In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CHRISTOPHER ALAN SPENCER,** **Defendant and Appellant.**

CAPITAL CASE

Case No. S057242

Santa Clara County Superior Court Case No. 155731
The Honorable Hugh F. Mullin, Judge

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STATEMENT OF THE CASE

An indictment filed in Santa Clara County Superior Court on May 9, 1992, charged appellant and codefendants Daniel Silveria ("Silveria"), John Travis ("Travis"), and Matthew Jennings ("Jennings") as follows:

Count One: Murder (Pen. Code, § 187)[1] of James Madden ("Madden");

Count Two: Robbery (§§ 211, 212.5, subd. (b)) of Madden; and

Count Three: Second degree burglary (§§ 459, 460.2) of a shop, LeeWards.

The indictment also charged appellant and Silveria with Count Six: Robbery (§§ 211, 212.5, subd. (b)) of Ben Graber.

The indictment further charged Silveria and Jennings as follows:

Count Four: Second degree Burglary (§§ 459, 460.2) of a shop, Sportsmen's Supply; and

Count Five: Robbery (§§ 211, 212.5, subd. (b)) of Ramsis Youssef.

As to Count One (murder), the indictment further alleged that appellant and his codefendants had committed the murder while lying in wait (§ 190.2, subd. (a)(15)), during the commission of a burglary (§ 190.2, subd. (a)(17)), and during the commission of a robbery (§ 190.2, subd. (a)(17)). As to appellant, Silveria, and Travis, the indictment alleged that the murder involved the infliction of torture (§ 190.2, subd. (a)(18)) and that each of them had used a deadly weapon, a knife, during the murder (§ 12022, subd. (b)).[2] (1 CT 231-236.)

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

[2] The indictment also alleged that Silveria had used a deadly and dangerous weapon, a stun gun, during the murder. (1 CT 233; see § 12022, subd. (b).)

On August 19, 1992, appellant pleaded not guilty to the charges and denied the allegations. (1 CT 264.)

On April 7, 1995, the trial court granted the defendants's motions to sever. The trial court ordered two trials with two co-defendants in each. Appellant and Jennings were to be tried together, each by an individual jury. (4 CT 1162-1165, 1166.)

On May 30, 1996, the trial court severed appellant's trial from Jennings's. (4 CT 1191.) On June 10, 1996, the trial court granted the prosecutor's motion to strike the lying-in-wait and torture special circumstances. (4 CT 1196.)

On August 21, 1996, the jury found appellant guilty of all charges. The jury also found true the special circumstances that appellant had committed the murder during the course of a burglary and a robbery. (5 CT 1277-1281.)

On September 19, 1996, the jury returned a verdict of death. (5 CT 1398, 1444.)

This appeal follows automatically from the verdict of death.

STATEMENT OF FACTS

I. GUILT PHASE

A. The Gavilan Bottle Shop Robbery

Around 10:00 p.m. on January 24, 1991, a group of men stopped Ben Graber as he was leaving work at the Gavilan Bottle Shop.[3] One of the men shocked Graber on his hip with a stun gun. The men robbed Graber and took cash from the store. (70 RT 20840-20844, 20850, 20845, 20848.)

[3] The Gavilan Bottle Shop is described as a liquor store. (See, e.g., 75 RT 21466.)

Graber told the police that he had been robbed by three men, and he identified Silveria from a photograph. (70 RT 20871, 20873, 20878.)

B. The Robbery Investigation

On January 25, 1991, San Jose Police Department Detective John Boyles was assigned to investigate the Gavilan Bottle Shop robbery, as well as another robbery at a Quik Stop involving the use of a stun gun. (70 RT 20854, 20856.) Another officer identified Troy Rackley ("Rackley") as a suspect. (70 RT 20859.) On January 28, Detective Boyles spoke with a man named Jim Ireland, who identified Matthew Jennings ("Jennings") as another suspect. (70 RT 20860.) Detective Boyles also became aware of a burglary from a gun shop outside San Jose in which the burglars had stolen a stun gun. (70 RT 20864.)

At approximately 5:00 p.m. that day, Detective Boyles received a call from a female informant who gave the names "Danny, John, Matt, Chris, Troy" as the first names of the stun gun robbers. (70 RT 20860, 20862.) At 9:00 p.m., Detective Boyles got a call from a night detective, who said that an informant had called and asked Detective Boyles to call her back. (70 RT 20865-20866.) Detective Boyles did so, and recognized the voice who answered as that of the earlier caller. She provided more information on the individuals she had named earlier. (70 RT 20865-20867.)

Meanwhile, San Jose Police Department Officer Brian Hyland had conducted computer research on Rackley and Jennings. (71 RT 20889.) He went to Jennings's address and met with Jennings's brothers. (71 RT 20892.) They said that appellant, Travis, Jennings, Silveria, and Rackley were all together. (71 RT 20893.) Officer Hyland then went to appellant's address, where he spoke with appellant's father. (71 RT 20895.) Finally, Officer Hyland went to Silveria's residence and spoke with Silveria's

stepfather and brother. (71 RT 20899.) Outside the house, he spoke with Julie Snedley.[4] (71 RT 20900.) Because Officer Hyland had heard that the group was planning to commit another robbery, he told everyone he spoke with to call 911 if they saw appellant, Silveria, Travis, Jennings, or Rackley. (71 RT 20901, 20908-20909.)

C. The Murder

Two workers at LeeWards, a craft store in Santa Clara, testified that Madden—the manager of the store—was the last one in the building on the night of January 28, 1991. (71 RT 20951-20952, 20966, 20975.) This was corroborated by two janitors who cleaned the store that evening. (72 RT 20996, 21010.)

At 10:53 p.m. on January 28, 1991, an alarm went off at the store. The alarm company dispatcher spoke with someone at the store at 11:02 p.m., and the person gave the correct "pass card number." (72 RT 21019, 21022-21023.) A tape of the call was played to the jury. (72 RT 21023-21024.)

The next morning, three LeeWards employees discovered Madden's body in a back office of the store. (72 RT 21073, 21083, 21130.)

D. After the Murder

On January 29, Susan Morrison saw five people looking at used cars at the dealership where she worked in Redwood City. (74 RT 21282.) She sold a 1979 white Triumph Spitfire to appellant for $2,950. Appellant traded in a red Dodge for $500 in credit, and paid an additional $500 cash for the down payment. (74 RT 21279, 21285, 21287, 21290, 21292.) Morrison also sold Silveria a 1980 Honda Civic. (74 RT 21279, 21285.) Silveria paid $1,000 for the down payment. (74 RT 21287.)

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[4] Julie's last name may be Smedley. (71 RT 20901-20902.)

That same day, Travis and Silveria purchased a 1979 Datsun Z from Ebrahim Bahar at Rose Auto Sales in San Jose. (74 RT 21300-21302.) They paid a $1,300 down payment in cash. (74 RT 21302.) Jennings bought a 1975 Chevy Luv pickup from Alex Altoh at United Auto World, paying a $1,100 down payment in cash. (74 RT 21310, 21313-21314.)

Alice Gutierrez, John Durbin, and Christopher Wagner were roommates in an apartment at 3939 Seven Trees Boulevard in San Jose. (74 RT 21387, 21396.) Appellant, Silveria, Travis, Jennings, and Rackley would occasionally come over to the apartment to hang out. (74 RT 21379.) On one occasion a few weeks before the murder, Gutierrez and Wagner had seen the group playing with a stun gun. (74 RT 21383, 21399, 21407.) On January 29, 1991, appellant and Jennings came to the apartment. (74 RT 21380.) They were wearing new clothes. (74 RT 21382, 21388, 21403.) Appellant had brought a suitcase with money. (75 RT 21447, 21449.) He asked for an atlas, saying he wanted to leave California and go to Kentucky. (74 RT 21381-21382, 21389, 21401-21402.) Appellant also asked Wagner to listen to a police scanner Wagner owned, "because he was concerned the police were looking for him." (74 RT 21399-21400.)

E. The Murder Investigation

Detective Sergeant Ted Keech responded to LeeWards at approximately 8:15 a.m. on January 29, 1991. (74 RT 21320.) He observed Madden's body lying on the floor next to a tipped-over chair. (74 RT 21325.) Madden's feet were bound with duct tape at the ankles, duct tape was wrapped around his face, and his hands were bound behind his back with duct tape. (74 RT 21325, 21333.) His body had numerous puncture wounds. (74 RT 21333.) In the office where the body was found, Sergeant Keech observed empty register trays and ripped-open plastic bags on top of an empty safe. (74 RT 21336-21337.) Sergeant Keech examined

LeeWards's personnel files, noting that Silveria and Travis had recently been terminated from jobs at the store. (74 RT 21341; see 73 RT 21155.)

That evening, Dana Withers was working as a security officer at the Oakridge Mall. (74 RT 21368.) A young man approached him, pointed out three persons in an arcade, and said they were wanted by the police. (74 RT 21370.) The young man said he was going to call the police. (74 RT 21370.)

Around 6:46 p.m. that evening, the police received a call from an informant claiming that two of the stun gun robbery suspects were at the Oakridge Mall. (74 RT 21360-21361.) The informant provided two names and a brief description of the suspects. (74 RT 21361.) Withers, who had been following the suspects, provided updated information to the police. (74 RT 21372.)

Officer Jean Sellman responded to Oakridge Mall and stopped two vehicles matching descriptions he had been given— a Datsun Z and a Honda Civic. (75 RT 21414-21416.) Silveria was driving the Honda, and Travis was driving the Datsun, with Rackley as a passenger. (75 RT 21417, 21418, 21437.) Officer Sellman arrested Silveria and searched the Honda. (75 RT 21415-21416.) He found $694.40 cash in the car, and a stun gun and roll of duct tape in the trunk. (75 RT 21419, 21425, 21429.) When Officer Sellman told Silveria he was under arrest for robbery, Silveria asked, "Are you sure . . .?" (75 RT 21431.) Officer Jeff Ricketts watched while another officer searched the Datsun, uncovering $1,544 in cash. (75 RT 21438.)

Officer Hyland, who also responded to Oakridge Mall, spoke with Silveria, who had requested to speak individually. (75 RT 21478.) Silveria said that appellant and Jennings were "going to leave town in an hour." (75 RT 21482.) Officer Hyland had Silveria page Jennings, and when Jennings called back, he said they were at a friend's house. (75 RT 21488.) Since

Silveria knew the location, but not the address, of the friend's house, the police brought him along. Silveria brought the officers to Gutierrez's, Durbin's, and Wagner's apartment at 3939 Seven Trees Boulevard, and pointed out appellant's new Spitfire in the parking lot. (75 RT 21488-21490.)

Officer Hyland went up to the apartment and saw Durbin watching television. (75 RT 21492.) Durbin said that appellant and Jennings had gone to the store, but would return. (75 RT 21494-21495.) Two containers, with $722 and $282 in cash, were found in the apartment. The package containing $722 belonged to appellant. (75 RT 21496, 21497.) Officers also found a pager which still displayed the number of the police department pay phone Silveria used to set up the fake meeting. (75 RT 21497.)

Officer Larry Esquivel waited downstairs for Jennings to return, which he had heard would be in a red Chevy pickup. (75 RT 21453.) He saw a vehicle matching that description approaching, and, when it stopped, he arrested the driver, Jennings. (75 RT 21453-21454.) Appellant was a passenger in the truck. (75 RT 21455.)

Detective George De La Rocha interviewed appellant at 11:30 p.m.[5] (75 RT 21510, 21517.) Appellant admitted driving his car to the Gavilan Bottle Shop robbery and said he had been paid $70 to do so. (75 RT 21513-21514.) He claimed that the robbery had been Silveria's idea. (75 RT 21520.) Appellant said that on the night of January 28, he had been in Redwood City with Silveria, Travis, Jennings, and Rackley. (75 RT 21517, 21518.)

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[5] A recording of the interview was played to the jury. (76 RT 21561.)

After learning that appellant, Silveria, Travis, Jennings, and Rackley were in custody, Detective Keech went to interview them, arriving in San Jose around midnight. (75 RT 21539-21541.) Because he heard that Silveria had been cooperative, he interviewed Silveria first. (75 RT 21543.) Next, he interviewed appellant. (75 RT 21547.) In the interview, appellant at first denied any involvement in the LeeWards burglary or Madden's murder. (1 CT Supp. #2 13-14.) Later, after many attempts to lie and minimize his involvement, appellant admitted having gone with Silveria, Travis, Jennings, and Rackley to burglarize the store. (1 CT Supp. #2 17.)

According to appellant, the plan was to wait until the manager left the store, then go in and take the money. (1 CT Supp. #2 17.) The group waited for Madden to come out, when Silveria confronted him. (1 CT Supp. #2 20.) Silveria told Madden to go back inside and zapped him with the stun gun. (1 CT Supp. #2 20.) Rackley and Jennings remained outside as lookouts. (1 CT Supp. #2 38.) Appellant, Silveria, and Travis went inside and bound Madden with duct tape. (1 CT Supp. #2 22-23, 33-34.) When the alarm company called, Silveria got the code card from Madden's wallet so Madden could give the pass code to the dispatcher. (1 CT Supp. #2 25.) Appellant took the duct tape off of Madden's face so he could speak, then re-taped him when the call was over. (1 CT Supp. #2 39.) Travis then told appellant, "Kill him," and appellant stabbed Madden three or four times in the chest. (1 CT Supp. #2 44.) While doing this, Silveria used the stun gun on Madden's leg. (1 CT Supp. #2 53.) Travis then took the knife and stabbed Madden in the chest. (1 CT Supp. #2 34, 45, 54.)

Appellant said he made about $1,500 from the LeeWards burglary.[6] (1 CT Supp. #2 36.) He spent $500 on his car, $200 on new clothes, and

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[6] Later, he said the group had "put out nine," presumably meaning that they had stolen approximately $9,000. (1 CT Supp. #2 48.) An

(continued...)

$54 on a motel room that night. (1 CT Supp. #2 36.) Appellant said he had given his tennis shoes to the Foot Locker at Oakridge Mall to throw away. (1 CT Supp. #2 29.)

Appellant said that Silveria and Travis had talked about killing Madden when planning the burglary, because he could identify them as former employees. (1 CT Supp. #2 28, 42-43.) Appellant also said that Silveria and Travis were making the decisions at the scene. (1 CT Supp. #2 53.) Appellant admitted puncturing the tire of Madden's truck, which had been parked in the LeeWards lot. (1 CT Supp. #2 55.)

Santa Clara Police Department Officer Brian Lane recovered several items from the Oakridge Mall dumpster, including a Converse shoe box containing a pair of shoes. (73 RT 21200.) An expert in shoe print comparison testified that one of those shoes matched a footprint at LeeWards. (76 RT 21597, 21599.)

Police also recovered the murder weapon in a cubbyhole at LeeWards. (77 RT 21614.) Elizabeth Skinner, a criminalist in the Santa Clara County Crime Laboratory and an expert on criminalistics, specifically forensic serology and physical comparison (76 RT 21582), testified that the blood on the knife could have come from Madden, but could not have come from appellant, Silveria, Travis, Jennings, or Rackley. (76 RT 21586.) She also testified that a piece of duct tape from Madden's head matched the end of the roll of duct tape recovered from Silveria's car. (76 RT 21591.)

Parviz Pakdaman, an assistant medical examiner at the Santa Clara County Coroner's Office, conducted Madden's autopsy and testified as an expert on pathology and the determination of cause of death. (77 RT

(...continued)
assistant manager at LeeWards testified that more than $8,900 in cash had been taken from the safe. (73 RT 21153-21154.)

21647-21648.) Madden suffered 32 stab wounds: 5 to the neck, including 1 that penetrated and severed his trachea; 24 to the chest, causing 8 penetrations of the lungs and 6 of the heart; and 3 to the abdomen, 2 of which penetrated the liver. (77 RT 21653-21657.) Madden's thigh also had four small abrasions. (77 RT 21652.) Dr. Pakdaman opined that the cause of death was stab wounds to the neck, chest, and abdomen. (77 RT 21658.)

II. PENALTY PHASE

A. The Prosecution's Case

1. Circumstances of the crime

Dr. Pakdaman testified that Madden had foam in his airway, which indicates that he was breathing when his lungs or his trachea were wounded. (82 RT 21931.) He opined that Madden could have been breathing for several minutes, although he could not say precisely how long. (82 RT 21950, 21963-21964.) He made a "guesstimate" that Madden died 15 to 30 minutes after the infliction of the first wound. (82 RT 21935.) In all events, Madden had been alive when he toppled from the chair, because an abrasion on his head from the fall must have occurred before death. (82 RT 21952, 21957, 21964.)

The prosecutor also presented the shirt Madden had been wearing at the time of the murder. The shirt had been removed from the body and placed on a mannequin, then placed inside a plastic case. Markers had been attached to identify the punctures and cuts in the cloth. (82 RT 21897-21898, 21902-21904.) Dr. Pakdaman referred to the shirt occasionally during his testimony. (See, e.g., 82 RT 21925-21929, 21970-21971.)

2. Victim impact testimony

Shirley Madden ("Sissy")[7] married Madden in 1979. (83 RT 22002.) Their only child, daughter Julie, was born on January 3, 1984. (83 RT 22002; 22003.) Madden was a "very loving" husband and "pretty much a perfect dad." (83 RT 22002, 22006.)

On the evening of January 28, 1991, Sissy took Julie to LeeWards to visit Madden. (83 RT 22006.) Then Sissy took Julie home to get ready for bed. (83 RT 22008.) Around 5:00 a.m. the next morning, Madden had not returned. (83 RT 22009.) Concerned, Sissy called the highway patrol and the police. (83 RT 22009.) About a half hour later, the police said they had checked LeeWards and everything appeared all right. (83 RT 22009-22010.) Although Sissy was upset, she took Julie to day care and went to work. (83 RT 22010.)

Sissy was upset at work, and told her coworkers about her concerns. (82 RT 21881, 21886; 83 RT 22011.) Her coworker Susan Thuringer and her boss Kay House began making calls in an effort to locate Madden. (82 RT 21882, 21887-21888.) Around the same time, they each learned that Madden had died. (82 RT 21882, 21888.) When they told Sissy, she "reacted like . . . a wounded animal," flailing around and screaming for a long time. (82 RT 21883, 21888-21889.) Officer Lane, who arrived at the office around 10:10 a.m. to notify Sissy of Madden's death, heard screaming and crying as he walked in. (82 RT 21894.)

Sissy returned home, bringing Thuringer and House. (82 RT 21884, 22011.) When Julie got home, Sissy told her that Madden had died. (82 RT) Julie screamed and cried. (82 RT 21885, 21889-21890, 22012.)

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[7] To avoid confusion, persons with the same last name as Madden or appellant will be referred to by their first names. No disrespect is intended. In particular, respondent notes that Shirley Madden goes by "Sissy." (83 RT 22001.)

Since the murder, Sissy "just feel[s] empty." (83 RT 22012.) Julie slept with Sissy for a year and a half, and had been in therapy since the murder. (83 RT 22013.)

Eric Lindstrand was Sissy's brother and Madden's brother-in-law. (83 RT 21977.) Lindstrand knew Madden as "a really good guy," and noticed that Sissy "was like a new person" when she and Madden fell in love. (83 RT 21978-21979.) Madden was a devoted husband. (83 RT 21980.) Since his death, Julie and Sissy are "like the living dead." (83 RT 21982, 21983.) Sissy had been in therapy and suffered from psoriasis. (83 RT 21983-21984.) Julie had to take remedial classes, and would not let her mother out of her sight for a year. (83 RT 21984.) Lindstand himself found Madden's death "crushing" and it still affected him at the time of trial. (83 RT 21982.)

Judith Sykes was Madden's older sister. (83 RT 21986.) Madden was a good brother and very good father. (83 RT 21989-21990, 21992.) For the first year, Julie could not be apart from Sissy without throwing up. (83 RT 21998.) Since his murder, "there's a big hole" in Sykes's life. (83 RT 21996.)

Madden's mother Joan testified that her husband died of a heart attack a week before Julie was born. (83 RT 22030.) Madden had been present and tried mouth-to-mouth resuscitation, and afterwards "did everything" planning the funeral. (83 RT 22028.) Madden "was a wonderful father" to Julie. (83 RT 22030.) Joan had still not gotten over the loss of her son. (83 RT 22038-22039.)

B. Appellant's Case

Elizabeth Howard was appellant's grandmother. (84 RT 22050.) Howard's daughter was appellant's mother. (84 RT 22050.) While appellant lived with Howard in Harlan County, Kentucky, she saw that he

"was a happy child." (84 RT 22056.) However, he "was not a leader." (84 RT 22057.)

Sallie Jo Spencer ("Sallie") was appellant's mother. (84 RT 22064.) At 16, she left her home in Kentucky after getting married. (84 RT 22067.) She divorced her first husband after bearing him two children— Delmar Cole ("Delmar") and Davietta Cole-Martinez ("Davietta"). (84 RT 22068.) While living in San Jose in 1969, she married Alan Spencer ("Alan"), and appellant was born shortly after that. (84 RT 22069, 22070.) Alan was an alcoholic, although he stopped drinking around 1975. (84 RT 22079, 22092; see 22124.)

When appellant was about 14 months old, the family moved from San Jose to Harlan County. (84 RT 22070.) Alan did maintenance work that required travel, meaning that he left for work on Monday morning and did not return until Friday, every week. (84 RT 22080.) Sallie also worked, which sometimes required her to work the "swing shift" from 2:00 p.m. until 12:00 a.m. (84 RT 22085.) Eventually, Alan's two children by a previous marriage—Tammy and Julia Degrie ("Julia")—came to live with the Spencers in Kentucky, where the Spencers had only a 24 foot by 24 foot house. (84 RT 22080-22081.) The older children or Howard would watch the younger children. (84 RT 22085.)

In December 1972, Sallie and Alan had a daughter, Alisa. (84 RT 22070.) In 1975 or 1976, Alan left his maintenance job and began working in the coal mines. (84 RT 22087.) In 1977 or 1978, Tammy got married and moved out. (84 RT 22082.)

In 1983, Sallie, Alan, appellant, and Alisa moved to San Jose. (84 RT 22070, 22087-22088.) When appellant was 17, he told his mother he had a problem with marijuana. (84 RT 22110.) Sallie sent him back to Kentucky for a few months, but after he failed to behave, he returned. (84 RT

22110.) After his 18th birthday, appellant was taken to Juvenile Hall for drunk driving. (84 RT 22113-22114.)

Sallie opined that appellant was "a good boy" who liked football, but that he "let his friends basically take advantage of him." (84 RT 22095.) She said, "Chris was a follower" who never took charge or decided what a group should do. (84 RT 22097, 22098.) She had noticed that Travis "did more of 'we're going to do this' or whatever." (84 RT 22119.)

Alan also testified on appellant's behalf. When appellant was young, Alan would go to watch him play football and take him fishing. (84 RT 22135.) Appellant "was a good child." (84 RT 22137.) After the family moved to San Jose, Alan noticed appellant become "a little moody," but felt he was still the same person. (84 RT 22139-22140.) Alan opined that appellant "was more of a follower" than a leader. (84 RT 22140.)

Alisa, appellant's sister, testified that she started drinking alcohol and consuming cocaine and crank when she was 13 years old and living in San Jose with her family. (84 RT 22191, 22193.) However, she recalled occasionally drinking in Kentucky with her siblings, including appellant. (84 RT 22191-22192.) At 15, she became pregnant. (84 RT 22190.) At 17, she moved out of the family home to live with the man who would become her husband. (84 RT 22189.) Alisa knew Travis, Silveria, and Jennings. (84 RT 22194.) She felt that Travis and Jennings were the leaders of the group, while appellant was "[a] follower." (84 RT 22195, 22196.)

Delmar, appellant's half-brother, testified that he dropped out of school in eighth grade. (84 RT 22146-22147.) He began working but was injured in a car accident shortly thereafter. (84 RT 22147.) In California, Delmar spent time with appellant, Silveria, Travis, and Jennings. The group would go fishing and camping, and would drink alcohol and consume marijuana, cocaine, and methamphetamine. (84 RT 22150-

22151.) Appellant was a "quiet, cheerful person." (84 RT 22151.) Delmar moved away from the area in July 1990 after getting married, and was "just shocked" that his friends had committed murder. (84 RT 22151-22152.) He did not consider appellant's tattoos, apparently obtained in jail, to show a positive change. (84 RT 22153.)

Julia, appellant's half-sister, testified that she began living with the Spencers in Kentucky in 1976. (84 RT 22157.) When she was 13 or 14 years old, she was drinking alcohol and taking acid. (84 RT 22164-22165.) She ran away several times, and at age 16 placed herself into foster care. (84 RT 22158-22159.) She felt that she would "never be good enough[,] especially with [Alan, her] father." (84 RT 22159.) Although Julia returned to the family home after a year, nothing had improved. (84 RT 22160.) She left after meeting a man, but began living with the Spencers again in San Jose. While there, she worked with appellant at Sizzler. (84 RT 22161.) She consumed cocaine with appellant, who obtained it. (84 RT 22170.) Appellant "was a good child," but "[d]efinitely a follower." (84 RT 22166, 22176.) Julia testified that neither she, Tammy, Delmar, Davietta, appellant, or Alisa ever graduated high school. (84 RT 22184.)

William Musick moved to Harlan County, Kentucky in 1982. (85 RT 22220.) He taught history and coached the football team at the middle school. (85 RT 22203.) Appellant played on the team and was in Musick's history class. (85 RT 22203.) Appellant was 13 or 14 years old at the time. (85 RT 22203.) Musick noticed that appellant "had a very dysfunctional-type family" that had "a hard time making ends meet." (85 RT 22204.) However, Musick acknowledged that poverty and family dysfunction were common in Harlan County. (85 RT 22205, 22246.) Musick stated that appellant "was a follower; he was not a leader." (85 RT 22212.) Musick worried that appellant would have difficulty adapting to life outside of

Harlan County, and tried to prevent his family from moving away with him. (85 RT 22216-22218.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED JUROR C-67

Appellant contends that the trial court erroneously granted the prosecutor's challenge to prospective juror C-67 ("Juror C-67"). (AOB 45.) Not so.

A. Juror Information

In his questionnaire, Juror C-67 indicated that he considered himself a religious person, and that "Religiously[,] I would find it very difficult to ask for [a] death sentence." (33 CT Supp. #1 9808.) Later, he repeated, "I have a religious bias against the death penalty." (33 CT Supp. #1 9823, 9824.) He indicated he was "strongly" to "moderately" opposed to the death penalty, and preferred life without parole or "even castration" to death. (33 CT Supp. #1 9823.) When asked if he could see himself choosing the death penalty "in the appropriate case," Juror C-67 wrote, "I don't know." (33 CT Supp. #1 9828.)

When the questionnaire asked if Juror C-67 could "set aside any preconceived notions you may have about the death penalty, and make any penalty decision in this case based upon the law as it is given by the judge," Juror C-67 wrote, "No. My true beliefs are not 'preconceived notions to be set aside'." (33 CT Supp. #1 9828.) Later, he wrote that he could set aside his personal feelings, "with the possible exception of the death penalty." (33 CT Supp. #1 9829.) In response to a concluding question asking for "anything which you believe may affect your ability to be a juror or which may affect your participation as a juror in this trial," Juror C-67 wrote, "My reluctance about the death penalty." (33 CT Supp. #1 9830.)

When the trial court asked Juror C-67 about his questionnaire answers, the following discussion occurred:

> [TRIAL COURT]: Now, assume again that you're a juror participating here and we find ourselves in a penalty phase. Again, would you be able to keep an open mind throughout the course of the penalty phase, not make up your mind until you've heard everything out here in court that you're supposed to hear and had a chance to go back and deliberate?
>
> [JUROR C-67]: Yes.
>
> [TRIAL COURT]: Do you think you would automatically vote for one of those penalties simply because you might favor it over the other one?
>
> [JUROR C-67]: Well, in the questionnaire there were—there was a lot of discussion about the death penalty.
>
> [TRIAL COURT]: Right.
>
> [JUROR C-67]: And I suppose I have a lot of reservations about that, as my answers probably indicate.
>
> [TRIAL COURT]: All right. With your reservations about the death penalty in mind, do you think in a penalty-phase determination during deliberations, do you think you would always vote against the death penalty despite any aggravating or negative evidence that may have been presented?
>
> [JUROR C-67]: I don't know. I've never had to be in that situation before.

(64 RT 19980.) Juror C-67 explained, "Well, if I believed the death penalty was warranted in the case then I would vote for it, but for me to believe that the death penalty is warranted is the whole issue." (64 RT 19981.) He stated, "I can imagine things horrible enough to get me to vote for the death penalty, I suppose." (64 RT 19982.)

The prosecutor challenged Juror C-67 for cause on the ground that Juror C-67 was substantially impaired. (64 RT 19982.) The trial court granted the challenge and dismissed Juror C-67. After noting that Juror C-

67 had also expressed a strong anti-defendant bias in his questionnaire,[8] the trial court concluded, "He has a very strong religious bias against the death penalty, which is fine. There's no way he could be fair and impartial probably to either side, to be honest with you." (64 RT 19984-19985.)

B. Legal Principles

"[T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Moon* (2005) 37 Cal.4th 1, 13.)

> Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. The trial court must determine whether the prospective juror will be unable to faithfully and impartially apply the law in the case. A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether to remove the juror for cause. The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence. [W]here equivocal or conflicting responses are elicited regarding a prospective juror's ability to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court.

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[8] For example, the "first thing that comes to mind" when Juror C-67 thought of criminal defense attorneys was "dishonest." (33 CT Supp. #1 9810.) He also wrote an extensive comment explaining why he believed that a person who has been arrested is more likely to be guilty than innocent. (33 CT Supp. #1 9818-9819.) As another example, he wrote that he did not know whether he could be fair and impartial to a person whose lifestyle was considerably different from his own, "if I consider it despicable." (33 CT Supp. #1 9819.)

(*Moon*, *supra*, 37 Cal.4th at p. 14, internal quotation marks and citations omitted.)

C. The Trial Court Properly Dismissed Juror C-67

The trial court's decision to discharge Juror C-67 was supported by substantial evidence. As described above, the questionnaire demonstrates that Juror C-67 had a strong religious bias against the death penalty. Indeed, Juror C-67 explicitly denied an ability to set aside his preconceived notions about the death penalty. In fact, he refused to describe them as "preconceived notions," preferring instead to call them "true beliefs." Tellingly, even Juror C-67 acknowledged that his bias against the death penalty was so strong that it would affect his ability to be a juror. The trial court's voir dire only confirmed the existence of Juror C-67's substantial impairment. For example, the trial court asked Juror C-67 three times whether he would automatically vote for life without parole. Each time, Juror C-67 failed to respond "no," instead referring to the questionnaire or saying, "I don't know." (64 RT 19980, 19981.) Even though, as appellant notes, Juror C-67 indicated that he "suppose[d]" he could imagine a case in which he would impose the death penalty, the trial court was not bound to accept that statement and reject the others. "In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1094.) It is for that reason that this Court must defer to the trial court's findings regarding Juror C-67's state of mind, since the trial court was in the better position to observe his demeanor and tone. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1290.) Here, the trial court found that Juror C-67 had "a very strong religious bias against the death penalty." That finding is entitled to deference, and, when

combined with Juror C-67's questionnaire and voir dire, constitutes substantial evidence of substantial impairment. Accordingly, appellant's argument fails.

Appellant's reliance on *People v. Stewart* (2004) 33 Cal.4th 425 is unavailing. (AOB 55.) In *Stewart*, this Court noted that "a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty." (*Stewart, supra*, 33 Cal.4th at p. 447.) Here, Juror C-67 explicitly stated in his questionnaire that he had a strong religious objection to imposing the death penalty, and that such difficulty affected his ability to be a fair and impartial juror. Juror C-67 also indicated that he preferred *castration* to the death penalty. This substantial evidence supports the trial court's finding that Juror C-67's aversion to the death penalty rose beyond "difficulty" and into substantial impairment. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 645-646 [discharge for cause proper where questionnaire more particular than that in *Stewart*].)

Appellant "readily acknowledges" that the trial court's finding regarding Juror C-67's true state of mind is entitled to deference, then immediately argues that no deference is required, because the court's ruling "was[] explicitly[] based on the juror's responses . . . and not on [J]uror C-67's 'demeanor.'" (AOB 68.) This argument is disingenuous. The trial court was not reading a cold record of Juror C-67's responses, but was instead directly observing Juror C-67 as he answered questions during voir dire. Further, the court's ruling was explicitly based in part on its observation of Juror C-67 during voir dire, including his having to think "a long time" before stating he could imagine a case where the death penalty was appropriate. In all events, this Court has made it clear that a trial

court's finding on a prospective juror's true state of mind is entitled to deference when supported by substantial evidence, as the finding is here. (*Moon*, *supra*, 37 Cal.4th at p. 14.) Accordingly, appellant's contrary argument must be rejected.

II. APPELLANT'S ARREST WAS SUPPORTED BY PROBABLE CAUSE

Appellant argues that he was arrested without probable cause, and that his subsequent statements to the police should have been suppressed. (AOB 77.) Not so.

A. The Suppression Hearing[9]

San Jose Police Department Detective John Boyles was assigned to handle the stun gun robberies on January 25, 1991. (1 RT 17.) From the videotape of the Quik Stop robbery, he learned that two of the three suspects were Rackley and Jennings. (1 RT 33-36, 40-41.)

Around 5:00 p.m. on January 28, Detective Boyles received a phone call from a woman who would not identify herself, but claimed to have information about the robberies. (1 RT 44, 45, 111.) She said that the first names of the robbers were "Danny, John, Matt, and Chris." (1 RT 45.) When Detective Boyles asked her if she knew a "Troy," the informant responded that "he also hung around with that group." (1 RT 45.) The informant mentioned that the group was staying at an abandoned house in Uvas Canyon. (1 RT 47.)

After Detective Boyles had gone home, Officer George McCall received a call from an person with information on the robberies. The caller provided a last name of Silveras or Silveria for Danny. (2 RT 222.)

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[9] The summary of evidence that follows was heard in the hearing following appellant's motion to suppress (3 CT 785) and the prosecution's opposition (3 CT 822). The hearing began on January 31, 1994. (3 CT 924.)

The informant also said that the suspects were using a red and black[10] Charger. (2 RT 223.) Finally, the informant said that the suspects "were going to be leaving town and they were going to pull another robbery that night." (2 RT 223.) Officer McCall passed the information along to Officer Brian Hyland, who was assisting Detective Boyles with the investigation. (2 RT 223-224; 3 RT 241-242, 247.)

Officer Hyland conducted a records search and discovered addresses for Jennings and Silveria. (2 RT 247-248; 3 RT 252.) He went to Jennings's residence, which was given as 230 Bendorf, Apartment 1. (3 RT 252.) There, he spoke with Jennings's two brothers and his mother. (3 RT 252-253.) One of the brothers stated that Jennings had packed a suitcase and left with appellant, Rackley, Travis, and Silveria. (3 RT 254-255.) That brother gave Officer Hyland appellant's and Travis's names, and said that appellant had a Charger. (3 RT 255, 256, 350-351.)

Officer Hyland then went to appellant's address, which he had learned from someone at Jennings's house, and which was nearby at 208 Roundtable Drive. (3 RT 255-256.) Appellant's father said that appellant was with Jennings and that appellant was also friends with Rackley, Silveria, and Travis. (3 RT 257-258.) In appellant's room, Officer Hyland observed a traffic citation with a license plate number for appellant's Charger. (3 RT 258.)

Officer Hyland next went to Silveria's last known address, 5490 Carryback Avenue. (3 RT 259.) Silveria's brother told Officer Hyland that Silveria had packed a suitcase and was going "to go live in the mountains"

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[10] Various witness testified regarding the reported colors of the Charger, which is described at various times as red and black, or red and white. (See, e.g., 2 RT 223 [red and black]; 3 RT 247 [red and white].) Officer Hyland explained that the discrepancy may have been a typographical or other error on his part. (4 RT 452.)

with appellant, Travis, Jennings, and Rackley. (3 RT 260.) Behind Silveria's house, Officer Hyland saw Julie Snedley, who confirmed that appellant, Travis, Rackley, Silveria, and Jennings were friends, and that they would sometimes "party and hang out" at a vacant house in Uvas Canyon. (3 RT 263.)

At 9:00 p.m., Detective Boyles received a call at home from a woman who gave the name "Cynthia." (1 RT 48.) Cynthia provided a last name of Jennings for Matt and Silveria for Danny. (1 RT 49, 121-122.) She also provided Jennings's address as 230 Bendorf, Apartment 9, in San Jose; that address was only slightly different from the address that Detective Boyles had discovered through his investigation— 1930 Bendorf, Apartment 9, in San Jose. (1 RT 41, 50.) Cynthia also said that Jennings was driving a red and white vehicle, "possibly a [Dodge] Charger." (1 RT 51.) Based on her information and her voice, Detective Boyles was "sure" it was the same woman that had called earlier in the day. (1 RT 49, 121, 149.)

The next day, Officer Hyland heard from the police dispatcher that an informant had called 911 and reported that two or three of the suspects were at the Oakridge Mall. (3 RT 266-267, 307; see 4 RT 494-496.) The informant provided descriptions of the suspects and mentioned that they were going to leave in two described vehicles. (3 RT 267.) Officer Hyland refused to identify the informant, but testified that he had personally spoken with the informant in the past two days.[11] (3 RT 301-302.)

Officers responding to Oakridge Mall observed and stopped two cars matching the provided descriptions. (4 RT 465.) Silveria was driving one car (4 RT 468-469), and Travis was driving the other (4 RT 471) with

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[11] Officer Hyland invoked his privilege under Evidence Code sections "1040 through 1042" as to the identity of the informant. (3 RT 300.)

Rackley as a passenger (4 RT 521, 524). In Silveria's car, officers found a large amount of cash, a roll of duct tape, and a stun gun. (3 RT 345; 4 RT 468-470.) In Travis's car, officers found a large amount of cash and a packet of batteries with a LeeWards tag. (4 RT 526, 528-529.) Silveria, Travis, and Rackley were arrested. (4 RT 467, 524-525.)

When Detective Boyles learned that Travis, Silveria, and Rackley were in custody, he interviewed each of them. (1 RT 62, 76-77 [Rackley]; 77 [Travis]; 82-83 [Silveria].) Rackley and Silveria admitted participating in the Sportsmen's Supply burglary and the Gavilan Bottle Shop and Quik Stop robberies. (1 RT 63-67, 91, 93, 94.) Travis provided the same address that Cynthia had given for Jennings—230 Bendorf—and said his phone number was the same as the number Cynthia had called from. (1 RT 80; see 1 RT 48.) Silveria said that appellant had driven the group to Sportsmen's Supply and that he had helped them commit the Gavilan Bottle Shop robbery. (1 RT 91, 94.) Specifically, he said that appellant had driven a red and black Charger. (1 RT 95.)

Officer Hyland had Silveria set up a fake meeting with appellant and Jennings, in an effort to locate and arrest them. (3 RT 276-278.) The meeting was set to take place at an apartment at 3939 Seven Trees Boulevard. (3 RT 278.) When officers arrived, a resident of the apartment said that appellant and Jennings had just gone to the store, but that they would be returning soon in Jennings's vehicle, a red Toyota pickup truck.[12] (3 RT 280-281.) Officers approached the truck when it arrived at the apartment complex, and saw Jennings driving with appellant as a passenger. (3 RT 281; 5 RT 618-619.) When asked, Jennings identified himself. (5 RT 618.) He and appellant were arrested. (3 RT 285, 290-291;

[12] Silveria had already informed officers that everyone had obtained new cars. (3 RT 342.)

5 RT 639.) Inside the apartment, officers located two containers of cash, which they were told belonged to appellant and Jennings. (3 RT 282, 285.) Officers also recovered a pager still displaying the number of the phone they had used to set up the fake meeting. (3 RT 286-287.)

The trial court denied appellant's motion to suppress. (4 CT 983-988.)

B. Appellant's Arrest Was Supported by Probable Cause

Appellant argues that Cynthia was not a "citizen informant" and that her information was not corroborated prior to appellant's arrest. He concludes that since that his arrest was "based solely on information received from 'Cynthia,'" it was therefore not supported by probable cause. (AOB 85-89.) This argument fails.

"Probable cause exists when the facts known to the arresting officer would persuade someone of 'reasonable caution' that the person to be arrested has committed a crime." (*People v. Celis* (2004) 33 Cal.4th 667, 673, citing *Dunaway v. New York* (1979) 442 U.S. 200, 208, fn. 9.) As this Court explained in *People v. Carter* (2005) 36 Cal.4th 1114:

> An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. "The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review." [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review.

(*Id.* at p. 1140, internal citations omitted.)

The police had probable cause to arrest appellant. The investigation began with Rackley and Jennings as suspects in the stun gun robberies. When "Cynthia" called, she provided four first names, one of which matched Jennings.[13] She also confirmed that "Troy" was familiar with the four named individuals. Her later calls, providing Silveria's and Jennings's last names, also indicated that the group was planning to commit another robbery and leave the area. This information was corroborated by Officer Hyland's own investigation, in which he interviewed Jennings's, appellant's, and Silveria's families, all of whom agreed the five were friends and were planning on leaving the area soon. After Silveria, Travis, and Rackley were arrested, police discovered cash and the stun gun in their cars, and Silveria implicated appellant in the Sportsmen's Supply and Gavilan Bottle Shop robberies. Appellant was later arrested as a passenger in Jennings's car. Considering these circumstances—namely, that appellant was closely associated with a small group of persons directly involved in the stun gun robberies, was planning on leaving the area with them, and had been implicated in the robberies by Cynthia and Silveria—a person of reasonable caution would have been persuaded that appellant had committed a crime. Accordingly, his arrest was supported by probable cause.

Appellant argues that the trial court erred, because Cynthia "did not fulfill the requirements necessary to be deemed a citizen informant . . . ." (AOB 86.) Specifically, he argues that "she was not an observer of criminal activity and had no firsthand knowledge that appellant . . . had perpetrated any crimes." (AOB 86.) This Court has "distinguished between those informants who 'are often criminally disposed or implicated,

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[13] Although appellant was not yet a known suspect at the time of the first call, his first name, "Chris," was included in this list.

and supply their 'tips' . . . in secret, and for pecuniary or other personal gain' and victims or chance witnesses of crime who 'volunteer their information fortuitously, openly, and through motives of good citizenship.'" (*Humphrey v. Appellate Division* (2002) 29 Cal.4th 569, 576.) Here, there is no reason to believe that Cynthia approached the police from any motive other than good citizenship. Nor did Cynthia remain completely anonymous, as she provided both her first name and a phone number. (1 RT 48.) Further, the information she provided was substantially corroborated. She provided first names for four of the five suspects, which matched the police investigation. Later, she provided two last names, which also matched the police investigation. Cynthia also indicated the group spent time at an abandoned home in Uvas Canyon, which was verified by Snedley. Finally, she said that appellant drove a Charger, which he had. Considering the abundance of corroboration, the trial court properly found her a reliable citizen informant. Moreover, as discussed above, probable cause to arrest appellant was also amply demonstrated by other aspects of the police investigation. Accordingly, appellant's claim fails.

III. APPELLANT'S CONFESSION WAS NOT OBTAINED IN VIOLATION OF *MIRANDA*

Appellant contends that Sergeant Keech "failed to properly re-advise appellant of his rights" prior to interrogating him. (AOB 93.) Accordingly, appellant concludes that his statement was taken in violation of his constitutional rights. Not so.

A. Background

Detective George De La Rocha interviewed appellant at 11:30 p.m. that night. (5 RT 580, 583.) The detective read appellant his *Miranda*[14] rights from a department-issued card.[15] (5 RT 583.) He asked if appellant understood those rights, and appellant responded, "Yeah." (5 RT 583-584.) Detective De La Rocha then asked if appellant was willing to talk to the police, and appellant responded, "Yeah." (5 RT 584.) Appellant then admitted having driven the suspects to a robbery at a "liquor store" in his Charger. (5 RT 585.) The interview lasted only seven to ten minutes, as the detective soon learned that appellant and the others were suspects in the LeeWards murder. (5 RT 593, 605.)

Sergeant Ted Keech arrived at the San Jose Police Department shortly after midnight on January 30. (5 RT 647, 648-649.) After speaking with the local officers, Sergeant Keech interviewed Silveria. (5 RT 647, 658-659.) Around 4:00 a.m., he began interviewing appellant. (5 RT 660; 6 RT 801-802.) The interview was recorded (5 RT 662) and the tape was played in court (see 8 RT 890).[16] At the beginning of the interview, Sergeant Keech introduced himself and his partner, and said:

> KEECH: We're from Santa Clara Police Department. Okay, uh, I understand you already talked to one of the San Jose detectives. Is that correct?

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[14] *Miranda v. Arizona* (1966) 384 U.S. 436.

[15] The card read: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish one." (5 RT 583.)

[16] A transcript of appellant's interview may be found in CT Supp. #2, Volume 1, pages 1-57.

SPENCER: Yes, I have.

KEECH: Okay. And I understand you . . . . .

SPENCER: I've admitted to being involved in a robbery.

KEECH: Okay. And he read you, uh, your rights?

SPENCER: Yes.

KEECH: Did you understand your rights?

SPENCER: Yes.

KEECH: Okay. And you waived your rights.

SPENCER: Yes.

(1 CT Supp. #2 2.) After getting appellant's full name and address, Sergeant Keech repeated, "First of all, you understand your rights. You're willing to talk to us. Is that correct?" Appellant responded, "Yeah." (1 CT Supp. #2 3-4.) Appellant went on to admit that he had participated in the LeeWards murder, including stabbing Madden. (1 CT Supp. #2 44.)

At the end of the interview, Sergeant Keech asked:

KEECH: Okay. Before we, before we stop, I just want to make it clear that, uh . . . I know San Jose officers advised you of your rights. What did they tell you?

SPENCER: They just read me my rights.

KEECH: And what were those rights?

SPENCER: The, read my Miranda rights. I can't cite them but if, yeah, they were read to me. I know my Miranda rights.

KEECH: Did they tell you, you had the right to remain silent?

SPENCER: All that, yeah.

KEECH: Did they tell you that you had, that anything you said can and would be . . . .

SPENCER: Can and will be used against me in a court of law.

KEECH: Did they tell you that . . . .

SPENCER: I have the right to an attorney. Uh . . . .

KEECH: Did they tell you that if you couldn't afford an attorney, one would be provided for you?

SPENCER: Yes.

KEECH: You understand those rights?

SPENCER: Yes.

KEECH: Do you know them to be Miranda rights?

SPENCER: Yes.

(1 CT Supp. #2 55-56.) The interview ended shortly before 5:30 a.m. (5 RT 660; 6 RT 802.)

The trial court denied appellant's motion to exclude his statement. (4 CT 959-962.)

B. Appellant's Confession Was Not Obtained in Violation of *Miranda*

Appellant argues that, under the totality of the circumstances, Sergeant Keech was required to re-advise appellant of his *Miranda* rights prior to interrogating him about the LeeWards murder. (AOB 100.) Not so.

"This court repeatedly has held that a *Miranda* readvisement is not necessary before a custodial interrogation is resumed, so long as a proper warning has been given, and 'the subsequent interrogation is "reasonably contemporaneous" with the prior knowing and intelligent waiver.'" (*People v. Smith* (2007) 40 Cal.4th 483, 504.) The *Smith* Court also stated:

> We have established several factors to determine whether readvisement is necessary prior to a subsequent interrogation

> held after an earlier valid *Miranda* waiver: 1) the amount of time that has passed since the initial waiver; 2) any change in the identity of the interrogator or location of the interrogation; 3) an official reminder of the prior advisement; 4) the suspect's sophistication or past experience with law enforcement; and 5) further indicia that defendant subjectively understands and waives his rights.

(*Ibid.*)

Here, the circumstances rendered readvisement unnecessary. First, only four and a half hours separated the De La Rocha and Keech interviews. The interviews were therefore reasonably contemporaneous in time. (See *Smith*, *supra*, 40 Cal.4th at pp. 504-505 [12 hours]; *People v. Mickle* (1991) 54 Cal.3d 140, 171 [36 hours].) Second, the location of the interrogations was the same, and although the interrogators changed, Sergeant Keech was careful to remind Spencer of the change. He explicitly stated that he was from the Santa Clara police, unlike De La Rocha, who was with the San Jose police. No attempt was made to conceal the fact that Sergeant Keech was a police officer. (C.f. *People v. Quirk* (1982) 129 Cal.App.3d 618, 630 [psychiatrist conducting subsequent interrogation "not so readily identifiable as an agent of the prosecution or the police, who originally gave the *Miranda* warnings"].) Third, appellant was given an extensive official reminder of his prior advisement, including whether he had understood and waived them. Fourth, appellant some prior experience with law enforcement, as he had suffered four prior misdemeanor convictions, resulting in three jail sentences. (5 CT 1488, 1494-1496.) Fifth, appellant was *obviously* aware of his rights, insofar as at the end of the interrogation, he recited portions of them to Keech, and confirmed understanding the remainder. Moreover, at the beginning of the interview, he acknowledged speaking with the San Jose police and stated that he had "admitted to being involved in a robbery." (1 CT Supp. #2 2.) This demonstrates that appellant recalled his first interrogation, which supports

the conclusion that he remembered being read his *Miranda* rights. Considering all of these circumstances, no readvisement was required.

Appellant emphasizes the fact that he was interrogated by "*two different* police departments investigating *two different* crimes." (AOB 102.) He concludes that re-advisement was required under these circumstances. (AOB 101-103.) However, such a rule is not supported by the reasoning of *Miranda* or its progeny. Respondent acknowledges that a change in the identity of the interrogator is a factor weighing in favor of readvisement. (*Smith*, *supra*, 40 Cal.4th at p. 504.) However, it is only one factor. Here, although the interrogators had changed and were from different police departments, there could be no mistake that appellant was still in custody. (See *People v. Pettingill* (1978) 21 Cal.3d 231, 245 ["the large majority of suspects . . . neither know nor care about the precise jurisdictional competence of their interrogators"].) Considering the balance of the circumstances as discussed above, readvisement was not required simply because Sergeant Keech was employed by the Santa Clara Police Department. Nor was readvisement required by the fact that Detective De La Rocha and Sergeant Keech were investigating different crimes.[17] Law enforcement agencies are not required to advise a custodial suspect of all possible topics of interrogation. (*Colorado v. Spring* (1987) 479 U.S. 564, 576; *People v. Tate* (2010) 49 Cal.4th 635, 683.) Accordingly, no reason exists why readvisement should be necessary on the basis that the interrogator asks about an event or offense different from that which began the interrogation. Appellant's claim fails.

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[17] In all events, it appears appellant was aware that he and his companions were suspects in Madden's homicide. (1 CT Supp. #2 23.)

IV. APPELLANT'S STATEMENT WAS VOLUNTARY

Appellant argues that his statement to Sergeant Keech was "the product of impermissible coercion and thus involuntary . . . ." (AOB 106.) This argument fails.

A. Background

At the beginning of appellant's interview with Sergeant Keech, appellant lied about his whereabouts on the evening of January 28 (1 CT Supp. #2 6, 13) and where the money for his new car had come from (1 CT Supp. #2 7). Sergeant Keech then explained what he believed had happened based upon his investigation. (1 CT Supp. #2 14-15.) He concluded:

> Now, that's the story I'm gonna tell the jury and I got somebody, and I got evidence. And I got people that are also gonna get up there and tell the same story. In the meantime, you're gonna tell this story. And it's gonna get laid on you because a lot of the information we got has already been laid on you. Now, you got a chance right now to give us, out front, right up front, what your side is. You don't take this chance right now, you may never get it again. And if you don't think I can't prove this case [*sic*], if you don't think I can't fry you [*sic*], you're sadly mistaken, Chris. Now, don't let these guys lay it all on you 'cause that's what's happening. You get a chance to lay some back and say exactly what happened.

(1 CT Supp. #2 15-16.)

The trial court found that appellant's statement was freely and voluntarily given. (4 CT 961.)

B. Legal Principles

"A defendant's admission or confession challenged as involuntary may not be introduced into evidence at trial unless the prosecution proves by a preponderance of the evidence that it was voluntary." (*People v. Williams* (1997) 16 Cal.4th 635, 659.) On appeal, the legal issue of voluntariness is reviewed independently, while any factual findings by the

trial court on the circumstances of the statement are reviewed "under the deferential substantial evidence standard." (*Ibid.*) "In deciding the question of voluntariness, the United States Supreme Court has directed courts to consider 'the totality of circumstances.'" (*Ibid.*, quoting *Withrow v. Williams* (1993) 507 U.S. 680, 693-694.)

C. Appellant's Statement Was Voluntary

Appellant made his statement to Sergeant Keech voluntarily. He was aware of his right to silence and his right to an attorney, and he agreed to speak about what happened at LeeWards. (1 CT Supp. #2 2.) At no point did Sergeant Keech threaten appellant or make promises to appellant to induce him to tell a particular story. Indeed, at the conclusion of the interrogation, appellant explicitly said that his statement was freely and voluntarily given, and that the police had not made him any promises or threats. (1 CT Supp. #2 56-57.) These circumstances demonstrate that his statement was voluntary.

Appellant disagrees on six grounds. First, he asserts that the lack of a *Miranda* readvisement tainted the voluntariness of his statement. (AOB 112-113.) However, as discussed above, no readvisement was required, and appellant was plainly aware of his rights throughout Sergeant Keech's interrogation.

Second, appellant argues that his statement was coerced by Sergeant Keech "forcefully telling appellant exactly what he was suspected of by inserting appellant's name into a narrative of a gruesome murder," resulting in "brainwashing . . . from repeated suggestion." (AOB 113, quoting *People v. Anderson* (1980) 101 Cal.App.3d 563, 574.) However, appellant's statement was not the product of brainwashing. After listening to appellant attempt to fabricate an alibi, Sergeant Keech gave a brief summary of what his investigation had uncovered. (1 CT Supp. #2 14-15.) Appellant immediately offered details that had *not* been "repeatedly

suggested" to him, such as the order the group entered and exited the LeeWards, the weapons that each of them brought, and what cars were in the parking lot. (1 CT Supp. #2 17-19.) These new details demonstrate that appellant was not merely parroting Sergeant Keech. A further example is found when considering Sergeant Keech's question, "How about if I told you [Travis] handed you the knife and told you to kill [Madden], and you tried to cut [Madden's] throat?" (1 CT Supp. #2 26.) Rather than being "brainwashed" by such a comment, appellant denied the suggestion, even going so far as to say that Sergeant Keech had told a lie. (1 CT Supp. #2 26.) This demonstrates that appellant's statement was not the result of brainwashing.

Third, appellant argues that Sergeant Keech's comment that he could "fry" appellant was a threat, "implying that if he didn't confess, the death penalty would be imposed." (AOB 113-114.) Initially, it is not clear that Sergeant Keech's "fry" comment was made in reference to the death penalty, as opposed to his ability to disprove appellant's fabricated alibi at trial. (See 7 RT 858.) In all events, "[r]eference to the death penalty does not necessarily render a statement involuntary." (*People v. Williams* (2010) 49 Cal.4th 405, 443.) Here, Sergeant Keech's "fry" comment did not overcome appellant's will. Indeed, appellant seized on Sergeant Keech's speech as an opportunity to negotiate, asking, "All right, if I tell you the whole story, what . . ." before Sergeant Keech cut him off saying, "don't ask me to make you any promises." (1 CT Supp. #2 16.) Moreover, appellant continued to minimize his role and lie about his involvement in Madden's murder. (See, e.g., 1 CT Supp. #2 26 [never touched knife], 28, 29, 30 [was not present when Madden stabbed], 26, 32, 42 [never stabbed Madden]; 19 [did not know about Madden's truck]; but see 1 CT Supp. #2 35 [touched knife], 32 [present when Madden stabbed], 44 [stabbed Madden], 52, 55 [sliced Madden's tire].) Thus, appellant "exhibited no

sign of distress in response . . . and remained able to parry the officers' questions." (*Williams*, *supra*, 49 Cal.4th at p. 443.) Sergeant Keech's comment therefore did not render appellant's statement involuntary.

Fourth, appellant complains that Sergeant Keech "lied about evidence that the police had recovered." Specifically, appellant mentions Sergeant Keech's claim that appellant's fingerprints had been recovered from the duct tape used to bind Madden. (AOB 114.) Initially, respondent notes that Sergeant Keech never asserted that appellant's fingerprints were recovered on the duct tape; he only asked why they would be there. (See 1 CT Supp. #2 24.) In all events, "[p]olice deception 'does not necessarily invalidate an incriminating statement.'" (*People v. Smith* (2007) 40 Cal.4th 483, 505.) "Where the deception is not of a type reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted." (*People v. Farnam* (2002) 28 Cal.4th 107, 182.) Indeed, in *People v. Watkins* (1970) 6 Cal.App.3d 119, 124-125, cited in *Smith*, no error was found from the admission of a confession after officers told the suspect his fingerprints had been recovered from the getaway car, although no fingerprints had actually been found. (See also *Farnam*, *supra*, 28 Cal.4th at p. 182 ["the deception concerning defendant's fingerprints was unlikely to produce a false confession"].) Here, any deception did not render appellant's statement involuntary.

Fifth, appellant complains that Sergeant Keech made implied promises of leniency "by suggesting that it was okay to admit involvement so long as appellant did not mean to *kill* the victim . . . ." (AOB 115, emphasis in original.) Late in the interrogation, Sergeant Keech commented, "I think you're telling me the truth, all except for one point. And that is at some point you grabbed the knife and you cut him, too. . . . Isn't that right? Maybe you didn't mean to kill him but you cut him." (1 CT Supp. #2 43-44.) Appellant then admitted stabbing Madden. However,

"mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary." (*People v. Carrington* (2009) 47 Cal.4th 145, 174, internal quotation marks omitted.) Respondent is unable to discern any explicit or implied promise of leniency in Sergeant Keech's comment. Rather, Sergeant Keech simply advised appellant to tell the truth, without making any such promise. Indeed, Sergeant Keech had repeatedly stated that he would make no promises (1 CT Supp. #2 16, 32; see also 48 [Officer Cusimano said "I don't know" when appellant asked, "what am I looking at?"]), and appellant agreed that no promises had been made (1 CT Supp. #2 57). Accordingly, Sergeant Keech's comment was not an implied promise of leniency and did not render appellant's statement involuntary.

Sixth, appellant asserts that his personal characteristics "point towards involuntariness." Specifically, appellant relies on his "severe cough" during the interrogation, his youth, and his "insignificant record of criminal conduct." (AOB 115.) Appellant's cough, which he asserted was due to bronchitis (1 CT Supp. #2 4), occurred throughout the interrogation. (See, e.g., 1 CT Supp. #2 3, 4, 11, 17.) However, there is no indication that his condition caused him to be unable to understand the proceedings, or that the police withheld treatment in an effort to induce a confession. Similarly, there is no indication appellant's youth or "insignificant record of criminal conduct"[18] caused him to fail to understand the proceedings, or that the

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[18] Respondent questions whether appellant's criminal experience with the criminal justice system can be characterized as "insignificant" in light of his four prior misdemeanor convictions, especially insofar as he was only 21 years old when he was arrested for the instant offenses. Moreover, appellant's assertion that he had "never . . . served any jail

(continued...)

police exploited those characteristics. Accordingly, none of these circumstances demonstrate that appellant's statement was involuntary.

D. Any Error Was Harmless

Even if appellant's statement was involuntary, its admission was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.) While the confession was damaging, the weight of the remaining evidence against appellant was strong, and more than supported the jury's verdict. Accordingly, any error was harmless.

V. APPELLANT HAS NOT BEEN DENIED MEANINGFUL APPELLATE REVIEW

Appellant argues that this Court has denied him "meaningful appellate review" by refusing to allow appellant to raise claims of "bad-faith prosecution and potential instructional" error in this appeal.[19] (AOB 117.) Specifically, he argues that the Superior Court and this Court erroneously refused to include the transcripts from Silveria and Travis's trial in the record for this appeal. Appellant further asserts that the expense of independently acquiring those transcripts "hobbles" his attorney. (AOB 138-142.) These claims fail.

A. Background

During the penalty phase, appellant introduced testimony from his family members and one of his middle school teachers. Howard, Sallie,

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(...continued)
time," is flatly belied by the record of his three prior jail sentences. (5 CT 1494-1496; see AOB 115.)

[19] However, appellant makes no further reference to asserted instructional error, nor does he raise a claim of prosecutorial misconduct based on the cited portion of the argument.

Alan, Julia, Alisa, and Musick each testified that appellant was a "follower," not a leader. (See 84 RT 22057, 22097, 22140, 22166, 22196; 85 RT 22212.)

In closing argument, appellant's attorney relied on that testimony. Specifically, he characterized appellant as a person who "falls in with friends in a circumstance where friends are terribly important . . . acts with them, does what they say, follows their lead and ultimately participates in this killing." (86 RT 22371.) He followed this up by noting that "[t]hree of them stabbed Jim Madden to death," but "[t]hose other two thought this all up, targeted the robbery and the victim, commanded that the killing be done." (86 RT 22373.) He emphasized that appellant only "killed at the incidence [*sic*] of another . . . ." (86 RT 22373.)

In his rebuttal closing argument, the prosecutor responded by going over appellant's confession, ultimately reaching the point at which appellant had admitted being the first one to stab Madden. (86 RT 22387-22389.) The prosecutor concluded, "Under Mr. Spencer's version, in effect, John Travis and Danny Silveria followed his lead. He led the stabbing." (86 RT 22389.) Appellant's attorney objected:

> I'm very disturbed about where the argument is going at this point. I recognize that there are some lacunae in the evidence in this case with regard to the details of every actor's participation, but I apparently am about to hear . . . Travis and Silveria reduced to the position of stooges for Chris Spencer. And that I think is not permissible.
>
> This case has already been tried once where they were the principals and Mr. Spencer was absent. Of course, that was not the prosecution's theory at the time. But more importantly there is on the record of this case evidence which the prosecution must be aware of which establishes very clearly the tertiary position of Chris Spencer in the planning and plotting of this entire operation.

(86 RT 22389-22390.) The trial court stated, "Why don't we just stick, both of you, to what was brought out during the course of this trial. What the theory was of a prior trial has absolutely nothing to do with this case. Absolutely nothing." (86 RT 22390-22391.)

B. Legal Principles

> A criminal defendant is entitled under the Eighth and Fourteenth Amendments to an appellate record that is adequate to permit meaningful review. [Citations.] An appellate record is inadequate "only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal." [Citation.] The defendant bears the burden of demonstrating that the record is not adequate to permit meaningful appellate review.

(*People v. Young* (2005) 34 Cal.4th 1149, 1170.)

C. Appellant Has Not Been Denied Meaningful Appellate Review

Appellant argues, "It is factually impossible that appellant was the 'ringleader' in the charged offenses as opposed to Silveria and Travis, as argued at appellant's trial, *and at the same time*, that *Silveria and Travis* were the ringleaders and appellant merely a follower, as allegedly occurred at the first Silveria-Travis trial." Appellant then asserts that his objection below "undeniably raised a colorable issue on appeal" regarding the prosecution's use of "contradictory theories" in the two trials. Appellant concludes that the Superior Court and this Court erred by refusing to include the transcript of the Silveria and Travis trial, because that refusal denied appellant meaningful appellate review. (AOB 121.) This argument fails.

Appellant cannot establish that the record is deficient, because "[a]n appellate record is inadequate 'only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal.'" (*Young*,

supra, 34 Cal.4th at p. 1170.) Appellant's claim, however, must be raised by a petition for writ of habeas corpus.

In *People v. Moore* (2011) 51 Cal.4th 1104,[20] this Court addressed a claim similar to appellant's. In *Moore*, the defendant argued that the prosecutor unconstitutionally argued inconsistent theories at his trial and at his accomplice's trial. Specifically, the defendant asserted that the prosecutor had labeled the accomplice the "mastermind" at the accomplice's trial, then argued the defendant was "a coequal participant" at the defendant's trial. (*Id.* at p. 1143.) This Court rejected the defendant's claim:

> [W]e reject his claim on appeal for the same reasons we stated in *People v. Sakarias* (2000) 22 Cal.4th 596, 635. "[T]he asserted inconsistencies in prosecutorial theory were not the subject of any proceeding in the trial court and, hence, neither the inconsistencies nor any explanations the prosecutor may have been able to offer appear in the appellate record. . . ." We also deny defendant's related motion requesting that we take judicial notice of the transcripts of Harris's trials. (*Id.* at p. 636, ["to take notice under these circumstances and for the purpose requested would be to augment improperly the appellate record"].) Defendant must raise his due process claim in a petition for a writ of habeas corpus, not in his appeal.

(*Moore*, *supra*, 51 Cal.4th at p. 1143.)

Appellant's claim fails as the defendant's did in *Moore*. Here, as in *Moore*, the complained of inconsistency was never the subject of any proceeding that relied on the record of another trial. While appellant did object to the prosecutor's argument and make a brief reference to the Silveria and Travis trial, the trial court never considered the record of that trial before ruling on the objection. Accordingly, appellant must raise his claim that the prosecutor employed inconsistent theories in a petition for

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[20] Respondent notes that *Moore* was decided on June 23, 2011, after the filing of appellant's opening brief.

writ of habeas corpus. As his direct appeal is not impacted by the alleged deficiency in the record, appellant has failed to establish that the existing record is insufficient for meaningful appellate review, and his claim fails.

Appellant disagrees, arguing that this claim was one that he "was is [*sic*] required, under California law, to pursue as part of his *appeal* as opposed to the mechanism of *habeas corpus*[,] because the documents and papers upon which appellant's objection was based, i.e., the respective transcripts of Spencer's trial and the first *Silveria-Travis* trial . . . were all properly part of the appellate record in appellant's case." (AOB 123, emphasis in original.) However, contrary to appellant's assertion, the trial court was never presented with the transcripts of the Silveria and Travis trial, made no findings regarding what had occurred during that trial, and in no way relied on those proceedings when it made its ruling on appellant's objection. Accordingly, this case is unlike *People v. Richardson* (2008) 43 Cal.4th 959, where the trial court had augmented the record to include the record of another trial. (*Id.* at p. 1015, fn. 18.) Nor was appellant entitled to have the record expanded on appeal. Under "the general rule that an appellate court should not take notice of matters not first presented to and considered by the trial court," (see *Sakarias*, *supra*, 22 Cal.4th at p. 635), this Court should neither augment the record with, nor take judicial notice of, the record in the Silveria and Travis trial. Indeed, without the trial court being presented with the transcripts and other evidence from the Silveria and Travis trial, and without a hearing at which the prosecutor could explain any material inconsistencies, even taking judicial notice of the Silveria and Travis trial record would not be sufficient to resolve the issue. (See *Sakarias*, *supra*, 22 Cal.4th at p. 635-636.)

In all events, appellant was not entitled to an expansion of the record because he cannot prevail on his underlying claim. The prosecution's "use of irreconcilable theories of guilt or culpability, unjustified by a good faith

justification for the inconsistency, is fundamentally unfair . . . ." (*In re Sakarias* (2005) 35 Cal.4th 140, 159.) Here, the prosecutor's argument was not "irreconcilable" with the argument appellant believes was made in the Silveria and Travis trial. Appellant asserts that in his case, the prosecutor argued "that appellant was the 'ringleader' in the charged offenses as opposed to Silveria and Travis . . . ." (AOB 121.) Not so. The prosecutor—in response to appellant's evidence and argument that he was a "follower"—argued that appellant had been the first to stab Madden. This was entirely consistent with the presented evidence, and not "irreconcilable" with the theory that Silveria and Travis were the "ringleaders" of the burglary and murder, even if such a theory had been used at their trial. At no point in this case did the prosecutor describe appellant as a "ringleader" or attempt to reduce Silveria and Travis to appellant's "stooges." Accordingly, appellant's underlying claim would fail even if heard on direct appeal, and no expansion of the record would entitle him to a different result. Thus, he has not been denied meaningful appellate review.

Appellant goes further, arguing that to deny his claim on appeal would violate the federal Due Process Clause by denying him "rights and privileges that are by state law afforded to other, similarly situated criminal defendants." (AOB 137; see *Hicks v. Oklahoma* (1980) 477 U.S. 343.) Of course, appellant cannot point to another similarly-situated defendant; that is, he can point to no defendant who has been entitled to raise a similar claim on direct appeal without the proper record, or to have the record on appeal expanded with material never presented to the trial court. Indeed, appellant argues on the next page of his brief that he "is uniquely situated . . . ." (AOB 138.) Further, appellant remains able to prosecute his claim by petitioning for a writ of habeas corpus. (See, e.g., *In re Sakarias*, *supra*, 35 Cal.4th at pp. 160-168.) Accordingly, the state has not deprived him of a

federal constitutional right by not hearing his claim on appeal, or by refusing to expand the record. Appellant's contrary assertions fail.

Nor does the Court's refusal to expand the record "hobble" appellate counsel. (See AOB 139-144.) As discussed, appellant is not entitled to have the record in his case expanded to include the record of another trial. Respondent expresses no further opinion on appellate counsel's compensation.

VI. THE TRIAL COURT PROPERLY ALLOWED VICTIM IMPACT EVIDENCE

Appellant argues that the trial court erred by admitting "excessive and inflammatory" victim impact evidence. (AOB 147.) Specifically, appellant complains of the testimony from Madden's family "was too detailed and far too plentiful" and that "[t]he extensive accounts of the impact to the non-testifying witnesses . . . were also inappropriate and highly prejudicial." (AOB 162.) Appellant also complains of "the overwhelming quantity" of evidence of Madden's character. (AOB 195.) Appellant's arguments fail.

A. Legal Principles

As explained by this Court in *People v. Prince* (2007) 40 Cal.4th 1179:

> In a capital trial, Eighth Amendment principles ordinarily do not prevent the sentencing authority from considering evidence of "the specific harm caused by the crime in question." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.) The high court has explained that the prosecution has a legitimate interest in rebutting the mitigating evidence that the defendant is entitled to introduce by introducing aggravating evidence of the harm caused by the crime, "'reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'" (*Ibid.*) "[W]e also have found such evidence (and related 'victim character' evidence) admissible as a 'circumstance of the crime' under section 190.3, factor (a)."

(*Prince*, *supra*, 40 Cal.4th at p. 1286.)

B. The Admitted Victim Impact Evidence Was Proper

The trial court properly allowed the victim impact evidence here. Contrary to appellant's claim that there was a "voluminous" amount of victim impact evidence, see AOB 161, the entirety of the victim impact testimony, including cross-examination, took only 76 pages of the reporter's transcript and perhaps two hours to present. (82 RT 21880-21896; 83 RT 21976-22015; 22022-22040; 5 CT 1375, 1378 [with the exception of Joan's testimony, for which neither a beginning nor ending time is given, other victim impact witnesses total at *most* 106 minutes of testimony].)[21] This volume of testimony cannot be described as excessive. (See *People v. Garcia* (2011) 52 Cal.4th 706, 752 [three hours not excessive].)

Appellant complains that "the jurors were told about Sissy Madden's grief seven times." (AOB 178.) However, there is no requirement that family members confine their testimony about the impact of the victim's death to themselves, omitting mention of other family members. (*People v. Panah* (2005) 35 Cal.4th 395, 495.) The testimony about Sissy's grief came from witnesses who knew her professionally, witnesses who knew her personally, and one witness who had never met her prior to these events; witnesses who observed her at the time she discovered Madden had been murdered, and witnesses who observed her in the years after. Considering the impact Madden's death had on Sissy, these differing

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[21] Appellant asserts, "Jurors in Chris Spencer's penalty phase spent a day and a half immersed in victim impact and victim character evidence." (AOB 205.) Appellant provides no citation to the record in support of this proposition, and may erroneously cumulate the presentation of the prosecution's other factor (a) evidence with the victim impact evidence discussed here. In all events, appellant's assertion is inaccurate.

perspectives helped remind the jury that Madden's death was a unique loss. Moreover, each of the descriptions of Sissy's grief was brief. Accordingly, the testimony was neither unduly repetitious nor prejudicial.

C. The Admitted Victim Character Evidence Was Proper

Appellant argues that his "rights to due process of law and a fair and reliable sentencing" were violated by the introduction of a "sheer excess" of "irrelevant, cumulative," victim character evidence. (AOB 179-180.) "Evidence regarding the character of the victim is admissible to demonstrate how a victim's family is impacted by the loss and to show the victim's uniqueness as an individual human being, whatever the jury might think the loss to the community resulting from his death might be." (*People v. Russell* (2010).50 Cal.4th 1228, 1265, internal quotation marks omitted.) As discussed above, the testimony was brief and provided insight for the jurors into Madden's individuality. There was no error in its admission.

Appellant compares himself favorably to the defendant in *People v. Roldan* (2005) 35 Cal.4th 646, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 290. (AOB 193-195.) In *Roldan*, the victim's widow testified at the penalty phase, and her "time on the stand was relatively short and subdued, and no other family member testified." (*Id.* at p. 732.) The trial court had also excluded "the many plaques and certificates bestowed on the victim for community work and individual heroism." (*Ibid.*) The *Roldan* court found no error in the admission of the widow's victim impact testimony. By contrast, appellant argues that there was an "overwhelming quantity of material" in his case, and the jurors were also exposed to "multiple photographs" and "a gruesome and disturbing exhibit in the form of the victim's bloody shirt." (AOB 195.)

Appellant's comparison fails. As described above, the victim impact and victim character testimony given here was brief. Nor was the evidence

overly emotional. Appellant asserts, "[t]he evidence here was at least as powerful as the 17[-]minute video montage" discussed in *People v. Robinson* (2005) 37 Cal.4th 592, 652. (AOB 204-205.) As described in *Robinson*, that video contained "approximately 140 photographs set to emotional music, including 'My Heart Will Go On,' sung by Celine Dion and featured prominently in the film Titanic." (*Robinson*, *supra*, 37 Cal.4th at p. 652.) Appellant's comparison of the victim impact evidence in this case to a video backed by music associated with a popular romantic movie cannot be credited. While the testimony here was, by necessity, emotional, it was not unduly so. Further, to the extent that appellant complains of the introduction of photographs of Madden's body and the display of his shirt (see Arg. VII, *infra*), that evidence was not victim impact or character evidence, and should not be cumulated with such. In conclusion, the evidence here was neither excessive nor overly emotional. Accordingly, appellant's claim must be rejected.

D. Any Error Was Harmless

Assuming any victim impact evidence was erroneously admitted, the error was harmless beyond a reasonable doubt. (*Russell*, *supra*, 50 Cal.4th at p. 1265; see *Chapman v. California* (1967) 386 U.S. 18, 24.) The evidence overwhelmingly demonstrated that appellant brutally accosted and bound Madden, then was the first of the group to stab him. Further, appellant had waited with the group outside LeeWards, had re-bound Madden after the alarm company called, and had brought the murder weapon to the scene. The next day, he callously bought a new car and new clothes before attempting to flee the state. Considering these facts, the erroneous admission of some victim impact evidence was harmless beyond a reasonable doubt.

VII. THERE WAS NO ERROR IN THE PROSECUTION'S USE OF MADDEN'S SHIRT, A PHOTOGRAPH OF MADDEN'S THIGH, OR MEDICAL TESTIMONY

Appellant argues that the trial court erroneously allowed the prosecutor to display a mannequin adorned with Madden's shirt, as the exhibit was "designed to arouse shock and horror." (AOB 209.) He also complains that the prosecutor was improperly permitted to introduce a photograph of Madden's right thigh. (AOB 208.) Finally, appellant argues that the medical testimony during the penalty phase was cumulative and inflammatory. (AOB 219-222.) These claims fail.

A. Background

During the penalty phase, the prosecutor introduced an exhibit which displayed the shirt that Madden had been wearing when he was murdered. The shirt had been removed during Madden's autopsy, then placed on a mannequin inside a plastic display case. (82 RT 21897-21898.) Green arrows placed on the shirt identified various defects in the fabric caused by the wounds inflicted on Madden. (82 RT 21900, 21903.) For example, the cuts to Madden's throat caused marked deformities to part of the shirt. (82 RT 21904.)

Appellant objected to the prosecution's use of the shirt. (81 RT 21854.) Specifically, appellant argued that "[t]he shirt is legitimate evidence only of the number of wounds, which are simply not at issue here in the context of the case." (81 RT 21855; see 82 RT 21899.)

The prosecutor responded that the shirt "illustrates far better than any other piece of evidence here that this attack was clearly directed toward that vital portion of the victim's body . . . they're all directed towards his vital area." (81 RT 21860.) He also noted that the shirt showed "the torturous aspect" of "what the victim went through." (81 RT 21859-21860.)

The trial court admitted the shirt and display case into evidence as Exhibit 65. (81 RT 21863; 82 RT 21899.) Dr. Pakdaman referred to the exhibit during his testimony. (See, e.g., 82 RT 21925-21926, 21928-21929.)

Exhibit 67-K, a photograph of Madden's thigh, was admitted into evidence over appellant's objection. (82 RT 21909; see 56 CT Supp. #1 16486 [photograph].) The prosecutor asked Dr. Pakdaman about the abrasion marks depicted in the photograph, and Dr. Pakdaman opined that they were consistent with the application of a stun gun. (82 RT 21922-21923.)

B. The Trial Court Properly Admitted Madden's Shirt

Appellant argues the trial court "did not properly weigh the probative value against the possible prejudice arising from Exhibit No. 65." (AOB 211.) A trial court has discretion to exclude evidence the prosecution offers to demonstrate the circumstances of the crime, if the evidence is offered "in a 'manner' that is misleading, cumulative, or unduly inflammatory." (*People v. Box* (2000) 23 Cal.4th 1153, 1201, disapproved on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.) "However, [t]he trial court's discretion to exclude such evidence at the penalty phase is more circumscribed than it is in the guilt phase." (*People v. Eubanks* (2011) 53 Cal.4th 110, 146-147.) This is because at the penalty phase, "the sentencer is expected to weigh the evidence subjectively." (*People v. Salcido* (2008) 44 Cal.4th 93, 158.)

Here, the trial court acted within its discretion when it admitted Exhibit 65. The shirt showed the wounds inflicted on Madden "in a fashion that gives a more complete view than any of the photographs" and also demonstrated that the cuts and stabs were directed at his "vital areas" rather than his extremities. (See 82 RT 21903.) Further, it was a graphic reminder of the violence causing Madden's death. Thus, it had significant

probative value for the jury's determination of the proper punishment. Moreover, any prejudicial effect was limited. Even if the jurors had been shocked at the amount of blood on the shirt, Sergeant Keech testified that the shirt's blood stains had increased since the murder due to the movement of the body during the investigation, thus reducing any prejudice the jurors may have felt towards appellant from the blood. (82 RT 21905-21906.) Further, the entire exhibit was apparently removed from the courtroom—not simply covered—when not in use. (See 82 RT 21973-21975.) Considering that the jury was entitled to weigh the evidence subjectively at the penalty phase and the trial court's "circumscribed" discretion to exclude evidence of the circumstances of the crime, Exhibit 65 was properly admitted. (See *People v. Medina* (1990) 51 Cal.3d 870, 898-899 [trial court properly admitted mannequin with victim's bloodstained shirt placed upon it]; *People v. Hong Ah Duck* (1882) 61 Cal. 387, 391, overruled on another ground in *People v. Bushton* (1889) 80 Cal. 160 ["It is a practice, not at all uncommon, to offer in evidence the bloody clothing worn by the deceased at the time of the homicide"].)

Appellant relies on *People v. Blue* (2000) 189 Ill.2d 99, in which the Illinois Supreme Court found error in the admission into evidence of a mannequin wearing the uniform of the police officer victim. (AOB 212-213, 218-219.) That court found that the uniform, which was "spattered with the actual blood and brains of the victim," had only "minimal" incremental relevance in light of the other evidence of the victim's injuries, while the prejudicial effect was significant because of its extended presence in the courtroom and the fact that it was stained with brains as well as blood. (*Blue*, *supra*, 189 Ill.2d at pp. 120-126.)

Blue is easily distinguishable from the instant case. In *Blue*, the mannequin was used in the guilt phase, and as the Illinois Supreme Court ultimately reversed for a new trial, it did not consider whether such a

mannequin would have been admissible at the penalty phase. (*Id.* at p. 140.) Here, the mannequin was admitted in the penalty phase, where the jurors were expected to weigh the evidence subjectively. Thus, the shirt had significantly higher probative value than the uniform in *Blue*, and there was no risk that the jurors would convict appellant in shock or outrage, because appellant had already been found guilty of murder.

There are also numerous factual differences between *Blue* and the instant case. In *Blue*, the fatal shot was to the head, and the mannequin and uniform were headless, diminishing their probative value. (*Id.* at p. 125.) By contrast, Exhibit 65 displayed all of the fatal wounds inflicted on Madden. Further, in *Blue*, the victim's clothing was covered in brain matter as well as blood, which "intensified" the graphic and disturbing nature of the exhibit. Here, Madden's shirt was stained only with blood, and Sergeant Keech testified that the stains had spread after the murder, thus diminishing the inflammatory power of the blood. As Exhibit 65 had more probative value and less prejudicial effect than the uniform in *Blue*, appellant's analogy must be rejected.

C. The Trial Court Properly Admitted Exhibit 67-K

Appellant briefly argues that the admission of Exhibit 67-K "was especially inappropriate and its use demonstrates the prosecutor's clear desire to inflame the jury." (AOB 208.) Not so.

The trial court properly admitted Exhibit 67-K, the photograph of Madden's leg showing four abrasions consistent with the application of a stun gun. (See 56 CT Supp. #1 16486.) Admission of photographs is discretionary, and a trial court's ruling will not be disturbed on appeal unless the probative value of the photographs is clearly outweighed by their prejudicial effect. (*People v. Moon* (2005) 37 Cal.4th 1, 34.) Here, the photograph was relevant aggravating evidence, since it demonstrated another aspect of the torturous suffering Madden endured as he died. It was

particularly important because appellant had admitted that Silveria had used the stun gun while appellant was stabbing Madden. (1 CT Supp. #2 53.) Thus, the photograph had significant probative value in the penalty phase. Moreover, Dr. Pakdaman's testimony on the photograph was brief, and the photograph itself not particularly gruesome or horrific. Thus, there was little, if any, prejudice arising from the admission of the photograph. Accordingly, the trial court did not abuse its discretion in admitting Exhibit 67-K into evidence.

D. The Medical Testimony Was Proper

Appellant argues that the medical testimony given in the penalty phase was cumulative to that presented in the guilt phase, and that it was unduly inflammatory because "the jury was invited to attribute *all* of the viciousness of the homicide to appellant." (AOB 219-221.) Appellant's claim fails.

The prosecutor was entitled to present evidence of the circumstances of the crime. (§ 190.3, subd. (a).) As discussed, he introduced several items of new evidence for the penalty phase, including Exhibit 65 and the photograph of Madden's leg. This evidence needed to be identified, explained, and put in context for the jurors. The brief recitation of Madden's wounds, with reference to the new exhibits, was proper. Nor could the jury have been unduly inflamed by this testimony; they were aware of the evidence that Silveria and Travis had also stabbed Madden, and thus that not all of the wounds were inflicted by appellant. The viciousness of the killing, however, remained a relevant circumstance for the jury's determination of appellant's penalty. Accordingly, the evidence was properly admitted.

VIII. THERE WAS NO PROSECUTORIAL MISCONDUCT

Appellant argues the prosecutor committed numerous acts of misconduct in his closing argument at the penalty phase. (AOB 222-254.) These arguments are each forfeited, and fail in all events.

A. Legal Principles

In *People v. Dykes* (2009) 46 Cal.4th 731, this Court explained:

> As at the guilt phase of the trial, at the penalty phase a prosecutor commits misconduct under the federal standard by engaging in conduct that renders the trial so unfair as to constitute a denial of due process. [Citations.] State law characterizes the use of deceptive or reprehensible methods as misconduct. [Citation.] In order to preserve any claim of prosecutorial misconduct, there must be a timely objection and request for admonition. [Citation.] "'[O]therwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.'"

(*Id.* at p. 786.)

B. The Prosecutor Did Not Mischaracterize the Jurors's Oaths

Appellant argues that "the prosecutor insisted that society demanded a death sentence for Chris Spencer, and that the jurors were duty bound to fulfill this expectation." (AOB 224.) This argument is forfeited, and fails in all events.

1. Background

Appellant complains of portions of the prosecutor's argument in which he referred to imposing life without parole as "easy." For example:[22]

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[22] Appellant challenges at least 10 different portions of the prosecutor's argument as misconduct on this ground. For the sake of brevity and clarity, respondent recites only what are arguably the most compelling portions. Respondent will also do so in subsequent parts of appellant's argument, as necessary.

> This is a solemn responsibility and not one to be taken lightly, nor is this responsibility one of taking the easy way out by voting for life without parole simply because the alternative is too difficult to contemplate. That wouldn't be right, either.

(86 RT 22310.)

> There may be some that would suggest, "Well, since he's going to die in prison anyway, why execute him? Why not just give him life without parole since he's going to die there some day anyway?"
>
> Ladies and gentlemen, we're all going to die some day anyway. That's a fact of life. To follow the suggestion I just referred to and just give the defendant an LWOP, as they call it, a life without parole simply because it's easier for you would be an abrogation of your responsibility as jurors.
>
> Your responsibility as jurors is to weigh and consider all of the aggravating evidence, all of the mitigating evidence, and make your determination based on a moral evaluation. It would be wrong to avoid that moral weighing process and decide on life without parole simply because it's an easier decision and achieves the same result in the long run.

(86 RT 22317.)

Appellant also complains of the prosecutor's argument allegedly intended "to diminish the jurors'[s] sense of personal, moral responsibility for the penalty decision." (AOB 225-226.) For example:

> The presumption of innocence has evaporated and guilt has been conclusively established. Chris Spencer is no longer an innocent man. You don't need to worry about imposing the ultimate penalty on somebody who is not truly and undeniably guilty.

(86 RT 22313.)

> I submit that for what this man has done he deserves the death penalty. He has brought that on himself. And I submit that if you're honest with yourselves you will agree with that, each and every one of you.

> The issues is whether you have the courage, the strength, the conviction to impose what is required here by the facts and circumstances of this most horrible crime.

(86 RT 22354.)

2. Appellant has forfeited this claim

Appellant has forfeited this claim. He did not object to any of the arguments he refers to in his brief. Accordingly, his claim on appeal is forfeited. (*Dykes*, *supra*, 46 Cal.4th at p. 788.)

3. The prosecutor's argument was proper

In all events, the prosecutor's argument was proper. As is plain from the record, his comments reminded the jurors of their responsibility to weigh the aggravating and mitigating evidence when determining the penalty, rather than to shirk their duty. For example, the prosecutor stated, in a comment conspicuously absent from appellant's relatively exhaustive set of quotations:

> If one were asked to vote for life without parole simply because the defendant is going to die in prison anyway, then that would be taking the easy way out, it would be avoiding making a decision, and basically you would not be doing what you're supposed to be doing as jurors by deciding this penalty with a moral evaluation and weighing as mandated by law.

(86 RT 22318.) Thus, the prosecutor never denigrated life without parole as the "easier" penalty to impose; rather, he was urging the jurors to perform their duty. At no point does the prosecutor urge the jurors to violate their oath, defer their responsibility to make the penalty determination, or avenge themselves on appellant as representatives of the victims or community in general. To the contrary, the prosecutor reminded the jurors of their "solemn" and "awesome" responsibility. (86 RT 22310, 22318.) This was proper argument.

Appellant argues that the prosecutor's argument was misconduct because it "urge[d] the jury to return a verdict based on perceived community feeling." (AOB 228-229.) However, as discussed above, the record of the prosecutor's argument belies any such urging. In any event, "[i]solated, brief references to retribution or community vengeance . . ., although potentially inflammatory, do not constitute misconduct so long as such arguments do not form the principal basis for advocating the imposition of the death penalty." (*People v. Ghent* (1987) 43 Cal.3d 739, 771.) Here, the prosecutor's comments were not inflammatory, nor did they form the principal basis of his argument for the death penalty. Accordingly, he did not commit misconduct.

Appellant further argues that the prosecutor's argument was misconduct because "it was couched in terms of a personal request." (AOB 229-230.) Presumably, appellant intends to address this argument to the prosecutor's comment, "I submit that for what this man has done he deserves the death penalty." (86 RT 22354.) However, those "statements were not couched as an expression of personal opinion but as a conclusion to be drawn from the evidence. In any event, it is not misconduct for a prosecutor in the penalty phase of a capital case to express in argument a personal opinion that death is the appropriate punishment, provided the opinion is grounded in the facts in evidence." (*People v. Mayfield* (1997) 14 Cal.4th 668, 804.) That is precisely what the prosecutor argued here. Appellant's claim fails.

C. Improper Appeal to Emotion

Appellant asserts that the prosecutor improperly argued "that the jury must give [a]ppellant and the victim equivalent treatment." (AOB 235.) This argument is forfeited, and fails in all events.

1. Background

Appellant cites to several portions of the prosecutor's argument. Among them:

> Remember the victims here. Remember Jim Madden, remember Eric Lindstrand, remember Judy Sykes, remember Joan Madden, remember Sissy Madden, remember Jim Madden's grandmother, remember Julie Madden, whose father was forever stolen from her in a night by this man, Mr. Spencer, and his friends.

(86 RT 22352.)

> [Defense counsel] wants you or at least one of you to send his client to state prison for the rest of his natural life. Will you do that? Don't you think that if Mr. Madden had that choice he would rather be in prison for the rest of his life?

(86 RT 22409.)

2. Appellant has forfeited this claim

Appellant has forfeited this claim. He did not object to any of the arguments he refers to in his brief. Accordingly, his claim on appeal is forfeited. (*Dykes*, *supra*, 46 Cal.4th at p. 788.)

3. The prosecutor's argument was proper

In all events, the prosecutor's argument was proper. A prosecutor is entitled to argue that a capital defendant deserves "no less punishment than what he inflicted on the murder victim . . . ." (*People v. Kennedy* (2005) 36 Cal.4th 595, 636, disapproved on another ground in *Williams*, *supra*, 49 Cal.4th 405.) That is, at worst, what the prosecutor argued here. Those comments did not constitute misconduct.

D. "Golden Rule" Argument

Appellant argues that "[i]t has long been held that it is *impermissible* for an attorney to argue to jurors that they should place themselves in the position of the victim in the case in assessing the sanction to be imposed

against the defendant (the so-called "Golden Rule" argument)." (AOB 238.) This argument is forfeited, and fails in all events.

1. Background

Appellant complains of the prosecutor's comment during opening argument, "You can put yourself in the position of the victim and consider how this crime caused his death . . . ." (82 RT 21879.)

Appellant also challenges the following portion of the prosecutor's closing argument:

> And remember, evidence as to the specific harm caused by the defendant in this case includes an assessment of and reaction to the crime from the victim's viewpoint. You can put yourself, to that degree that you can, in Mr. Madden's shoes when evaluating this crime, ladies and gentlemen. That is permissible under the law.

(86 RT 22330-22331.)

2. Appellant has forfeited this claim

Appellant has forfeited this claim. He did not object to any of the arguments he refers to in his brief. Accordingly, his claim on appeal is forfeited. (*Dykes*, *supra*, 46 Cal.4th at p. 788.)

Appellant disagrees, arguing that an objection would have been futile because "[o]nce the prosecutor invited the jurors to imagine the impact of such an offense, and the immediate, bloody aftermath, of a case such as appellant's case, on their own lives, it was impossible to 'unring the bell.'" (AOB 246.)[23] Appellant's hyperbolic attack on the competence of jurors

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[23] Appellant relies on *People v. Wein* (1958) 50 Cal.2d 383, for this proposition. Respondent notes that the portion of the *Wein* opinion upon which appellant relies is from the dissenting opinion of Justice Carter, although appellant did not so indicate in his citation. Further, the case was overruled in part—albeit on a different ground than the portion of the

(continued...)

notwithstanding, it remained incumbent upon defense counsel to object to the prosecutor's argument to preserve the issue on appeal. His failure to do so forfeits the claim here.

3. The prosecutor's argument was proper

Even if appellant's claim is heard, it fails. At the penalty phase of a capital case, "a prosecutor may ask the jurors to put themselves in the shoes of the victim." (*People v. Jackson* (2009) 45 Cal.4th 662, 692.) Appellant's contrary assertion, apparently based upon civil cases, a non-capital criminal case, and a holding from the guilt phase of a capital case, is completely baseless. (AOB 238.) The prosecutor's argument was proper, and was not otherwise unduly inflammatory or prejudicial. Accordingly, it was not misconduct.

E. *Griffin*[24] Error

Appellant argues that his "rights under the Fifth and Fourteenth Amendments were violated by . . . the repeated references to Chris Spencer's failure to testify." (AOB 247.) This claim is forfeited, and fails in all events.

1. Background

Appellant complains of the following portion of the prosecutor's argument:

> [Defense counsel]'s argument no doubt will be eloquent and emotional, but it won't change the facts. What [defense counsel] won't be able to speak of is any sympathy or compassion or charity that his client, Mr. Spencer, showed Jim Madden.

(...continued)
dissenting opinion on which appellant relies—by *People v. Daniels* (1969) 71 Cal.2d 1119, which appellant also failed to note in his citation.

[24] *Griffin v. California* (1965) 380 U.S. 609.

> He won't be able to point to any remorse on the part of his client for what he has done, because there is none here before you. No remorse, of course, unless it's in his statement where he speaks of himself: "What am I looking at? How long am I going to have to serve? I know I was wrong. I know I'm stupid. Oh, fuck. There went my life. Where will they send me?" "I don't know. I really don't know." "Not even on a first-time offense?" His last words in the confession: "Chris, you fucked up."
>
> Anywhere in there does he say that he's sorry for what he's done? Does he express feelings for Mr. Madden for what happened here? Don't get me wrong, consider [defense counsel]'s argument and plea for compassion, his appeal to spare his client's life, consider that, but, ladies and gentlemen, consider it in the proper perspective, in light of everything else you know about this case and about what the defendant has done here.

(86 RT 22347-22348.)

2. Appellant has forfeited this claim

Appellant has forfeited this claim. He did not object to this argument below. Accordingly, his claim on appeal is forfeited. (*Dykes*, *supra*, 46 Cal.4th at p. 788; *People v. Sims* (1993) 5 Cal.4th 405, 465.)

Appellant disagrees, arguing that his failure to object "should be overlooked." (AOB 249.) First, he states that "[t]he trial court was dismissive of defense objections during argument and refused to admonish the jury or to provide curative instructions." Appellant provides no record citations in support of this proposition, perhaps because defense counsel had not lodged any objections by that point in the prosecutor's argument.[25] Second, appellant argues that an objection would have been futile, although he does not explain how or why. Finally, he urges this Court to consider

[25] Defense counsel lodged only one objection to the prosecutor's closing argument. (See 86 RT 22389-22390.)

the merits "for reasons of judicial economy; *e.g.*, [*sic*] to obviate the need to address a future a [*sic*] claim of ineffectiveness of trial counsel." Respondent suggests that judicial economy would be better served by enforcing the rule of forfeiture. (See *People v. Scott* (1994) 9 Cal.4th 331, 356, fn. 18.)

3. The prosecutor's argument was proper

In all events, the prosecutor did not impermissibly comment on the defendant's failure to testify on his own behalf in violation of *Griffin*. Here, "[t]he prosecutor did not comment that defendant had failed to *take the stand* to express remorse; he simply said there was no *evidence* that defendant had *ever* expressed remorse." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1174, disapproved on another ground in *Doolin*, *supra*, 45 Cal.4th 390.) This Court has "consistently found such penalty phase argument permissible under *Griffin* . . . ." (*Ibid.*) Accordingly, the prosecutor did not commit misconduct.

F. Describing Appellant As a Monster or Wild Animal

Appellant argues that the prosecutor committed misconduct by his use of a "Bengal tiger" metaphor. (AOB 249.) This claim is forfeited, and fails in all events.

1. Background

In his closing argument, the prosecutor told a story about two men, which in relevant part went as follows:

> But in this little story there were two figures. One was someone who had a lot of money and was really enamored with animals and visited zoos and just liked creatures wild and tame and liked to be able to see them. He liked to keep trophies on the wall.
>
> The other character in this little story had to do with a hunter, a hunter who was a big game type of hunter. Well, it so happened that the two of them were together at a zoo and they

were walking through the zoo and they happened upon a cage which has a sign over it that says "Bengal tiger." And there's a tiger, a Bengal tiger, and it's lying in the sun and it's kind of fat and relaxed and comfortable and its tail is whipping back and forth on the flies that are bothering him.

And the rich guy who likes the animals is really all excited about this and he goes to his big game hunter friend and says, "Look, they've got a Bengal tiger at this zoo. Come on over." The big hunter walks over to him. "Look, look. It's a Bengal tiger. I've always wanted to see one of these."

The hunter says, "That's not a Bengal tiger."

And he says, "Sure, it is. You know, I've seen pictures in books in bookstores and look at this and see the sign. It says 'Bengal tiger.' And look at him."

The hunter says, "No, that's not a Bengal tiger." He says, "I'll prove it to you. You put up the money and I'll prove it to you." The guys says okay.

So they get an airline reservation. They fly off to India to the jungles. They take an expedition into the jungles. They're gone three days hiking and they are tired. They are looking around. And then suddenly one afternoon they hear this absolutely hellacious blood curdling roar from nearby enough to just send shivers down the spine of the guy who's financed the expedition.

They go to a clearing. As they come into the clearing there's this creature. It must be fifteen feet long and it's over its kill. And its eyes look up. It's got the blood dripping from its mouth. It looks up and it sees these two intruders and it lets out another roar.

This guy who's financed this trip freaks. He's out of there. The hunter goes with him. They are off and gone. They don't stop running for about twenty minutes. They stop, catch their breath. "Did you see that?"

The hunter says: "Now you've seen a Bengal tiger."

The point of it is this, ladies and gentlemen: You've got Mr. Spencer in court. You've got a photo of him here.

> Monsters. You know, it's a word. It's a catch phrase. What we're talking about is a monstrous act. We're talking about the effect. Right?
>
> The only one that saw the Bengal tiger, the real Bengal tiger, inside that man, Chris Spencer, was Jim Madden. In that setting that night the tiger came out and that's the result. The boy in the photographs is not the tiger. The boy didn't kill him. The defendant did, the man seated in court.

(86 RT 22395-22397.)

2. Appellant has forfeited this claim

Appellant has forfeited this claim. He did not object to this argument below. Accordingly, his claim on appeal is forfeited. (*Dykes*, *supra*, 46 Cal.4th at p. 788; *People v. Duncan* (1991) 53 Cal.3d 955, 976.)

3. The prosecutor's argument was proper

In all events, the prosecutor did not commit misconduct. "The prosecutor was attempting to focus the jury's attention on the vicious nature of the crime." (*Duncan*, *supra*, 53 Cal.3d at p. 977.) The story highlighted the difference between appellant's violent stabbing of Madden and his docile behavior in the courtroom, as well as his childhood photographs. This was proper argument, not misconduct. (*People v. Brady* (2010) 50 Cal.4th 547, 585; *Duncan*, *supra*, 53 Cal.3d at p. 977.)

IX. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant makes numerous challenges to California's death penalty statute. (AOB 255.) These arguments fail.

A. Section 190.2 Is Not Impermissibly Broad

Appellant argues that in California's death penalty statute, "special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder . . . ." (AOB 25.) This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish

his case from those previously decided. (See, e.g., *People v. Stanley* (2006) 39 Cal.4th 913, 958 [and cases cited therein]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 43 [and cases cited therein].)

B. Section 190.3 Is Not Impermissibly Broad

Appellant argues that section 190.3, subdivision (a), "has been applied in such a wanton and freakish manner that almost all features of every murder . . . have been characterized by prosecutors as 'aggravating' within the statute's meaning." (AOB 259.) This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *Stanley*, *supra*, 39 Cal.4th at p. 967 [and cases cited therein]; *People v. Harris* (2005) 37 Cal.4th 310, 365 [and cases cited therein].)

C. California's Death Penalty Statute Provides Appropriate Safeguards to Avoid Arbitrary and Capricious Sentencing

In addition to the above two claims, appellant argues that other aspects of California's death penalty statute deprived him of necessary safeguards to avoid arbitrary and capricious sentencing. (AOB 261.) These claims fail.

1. There is no requirement that the jury find beyond a reasonable doubt that aggravating factors exist, that the aggravating factors outweigh the mitigating factors, or that death is the appropriate penalty

Appellant argues that his jury should have been required to unanimously find aggravating factors true beyond a reasonable doubt, to find beyond a reasonable doubt that the aggravating factors outweighed mitigating factors. (AOB 262-272.) He also argues the jury was required to find beyond a reasonable doubt that death was the appropriate penalty. (AOB 272-275.) This Court has repeatedly rejected such claims, and

appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *People v. Curl* (2009) 46 Cal.4th 339, 362-363 [and cases cited therein]; *Demetrulias*, *supra*, 39 Cal.4th at pp. 40-41 [and cases cited therein].)

2. No written findings were required

Appellant argues that the California death penalty statute violates the Sixth, Eighth, and Fourteenth Amendments, because it does not require written findings regarding sentencing. (AOB 275-278.) This claim has previously been rejected by this Court, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g, *People v. Cook* (2006) 39 Cal.4th 566, 619.)

3. There is no constitutional requirement of inter-case proportionality

Appellant asserts that the failure of California's capital sentencing statute to require inter-case proportionality review renders it unconstitutional. (AOB 278-280.) This claim has previously been rejected by this Court, and appellant offers nothing specific to his case that would justify a departure from that holding. (See, e.g., *People v. Famalaro* (2011) 52 Cal.4th 1, 77; see also *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [proportionality review not constitutionally required].)

Appellant also argues that "[t]he prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court." He concludes that "[t]his Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment." (AOB 280.) This claim has previously been rejected by this Court, and appellant offers nothing specific to his case to justify a different result. (See, e.g., *People v. Redd* (2010) 48 Cal.4th 691, 757; *People v. Carrington* (2009) 47 Cal.4th 145, 199.)

4. The consideration of unadjudicated criminal activity is proper

Appellant argues that "[a]ny use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process [*sic*] and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable." (AOB 280-281.) This claim has been repeatedly rejected by this Court, and appellant offers no basis to depart from those holdings. (See, e.g., *People v. Fuiava* (2012) 53 Cal.4th 622, 732.)

5. The use of terms such as "extreme" and "substantial" does not impermissibly limit consideration of mitigating factors

Appellant argues, "The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see [section 190.3,] factors (d) and (g)) and "substantial" (see [section 190.3,] factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments." (AOB 281.) This claim has been repeatedly rejected by this Court, and appellant offers nothing specific to his case to justify a different result. (See, e.g., *Fuiava*, *supra*, 53 Cal.4th at p. 732; *Cook*, *supra*, 39 Cal.4th at p. 618.)

6. There is no requirement that the jury be instructed that mitigating factors are relevant solely as "potential mitigators"

Appellant argues that the jury should have been instructed that the statutory mitigating factors "were relevant *solely* as possible mitigators . . . ." (AOB 282-285.) This claim has previously been rejected by this Court, and appellant offers nothing specific to his case warranting a departure from those rulings. (See, e.g., *People v. Smith* (2007) 40 Cal.4th 483, 527; *People v. Sanders* (1995) 11 Cal.4th 475, 564 [and cases cited therein].)

D. California's Death Penalty Statute Does Not Violate the Equal Protection Clause

Appellant argues that the California death penalty statute violates the Equal Protection Clause of the Constitution due to its failure to require a specific burden of proof and unanimous findings for aggravating circumstances. (AOB 285-288.) This claim has previously been rejected by this Court, and appellant offers nothing specific to his case that would justify a departure from that holding. (See, e.g., *Harris*, *supra*, 37 Cal.4th at p. 365 [and cases cited therein].)

E. California's Use of the Death Penalty Does Not Violate the Eighth or Fourteenth Amendments or International Law

Appellant asserts that California's use of the death penalty violates international norms and thus violates the Eighth and Fourteenth Amendments. (AOB 288-290.) This Court has repeatedly rejected such claims, and appellant offers nothing specific to his case that would warrant a reversal of that position. (See, e.g., *Demetrulias*, *supra*, 39 Cal.4th at p. 43 [and cases cited therein]; *Harris*, *supra*, 37 Cal.4th at p. 365 [and cases cited therein].)

CONCLUSION

For the reasons given, respondent respectfully requests that this Court affirm appellant's verdict and sentence.

Dated: April 9, 2012

Respectfully submitted,

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ALICE B. LUSTRE
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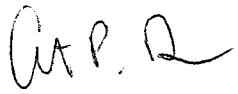

ARTHUR P. BEEVER
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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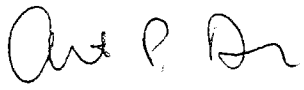
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 19,804 words.

Dated: April 9, 2012

KAMALA D. HARRIS
Attorney General of California



ARTHUR P. BEEVER
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Spencer**

No.: **S057242**

I declare:

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

On April 9, 2012, I served the attached

RESPONDENT'S BRIEF

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Emry J. Allen
Attorney at Law
5050 Laguna Blvd., Suite 112
PMB 336
Elk Grove, CA 95758

CAP - SF
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

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 April 9, 2012, at San Francisco, California.

A. Bermudez
Declarant

A. Bermudez
Signature

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