trial court properly exercised its discretion and excluded the evidence because it was unduly prejudicial.

Relying upon *People v. Bell* (1955) 138 Cal.App.2d 7, appellant argues that California law permits "'a witness to be impeached on cross-examination' with evidence of 'drug' addiction or any other matter that affects 'his powers of perception, memory or narration." (AOB 140-141.) Such reliance is misplaced. "Evidence of consumption of narcotics is admissible for impeachment purposes if there is expert testimony substantiating the effects of such use. [Citations.]" (*People v. Rocha* (1971) 3 Cal.3d 893, 901.) Here, the defense counsel failed to produce the necessary expert testimony regarding the effect of Lehman's alleged drug use. (*Ibid.*) Accordingly, in *Barnett v. Superior Court* (2006) 145 Cal.App.4th 495, the Court rejected the defendant's argument that the trial court trial court erred in denying his

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18. Evidence Code section 765, subdivision (a) provides:

> The court shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment.

request for disclosure of any information in the government's possession indicating that a witness was a drug addict or used drugs because "such evidence is impeaching, showing that the addict's testimony is inherently suspect and that the fact of addiction is probative of other motive for testifying." (*Id.* at pp. 535-536.) The *Barnett* Court explained that evidence of a witness's drug use or addition in general is not necessarily relevant for impeachment purposes:

> The two California cases Barnett cites on this point are inapposite. In *People v. Melton* (1988) 44 Cal.3d 713, 736-737, 244 Cal.Rptr. 867, 750 P.2d 741, the court concluded that "[a] witness's drug intoxication may indeed be a basis for impeaching his credibility," but that conclusion related to a witness the defendant claimed was intoxicated at the time he was testifying. In *People v. Rocha* (1971) 3 Cal.3d 893, 901, 92 Cal.Rptr. 172, 479 P.2d 372, the court concluded "[e]vidence of consumption of narcotics is admissible for impeachment purposes if there is expert testimony substantiating the effects of such use," but that conclusion related to a witness (the defendant himself) who was allegedly under the influence of marijuana at the time of the crime. Neither of these cases stands for the proposition that evidence of a witness's drug use or addiction in general is relevant for impeachment purposes.
>
> The federal cases on which Barnett relies provide some support for the proposition that when an informant witness is also a drug addict, the witness's drug addiction is relevant to his credibility. For example, in *United States v. Kinnard* (D.C. Cir. 1972) 465 F.2d 566, 570, the court stated that "a government informer's addiction to narcotic drugs and his indictment for narcotics violations . . . increase[s] the danger that he will color his testimony to place guilt on the defendant for his own benefit." These cases, however, do not support the broader proposition that any witness's drug addiction is relevant to the witness's credibility. In the absence of any other authority, we conclude that Barnett has failed to show that the materials he seeks would have been favorable to him; thus, we need not address his failure (once again) to demonstrate their materiality. Under these circumstances, the trial court did not abuse its discretion in denying this request.

(*Barnett, supra,* at p. 536, underlining added.)

Appellant also mistakenly relies upon *United States v. Vgeri* (9th Cir. 1995) 51 F.3d 876 in which the federal appellate court rejected the defendant's

contention that the district court erred in denying his request for an addict-informer jury instruction. Although not binding on this Court, *Vgeri* is distinguishable. (See *Raven v. Deukmejian, supra,* 52 Cal.3d at p. 352; *People v. Bradley, supra,* 1 Cal.3d at p. 86.) The *Vgeri* Court noted that, "[a] 'witness using drugs' or 'addict' instruction is appropriate when a witness is a drug addict. The instruction is not required, however, if: (1) the addiction is disputed; (2) the defense adequately cross-examines the witness about the addiction; or (3) another cautionary instruction is given." (*Id.* at p. 881, citing *United States v. Ochoa-Sanchez* (9th Cir. 1982) 676 F.2d 1283, 1289.) The Court explained why the addict-informer instruction was not required:

> The requested instruction provided: 'there has been evidence [that Gogue] . . . was using drugs when certain events she observed took place.' There is record evidence that Gogue used cocaine between her first meeting with Agent Anderson and the arrests of Vgeri and Stramarko, but Vgeri failed to establish that Gogue was under the influence of drugs during any of the events to which she testified. Further, Vgeri's counsel extensively cross-examined Gogue about her drug use. The court also gave specific instructions regarding credibility of witnesses, character for truthfulness, and testimony under grant of immunity. The record precludes a finding of abuse of discretion.

(*Vgeri, supra,* 51 F.3d at p. 881.)

The defense counsel cross-examined Lehman regarding her past and present drug use but Lehman testified that she had not taken any drugs that day, it had been a long time since she had last used drugs, and the use of drugs had not effected her memory. (19 RT 4134.) The defense failed to establish that Lehman was under the influence of drugs during any of the events to which she testified. Moreover, considering the scope of the cross-examination the defense counsel was able to achieve and the unlikelihood that further information about Lehman's alleged drug use would have aided in impeaching her, it is clear appellant was afforded sufficient opportunity to cross-examine her.

Appellant's failure to raise his constitutional claims in the trial court forfeits his claims on appeal. (*People v. Partida, supra,* 37 Cal.4th at p. 435; *In re Seaton, supra,* 34 Cal.4th at p. 198; *In re Dakota H., supra,* 132 Cal.App.4th at pp. 221-222.) In any event, no constitutional error occurred. "'[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defendant might wish.' [Citation.]" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) Thus, "not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance." (*People v. Frye* (1998) 18 Cal.4th 894, 946, citing *Van Arsdall, supra*, at pp. 678-679; see *People v. Belmontes* (1988) 45 Cal.3d 744, 780.) Application of the ordinary rules of evidence generally does not impermissibly infringe on the defendant's right to present a defense. (*People v. Fudge, supra*, 7 Cal.4th at pp. 1102-1103; see *People v. Frye, supra,* 18 Cal.4th at p. 945; *People v. Collins* (1986) 42 Cal.3d 378, 387.) "[U]nless the defendant can show that the prohibited cross-examination would have produced 'a significantly different impression of [the witness's] credibility' (*Van Arsdall, supra,* at p. 680), the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment." (*Frye, supra,* citing *People v. Cooper* (1991) 53 Cal.3d 771, 817.)

Even if an appropriate constitutional objection had been made in the trial court, the defense counsel's cross-examination of Lehman was properly restricted under Evidence Code section 352. Moreover, the exclusion of evidence of Lehman's alleged past and present drug use did not violate appellant's constitutional rights. The defense counsel elicited Lehman's testimony that her memory regarding the dates and times of the events was very poor and she was not sure of the events. (19 RT 4127-4129, 4134.)

However, Lehman testified she recalled that appellant's statements had "something to do with an old man, him checking on"; and she recalled that appellant threatened her. (19 RT 4152.) The defense counsel cross-examined Lehman regarding her past and present drug use but Lehman testified that she had not taken any drugs that day, it had been a long time since she had last used drugs, and the use of drugs had not effected her memory. (19 RT 4134.) Pursuant to the defense counsel's further cross-examination, Lehman admitted that she was upset that her brother Brian Ray was arrested and charged with the victim's murder and possession of stolen property but indicated that she would only state the truth. (19 RT 4151-4152.) Pursuant to the defense counsel's request, Lehman was excused as a witness and was subject to recall; but the defense did not recall her. (19 RT 4153.) Instead, the defense proffered the testimony of Lehman's ex-husband Vaughn Lehman, who testified that he was married to Karen for 22 years and that he had known Lehman's brother Brian Ray for about 25 years. (27 RT 5731.) He testified that Karen's and Brian's reputations for truth and veracity were "bad." (*Ibid.*)

The defense counsel's cross-examination showed Lehman's possible bias for her brother and against appellant and her poor memory. Vaughn's testimony attempted to establish Lehman was a liar. It was far more significant for appellant to show Lehman's possible bias than to show her alleged drug use, since without bias, Lehman would have had no reason to lie. Defense counsel Dougherty argued to the jury that Lehman was biased against appellant because "[h]e got her brother in trouble with the guns" and that Lehman was "the woman scorned" because appellant had reunited with Beverly Westervelt. (28 RT 6021.) The jury was admonished regarding the significance of the evidence pursuant to instructions on the credibility of witnesses (CALJIC No. 2.20; VII CT 2127-2128; 28 RT 6098-6100); discrepancies in testimony (CALJIC No. 2.21.1; VII CT 2129; 28 RT 6100); and witness willfully false (CALJIC No. 2.21.2; VII CT 2130; 28 RT 6100).

The evidence against appellant was overwhelming, and Lehman's testimony was corroborated by independent evidence. Since appellant was able to show Lehman's possible bias, alleged "bad" reputation for truth and veracity, and poor memory, there is no reasonable probability that appellant would have received a more favorable outcome if he had been permitted to show that she had suffered a misdemeanor conviction involving moral turpitude. (See *People v. Frye, supra,* 18 Cal.4th at p. 223 [applying *People v. Watson, supra,* 46 Cal.2d 818].) Furthermore, there is no reasonable possibility that appellant would have received a more favorable outcome if he had been permitted to introduce evidence of Lehman's prior conviction. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Appellant was not denied his right of confrontation because no reasonable jury would have formed a significantly different impression of Lehman's credibility had appellant been permitted to further explore her alleged drug use. (Compare with *People v. Hillhouse* (2002) 27 Cal.4th 469, 495, quoting *People v. Kelly, supra,* 1 Cal.4th at p. 523 [upholding exclusion of evidence showing presence of marijuana in victim's system because court is not required to admit evidence of cocaine or marijuana use "that merely makes the victim of a crime look bad"; victim's marijuana use had little relevance, if any, to show defendant's intent ; and defendant's assumed intent to get marijuana would not negate other evidence of intent to rob or kill]; *People v. Wright* (1985) 39 Cal.3d 576, [reversing exclusion of evidence that victim had heroin in his system within 24 hours of his death because defense theory was that defendant acted in self-defense in response to victim's irrational behavior, and jury could infer from evidence that victim was under influence of narcotic at time of death; evidence also impeached credibility of prosecution's primary witness that victim had not used narcotics in 24 hours immediately prior to his death]; *People v. Buttles* (1990) 223 Cal.App.3d 1631, 1641 [upholding admission of evidence that defendant's companion possessed substantial amount of

methamphetamine when he and defendant were arrested because evidence was probative on issue of whether companion's evasiveness showed consciousness of guilt as to charged shooting or whether it was explained by fact that he was in possession of controlled substance].)

C. Impeachment With Misdemeanor Conviction Of Assault With A Deadly Weapon

Subject to Evidence Code section 352, past misconduct involving moral turpitude is admissible to impeach a witness in a criminal trial. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296.) In exercising its discretion, the trial court should consider, inter alia, the relationship between a prior conviction and credibility and its nearness or remoteness in time. (*People v. Castro, supra,* 38 Cal.3d at pp. 307, 312; see *People v. Collins, supra,* 42 Cal.3d at p. 392.) "[T]he trial courts have broad discretion to admit or exclude prior convictions for impeachment purposes. . . . The discretion is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded." (*People v. Collins, supra,* 42 Cal.3d at p. 389; see *People v. Hinton* (2006) 37 Cal.4th 839, 887; *People v. Clair* (1992) 2 Cal.4th 629, 655.) Assault with a deadly weapon is an offense that involves moral turpitude. (*People v. Thomas* (1988) 206 Cal.App.3d 689, 700.) "Obviously it is easier to infer that a witness is lying if the felony of which he has been convicted involves dishonesty as a necessary element than when it merely indicates a 'bad character' and 'general readiness to do evil.'" (*People v. Castro, supra,* 38 Cal.3d at p. 315.)

The trial court's decision to exclude impeachment evidence of Lehman's misdemeanor conviction of assault with a deadly weapon conviction was not arbitrary, capricious or patently absurd. "[A] court need not expressly weigh prejudice against probative value or even expressly state that it has done so,

if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169, citing *People v. Riel* (2000) 22 Cal.4th 1153, 1187-1188; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1053; *People v. Box* (2000) 23 Cal.4th 1153, 1200.) The record here shows the court was aware of its discretion and the relevant factors and that it weighed them as required by Evidence Code section 352 prior to deciding to exclude the evidence. The court concluded the risk of undue prejudice from admitting the evidence significantly outweighed its probative value. The trial court could reasonably find that Lehman's misdemeanor conviction resulting from her act of throwing a rock at her ex-husband was minimally probative of her credibility and alleged bias and that it posed a substantial risk of diverting the jury's attention to extraneous matters. (Evid. Code, § 352.) The trial court did not abuse its discretion in excluding the impeachment evidence.

Appellant failed to object in the trial court that exclusion of the evidence of the assault with a deadly weapon conviction violated his constitutional rights. He therefore forfeited this claim. (*People v. Williams* (1997) 16 Cal.4th 153, 250.) In any event, proper application of the rules of evidence ordinarily does not violate the due process of either the federal or the state Constitution. (*People v. Fudge, supra,*7 Cal.4th at pp. 1102-1103; see *People v. Frye, supra,* 18 Cal.4th at p. 945; *People v. Collins, supra,* 42 Cal.3d at p. 387.)

In this case, the exclusion of Lehman's misdemeanor conviction did not violate appellant's constitutional rights. The defense counsel elicited Lehman's testimony that her memory regarding the dates and times of the events was very poor and she was not sure of the events. (19 RT 4127-4129, 4134.) However, Lehman testified she recalled that appellant's statements had "something to do with an old man, him checking on"; and she recalled that appellant threatened her. (19 RT 4152.) The defense counsel cross-examined

Lehman regarding her past and present drug use but Lehman testified that she had not taken any drugs that day, it had been a long time since she had last used drugs, and the use of drugs had not effected her memory. (19 RT 4134.) Pursuant to the defense counsel's further cross-examination, Lehman admitted that she was upset that her brother Brian Ray was arrested and charged with the victim's murder and possession of stolen property but indicated that she would only state the truth. (19 RT 4151-4152.) The defense elicited the opinion testimony of Lehman's ex-husband Vaughn Lehman that Lehman's reputation for truth and veracity was "bad." (27 RT 5731.)

The defense counsel's cross-examination showed Lehman's possible bias for her brother and against appellant and her poor memory. Vaughn's testimony attempted to establish Lehman was a liar. It was far more significant for appellant to show Lehman's possible bias than to show a minor incident of moral turpitude, since without bias, Lehman would have had no reason to lie. The defense counsel argued to the jury that Lehman was biased against appellant because "[h]e got her brother in trouble with the guns" and that Lehman was "the woman scorned" because appellant had reunited with Beverly Westervelt. (28 RT 6021.) The jury was admonished regarding the significance of the evidence pursuant to instructions on the credibility of witnesses (CALJIC No. 2.20; VII CT 2127-2128; 28 RT 6098-6100); discrepancies in testimony (CALJIC No. 2.21.1; VII CT 2129; 28 RT 6100); and witness willfully false (CALJIC No. 2.21.2; VII CT 2130; 28 RT 6100).

Appellant is not in the same position as the defendant in *Davis v. Alaska* (1974) 415 U.S. 308, who was entitled to attempt to show that the witness was biased because of his vulnerable status as a probationer and his concern that he might be a suspect in the burglary charged against the defendant. (*Id.* at pp. 317-428.) Moreover, the evidence against appellant was overwhelming, and Lehman's testimony was corroborated by independent evidence. Since appellant was able to show Lehman's possible bias, allegedly

"bad" reputation for truth and veracity, and poor memory, there is no reasonable probability that appellant would have received a more favorable outcome if he had been permitted to show that she had suffered a misdemeanor conviction involving moral turpitude. (See *People v. Frye, supra,* 18 Cal.4th at p. 223 [applying *People v. Watson, supra,* 46 Cal.2d 818].) Furthermore, there is no reasonable possibility that appellant would have received a more favorable outcome if he had been permitted to introduce evidence of Lehman's prior conviction. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

IV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS IN EXCLUDING THE HEARSAY EVIDENCE OF APPELLANT'S STATEMENTS TO BEVERLY WESTERVELT AND DUTLER DAUWALDER

Appellant contends the trial court erroneously excluded allegedly exculpatory evidence consisting of his statements in his letters to his ex-girlfriend Beverly Westervelt and his statements to real estate broker Dutler Dauwalder that he had bought the victim's firearms from a third party. He alleges violations of his rights to due process, compulsory process, present a defense, and a proportionate and reliable determination on guilt and penalty (U.S. Const., Amends. V, VI, VIII, & XIV; Cal. Const., art. I, §§ 7, 15, 17, & 28). (AOB 147-161.)

The trial court properly excluded the hearsay evidence of appellant's statements to Westervelt and Dauwalder. There was no violation of appellant's statutory or constitutional rights.

A. Relevant Proceedings

During his cross-examination of Westervelt, appellant's ex-girlfriend, defense counsel Gillis asked, "And has Chris ever said that he bought guns

from a person out of the trunk of a car?" (21 RT 4603.) The prosecutor objected on the ground that appellant's statement to Westervelt was hearsay. (*Ibid.*) Defense counsel Gillis argued that appellant's statement was an admission. (*Ibid.*) During discussions outside the jury's presence, the prosecutor indicated that appellant wrote in letters to Westervelt that he bought guns out of the trunk of a car. (21 RT 4604.) The prosecutor argued that she never asked Westervelt whether appellant bought guns out of someone's car and that she never offered any statements by or letters from appellant that he bought guns out of a car. (21 RT 4604-4606.) She stated that none of the parts of the 24 letters which she had referred to during her cross-examination of Westervelt contained statements by appellant that he purchased guns out of the truck of a car. (21 RT 4606-4607.) Defense counsel Gillis argued that before appellant went into custody in August 1994, he told Dutler Dauwalder that he purchased the guns out of the trunk of a car. (21 RT 4607.) He argued appellant's statement to Westervelt was against his penal interest, it was an admission, and it was admissible under Evidence Code section 356 even though the prosecutor had not introduced the letter containing appellant's statement to Westervelt because "the statements goes to show other indications of what has gone on and what has been said in the previous letters." (21 RT 4607-4608.) The defense counsel then conceded that appellant never referred to where he obtained the guns in the parts of the letters introduced by the prosecutor and that it would be inappropriate to admit all of the letters in their entirety into evidence. (21 RT 4608-4610.) Finding appellant's alleged statement to Westervelt was not an admission, the court excluded it:

> THE COURT: And so to talk about what else is said in the letters really I don't think is -- I don't think is relevant to this conversation we're having about whether or not there is an exception to the hearsay rule on the basis of some admission.
>
> So if that were the case, if your position that you advance here, that this is an admission by the defendant as to his having purchased the weapons, if that could be construed in some way as an admission --

let's assume for discussion that this is qualified as an admission for purpose of this discussion. Then any self-serving statement could be made by an defendant, labeled an admission and attempted to be brought into the courtroom and presented to the jurors to establish the truth of the matter stated as an exception to the hearing rule because it's an admission.

[¶ . . . ¶]

THE COURT: I don't think that the circumstances as you presented them would qualify as an exception to the hearsay rule to establish that information for the truth of the matter stated by asking this witness concerning that representation. So the Court's going to grant the motion of the People to exclude any reference to that conversation of that statement made by the defendant to Ms. Westervelt.

(21 RT 4510-4611.)

On June 14, 1995, the defense counsels advised the court that they did not know the whereabouts of subpoenaed witness Dutler Dauwalder. (26 RT 5696.) Over the prosecutor's hearsay objection, the defense counsels sought to admit Dauwalder's statement to the district attorney's investigator Tom Mireles that Dauwalder asked appellant if he had any guns. (26 RT 5696-5703; 27 RT 5719-5722.) Appellant responded that yes, he did, that he bought them from a guy across the street from his mother's house. (26 RT 5697.) The defense argued that the statement was admissible to show appellant's state of mind. (26 RT 5698-5699; 27 RT 5722-5723.)

The next day, June 15, 1995, Dauwalder was present at trial. (27 RT 5715.) The court excluded the proposed testimony sought to be elicited as hearsay:

It appears to me, Mr. Gillis, that what you're attempting to do with this proposed evidence is to establish the truth of the matter stated, that is that Mr. Lightsey told Mr. Dauwalder that he bought the guns from somebody else out of the trunk of a car or whatever, and that the effort at this point in time is not to show state of mind but rather to show -- to establish a fact by that hearsay statement.

And I don't think there is any state of mind issue involved in this. It's an effort to try to establish the fact of the matter stated. So on that basis the Court's going to deny your request to introduce that hearsay evidence on behalf of the defendant and grant the motion of the People

to sustain, I guess, the objection that was made in advance as a result of this.

(27 RT 5723-5724; see 26 RT 5699-5701.)

B. Appellant's Statements In His Letters To Beverly Westervelt

Appellant argues that his statements in his letters to Beverly Weservelt were admissible as statements against his penal interest. (AOB 151.)

Appellant's proffered statements were hearsay statements (Evid. Code, § 1200[19]) offered as declarations against penal interest. (Evid. Code, § 1230.) That exception provides that "[e]vidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." To be admissible, the proponent of such evidence must show: (1) the declarant is unavailable, (2) the declaration was against the declarant's penal interest when made, and (3) the declaration was sufficiently reliable to warrant admission despite its hearsay character. (*People v. Lawley, supra,* 27 Cal.4th at p. 153; *People v. Duarte* (2000) 24 Cal.4th 603, 610-611.) To be admissible, a declaration against interest must be "distinctly" against the declarant's interest. (*People v. Traylor* (1972) 23 Cal.App.3d 323, 331.) The trial court has the duty to determine whether the proponent of hearsay evidence has established the preliminary facts. (*People v. Huggins* (1986) 182 Cal.App.3d 828, 832; Evid. Code, § 405.) In determining whether proffered evidence is sufficiently reliable the trial court """may take into account not just the words but the circumstances under which they were uttered, the possible

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19. "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).)

motivation of the declarant, and the declarant's relationship to the defendant.'"' (*People v. Lucas* (1995) 12 Cal.4th 415, 462, quoting *People v. Cudjo* (1993) 6 Cal.4th 585, 607.) The proponent of hearsay evidence has the burden of establishing the foundational requirements for its admission (*People v. Morrison, supra,* 34 Cal.4th at p. 724) and the evidence may be properly excluded if the proponent fails to make an adequate offer of proof. (*Ibid; Lawley, supra,* at p. 155.) The trial court's ruling is reviewed for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1140; *Lawley, supra,* at p. 153.)

The trial court did not abuse its discretion is excluding appellant's statements to Westervelt. Appellant's offer of proof showed that he wrote the statements in letters to Westervelt while he was in custody. These statements are hearsay, and there is no exception for the statements. The statements do not satisfy the foundational requirements of Evidence Code section 1230.

First and foremost, appellant was not "unavailable" within the meaning of Evidence Code section 1230. "Defendant was certainly not unavailable to himself. Although he possessed, and exercised, a privilege not to testify, the choice was his. He could have testified had he so elected. As stated in the Comment of the Assembly Committee on the Judiciary to Evidence Code section 240, the section defining the phrase 'unavailable as a witness,' 'if the out-of-court statement is that of the party himself, he may not create "unavailability" under this section by invoking a privilege not to testify.'" (*People v. Edwards* (1991) 54 Cal.3d 787, 819; see *People v. Elliott* (2005) 37 Cal.4th 453, 483.) As appellant was not "unavailable" to himself, he cannot now invoke Evidence Code section 1230. (See *Elliott, supra.*)

Second, appellant's statements to Westervelt were not distinctly against his penal interest. They were made "long before [appellant] became a suspect in this case." (AOB 148.) Even assuming appellant's statements may have somehow incriminated or subjected him to criminal liability as a felon in

possession of a firearm (§ 12021), the statements to Westervelt were nothing more than a deliberate and preemptive self-serving attempt to exculpate himself from future possible criminal liability for the murder and robbery and to set the stage for a future possible admission of guilt to a less serious crime, i.e., receiving stolen property. (See *People v. Robinson* (1991) 229 Cal.App.3d 1620, 1625.) Appellant's statements were exculpatory rather than inculpatory. (See *People v. Kraft, supra,* 23 Cal.4th at pp. 1073-1074; *People v. Livaditis* (1992) 2 Cal.4th 759, 780.)

Third, appellant produced no evidence concerning the statements' reliability. In fact, the evidence established that appellant's statements were self-serving and not reliable. Appellant made his statements to explain his possession of the guns and to deflect Westervelt's suspicions regarding appellant's possible criminal activity in obtaining the guns.

Under the totality of circumstances presented, appellant's statements to Westervelt were not sufficiently "'against the declarant's penal interest when made and . . . sufficiently reliable to warrant admission despite [their] hearsay character.'" [Citations.]" (*People v. Lawley, supra,* 27 Cal.4th at p. 153.) The record fully supports the trial court's finding that Westervelt's proffered testimony regarding appellant's statements in his letters was hearsay and the statements did not qualify as declarations against penal interest. (Evid. Code, § 1230.) There was no error.

Appellant's failure to raise constitutional objections to the exclusion of his statements to Westervelt forfeited any constitutional claims. In any event, appellant;'s constitutional rights were not violated. In *Chambers v. Mississippi* (1973) 410 U.S. 284, the defendant in a murder case was prevented under Mississippi's hearsay rule from presenting the testimony of three witnesses who would have said that another person, available at trial, had confessed to them on separate occasions that he had committed the murder. These hearsay statements would have been considered reliable under federal rules of

evidence because they were admissions against penal interest, a rule of evidence Mississippi did not recognize at the time. The defendant was unable to get the evidence of the other's confession before the jury in any other form. The Supreme Court ruled that the state hearsay rule had to give way to the defendant's right under the due process clause to present reliable evidence bearing directly on guilt that was critical to his defense. (*Id.* at pp. 295-298.)

Distinguishing *Chambers*, this Court has held that application of the hearsay rule against penal interest to restrict or exclude evidence of third party culpability does not violate the accused's due process rights. (*People v. Lawley, supra,* 27 Cal.4th at pp. 154-155.) "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations]." (*People v. Hall* (1986) 41 Cal.3d 826, 834; *Lawley, supra,* at p. 155.)

Moreover, *Chambers* does not apply in cases where the defendant is the declarant. The defendant is not unavailable to testify within the meaning of the hearsay rules if he chooses to invoke his privilege not to testify. Appellant was available to testify but chose not to. Furthermore, under *Chambers*, the hearsay statements must be exculpatory and made under circumstances demonstrating "considerable assurance of their reliability." (*Chambers, supra,* at p. 300.) The *Chambers* court relied upon several factors supporting the reliability of the statements: (a) the statements were made spontaneously shortly after the murder to a close acquaintance; (b) other evidence corroborated the statements; (c) the statements were "in a very real sense self-incriminatory and unquestionably against interest . . ."; and (d) the declarant was available for cross-examination. (*Chambers, supra,* at pp. 300-301.)

Appellant's statements were not made spontaneously shortly after the

murder was committed; they were made in his letters to Westervelt after he went into custody on August 12, 1993, more than a month after the murder. (See 20 RT 4409-4410.) Appellant's statements were not corroborated by other evidence. Appellant's statements were not necessarily self-incriminatory and were not unquestionably against his interest. Appellant, the declarant, was not available for cross-examination. Accordingly, appellant's statements lacked the necessary reliability to be admitted as a declaration against penal interest under *Chambers*. Appellant was not denied his constitutional right to due process or to present a defense.[20] (See *People v. Ayala* (2000) 23 Cal.4th 225, 270 [exclusion of hearsay statements of two individuals who were interviewed by defense investigators but died before trial did not violate defendant's constitutional rights where statements were given to person seeking exculpatory evidence, statements were not spontaneous, there was no opportunity for cross-examination, and statements were not made under circumstances suggesting they were reliable]; also *People v. Kaurish* (1990) 52 Cal.3d 648, 704, *Green v. Georgia* (1979) 442 U.S. 95, 97 ["[A] defendant's due process rights are violated when hearsay testimony at the penalty phase of a capital trial is excluded, if both of the following conditions are present: (1) the excluded testimony is 'highly relevant to a critical issue in the punishment phase of the trial,' and (2) there are substantial reasons to assume the reliability of the evidence."].)

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20. Appellant cites *Chia v. Cambra* (9th Cir. 2002) 281 F.3d 1032, 1037. (AOB 152-154.) The United States Supreme Court granted certiorari in *Chia*, vacated the judgment, and remanded the matter to the Ninth Circuit (sub nom. *McGrath v. Chia* (2003) 538 U.S. 902) in light of the decision in *Lockyer v. Andrade* (2003) 538 U.S. 63. *Chia* has no precedential value. Nonetheless, its holding that the exclusion of a hearsay statement that bore persuasive assurances of trustworthiness and was critical to the defense may rise to a constitutional due process violation under *Chambers* is of no assistance to appellant.

However, assuming error, it was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-307; *Chapman v. California, supra,* 386 U.S. at p. 24 [constitutional error does not automatically require reversal of conviction].) Appellant testified during the penalty phase of his trial that he purchased the victim's guns out of the trunk of a car across the street from his mother's house from people he did not know. (30 RT 6430-6432, 6436, 6487, 6543.) The jury rejected appellant's testimony and sentenced him to death. It is clear beyond a reasonable doubt that the exclusion of appellant's inadmissible hearsay statements did not deprive him of a fair trial.

The trial court properly excluded the evidence of appellant's statements to Westervelt as unreliable hearsay.

C. Appellant's Statements To Dut Dauwalder

Appellant argues that his statements to Dut Dauwalder were admissible as statements against his penal interest. (AOB 151.) The trial court did not abuse its discretion in excluding appellant's statements to Dauwalder. These statements are hearsay, and there is no exception for the statement. The statements do not satisfy the foundational requirements of Evidence Code section 1230. Appellant was not "unavailable" within the meaning of Evidence Code section 1230 because he could have testified. (*People v. Edwards, supra,* 54 Cal.3d at p. 819; see *People v. Elliott, supra,* 37 Cal.4th at p. 483.) Appellant's statements to Dauwalder were not distinctly against his penal interest. They were made "long before [appellant] became a suspect in this case." (AOB 148.) Even assuming appellant's statements may have somehow incriminated or subjected him to criminal liability as a felon in possession of a firearm (§ 12021), the statements to Dauwalder were nothing more than a deliberate and preemptive self-serving attempt to exculpate himself from future possible criminal liability for the murder and robbery and

to set the stage for a future possible admission of guilt to a less serious crime, i.e., receiving stolen property. (See *People v. Robinson, supra,* 229 Cal.App.3d at p. 1625.) Appellant's statements were exculpatory rather than inculpatory. (See *People v. Kraft, supra,* 23 Cal.4th at pp. 1073-1074; *People v. Livaditis, supra,* 2 Cal.4th at p. 780.) Appellant produced no evidence concerning the statements' reliability.

Under the totality of circumstances presented, appellant's statements to Dauwalder were not sufficiently "'against the declarant's penal interest when made and . . . sufficiently reliable to warrant admission despite [their] hearsay character.'" [Citations.]" (*People v. Lawley, supra,* 27 Cal.4th at p. 153.) The record fully supports the trial court's finding that Dauwalder's proffered testimony regarding appellant's statements was hearsay and the statements did not qualify as declarations against penal interest. (Evid. Code, § 1230.) The trial court properly excluded the evidence of appellant's statements to Dauwalder as unreliable hearsay. There was no error.

Appellant's failure to raise constitutional objections to the exclusion of his statements to Dauwalder forfeited any constitutional claims. In any event, appellant's statements to Dauwalder lacked the necessary reliability to be admitted as a declaration against penal interest under *Chambers*. Appellant's statements were not made spontaneously shortly after the murder was committed. Dauwalder was not a close acquaintance of appellant; he was appellant's real estate broker. (27 RT 5726.) Appellant's statements were not corroborated by other evidence. Appellant's statements were not necessarily self-incriminatory and were not unquestionably against his interest. Appellant, the declarant, was not available for cross-examination. For the same reasons the trial court's exclusion of appellant's hearsay statements to Westervelt did not violate appellant's constitutional rights, the exclusion of appellant's hearsay statements to Dauwalder under the rules of evidence did not violate appellant's constitutional rights. (See *People v. Lawley, supra,* 27 Cal.4th at pp. 154-155;

People v. Hall, supra, 41 Cal.3d at p. 834.)

V.

NO PROSECUTORIAL MISCONDUCT OCCURRED; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS IN DENYING APPELLANT'S MOTION FOR MISTRIAL

Appellant contends his convictions must be reversed because the prosecutor committed prejudicial misconduct by eliciting testimony from Beverly Westervelt that appellant's "return address is Wasco" (20 RT 4491) and from Robert Rowland that he (Rowland) was housed in a prison protective housing unit (24 RT 5182-5183). Appellant argues that the prosecutor violated the trial court's order excluding evidence that appellant was a convicted felon in prison. He contends the trial court erroneously denied his motion for mistrial, which was based on the prosecutor's examination of Westervelt. He alleges violations of his state and federal constitutional rights to raise a defense, due process, and a proportionate and reliable death verdict (U.S. Const., Amends. V, VI, VIII, & XIV; Cal. Const., art. I, §§ 7, 15, 17, & 28). He further alleges a violation of his federal constitutional due process "liberty interest" under California "prosecutorial misconduct rules." (AOB 162-166.)

Because no prosecutorial misconduct occurred, the trial court properly denied appellant's motion for mistrial. There was no violation of appellant's statutory or constitutional rights.

A. Relevant Proceedings

In limine, the trial court granted the defense counsels' motion to advise the jury that appellant was charged with first degree murder and was in custody. (1 RT 105-106, 108; see 1 RT 90-91; VII CT 1881.) The court agreed to admonish the jury regarding appellant's in custody status. (1 RT

108.)

During trial, appellant's exgirlfriend Beverly Westervelt testified that she continued to communicate with appellant after he went "into custody on August 12th, 1993," and she visited him one time when he was out at Lerdo. (20 RT 4478-4479.) The prosecutor stated, "Then he got transferred to Wasco," and Westervelt responded affirmatively. (20 RT 4479.) During examination by the prosecutor regarding a letter from appellant, Westervelt confirmed that on the letter, appellant's "return address is Wasco." (20 RT 4491.) After further testimony, defense counsel Gillis had a sidebar conference with the judge, and the jury left the courtroom. (20 RT 4493.) The defense counsel then stated his "concern is reading from the letters in reference to Wasco. I think the only thing in Wasco is a state prison." (20 RT 4493.) The defense counsel explained:

> MR. GILLIS: I don't believe it's relevant as to where the letters are written from. It's agreed that he is in custody. And I'd ask that Wasco not be used. I don't believe it's relevant as far as -- I can see if they are going to read in the date the letters are sent, I have no objection. But the fact that they are being sent from a particular place. We know he's in custody. Not necessary to discuss where he's at.

(20 RT 4494.)

The prosecutor agreed not to question the witness regarding where appellant sent the letters from. (20 RT 4494.) The defense counsel stated:

> The concern that we have right not is potential damage that's been done to reference to Wasco. And I suppose it's my mistake for not jumping up right when it was said, but I didn't want to highlight the issue as it went by.

(20 RT 4495.)

The trial court noted that there had been a prior reference to "Wasco," and the defense had not objected thereto. (20 RT 4495; see 20 RT 4479.) Defense counsel Gillis made a motion for mistrial. (20 RT 4496-4497.) The court denied the motion for mistrial:

> THE COURT: Well, the court considers your motion for mistrial.

I don't understand that there is anything so prejudicial of the reference to Wasco it would be a basis for a mistrial. As I pointed out before, a lot of things in Wasco. There's a lot of places in Wasco. We know that the defendant was writing these letters from someplace in custodial status. And I don't find that that reach[e]s to the level of being a basis for a mistrial.

Motion is denied.

MR. GILLIS: Okay.

THE COURT: Mrs. Green has indicated that she has no intention of making any further reference to Wasco. And I'm satisfied that the only other thing the court can comment to the jurors it ask them to disregard whatever references are made to the word Wasco. Would that be helpful or do you think that would be further emphasizing the problem.

MR. GILLIS: I think it would only further emphasize the concerns that we have, your Honor.

(20 RT 4497.)

The next day, June 1, 1995, defense counsel Gillis renewed the motions to dismiss and for a new trial, arguing, "What it essentially does is implicate [sic] that Mr. Lightsey has a felony conviction, and it's a way of impeaching Mr. Lightsey without him having to take the stand." (21 RT 4518-4519.) The court denied the motion, stating:

> There is no substantial impact to the defendant based upon the reference to Wasco, and certainly it would not reach the level of being appropriate for purposes of supporting a request for a mistrial. [¶] I proposed yesterday to counsel that the Court, at their request, would admonish the jurors to disregard that. The attorneys for the defendant felt that would unduly prejudice the defendant further by virtue of bringing that to the attention of the jurors. So we moved on from there. [¶] The ruling that there was no basis for any kind of a motion for mistrial based upon that reference is -- . . . denied. . . .

(21 RT 4519-4520.)

During trial discussions regarding the admissibility of witness Robert Rowland's testimony, the court referred to its prior ruling, stating, "As it relates to the place where the conversation took place, it seems to me that that can be easily remedied to provide the defense at least in part a response to their concern where you dealt with the Wasco thing previously [sic]. I think

that got straightened around. I still feel very strongly that there was no prejudice to Mr. Lightsey's interest by some reference to the correspondence having come from Wasco." (24 RT 5107.)

During direct examination, the prosecutor elicited Rowland's testimony that he was incarcerated and he had testified as an informant in two cases. (24 RT 5177-5180.) Without objection from the defense counsel, the prosecutor elicited Rowland's testimony that he lived in a protective housing unit:

> Q. [MS. GREEN:] And as a result of testifying as an informant in those two cases, for example, on this particular incarceration that you are serving time on, thirteen year sentence, are you housed in some type of protective housing unit?
>
> A. [ROWLAND:] Yes. That's exactly what it is.
>
> Q. Could you just describe just in general terms what a protective housing unit is?
>
> A. It's just a separate unit from every where else in the prison where there's about right now I think there's twenty-five guys in there for the whole state that need protection for either behind high profile case that they are in for or [giving] testimony for the state or, whatever, the government, and they just need to be protected or killed anywhere else.
>
> Q. You are in that type of unit because [of] your status as an informant?
>
> A. Yes.

(24 RT 5182-5183.)

Rowland then testified that from November 1993 through January 1994, he was housed in the correctional facility in Kern County. (24 RT 5202-5204.) For about a month, he was housed in the Kern County facility with appellant. (24 RT 5204.) He talked with appellant a few times during that month, and appellant talked about killing an old man for guns. (24 RT 5204-5205, 5207-5215, 5244-5245, 5255-5256.)

During cross-examination, defense counsel Dougherty's elicited Rowland's testimony that he was in prison from 1977 to the middle of 1978; in a fire camp at Chino prison from the end of 1978 to 1979; in Chino prison, the county jail, and San Quentin prison from January 1980 to January 1992;

and in prison from September1992 to the present, with an expected release date of July 1999. (24 RT 5225-5227.) The court stated, outside the jury's presence:

> The Court called a recess -- probably obvious to counsel the reason. The Court called a recess because there was a substantial amount of concern expressed by the defense as it relates to disclosing the fact that the meeting between Mr. Lightsey and this witness occurred in a state prison.
>
> The District Attorney has been very careful to talk about institutions and not talk about prisons. And that anxiety that was earlier discussed today by the defense was discussed by I believe Mr. Dougherty, and now I find Mr. Dougherty pursuing a line of questioning that is clearly disclosing to the jurors that this witness was in and out of prisons over a period of fifteen to twenty years, as he's been talking about here.
>
> And I'm a little bit baffled, I guess, Mr. Dougherty, as to why you're doing that in light of the fact that there was a -- in fact, the witness was admonished after Mrs. Green had talked to him to be careful and not disclose these prison experiences and talk about custodial facilities. [¶] And now you seem to have blown the whole cover, Mr. Dougherty, and I'm curious about that.

(24 RT 5227-5228; see 24 RT 5229-5230.)

Defense counsel Dougherty responded that he merely laid a foundation for further questioning by establishing that Rowland was in and out of prison up to 1992 and that Rowland did not meet Lightsey until 1994. (24 RT 5228-5229.) The defense counsel elicited Rowland's testimony that he was a member of the Aryan Brotherhood prison gang until 1987. (24 RT 5234, 5238.) The next day, the court stated, outside the jury's presence:

> Do you still have a concern, Mr. Dougherty, about the reference to prisons and things of that nature in which the witness was housed? You got -- I called a recess at one point yesterday to see if we could head off what I deemed to be a possible overzealous approach to the explanation in which I thought you were getting pretty close to the line as it related to state prison facilities. And I didn't want to let that happen after you had enthusiastically urged the court to not allow such references, then you seem to be making them. And then subsequently, when you were cross-examining Mr. Rowland, you got even deeper into that area, as I recall. I don't have a copy of the transcript yet of yesterday's proceedings, but I think when we get one, we can analyze

that. It seems to me that probably that effort to keep that under the rug, so to speak, because of the allegation that it's irrelevant is [sic] now probably been transgressed, if that's the right term.

(25 RT 5295.)

The court and counsel then noted that the jurors probably knew that Rowland was in custody based on the presence of additional court security guards, who were SWAT team members, and Rowland's testimony that he was in the custody of the California Department of Corrections. (25 RT 5296-5298.) The court instructed the jury pursuant to CALJIC No. 3.20 regarding Rowland's in-custody status:

> The testimony of an in custody informant should be viewed with caution and close scrutiny. [¶] In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of or expectation of any benefits from the party calling the witness. [¶] This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in light of all the evidence in this case.
>
> In custody informant means a person other than a percipient witness whose testimony is based upon statements made by a defendant while both the defendant and the informant are held within a correctional institution.
>
> Robert Rowland is an in custody informant. Both Mr. Rowland and Mr. Lightsey were housed in a correctional institution.

(28 RT 6105-6106; see VII CT 2144.)

B. Beverly Westervelt's Testimony That Appellant's "Return Address Is Wasco"

Appellant contends his convictions must be reversed because the prosecutor committed prejudicial misconduct by eliciting testimony from Beverly Westervelt that on a letter sent to her by appellant, "his return address is Wasco." To the extent the defense counsels preserved their claim of prosecutorial misconduct by making a motion for mistrial, respondent submits that no prosecutorial misconduct occurred. A prosecutor's conduct violates the Constitution only when it is ""'so egregious that it infects the trial with such

unfairness as to make the conviction a denial of due process.'"' (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Conduct that does not rise to the level of a constitutional violation will constitute prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' (*Espinoza, supra,* at p. 820; see *People v. Ledesma* (2006) 39 Cal.4th 641, 680-681.) While it is misconduct for a prosecutor to intentionally elicit inadmissible and prejudicial testimony (see, e.g., *People v. Bell* (1989) 49 Cal.3d 502, 532; *People v. Cunningham* (2001) 25 Cal.4th 926, 1020), the prosecutor did not do so in this case.

Contrary to appellant's argument, the prosecutor's examination eliciting Westervelt's testimony confirming that on the letter sent to her by appellant, "his return address is Wasco" (20 RT 4491) was not "in direct conflict" with the trial court's order excluding evidence that appellant was in prison. Stating that appellant had a return address in Wasco was not the same as stating that appellant was in prison. As the trial court correctly noted, "[A] lot of things in Wasco. There's a lot of places in Wasco." (21 RT 4497.) It was not an intentional, deceptive, or reprehensible attempt to introduce inadmissible and prejudicial evidence. This is especially true in view of the fact that the defense counsels did not object to the prosecutor's prior examination of Westervelt confirming that appellant was transferred to Wasco. (20 RT 4479.)

The trial court did not abuse its discretion in denying the motion for mistrial. '"A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 565; see *People v. Williams, supra,* 16 Cal.4th at p. 210; *People v. Hines* (1997) 15 Cal.4th 997, 1038.) The trial court essentially determined that the prosecutor

had questioned Westervelt in good faith. And the trial court properly concluded, "There is no substantial impact to the defendant based upon the reference to Wasco, and certainly it would not reach the level of being appropriate for purposes of supporting a request for a mistrial." (21 RT 4519.) Appellant fails to rebut the trial court's conclusion by providing any evidence in the record that would suggest the jury was improperly influenced by the Wasco references. Because there was no prosecutorial misconduct as defined in state law, there was no basis for a finding of mistrial. (See *People v. Ayala, supra,* 23 Cal.4th at p. 284.) The trial court did not abuse its discretion in denying the defense counsels' motion for trial.

Neither the prosecutor's examination of Westervelt nor the trial court's denial of the motion for mistrial violated appellant's constitutional rights.

C. Robert Rowland's Testimony That He (Rowland) Was Housed In A Protective Housing Unit

Appellant contends his convictions must be reversed because the prosecutor committed prejudicial misconduct by eliciting testimony from Robert Rowland that he (Rowland) was housed in a prison protective housing unit in violation of the trial court's order excluding evidence that appellant was a convicted felon in prison.

First, the defense counsels never objected or made a motion for mistrial when the prosecutor elicited Rowland's testimony that he was housed in a protective housing unit. (21 RT 5182-5183.) "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation .]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; see *People v. Hill* (1998) 17 Cal.4th 800, 820.) Had the defense counsels objected to the questions and the court had sustained the objection and

admonished the jury to disregard them, no harm would have been done by the questions. "A jury will generally be presumed to have followed an admonition to disregard improper evidence or comments, as '[i]t is only in the exceptional case that "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions." [Citation.]'" (*People v. Pitts, supra,* 223 Cal.App.3d at p. 692.) The defense counsels' failure to object to the prosecutor's allegedly improper questions at the time of trial forfeited appellant's statutory and constitutional claims on appeal. (See *Hill, supra,* at pp. 821-822; also *People v. Barnett* (1998) 17 Cal.4th 1044, 1136-1137; *People v. Frye, supra,* 18 Cal.4th at p. 969.)

Second, assuming appellant's claim of prosecutorial misconduct is cognizable on appeal, the trial court's order excluding evidence that appellant was in prison did not encompass evidence that Rowland was in prison and was housed in the security housing unit. Moreover, "in certain circumstances a jury inevitably will learn a defendant is in custody for the current charged offense, for example where the jury is presented with the testimony of a jailhouse informant." (*People v. Bradford, supra,* 15 Cal.4th at p. 1336 [prosecutor did not commit misconduct in eliciting responses from witness about her continuing contacts with defendant, from which jury could have inferred he was in custody]; see *People v. Ledesma, supra,* 39 Cal.4th at p. 681.) The prosecutor did not commit misconduct.

Neither the prosecutor's examination of Rowland nor the trial court's denial of the motion for mistrial violated appellant's constitutional rights.

VI.

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY WITH APPELLANT'S ALIBI INSTRUCTION

Appellant contends the trial court erroneously refused to instruct the jury with his alibi defense instruction. He alleges violations of his federal

constitutional rights to a fair trial, due process, and a proportionate and reliable death verdict (U.S. Const., Amends. V, VI, VIII, & XIV; Cal. Const., art. I, §§ 7, 15, 17, & 28). He further alleges a violation of his federal constitutional due process "liberty interest" under California law to receive proper jury instructions. (AOB 167-174.)

Trial court properly rejected appellant's alibi defense instruction. There was no violation of appellant's statutory or constitutional rights.

A. Relevant Proceedings

After the evidentiary phase of the trial, the court agreed to instruct the jury with the defense's proffered alibi instruction, CALJIC No. 4.50:

> The defendant in this case has introduced evidence for the purpose of showing that he was not present at the time and place of the commission of the alleged crime for which he is here on trial. If after consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, you must find him not guilty.

(27 RT 5791, 5807, 5863; see VII CT 2147.)

Defense counsel Gillis thereafter requested the court to give a special alibi instruction:

> Where it is claimed that the defendant was not at the scene at the time the alleged crime was to have been committed, the defendant is not required to prove the alibi beyond a reasonable doubt or by a preponderance of the evidence. Rather, the prosecution has the burden to prove beyond a reasonable doubt the defendant was present on the premises when the crime was committed.

(CT 2195; see 28 RT 5886-5887.)

The prosecutor objected to the giving of the instruction, arguing it was repetitive to CALJIC No. 4.50 and confusing because it referred to preponderance of the evidence which was not defined by the existing instructions. (28 RT 5886-5887.) The court refused to give the instruction, finding it confusing and repetitive to CALJIC No. 4.50. (28 RT 5888.)

The prosecutor stated during her opening argument:

And I would like to now turn to the question of whether he had the opportunity to commit this crime that, of course, turns on the issue of his alibi or his supposed alibi. [¶] I would suggest if you look at all the evidence in this case, I know you will, you will come to the conclusion that, in fact, Christopher Lightsey had the opportunity to commit this murder.

We know he was in court at approximately 8:30 on July 7th. [¶] We know that because of the testimony of Robin Lorenz, the man Mr. Eyherabide's other client. Testimony of Darrell Epps, the bail bondsman. [¶] Robin Lorenz testified when he last saw Christopher Lightsey he was walking across the street towards Superior Court with his mother. [¶] Darrell Epps testified that he saw Christopher Lightsey outside of Department 10 at about 8:30 a.m. on the morning of the 7th.

The case was called the first time, according to John Somers the Deputy DA, who appeared on the case at approximately 9:05 to 9:10. It was trailed or continued to 10:30 because Mr. Eyherabide, the defendant's attorney was in trial in the Emdy case in Department 4. And he had to be there at nine o'clock. So Mr. Eyherabide was gone when the case was first called.

You remember Mr. Somers asking the Court should I be back at 10:45 or 10:30. The Court said 10:30 in case Mr. Eyherabide's early. [¶] Mr. Somers testified he left and he returned a minute or two before 10:30. The Court was just finishing its recess, according to Mr. Somers. And Mr. Eyherabide arrived. [¶] We know from Mr. Eyherabide's notes which is about the only thing of value we got from Mr. Eyherabide's testimony was that court recessed exactly at 10:30. [¶] At 10:30 he came down to Department 10 and handled the Lightsey case. The case was called. Mr. Eyherabide says client's outside, he may be in the coffee shop. This is per the transcripts which you heard probably ad nauseam. A very brief matter was called. The Lightsey case was recalled. And Mr. Lightsey was present in court and the case was continued until Friday at 1:30.

How long did that hearing take in which the case was continued? Mr. Somers estimated this matter took less than five minutes. [¶] Mr. Eyherabide estimated it took two to three minutes. [¶] Mr. Epps testified his estimate I don't think it took over five minutes.

So five minutes at the most is how long it took before it recessed from the time that calendar was called a minute or two after 10:30 until they got Mr. Lightsey and the case was recalled, then the case was continued. The Court had a recess in the morning. No later than 10:40 that is the bottom line on that. That is the only -- only interpretation of that sequence of events.

Defendant is seen walking across the parking lot with a lady which Darrell Epps believes was his mother, thirty to forty feet in front of Darrell Epps. He left court and exited down this hall up the stairs, down this hall into the Sheriff's or rear parking lot and that's the parking lot he saw Mr. Lightsey and his mother walking across. [¶] Of course, where were they heading. They were heading to Rita Lightsey's, the Volvo, parked in front of Mr. Eyherabide's office. [¶] We do know Rita Lightsey was in court on July 7th, 1993, but we don't know that from what she told us. [¶] We know it because of Darrell Epps' testimony that he saw her. [¶] Robin Lorenz's testimony he saw her. And Fred McAtee's testimony. It was clearly established that she was in court on July 7th, 1993. [28 RT 5966-5969.]

[¶ . . . ¶]

So in answering the question that I raised earlier this morning, whether or not Christopher Lightsey had the opportunity to kill William Compton, I think the evidence does show a resounding yes, that in fact he did.

The evidence that's before you is that court ended approximately 10:40, that despite what Mrs. Lightsey testified about the way they walked back to the office, which I don't think was factual since the evidence is she was cutting across the parking lot here -- Mr. Epps was behind [her] -- it would have taken approximately somewhere in the neighborhood of five minutes to get back to her car, somewhere in the neighborhood of five to seven minutes to drive home to her house, and they would have been home at her house somewhere between 10:55, 10:50, 10:55, even 11:00. That would have given the defendant plenty of time to get in his car and drive the half mile that it was to William Compton's house. [¶] You drove that distance in the bus. You know how long it is. It's a very brief distance.

There certainly was plenty of time for Christopher Lightsey to commit this murder. In fact, I would suggest to you that it's not just a coincidence that the time of death was at 11:00 or 11:05 when Christopher Lightsey doesn't have an alibi. [¶] I would suggest to you that it's not a coincidence that he's home at his house at 11:50 making a call to a bail bondsman. Kevin Clerico testified it's a 15 minute drive from the defendant's residence to the Oak Tree residence. [¶] As I indicated this morning, where else are you going to go after you perpetrated a crime such as this one?

There may be a question remaining in your mind as to why this day and did Christopher Lightsey know the true extent of William Compton's gun collection on July 7th. [¶] I suggest the answer to why this particular day is in part because Christopher Lightsey is clever. He realizes that he did have an alibi of sorts, having been in court for a

good part of the morning, not the entire morning but a good part. [¶] He probably figured that nobody would remember exactly what time court ended that morning, and even if they did he probably counted on the fact that it would be a long time before the victim's body was discovered.

(28 RT 5978-5980.)

In her closing argument, the prosecutor stated:

He relies on the alibi, which I've gone over, and I'm not going to go over because it's not a true alibi. The fact -- the evidence is that Christopher Lightsey doesn't have an alibi for the time evidence shows the murder was committed.

(28 RT 6042-6043.)

Before the court instructed the jury, defense counsel Gillis renewed his request for the special instruction. (28 RT 6059-6065.) The defense counsel cited *People v. Lee Sare Bo* (1887) 72 Cal. 623 "for the proposition that the defendant is not required to prove the alibi beyond a reasonable doubt or by a preponderance of the evidence" and *People v. Mar Gin Suie* (1909) 11 Cal.App. 42 for the proposition that "where the defendant is not at the scene where the crime is alleged to have been committed, the prosecution must prove the defendant was present at the premises." (28 RT 6064.) The court recessed and researched the cited cases and then explained:

I did note that Cal Appellate Reports, the second edition, started in 1934, there about. So these cases are maybe sixty years old is my guess. I did look at the Sheppard's. Just looking at the alibi CALJIC instructions, I found one reference to People versus McDate at 230 Cal.App. 3d at page 118, a May 1991 decision from the appellate court, Second District Appellate Court. And the reference in that decision to CALJIC 4.50 in part, the footnote three on page 127, talks about the wording of CALJIC 4.50.

It in part states: If after consideration of all the evidence you have reasonable doubt as to whether a defendant was present at the time of [sic] the crime was committed in count one, he's entitled to a not guilty verdict. [¶] That seems to be pretty much on all fours with CALJIC 4.50 publication, which apparently is the most recent. This fifth edition of CALJIC was last copy righted 1988. So from that time to the present there apparently has not been any change in the instruction. [¶]

> In the California Jury Instruction, Criminal, Fifth Edition, January 1995 supplement, volume one, there is no indication of any updates or changes as to 4.50 of CALJIC. And, therefore, I can only conclude that 4.50 as printed in 1988 is the law as it relates to the CALJIC commission. [¶] And I don't really understand as yet -- I haven't had any explanation as yet to defense's proposal other than the words that you gave me on a piece of paper.

(28 RT 2065, 6067-6068.)

The defense counsel stated that the special instruction would not substitute for CALJIC No. 4.50 but would "explain it further, to tell the jury that it's not his burden to prove beyond a reasonable doubt the alibi defense, and that is not mentioned anywhere." (28 RT 6068.) The court responded that "the jury instructions generally advise the jury that the defense doesn't have to prove anything. The defendant doesn't have to prove his innocence. He doesn't have to prove anything. He can rely upon the state of the evidence after the People have pled their case, if he wishes to." (28 RT 6069.) The defense counsel conceded that CALJIC No. 4.50 did not imply that the defendant had an obligation to prove his innocence but argued that "the jury may conclude that based on circumstantial evidence the defendant has some form of burden to prove the alibi under one of those two circumstances." (28 RT 6069.)

After further discussion, the court again refused to give the special instruction, finding that the special instruction "would at least imply or infer that there is some burden on the defendant to do something, even though it may not be required to prove the alibi beyond a reasonable doubt" and that the special instruction was superfluous, redundant, and confusing. (28 RT 6072-6073.) The court instructed the jury with CALJIC No. 4.50. (28 RT 6107.)

B. The Trial Court Properly Rejected The Special Alibi Instruction

"For the purpose of instructing with respect to an alibi defense, it is sufficient that the jury be instructed generally to consider all the evidence, and

to acquit the defendant in the event it entertains a reasonable doubt regarding his or her guilt. [Citation.]" (*People v. Alcala* (1992) 4 Cal.4th 742, 804.) It is well established that it is redundant to give standard burden of proof and alibi instructions. In *People v. Freeman* (1978) 22 Cal.3d 434, 438, the Court explained, "It would have been redundant to have required an additional instruction which directed the jury to acquit if a reasonable doubt existed regarding defendant's presence during the crime . . . no juror could possibly be misled by the failure to instruct on the significance of defendant's alibi defense." (See *People v. Pimentel* (1979) 89 Cal.App.3d 581, 585.) Accordingly, an alibi instruction (CALJIC No. 4.50) will be given upon request but need not be given sua sponte. (*People v. Freeman, supra*, 22 Cal.3d at p. 438; *People v. Pimentel, supra,* 89 Cal.App.3d at p. 585.)

Here, the jury was instructed pursuant to CALJIC No. 4.50, which instructed the jury, in part, "If after consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, you must find him not guilty." (V CT 2147; 28 RT 6107.) The jury was instructed on the reasonable doubt standard (CALJIC No. 2.90). (V CT 2143; 28 RT 6105.) It was also advised of its duty to determine the facts from the evidence received in trial (CALJIC No. 2.00; V CT 2114; 28 RT 6092), witness credibility (CALJIC Nos. 2.20, 2.21.1, 2.21.2, 2.22, 2.24, and 2.27; V CT 2127-2131, 2133-2134; 28 RT 6098-6101), and the elements of the crimes (CALJIC Nos. 8.10, 8.11, 8.20, 8.21, 8.80.1, special instruction No. 1, 8.81.17, 8.81.18, 9.40, 14.50; V CT 2148-2158, 2164-2166; 28 RT 6107-6113, 6116-6117). These instructions adequately advised the jury of the relevant legal principles and that it is "'to consider all the evidence in the case, and that [appellant] is entitled to an acquittal in case of a reasonable doubt whether his guilt is satisfactorily shown.' [Citations.]" (*People v. Freeman, supra,* 22 Cal.3d at p. 438; see *People v. Alcala, supra,* 4 Cal.4th at pp. 803-804.) The special instruction added nothing substantive to these

principles of law and would have been the third instruction regarding appellant's alibi defense. As such, it was undoubtedly redundant. (See *Freeman, supra.*)

The special instruction was confusing because, as the prosecutor argued and the trial court found, the jury was not instructed regarding standard of "preponderance of the evidence." (28 RT 5886-5888.)

Because the jury was properly instructed pursuant to CALJIC No. 4.50, appellant's claim that the special instruction was required to be given is meritless. (See *People v. Alcala, supra*, 4 Cal.4th at p. 804.)

Moreover, any instructional error was harmless. Appellant did not have a complete alibi. An alibi is a "defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time." (Black's Law Dict. (7th ed.1999) p. 72; see *People v. Gourdin* (1930) 108 Cal.App. 333, 335 [to warrant alibi instruction, evidence must show defendant was somewhere other than crime scene when crime was committed].) Considering all of the evidence presented at the trial, appellant's alleged alibi evidence was weak in relation to the prosecution's case. The evidence established that appellant could have committed the murder, and the jury concluded that appellant did commit the murder.

As explained *ante*, the jury in this case was given an alibi instruction as well as instructions on all of the relevant legal principles, including the state's burden of proof, the reasonable doubt standard, the jury's duty to determine the facts from the evidence received in trial, witness credibility, and the elements of the crimes. These instructions properly told the jury the state bore the burden of proving beyond a reasonable doubt appellant's presence at the scene of the crimes. The defense counsel's closing argument focused heavily on appellant's alibi defense. Considering the instructions given and the argument of the defense counsel, there is no reasonable probability that appellant would have obtained a more favorable result had the additional

special alibi instruction been given. (*People v. Watson, supra,* 46 Cal.2d at p. 836; see *People v. Earp* (1999) 20 Cal.4th 826, 886-887 [trial court properly refused defense instructions which were plainly argumentative; even assuming error, defendant suffered no prejudice because jury was instructed under CALJIC No. 2.90 and defense counsel argued theory that third party committed crimes].)

For the first time on appeal, appellant asserts that the trial court's refusal to give his special alibi instruction violated his federal constitutional rights. By failing to make the federal constitutional claims at trial, appellant has forfeited his right to review on those grounds. (*People v. Partida, supra,* 37 Cal.4th at p. 435.) In any event, there was no constitutional error. Whether the failure to give a requested alibi instruction in a state prosecution constitutes a denial of federal due process depends upon the evidence in the case and the overall instructions given to the jury. (See *Cupp v. Naughten* (1973) 414 U.S. 141, 147 [constitutionality determined not by focusing on ailing instruction "in artificial isolation" but by considering effect of instruction "in the context of the overall charge"); also *Henderson v. Kibbe* (1977) 431 U.S. 145, 155 [recognizing that "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law" and, therefore, habeas petitioner whose claim of error involves failure to give particular instruction bears "especially heavy" burden].) The jury in this case was given an alibi instruction as well as instructions on all of the relevant legal principles. The defense counsel's closing argument focused heavily on the alibi defense. Considering all of the evidence presented at the trial, appellant's alibi evidence was weak in relation to the prosecution's case. Considering the evidence and the instructions given to the jury, appellant's constitutional rights were not violated.

There was no violation of appellant's statutory or constitutional rights.

VII.

THE TRIAL COURT PROPERLY DID NOT INSTRUCT THE JURY SUA SPONTE TO DISREGARD APPELLANT'S SHACKLES BECAUSE THE SHACKLES WERE NOT VISIBLE TO THE JURY

Appellant contends his convictions must be reversed because the shackles were visible to the jury and the trial court failed to instruct the jury sua sponte pursuant to CALJIC No. 1.04 to disregard the shackles. He alleges violations of his federal constitutional rights to a fair trial, due process, and a proportionate and reliable death verdict (U.S. Const., Amends. V, VI, VIII, & XIV; Cal. Const., art. I, §§ 7, 15, 17, & 28). He further alleges a violation of his federal constitutional due process "liberty interest" under California law to receive proper jury instructions. (AOB 175-181.)

The trial court was not required to instruct the jury sua sponte to disregard appellant's shackles because the shackles were not visible to the jury. There was no violation of appellant's statutory or constitutional rights.

A. Relevant Proceedings

In limine on April 4, 1995, Judge Kelly advised counsel that he intended to discuss courtroom security with the bailiff and sheriff's department. (RT [4/4/95] 299.) The next day, April 5, 1995, Judge Kelly advised counsel that Kern County Sheriff's Department Sergeant Joe Orman, Superior Court unit supervisor, was investigating appellant's in-custody conduct. (RT [4/5/95] 325, RT [4/12]95] 510.) On April 7, 1995, the court, counsel, and Sergeant Orman discussed in-court security. (RT [4/7/95] 435-438.) On April 12, 1995, the court and counsel discussed in-court security. (RT [4/12/95] 503-509.) Sergeant Orman testified that Department of Corrections and Kern County Sheriff's Department personnel reported that within the past year "on approximately half a dozen occasions [appellant] was given disciplinary write-ups for failing to follow directions, failing to follow

orders given by correctional personnel." (RT [4/12/95] 511-513, 520.) A sheriff's department report stated that appellant squared-off to face a correctional officer. (RT [4/12/95] 512.) In January 1995, appellant told one of the deputies that "if he was able to get [a hold] of the [deputy's] handgun that nobody would be left standing other than him." (*Ibid.*) The sergeant recommended that appellant wear a REACT belt security device and leg irons during the trial. (RT [4/12/95] 513-517, 521.) The belt and irons would not be visible to the jury. (RT [4/12/95] 514, 516-518.) Later that day, the court and counsel viewed a videotape regarding the REACT belt. (RT [4/12/95] 524-526.) The next day April 13, 1995, the defense counsels objected to the REACT belt and stated that appellant could be manacled and hooked to the floor. (RT 4/13/95] 531-535.)

Judge Kelly ordered that appellant be "affixed to the floor with leg irons taped and with the use of the eye bolt that's in the well there under the table and which is shrouded from any observation by the jurors." (RT [4/13/95] 538-539.) The leg irons were attached to a waist chain. (RT [4/13/95] 540.) Appellant's wrists were free from the waist chain. (*Ibid.*) The judge found that the leg irons would not be intrusive or impact on the jury's judgment and that they were necessary for general security purposes. (RT [4/13/95] 539; see VI CT 1738.) The court noted that "so long as he doesn't destroy the shroud, the jurors will not know of his being in confinement." (RT [4/13/95] 540.) The court further noted that if appellant testified, they would remove the jurors from the courtroom before appellant's chain was bolted to the eye bolt in the witness stand. (*Ibid.*)

On April 24, 1995, the trial court referred to the prior discussion regarding the shackling of appellant, stating, "He's not going to stand without making it quite evident to the prospective jurors that he's got some kind of constraints. . . So I don't -- my solution for that would be just not have him stand and hope that the prospective jurors can view him from where they are

in the courtroom and proceed without having him -- . . . get on his feet." (1 RT 102.) Defense counsel Gillis indicated the alternative that appellant not be shackled so he could stand and noted, "I'm not aware of how much noise that particular chain -- because you indicated it would be wrapped in tape to cut down the sound." (*Ibid.*) The court responded that the court bailiff had indicated that they were going to take steps to "use some kind of duc[t] tape or something of that nature so that the chains won't be hitting on each other to the extent they would otherwise be possibly, and it would reduce the possibility of any sound of any rattling chain." (1 RT 102-103.)

On April 24, 1995, the trial court granted the defense counsels' motion to advise the jury that appellant was charged with first degree murder and was in custody. (1 RT 105-106, 108; see 1 RT 90-91; VII CT 1881.) The court agreed to admonish the jury regarding appellant's in custody status. (1 RT 108.) On April 27, 1995, the court introduced appellant to the prospective jurors, "First, Mr. Christopher Lightsey, who is in custody[,] is the defendant in this case." (3 RT 478.) That same day, outside the presence of the prospective jurors, the court and counsel discussed the anticipated jury view of the victim's house. (3 RT 637-741.) Discussing appellant's presence at the house, the court stated:

> . . . Defendant would go to the scene with the jurors, not in the bus with the jurors, but he would be taken to the scene in a a [sic] Sheriff's vehicle. And they have been told he's in custody. So that mystery is behind us. Okay. That was done with the suggestion and agreement of all parties. The security aspect of it we would utilize, according to what we have been discussing, at least would be this REACT belt that would be the defendant would be rigged with that REACT belt. And so that he wouldn't be wandering around dragging chains and, I guess, we would stroll through the property.

(3 RT 640-641.)

On May 3, 1995, outside the presence of the prospective jurors, the trial court and counsel discussed the prosecutor's objection to appellant's saying "good morning" to the prospective jurors. (6 RT 1164-1166.) Defense

counsel Dougherty responded to the prosecutor's objection:

> MR. DOUGHERTY: Mr. Lightsey is in custody. He is shackled to the a bolt in the floor. That takes care of the fact that he is in custody of the Department of Corrections. That takes care of that matter completely. [¶] As far as the fact that he is -- or as to the fact that he is in custody of the Department of Corrections, it is absolutely irrelevant to this case. [¶] He is innocent as he sits here. He has all the rights of any defendant in court. And maybe Mrs. Green is excited because he has been convicted and because he's in the Department of Corrections, but that's got nothing to do with this case. And he's bound by the constraints of a like defendant before the court.

(6 RT 1166-1167.)

The trial court ruled that appellant could say "good morning" to the prospective jurors and "[i]f he does it in such a manner that it appears to this Court that he's attempting to influence their thought processes, I'll cut it off." (6 RT 1169-1170.)

B. Appellant's Shackles Were Not Visible To The Jury

Appellant does not appeal the trial court's shackling order. (AOB 175, fn. 50.) Appellant argues that the shackles were visible to the jury and the trial court was required to instruct the jury sua sponte pursuant to CALJIC No. 1.04[21] to disregard the shackles.

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21. CALJIC No. 1.04 provides:

> The fact that physical restraints have been placed on defendant [ ] must not be considered by you for any purpose. They are not evidence of guilt, and must not be considered by you as any evidence that [he] [she] is more likely to be guilty than not guilty. You must not speculate as to why restraints have been used. In determining the issues in this case, disregard this matter entirely.

The Use Note states that the instruction should be given whenever the restraints are in the view of the jury.

The jury never saw appellant's shackles. (See *People v. Pride* (1992) 3 Cal.4th 195, 233 [rejecting defendant's claim that shackling violated his constitutional rights because his assertion that jury saw shackles was "speculative"].) The shackles, consisting of a waist chain and leg chains wrapped in duct tape and bolted to the floor, were covered with a shroud and were not visible to the jury in the courtroom. (RT [4/13/95] 540.) The shackles did not make any noise because they were duct taped. (1 RT 102-103; see AOB 176, citing to RT [3/23/95] 116.) In court during trial, appellant's hands were not restrained because his wrists were not shackled. (RT [4/13/95 540.) During the jury view of the victim's house, appellant did not wear leg irons or chains. (3 RT 641.)

Appellant and his defense counsels never complained that the shackling interfered with or prejudiced his defense. The defense counsel complained only once that the placement of the desk on that day prevented appellant from standing when the jury entered the courtroom. (20 RT 4279-4281.) Appellant and his defense counsels never requested the trial court to instruct the jury to disregard the shackles. Appellant now proffers no evidence that the shackles interfered with or prejudiced his defense. (See *People v. Combs* (2004) 34 Cal.4th 821, 839.) The pretrial proceedings, of course, did not involve a jury. (See *People v. George* (1994) 30 Cal.App.4th 262, 273.) Appellant now proffers no evidence and makes no argument that the shackling of appellant's wrists during pretrial proceedings impaired his defense. (See AOB 176, citing to RT [8/2/94] 215; RT [3/23/95] 116-118; RT [4/5/95] 347.)

When the defendant's restraints are concealed from the jury's view, CALJIC No. 1.04 should not be given unless requested by defendant since it might invite initial attention to the restraints and thus create prejudice which would otherwise be avoided. (*People v. Duran* (1976) 16 Cal.3d 282, 292; *People v. Givan* (1992) 4 Cal.App.4th 1107, 1116–1117; see *People v. Jacobs* (1989) 210 Cal.App.3d 1135, 1142 [if jurors have seen defendant in restraints

during transport, "upon request by the defense, the trial court must instruct the jury that the physical restraints on defendant have no bearing on the determination of guilt"].)

The instant case is distinguishable from *People v. George, supra,* 30 Cal.App.4th 262 in which the jury was properly admonished to disregard the defendant's shackling, which included leg chains, waist chains, and handcuffs attached to the waist chains, and the courtroom security measures, which included two bailiffs stationed inside the well and one or more other bailiffs stationed in another area in the courtroom. The leg and waist chains were not visible except when the defendant walked from the defense table back into the holding area. (*Id.* at p. 268, fn. 3.) During trial here, appellant's wrists were not shackled, and his leg and waist chains were not viewed by the jury at any time. Since the record fails to support appellant's premise that the jurors saw his shackles, the trial court properly did not instruct the jury sua sponte that they should disregard the shackling in their deliberations. (*People v. Ward* (2005) 36 Cal.4th 186, 206; *People v. Medina* (1995) 11 Cal.4th 694, 732; see *People v. Tuilaepa* (1992) 4 Cal.4th 569, 584 ["Nothing in the record on appeal clearly establishes that the jury did or could see defendant's restraints. . . . Prejudicial error does not occur simply because the defendant "was seen in shackles for only a brief period either inside or outside the courtroom by one or more jurors or veniremen,." quoting *People v. Duran, supra,* 16 Cal.3d at p. 287, fn. 2; also *People v. Ward, supra,* 16 Cal.4th at p. 206 ["Moreover, it does not appear that any jurors were aware of the shackling, thus minimizing any possible prejudice"].)

For the first time on appeal, appellant asserts that the trial court's failure to give a shackling instruction sua sponte violated his federal constitutional rights. By failing to make the federal constitutional claims at trial, appellant has forfeited his right to review on those grounds. (*People v. Partida, supra,* 37 Cal.4th at p. 435.) In any event, because the jury did not view appellant's

shackles, the trial court was not required to give a shackling instruction. Moreover, the failure to give an instruction does not violate the defendant's constitutional rights unless the omission "so infected the entire trial that the resulting conviction violates due process." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, quoting *Cupp v. Naughten, supra,* 414 U.S. at p. 147.) "An omission or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." (*Henderson v. Kibbe*, *supra*, 431 U.S. at p. 155.) Here, the lack of the instruction did not violate due process. There was no constitutional error.

There was no violation of appellant's statutory or constitutional rights.

PENALTY PHASE ARGUMENTS

VIII.

THE TRIAL COURT DID NOT RESTRICT THE DEFENSE COUNSEL'S EXAMINATION OF PSYCHOLOGIST WILLIAM PIERCE

Appellant contends his death sentence must be reversed because the trial court did not allow clinical psychologist William Pierce "to testify in detail about the content of the materials he reviewed in forming his expert opinion that [appellant] suffered from 'a severe emotional disturbance' based on a 'paranoid delusional disorder and a narcissistic personality disorder' and about the conduct and symptoms of appellant's father." He alleges violations of his rights under the Eighth and Fourteenth Amendments and the California Constitution to have the jury consider all relevant mitigating evidence offered for a sentence less than death. (AOB 182-212.)

The trial court did not restrict the defense counsel's examination of psychologist Pierce.

A. Relevant Proceedings

During the penalty phase of the trial, appellant testified that in 1978 his father committed suicide by shooting himself with a shotgun, and appellant found his father's body. (30 RT 6377-6379.) Appellant claimed that prosecutor Green instituted proceedings under section 1368. (30 RT 6401.) The trial court sustained prosecutor Green's objection that evidence regarding the section 1368 proceedings was irrelevant. (*Ibid.*) The prosecutor then objected when defense counsel Dougherty asked appellant whether he was examined by psychiatrists because the court appointed them. (30 RT 6401-6402.) Outside the jury's presence, the prosecutor argued that evidence of the competency examinations performed by Drs. Manohara and Velosa was not relevant during the penalty phase. (30 RT 6403-6405.) The defense counsel

argued that the evidence was admissible to show that appellant "was under the influence of extreme mental or emotional disturbance" (CALJIC No. 8.85(d)). (30 RT 6406-6407.) The defense counsel stated he was going to lay the foundation for the admission of the 1994 evaluations of Drs. Manohara, Velosa, and Burdick through appellant and psychologist Pierce. (30 RT 6407.) He stated that none of the doctors would testify. (30 RT 6408.) He stated that he wanted "to establish [that appellant] was in fact examined at the court's order by three different psychiatrists back in 1994," (30 RT 6408; see 30 RT 6410-6411.) He stated, "One of them found, which I can bring out through Dr. Pierce, that he had bipolar disorder manic type." (30 RT 6408.) The prosecutor argued that evidence of the 1994 doctors' opinions was inadmissible hearsay under *People v. Nicolaus* (1991) 54 Cal.3d 551. (30 RT 6408-6410.)

The trial court asked defense counsel Dougherty if he wished only to elicit appellant's testimony that he was evaluated by three doctors and psychologist Pierce's testimony that he relied upon the reports of Drs. Manohara, Burdick, and Velosa. (30 RT 6412-6413.) The defense counsel stated that was the evidence he wished to elicit. (30 RT 6413.) The court ruled the testimony was admissible, and appellant could respond either yes or no. (30 RT 6413-6414.)

Appellant resumed his testimony, stating that pursuant to the order of Judge Felice, he was to be examined by Dr. Burdick in 1994, but he refused to speak to the doctor; and no examination was conducted. (30 RT 6416-6418.) Appellant testified he talked for about 45 minutes to Dr. Velosa in 1994 pursuant to the order of Judge Kelly. (30 RT 6420-6422.)

Appellant testified that his father went on a hunger strike after reading the Bible and got scurvy. (30 RT 6422-6423.) His father had an inner ear disease and was disabled. (30 RT 6425.) The trial court did not limit the defense counsel's questioning of appellant.

Appellant's brother Richard Lightsey testified that during the summer of either 1969 or 1970, their father physically attacked their mother. (31 RT 6662, 6664, 6670.) Appellant did not witness the attack. (31 RT 6670.) Their father then went on a fast of bread and water and moved into a separate room of the house. (31 RT 6662.) Their father, who weighed about 250 pounds, lost about 100 pounds, became malnourished, and went to the hospital, where he recovered. (31 RT 6662-6663.) In 1977, their father again physically assaulted their mother. (31 RT 6664-6665, 6670-6671.) Appellant did not witness the attack. (31 RT 6671.) Their mother and Richard moved into the house on Holtby Road, and appellant continued to live with their father. (31 RT 6665, 6671.) One night in December 1977, their father cried, moaned, asked for mercy, and was "wrestling with himself but showing signs of both physical and mental anguish." (31 RT 6665.) On the day their father died in June of 1978, appellant cried hysterically and banged his head and fists on the garage wall. (31 RT 6666.) Appellant's life returned to normal, and appellant never indicated that their father's suicide had impacted his life. (31 RT 6667.)

Psychologist Pierce testified that in June 1994, appellant's then advisory counsel Ralph McKnight hired him to develop a psychosocial profile of appellant. (31 RT 6680, 6746.) Pierce interviewed appellant, then 41 years old, on October 12 and 27, 1994. (31 RT 6694-6695, 6747.) Pierce reviewed the Bakersfield Police and Kern County Coroner's reports; the reporter's transcripts of the preliminary hearing and the court proceedings of July 1994 and June 26 1995; the defense investigator's background report; interviews with appellant's brothers Richard, and Joseph and appellant's sister Rita; and three psychiatric evaluations written by Drs. Burdick, Manohara, and Velosa. (31 RT 6694-6695, 6721-6722, 6730, 6732, 6747-6748, 6754-6755.) Based thereon, he diagnosed appellant as suffering from a persecutory paranoid delusional disorder and a narcissistic personality disorder with depressive features. (31 RT 6695, 6723-6729, 6732, 6734, 6760-6761, 6767; 32 RT

6814.) Appellant began developing these emotional and mental disturbances during late adolescence or early adulthood. (31 RT 6734.) On the day of the murder, appellant was suffering from these mental and emotional disturbances. (31 RT 6734.) Pierce testified that appellant was overly verbose with pressured speech and disorganized thought disorder (fragmented, disordered, tangential thinking, and loose associations). (31 RT 6696-6697, 6729-6733, 6759.) Appellant demonstrated a labile affect (moodiness) and religiosity (appeal to God). (31 RT 6697-6698, 6731.) He believed both he and his family were persecuted. (31 RT 6698.)

Pierce testified that appellant never indicated that the conduct of the father was "as bizarre, and what I call psychotic in my opinion, as the other family members." (31 RT 6714.) Pierce testified, "Without getting the indication from the other family members of how bizarre and uncontrollable the father's behavior was, you would not -- would have never got the impression from [appellant] that it was this type of bizarre, out of control behavior." (31 RT 6714-6715.) Pierce opined that appellant identified with his father, minimized his father's alleged psychotic behavior, and developed a defensive psychological system to deal with his father's suicide. (31 RT 6714-6715, 6718-6719, 6726-6727.) The father's aberrant, psychotic actions affected appellant and the rest of the family. (31 RT 6728; see 31 RT 6735.) The difficulties between appellant's parents, the physical abuse by his father, and the trauma of his father's psychotic break and suicide effected appellant's personality development. (31 RT 6734-6735, 6772, 6807-6808.)

Pierce testified that appellant's mother stated that the father was physically abusive toward her and her children, including appellant. (31 RT 6705.) Appellant's brother Joseph told Pierce that the father "was a strong disciplinarian and although appellant was punished more, the father protected appellant." (31 RT 6705, 6770-6771.) Other family members related that the father physically attacked the mother in 1972 when appellant was 19. (31 RT

6710-6711.) After the father was hospitalized for a back operation, his behavior changed, with increased drinking, ingesting of pain medication, and reading and quoting the Bible. (31 RT 6712-6713.) The mother reported that while in the hospital, the father claimed he had a vision that he was not going to die, he did not have to be buried, and he had special powers and acts. (31 RT 6712.) One of appellant's brothers stated that the father claimed "he could play the piano, and he would sit down on the piano and bang on the keys just as fast [as] he [] could play the piano, but he really couldn't play the piano." (31 RT 6712.)

Pierce testified that the family members reported that the father became more violent, once chased the family around the house with a knife, and twice was taken by the police and admitted to the psychiatric ward. (31 RT 6713.) He went on a starvation diet and developed scurvy. (31 RT 6714.) On June 11, 1978, the father shot himself in the head, and appellant found his body. (31 RT 6716.) Appellant was extremely upset. (31 RT 6717.)

Pursuant to the defense counsel's questioning, Pierce testified, "There were other psychiatric evaluations, reports that were done by other psychiatrists that I read subsequent to my coming to an opinion, and he was evaluated by these psychiatrists July 1994 for a couple of reasons. One -- ." (31 RT 6721-6722.) The prosecutor objected, stating that she thought they had reached an understanding the previous day. (31 RT 6722.) Stating that he recalled the prior agreement, defense counsel Dougherty explained that "the doctor was going to explain that he read these psychiatric evaluations as part of the foundation for arriving at his conclusion" and agreed, "I'll be general." (*Ibid.*) Pierce explained the basis of his opinion:

> Q. [DEFENSE COUNSEL:] And after having read these reports and having read all the other material provided to you, having had your interviews with members of the family and Christopher Lightsey, did you come to a professional opinion as to Mr. Lightsey's personality?
>
> A. Oh, yes. I came to a conclusion in terms of my diagnosis, which is delusional paranoid disorder, persecutory type, and narcissistic

personality with depressive features. And I'll be glad to explain what I mean by that.

(31 RT 6722-6723.)

Pierce opined that a sentence of life without the possibility of parole would deter appellant's criminal behavior. (32 RT 6814.) He opined that appellant was under extreme emotional disturbance when he committed the murder and that appellant's family background could be a mitigating circumstance. (32 RT 6818.)

Under cross-examination, Pierce admitted that appellant was committing felony crimes, including selling marijuana and methamphetamines, before his father's suicide. (32 RT 6808.) He admitted that between 1976 and 1985, appellant was arrested for possession of cocaine and that appellant's service of prison terms between 1987 and 1990 did not deter him from committing crimes. (32 RT 6809, 6813.) He claimed that with psychiatric treatment, it was possible that appellant's narcissistic personality disorder could be in remission. (32 RT 6815.) He claimed that appellant's delusional paranoid disorder was treatable. (32 RT 6815.) He acknowledged that appellant's three brothers and sister led productive, law-abiding lives despite their father's alleged psychosis. (31 RT 6771.)

B. The Trial Court Did Not Restrict Defense Counsel Dougherty's Examination of Psycholgist Pierce

Appellant essentially contends the trial court restricted the defense counsel's examination of psychologist Pierce by ruling that Pierce could not testify "in detail about the content of the materials he reviewed in forming his expert opinion that [appellant] suffered from 'a severe emotional disturbance' based on a 'paranoid delusional disorder and a narcissistic personality disorder' and about the conduct and symptoms of appellant's father." (AOB 182.) The record establishes the trial court never issued a ruling restricting the defense counsel's examination of Pierce or restricting Pierce's testimony because the

defense counsel never requested the trial court to make a ruling. The defense counsel did not request permission to examine Pierce regarding the information he considered in forming his opinion. The defense counsel never requested permission to examine Pierce regarding the conduct and symptoms of appellant's father. In response to the trial court's request for clarification of the information the defense counsel wished to elicit from Pierce, the defense counsel acknowledged that he wished only to elicit appellant's testimony that he was evaluated by three doctors and psychologist Pierce's testimony that he relied upon the reports of Drs. Manohara, Burdick, and Velosa. (30 RT 6412-6413.) When the trial court ruled Pierce's testimony that he relied upon the doctors' reports was admissible, the defense counsel never requested permission to elicit details regarding the reports or appellant's father's conduct. (30 RT 6413-6414.) The defense counsel never objected to the trial court's ruling admitting Pierce's testimony. (*Ibid.*) During his examination of Pierce, the defense counsel confirmed the information he wished to elicit, stating, "the doctor was going to explain that he read these psychiatric evaluations as part of the foundation for arriving at his conclusion." (31 RT 6722.)

Appellant's argument that the trial court's alleged restriction of the defense counsel's examination of Pierce and restriction of Pierce's testimony violated his constitutional rights under the Eighth and Fourteenth Amendments and the analogous provisions under the California Constitution has been waived by his failure to seek a ruling from the trial court and to object to any alleged ruling restricting the defense counsel's examination and Pierce's testimony. (See *People v. Rowland* (1992) 4 Cal.4th 238, 265, fn. 4; *People v. Raley* (1992) 2 Cal.4th 870, 892.)

In any event, appellant's constitutional claims fail because any testimony from psychologist Pierce regarding the details of the doctors' reports and appellant's father's conduct was inadmissible hearsay, which the trial court

would have properly excluded. (See *People v. Hawkins* (1995) 10 Cal.4th 920, 952, overruled on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.) Appellant complains of a violation of his constitutional right to present all relevant mitigating evidence. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4.) The rule allowing all relevant mitigating evidence has not "abrogated the California Evidence Code." (*People v. Edwards, supra,* 54 Cal.3d at p. 837; see *People v. Carpenter* (1997) 15 Cal.4th 312, 404.) Application of the ordinary rules of evidence does not infringe on a defendant's constitutional rights. (*People v. Fudge, supra,* 7 Cal.4th at pp. 1102-1103.) "Courts retain [] a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.]" (*People v. Hall, supra,* 41 Cal.3d at p. 834; accord, *People v. Lucas, supra,* 12 Cal.4th at p. 464; see *Chambers v. Mississippi, supra,* 410 U.S. at pp. 302-303 [in holding that strict application of certain state evidentiary rules excluded potentially exculpatory evidence crucial to defense, United States Supreme Court established no new principles of constitutional law and did not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures"].)

"[F]oundational prerequisites are fundamental to any exception to the hearsay rule. [Citations.] As a general proposition, criminal defendants are not entitled to any deference in the application of these constraints but, like the prosecution, 'must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' [Citation.]" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 57 ["[T]he restrictions imposed under Evidence Code sections 1235 and 1291 are neither 'archaic, irrational, and potentially destructive of the truth-gathering process' [citation] nor 'the subject of considerable scholarly criticism' [citations].].)"

Evidence Code section 801, subdivision (b) states that a witness testifying as an expert is limited to providing opinions "[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." Evidence Code section 802 states, "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion."

> Expert testimony may . . . be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.] Of course, any material that forms the basis of an expert's opinion testimony must be reliable. [Citation.] For 'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based. [Citation .]
>
> So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony. [Citations.] And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. [Citations.]
>
> A trial court, however, 'has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay.' [Citation.] A trial court also has discretion 'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' [Citation.] This is because a witness's on-the-record recitation of sources relied on

> for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact. [Citations.]

(*People v. Gardeley* (1996) 14 Cal.4th 605, 618-619 [expert witness testified regarding defendant's admissions which were admitted as exceptions to hearsay rule under Evidence Code sections 1200, subdivision (b) & 1220].)

A trial court may permit an expert to explain, on direct examination, the reasons for his or her opinions, including the matters he or she considered in forming them, but the court must guard against the "'prejudice [which] may arise if, "'under the guise of reasons,'" the expert's detailed explanation "'[brings] before the jury incompetent hearsay evidence.'" [Citations.]' [Citation.]" (*People v. Carpenter, supra*, 403; accord, *People v. Hughes* (2002) 27 Cal.4th 287, 339; *People v. Montiel* (1993) 5 Cal.4th 877, 918-919; *People v. Nicolaus, supra,* 54 Cal.3d at pp. 582-583; *People v. Coleman* (1985) 38 Cal.3d 69, 92.) "In this context, the court may "'exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value.'" [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 137.) "The discretion to exclude hearsay applies to defense, as well as prosecution, expert evidence. [Citation.]" (*Carpenter, supra,* 15 Cal.4th at p. 403.)

Evidence Code section 802 allowed psychologist Pierce to testify as to what information he considered in forming his opinion. Section 802 allowed Pierce to testify, as he did, that he relied on the doctors' reports. However, Pierce could not present inadmissible hearsay (i.e., the doctors' statements in the reports and statements regarding appellant's father's conduct) even though it was a basis for his opinion. (*People v. Price* (1991) 1 Cal.4th 324, 416; *People v. Coleman, supra,* 38 Cal.3d at pp. 91-93; *People v. Nicolaus, supra,* 54 Cal.3d at pp. 582-583.) "On direct examination, an expert may give the reasons for an opinion, including the materials the expert considered in forming the opinion, but an expert may not under the guise of stating reasons

for an opinion bring before the jury incompetent hearsay evidence." (*Price, supra,* at p. 416.) While an expert may testify regarding the matters on which he or she relied in forming an opinion, that expert may not testify regarding the details of those matters if they are otherwise inadmissible (e.g., inadmissible hearsay). (*Coleman, supra*, at p. 92.) Here, had the defense counsels requested, the trial court would have properly exercised its discretion to exclude the hearsay basis of Pierce's opinion.

Moreover, appellant has not shown it is reasonably probable he would have received a more favorable verdict had Pierce testified regarding the details of the doctors' reports. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Pierce testified in detail regarding his opinion and the basis therefor. The jury did not need to consider the hearsay upon which Pierce's opinion was based in order properly to evaluate his opinion. (See *People v. Montiel, supra,* 5 Cal.4th at p. 919.) Had the defense counsels determined the opinions of Drs. Burdick, Manohara, and Deloza were crucial to appellant's penalty phase defense, they would have presented the doctors as witnesses. The doctors could have testified regarding their reports and the basis of their conclusions in their reports; and the doctors would have been subject to cross-examination by the prosecutor. Even then, the trial court would have discretion to exclude any hearsay basis of the doctors' opinions.

Appellant has not shown any prejudice from the alleged restriction of Pierce's testimony regarding appellant's father's conduct. In fact, as set forth *ante*, Pierce testified extensively without objection by the prosecutor regarding the statements of appellant's family members reporting the father's conduct. Pierce testified extensively regarding the alleged effect of the father's conduct on appellant. Appellant testified at trial regarding his personal history and that history presumably was substantially the same history he presented, when he chose to talk to the doctors, during his clinical interviews with the doctors.

There was no violation of appellant's constitutional rights.

IX.

THE TRIAL COURT PROPERLY INSTRUCTED THE PENALTY PHASE JURY THAT IT COULD CONSIDER APPELLANT'S CONDUCT DURING HIS ALTERCATION WITH KERN COUNTY SHERIFF'S DETENTION OFFICER CRISTOBAL JUAREZ AN AGGRAVATING FACTOR UNDER SECTION 190.3, SUBDIVISION (b)

Appellant contends his death sentence must be reversed because the trial court erroneously instructed the jury that appellant's conduct during his altercation with Kern County Sheriff's Officer Cristobal Juarez, including his act of clenching his fists, constituted an aggravating factor under section 190.3, subdivision (b). He alleges violations of his federal constitutional rights to a fair trial, due process, and a proportionate and reliable death verdict (U.S. Const., Amends. V, VI, VIII, & XIV; Cal. Const., art. I, §§ 7, 15, 17, & 28). He further alleges a violation of his federal constitutional due process "liberty interest" right to have valid section 190.3 aggravators used to sentence him to death. (AOB 213-244.)

The trial court properly instructed the jury that it could consider appellant's conduct during his altercation with Deputy Juarez an aggravating factor under section 190.3, subdivision (b).

A. Relevant Proceedings

During the penalty phase, Kern County Sheriff's Detention Officer Cristobal Juarez testified that on April 2, 1995, he was on duty at the Lerdo pretrial jail. (29 RT 6269-6271.) The officer observed contraband clothing in appellant's cell. (29 RT 6271-6272.) The officer entered the cell and asked appellant, who was lying on the bunk, to stand up and face the wall so the officer could search the bunk. (29 RT 6273.) Appellant stated that he did not do anything and that was all the clothing. (29 RT 6273, 6278.) The officer stated that he wanted to make sure and twice asked appellant to face the wall.

(29 RT 6273-6274, 6278.) Appellant turned and "squared up" to the officer by facing the officer with his fists clenched at his sides. (29 RT 6273-6274, 6277-6278.) Appellant stood about one foot away from the officer. (29 RT 6274-6275.) The officer perceived that appellant had taken a "combative stance." (29 RT 6275.) For his and appellant's safety, the officer restrained appellant, placed him on the floor, and handcuffed his wrists. (29 RT 6275, 6278-6279.) Pursuant to procedure, the officer took appellant to the infirmary. (29 RT 6275, 6279.) The officer filed an incident report. (29 RT 6276.)

Defense counsel Dougherty thereafter made a motion to strike the testimony of Officer Juarez on the ground that appellant's conduct, as described by the officer, was not a crime within the meaning of section 190.2, subdivision (b). (29 RT 6308, 6312-6313.) The prosecutor stated that appellant's conduct was an implied threat of force or violence and constituted a violation of section 148[22], resisting or obstructing a law enforcement officer in the performance of his duties. (29 RT 6310-6311, 6314-6315.) The court denied the motion to strike:

> Court's going to deny the motion to strike. [¶] I think that the conduct that proposed or the conduct that was brought to the attention of the jurors by the evidence from Mr. Juarez and Mr. Kimbrell clearly fall[s] within the purview of what's described in [CALJIC No.] 8.85, the presence or absence of criminal activity by the defendant other than

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22. Section 148, subdivision (a)(1) provides:

> Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

the crime for which the defendant is being tried in the present proceeding, which involve the use or attempted use of force or violence or the express or implied threat to use force or violence.

That's a jury question. They can figure that out themselves, make a determination as to whether or not that conduct which was testified about by those witnesses falls within that -- within that category.

(29 RT 6315.)

The defense counsels approved CALJIC Nos. 8.87 and 2.90 (modified). (30 RT 6581-6582, 6595-6596; 31 RT 6784-6786, 6805.) As to appellant's assaultive conduct against Officer Juarez, the defense counsels approved CALJIC Nos. 16.140, 16.141, 16.102, 16.103, 1.20, 3.30 and 3.31. (30 RT 6583-6584, 6588-6590, 6604, 6608; 31 RT 6786-6788, 6790.) The defense counsels did not proffer additional instructions. (30 RT 6620.) Defense Counsel Dougherty argued to the court that appellant did not assault the officer:

And I think that the record is going to be muddied. And it's going to give the jury a problem it doesn't need. [¶] There are three other allegations. Certainly there is no connection with violence when a person stands at attention and cl[e]nches his fists. [¶] The officer testified he arrested him. He put him down on the ground and handcuffed him. It may be a violation of failure to obey an order, but it certainly, I submit, is legally not an assault.

(31 RT 6793-6794.)

The court stated that it was going to give CALJIC No. 16.140, as modified by the prosecutor, "notwithstanding the objection." (31 RT 6796-6797.)

During her closing argument to the jury, the prosecutor argued regarding appellant's violent conduct against Officer Juarez:

Then finally the testimony of Officer Juarez. You'll be instructed on the crime of Penal Code Section 148, resisting an officer in the performance of his duties. [¶] Remember I just said factor B talks about the attempted use of force or violence or the express or implied threat to use force or violence. And what I'm suggesting to you is that when Mr. Lightsey squared up to Officer Juarez, clenched his hand at his sides as Officer Juarez demonstrated, that that is an implied threat

to use force or violence, and you can consider that as a factor in aggravation.

If you found that the defendant committed any or all of these beyond a reasonable doubt, you may and you should consider each and every one of them. . . .

(32 RT 6836-6837.)

During his closing argument to the jury, defense counsel Gillis argued:

What I call interfering with the jailer, the jailer testified that he cl[e]nched his fists. At no point did he attempt to strike him. At no point did he do anything but cl[e]nch his fist down at his side. The jailer was threatened. Certainly he would have got lots of help. There's lots of jailers. The jailer took him down by himself. [¶] I would submit to you that that conduct by itself is not an implied threat with the use of force or violence.

(32 RT 6899-6900.)

B. The Trial Court Properly Instructed The Jury That It Could Consider Appellant's Conduct During His Altercation With Officer Juarez An Aggravating Factor Under Section 190.3, Subdivision (b)

The prosecution introduced the evidence of appellant's conduct during his altercation with Officer Juarez as section 190.3, subdivision (b) aggravating evidence of "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." This section allows proof of violent conduct, other than the capital crime, that itself is criminal. (*People v. Anderson* (2001) 25 Cal.4th 543, 584.) It encompasses only those threats of violence that are directed against persons, not property. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1016; *People v. Boyd* (1985) 38 Cal.3d 762, 776; see *People v. Monterroso* (2004) 34 Cal.4th 743, 770.) Such other violent crimes are admissible regardless of when they were committed or whether they led to criminal charges or convictions, except as to acts for which the defendant was acquitted. (*Anderson, supra.*)

There must be substantial evidence of the other violent criminal conduct. Substantial evidence of other violent criminal conduct is evidence that would allow a rational trier of fact to find the existence of such activity beyond a reasonable doubt. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1167-1168; *People v. Clair, supra,* 2 Cal.4th at pp. 672-678; also *People v. Griffin* (2004) 33 Cal.4th 536, 584-585; *People v. Boyd, supra,* 38 Cal.3d at p. 778.) Before an individual juror may consider evidence of other violent criminal activity in aggravation, he or she must find the existence of such activity beyond a reasonable doubt. (See *People v. Benson* (1990) 52 Cal.3d 754, 809-811; *Griffin, supra*, at p. 585.) There is no requirement, however, that the jury as a whole unanimously find the existence of other violent criminal activity beyond a reasonable doubt before an individual juror may consider such evidence in aggravation. (See *ibid.;* also *People v. Lewis* (2006) 39 Cal.4th 970, 1068.) A trial court's ruling on the admissibility of evidence of other violent criminal conduct is reviewed for abuse of discretion. (See *Griffin, supra*; *People v. Ochoa* (1998) 19 Cal.4th 353, 449; *Clair, supra,* 2 Cal.4th at p. 676.)

The evidence was properly admitted under section 190.3, subdivision (b). Within the meaning of subdivision (b)'s "threat to use force or violence," the term "threat" contemplates "[an] expression of an intention to inflict loss or harm on another by illegal means and esp[ecially] by means involving coercion or duress of the person threatened." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1256, quoting Webster's New Internat. Dict. (3d ed. 1961) p. 2382.) Officer Juarez's testimony established that in response to the officer's request that appellant stand up and face the wall so the officer could search appellant's bunk, appellant stated that he did not do anything and that was all the clothing. (29 RT 6271-6273, 6278.) After the officer twice asked appellant to face the wall, appellant turned, faced the officer, and took a "combative stance" by "squaring up" to the officer with his fists clenched at

his sides. (29 RT 6273-6275, 6277-6278.) Appellant stood about one foot away from the officer. (29 RT 6274-6275.) For his and appellant's safety, the officer restrained appellant, placed him on the floor, and handcuffed his wrists. (29 RT 6275, 6278-6279.)

The trial court could reasonably find there was substantial evidence that appellant's initial failure to comply with Officer Juarez's repeated orders and appellant's subsequent confrontational and aggressive stance and clenched fists constituted the crimes of resisting arrest (§ 148) and an implied threat of force or violence. (See *Mathews v. Workmen's Compensation Appeals Board* (1972) 6 Cal.3d 719, 727 ["Under appropriate circumstances, clenching a fist . . . may be sufficient to convey a real, present and apparent threat of physical injury."]; also *People v. Hughes, supra*, 27 Cal.4th at p. 383; *People v. Tuilaepa, supra,* 4 Cal.4th at p. 589.)

Appellant relies on *People v. Quiroga* (1993) 16 Cal.App.4th 961. In *Quiroga*, police officers entered an apartment after observing, through the open front door, one of the occupants holding what appeared to be a marijuana cigarette. As the officers entered, the defendant stood up from a couch and began to walk into the hallway. One of the officers ordered the defendant to sit back down. The defendant argued before complying with the order. (*Id.* at p. 964.) Moments later, the officer, noticing that the defendant was reaching with his right hand between the couch cushions and the side of the couch, ordered the defendant to put his hands on his lap. "Again [the defendant] was 'very uncooperative' but 'finally' obeyed the order." (*Ibid.*) Shortly thereafter, the officer ordered the defendant to stand up. The defendant "refus[ed] several times" before finally complying. Subsequently, the officer found a quantity of cocaine under a couch cushion where he had seen the defendant reaching and placed the defendant under arrest. (*Ibid.*) The *Quiroga* Court found that nothing in the defendant's conduct constituted a charge of violating section 148. (*Quiroga, supra,* at p. 966.)

Unlike the defendant in *Quiroga*, who was slow to respond to commands, appellant ignored Officer Juarez's repeated commands and then stood within one foot of the officer in a combative stance with his fists clenched. This case is similar to *In re Muhammed C.* (2002) 95 Cal.App.4th 1325. In that case, the defendant approached the back of the police patrol car and spoke to an arrestee seated in the back seat. Officer number one ordered the defendant to step away from the vehicle; but the defendant continued talking to the arrestee. Officer number two ordered the defendant away. Officer number three also ordered the defendant away. The defendant then extended his right hand out to the back, raising his palm towards the officers. Officer number two told the defendant to step away from the patrol car or the officers would take him to jail. Officer number one began to cross the street and approach the defendant. He again ordered the defendant to step away from the patrol car. The defendant walked toward officer number one. Officer number two escorted the defendant across the street. Officer number three said something to the defendant about breaking the law, the defendant said some words in reply, and officer number three grabbed the defendant's right arm and announced that he was under arrest. The defendant then pulled his arm out of officer number three's grasp. The officers reached out and grabbed the defendant. (*Id.* at p. 1328.)

The *Muhammed C.* court held "a reasonable inference could be drawn that [the defendant] willfully delayed the officers' performance of duties by refusing the officers' repeated requests that he step away from the patrol car: three officers ordered the defendant five times to step away before the defendant complied; they had interrupted processing the stopped car to attend to the defendant; and officer number two specifically affirmed that the elapsed time had delayed the ongoing investigation." The court distinguished *People v. Quiroga, supra,* 16 Cal.App.4th 961:

It is true that "it surely cannot be supposed that Penal Code section

> 148 criminalizes a person's failure to respond with alacrity to police orders." (*People v. Quiroga* [(1993) 16 Cal.App.4th 961,] 966 [].) But here, [the defendant] acknowledged the officers' orders with his hand gesture yet continued his conversation with Robinson [the arrestee]. Thus, there is no mere failure to respond here. [The defendant] affirmatively responded to the police orders with defiance. Though [the defendant] has a benign interpretation of his hand gesture, the trial court was entitled to interpret the gesture as one of defiance and we must accept the interpretation in support of the trial court's finding. Similarly, [the defendant's] point that he should not be criminally culpable for doing no more than temporarily distracting the officers from the performance of duties is simply an interpretation of the evidence. The trial court was entitled to conclude that [the defendant's] defiant behavior constituted more than a temporary distraction. That [the defendant] did not pose a safety threat or a threatened interference with the officers' investigation, as [the defendant] urges, is simply circumstantial evidence from which [the defendant] could argue that he did not delay the officers.

(*In re Muhammed C., supra,* at p. 1330.)

Here, as in *In re Muhammed C., supra,* 95 Cal.App.4th 1325, there was no mere failure to respond. Appellant failed to respond to Officer Juarez's repeated orders and then affirmatively responded to Officer Juarez's orders with defiant and aggressive conduct, viz., he stood one foot in front of the officer with his fists clenched. The trial court and ultimately the jury could reasonably conclude that appellant's conduct was criminal and involved an implied threat to use force or violence. There was substantial evidence that appellant's conduct constituted a violation of section 148.

In *People v. Monterroso* (2004) 34 Cal.4th 743, the defendant scratched "WSA," the initials of his gang, on the side of the victims' van a couple of days after he marked their sidewalk with graffiti, insulted and assaulted the husband, and was arrested. (*Id.* at p. 771.) The prosecution's gang expert testified that the defendant's act of vandalism of the victims' van was a warning to the victims not to "mess" with the gang and that the purpose of the act was to instill "fear." This Court held that "the act of vandalism unquestionably qualified as an express or implied threat to use force or violence against the

[victims] under factor (b)." (*Ibid.*)

This Court further held in *Monterroso* that the trial court properly admitted under subdivision (b) of section 148 the defendant's in-custody threat to a sheriff's deputy. While in custody at the Orange County jail, the defendant complained that he was not provided a lunch tray; but when his cell door was opened, he came out with a tray in his hands. The sheriff's deputy, who supervised the distribution of lunch trays, refused to provide the defendant with another tray. The defendant flew into an "[a]bsolute rage, shook the cell door, and screamed repeatedly that he was going to kill the deputy with a shank the next chance he got. The deputy took the threat very seriously." (*Id.* at p. 775.) This Court rejected the defendant's claim that his threats did not establish a criminal offense, stating:

> Threatening to kill a sheriff's deputy for the performance of his duty would appear to violate section 71, which provides that "[e]very person who, with intent to cause, attempts to cause, or causes, . . . any public officer or employee to do, or refrain from doing, any act in the performance of his duties, by means of a threat, directly communicated to such person, to inflict an unlawful injury upon any person or property, and it reasonably appears to the recipient of the threat that such threat could be carried out, is guilty of a public offense . . . ." (See *People v. Boyd, supra,* 38 Cal.3d at p. 777 [].) This was not a random outburst uttered while officers patrolled outside (cf. *People v. Tuilaepa, supra,* 4 Cal.4th at p. 590 []); rather, defendant's threat was plainly uttered in response to the deputy's proper execution of his duties. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153 [] ["to the extent his official duties included overseeing the custody and control of defendant and his fellow inmates, a threat to kill a deputy constituted an attempt to deter or prevent Deputy Shafia from performing his official duties"].) Nor did [the deputy] believe the threat was an idle one (cf. *Tuilaepa, supra,* 4 Cal.4th at p. 590 [] ["the recipients of these threats indicated they did not actually fear for their safety"]), since inmates had been able to manufacture shanks and other weapons despite the jail's best efforts to prevent it and defendant's rage was unmistakable. (See *People v. Hines* (1997) 15 Cal.4th 997, 1060 [].) Thus, this incident was properly admitted as an aggravating factor.

(*People v. Monterroso, supra,* at pp. 775-776; see *People v. Lewis*, *supra*, 39

Cal.4th at p. 1053 [jury could infer that inmate's possession of knife was an implied threat of violence; prosecution was not required to show that inmate intended to use knife in provocative or threatening manner]; *People v. Smithey* (1999) 20 Cal.4th 936, 992-993, citing *People v. Clair, supra,* 2 Cal.4th at pp. 676-677 [jury could infer implied threat of violence from defendant's failure to remove hand from loaded weapon kept hidden in jacket while attempting to avoid arrest "when the evidence permits an inference that the defendant possessed a dangerous weapon with the purpose of using it to avoid apprehension and successfully escape the scene of a crime; the circumstance that the defendant chose not to act upon his plan could not negate the implied threat to use the weapon against anyone who might interfere"].)

In *People v. Dunkle* (2005) 36 Cal.4th 861, this Court found sufficient evidence under subdivision (b) that force or violence was used or threatened during the burglary where a pair of scissors was found lying on the floor, away from its usual place in the dining room; the victim's daughter's quilt lay on the floor, halfway out of her bedroom; and the defendant had previously discussed with a police officer the possibility of committing burglaries, stating, in effect, that the police do not take 12-year-old children seriously as witnesses, and that if a child were present at a burglary he or she could be tied up or handcuffed and questioned about the location of items in the house. (*Id.* at p. 923.) Finding this evidence sufficient under subdivision (b), this Court explained:

> Seen in the context of defendant's musings about restraining a child to facilitate stealing a family's valuables, [the police officer's] testimony supported an inference that defendant armed himself with the scissors, entered the sleeping girl's bedroom and disturbed her quilt before being interrupted and attempting to leave the house. That other inferences could, as defendant suggests, be drawn from these facts does not mean the instruction was improper. In sum, there was evidence sufficient to support a jury finding that defendant attempted to use force or violence in committing the burglary, and the jury was properly instructed under section 190.3, factor (b).

(*Ibid.*)

Finally, any error in admitting the evidence and instructing the jury did not prejudice appellant. The jury was instructed not to consider the evidence regarding the threat to Officer Juarez unless it found the prosecution had proven all the elements of a violation of section 148 beyond a reasonable doubt. It is presumed that the jury followed those instructions. (*People v. Dunkle, supra,* 36 Cal.4th at p. 921.) Even assuming error in the giving of the factor (b) instruction, there is no reasonable possibility appellant would have obtained a more favorable outcome in its absence, given the great weight of the aggravating evidence against him. (*Ibid.*; see *People v. Williams* (2006) 40 Cal.4th 287, 293.)

For the first time on appeal, appellant asserts that the trial court's instruction to the jury violated his federal constitutional rights. By failing to make the federal constitutional claims at trial, appellant has forfeited his right to review on those grounds. (*People v. Partida, supra,* 37 Cal.4th at p. 435.) In any event, there was no constitutional error. The trial court properly instructed the jury to consider the threat to Officer Juarez. In view of the totality of the instructions and the counsel's argument to the jury, any instructional error was harmless under any standard. The prosecutor here told the jury more than mechanical counting of the aggravating factors was required, and the defense counsel told the jury they alone could decide the weight and importance of each factor and any single factor could justify a death sentence.

There was no violation of appellant's statutory or constitutional rights.

X.

THE TRIAL COURT PROPERLY REFUSED TO ALLOW APPELLANT TO ADDRESS THE JURY BEFORE THE PENALTY VERDICT WAS ANNOUNCED

Appellant contends his death sentence must be reversed because the trial court erroneously refused his request to address the jury before the

penalty verdict was announced. He claims he was denied his constitutional and statutory rights to allocution. (AOB 226-240.)

The trial court properly refused to allow appellant to address the jury before the penalty verdict was announced. Appellant had no statutory or constitutional right to address the jury before the penalty verdict was announced.

A. Relevant Proceedings

Outside the jury's presence on June 7, 1995, the court stated:

> Before we have the jurors come in, it's been observed that the defendant continues to talk audibly during the proceedings. [¶] And I told you, on the defense side of this process, given this speech so many times I'm sick of hearing myself give it. But I will. The next time this happens, I promise you I'm going to stop the proceedings in front of the jurors, I'm going to exit the jurors from the courtroom. And Mr. Lightsey's going to be taken out of the courtroom, either gagged or left out of the courtroom. And the trial will proceed without his presence. [¶] I'm not going to allow that continued interruption by the defendant of these proceedings.
>
> In addition to that, I've noted that the defendant's commences to talk to counsel as the jurors are being excused and walking from the courtroom. And he stands. And he's talking with [sic] generally with Mr. Gillis, not talking with him, talking at him, I should say. I don't think Mr. Gillis is participating in that conversation. Mr. Gillis appears to be pointing at the yellow pad every time that Mr. Lightsey chooses to make a statement, which I heard this morning several times such as he's lying being said audibly. [¶] And I'm sure, Mr. Gillis, you as well have heard that statement, have you not, sir?
>
> MR. GILLIS: Yes, your Honor.
>
> And I think I understand what the court's talking about because I somewhat inferred from the court requesting a recess that it was going to discuss this particular matter. And I have attempted to both [sic] before I walked outside the court, I've explained to Mr. Lightsey that he's gone too far. He needs to keep his mouth shut and write everything down on the pad that he is not to communicate at all to me. I can appreciate the court's indulgence so far during this trial.
>
> THE COURT: One of the things that I need to point out every time that I make this observation is directed to the defendant and that is it can do nothing but hurt his interests. And the jurors are going to, if

they make any evaluation of that, hopefully they won't, but if they make an evaluation of that conduct by the defendant, it's going to do nothing but be detrimental to his interest because they are not used to these proceedings. They are not used to being in a jury box. They are certainly not used to seeing defendants make comments while other people are testifying. Evaluating or commenting that a particular witness is lying or not telling the truth or whatever. So that's going to hurt your interest, Mr. Lightsey. [¶] And I can't help but again reiterate that and tell you that as I've told you numerous times in the past.

(24 RT 5136-5137.)

The next day, after defense witness Robin Lorenz testified, the court responded to the prosecutor's complaint regarding appellant's in-court conduct:

[THE COURT TO DEFENSE COUNSEL DOUGHTERTY:] You're within the sound range though of Mr. Lightsey as he makes these expressions.

[¶] . . . And continues to make these expressions even after Mrs. Green's most recent remarks, he talked to Mr. Gillis. And I just can't understand why he continues to do that in the face of what the court has advised him. [¶] It can't help him. It can't help his interests in this case to be continually animated with pleasure or displeasure, whichever it may be, such as the glares that he was trying on with Mr. Rowland yesterday and expressed with this most recent witness who was in court and his nodding. I observed that. I saw his sitting there in a very obvious attempt to convey to the jurors his agreement with that witness' testimony. And as we are all well aware, that's improper. It's out of line. It's not acceptable. And I have made -- I've made numerous efforts.

The number three doesn't impress me, Mrs. Green, as number of times I've talked to Mr. Lightsey or told him to put his expressions to his counsel on paper. Many, many more than three times have we gone through this bit -- this scenario that we're going through at this point in time. [¶] And I don't know what to tell you, Mr. Dougherty. I know you are frustrated by it. I have heard you make comments to Mr. Lightsey when the jurors are not in the courtroom admonishing him to comply with the court's orders. Am I right about that?

MR. DOUGHERTY: Yes, sir.

THE COURT: And, of course, that's been done numerous times. Mr. Gillis had made efforts at the same time as well to put some kind of a control on Mr. Lightsey's efforts to not only talk to his attorneys but to talk to Mrs. Green via these comments and remarks that he's been

making. Since the outset of this proceeding, even before the jurors were selected, we experienced a significant amount of this and I attempted to take advantage of those situations, so I could hopefully have him curtail his conduct. But it hasn't worked. It just continues.

I don't know what to tell you. I've promised him I was going to remove him from the courtroom or gag him. And I've had occasion in one case previously to gag someone in front of a jury. And I'm not going to back off just 'cause this happens to be a death penalty case from doing that in this case.

If he continues to attempt to convey through his utterances, thoughts and ideas, agreements and disagreements, pleasure and displeasure with a particular witness' testimony or any other aspect of this case, I have to seriously consider doing that or removing him from the courtroom and setting up a microphone, let him sit in the back room and listen to what's going on her and not be present before the jurors.

That's certain [sic] going to be detrimental to his interest, if I have to do either one of those things. It shouldn't be necessary. We've gone through this over and over and over. I think I've been more than tolerant. But I just can't tolerate it any further.

Now, do you have some suggestion how are we going to put a control over the defendant. [¶] As I'm making these remarks, for instance, he's not even listening to me.

THE DEFENDANT: Yes, I am.

THE COURT: He's talking to Mr. Gillis. [¶] So I don't know how to deal with him other than as I suggested I might. [¶] So, Mr. Lightsey, you're told one more time and I don't know how many times this has been, but one more time I'm telling you to constrain yourself, deal with yourself on a responsible basis, don't attempt to communicate with witnesses or jurors or attorneys, whether they are yours or whether they are the prosecution in this case, except utilizing your yellow pad to talk to Mr. Gillis and/or Mr. Dougherty.

Other than that, you will have a chance to express yourself with these jurors, if you chose to testify. If you don't [choose] to testify, then you don't get that opportunity. Okay. [¶] Do you understanding what I'm referencing, sir?

THE DEFENDANT: Yes, sir.

(25 RT 5371-5373.)

On June 14, 1995, outside the jury's presence, the court again discussed appellant's in-court conduct with counsel:

I am concerned again about Mr. Lightsey's conduct in the courtroom and his apparent efforts to influence the jury, physically reacting to his

witnesses, shall we say, his audibly making comment[s] which were heard by the District Attorney as well as by the Court. [¶] I believe Mr. Gillis indicated that he was aware of the auditory or audible remarks. And I guess maybe it's a memory factor, but we just can't tolerate that. [¶] And I have suggested on past occasions, at least a half a dozen times, this observation and the concern that the Court has, because I am sure that if he's successful at all in displaying any of this conduct to the jurors, who have kind of actually postured themselves to not even look at him, the Court has noted -- but if he's been able to cause any influence at all on the jurors, I'm sure it's to his detriment. And I'm just as concerned about his detrimentally effecting his situation in his effort to try to help himself in their eyes by these remarks and this conduct.

And I gather you had an opportunity to talk to your client Mr. Gillis, during the break.

MR. GILLIS: Yes, I did, your Honor.

THE COURT: Do you have some suggestion as to -- I've asked you this question numerous times in the past, but we have got to put a stop to this.

MR. GILLIS: I don't know what to say, your Honor. I have expressed to him what my feelings are, which are basically what you have just expressed, and my concern [sic] , which are basically what you have just expressed.

THE COURT: I gather your observations are similar to mine. This isn't some figment of my imagination that he's conducting himself in this manner.

MR. GILLIS: No, your Honor. And I think it was probably to me more obvious this morning during these two witnesses -- I wasn't looking at his gestures, but his talking to me and things like that. He has promised me he's going to keep his mouth shut.

THE COURT: Just curious --

MR. GILLIS: I suppose the bright note is we don't have that many more witnesses to call.

THE COURT: Just curious, Mr. Gillis. Have you, by any chance, been keeping track how many times he's promised you he would refrain from this conduct?

MR. GILLIS: No, your Honor.

THE COURT: Okay. Who's counting, huh?

MR. GILLIS: Yes.

THE COURT: Mr. Gillis, I -- Mr. Lightsey, I want you to understand again that I won't put up with this. We just can't tolerate it. [¶] It is for your benefit as well that you conduct yourself in a responsible manner. Your conduct before these jurors is not

acceptable. And if it continues, as I promised you in the past, the Court's going to be required to either remove you from the courtroom or gag you, one or the other. I hope it's not necessary.

THE DEFENDANT: Your Honor, I was just recalling --

THE COURT: I don't want to hear any comment from you, Mr. Lightsey. [¶] Sometimes the emotional aspects become a bit overwhelming and people get a bit overzealous in their situation, and that can be understandable, but we have experienced this so many times that I think we're past that.

(26 RT 5517-5520.)

The jury found appellant guilty on June 20, 1995. (VIII CT 2203-2212, 2221-2222; 28 RT 6143-6144, 6150-6156, 6189-6191.) Prior to the commencement of the penalty phase on June 26, 1995, the defense counsels requested that should appellant disrupt in-court proceedings, he would not be gagged but rather be located outside the courtroom. (29 RT 6226-6227.) In an effort to appease appellant, the court allowed him to give a statement outside of the jury's presence. (29 RT 6227-6230.) The penalty phase trial continued in appellant's presence. (29 RT 6232.) Later that day, the prosecutor and defense counsel Dougherty advised the court, outside the jury's presence, that they agreed it was appropriate for the court to instruct the jury regarding appellant's conduct in court. (29 RT 6295-6296.) The court directed counsel to submit a statement to be read with the other instructions. (29 RT 6296-6297.)

On June 29, 1995, the evidentiary portion of the penalty phase was completed and counsel gave their arguments to the jury. (32 RT 6819.) During the prosecutor's opening argument, appellant verbally interrupted her six times, attempting to rebut the argument. (32 RT 6821, 6833, 6839, 6844, 6846-6847.) During defense counsel Dougherty's argument, appellant verbally interrupted him five times, attempting to rebut the argument and accusing the defense counsel of misconduct (32 RT 6854-6855), and the court recessed:

MR. DOUGHERTY: [¶] However, the hardest part of the case was Mr. Lightsey. Mr. Lightsey does not understand what is going on. He

doesn't understand what's going on.

THE DEFENDANT: You came to Bakersfield, became part of the conspiracy and you took fifteen thousand dollars from my family.

MR. DOUGHERTY: Mr. Pierce --

THE COURT: Mr. Lightsey, please.

MR. DOUGHERTY: Dr. Pierce was selected long before we entered the case. [¶] Mr. Gillis and I have tried to be as objective as we possibly can, not to be personally involved in the case, present the case to you in absolutely the best light we can.

THE DEFENDANT: Intentionally threw the case to suppress evidence.

MR. DOUGHERTY: We did not want him to take the witness stand.

THE DEFENDANT: That's where you failed, too.

MR. DOUGHERTY: We didn't want him to take the witness stand. Finally he took the witness stand. [¶] Mr. Lightsey did not listen to Judge Kelly. Mr. Lightsey did not listen to me.

THE DEFENDANT: Ineffective assistance of counsel.

MR. DOUGHERTY: Mr. Lightsey did not listen to Mr. Gillis. Mr. Lightsey listened to no one. [¶] In the meantime he was furiously writing letters to everybody. He wrote a letter to Elva Atkins, which he describes as a thank you note, and it literally scared her to death. Our investigator was about to talk to her, and she got so scared she wouldn't have anything to do with him. And the day before she was cooperative, wanted to explain things to him.

Mrs. Green very, very decently and honestly brought up one concept in the case.

THE DEFENDANT: There's nothing honest about Mrs. Green whatsoever.

THE COURT: Excuse me, Mr. Dougherty. Mr. Dougherty, I hate to interrupt you.

MR. DOUGHERTY: Yes, your Honor.

THE COURT: I don't like to do this, but I'm going to interrupt you, and we'll take our morning recess at this point, sir.

MR. DOUGHERTY: All right, sir.

THE COURT: Please don't discuss the matter amongst yourselves or with anyone else.

THE BAILIFF: Chris, while the jury is moving, be quiet. Chris, while the jury is moving, be quiet.

THE COURT: Court's in recess.

(Whereupon, the jury exited.)

THE COURT: We're on the record.

While the jurors are outside the courtroom I want to put something

on the record here that will at least provide someone down the road who may be reviewing this -- and of course there's the chance that will occur -- reviewing the record that's being made here.

First off, the comments of the attorneys in their closing here, it is important for the record to reflect that Mr. Lightsey has now on nine occasions this morning interrupted those proceedings. You might ask who's counting. I was. I anticipated his intentional effort to continue with expressing himself improperly, irresponsibility and unreasonably.

We are at a very, very important stage of this proceeding. Mr. Lightsey's life is at stake. Mr. Lightsey doesn't seem to have an appreciation for that or, in the alternative, if he does, he feels apparently that his conduct in some way or another with this bizarre -- continuing bizarre conduct will somehow or other assist him in saving his own life.

And I would suggest, and I've told Mr. Lightsey on numerous occasions as we have gone through the trial, as we have gone through the instructions and the closing in the guilt phase of the trial as well as we've gone through even his own witness -- Dr. Pierce was interrupted by Mr. Lightsey's comments -- and I've told Mr. Lightsey that these -- anything of this nature is not going to be in any way helpful to his situation -- good chance that it will be a hindrance to his welfare. [¶] The jurors have been patient in this case. Counsel have been patient.

Mr. Lightsey, I don't know what I can say that I haven't already said at least a dozen times to persuade you to conduct yourself responsibly, and I'm not sure that what I'm saying is going to have any impact whatsoever on you. [¶] What I have said in the past has not seemed to assist your appreciation for the gravity of this, your appreciation for what you're doing to yourself potentially by your conduct. I think it's important that the record reflect my comments.

I think it's important that you take a half step backward. And in the brief moments and minutes that are left in this trial before the jury commences its deliberation, I would suggest to you that it is extremely important for you to conduct yourself responsibly and without an ongoing attempt to address these issues which you continually reference in your remarks. [¶] Now your attorneys are doing the best they can under the circumstances, but you're interfering with those attorneys. You're interfering with their efforts to act in your behalf.

THE DEFENDANT: [Complaints regarding the defense counsel.]

[¶ . . . ¶]

THE COURT: What the record needs to reflect, at each stage of this process when Mr. Lightsey made a request, full consideration was given to his requests. The Court attempted to act patiently, with an understanding, trying to give consideration to the fact that Mr. Lightsey

has been for -- now two years has been under the bright light of being an accused murdered. And I understand that that can certainly cause anxieties, it can cause emotional outbursts, it can cause bizarre conduct. [¶] And I've tried to be as patient as I can in this case in exercising my function here, but we must conclude this case, Mr. Lightsey. We must conclude it by allowing the jurors not to be distracted by your irresponsible conduct. [¶] We're going to finish this case today, and I don't want there to be any more outbursts by you. [¶] Do you understand what I've said? Yes, sir?

THE DEFENDANT: I believe Mr. Dougherty came here with ulterior motives in the first place.

THE COURT: Do you understand what I said, Mr. Lightsey?

THE DEFENDANT: Yes.

(32 RT 6853-6862.)

When defense counsel Dougherty continued his argument appellant verbally interrupted him eleven times, attempting to rebut the argument and accusing the defense counsel of misconduct. (32 RT 6865-6869.) During the prosecutor's closing argument, appellant verbally interrupted her seven times, attempting to rebut the argument and accusing the prosecutor of misconduct. (32 RT 6869-6872.) During defense counsel Gillis's opening argument, appellant verbally interrupted him ten times, accusing the defense counsel of misconduct. (32 RT 6872-6875.) The court then addressed the counsel and jury:

THE COURT: All right. We're going to take a recess. The court's going to set up a television camera outside of the courtroom. [¶] Mr. Lightsey will observe the balance of this trial. He has an entitlement to know what's been said in the trial.

The Court has the prerogative to deal with the interruptions that he has continually imposed here on all of us and is now -- in the closing phase of this process he's interfering with his own attorney's presentation in his behalf.

We'll set up during the noon hour. We will have electronic people in here to set up the camera so Mr. Lightsey can be in a back room and have -- we will have a television camera here, and we will have it then sent back to the room in which Mr. Lightsey will be with several guards. And he will not be then afforded an opportunity to continue to interfere with the presentation by his counsel.

I'm sorry to delay this, but we're getting to the point that we're going

to finish this case today one way or the other, folks, and your deliberations, of course, will be after that finish. . . .

(32 RT 6875-6876.)

Outside the jury's presence, the prosecutor stated that she agreed with the court's actions of removing appellant from the courtroom, and the court responded:

THE COURT: . . . Mr. Lightsey has for some time been interruptive in his conduct here. And the Court would make an observation that, notwithstanding the interruptive conduct of the defendant, the jurors have been able to hear most everything that has been said except when the Court was possibly admonishing Mr. Lightsey to quiet down when he was talking and his attorney was telling him to not talk. Substantially all the presentation in the courtroom has been observed and heard by the jurors.

(32 RT 6878.)

When court reconvened outside the jury's presence, the court stated:

THE COURT: . . . At the noon break, Mr. Lightsey was being so disruptive that we had to break early. He was in the process of interrupting his own attorney, interfering with his own attorney's ability to express his closing remarks to the jurors.

And I advised the jurors that we would remove Mr. Lightsey from the courtroom and place him in a back room with a video monitor. And we have done that. That camera should be probably vectored up here, Kevin. So if Mr. Lightsey cares to hear my remarks, he will be availed of that opportunity.

[¶ . . . ¶]

THE COURT: Now, that those comments were for the record, so that the record would reflect that the procedure that we're now pursuing, Mr. Lightsey is in that jury room in the back hallway about fifty feet from this courtroom. And he's accompanied by guards at that location and will be able to observe the proceedings here in court and hear what's being said.

I have had the attorneys for the defendant take a look at the conditions that are in place there. And I believe they've been able to observe the conditions under the defendant is monitoring this process through that remote monitor. Is that correct, counsel?

MR. GILLIS: Yes, your Honor.

THE COURT: You have any suggestions or comments regarding what we have done at kind of a later moment here, to set this up to

accommodate his continuing wish to be able to observe and hear these proceedings.

MR. GILLIS: In my opinion, you accommodated him very well with this video camera, your Honor.

(32 RT 6879-6880.)

The court then advised counsel and appellant that one of the jurors had gone to the hospital as a result of his involvement in appellant's case. (32 RT 6881-6882.) With counsels' concurrence, the court placed one of the alternate jurors on the jury. (32 RT 6883-6888, 6894.) The court then stated that he personally spoken to appellant regarding his conduct:

> The other thing I need to tell you is that I told Mr. Lightsey off the record and in the room where he's sequestered, if that's the right term, that it's the court's [intention] to keep him there even during the verdict stage of this process unless he expresses to his counsel that he give them the full assurance that he's not going to have any reaction, vocal or otherwise, to the reading of the verdict. If he fails to give you that, counsel, counsel for the defendant, I intend to leave him where he is and let him observe the reading of the verdict from that point as we know that previously it was that activity that triggered an outburst as well.
>
> So I think it's best that he stay where he is unless he can give us the full assurance of cooperation.

(32 RT 6888-6889.)

The jury returned to the courtroom, defense counsel Gillis completed his closing argument, and the court instructed the jury. After the jury retired to deliberate, the court asked the defense counsel "to talk to Mr. Lightsey to see if he want to come in here and give us his full assurance of his responsibilities as it relates to his conduct for the reading of the verdict." (32 RT 6933.)

At 10:00 a.m. the next morning, June 30, 1995, the court reconvened and announced that the jury had reached a verdict. (33 RT 6939-6940.) The court asked the defense counsel whether they had discussed with appellant "the possibility of his returning to the courtroom to be present during the reading of the verdict?" (33 RT 6940.) The defense counsels stated that

appellant had promised "that he will not make any outbursts or interfere with the proceedings." (*Ibid.*) The court ordered that appellant be returned to the courtroom. (33 RT 6941.) In appellant's presence, the defense counsel Dougherty stated that appellant wanted to make a statement to the jury:

> MR. DOUGHERTY: Mr. Lightsey has asked me one other think to communicate to the Court, that he would like to make a statement to the jury. I have told him procedurally that's not proper, but --
>
> THE COURT: That's exactly right. It's not proper. He's made too many statements to this jury.
>
> We have a juror in this case that had to be excused because of the stress that that juror was put under by, amongst other things, Mr. Lightsey's conduct[] and his remarks. And I'm not going to allow him to impose any further anxieties or stresses on these jurors. So that request is denied. [¶] Anything further?
>
> THE DEFENDANT: You can't blame me for that elderly man's heart condition.
>
> THE COURT: Mr. Lightsey, you're here with the representation through your counsel that you're going to not blurt out things such as you just have done. You understand that?
>
> THE DEFENDANT: Yes. I just resent the accusation that you blame me for the elderly man's --
>
> THE COURT: All right. Take him out of here. Put him back into the jury room.
>
> We'll proceed with a verdict reading here without his presence.
>
> (Mr. Lightsey exited the courtroom.)

(33 RT 6944-6945.)

The jury returned the death penalty verdict. (VIII CT 2331-2332, 2334; 33 RT 6947-6949.)

On the morning of August 15, 1995, appellant and counsel appeared in court for appellant's motions for a new trial and to modify the death verdict. (34 RT 6961.) Defense counsel Dougherty advised Judge Kelly that appellant erroneously believed the judge had previously stated it would deny the motion for a new trial and that appellant wanted the judge to withdraw from further proceedings in the case. (34 RT 6961-6962.) Judged Kelly explained he had never stated that he would deny the motion for a new trial. (34 RT 6962-6964.) Appellant interrupted the judge, who warned appellant regarding his

conduct. (34 RT 6963-6964.) Appellant continued to interrupt Judge Kelly, and the judge ordered that appellant be gagged. (34 RT 6964.) The court recessed and appellant was gagged. (See 34 RT 6964-6965.) Although appellant was gagged, defense counsel Dougherty advised the court that he and defense counsel Gillis were having difficulty hearing and paying attention to the court. (34 RT 6969.) Appellant disrupted defense counsel's argument to the court. (34 RT 6982.) The prosecutor commented regarding appellant's disruptive conduct:

> MS. GREEN: Your Honor, I'm going to be very brief. I want the record to reflect, however, that through the new trial motion argument and then throughout this argument Mr. Lightsey, although he is gagged, continues to be as loud as the Court and counsel and so distracting. It's very distracting to me. He's mouthing obscenities at me that I'm able to hear despite the fact that he's gagged.

(34 RT 6984.)

After listening to the arguments of counsel, the court denied appellant's motions for a new trial and to modify the judgment under section 190.4. (VIII CT 2379; 34 RT 6979, 6985-6989.)

When appellant's sentencing hearing commenced that afternoon, defense counsel Dougherty stated there was no legal cause why sentence could not be pronounced and waived formal arraignment for sentencing. (34 RT 6989.) The court addressed appellant:

> THE COURT: Before we proceed, so hopefully we can do this in an orderly, reasonable fashion this afternoon, I want to address a couple comments to you, Mr. Lightsey. As I told you previously on numerous occasions, I want you to be a participant in his process to the extent that it's responsible. I want you to have the opportunity at your sentencing to express your thoughts so long as they're expressed in an appropriate manner. And I indicated to your attorney at the conclusion of this morning's matter that it's my intent and the intent of the system that you be given the opportunity to express yourself so long as it's responsible.
>
> THE DEFENDANT: Your Honor, I've always had --
>
> THE COURT: Just a minute, Mr. Lightsey. If you stray from a responsible expression, we're going to find ourselves back in the same

situation we were in this morning when the Court it necessary to gag you. I don't want you to do that again. I hope you had an opportunity to at least have some reflection so that won't be necessary. [¶] You will be given an opportunity to express yourself. At that time you may express yourself, but until then I want you to listen carefully to my comments, please.

(34 RT 6989-6990.)

The court discussed the letters from the victim's family and the probation officer's report, which recommended the death penalty. (34 RT 6992-6997.) The court stated it would allow appellant to make a statement to the court:

[THE COURT:] . . . Before I impose sentence and read the commitment and judgment in this matter, counsel for the defendant have any further comment?

THE DEFENDANT: Yes, your Honor. And I would like to -- yes, sir. Yes, Your Honor, I do.

THE COURT: Just a second.

MR. DOUGHERTY: No, your Honor.

THE DEFENDANT: I thought he said the defendant.

THE COURT: Now I'm going to allow you to make an expression, Mr. Lightsey.

(34 RT 6997-6998.)

Appellant gave a lengthy and detailed statement consisting of about 20 pages of reporter's transcript. (34 RT 6998-7019.) The court then stated, "Mr. Lightsey, we are getting into personal attacks again. I'm going to cut you off now. You've had an opportunity to express yourself. [¶] The Court's going to proceed with imposing sentences." (34 RT 7018-7019.)

The court sentenced appellant to death for the murder. (VIII CT 2380, 2415, 2417-2421, 2424-2428; 20 SCT 5947-5251; 34 RT 7019-7028.) For the robbery and burglary, the court imposed the upper term of six years each, plus one year each for the personal weapon use enhancement, the sentences stayed pursuant to section 654. (VIII CT 2380-2381, 2415, 2429; 34 RT 7021-7022.) For the possession of a firearm by a felon, the court imposed the upper term of three years, plus one year for the prior prison term, the sentence stayed

pursuant to section 654. (VIII CT 2381, 2415-2416, 2429; 34 RT 7022.)

B. There Is No Statutory Or Constitutional Right To Make A Personal Statement To The Jury Prior To The Announcement of the Penalty Verdict

Appellant claims the trial judge violated section 1200 and his constitutional rights by refusing to allow him to address the jury before the penalty verdict was announced. "[N]either the constitution nor the death penalty statute gives defendant the right to testify with a unique immunity from examination by the People." (*People v. Keenan* (1988) 46 Cal.3d 478, 511; see *People v. Carter* (2005) 36 Cal.4th 1215, 1276; *People v. Davenport* (1995) 11 Cal.4th 1171, 1209 [rejecting capital defendant's claim that trial court erred in refusing his request to plead for mercy without being subject to cross-examination].) "[T]he defendant does *not* have the '"right to address the sentencer without being subject to cross-examination" in capital cases.' (*People v. Robbins* (1988) 45 Cal.3d 867, 888-890 [].)" (*People v. Hunter* (1989) 49 Cal.3d 957, 989, italics in original.) As this Court explained in *People v. Keenan, supra,* 46 Cal.3d at page 511,"*Robbins* is persuasive that the right of allocution is unavailable in California capital penalty trials. Its principal purpose in such cases would be to cloak defendant's right to testify with a unique immunity from cross-examination by the People. Recognition of a right to allocution is unnecessary to a fair trial and runs counter to the [death penalty] statute's purpose of providing the sentencer with all relevant information bearing on the appropriate penalty." (See *People v. Lucero* (2000) 23 Cal.4th 692, 717 [rejecting defendant's equal protection claim that failure to permit allocution violates right of capital defendant to equal protection because noncapital defendant may address court at sentencing without being subject to cross-examination because no court has held that in noncapital case trial court must offer defendant allocution].)

Section 1200 provides:

> When the defendant appears for judgment he must be informed by the court, or by the clerk, under its direction, of the nature of the charge against him and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him.

The issue of whether section 1200 gives a defendant a statutory right to make a personal statement urging leniency at sentencing[23] is irrelevant in this case. Appellant gave a lengthy (consisting of about 20 pages of reporter's transcript) personal statement to the court before the court pronounced judgment. (See 34 RT 6998-7019.)

Appellant relies upon the federal appellate case of *Boardman v. Estelle* (9th Cir. 1992) 957 F.2d 1523, which held that the right of the noncapital defendant to speak at his sentencing hearing was constitutionally secured.[24] (*Id.* at p. 1530; see AOB 229-232.) Decisions of the lower federal courts interpreting federal law are not binding on state courts. (See *Raven v. Deukmejian, supra,* 52 Cal.3d at p. 352; *People v. Bradley, supra,* 1 Cal.3d at p. 86.) Even assuming any precedential value, *Boardman* does not further appellant's argument. In *People v. Clark* (1993) 5 Cal.4th 950 this Court explained:

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23. The issue of whether the trial court denied the noncapital defendant due process or violated his right of allocution when it denied his request to speak on his own behalf before the court imposed sentence is now pending before this Court in *People v. Evans*, S0141357 (A107822, review granted April 26, 2006). (See *People v. Cross* (1963) 213 Cal.App.2d 678; *People v. Sanchez* (1977) 72 Cal.App.3d 356.)

24. Contrary to the Ninth Circuit, other federal circuits have concluded that the failure to allow allocution is not an error of constitutional dimension. (See, e.g., *Milone v. Camp* (7th Cir. 1994) 22 F.3d 693, 704, fn. 10; *United States v. Tamayo* (11th Cir. 1996) 80 F.3d 1514, 1518-1519, fn. 5.) The Supreme Court has "held that failure to ensure such personal participation in the criminal process is not necessarily a constitutional flaw in the conviction." (*McGautha v. California* (1971) 402 U.S. 183, 220, citing *Hill v. United States* (1962) 368 U.S. 424.) And, even under *Boardman*, denial of allocution is subject to harmless error analysis. (*Boardman, supra,* 957 F.2d at p. 1530.)

> This Court repeatedly has held that a capital defendant has no right to address the penalty phase jury in allocution. (*People v. Nicolaus* [(1991) 54 Cal.3d 551,] 583 []; *People v. Keenan* (1988) 46 Cal.3d 478, 511 []; *People v. Robbins* (1988) 45 Cal.3d 867, 888-890 [].) Defendant presents no persuasive reason for this court to reconsider its prior rulings.
>
> The recent decision of the Ninth Circuit in *Boardman v. Estelle* (9th Cir.1992) 957 F.2d 1523 does not persuade us to reach a different result. In that case, the Ninth Circuit held that the failure to permit a noncapital defendant who requests to speak in allocution to do so violates federal due process rights. However, in our *Robbins* decision, we found *Ashe v. State of N.C.* (4th Cir. 1978) 586 F.2d 334, 336 a similar federal ruling, to be distinguishable. We wrote: "In the noncapital sentencing context, a defendant does not generally have an opportunity to testify as to what penalty he feels is appropriate. Accordingly, *Ashe* might be correct in saying a defendant may not be denied that opportunity when he requests it. The sentencing phase of a capital trial, on the other hand, specifically provides for such testimony. The defendant is allowed to present evidence as well as take the stand and address the sentencer. Given this, we fail to see the need, much less a constitutional requirement, for a corresponding 'right to address the sentencer without being subject to cross-examination' in capital cases." (*People v. Robbins, supra,* 45 Cal.3d at p. 889 [].)

(*Clark, supra,* at p. 1036.)

Boardman is not applicable to capital defendants such as appellant. *Boardman* held the noncapital defendant had the right to address the court before the sentence was announced; it did not hold that the capital defendant had the right to address the jury before the penalty verdict was announced. Nor can the holding of *Boardman* be extended to give the capital defendant the right to address the jury before the penalty is announced. At common law, the defendant in a felony case was entitled to address the court before the court pronounced judgment. "The right to allocution emerged from an early time when criminal defendants had no right to counsel and could not testify in their own behalf, and with few exceptions the only punishment upon conviction of a felony was death. [Citations.]" (*In re Shannon B.* (1994) 22 Cal.App.4th 1235, 1240.) The purpose of this "right to allocution" was to "permit the

assertion of one of the few grounds for avoiding or delaying execution: the defendant had received a pardon from the crown, was insane, was pregnant, was not the person convicted, or was entitled to claim 'benefit of clergy.' [Citations .]" (*Ibid.*)

The Federal Rules of Criminal Procedure include a "right of allocution" that extends beyond the common law right, allowing the defendant a right to speak personally in his own behalf at sentencing. (Fed. Rules Crim. Proc., rule 32(i)(4)(A)(ii); see *Green v. United States* (1961) 365 U.S. 301, 304.) But a sentencing judge's failure to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed, although a violation of the federal rule, is not an error of constitutional dimension. (*Hill v. United States* (1962) 368 U.S. 424, 428.)

The legal rationale under the common law and federal rules for the defendant's right of allocution at sentencing does not support a California capital defendant's right to address the jury before the penalty verdict is announced. Appellant had no statutory or constitutional right to make a non-testimonial statement to the jury. Appellant had the right, which he exercised, to testify before the jury; and the People had the right to cross-examine appellant regarding his testimony. Accordingly, the penalty phase jury was instructed that it was to "determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise" (CALJIC No. 8.84.1; VIII CT 2262; 32 RT 6904) and to "decide all questions of fact in this case from the evidence received in this trial and not from any other source" (CALJIC No. 1.03; VIII CT 2265; 32 RT 6906) and that "[a]fter having heard all of the evidence and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed" (CALJIC No. 8.88; VIII CT 2315; 32 RT 6929.) The court also gave a special instruction regarding appellant's courtroom

conduct:

> The defendant's conduct in this courtroom at the time that the verdict was read is not relevant evidence on the issue of what penalty should be imposed.
>
> His demeanor and statements in this court at the time the verdict was read cannot be considered by you in any way in determining the appropriate penalty to be imposed.

(VIII CT 2307; 32 RT 6926.)

There was no violation of appellant's statutory or constitutional rights.

XI.

THE TRIAL COURT PROPERLY DID NOT INSTRUCT THE JURY SUA SPONTE TO DISREGARD APPELLANT'S SHACKLES BECAUSE THE SHACKLES WERE NOT VISIBLE TO THE JURY

Appellant contends his death sentence must be reversed because the shackles were visible to the jury and the trial court failed to instruct the jury sua sponte pursuant to CALJIC No. 1.04 to disregard the shackles during its sentence deliberations. He alleges violations of his federal constitutional rights to a fair trial, due process, and a proportionate and reliable death verdict (U.S. Const., Amends. V, VI, VIII, & XIV; Cal. Const., art. I, §§ 7, 15, 17, & 28). He further alleges a violation of his federal constitutional due process "liberty interest" under California law to receive proper jury instructions. (AOB 241-246.)

For the reasons set forth herein in addressing argument VI, the trial court was required not to instruct the jury sua sponte to disregard appellant's shackles because the shackles were not visible to the jury. Although appellant testified during the penalty phase, this Court can infer that the jury never saw appellant's shackles. During prior discussions regarding the shackles, the trial court noted that if appellant testified, they would remove the jurors from the courtroom before appellant's chain was bolted to the eye bolt in the witness stand. (RT [4/13/95] 540.) The record indicates that before appellant

testified, he was moved to the witness stand outside the jury's presence; and after he finished testifying, he was moved from the witness stand to the defense counsels' table during a recess outside the jury's presence. (30 RT 6318-6319, 6321, 6394, 6566, 6650, 6659.) Appellant remained seated when he was sworn on the witness stand. (30 RT 6337.)

There was no violation of appellant's statutory or constitutional rights.

XII.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL

Appellant contends that in denying his motion for a new trial, the trial court failed to address his claims of prosecutorial misconduct and the allegedly erroneous denial of his section 995 motion. He alleges violations of his state and federal constitutional rights to due process and a proportionate and reliable death verdict (U.S. Const., Amends. V, VI, VIII, & XIV; Cal. Const., art. I, §§ 7, 15, 17, & 28). He further alleges a violation of his federal constitutional due process "liberty interest" right to have his new trial motion properly considered. (AOB 247-262.)

A. Relevant Proceedings

The defense counsel filed a motion for a new trial on August 14, 1995. (VIII CT 2357-2368.) The motion alleged that the verdicts and findings of the jury were contrary to the law and evidence; the testifying district attorney was guilty of prejudicial misconduct; and the court erred in deciding a question of law. (VIII CT 2365.)

The alleged trial court error of law was that the trial court erroneously denied appellant's motion to set aside the information under section 995. (VIII CT 2367.) Appellant's section 995 motion of November 17, 1999, alleged there was insufficient evidence that appellant committed robbery, burglary, receiving stolen property, and capital murder. (V CT 1471-1521.)

The alleged misconduct was that Deputy District Attorney John Somers testified that he did not remember seeing appellant specifically the second time the case was called, which was at or very shortly after 10:30, but he recalled seeing appellant walking to the courtroom. (VIII CT 2361.) The defense alleged that "Mr. Somers could not have seen [appellant] walking [to] the courtroom for the second call. He testified at the preliminary hearing that he finished the third call about 10[:]45." (*Ibid.*) Somers's alleged misconduct was that his trial testimony "contradict[ed] recorded facts of the happenings" in the courtroom on July 7, 1993. (VIII CT 2367.)

On August 15, 1995, the court held a hearing on appellant's motion for a new trial and invited arguments from counsel. (34 RT 6967.) Defense counsel Dougherty argued that appellant's alleged alibi defense warranted a new trial. (34 RT 6969-6974.) The prosecutor argued that in his written motion, the defense counsel claimed nonstatutory grounds for a new trial, including prosecutorial misconduct of witness John Somers and the erroneous denial of appellant's section 995 motion. (34 RT 6974-6975.)

The court denied appellant's motion for a new trial:

> THE COURT: As I've indicated in my earlier remarks, I've had a substantial amount of time to review the pleadings in this matter, in particular addressing the particular matters before the Court right now, which is the motion for new trial. And the Court, of course, heard all the evidence in this case. And through an independent process of evaluating the evidence and the alleged alibi, the Court is not convinced that the motion should be granted.
>
> The verdict was not contrary to the law nor the evidence presented, and it's in light of that and in light of the review of the various arguments presented here today, along with the written motion and the written response of the People, the Court's going to deny the motion for new trial.

(34 RT 69778-6979; see VIII CT 2379.)

B. The Trial Court Properly Denied Appellant's Motion For A New Trial

When a verdict has been rendered or a finding made against the defendant, he may move for a new trial on various statutory grounds including that the verdict is contrary to the law or evidence. [Citation.] A trial court may grant a motion for new trial only if the defendant demonstrates reversible error. . . . On appeal, a trial court's ruling on a motion for new trial is reviewed for abuse of discretion. [Citation.] Its ruling will not be disturbed on appeal '"unless a manifest and unmistakable abuse of discretion clearly appears." [Citation.]' [Citation.]

(*People v. Guerra, supra,* 37 Cal.4th at pp. 1159-1160.)

Section 1181 provides, in relevant part:

> When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only:
>
> [¶ . . . ¶]
>
> 5. When the court has . . . erred in the decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury . . . .

Appellant does not contend the trial court did not apply the proper standard to his motion for new trial; he simply alleges the trial court did not state its reasons for denying the motion on the grounds of prosecutorial misconduct and error of law.

In *Jie v. Liang Tai Knitwear Co.* (2001) 89 Cal.App.4th 654, the trial court denied a motion for new trial without making any findings. The appellate court applied the standard presumption in affirming the judgment:

> '"An order is presumed correct; all intendments are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown.' [Citation.] We must 'view the record in the light most favorable to the trial court's ruling and defer to its findings of historical fact, whether express or implied, if they are supported by substantial evidence.' [Citation .]" (*People v. Carpenter* (1999) 21

> Cal.4th 1016, 1046 [].) Implicit in the order denying the motion for a new trial is a finding that the declarant was not credible. Such an implicit finding is sufficient to support the trial court's order denying the motion for a new trial.

(*Jie, supra,* at pp. 666-667, fn. omitted.)

Here, the trial court made no express findings denying the new trial motion. Applying the principles expressed in *Jie v. Liang Tai Knitwear Co., supra,* 89 Cal.App.4th 654, it is inferred that the trial court made implied findings that the claims of prosecutorial misconduct and trial court error were meritless. These rulings were clearly correct.

To the extent the trial court adopted the prosecutor's argument that a new trial could not be granted on the ground of alleged prosecutorial misconduct under section 1181, subdivision (5), no abuse of discretion occurred. By its terms, subdivision (5) is limited to "the district attorney or other counsel prosecuting the case." As a matter of law, John Somers was not the prosecuting district attorney within the meaning of section 1181, subdivision (5). At trial, Somers testified that he was originally assigned to prosecute appellant's case. (25 RT 5461.) He was recused from the case before the preliminary hearing in the municipal court because he was a potential witness. (*Ibid.*) Deputy district attorney Lisa Green was assigned to prosecute the case. The trial court did not abuse its discretion in denying appellant's motion for a new trial based on his claim of prosecutorial misconduct. (Compare with *People v. Hardy* (1992) 2 Cal.4th 86, 213 [Trial court is "in a better position to" decide any prosecutorial misconduct did not necessitate new trial and "[b]ecause the decision was not 'plainly wrong,' we have no occasion to upset it"], citation omitted.)

To the extent the trial court denied appellant's motion for a new trial on the ground of alleged prosecutorial misconduct on the merits, no abuse of discretion occurred. "It is true the section expressly limits the grant of a new trial to only the listed grounds, and [the alleged misconduct of a recused

district attorney] is not among them. Nevertheless, the statute should not be read to limit the constitutional duty of the trial courts to ensure that defendants be accorded due process of law. . . .The Legislature has no power, of course, to limit this constitutional obligation by statute. [Citation.]" (*People v. Fosselman* (1983) 33 Cal.3d 572, 582.) Appellant proffered no evidence in support of his claim that recused district attorney John Somers committed prosecutorial misconduct. It can be inferred from the record that the trial court determined that there was insufficient evidence of alleged prosecutorial misconduct by Somers, or that if it occurred, it was not prejudicial. The conduct of the recused prosecutor did not contribute to the verdict and reversal of the judgment is not justified on this ground. (See *People v. Reyes* (1974) 12 Cal.3d 486, 506; *People v. Montgomery* (1976) 61 Cal.App.3d 718, 734.)

To the extent the trial court adopted the prosecutor's argument that a new trial could not be granted on the ground of alleged trial court error in denying appellant's section 995 motion (which claimed there was insufficient evidence), no abuse of discretion occurred. Appellant cannot relitigate at trial the merits of an unsuccessful pretrial section 995 motion by moving for a new trial. The ruling of the trial court in denying appellant's motion to set aside the information under section 995 can be reviewed pretrial by writ of prohibition pursuant to section 999a or after conviction upon an appeal from the judgment. (See *People v. Turner* (1870) 39 Cal. 370, 371 ["The action of the Court upon the demurrer, and upon the motion to set aside the indictment, can only be reviewed in the appellate Court on appeal from the final judgment."]; compare with *People v. Superior Court* (1971) 4 Cal.3d 605, 611 [defendant cannot relitigate at trial merits of unsuccessful pretrial motion to suppress by moving for new trial under section 1181, subdivision (5); any judicial error occurring at pretrial hearing would be reviewable only by petition for extraordinary relief under section 1538.5 subdivision (i), or on appeal from conviction following trial].) In *Turner, supra,* the Court explained:

> Thus, it will be seen, that a motion for a new trial presupposes a sufficient valid indictment, upon which, with sufficient legal evidence in support of its allegations, a legal verdict and a valid, binding judgment may be pronounced. The statute does contemplate or authorize a re-trial upon an insufficient or invalid indictment; hence, a motion for a new trial cannot properly be based upon any objection to the sufficiency or validity of the indictment, or any errors or irregularities occurring in the proceedings before issue of fact joined by plea to a good and sufficient indictment, the object and purpose of a re-trial being simply to enable the trial Court to avoid the errors and irregularities claimed to have occurred on the former trial to the prejudice of the rights secured to the defendant.

(*Id.* at p. 371; see *People v. Duncan* (1942) 50 Cal.App.2d 184, 188 ["[A]n attack upon either an indictment or an information cannot be considered by this court upon an appeal from an order denying motion for new trial."]; *People v. Johnston* (1940) 37 Cal.App.2d 606, 608 ["The action of the court in overruling a demurrer can be reviewed in this court only upon an appeal from a judgment."].)

To the extent the trial court denied appellant's motion for a new trial on the ground of alleged trial court error on the merits, no abuse of discretion occurred. The trial court implicitly and properly concluded the committing magistrate had some rational ground for assuming the possibility that the offenses charged against appellant had been committed and that appellant was guilty of committing them. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 654; *Salazar v. Superior Court* (2000) 83 Cal.App.4th 840, 842; *People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1226.) Notably, irregularities in pretrial commitment proceedings that are not jurisdictional in the fundamental sense require reversal on appeal only where the defendant shows he was deprived of due process or suffered prejudice as a result. (*People v. Millwee* (1998) 18 Cal.4th 96, 121, citing *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.) Errors in the denial of a section 995 motion claiming insufficiency of the evidence are not jurisdictional in the fundamental sense. (*People v. Lewis, supra,* 39 Cal.4th at pp. 990-991; see *People v.*

Mattson (1990) 50 Cal.3d 826, 870.) Alleged errors in the magistrate's denial of appellant's section 995 motion claiming insufficiency of the evidence is not jurisdictional; and appellant makes no claim on appeal that the evidence was insufficient to support the guilty verdicts. Appellant has not shown any denial of due process or prejudice warranting relief.

There was no violation of appellant's statutory or constitutional rights.

XIII.

THE APPELLATE REVIEW PROCESS IS NOT IMPERMISSIBLY INFLUENCED BY POLITICAL CONSIDERATIONS IN CAPITAL CASES

Appellant contends his death sentence must be reversed because "the automatic appeal process in California is too tainted by political considerations to ensure [his] constitutional rights are respected." He alleges violations of his state and federal constitutional rights (U.S. Const., Amends. V, VI, VIII, & XIV; Cal. Const., art. I, §§ 1, 7, 9, 15, 16, 17, & 24). (AOB 263-275.)

The appellate review process is not impermissibly influenced by political considerations in capital cases. (*People v. Stitely* (2005) 35 Cal.4th 514, 574; *People v. Maury* (2003) 30 Cal.4th 342, 440-441; *People v. Kipp* (2001) 26 Cal.4th 1100, 1140-1141; *People v. Hughes, supra,* 27 Cal.4th at p. 406.) Appellant's constitutional rights were not violated.

XIV.

APPELLANT WAS NOT DENIED HIS INTERNATIONAL RIGHTS

Appellant contends his verdict and death sentence must be reversed because he was denied his international rights to a fair trial by an independent tribunal and to minimum guarantees for the defense. (AOB 276-294.)

Appellant specifically contends he "was denied his internationally guaranteed rights to a fair trial by an independent tribunal and his right to

minimum guarantees for the defense under principles established by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration)." (AOB 276-277.)

To the extent appellant alleges violations of the International Covenant on Civil and Political Rights, which he alleges incorporates the Universal Declaration of Human Rights, his claim lacks merit, even assuming he has standing to invoke this covenant. "'International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements.'" (*People v. Brown* (2004) 33 Cal.4th 382, 404; *People v. Ramirez, supra,* 39 Cal.4th at p. 479; *People v. Harris* (2005) 37 Cal.4th 310, 366; *People v. Cornwell* (2005) 37 Cal.4th 50, 106; *People v. Turner* (2004) 34 Cal.4th 406, 439-440.) Applying those standards here, there are no errors under state or federal law whose cumulative effect was prejudicial. Accordingly, appellant has no basis for his claim of international law violations. (See *People v. Boyer* (2006) 38 Cal.4th 412, 489-490; *Cornwell, supra*; *People v. Blair, supra,* 36 Cal.4th at p. 755.)

XV.

CAPITAL SENTENCING DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant contends his death sentence must be reversed because the capital sentencing structure in California violates his federal constitutional rights to trial by jury, due process, freedom from cruel and unusual punishment, and a reliable verdict. (AOB 295-351.)

A. Section 190.2 Is Not Impermissibly Broad

Appellant contends section 190.2 is impermissibly broad. (AOB 295-305.) This claim should be rejected pursuant to the authority of *People v. Rogers* (2006) 39 Cal.4th 826:

> Specifically, we have held: "section 190.2 -- setting out the special circumstances that, if found true, render a defendant eligible for the death penalty – adequately narrows the category of death-eligible defendants in conformity with the requirements of the Eighth and Fourteenth Amendments." (*People v. Blair* [(2005) 36 Cal.4th 686,] 752 []; *People v. Barnett* (1998) 17 Cal.4th 1044, 1179 [].) The multiple-murder special circumstance, section 190.2, subdivision (a)(3), is not overly broad and does not focus improperly on the nature of the act rather than on the defendant's mental state. (*People v. Lucero* [(2000) 23 Cal.4th 692,] 740 []; see also *People v. Sapp* [(2003) 31 Cal.4th 240,] 286-287 [].)

(*Rogers, supra,* at pp. 892-893.)

B. Section 190.3(a) Is Not Arbitrary And Capricious

Appellant essentially contends that section 190.3(a) is arbitrary and capricious. (AOB 299-306.) This claim should be rejected pursuant to the authority of *People v. Manriquez* (2005) 37 Cal.4th 547:

> Section 190.3, factor (a), is not overbroad, nor does it allow for the arbitrary and capricious imposition of the death penalty. (*People v. Carter* [(2005)] 36 Cal.4th 1215, 1278 []; *People v. Maury* (2003) 30 Cal.4th 342, 439 []; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050-1053 [].)

(*Manriquez, supra,* at p. 589, fn. omitted; see *People v. Demetrulias* (2006) 39 Cal.4th 1, 43, citing *People v. Stitely, supra,* 35 Cal.4th at p. 573 and *People v. Snow* (2003) 30 Cal.4th 43, 125-126 ["California homicide law and the special circumstances listed in section 190.2 adequately narrow the class of murderers eligible for the death penalty, and the existence of prosecutorial discretion to seek the death penalty in a death-eligible case does not render the imposition of the penalty unconstitutionally arbitrary and capricious."].)

C. The Jury Is Not Required To Find Unanimously Beyond A Reasonable Doubt That The Aggravating Factors Exist

Appellant contends that the aggravating factors must be found beyond a reasonable doubt by a unanimous jury. (AOB 306-324.) This claim should

be rejected for the reasons set forth in *People v. Demetrulias, supra,* 39 Cal.4th 1:

> Our statute "is not invalid for failing to require (1) written findings or unanimity as to aggravating factors, (2) proof of all aggravating factors beyond a reasonable doubt, (3) findings that aggravation outweighs mitigation beyond a reasonable doubt, or (4) findings that death is the appropriate penalty beyond a reasonable doubt." (*People v. Snow* [(2003) 30 Cal.4th 43,] 126 [].) Generally, no instruction on burden of proof is required in a California penalty trial. (*People v. Gray* (2005) 37 Cal.4th 168,] 236 [].)

(*Demetrulias, supra,* at p. 43; accord *People v. Rogers*, 39 Cal.4th at p. 893; *People v. Blair, supra,* 36 Cal.4th at p. 753; *People v. Davis* (2005) 36 Cal.4th 510, 571; *People v. Brown, supra,* 33 Cal.4th at p. 402.) Unanimity is required only as to the appropriate penalty. (*People v. Stanley* (2006) 39 Cal.4th 913, 963; *People v. Anderson, supra,* 25 Cal.4th at p. 590.)

Appellant argues that *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) 542 U.S. 296 requires that the aggravating factors be found beyond a reasonable doubt by a unanimous jury. (AOB 306-320.) This claim should be rejected. In *People v. Stanley, supra,* 39 Cal.4th 913, this Court explained:

> Defendant nonetheless cites the high court's recent decision in *Ring v. Arizona* (2002) 536 U.S. 584 [] as requiring that California juries find the death penalty appropriate beyond a reasonable doubt. Not so. In *Ring* the high court held that Arizona's death penalty scheme was unconstitutional "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." (*Id.* at p. 609 [].) In *People v. Prieto* (2003) 30 Cal.4th 226 [], we explained that the rationale of *Ring* does not apply to the penalty phase of a capital murder trial in California. (*Id.* at p. 263 [].) That is because once a defendant has been convicted of first degree murder and one or more special circumstances have been found true under California's death penalty statute, the statutory maximum penalty is already set at death. (*Ibid.*) Thus, the high court's holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [] -- that any facts used to increase the maximum penalty must be found by a jury beyond a reasonable doubt -- does not apply and, accordingly, its subsequent holding in *Ring* is likewise inapplicable. As we explained

in *Prieto*, "Because any finding of aggravating factors during the penalty phase does not 'increase[] the penalty for a crime beyond the prescribed statutory maximum' (*Apprendi, supra,* 530 U.S. at p. 490 []), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*Prieto, supra,* 30 Cal.4th at p. 263 []; see also *People v. Ward* (2005) 36 Cal.4th 186, 221 []; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32 [].)

(*Stanley, supra,* 39 Cal.4th at pp. 963-964.)

Accordingly, in *People v. Morrison, supra,* 34 Cal.4th 698, this Court explained:

> We repeatedly have held that neither *Apprendi v. New Jersey* (2000) 530 U.S. 466 [] nor *Ring v. Arizona* (2002) 536 U.S. 584 [] affects California's death penalty law or otherwise justifies reconsideration of the foregoing decisions. (*People v. Cleveland* (2004) 32 Cal.4th 704, 765 []; *People v. Martinez* (2003) 31 Cal.4th 673, 700-701[]; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263 [].) And contrary to defendant's assertion, *Blakely v. Washington* (2004) 542 U.S. 296 [] does not undermine our analysis on the point. That recent decision simply relied on *Apprendi* and *Ring* to conclude that a state noncapital criminal defendant's Sixth Amendment right to trial by jury was violated where the facts supporting his sentence, which was above the standard range for the crime he committed, were neither admitted by the defendant nor found by a jury to be true beyond a reasonable doubt.

(*Morrison, supra,* at p. 730; accord *People v. Rogers, supra,* 39 Cal.4th at p. 893; *People v. Blair, supra,* 36 Cal.4th 686, cert. denied (2006) 547 U.S. 1107.)

D. The Jury Is Not Required to Find Beyond A Reasonable Doubt That The Aggravating Factors Outweigh The Mitigating Factors

Appellant contends that the jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. (AOB 320-324.) This claim should be rejected for the reasons set forth in *People v. Rogers, supra,* 39 Cal.4th 826:

> "[N]either the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment,

> requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty. [Citations.] Indeed, the trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase." (*People v. Blair* [(2005) 36 Cal.4th 686,] 753 []; *People v. Davis* (2005) 36 Cal.4th 510,] 571 [].)

(*Rogers, supra,* at p. 893; accord *People v. Demetrulias, supra,* 39 Cal.4th at p. 43; *People v. Gray* (2005) 37 Cal.4th 168, 236; *People v. Wilson* (2005) 36 Cal.4th 309, 360; *People v. Snow, supra,* 30 Cal.4th at p. 126.)

Moreover, "[s]ince neither capital defendants nor noncapital defendants have their penalties fixed under the 'beyond a reasonable doubt' standard of proof, the death penalty does not in that respect violate principles of equal protection. (*People v. Marshall* (1990) 50 Cal.3d 907, 936 [].)" (*People v. Stanley, supra,* 39 Cal.4th at p. 963.)

E. The Jury Is Not Required To Find By A Preponderance Of The Evidence That The Aggravating Factors Exist, The Aggravating Factors Outweigh The Mitigating Factors, And Death Is The Appropriate Sentence

Appellant contends that the jury must find by a preponderance of the evidence that the aggravating factors exist, the aggravating factors outweigh the mitigating factors, and death is the appropriate sentence. (AOB 324-327.) This claim should be rejected for the reasons set forth in *People v. Stanley, supra,* 39 Cal.4th 913:

> Defendant contends the death penalty law is unconstitutional in that it fails to require the jury to be instructed on certain burdens and standards of proof as to aggravating and mitigating evidence. It is settled, however, that California's death penalty law is not unconstitutional for failing to impose a burden of proof -- whether beyond a reasonable doubt or by a preponderance of the evidence -- as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence. ([*People v. Brown* (2004) 33 Cal.4th 382,] 401 []; *People v. Lenart* (2004) 32 Cal.4th 1107, 1136 [];

People v. Hillhouse (2002) 27 Cal.4th 469, 510-511 []; [*People v. Fairbank* (1997) 16 Cal.4th 1223,] 1255 [].)

(*Stanley, supra,* at p. 964.)

Appellant's claim should be rejected.

F. The Trial Court Is Not Required To Instruct The Jury That There Is No Burden of Proof

Appellant contends that the trial court must instruct the jury that there is no burden of proof at the penalty phase. (AOB 327.)

"[T]he trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase. (*People v. Carpenter* (1997) 15 Cal.4th 312, 417-418 []; *People v. Holt* (1997) 15 Cal.4th 619, 682-684 []; *People v. Hayes* (1990) 52 Cal.3d 577, 643 [].)" (*People v. Blair, supra,* 36 Cal.4th at p. 753; accord *People v. Stanley, supra,* 39 Cal.4th at p. 964; *People v. Gray, supra,* 37 Cal.4th at p. 236.) Appellant's claim should be rejected.

G. The Jury Is Not Required To Make Written Findings Of Aggravating Factors

Appellant contends the jury must make written findings of aggravating factors. (AOB 327-331.)

The jury is not required to make written findings regarding aggravating factors. (*People v. Rogers, supra,* 39 Cal.4th at p. 893, *People v. Blair, supra,* 36 Cal.4th at p. 754; *People v. Davis, supra,* 36 Cal.4th at p. 571; *People v. Griffin, supra,* 33 Cal.4th at pp. 593-594; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-778.)

H. Intercase Proportionality Is Not Required

Appellant contends that intercase proportionality is required in capital sentencing. (AOB 331-337.)

"Comparative intercase proportionality review by the trial or appellate

courts is not constitutionally required." (*People v. Snow, supra,* 30 Cal.4th at p. 126; accord *People v. Demetrulias, supra,* 39 Cal.4th at p. 44; *People v. Gray, supra,* 37 Cal.4th at p. 237; *People v. Blair, supra,* 36 Cal.4th at p. 753; *People v. Stitely, supra,* 35 Cal.4th at p. 574; *People v. Anderson, supra,* 25 Cal.4th at p. 602.) This Court has also rejected the claim that in view of the availability of certain procedural safeguards such as intercase proportionality review in noncapital cases, the denial of those same protections in capital cases violates equal protection principles under the Fourteenth Amendment. (See *Blair, supra,* at pp. 754-755; *People v. Ramos, supra,* 15 Cal.4th at p. 1182; *People v. Cox* (1991) 53 Cal.3d 618, 691; *People v. Allen* (1986) 42 Cal.3d 1222, 1287-1288.)

I. The Use Of Restrictive Adjectives In Mitigating Factors Was Proper

Appellant contends that the use of the adjectives "extreme" in factors (d) and (g) and "substantial" in factor (g) "acted as barriers to the consideration of mitigation." (AOB 338.)

"The use of adjectives such as 'extreme' and 'substantial' in section 190.3 penalty factors (d) and (g) does not impermissibly restrict the jury's consideration of mitigating evidence in violation of the Eighth or Fourteenth Amendments. (*People v. Arias* [(1996) 13 Cal.4th 92,] 188-189 []; *People v. McPeters* (1992) 2 Cal.4th 1148, 1191 [].)" (*People v. Blair, supra,* 36 Cal.4th at pp. 753-754; accord *People v. Demetrulias, supra,* 39 Cal.4th at p. 42; *People v. Wilson, supra,* 36 Cal.4th at p. 360; *People v. Harris, supra,* 37 Cal.4th at p. 365.) Appellant's claim should be rejected.

J. The Trial Court Was Not Required To Instruct That Mitigating Factors Were Relevant Solely As Potential Mitigators

Appellant contends that the trial court erroneously failed to instruct the jury which factors were relevant as mitigating circumstances. (AOB 356-340.)

The trial court is not required to instruct the jury which factors are relevant as mitigating circumstances and which factors are relevant as aggravating circumstances. (*People v. Wilson, supra,* 36 Cal.4th at p. 360; *People v. Farnam* (2002) 28 Cal.4th 107, 191-192.) This claim should be rejected.

K. There Was No Denial Of Procedural Safeguards

Appellant contends that the California death penalty law violates the Equal Protective Clause because it denies "procedural safeguards to capital defendants which are afforded to non-capital defendants." (AOB 340-348.)

This Court has rejected the claim that in view of the availability of certain procedural safeguards such as intercase proportionality review in noncapital cases, the denial of those same protections in capital cases violates equal protection principles under the Fourteenth Amendment. (See *People v. Blair, supra,* 36 Cal.4th at p. 754; *People v. Ramos, supra,* 15 Cal.4th at p. 1182; *People v. Cox, supra*, 53 Cal.3d at p. 691; *People v. Allen, supra,* 42 Cal.3d at pp. 1287-1288.) This Court has observed that capital case sentencing involves considerations wholly different from those involved in ordinary criminal sentencing. (*Blair, supra*; *People v. Danielson, supra,* 3 Cal.4th at pp. 719-720, overruled on other grounds in *Price v. Superior Court, supra,* 25 Cal.4th at p. 1069, fn. 13.) "By parity of reasoning, the availability of procedural protections such as jury unanimity or written factual findings in noncapital cases does not signify that California's death penalty statute violates equal protection principles." (*Blair, supra.*)

L. Use Of The Death Penalty Does Not Violate International Law And/Or The Constitution

Appellant contends that use of the death penalty as a regular form of punishment violates international law and the Eighth and Fourteenth Amendments. (AOB 348-351.)

In *People v. Brown, supra,* 33 Cal.4th 382, this Court rejected this

claim:

> Defendant further argues that California's death penalty statute is unconstitutional because the use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency. In a related vein, he contends that the statute violates international law as set forth in the International Covenant on Civil and Political Rights (ICCPR) and that use of the death penalty violates international standards because only a small minority of countries consider death an appropriate form of punishment.
>
> Setting aside whether defendant has standing to invoke the terms of an international treaty in this circumstance (see, e.g., Hanoch Tel-Oren v. Libyan Arab Republic (D.D.C.1981) 517 F.Supp. 542, 545-547), we question whether defendant's argument regarding the ICCPR fails at its premise. Although the United States is a signatory, it signed the treaty on the express condition "[t]hat the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." (138 Cong. Rec. S4781-01 (Apr. 2, 1992); see Comment, The Abolition of the Death Penalty: Does "Abolition" Really Mean What You Think It Means? (1999) 6 Ind. J. Global Legal Studies 721, 726 & fn. 33.) Given states' sovereignty in such matters within constitutional limitations, our federal system of government effectively compelled such a reservation.
>
> In any event, we have previously considered and rejected the various permutations of defendant's arguments. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 511 []; *People v. Jenkins* [(2000) 22 Cal.4th 900,] 1055 []; see also *People v. Ghent* (1987) 43 Cal.3d 739, 778-779 [] (maj. opn. of Lucas, C.J.); *id.* at pp. 780-781 [] (conc. opn. of Mosk, J.).) As succinctly stated in *People v. Hillhouse,* at page 511 []: "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]" Since we find no other defect in imposing the death penalty against defendant, we decline to find the law defective based on any provision of international law.

(*Brown, supra,* at pp. 403-404; accord *People v. Lewis, supra,* 39 Cal.4th at p. 1066; *People v. Demetrulias, supra,* 39 Cal.4th at p. 43; *People v. Snow, supra,* 30 Cal.4th at p. 127.)

Moreover, appellant's argument that the use of capital punishment "as regular punishment for substantial numbers of crimes" violates international

norms of human decency and hence the Eighth Amendment to the United States Constitution fails, at the outset, because California does not employ capital punishment in such a manner. (*People v. Demetrulias, supra,*39 Cal.4th at pp. 43-44.) "The death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1-190.9, 1239, subd. (b).)" (*Demetrulias, supra,* at p. 44; accord *People v. Blair, supra,* 36 Cal.4th at p. 754.)

Although international authorities and norms are relevant to the consideration whether a punishment is cruel and unusual under the Eighth Amendment, they are not controlling. (*Roper v. Simmons* (2005) 543 U.S. 551, 575-578; see also *id.* at pp. 604-605 (dis. opn. of O'Connor, J.).) "Eighth Amendment analysis instead hinges upon whether there is a national consensus in this country against a particular punishment. (*Roper v. Simmons, supra,* 543 U.S. at pp. 562-566 [].) Defendant makes no claim that there exists a national consensus against the use of the death penalty as currently employed." (*People v. Blair, supra,* 36 Cal.4th at pp. 754-755.)

XVI.

THERE IS NO CUMULATIVE EFFECT OF ERRORS

Appellant contends his convictions and death sentence must be reversed because the cumulative effect of the alleged errors violated his federal and state constitutional rights to due process, a trial before a fair and impartial jury, confrontation, the assistance of counsel, and a reliable penalty determination. (AOB 352-353.)

When evaluated collectively, any errors that may have possibly occurred in this case were harmless. Appellant was entitled to a fair trial, not

necessarily a perfect one. This is exactly what he got. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1009; see *People v. Stanley, supra,* 39 Cal.4th at p. 966; *People v. Johnson* (1992) 3 Cal.4th 1183, 1255.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: November 15, 2007

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 80960 words.

Dated: November 15, 2007

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. CHRISTOPHER C. LIGHTSEY** No.: **S048440**

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

On November 15, 2007, I served the attached **Respondent's Brief** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 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 November 15, 2007, at Sacramento, California.

_____
Declarant