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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ROBERT WALTER SCULLY,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S062259

SUPREME COURT
FILED
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Deputy

Sonoma County Superior Court Case No. SCR22969
The Honorable Elaine Watters, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
GLENN R. PRUDEN
Supervising Deputy Attorney General
JULIA Y. JE
Deputy Attorney General
State Bar No. 192746
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5567
Fax: (415) 703-5480
Email: Julia.Je@doj.ca.gov
Attorneys for Respondent

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STATEMENT OF THE CASE

On November 15, 1996, the Sonoma County District Attorney filed a first amended information charging appellant and co-defendant Brenda Moore[1] with murder (Penal Code[2] §187; count 1), robbery (§ 211, count 2), conspiracy to commit robbery (§ 182, count 3), attempted robbery (§§ 211, 664, count 4), possession of a short-barreled shotgun (§ 12020, subd. (a), count 5), possession of firearms as a convicted felon (§ 12021, subd. (a)(1), count 6), first-degree robbery (§ 459, count 7), assault with a firearm (§ 245, subd. (a)(2), count 8), and six counts of false imprisonment to gain protection from arrest (§§ 210.5, 236, counts 9-14). (21 CT 4247-4267.)

In count one, the first amended information alleged that the offense was a serious felony (§ 1192.7, subd. (c)(1)), that co-defendants aided and abetted the crime to avoid and prevent lawful arrest (§ 190.2, subd. (a)), that the victim, Frank Trejo, was a peace officer intentionally killed while performing his duties (§ 190.2, subd. (a)(7)), that co-defendants engaged in the commission of a robbery (§ 190.2, subd. (a)(17)), and that appellant, as a principal, was armed with and personally used a short-barreled shotgun (§§ 1192.7, subd. (c)(8), 12022, subd. (a)(1), 12022.5). (21 CT 4247-4248.)

In counts two, four, and seven through fourteen, the first amended information alleged that appellant was armed with and personally used a short-barreled gun or a revolver, making the offense a serious felony (§§ 1192.7, subd. (c)(8), 12022, subd. (a)(1), 12022.5). (21 CT 4248-4249, 4251-4262.)

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[1] Co-defendant Moore was not charged in count 6 (possession of a firearm as a felon).

[2] All statutory references are to the Penal Code unless otherwise specified.

Further, the first amended information alleged that appellant suffered three prior strike convictions (§ 1170.12), six prior felony convictions (§§ 667, subd. (a), 1192.7, subd. (c)), and had served one prior prison term under section 667.5, subdivision (a) and two prior prison terms under section 667.5, subdivision (b). (21 CT 4262-4267.)

Appellant pleaded not guilty to all counts and denied the allegations. (48 RT 7350-7356.) The court denied appellant's motion to change venue. (18 RT 2734; 18 CT 3611-3628.) The court granted appellant's motion to proceed in pro per, but clarified that his appointed public defender would serve as lead counsel. (28 RT 3810-3813, 30 RT 3941-3942.)

On December 3, 1996, the guilt-phase jury trial began. (9 RT 1110-1111.) Appellant and Moore proceeded in the same trial but with separate juries. (9 RT 1110-1111.) Following the prosecution's case, the court granted the defense motion for acquittal on count four, the attempted robbery of Marian Wilson. (94 RT 14940, 14964-14965; 22 CT 4609.) On April 14, 1997, the court declared a mistrial as to count three, conspiracy to commit robbery. (114 RT 18224.)

On April 16, 1997, the jury found appellant guilty of first-degree murder and of the remaining charges, and found all special circumstances and allegations to be true.[3] (114 RT 18292-18300.) On April 28, 1997, the jury found true the prior conviction and prior prison term allegations. (118 RT 18791-18794.) On the same day, appellant's penalty-phase trial began.

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[3] A separate jury found Moore guilty of counts two, five and seven through fourteen, and found true the allegations contained in those counts. (116 RT 18580-18584.) The trial court declared mistrials as to the murder and conspiracy counts (counts 1 and 3) as to Moore. (116 RT 18580-18584.) Moore was acquitted of the attempted robbery of Marian Wilson (count 4). (22 CT 4609.)

On May 27, 1997, the jury determined that appellant should be sentenced to death. (128 RT 20031-20032.)

On June 12, 1997, the trial court denied appellant's motion for a new trial and motion to modify the verdict to life without the possibility of parole. (129 RT 20068, 20115.) On June 13, 1997, the court sentenced appellant to death. (129 RT 20134-20140.) The matter is before this Court pursuant to automatic appeal. (§1239.)

STATEMENT OF FACTS

A. Guilt Phase

On the evening of March 29, 1995, five days after being paroled from Pelican Bay State Prison, appellant shot and killed Sonoma County Sheriff Deputy Frank Trejo. Appellant, who was concealing a sawed-off shotgun in a pickup truck, was stopped by Deputy Trejo in the Santa Rosa Saddlery parking lot shortly before midnight. Rather than risk arrest and be returned to prison, appellant used the weapon to disarm and from a close range, fatally shoot the deputy. According to the testimony of several witnesses and consistent with the physical and forensic evidence, the deputy was unarmed and on his knees when appellant shot him, execution-style, in the forehead. Appellant permanently deprived the deputy of his gun and gun belt and fled the scene of the killing. Appellant then proceeded to take an entire family, including two children, hostage at gun point in their home to protect himself from arrest.

B. Prosecution Case

1. Witnesses at the R&S Bar

Several individuals witnessed the shooting of Deputy Trejo from the R&S Bar parking lot, which was adjacent to the Santa Rosa Saddlery parking lot and separated by a wire fence.

a. Alejandro Ramirez

On the evening of March 29, 1995, Alejandro Ramirez[4] was socializing with friends at the R&S Bar. (58 RT 9000-9001.) At approximately 7:00 or 8:00 p.m., Ramirez accompanied his friend Onesimo Guerrero ("Memo") to the pay phone located outside the bar. (58 RT 9005-9008.) While Memo was on the phone, another friend named Miguel walked by. (58 RT 9009, 59 RT 9122.) Ramirez's attention was drawn to a reflection of light coming from the Santa Rosa Saddlery parking lot next door. (58 RT 9009, 9023.) There, he saw a sheriff's patrol car shining its spotlight on a pickup truck parked in front of the police vehicle. (58 RT 9009-9011.) Ramirez observed a sheriff deputy pointing his flashlight on the truck's rear license plate while talking to a shorter man, later identified as appellant. (58 RT 9013-9016, 9048.) A woman with long blonde hair, later identified as Brenda Moore, was seated in the driver's seat of the truck. (58 RT 9017, 9048.)

Appellant was seen walking to the passenger side of the truck. (58 RT 9018-9019.) Appellant then came back towards the deputy, holding a two-foot long rifle pointed at the officer's chest. (58 RT 9018-9019.) The deputy attempted to pull something from his hip area and dropped his flashlight. (58 RT 9018-9021.) As the deputy and appellant were standing a few feet from each other, Moore emerged from the truck. (58 RT 9021, 9024-9025.) She approached the deputy and took the radio from his shoulder and removed his gun belt. (58 RT 9026.) Ramirez then saw Moore reach into the patrol car and walk back to the truck. (58 RT 9027.)

The deputy was walking backwards with his hands up in front of his face. (58 RT 9043-9044.) Appellant ordered the deputy to turn around and

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[4] Ramirez' full name is Jesus Alejandro Ramirez Gutierrez. (58 RT 8998.)

get down on the ground. (58 RT 9028.) As the deputy was bending down, the officer's face was illuminated by the light. (58 RT 9029.) Ramirez tried to use the pay phone to call the police but he could not get the person using it off the phone. (58 RT 9030, 9044.) By this time, Moore had entered the pickup truck, looked in Ramirez' direction and began knocking on the truck's rear window signaling to appellant. (58 RT 9030-9031.) The pavement was dark and Ramirez could not see precisely how the officer was facing while on the ground. (58 RT 9032.) He believed, however, that the deputy was facing down with his head closer to the patrol car. (58 RT 9032.) Ramirez heard a loud shot fired from the rifle, saw the muzzle flash, and the deputy's body jump. (58 RT 9032-9033.) He maintained that the deputy was shot from a close range of approximately two feet and was not on his knees. (59 RT 9133-9134, 9161.) Ramirez saw appellant quickly get into the truck and speed off towards Santa Rosa on Highway 12. (58 RT 9033, 9036, 9047.) Ramirez approached the fence and saw that the deputy was dead. (58 RT 9036-9037.)

At the time Ramirez observed the shooting, Memo was standing on the other side of Ramirez, close to a taco truck by the bar. (58 RT 9044.) Ramirez did not know where Miguel was at that time. (58 RT 9044.) Ramirez and Memo left the bar parking lot in Memo's car along with two of Memo's female friends. (58 RT 9044.) Ramirez did not immediately report the incident to the police because he was nervous and afraid. (58 RT 9047.) However, he spoke to the police several weeks after the deputy's shooting.[5] (59 RT 9174.)

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[5] At trial, Ramirez testified that he had experienced his own criminal problems before he reported the shooting incident to the police. (59 RT 9177.) He had been served with a restraining order after assaulting his pregnant girlfriend in April 1995. (59 RT 9179.) Ramirez contacted the police about the deputy's shooting ten days after being served the

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The morning after the shooting, Ramirez told his landlord, Ismael Martin, that he had witnessed a deputy being shot at the saddlery parking lot. (81 RT 12386-12389.) He explained that that the deputy was checking the license plate behind the truck when appellant came out with a gun in his hand. (81 RT 12390.) Ramirez indicated to Martin that appellant ordered the deputy to get down and as the deputy was going down on his knees that appellant shot him. (81 RT 12391.) Ramirez also told him that Moore had helped appellant take the gun away from the deputy. (81 RT 12393.)

b. Miguel Aguilar

Miguel Aguilar[6] had arrived at the R&S Bar parking lot at approximately 9:30 p.m. (61 RT 9457.) While seated in his brother's car, Aguilar also noticed the sheriff's patrol car shining its spotlight on a green pickup truck in the saddlery parking lot. (61 RT 9466-9469.) A woman standing in the door of the truck appeared to be searching for something in the cabin. (61 RT 9471.) The deputy was shining his flashlight inside the truck's cabin, and suddenly moved back when a man, later identified as appellant, emerged from the truck with a 12-gauge shotgun pointed at the officer. (61 RT 9477-9579, 61 RT 9500-9501.) As appellant moved toward the deputy, he ordered him to "hurry up" or "move fast." (61 RT 9481.) The deputy moved back with his hands on the back of his head. (61 RT 9483, 9504.) Aguilar observed appellant "cutting" the shotgun, pulling

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restraining order and prior to his court appearance related to that domestic incident. (59 RT 9185.) Ramirez also testified that he had been arrested in 1992 for spousal battery and served less than one year in jail for the offense. (59 RT 9183.)

[6] Aguilar, whose full name is Oscar Gustavo Aguilar Lopez, is known as Miguel. (61 RT 9456.)

it back and forth. (61 RT 9503-9504, 62 RT 9642-9643.) The deputy then knelt down behind the truck. (61 RT 9505, 9551.)

Aguilar got out of his brother's car and walked towards the bar. (61 RT 9492, 9495.) He saw Alejandro Ramirez[7] and another friend using the pay phone, and told them that an officer was having a problem. (61 RT 9493-9494, 9496.) Aguilar looked in the direction of the saddlery and heard a gunshot. (61 RT 9497.) Aguilar saw appellant enter the pickup truck and drive off. (61 RT 9497, 9499.) Aguilar immediately went inside the bar to get his brother. (61 RT 9498.) After Aguilar learned that the police had been called, he went outside where he saw the deputy face down on the ground. (61 RT 9509-9510.)

Later that evening, Aguilar spoke to the police and gave a description of the truck and the individuals he had seen in the saddlery lot. (61 RT 9507-9508.) He maintained that he had not seen appellant or the woman approach the patrol car. (61 RT 9500, 9507.) Several days after the incident, Aguilar and Ramirez spoke to each other about what they had witnessed that night. (62 RT 9591, 9681.) Aguilar told Ramirez that he had seen the deputy's shooter. (62 RT 9591, 9681.) Ramirez indicated to Aguilar that he had observed the woman take the radio and gun belt from the deputy. (62 RT 9673.)

c. "Memo" Guerrero

On the evening of the shooting, Onecimo Guerrero ("Memo") and his two friends, Kellie Jones and Rhonda Robbins, were parked in the R&S Bar parking lot. (63 RT 9748-9750.) The young women stayed in the car while Memo went to order food from a taco truck located next to the bar. (63 RT

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[7] Aguilar knew Alejandro Ramirez by the name "Memo," not to be confused with another witness Onecimo Guerrero whose nickname is also "Memo." (61 RT 9511; 62 RT 9645.)

9752.) Memo greeted Alejandro Ramirez at the pay phone near the bar entrance. (63 RT 9754-9756.) Memo noticed a sheriff's patrol car and a pickup truck in the saddlery lot. (63 RT 9756.) There was a woman, later identified as Brenda Moore, inside the truck. (63 RT 9758, 9762-9763.) He walked closer to get a better look. (63 RT 9759.) A deputy was in front of his patrol car with another man, later identified as appellant. (63 RT 9761, 63 RT 9762- 9763.) The front lights on the patrol car and the top spotlight were on. (63 RT 9763-9764.)

Memo saw the deputy standing with his hands up behind his head as appellant was aiming a shotgun at the officer's neck. (63 RT 9764-9766.) He heard both of them talking but did not see the deputy change from the standing position. (63 RT 9766, 9769.) Memo was nervous and did not know what to do. (63 RT 9766.) Memo then went back to the area near the taco truck where Ramirez was still standing. (63 RT 9768.) Moore was seen walking from the pickup truck and entering the driver's side of the patrol car. (63 RT 9770.) The front lights of the patrol car were then turned off and the spotlight was moved up towards the sky. (63 RT 9770.) When Moore exited the patrol car, she was carrying something in her hands and went to back to the pickup truck. (63 RT 9771.)

At this time, Miguel Aguilar and Alejandro Ramirez were talking near the pay phone and Memo was closer to the taco truck. (63 RT 9773-9974, 65 RT 10031.) Memo heard the shotgun discharge and shortly afterwards, the engine of the truck start. (63 RT 9774, 9778.) He then saw appellant leaving the area of the patrol car with his weapon. (63 RT 9775.) Memo was not able to see the deputy's position due to the dust or smoke raised from the shot. (63 RT 9777.) Memo observed appellant walk back to the truck and drive quickly towards Santa Rosa on Highway 12. (63 RT 9777-9778.) Over the fence, Memo spotted the fallen deputy, face down in front

of the patrol car. (63 RT 9779-9781.) Memo then left the parking lot quickly with the young women and Ramirez. (63 RT 9782.)

One week later, Memo spoke to police about the shooting. (63 RT 9787.) He told police what he had seen when the deputy was shot and that Ramirez was also in the parking lot that night. (63 RT 9789.) Memo informed police that he heard appellant yell, "lay down on the ground" to the deputy. (63 RT 9789, 10055-10058.) At that moment, Memo heard a gunshot and saw a large cloud of dust. (65 RT 10058.) Memo never saw appellant go to the driver's side of the patrol car or make a throwing motion towards Highway 12. (63 RT 9782.) He explained that the view of the patrol car in saddlery parking lot was somewhat blocked by horse trailers and parked cars. (65 RT 100025-100026.)

Memo testified at the preliminary hearing that he did not see Moore get out of the truck and go to the patrol car. (65 RT 10039.) At trial, however, he indicated that had had seen Moore exit the truck and approach the patrol car. (65 RT 10040, 10053.) When Moore returned to the truck, she had something in her hand but he could not tell what it was. (65 RT 10053-10054.) He explained that he had been nervous and confused at the preliminary hearing, but at trial, he was recalling the events more clearly and was being truthful in his testimony. (65 RT 10039-10042.)

At trial, Memo testified about his prior felony conviction and drug use.[8] (63 RT 9792-9835.) He maintained that he was not under the

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[8] Memo suffered a prior felony conviction on October 15, 1996, for transportation and sale of a controlled substance, and evading a police officer. (63 RT 9792.) He had not yet been sentenced for those offenses when he testified at trial. (63 RT 9793.) Memo denied the district attorney had made any promises of leniency in exchange for his trial testimony. (63 RT 9794.) He testified that between March 29, 1995, and June 1995, he had used methamphetamine on a regular basis and sold drugs to support his habit. (63 RT 9833, 9835.) Memo denied that methamphetamine affected

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influence of drugs when he made his observations from the bar parking lot on March 29, 1995, or when he testified at the preliminary hearing. (63 RT 9837, 9844.)

d. Rhonda Robbins and Kellie Jones

Memo's two teenage friends, Rhonda Robbins and Kellie Jones, had also observed the shooting. Rhonda and Kellie were waiting in Memo's car while he used the pay phone at the R&S Bar. (65 RT 10118-10119, 10124.) The girls came out of the car and looked in the direction of the saddlery parking lot. (65 RT 10125, 70 RT 10559-10660.) They saw a sheriff's patrol car with its headlights and spotlight directed at a green pickup truck parked in front of it. (65 RT 10125-10127, 70 RT 10553-10557.) The deputy, was holding a flashlight and talking to a woman, Brenda Moore, seated in the truck. (65 RT 10128-10129, 70 RT 10557-10558, 70 RT 10569-10572.) A man, later identified as appellant, then exited the truck and walked towards the deputy. (65 RT 10131, 65 RT 10128-10129, 70 RT 10569-10572.) Appellant and the deputy began to wrestle between the vehicles. (65 RT 10133, 70 RT 10564-10565.) Appellant was carrying a sawed-off shotgun and pointed the weapon at the deputy's head from approximately three feet away. (65 RT 10136-10137.) The deputy put his hands up and Moore went into the patrol car and removed an item from the deputy's vehicle. (65 RT 10134-10135; 70 RT 10567.) Although Rhonda was not sure what the item was, Kellie believed it was a CB radio. (70 RT 10596.) Moore had turned off the headlights on

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his ability to remember. (63 RT 9837.) He denied using methamphetamine between the night of the shooting and the time he testified at the preliminary hearing. (63 RT 9837, 9844.) However, Memo had used methamphetamine several months after the preliminary hearing until his arrest in June 1996. (63 RT 9846.)

the patrol car and turned the spotlight to face the bar. (65 RT 10134-10135.)

Appellant had the shotgun pointed at the deputy when the deputy got on his knees. (65 RT 10136, 70 RT 10566.) Rhonda and Kellie testified that they saw appellant shoot the deputy in the face. (65 RT 10139, 70 RT 10569.) Kellie recalled hearing the gunshot, seeing a flash, and then seeing the deputy fall to the ground. (70 RT 10569-10570.) She testified that the deputy was on his knees when he was shot. (70 RT 10669-10570.) Kellie then saw appellant take a gun belt from the deputy when the deputy was on the ground. (71 RT 10738.) Kellie did not see appellant trip or fall at any time. (70 RT 10597.)

After the shot was fired, Moore warned appellant, "look at all those people over there," or "there's people watching". (65 RT 10139-10140, 70 RT 10571.) Appellant quickly got into the pickup truck and drove away with Moore. (65 RT 10139-10140, 70 RT 10571.)

Frightened by what they had seen, Rhonda and Kellie returned to Memo's car and were driven home. (65 RT 10142-10145.) The morning after the shooting, Rhonda and Kellie gave a statement to the police. (69 RT 10304-10305, 10312.)

2. Police Arrive at the Crime Scene

On the evening of the shooting, at 11:30 p.m., Deputy Trejo had informed dispatch that he was stopping a suspicious truck parked at the Santa Rosa Saddlery Shop parking lot. (72 RT 10953, 10969.) He provided dispatch with the license plate of a green Ford pick up truck owned by co-defendant Moore. (72 RT 10954.) At 11:36 p.m., dispatch communicated with another deputy to check the status of Deputy Trejo. (71 RT 10816-10817.)

The first officer arrived at the saddler parking lot at approximately 11:41 p.m. (71 RT 10820, 10955.) The lights on the Deputy Trejo's patrol

car were off and the spotlight was canted to the right. (71 RT 10824, 72 RT 10910.) Deputy Trejo was found dead in front of his patrol car, lying face down on his stomach in a pool of blood. (71 RT 10823.) The deputy had his arms up and in front of his head, fists clenched, and his legs pointed straight back. (71 RT 10836-10837.) The right side of his face was turned slightly, exposing major trauma on his face. (71 RT 10837.) The deputy's gun belt and weapon, normally kept around his waist, were missing, and his radio and flashlight could not be located. (72 RT 10884.) The deputy's shotgun was still electronically locked inside his patrol vehicle. (72 RT 10932, 10938-10939.) Officers proceeded to interview potential witnesses at the R&S Bar and secure the area. (72 RT 10898-10899.)

At approximately 3:10 a.m., the following morning, police, using helicopter surveillance, located Moore's green pickup truck abandoned at a church parking lot on South Wright Road in Santa Rosa. (78 RT 11902, 82 RT 12592-12597.) The license plate and description of the truck matched the vehicle sought in connection with Deputy Trejo's shooting death. (78 RT 11907.)

3. The Cooper/King Family Held Hostage

After fleeing from the Santa Rosa Saddlery Shop parking lot, appellant and co-defendant Moore entered a residence at 1400 Lloyd Avenue, the home of 68-year old Frank Cooper and his fiancé Yolanda King. (82 RT 12611.) The couple and their family were asleep. (82 RT 12613.) At approximately 1:00 a.m., Frank, awoken by the sound of his back door being kicked in, came out of his bedroom to investigate. (99 RT 15820.) There, Frank was confronted by appellant. (82 RT 12615-12624.) Appellant pointed a sawed-off shotgun at Frank's head and shouted to get down on his knees or he would "blow his head off." (82 RT 12621-12625.) Yolanda, who was still in their bedroom, asked Frank to comply. (82 RT 12625.) Appellant ordered Frank to wake up the rest of the family

members and get them into one room. (82 RT 12626.) Frank, Yolanda's daughter Karen, son Jeremy, and Karen's toddler son and infant daughter were then gathered in Karen's bedroom. (82 RT 12626.) Appellant repeatedly told them not to use the phone or look out the window, or someone would get hurt. (82 RT 12665-12666.)

Appellant told the family he was going downstairs to get "another hostage" and then brought Brenda Moore into the room. (82 RT 12628-12629.) Appellant was armed with the sawed-off shotgun and a pistol. (90 RT 14171.) The Cooper/King family sat on the bed while Moore sat on the bedroom floor and appellant sat against the doorway. (82 RT 12629, 82 RT 12647-12648.) Moore did not appear frightened. (90 RT 14177.) At one point, Moore laid her head on appellant's lap and whispered in his ear. (92 RT 14424.) Appellant never pointed the gun at Moore and the family did not believe Moore was a hostage. (92 RT 14430.)

After obtaining a pair of socks from Frank, appellant unloaded the shotgun, placed the shotgun shells in the socks, and tucked them in his waistband. (82 RT 12644-12645.) Moore briefly went downstairs to make a phone call.[9] (82 RT 12649.) The Cooper/King family remained on the bed for hours. (83 RT 12753.) They were afraid and obeyed appellant's orders because he had a gun. (83 RT 12759.) At no time did the family feel they were free to leave the house. (91 RT 14212.)

Approximately five hours later at 6:30 a.m., Frank was allowed to leave the bedroom to make coffee. (82 RT 12651.) Frank told appellant

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[9] At approximately 3:00 a.m., Moore telephoned her neighbor Delila Caul informing her that Moore was in Santa Rosa. (84 RT 13032-13033.) Moore told Delila that appellant "had killed a cop" and that he was holding "them" hostage. (84 RT 13036.) Moore did not indicate how many people were involved. (84 RT 13037.) Moore sounded scared and asked Delila not to call the police. (84 RT 13041-13042.)

that Jeremy had a medical appointment in the morning and if he did not appear at the appointed time, someone would be calling the house. (82 RT 12653-12655.) At 7:30 a.m., appellant permitted Frank and Jeremy to leave but warned them that the rest of the family was still at the house and if anything went wrong it would be a deadly situation. (83 RT 12695, 83 RT 12860-12861.) By this time, the police were positioned outside the gate of the residence, and had set up several roadblocks around the area. (82 RT 12655-12660.) Frank was able to bypass the officers and reach his ex-wife's house where he telephoned his son and ultimately made contact with the police. (82 RT 12660-12662.)

As the other members of the Cooper/King family remained hostage in Karen's bedroom, appellant and Moore watched a television newscast reporting that a deputy sheriff had been killed. (91 RT 14199-14202.) Moore told appellant that they "got these people here to negotiate." (91 RT 14201.)

Frank, as instructed by the police, telephoned his house and informed appellant that he had run out of gas and needed Yolanda to bring him gas. (82 RT 12662-12663, 88 RT 13634-13635.) Appellant released Yolanda from the house but would not permit her to take Karen's children outside. (82 RT 12664, 90 RT 14444.)

Following several telephone calls from a police hostage negotiator and assurance that they would not be harmed, appellant and Moore surrendered and were arrested. (88 RT 13637-13647, 92 RT 14574-14576.)

4. Physical and Forensic Evidence

a. Evidence from the scene

Crime scene investigators found Deputy Trejo's body in the prone position, laying on his stomach with his hands cupped and forward alongside his head, and his knees slightly bent. (79 RT 11989, 11994,

11996.) The deputy's belt keeper that normally attaches his gun belt to his waist was found unsnapped. (79 RT 12000.) The deputy's clothing was significantly covered in blood. (74 RT 11375.) Before the deputy's body was moved into a body bag, brown paper bags were placed over his hands to preserve any trace evidence. (80 RT 12242.)

In order to determine the proximity of the weapon to the deputy when he was shot, a gunshot residue test was conducted on his hands. (80 RT 12238-12239, 12245, 82 RT 12285-12286.) Small glass fragments were obtained from the back of the deputy's jacket, from both of the deputy's arms, and from his right hand near his thumb. (81 RT 12290, 78 RT 11855-11859.) The deputy's eyeglasses with missing lenses were taken off his face. (78 RT 11860.) Tissue particles found at the scene were collected. (81 RT 12291-12292.) Evidence specialists also found one latex glove, a cassette box, and pieces of broken glass on the ground near where the deputy's body was located. (80 RT 12219, 12155.)

b. Evidence from the vehicles

The deputy's patrol car and Moore's 1969 Ford pickup truck were processed for latent fingerprints and searched for trace evidence. (77 RT 11702, 11712.) None of the prints lifted from the patrol car and the pickup truck matched the prints of appellant or Moore. (78 RT 11835-11837, 78 RT 11841-11842.) The interior of the patrol car was vacuumed to collect debris, hair, and fibers. (81 RT 12296.) No blood evidence was detected. (81 RT 12294.)

Several items were found inside the truck, including dirty clothing, a knit cap with the top cut open, binoculars, a bag of disposable latex gloves, a bottle of peppermint schnapps, and appellant's eyeglasses. (76 RT 11466-11483, 77 RT 11613.) Mechanical inspection of the truck revealed that the vehicle ran very poorly, was operating with three brakes, and contained two gallons of fuel. (82 RT 12496-12501.) Tests showed no

blood or evidence of bodily fluids on the truck. (76 RT 11584, 81 RT 12295.)

c. Evidence from the Cooper/King residence and surrounding field

Evidence specialists found several items in the marshy field and tree-lined area surrounding the Cooper/King residence. (78 RT 11910-11912.) In the open field, a cardboard box was found containing items belonging to Deputy Trejo. (78 RT 11911-11912.) A police radio was located in the mud, and the deputy's flashlight was found two feet from a fence line. (78 RT 11914, 85 RT 13176.) The deputy's gun belt was also retrieved from the field. (85 RT 13180.) There were no identifiable fingerprints on the flashlight or gun belt. (85 RT 13180-13182.)

A large plastic bag containing several marked road maps for Vallejo, Napa and Sonoma County were discovered in the field. (85 RT 13168.) One map had "Redwood Road" written on it, and an enlarged view of the city of Santa Rosa had several areas circled or blacked out with pen. (85 RT 13169.) The latent fingerprints on the maps could not be identified. (85 RT 13170-13171.)

Items belonging to appellant and Moore were also discovered in the field. Evidence specialists obtained a box containing paperwork bearing appellant's name, as well as clothing, shoes and a book. (86 RT 13291.) Moore's purse was found containing a receipt for Round Table Pizza and a written notice related to appellant's parole release instructing him to report to a San Diego parole office on March 27, 1995. (86 RT 13349-13351.)

During the search of the Cooper/King residence, evidence specialists retrieved two firearms and ammunition from the house. (85 RT 13209, 85 RT 13213-13215.) The deputy's Smith & Wesson revolver and speed loaders, and a sawed-off shotgun with a round in the chamber were found in one of the bedrooms. (85 RT 13209, 85 RT 13213-13215.) The police

found 22 unexpended shotgun shells stored in two socks. (85 RT 13211.) No identifiable fingerprints were developed from the revolver or the ammunition. (85 RT 13235-13238.) However, appellant's right palm print was identified on the sawed-off shotgun. (85 RT 13244.) A pair of brown boots and a maroon backpack containing some clothing, handkerchief, sunglasses, and a black purse with Moore's driver's license were also located in the residence. (85 RT 13222-13224.)

d. Pathologist's Findings

Forensic pathologist, Dr. Ervin Jindrich, initially examined the deputy's body at the scene, noting the deputy's face-down, prone position and the glass fragments found on his body. (81 RT 12334-12340, 12435-12437.) Dr. Jindrich observed a large amount of blood and brain matter on the deputy's face, upper chest, and jacket. (81 RT 12439-12440.) The deputy's shattered eyeglasses were displaced to the right of his face. (81 RT 12439-12440.)

Dr. Jindrich performed the autopsy. (81 RT 12441.) X-rays showed that the deputy's skull was massively fractured and numerous pellets[10] from the shotgun shell were embedded in his head, mainly in the forehead area. (81 RT 12442-12443.) There was no exit wound. (81 RT 12453.) Although the shot struck the deputy in a very tight packet, one shot had penetrated the distal shoulder. (81 RT 12444, 12454, 12473-12474.) Dr. Jindrich opined that the single shot to the shoulder could have occurred if the deputy had his arm elevated above his head thereby putting his shoulder close to his head where the shot could have impacted it. (81 RT 12454.)

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[10] Pellets refer to the metallic shots contained in the shotgun shell. The term pellets or shots are used interchangeably by Dr. Jindrich and the testifying criminalists.

The presence of a plastic fragment from a shotgun shell in the skull indicated that the shot had occurred from a relatively close distance. (81 RT 12444-12445.) The most striking finding was the large defect in the deputy's forehead that caused the brain to be visible. (81 RT 12447-12451.) Dr. Jindrich explained that at close range, the shot are tight together and function more like a large bullet that can cause a massive defect on the body. (81 RT 12449.) Lacerations that extended up into the hairline caused the face to lose its normal contour. (81 RT 12448-12450.) It appeared that some shot had separated off and one shot grazed the skin in the right temple area. (81 RT 12449-12450.) Because the deputy had been wearing eyeglasses at the time of shooting which were in the line of the shot, the glasses were shattered and fragments had penetrated the skin. (81 RT 12448.)

Dr. Jindrich determined the cause of death to be a "gunshot (shotgun) wound of the head." (81 RT 12455.) Specifically, the lead shots from the shotgun shell that had struck the deputy in the forehead caused his death. (81 RT 12452-12453.) Dr. Jindrich's diagnosis included massive fracturing and disruption of the skull, massive destruction of the brain, and subarachnoid and soft tissue hemorrhage. (81 RT 12456.) Given the nature of the wounds, Dr. Jindrich indicated death was virtually instantaneous. (82 RT 12572.) There were no wounds observed on the back of the head. (82 RT 12572.) Because of the mobility of the target, Dr. Jindrich was not able to state with certainty what the position of the deputy's body had been in relation to the shooter. (82 RT 12576.) However, it was evident that the deputy had been facing the barrel of the shotgun, because the shot was relatively straight at his face. (82 RT 12576.) Some brain tissue was discovered on the left lower part of the deputy's jacket and on his left hand. (82 RT 12577, 12580.) Dr. Jindrich explained that brain matter can be deflected on to the back of a victim's hands if the hands are in front of the

body and parallel to the shoulders at the time of the shooting. (82 RT 12581.)

e. Criminalist's Findings

Criminalist Richard Waller analyzed the physical and forensic evidence related to Deputy Trejo's shooting death for the prosecution. (88 RT 13693.) Waller measured and tested the 12-gauge sawed-off shotgun, finding it operable. (88 RT 13698-13705.) He did not find the presence of blood on shotgun. (88 RT 13697.) Waller determined that the microphone wire attached to the deputy's radio transmitter found in the field near the Cooper/King residence had been cut with two different knives, one knife which was obtained from the deputy's gun belt. (88 RT 13713-13717.) No blood was detected on the gun belt or on the handcuffs, keys, knife, leather keeper or flashlight. (88 RT 13718-13720.)

Waller did not find blood, glass or powder particles on several clothing items belonging to appellant and Moore. (88 RT 13760-13763, 89 RT 13850-13852.) A blue watch cap that was cut open on the top and found in Moore's truck contained hairs similar to the known hair of Moore. (88 RT 13766-13769.)

Waller examined the deputy's clothing for the presence of blood. Blood was found on the deputy's pants, specifically in the upper front portion of the pants, with some individual spots in the lap area and in the lower left front cuff and the back leg. (88 RT 13720-13735.) There was also blood on the belt and belt loops on the pants. (88 RT 13735.) Waller noted that the fibers on the left knee of the pants were frayed. (89 RT 13833.) Scuff marks on the toe area of the deputy's boots indicated that there was force coming from the heel towards the front toe area. (88 RT 13789-13796.) However, there was no evidence of glass or blood on the boots. (89 RT 13977.)

Waller found a large quantity of blood on the deputy's shirt. (88 RT 13797.) There was a hole or defect in the top right shoulder of the shirt that corresponded to a similar hole in the jacket. (88 RT 13797-13802.) It was noted that two other holes which were further back in the right shoulder were created by skims of a pellet. (90 RT 14116-14117.) There was a large quantity of blood on many locations on the jacket, on the front chest area and sleeves. (89 RT 13828-13829.) On the right sleeve there was blood, tissue, bone fragments, glass fragments and apparent lead. (89 RT 13829.)

Waller concluded that the blood spatters on the deputy's clothing were consistent with high velocity impact spatter. (89 RT 13835.) His conclusion was based on the size and physical appearance of the actual stain or drops of blood which were extremely small. (89 RT 13835.) Waller explained that when blood is impacted with high velocity force it results in extremely small drops, similar to a mist. (89 RT 13836.) The spatter marks observed on the pants were consistent with spatter as a result of a shotgun wound. (89 RT 13836.)

Using test fires, Waller concluded that the shots found in the deputy's body came from a sawed-off shotgun. (89 RT 13869-13876.) Waller attempted to determine the muzzle to target distance. (89 RT 13886-13891.) He reproduced the pattern of the shot by firing the weapon from various distances. (89 RT 13886-13891.) Waller concluded that the muzzle to target distance in the case of Deputy Trejo was approximately nine to ten feet. (89 RT 13897.) Waller took into consideration that the pellets had actually struck the deputy in the forehead, one pellet had entered his right shoulder, his eyeglasses were struck by the impact, and there were no pellet strikes below the ridge of the deputy's nose. (89 RT 13897-13899.) There was also blood spatter on the deputy's hands consistent with high velocity spatters. (89 RT 13903-13905.) Waller indicated that the

position of the deputy's hands would have had to be somewhere in front of the wound in order to catch the blood spatter. (89 RT 13903-13905.)

Given the muzzle to target distance of nine to ten feet, the location of the blood spatters, the presence of brain matter and glass fragments on the deputy's body and clothing, Waller concluded that the deputy was not in a prone position when he was shot. (89 RT 13909-13910.) Specifically, the amount of blood and tissue on the upper chest, the blood spatter on the top area of the pants, the lack of blow-back on the ground in front of the head, and the presence of glass particles on the clothing and body were not consistent with the deputy laying with his stomach down and receiving a wound to the head. (89 RT 13910.) Waller agreed that, based on the autopsy photos and blood pattern on the face, the deputy was shot fairly straight on. (90 RT 14117.)

5. Attempted Robbery of Marian Wilson

Marian Wilson and Sung Won Kim, owned Sushi Hana, a restaurant in Sebastopol. (56 RT 8598.) On March 29, 1995, they were at working at the restaurant after it closed at 9:00 p.m., cleaning and closing out the cashier. (56 RT 8599.) At approximately 10:00 p.m., after counting the day's receipts, Wilson left to go shopping at the nearby Safeway. (56 RT 8560.) A few minutes later, on the drive back to Sushi Hana, she observed a green pickup truck parked around the corner from the restaurant, on Main and Burnett streets. (56 RT 8608.) Wilson saw Moore and appellant in the truck. (56 RT 8612.) Wilson continued down the street and parked her pickup truck across the street from Sushi Hana. (56 RT 8613.) There is a Round Table Pizza across the alley way from the restaurant. (56 RT 8617.)

Wilson went briefly inside Sushi Hana to collect the briefcase that contained the day's receipts along with the mail. (56 RT 8614.) She was going to drive around the corner to place the mail in the mailbox, then return to the restaurant to pick up Sung Won Kim and drive home. (56 RT

8614.) At approximately 10:50 p.m., Wilson crossed the street with the briefcase in hand and headed to her truck. (56 RT 8619.) The green pick up truck that she had seen on Main Street five minutes earlier was now parked in front of her truck, and the same two individuals were sitting inside. (56 RT 8619.) Wilson became frightened, hurried to her truck, and threw the briefcase on the passenger side. (56 RT 8621.) As Marian Wilson was getting into her vehicle, appellant and Moore got out of their truck and walked towards her. (56 RT 8621.) She drove away quickly without turning on the headlights. (56 RT 8621-8622.) As Wilson turned the corner, she saw the green truck turning on to Petaluma Avenue and then head towards Highway 12. (56 RT 8625, 8628.) She was worried about Sung Won Kim who was still at the restaurant with the door unlocked. (56 RT 8625.) Wilson drove to the mailbox and then returned to Sushi Hana, parking directly in front of the restaurant. (56 RT 8625-8626.)

Sung Won Kim had remained in the restaurant after closing. (56 RT 8727.) A couple of minutes after Wilson had left for the mailbox, Kim heard an old car with a loud engine coming down the alley next to the restaurant. (56 RT 8729.) He heard the vehicle stop in front of the restaurant for at least 20 seconds. (56 RT 8730-8731.) Kim looked out the window and saw the vehicle turn in front of the restaurant and drive toward Petaluma Avenue. (56 RT 8731.) He saw the back of the vehicle and determined that it was a truck. (56 RT 8732.)

When Marian Wilson returned to Sushi Hana, she insisted that Kim and she leave immediately because of the two people who had been parked in front of her truck. (56 RT 8627-8628.) Although Wilson was scared, she did not contact the police at that time because nothing had happened to her. (56 RT 8630.) Wilson and Kim locked up the restaurant and went home. (56 RT 8628-8629.) The next morning, Wilson read the newspaper story about the shooting and recognized the green truck described in the

article. (56 RT 8631-8632.) She then reported the incident from the previous evening to the police. (56 RT 8631-8632.)

6. Other Crime Evidence Related to Conspiracy and Attempted Robbery Counts[11]

Appellant committed armed robberies of several restaurants in San Diego County within a three-week period in December 1981. Armed with a gun or a shotgun, appellant and an accomplice robbed two Pizza Huts (55 RT 8512-8546, 57 RT 8873-8877, 78 RT 11327-11328), the Bollweevil Restaurant (57 RT 8878-8893), and the Bull Pen Bar (63 RT 9728-9743) shortly before closing, and ordered the workers at gunpoint to empty the day's receipts from the cashier or safe.

Stephen Jarrett, appellant's accomplice in the 1981 robberies, testified that he and appellant would specifically target pizza places, restaurants, and bars they were familiar with, and knew had late business hours and accessible cash. (74 RT 11315-11317.) Appellant and Jarrett looked for businesses that were isolated and had easy road access. (74 RT 11317-11319.) They would wait until the late evening or early morning for the business to close when there would be no customers inside and less interference. (74 RT 11322.)

7. Appellant's Prior Felony Convictions

Evidence of appellant's eight prior felony convictions was presented in a bifurcated proceeding. (117 RT 18745-18751.) On April 28, 1997, the

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[11] The trial court admitted evidence of appellant's four prior crimes of armed robbery for the limited purpose of showing a common plan, scheme, or intent with respect to the count 3 – conspiracy to commit robbery, and count 4 – attempted robbery of Marian Wilson. (57 RT 8872, 74 RT 11314-11315.) The trial court ultimately declared a mistrial as to the conspiracy count and appellant was acquitted of attempted robbery. (114 RT 18224, 94 RT 14964-14965; 22 CT 4609.)

jury found true the allegations that appellant had suffered those prior convictions. (118 RT 18791-18794; 25 CT 5080-5083.)

C. Defense Case

1. Appellant's Testimony

At trial, appellant testified that he was responsible for the death of Deputy Trejo but the shooting was a horrible accident. (95 RT 15028.) Appellant did not plan to shoot the deputy or intend that the deputy lose his life. (95 RT 15028.) Appellant admitted to disarming the deputy by taking his gun belt but it was not his intention to permanently deprive him of the gun belt or the items on the belt. (95 RT 15029.) He did not demand the deputy's wallet and did not search through his pockets for items of value. (95 RT 15029.)

a. Appellant's release from PBSP

On the morning of March 24, 1995, appellant was paroled from Pelican Bay State Prison (PBSP), a maximum security prison located in Crescent City, California. (79 RT 12066, 95 RT 15053.) He was released from prison with a box containing some legal papers, a few personal belongings, and $200 in his pockets. (95 RT 15053-15054.) A friend, Brenda Moore, met appellant at the prison gate. (95 RT 15055.) Appellant remained at Moore's home in Crescent City for approximately three days until March 26, 1995. (95 RT 15 15055.) Moore drove appellant around in her old Ford pickup truck. (95 RT 15056-15057.) Appellant relied on Moore to do the driving since he did not know how to drive the stick-shift on the truck. (95 RT 15056-15057.)

While at Moore's house, appellant found a shotgun underneath the floor board of a van parked next to the residence. (95 RT 15036.) Appellant kept the shotgun without Moore's knowledge. (95 RT 15065.) He noticed that the shotgun had three shells of ammunition, the stock had

been sawed, and the pistol grip had been shortened. (95 RT 15067-15068.) Appellant cleaned the altered weapon and made it operable. (95 RT 15036-15037, 15066.)

Appellant testified that he was aware that, as a convicted felon, it was unlawful for him to possess any firearm, and unlawful for anyone to possess a sawed-off shotgun. (95 RT 15063-15064.) Nevertheless, he placed the shotgun, wrapped in a jacket, inside a bag with his belongings. (95 RT 15069.) Appellant explained that he kept the shotgun with him for protection and not for committing robberies. (95 RT 15035-15036.) He feared attack from enemies that he had made in prison and from unknown enemies outside of prison. (95 RT 15035-15036.) Over the next few days, he spent the $200 he had on ammunition, food and gas. (95 RT 15073.) By 11:00 p.m. on March 29, 1995, appellant had no money. (95 RT 15073.)

Appellant and Moore left Crescent City on Sunday, March 26, 1995, and the truck was operating without problems. (95 RT 15075.) Appellant placed the bag of clothing containing the shotgun in front of him on the floor of the passenger seat. (95 RT 15075.) Appellant had been instructed to report to his parole officer in San Diego by Monday, March 27, 1995. (79 RT 12066, 95 RT 15087-15088.) Moore agreed to drive him to at least San Francisco, where he would try to get a flight to San Diego. (95 RT 15088-15089.) However, when they arrived at Santa Rosa at 11:00 p.m., the truck was having mechanical problems and they stayed at motels for the next couple of days. (95 RT 15078-15080, 15089.)

On Monday, March 27, 1995, appellant did not report to his parole officer and made no effort to contact the parole office to inform them of his car troubles or to request an extension on his reporting date. (79 RT 12066-12067, 95 RT 15089-15091, 15094.) Appellant and Moore remained in Santa Rosa as repairs were being done on the truck's rear brakes. (95 RT

15081-15083.) Moore's friend had wired her some money so she could fix her truck and pay for a motel. (95 RT 15118-15119.)

On Tuesday, March 29, 1995, appellant and Moore spent several hours during the day walking around Howarth Park. (95 RT 15085-15086.) Appellant socialized with some people at the park, drinking beer and peppermint schnapps. (95 RT 15085-15086, 15091-15092, 15126-15127.) During the evening, appellant and Moore got back on the road. (95 RT 15095-15096.) They drove past Sebastopol toward the coast in order to take Highway 1 to San Francisco. (95 RT 15095-15096.) However, they circled back to take Highway 101 and got lost, driving around for a long time. (95 RT 15095-15096.) Moore stopped at a Round Table Pizza to use the bathroom, then continued driving down the street and parked near the Sushi Hana restaurant. (95 RT 15113-15115.) Moore told appellant that it was becoming too much for her to deal with the difficulties of the truck and wanted to return home to Crescent City. (95 RT 15113.) Appellant became upset and insisted that Moore drive him to San Francisco as she had agreed. (95 RT 15116.) They continued to drive around in circles and stopped at the end of an alley next to Sushi Hana. (95 RT 15119-15120.)

Moore got back on Highway 12 towards Santa Rosa and briefly pulled in at the Aplum Trucking Yard. (57 RT 8795, 95 RT 15121-15122.) A witness, Brian Nelsen, drove past them on the driveway and noticed the pickup truck. (57 RT 8795-8799, 95 RT 15121-15122.) Moore said that this is somebody's property, that they should not be there and then drove out of the yard. (95 RT 15124.) Appellant told her to stop the truck but Moore got back on Highway 12. (95 RT 15124-15125.)

As Moore was driving, appellant continued to argue and insist that she drive him to San Francisco as planned. (15123-15125.) He yelled at Moore to stop the truck, called her names and told her she was deceitful. (95 RT 15125.) Appellant testified that he did not know why he was so

adamant about getting to San Francisco that evening. (95 RT 15125-15126.) He was upset at that time, confused and irrational. (95 RT 15125-15126.) Appellant was simply insisting on the course that he had been anticipating and expecting to continue on. (95 RT 15126.) Appellant commented that he may have been "buzzed" from the four or five beers and peppermint schnapps that he had drank at Howarth park and in the truck. (95 RT 15126.) Upset and crying, Moore finally stopped the truck in front of the Santa Rosa Saddlery, a mile down the road from the Aplum Trucking Yard. (57 RT 8804, 95 RT 15128-15130.) They were in the saddlery parking lot only for a few seconds when Deputy Trejo pulled behind them and shined a spotlight on the truck. (95 RT 15130.)

b. The Shooting of Deputy Trejo

When the deputy stopped behind the truck at the saddlery parking lot, appellant immediately thought about the shotgun and his mind was racing. (95 RT 15030, 15131.) Appellant told Moore, "let's get out of here." (95 RT 15131.) She backed up and starting pulling forward when the red and blue emergency lights on the patrol car were activated. (95 RT 15131-15132.) Appellant began pulling the shotgun out of clothing bag in order to get rid of it because he knew it was illegal to have it in his possession. (95 RT 15131-15133.) Appellant was aware that he could be in trouble if caught with the shotgun and feared he would be returned to prison. (95 RT 15172.) Moore told appellant to calm down and that she would just tell the deputy that she was fine, and she and appellant were just arguing. (95 RT 15135.) Appellant told her to keep driving but it was too late, Moore had already stopped the truck. (95 RT 15140.) He was frantically trying to stuff the shotgun and shells underneath the passenger seat but the weapon would not fit. (95 RT 15135.)

After Moore spoke briefly to the deputy, she returned to the truck to get her driver's license out of her purse. (95 RT 15136.) Moore then saw

appellant with a shotgun in his hand, and exclaimed, "Oh, my god, I can't believe you did this." (95 RT 15136.) By that time, the deputy had approached the passenger side of the truck. (95 RT 15136.) The deputy told appellant to exit the truck. (95 RT 15136-15137.) The only thing appellant could think was to stall, to slow things down. (95 RT 15030.) Appellant came out of the truck and pointed the shotgun at the deputy. (95 RT 15030, 15139.) Appellant told him to put his hands up. (95 RT 15030.) The deputy put his hands above his head and tossed his flashlight down. (95 RT 15141.) The deputy then started to walk backwards towards his patrol car. (95 RT 15031.) Appellant told him to freeze but the deputy continued to walk backwards. (95 RT 15142.) Appellant then chambered a round in the shotgun. (95 RT 15031.) The sound of the pumping action made the deputy stop walking. (95 RT 15031, 15143.) Appellant and the deputy were standing between the patrol car and the tailgate of the truck, approximately 11 feet apart. (95 RT 15144.)

Appellant ordered the deputy to kneel down. (95 RT 15031.) When the deputy got on his knees, appellant told him to remove his gun belt and give it to him. (95 RT 15032, 15148-15149.) Appellant wanted to disarm the officer but did not want to get too close fearing the deputy might attempt to grab the shotgun. (95 RT 15148-15149.) The deputy removed his gun belt with two hands and handed it to appellant. (95 RT 15154.) Appellant tossed the gun belt in the bed of the truck and ordered the deputy to lie down on the ground. (95 RT 15032.) The deputy complied, and laid down with his hands in front of him. (95 RT 15167.) Appellant ran to the patrol car, removed the ignition key and threw it in a field nearby. (95 RT 15032.)

When appellant turned back around to face the deputy, he was still lying on the ground about ten feet away. (95 RT 15032, 15173, 15176.) Appellant began to walk backwards with the shotgun still pointed in the

deputy's direction. (95 RT 15177.) His left foot took a misstep, and his left leg went out from under him, causing appellant to fall on his buttocks. (95 RT 15033, 15177.) The shotgun hit appellant's leg, and discharged before it hit the ground. (95 RT 15033, 15178.) Appellant saw a flash from the muzzle of the weapon. (95 RT 15179.) When appellant got off the ground, he picked up the shotgun and the flashlight. (95 RT 15180, 15183.) After appellant realized that the shotgun fired, he saw that the deputy had been shot in the face and was dead. (95 RT 15033, 15184-15185.) Appellant testified that he did not aim the shotgun at the deputy and did not intent to shoot him. (95 RT 15033.) At that moment, appellant's world caved in and everything spun out of control. (95 RT 15185, 15034.) He was unsure where exactly he was, was frightened and his thoughts were irrational. (95 RT 15034.) Appellant looked at the deputy for a few seconds, then ran into the truck and drove off. (95 RT 15185.)

c. Appellant's escape to the Cooper/King residence

After fleeing from the saddlery parking lot, appellant instructed Moore to get off the next road. (95 RT 15187.) Appellant abandoned Moore's pickup truck in a church parking lot on South Wright Road. (95 RT 15188.) Appellant assumed that the deputy had called in a description of the vehicle before he made the stop and that the police would be searching for the truck. (95 RT 15187.) Appellant placed some clothing, a radio from the deputy's gun belt, the flashlight and a map[12] into a plastic

[12] Appellant testified that Moore had purchased a map at a gas station because they were not certain where they were and both she and appellant were unfamiliar with Santa Rosa. (96 RT 15266.) Appellant confirmed that he had circled street names and blackened-in portions of the map but could not explain his reasons for making some of the markings. (continued...)

bag. (95 RT 15189-15190.) Moore carried her belongings in a backpack. (95 RT 15189-15190.) Appellant and Moore crossed the field next to the church parking lot, waded through a creek, and continued walking until they reached a line of trees. (95 RT 15192-15195, 15303.) Appellant smashed the radio into the mud and, in order to silence it, cut the microphone cord with Moore's knife. (95 RT 15195.) Appellant could hear police sirens and see a helicopter with its spotlight hovering in the area. (95 RT 15196-15197.) After hiding in the trees for an hour or two, they headed toward a nearby residence to hide from the helicopter and obtain shelter from the cold. (95 RT 15199.) They soon discovered that the residence was the home of the Cooper/King family. (95 RT 15199.)

Once inside the house, appellant saw a light in Frank Cooper's bedroom. (95 RT 15199-15200.) Appellant confronted Cooper with the shotgun and ordered him to get on his knees or he would "blow his head off". (95 RT 15223.) Appellant had the deputy's revolver tucked in his waistband. (95 RT 15227.) Once he found out how many people were in the house, appellant wanted to get them all in one room where he could see everyone and no one could call the police. (95 RT 15200.) Appellant testified that he had allowed Frank and Jeremy to leave the house the next morning but warned them that it was a deadly situation and not to contact the police. (96 RT 15239-156240.) Appellant considered Moore his hostage because the police would not shoot him if she remained with him. (96 RT 15245-15346.) When they had been hiding in the trees, appellant told Moore that she was coming with him and she did not have a choice. (96 RT 15246.)

(...continued)
(96 RT 15266.) He underlined some street names to help Moore navigate while driving. (96 RT 15269.)

2. Criminalist's Findings

Peter Barnett, a consulting criminalist for the defense, analyzed the physical and forensic evidence collected in the investigation of Deputy Trejo's death. (99 RT 15796-15802.) Barnett determined that the trajectory of the shot to the deputy's head was almost perpendicular to the forehead. (99 RT 15808.) The trajectory of the pellet that struck the deputy's right shoulder was downward relative to the body, and slightly front to back. (99 RT 15809.) Barnett agreed with the prosecution's criminalist Richard Waller that the pellet spread was approximately four inches. (99 RT 15810.) Although the entire front of the deputy's jacket was soaked in blood, there was no evidence that it was "falling blood"[13] from the wound, but more likely as a result of the body lying in a pool of blood. (99 RT 15811-15812.)

Barnett noted the blood around the belt and on the top right of the deputy's pants. (99 RT 15816.) The small amount of blood on the top left portion of the deputy's pants appeared to be a transfer from the blood soaking the right side of the garment. (99 RT 15816.) There was no indication that there was falling blood below the belt area that was a result of the wound. (99 RT 15818.) Based on the absence of falling blood on the clothing, Barnett concluded that there was no evidence that the officer was in a vertical position at any time after being shot. (99 RT 15818.)

Contrary to Waller's testimony, Barnett opined that the deputy was in a prone position at the time of the shooting, with his upper torso raised somewhat off the ground. (99 RT 15819.) He drew his conclusion from the absence of evidence of falling blood and his observations of the position of the body. (99 RT 15820.) There was no indication of any blood falling

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[13] Waller described "falling blood" as blood falling from a wound as a result of the force of gravity. (99 RT 15811-15812.)

from the wound above. (99 RT 15820.) If the deputy had been in a crouched or kneeling position, falling drops of blood from the injury would have been expected on the front of his shirt and pants. (99 RT 15820.) Further, there was no falling blood on the asphalt surrounding the deputy or on the patrol car. (99 RT 15820.) Barnett indicated that if the deputy had been standing and had collapsed after being shot, he might have fallen backwards or to one side. (99 RT 15820.) If the deputy was in a position other than prone, his legs may have been bent. (99 RT 15820.) The position of the body suggested that the deputy collapsed from some position with his chest slightly off the ground and then fell straight down. (99 RT 15820.) The glass fragment found on the deputy's right sleeve suggested that the arm had not moved much after the impact of the pellets shattering his eyeglasses. (99 RT 15820-15821.)

Barnett also considered the trajectory of the shotgun blast in concluding that the deputy had been in the prone position when he was shot. (99 RT 15821.) In order to align the shot through the head with the shot through the shoulder, as well as the shots that skimmed the upper portion of the back of the jacket, the deputy's head would necessarily have been bent back. (99 RT 15821.) Barnett stated that it would be difficult for the deputy to hold this position on his knees because he would have been out of balance. (99 RT 15822.) However, the deputy could have supported this position if he were in a prone position and raising himself up. (99 RT 15822.) In such an instance, the gun has to be somewhere between ground level and four to five feet from the ground. (99 RT 15822.)

The blood spattering on the hands suggested to Barnett that the hands were likely in a position in front of the forehead wound to receive the blood spatter and fragments of glass. (99 RT 15823.) He confirmed that there was no evidence that pellets ricocheted off the eyeglasses. (99 RT 15826-15827.) Barnett determined that the blood found on the left front cuff of

the pants did not result from high velocity blood spatter. (99 RT 15832-15833.) He explained that one would not expect to find high velocity blood spatter on the back part of the pants if the deputy had been in a kneeling position. (99 RT 15834.) The blood on the pants may have resulted from the police handling the clothing or moving the body. (99 RT 15835.)

3. Inmate Testimony

Several inmates incarcerated at PBSP and housed in the Security Housing Unit (SHU) testified for the defense.

Inmate Dale Bretches, a prison artist who met appellant at PBSP, described the conditions in SHU as a prison within a prison, where he was isolated 23 hours a day, given only an hour and a half for yard exercise, and fed all his meals in his cell. (96 RT 15310.) He indicated, however, that some literature and television was permitted in the SHU cells and inmates were allowed outside visits. (96 RT 15323.) Bretches testified that he had discussed a business venture with appellant where appellant would act as his agent and sell his artwork when released from prison. (96 RT 15310-15317.)

Inmate Jose Padilla was housed in the cell next to appellant at PBSP SHU in 1995. Similarly to Bretches, Padilla had discussed a silk-screening business idea with appellant where appellant would market Padilla's artwork on t-shirts. (96 RT 15619-15622.) Appellant never contacted Padilla after appellant was released from prison. (96 RT 15622.)

Inmate Daniel Grajeda testified that he will likely be housed in SHU until he dies. (96 RT 15332.) Debriefing which involves snitching on other inmates, dying, or paroling are the only three ways out of SHU. (96 RT 15332.) Grajeda explained that because enemies are made in prison, there is reason to be fearful when you are out of prison and see someone who has debriefed. (96 RT 15334-15335.)

Inmate James Pendleton, also testified that making enemies is a common experience in prison and the situation spills over to the streets. (96 RT 15356-15357.) He added that there were no programs in SHU to adequately prepare an inmate when they are released on parole. (96 RT 15364.)

Inmate Eliot Grizzle testified further about the conditions in SHU. (98 RT 15635.) Grizzle indicated that inmates received a shower three times a week and were permitted to have ten books or magazines in their cell from the prison library or from outside vendors. (98 RT 15636, 15643.) There were also opportunities to have visitors in SHU every weekend and some holidays. (98 RT 15645.) Inmates had access to the prison law library once a month, and were allowed to have a television or radio in their cell, as well as write and send letters. (98 RT 15645, 15649.) Grizzle described the discomfort and fear he felt as he was waiting to testify at trial, particularly, when his handcuffs were removed and he was in the presence of many people. (98 RT 15635.) After not being around people for so many years, Grizzle did not know how to act and feared the potential presence of enemies. (98 RT 15635.)

4. Effects of Long-term SHU Incarceration

Dr. Stuart Grassian testified about the psychiatric effects on inmates of long-term housing in SHU, and a condition known as "SHU syndrome" that can develop as a result of continuous solitary confinement. (97 RT 15453-15464, 97 RT 15515-15516.) In his research, Dr. Grassian interviewed 49 inmates with significant mental health problems housed at PBSP SHU. (97 RT 15464-15465, 15525-15526.) Dr. Grassian described SHU syndrome as a condition where inmates exhibited a variety of symptoms along the spectrum of delirium disorders and acute organic brain syndromes, namely, extreme anxiety, panic attacks, and hyper-vigilance. (97 RT 15471, 15521.) Inmates in his study were noted to have significant

perceptual distortions, auditory illusions, and hyper-sensitivity to normal levels of physical and social stimulation. (97 RT 15471-15472.) Paranoia was a common symptom among the inmates along with disturbances in thought content and thought processing. (97 RT 15472-15473.) Dr. Grassian explained that some inmates suffering from SHU syndrome cannot not focus on anything and their mind is constantly wandering, while others become focused on a very narrow area and are obsessional. (97 RT 15473.) Often, affected inmates can display random violence, loss of impulse control, disorientation and confusion, and a disturbed sleep/wake cycle. (97 RT 15473-15474.)

Dr. Grassian described the lack of environmental stimulation at PBSP SHU, including the absence of nature, the lack of windows, and the stark walls and cells. (97 RT 15474.) There is also a lack of physical and social stimulation. (97 RT 15477.) Inmates are confined to their cells approximately 22 hours a day with an hour and a half in a cement cage for individual exercise. (97 RT 15477.) Dr. Grassian emphasized that there is no programming, or occupational and educational opportunities in SHU. (97 RT 15479.) In his opinion, the lack of internal and external stimulation can lead to brain dysfunction while hyper-responsiveness and obsessional symptoms can develop. (97 RT 15479-15480.)

Dr. Grassian interviewed appellant in October 1995 and during trial. (97 RT 15480.) Appellant informed him that he has been housed almost continuously in SHU for twelve to thirteen years, since 1982. (97 RT 15489.) Dr. Grassian concluded that appellant's prior vulnerabilities before being incarcerated in 1982, consisted of growing up in a dysfunctional home where alcohol and physical abuse were present. (97 RT 15490.) Appellant had functioned well, however, until age 11 when he became involved in drug and alcohol use. (97 RT 15490.) Upon leaving PBSP SHU, appellant had become obsessional in his thinking and engaged in a

significant amount of compulsive activity in order to manage the stressful and monotonous environment of the prison. (97 RT 15492.) By the time he left prison, appellant's thinking was very narrow, rigid, and obsessional. (97 RT 15492.) Appellant had nothing to keep him organized and allow him to focus and structure his days. (97 RT 15493.) Dr. Grassian concluded that appellant's ability to plan and look into the future was virtually gone, that he felt bewildered by people and lacked a natural ability to communicate with them. (97 RT 15493, 15503-15504.)

Based on his review of appellant's prison files, Dr. Grassian found that appellant did not have a documented history of symptoms normally associated with SHU syndrome.[14] (97 RT 15551-15552.) Although appellant would likely fit the diagnosis of delirium, Dr. Grassian admitted that appellant did not suffer from any neurological problems. (97 RT 15553, 15555.) Dr. Grassian concluded that appellant was not as vulnerable as other inmates but may have some impulse disorder that may have increased his vulnerability. (97 RT 15555.)

Dr. Grassian remarked that very little is done to prepare an inmate coming out of SHU into the real world. (97 RT 15494.) Inmates are only shown a series of videos of how to fill out a job application, obtain a driver's license, and accomplish other such tasks. (97 RT 15495.) Appellant's adjustment to the conditions of SHU was noted as better than other inmates, occupying his time reading classic novels, history and philosophy. (97 RT 15560-15561.) Dr. Grassian opined that on March 29, 1995, appellant was suffering from mental impairment attributable to his

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[14] Symptoms of SHU syndrome include hypersensitivity, hallucinations, increased paranoia, random violence, obsessive thoughts, panic attacks, free floating anxiety, and difficulties with concentration, thinking and memory.

SHU confinement, and in some respects worsened by the acute panic that he was going to be abandoned and helpless. (97 RT 15561-15562.)

D. Penalty Phase

1. Prosecution's Evidence in Aggravation

The prosecution presented evidence of numerous instances of prior conduct by appellant involving violence and threat of violence. Appellant committed forcible rape and multiple armed robberies prior to committing the instant offenses, and continuously engaged in violent conduct in prison.

a. Prior Crimes of Violence

On October 4, 1978, appellant entered the apartment of Diane Keogh while she slept and forcibly raped her. (119 RT 18900-18919.) As Keogh physically struggled with appellant, he struck her in the face and chest with a closed fist and attempted to strangle her. (119 RT 18913-18919.)

In December 1981, appellant committed a series of armed robberies of bars and restaurants in the San Diego area using a sawed-off shotgun to threaten his victims. On December 14, 1981, Teresa Harrison and her husband arrived at Victor's Too early in the morning to clean the beer taps. (118 RT 18834-18835.) As they walked in the back door, the couple witnessed appellant armed with a sawed-off shotgun and another man in the midst of committing a robbery. (118 RT 18836-18837.) The robbers had a shotgun pointed at the cook's head and told him to lie down on the ground. (119 RT 18979-18980.) Harrison and her husband were also ordered to lie down. (118 RT 18838.) The cook did not know where the money was kept and was kicked in the face. (119 RT 18982.) Appellant and his accomplice took the cook's wallet and jewelry, and the Harrisons' keys, wedding rings, and gold watch before driving off. (118 RT 18841.)

On December 18, 1981, appellant and an accomplice robbed the Blue Haven Bar. (120 RT 19048.) LaVada Kohlman, a server at the Blue

Haven, and a customer who was helping to close the bar were ordered at gun point to get on the floor. (120 RT 19050.) One of the robbers took money from the cash register and, when he could not find any more money, grabbed Kohlman by the hair and cursed at her. (120 RT 19052-19056.) They also struck the customer in the face before fleeing the bar. (120 RT 19056.)

On the evening of December 24, 1981, Richard Ruth was closing Debbie Jo's bar when appellant and an accomplice entered and held a gun to his head. (118 RT 18844-18848.) Appellant was holding a sawed-off shotgun. (118 RT 18848.) After they took Ruth's wallet, the men fled the bar. (118 RT 18851.)

Two days later, on December 26, 1981, appellant and an accomplice robbed an International House of Pancakes. (118 RT 18872-18880.) Appellant, armed with a sawed-off shotgun, ordered the manager, Edwin Watts, to get on the ground and then demanded the money kept at the restaurant. (118 RT 18878-18880.)

b. Prison Violence and Misconduct

Appellant engaged in several instances of violence and misconduct while incarcerated at San Quentin State Prison in the 1980's. On February 7, 1984, appellant was involved in a physical altercation with another inmate in the dining hall causing the gun rail officer to fire a warning round. (118 RT 18858-18861.) A crude stabbing weapon was found near the area where appellant and another inmate were fighting. (120 RT 19100.) Appellant did not sustain any injuries, while the other inmate had open bleeding wounds on his torso. (120 RT 19101.)

On April 27, 1984, appellant, holding an inmate manufactured weapon, rushed towards correctional officer Sean Crady who was walking by his cell during an inmate count. (119 RT 18965-18969.) The officer jumped out of the way and was not harmed. (119 RT 18969.) The stabbing

weapon, however, could not located during the search of appellant's cell. (119 RT 18969-18970.)

On May 1, 1984, as correctional officer James Hall was pouring coffee in front of appellant's cell, the officer felt a sharp prick on his left side and then saw an object withdrawn back into the cell. (119 RT 18894-18897.) Appellant was the only inmate occupying the cell during this incident. (119 RT 18896.) A search of appellant's cell yielded an inmate manufactured stabbing weapon approximately eight inches long hidden inside the toilet. (120 RT 19078-19079.)

On the same day, correctional officer Franklin Despain, used a metal detector to search appellant. (119 RT 19006-19007.) The metal detector sounded an alarm when placed next to appellant's rectum. (119 RT 19007.) Appellant voluntarily removed three hacksaw blades wrapped in plastic from his rectum. (119 RT 19007.)

On May 19, 1983, while housed at the adjustment center in San Quentin, appellant rushed towards inmate Louis Moody and stabbed him as Moody was being escorted in handcuffs out of the shower. (120 RT 19106-19116, 19123-19129.) Inmate Moody suffered puncture wounds on his shoulder. (120 RT 19129.) While investigating the incident, a correctional officer discovered a portion of the bars on appellant's cell was missing. (120 RT 19120.)

On August 29, 1990, appellant and another inmate physically assaulted a third inmate in the SHU yard at Corcoran State Prison. (120 RT 19059-19062.)

On July 8, 1996, while appellant was in custody at the Sonoma County jail, an officer discovered a metal instrument hidden in the binding of a Penal Code in appellant's cell. (199 RT 18987-18990.) A metal light-switch plate was later found to be missing from another individual's cell. (119 RT 19000.) Prior to conducting a search of appellant's cell, officer

Reynaldo Basurto opened the food port on the cell door in order for appellant to submit to handcuffs. (119 RT 19011-19012.) Appellant threw a milk carton containing urine through the food port and towards the officer. (119 RT 19012.) Some of the urine struck Officer Basurto on the arms, chest and face and also struck two other officers. (119 RT 19013, 19019.) Appellant was yelling profanities and confirmed the substance he had thrown was urine. (119 RT 19013.)

c. Victim Impact Evidence

The jury heard testimony from members of the Cooper/King family regarding the impact of appellant's crimes of terror against them. Frank Cooper testified that since the hostage incident, he is more afraid to go out and is vigilant in keeping his house safe. (121 RT 19169-19170.) Karen King has not been able to sleep well, is anxious, and stressed. (121 RT 19171.) She has since moved out of the Cooper/King residence because she is afraid. (121 RT 19171-19172.) Her relationship with her mother and children has changed in negative ways. (121 RT 19172.) Because of the incident, Karen is afraid to meet new people, particularly White people. (121 RT 19172-19173.)

Deputy Trejo's four children testified how their family life has been severely impacted by the loss of their father who loved and supported them. (121 RT 19175 19176-19192.) Deputy Trejo had an extremely close relationship with each of his children and had been actively involved in helping to raise his grandchildren. (121 RT 19177-19178, 19193-19194.) Deputy Trejo's widow, Barbara Trejo, testified that they shared a close marriage for 40 years. (121 RT 19197-19198.) Since her husband's death, Mrs. Trejo has had return to work to support her family. (121 RT 19199.) They had been planning on Deputy Trejo's retirement in March 1996. (121 RT 19200.)

2. Defense Mitigation Evidence

In mitigation, appellant called members of his family and his juvenile probation officer to testify about his difficult family life and childhood. Appellant also presented evidence related to the psychological effects of having been continuously incarcerated in SHU.

a. Appellant's Family

Robert Scully Jr., appellant's father, testified that his marriage to appellant's mother broke up when appellant was two or three years old and he did not have much contact with his son until recently. (122 RT 19232.) He admitted to having struggled with alcoholism and that alcoholism was present in his family history. (122 RT 19233-19234.)

Lola Bobby, appellant's sister, testified that their home environment growing up was not happy. (124 RT 19451.) Their mother and stepfather were abusive to each other and both suffered from alcoholism. (124 RT 19451-19453.) There was no positive male role model in the house. (123 RT 19302-19304.) Appellant left the household when he was 11 or 12 years old. (123 RT 19302.) Lola added that appellant was a harder person when he came out of prison in 1994, but wanted to improve his life. (123 RT 19306.) Appellant had made an effort to find a job but it was discouraging. (123 RT 19306.)

Appellant's two other sisters, Patricia and Marilyn, and his mother Sally Pike also testified to show their support of appellant. (124 RT 19448-19449, 19462-19464.)

b. Appellant's At-Risk Youth

Marcile Jones, appellant's juvenile probation officer, first came into contact with appellant at age 13 due to his marijuana and cocaine use. (123 RT 19270-19272.) She learned that appellant had been using marijuana since the fourth or fifth grade. (123 RT 19278.) Jones described

appellant's family life as "emotionally impoverished" with a mother who was overwhelmed by her own abusive marriage and her inability to deal with appellant and his three sisters. (123 RT 19280.) Appellant did not have a positive male role model and his stepfather was uninvolved. (123 RT 19281-19282.) Appellant spent his time skipping school, surfing and using drugs. (123 RT 19277, 19281-19282.) Jones described appellant in his youth as immature and lacking introspection. (123 RT 19282.)

c. Life in SHU Prisons

Two inmates at PBSP testified about the conditions of being incarcerated in SHU for life. (124 RT 19401-19418, 19423- 19432.) They described their prison life as filled with monotony, isolation, and fear. (124 RT 19401-19418, 19423- 19432.)

Dr. Haney, a professor of psychology at U.C. Santa Cruz, testified about the causes of violence in institutional settings and the psychological effects of living in maximum security prisons. (125 RT 19511-19518.) Dr. Haney described appellant's incarceration history in various penal institutions and tracked it with the development of maximum security prisons in California. (125 RT 19520-19535.) Shortly after appellant's arrival at San Quentin Prison in 1982, he witnessed a major riot involving hundreds of inmates which led to the prison being placed on lockdown for months. (125 RT 19536-19540.) Dr. Haney described San Quentin in the 1980's as a prison with an extraordinarily high level of violence. (125 RT 19549-19557.) In the late 1980's, due to prison overcrowding and increasing violence, new "super max" prisons were built in Tehachapi and later PBSP that were exclusively SHU prisons. (125 RT 19558-19959.) Appellant arrived at Tehachapi in 1986, and was later housed at the newly-constructed Corcoran State Prison in 1989. (125 RT 19563, 19616.)

From studies he conducted at San Quentin and PBSP, Dr. Haney concluded that severe "institutionalization" occurs when inmates endure

continuous and forced isolation and idleness. (125 RT 19520-19535, 19584, 19591-19593.) Dr. Haney testified that for inmates who have been deeply institutionalized as a result of SHU confinement, it is a disabling and frightening experience to be released from prison. (125 RT 19593-19594.) Inmates who are released after being housed in SHU settings for years are often unprepared to deal with the real world and do very poorly when they are out. (125 RT 19594.) Dr. Haney opined that an individual such as appellant who was continuously incarcerated in a SHU prison would either succumb to institutionalization or become mentally ill. (125 RT 19617.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTIONS FOR CHANGE OF VENUE

Before jury selection, appellant moved unsuccessfully for a change of venue. (18 CT 3611-3630.) Appellant renewed his motion after the jury had been selected. The trial court denied the renewed motion. (51 RT 7895-7899.) Appellant argues that the court erred in denying the venue motions given that there was a reasonable likelihood a fair trial could not be had in Sonoma County due to the impact of negative pretrial publicity on the jury pool. Appellant contends that his constitutional rights to a fair trial and an impartial jury were violated. We disagree.

The legal factors considered by the trial court did not support a change of venue. The case arose in Sonoma County, a mid-sized California county with no specific hostility against appellant or a similar group of persons. Although the murder of a peace officer was a grave crime, it did not involve bizarre facts or multiple victims. The victim was not a person well-known in the community prior to his death. Lastly, media coverage of the case was not so pervasive or inflammatory that the crime became embedded in the community's consciousness.

Moreover, the jury selection process was fair and effective in removing any bias from the jury pool through the use of jury questionnaires, individualized voir dire, and challenges for cause exercised by both sides. By carefully considering the written and oral responses of the jurors and observing their demeanor during voir dire, the court successfully filtered out individuals whose fixed opinions were formed through the media and who could not otherwise be fair and impartial. The record also demonstrates that the 12 seated jurors and 6 alternates were sufficiently vetted through individualized voir dire and accepted by both sides. Given these measures and the final composition of the jury,

appellant has failed to show a reasonable probability that a fair trial could not be had and was not, in fact, had in Sonoma County.

A. Background

1. Appellant's Pretrial Motion for Change of Venue

In appellant's motion for change of venue prior to jury selection, he argued that the widespread media publicity surrounding the case created strong public sympathy for the victim and community disdain for appellant. As a result of such publicity-induced bias, appellant contended he could not be fairly tried in Sonoma County. Both the defense and the prosecution conducted telephonic venue surveys which showed that a majority of the persons surveyed in Sonoma County, in the range of 68 to 83 percent of respondents, recognized appellant's case from media exposure. Following a hearing on the motion where experts for both sides testified about their respective survey findings and criticized the conclusions of the opposing party, the trial court denied appellant's motion.

a. Dr. Bronson

Defense expert, Dr. Edward Bronson, professor of political science at California State University, Chico, designed a venue survey to determine the extent to which the media affected people's prejudgment of appellant in Sonoma County. (11 RT 1369, 1379.) He also performed content analysis of the pretrial publicity in this case. (11 RT 1403, 1410.) The survey was administered by his colleague, Dr. Robert Ross[15]. (11 RT 1284, 1290.)

In assessing the nature and extent of the publicity, Dr. Bronson reviewed more than 130 news articles about the case, including editorials,

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[15] Dr. Ross, professor of political science at the California State University, Chico, testified for the defense. (11 RT 1277.) Dr. Ross validated Dr. Bronson's survey in terms of its methodology, design and implementation, and in the data that was generated. (11 RT 1319.)

heavily concentrated in the Santa Rosa Press Democrat, the main local newspaper in Sonoma County. (12 RT 1423-1424.) Although publicity was heaviest in the March-April period when the crime occurred, Dr. Bronson noted that it continued for several months afterwards. (12 RT 1423.)

Dr. Bronson testified that the publicity generated by the media was highly inflammatory, largely appealing to people's emotions, and contained inadmissible material as well as inaccurate coverage that presumed appellant's guilt. (12 RT 1435-1436.) The media invoked community outrage by repeatedly labeling the crime an "execution-style slaying," vilifying appellant as a cold-blooded killer, associating him with the Aryan Brotherhood – a White supremacist prison gang, and exposing him as a Pelican Bay parolee and career criminal. (12 RT 1434, 1443.) In contrast, the media portrayed Deputy Trejo's murder as a strike against the entire community and sympathetically reported on the funeral service and the memorial fund established for his family. (12 RT 1434, 1443, 1462-1466.) In Dr. Bronson's view, the media impassioned the community to avenge Deputy Trejo's death. (12 RT 1449.) Dr. Bronson concluded that the inflammatory nature of the publicity, with its repeated themes, prejudiced Sonoma County residents against appellant. (12 RT 1466-1467.)

As to the size of the community, Dr. Bronson noted that, as of January 1, 1996, Sonoma County ranked 16th in population among California's 58 counties, noting that at least 75 percent of the state's population was concentrated in the 15 largest counties. (12 RT 1453-1454.) Sonoma County was described as a medium-sized county. (12 RT 1454.) As such, the size of the community was a neutral factor in this case. (12 RT 1454.) Dr. Bronson opined, however, that Sonoma County responded as a small town would, expressing outrage at the killing of "our cop" and

personalizing the crime as a strike to the community's sense of safety and security. (12 RT 1458-1460.)

In analyzing the venue survey results from 402 Sonoma County respondents, Dr. Bronson determined the rate in which persons recognized appellant's case based on their exposure to pretrial publicity. (12 RT 1478.) The survey results showed a recognition rate of 83 percent. (12 RT 1482.) Of those who recognized the case, approximately 78 percent stated that appellant was either "definitely guilty" or "probably guilty." (12 RT 1492.) In addition, 59 percent of respondents chose death as the penalty in this case. (12 RT 1505.) The survey results showed respondents knew a lot about the case and were familiar with the details widely covered by the pretrial publicity. (12 RT 1507-1509, 13 RT 1611-1612.) Dr. Bronson found that the more specific facts people knew about the case from media exposure, the higher their rate of prejudgment of guilt. (12 RT 1515.)

Based on the survey results and the volume of inflammatory publicity in the local news media, Dr. Bronson opined that appellant could not receive a fair trial in Sonoma County. (12 RT 1517-1518.) He further concluded that the prejudice caused by pretrial publicity could not be remedied through the voir dire process because jurors generally acquiesce to the social pressure and say they can be fair and impartial when, in fact, they cannot abandon their preexisting biases. (12 RT 1518-1519.)

b. Dr. Ebbesen

Dr. Ebbe Ebbesen, a psychology professor at the University of California, San Diego, reviewed Dr. Bronson's survey findings and conducted his own venue survey for the prosecution. (13 RT 1661-1664, 1671.) Unlike the defense survey, Dr. Ebbesen questioned respondents in

Sonoma County and in San Diego County, as a comparison or control county with little exposure to publicity about appellant's case.[16]

Dr. Ebbesen's survey results showed approximately a 68 percent rate of recognition in Sonoma and 14 percent in San Diego, in contrast to the 83 percent recognition rate in Dr. Bronson's survey. (13 RT 1706.) Dr. Ebbesen found, however, that when asked to recount specific details, the majority of Sonoma residents who stated that they were familiar with the case had, in fact, a very shallow knowledge of the facts. (14 RT 1830-1831.) In contrast, Dr. Bronson's survey had questioned generally about familiarity but failed to measure the extent of a respondent's knowledge of the case. (13 RT 1704-1705.)

In assessing the level of prejudgment, Dr. Ebbesen found a high rate of guilt proneness in both counties where respondents were willing to find that an individual was guilty simply because they were charged with a crime. (13 RT 1693.) A vast majority in both counties were also in favor of the death penalty. (13 RT 1694.) When respondents were questioned specifically about appellant's guilt in this case, the guilt rate was 70 percent in Sonoma and 47 percent in San Diego County. (13 RT 1731-1732.) Dr. Ebbesen acknowledged that publicity had "some effect" on responses to the question of guilt in Sonoma County. (13 RT 1731-1732.)

To determine the extent of publicity-induced bias, Dr. Ebbesen tested whether respondents could set aside their seemingly fixed opinions in order to be fair and impartial when presented with new evidence. (14 RT 1750.) In both counties, the percentage of individuals who indicated that they could set aside what they knew and could be impartial ranged from 85 to 90

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[16] Dr. Ebbessen conducted a telephone survey of 404 respondents in Sonoma County and 401 respondents in San Diego County. (13 RT 1689-1690, 1696.)

percent. (14 RT 1802, 1830-1831.) When respondents were given a definition of first degree murder and the reasonable doubt standard in considering appellant's guilt, the difference in guilt proneness between Sonoma and San Diego virtually disappeared. (14 RT 1830-1831.) Further, there were no differences between the two counties in respondents' beliefs about what penalty appellant should receive if he were guilty. (14 RT 1830-1831.) Dr. Ebbesen validated the survey results by finding that very few individuals from Sonoma were personally or emotionally involved in the case, having neither attended the funeral nor donated money to the Trejo memorial fund. (14 RT 1830-1831.) When respondents' willingness to change their opinions in the face of new evidence was measured, those in Sonoma changed their opinions to an identical extent as those from San Diego. (14 RT 1830-1831.) As such, Dr. Ebbesen concluded that pretrial publicity did not appear to have the long-lasting effects suggested by Dr. Bronson because respondents in both counties were equally willing to change their opinions when confronted with new facts. (14 RT 1815.)

In Dr. Ebbesen's opinion, Dr. Bronson had overestimated the number of publicity-induced prejudgments of guilt in Sonoma. (14 RT 1775-1778.) Dr. Bronson's survey was faulted for not measuring for respondents who were unfamiliar with the case but would still find appellant guilty based on their general attitudes toward criminal justice. (14 RT 1775-1778.) Dr. Ebbesen found that the effect of publicity on prejudgment was closer to 20 to 25 percent, not the 64 percent reported by Dr. Bronson. (14 RT 1815.)

Dr. Ebbesen criticized Dr. Bronson's assumptions about the extent of people's knowledge about the case; the extent that publicity was broad, repeated and distributed widely over time; the hostile and emotional nature of people's reactions toward appellant; and the prejudgment bias against appellant. (14 RT 1744.) Indeed, Dr. Ebbesen opined that Dr. Bronson's assumptions were not fairly tested by the design of the defense survey

given that there could be reasonable alternative explanations for hostility against appellant that were not necessarily publicity-induced. (14 RT 1744.) For instance, respondents may have had an emotional reaction to the nature of the crime – a murder of a police officer – as opposed to antagonism against appellant fueled by publicity. (14 RT 1747-1749.) Dr. Ebbesen found almost all of Dr. Bronson's broad assumptions were not confirmed by the results of the defense survey. (14 RT 1815.)

Based on his own survey results, Dr. Ebbesen concluded that appellant would be at no greater risk of being found guilty in Sonoma than in San Diego where pretrial publicity was minimal. (14 RT 1831-1832.) The findings also indicated that the overwhelming majority of potential jurors in Sonoma could set aside what, if anything, they knew about the case and could reach a decision about appellant's guilt based on the evidence heard in court. (14 RT 1832.)

c. Dr. Dillehay

In rebuttal, Dr. Ronald Dillehay, a psychology professor at the University of Nevada, Reno, testified for the defense. (15 RT 1960-1961.) Dr. Dillehay, like Dr. Bronson and Dr. Ebbesen, had extensive experience in conducting venue studies on the influence of the media on conviction proneness. (15 RT 1964.) In this case, Dr. Dillehay did not conduct a separate venue survey but reviewed the survey findings of Dr. Bronson and Dr. Ebbesen and opined about their reliability and validity. (15 RT 1974-1975.)

Dr. Dillehay validated Dr. Bronson's methodology, confirming that there was high recognition and prejudgment rate among the survey respondents. (15 RT 1992.) He also agreed with Dr. Bronson that there was a reasonable likelihood that appellant could not get a fair trial Sonoma County. (16 RT 2378-2379.) In contrast, Dr. Dillehay criticized Dr. Ebbesen's survey for being extremely long and complex, describing its

readability as requiring a college or graduate school level of education. (15 RT 2000, 16 RT 2324-2325.) He expressed concerns about specific questions and the sequencing of items in the prosecution's survey. (15 RT 2000.) Dr. Dillehay was not convinced by Dr. Ebbesen's finding that respondents' opinions in this case were shallow and malleable. (16 RT 2374-2375.) In particular, he discounted the effectiveness of set-aside questions because people, regardless of their prejudgment level, are apt to give the socially acceptable answer that they can set aside their opinions and fairly consider all the evidence at trial. (15 RT 1994-1995.) Finally, Dr. Dillehay opined that Dr. Ebbesen had not successfully challenged the results of Dr. Bronson's survey. (16 RT 2380.)

Following the expert testimony, the trial court indicated that neither the defense nor the prosecution venue surveys and accompanying expert opinions were significantly helpful to the court in reaching its decision. (18 CT 3624-3625; 18 RT 2654-2655.) As a result, the court did not consider the substance of the surveys in denying the venue motion. (18 CT 3625; 18 RT 2655.) Rather, the court found that the surrounding circumstances and the extent of pretrial publicity in this case did not support a change of venue. (18 CT 3620-3626.)

Appellant unsuccessfully sought a writ of mandate in the Court of Appeal, challenging the trial court's ruling.

2. Appellant's Renewed Motion for Change of Venue

Following jury selection, appellant renewed his motion for change of venue. The trial court denied the renewed motion. (51 RT 7895.)
The jury selection process began with 800 prospective jurors, with over half excused for hardship. (51 RT 7896.) Thereafter, 197 jurors completed questionnaires including publicity questions. (51 RT 7896.) 30 to 40 jurors were then excused through stipulation. (51 RT 7896.) The remaining jurors were questioned in sequestered voir dire where both sides exercised

challenges for cause. From the 88 jurors who remained, the court and counsel ultimately approved 12 jurors and 6 alternates. (51 RT 7896.)

Prospective jurors were extensively questioned by the court and counsel about the impact of pretrial publicity on their opinions of the case and their ability to be fair and impartial. Both the defense and prosecution exercised a number of peremptory strikes and challenges for cause. After carefully considering the responses to the questionnaires, questioning individual jurors and observing their demeanor during voir dire, and even excusing some jurors over the objection of both sides, the trial court concluded that the venire of persons summoned did not demonstrate the level of publicity-induced bias necessary to disqualify them as a group of prospective jurors. (51 RT 7886, 7898.)

Further, the trial court separately considered the responses of the group of 12 persons who were deemed acceptable to both sides and ultimately impaneled. (51 RT 7898.) These 12 jurors and 6 alternates were deemed passed for cause and passed for peremptory challenges. (51 RT 7898.) In fact, both sides did not exercise all their peremptory challenges. (51 RT 7898.) Based on these considerations, the court found that the defense had not met its burden to prevail on a change of venue motion, either from the prospective pool of jurors or from the actual jurors who had been deemed acceptable by both sides. (51 RT 7898-7899.)

B. Legal Principles

It is well established that a change of venue must be granted when a defendant shows a reasonable likelihood that a fair trial cannot be had in the current county, in light of the nature and gravity of the offense, the nature and extent of the news coverage, the size of the community, the status of the defendant in the community, and the popularity and the prominence of the victim. (§ 1033, subd. (a); *People v. Vieira* (2005) 35 Cal.4th 264, 278 (*Vieira.*)

Most recently, in *People v. Famalaro* (2011) 52 Cal.4th 1 (*Famalaro*), this Court reaffirmed the legal standard for determining when a change of venue is required:

> A motion for change of venue must be granted when "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county" in which the defendant is charged. (§ 1033, subd. (a).) The trial court's initial venue determination as well as our independent evaluation must consider five factors: "'(1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim.' [Citations.]" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1394.) On appeal, a successful challenge to a trial court's denial of the motion must show both error and prejudice, that is, that "at the time of the motion it was reasonably likely that a fair trial could not be had in the county, and that it was reasonably likely that a fair trial was not had. [Citations.]" (*People v. Davis* (2009) 46 Cal.4th 539.) Although we will sustain the trial court's determination of the relevant facts if supported by substantial evidence, "'[w]e independently review the court's ultimate determination of the reasonable likelihood of an unfair trial.'" [Citation.]

(*Famalaro*, *supra*, 52 Cal. 4th at p. 21.)

C. The Trial Court Properly Denied the Venue Motion before Jury Selection

1. Nature and gravity of the offense

Here, appellant was charged with the gravest of crimes – the murder of a human being – and faced the gravest of punishments, death. Generally, capital cases inherently attract media coverage and for that reason "the factor of gravity must weigh heavily in a determination regarding the change of venue." (*Martinez v. Superior Court* (1981) 29 Cal.3d 574, 583.) However, the presence of this factor, standing alone, is not dispositive in this case. (See, e.g., *People v. Zambrano* (2007) 41 Cal.4th 1082, 1125 (*Zambrano*), disapproved on other grounds in *People v. Doolin* (2009) 45

Cal.4th 390, 421, fn. 22.) Indeed, this Court has rejected the establishment of a presumption of a venue change in all capital cases. (*People v. Sanders* (1995) 11 Cal.4th 475, 506; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1159.)

The nature of the crime also does not support a venue change. In essence, the crime involved one victim, the infliction of one shotgun wound, and instantaneous death. Although the media may have labeled the murder as a "cop killing" and as an "execution-style slaying", the crime was not the type of multiple and bizarre killings that have been the object of intense media attention in the past. (See *Corona v. Superior Court* (1972) 24 Cal.App.3d 872; *Frazier v. Superior Court* (1971) 5 Cal.3d 287.) Notably, the absence of prolonged violence, torture, or a physical struggle suggest that the crime was not necessarily more egregious than other shooting murders. In view of both the gravity of the offense and the nature of the crime, the trial court correctly concluded that this factor did not compel a change of venue. (18 CT 3620.)

2. Nature and extent of the media coverage

Contrary to appellant's characterization of the pretrial publicity as pervasive and continuous, the record shows that the media coverage decreased over time and was largely factual. (18 CT 3620-3621.) The early publicity received was typical of the media attention accompanying most capital cases. (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 942 (*Odle*).) As the trial court observed, "the publicity in every murder which the District Attorney chooses to seek the death penalty is not the type of media coverage that requires a venue change." (18 CT 3620.) Contrary to appellant's claim, media coverage here did not rise to the level of "saturation." The trial court more accurately recounted the extent of the media coverage as follows:

> The newspaper articles were extensive and detailed within the first two weeks after the killing and included reporting of the manhunt, hostage situation, arrest, arraignment and memorial service. They tapered off in number and frequency as time passed, covering the case when there was a hearing of interest, . . . However, there was no reporting between the various court appearances.

(18 CT 3621.)

The same was true for the frequency of reporting on the radio and television. (18 CT 3621.) Although there was heavy media coverage at the outset of the case that later became intermittent, this factor did not necessarily require a change of venue. (18 CT 3621.) The passage of time and decreased reporting diminished the potential prejudice from pretrial publicity. (*People v. Lewis* (2008) 43 Cal.4th 415, 449 (*Lewis*).)

With respect to the nature of the publicity, appellant argues that it was highly inflammatory and prejudicial. The crime was sensationalized as a "cop killing" in the media. He contends media coverage of the deputy's murder was widespread in Sonoma County and featured in local news broadcasts and the main local newspaper, the Press Democrat. The local media also reported on and televised the deputy's funeral.

It is well settled that pretrial publicity itself – even pervasive, adverse publicity – does not invariably lead to an unfair trial. (*People v. Prince* (2007) 40 Cal.4th 1179, 1216.) "When pretrial publicity is at issue, 'primary reliance on the judgment of the trial court makes [especially] good sense' because the judge 'sits in the locale where the publicity is said to have had its effect' and may base [the] evaluation on [the judge's] 'own perception of the depth and extent of news stories that might influence a juror.'" (*Skilling v. United States* (2010) __ U.S. __, 130 S.Ct. 2896, 2918 (*Skilling*).)

Here, the court, relying on its own observations of the publicity, did not find the reporting particularly inflammatory, sensational or hostile. (18

CT 3624-3626; 18 RT 2655.) The trial court noted that the newspaper and television reports at the time of trial were generally factual, contained no inadmissible or prejudicial material, and the press coverage was predominantly local. (18 CT 3620.) The court observed that, even in a different case where publicity surrounding the murder of police officer was markedly more sensationalized, this Court had found that it did not rise to the level of prejudice to warrant a change of venue. (18 CT 3623-3624; 18 RT 2654; see *Odle*, *supra*, 32 Cal.3d at p. 939.) Based on the trial court's view of the pretrial publicity in this case, appellant has failed to establish a reasonable likelihood that a fair trial could not be had in Sonoma County.

3. Size of the community

Sonoma County is a mid-sized county in California with both urban and rural areas. (18 RT 2650.) As of January 1996, Sonoma County ranked 16th out of 58 counties in the state in size, with a population of 421,500. (18 RT 2650.) In *People v. Coleman* (1989) 48 Cal.3d 112, 134 (*Coleman*), this Court found that Sonoma County's size with a population of 299,681 in 1980 did not support a change of venue. The *Coleman* court noted, "[t]hough not one of the state's major populations centers, the county is substantially larger than most of the counties from which this court has ordered venue changes." (*Ibid.*) Where there is a large and diverse pool of jurors, it is hard to sustain the suggestion that 12 impartial individuals could not be empanelled. (*Skilling*, *supra*, 130 S.Ct. at p. 2915.) Here, Sonoma County is of a sufficient size that publicity of the crime could be absorbed by the populace without resulting in a tainted jury pool. The trial court, thus, properly found that the size of the community alone, absent unusual facts, did not support a change of venue. (18 RT 2650.)

4. Community status of the defendant

The fourth factor, community status of the appellant, did not weigh in favor for a change of venue. Although appellant may have been portrayed by the media as an outsider, a career criminal, and recent parolee, the trial court observed that "disdain for such persons is not confined to the borders of Sonoma County." (18 CT 3618.) In this case, there was no evidence of unusual local hostility in Sonoma County against persons in those categories such that a change in venue would likely produce a less biased panel. In cases where the status of the defendant has supported change of venue, the accused belonged to a group locally disliked. (See *Frazier v. Superior Court* (1971) 5 Cal.3d 287 [hippies in Santa Cruz]; *Williams v. Superior Court* (1983) 34 Cal.3d 584 [Black defendant in a White county where victim was White].) The trial court also rejected appellant's alleged association with the Aryan Brotherhood as being supportive of a venue change based on the absence of group animosity specific to Sonoma County. (18 RT 2652.) (See *People v. Pride* (1991) 1 Cal.4th 324 [venue motion properly denied where the defendant alleged to have committed a murder as part of a conspiracy with other Aryan Brotherhood members].) Recognizing that the unpopularity of a criminal defendant is often universal, the trial court correctly found that circumstance alone did not compel a change of venue.

5. Prominence of the victim

Although Deputy Trejo was a long-time deputy for the Sonoma County Sheriff's Department, neither he nor his family were well-known in the community prior to his murder. The deputy and his family became known largely through the publicity surrounding his death because he was an officer who was murdered in the line of duty. That aspect would have followed the case to any county to which venue was changed. (See *Odle*,

supra, 32 Cal.3d at p. 942 [murdered police officer became "posthumous celebrity" because of his "status as an officer, killed in the line of duty," but "that aspect of the case would follow . . . to whatever community in which venue ultimately resides"].) The trial court properly concluded that the death of Deputy Trejo as an individual did not support change of venue since it was only his occupation and death in the line of duty that made his name recognizable in the public. (18 RT 2651.) This status, therefore, was not specific to Sonoma County, but would engender sympathy in any community. (18 RT 2651.)

6. Political Factors

Appellant raises political overtones as an additional factor to consider in support of venue change. However, the legislative response to address supervision of a parolee's release from prison that resulted from Deputy Trejo's murder does not constitute a political factor in this case. In rejecting appellant's reliance on political factors, the trial court indicated:

> The court does not agree there is any political factor in the case at bar. In *Maine v. Superior Court* (1968) 68 Cal.2d 375, the District Attorney and the defense attorney were running for the same judgeship against the original case's trial judge. *Powell v. Superior Court* (1991) 232 Cal.App.3d 785, was the subject of political finger pointing regarding the beating of Rodney King. Comparing the cases like *Maine* and *Powell* that discuss the impact of politics on venue with the case at bar, the introduction of a bill to require transport of inmates to their parole counties simply fails to qualify as a factor requiring consideration by this court.

(18 CT 3626.)

In sum, appellant has failed to show a reasonable likelihood under any of the legal factors that he could not receive a fair and impartial trial in Sonoma County.

D. The Trial Court Properly Denied the Renewed Venue Motion Following Jury Selection

1. The Jury Selection Process Was Fair

Appellant also claims that the jury selection process revealed that there was a reasonable likelihood that a fair trial could not be had in Sonoma County. On that basis, he contends that the trial court erred in denying his renewed venue motion. Appellant's argument should be rejected.

In evaluating this claim, this Court's independent review encompasses "'the voir dire of the actual, available jury pool and the actual jury panel selected.'" (*Vieira*, supra, 35 Cal.4th at p. 279, quoting *People v. Williams* (1989) 48 Cal.3d 1112, 1125.) Here, the trial court carefully considered the entirety of the jury selection process. The court initially summoned approximately 800 prospective jurors. (51 RT 7896.) Over half were excused, largely for hardship reasons. (51 RT 7896.) The remaining 197 prospective jurors completed a 31-page juror questionnaire including numerous questions about their familiarity with the case from media exposure, their opinions of appellant's guilt, their ability to be impartial, and their opinions on the death penalty. (1 SuppCT[17]- 22Supp CT.) Through stipulation, 30 to 40 additional jurors were excused. (51 RT 7896.) The remaining jurors underwent sequestered voir dire and the court excused a certain number for cause as a result of challenges by both sides. (51 RT 7896.) The venire was narrowed down to 88 prospective jurors. (51 RT 7896.) The court ultimately swore 12 jurors and 6 alternate jurors from those who had been passed for cause challenges as to either their

[17] "SuppCT" refers to the Supplemental Clerk's Transcript on appeal.

attitudes towards the death penalty or their exposure to pretrial publicity. (51 RT 7888.)

Appellant contends that the jury pool was predominantly biased against appellant due to media exposure with 163 out of 197 prospective recognizing the case. (AOB 115.) Appellant refers to a number of jurors whose questionnaire responses showed they had been negatively impacted by pretrial publicity and on that basis had prejudged appellant's guilt. (AOB 114-121.) However, a careful review of the record demonstrates that, for every juror who stated they believed appellant was guilty based on what they had heard and read in the news, there was a juror who had little or no knowledge of the case, had formed no opinion about appellant's guilt, and indicated that they could remain impartial if seated on the jury. Indeed, the spectrum of opinions among the 197 jurors who completed questionnaires was broad and varied – with some individuals indicating a strong bias against appellant, while others were completely unaffected by the publicity, and some who knew a lot about the case but were willing to be fair and impartial:

> "I have not really heard or remembered anything about the case other than what Judge Watters discussed. . . At this time I do not have enough information to even consider thoughts concerning the charges." (Juror No. 4580, 22 SuppCT 6022.)

> "I don't really know too much about what happen [sic]. . . I make no opinion or formed any conclusion." (Juror No. 3035, 1 SuppCT 132.)

> "I cannot make a decision on the truth of the charges, since I have not been informed of the evidence, only blurry memories from almost 1 1/2 years ago." (Juror No. 3761, 11 SuppCT 2891.)

> "No evidence has been given . . . He is still innocent, case has not started." (Juror No. 3444, 6 SuppCT 1527.)

"The evidence in this case is the only relevant material of concern. . . I cannot make a decision without sufficient information. . . I must remain impartial regardless how other jurors might think or feel." (Juror No. 3825, 11 SuppCT 3113.)

"I must assume that the prosecutor has enough compelling evidence to proceed." (Juror No. 3803, 11SuppCT 2984.)

"I tend to believe what I read in the paper which stated he was the main suspect." (Juror No. 4552, 22 SuppCT 5960.)

"The defendant is probably guilty. I would try to set that assumption aside during a trial, and weigh the evidence, but that's my impression at this point." (Juror No. 4135, 17 SuppCT 4751.)

"My thoughts are that the charges must be true." (Juror No. 3462, 6 SuppCT 1620.)

"I believe that he should have a fair chance but once a killer – I could never trust him." (Juror No. 3837, 12 SuppCT 3139.)

"Send him to the death chamber." (Juror No. 3844, 12 SuppCT 3201.)

"The guy's guilty . . . should be put away or fried." (Juror No. 3949, 14 SuppCT 3945.)

As shown, the jury pool encompassed a wide-range of opinions, not all publicity-induced or biased against appellant. Appellant's claim that the media had "poisoned the well" (AOB 114), and substantially prejudiced the jury pool against him is simply not supported by the record.

Even if the majority of prospective jurors had been exposed to pretrial publicity, such knowledge, in and of itself, was not sufficient to require a change of venue. There is no requirement that jurors be totally ignorant of the facts of a case so long as they can lay aside their impression and render an impartial verdict. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 450.) Courts have not required potential jurors to be ignorant of news accounts of the

crime or free of "'any preconceived notion as to the guilt or innocence of an accused.' [Citation.]" (*People v. Harris* (1981) 28 Cal.3d 935, 950 (*Harris*); see also *People v. Riggs* (2008) 44 Cal.4th 248, 281 (*Riggs*).) The mere presence of such awareness on the jurors' part, without more, does not presumptively deny a defendant due process, because to hold otherwise "'would be to establish an impossible standard.' [Citation.]" (*Harris*, *supra*, 28 Cal.3d at pp. 949-950.) In the absence of some reason to believe otherwise, it is only necessary that a potential juror be willing to set aside his or her "'impression or opinion and render a verdict based on the evidence presented in court.' [Citation.]" (*Id.*, at p. 950.)

Recognizing these principles, the trial court emphasized that juror exposure to information about appellant's prior convictions or to news accounts of the charged crime alone does not presumptively deprive him of due process. (51 RT 7897.) It is sufficient if the jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court. (51 RT 7897.) The court properly focused on whether the case had become so deeply embedded in the public consciousness that there was a reasonable probability that jurors could not view the case with the requisite impartiality. (51 RT 7898.) To that end, the court carefully reviewed the written questionnaire responses of prospective jurors, individually questioned them about the influence of the pretrial publicity on their opinions and their ability to be impartial, and observed their demeanor during voir dire. (51 RT 7898.) In addition, the court was even-handed and active during jury selection, having on occasion over objection of both sides excused jurors who seemingly gave perfect answers. (51 RT 7898.) In this way, the court attempted to ferret out those jurors who were honestly answering the questions from others who were less sincere. (51 RT 7898.)

Although some persons with biases may have remained after the screening of the juror questionnaires, none of the problematic jurors who

purportedly prejudged appellant's guilt survived the voir dire process. The trial court properly excused all of the biased prospective jurors for cause. The large number of prospective jurors initially summoned, approximately 800, ensured that an ample number of unbiased prospective jurors remained after the biased ones had been excused. (51 RT 7896.) As such, these measures were sufficient to ensure a fair selection process.

2. The Voir Dire of Appellant's 12 Jurors Did Not Demonstrate a Biased Jury

With respect to the 12 impaneled jurors, the majority had superficial knowledge of the case from the pretrial media coverage. In voir dire, each juror was extensively questioned by the trial court and counsel about the juror's responses to the publicity questionnaire, their recall of the case, and their ability to serve impartially. The defense unsuccessfully challenged two of the final jurors for cause based on either their exposure to pretrial publicity or opinion on the death penalty. However, the trial court, which observed the jurors' demeanor, expressly found they had demonstrated an ability to set aside any preconceived impressions derived from the media and properly credited their assertions of impartiality. As demonstrated by the voir dire record, the court and counsel approved a jury of 12 unbiased individuals.

a. Juror No. 3143

Juror No. 3143 did not remember hearing pretrial publicity about the case other than in passing. (35 RT 4751.) Juror No. 3143 indicated that she did not have any preconceived notions about the guilt or innocence of appellant and would keep an open mind if she had to judge the case. (35 RT 4751.) Being on a jury was an obligation which she took very seriously. (35 RT 4767.) Juror No. 3143 was accepted on the jury by both the prosecution and defense.

b. Juror No. 3360

Juror No. 3360 had read newspaper accounts of the shooting in the Press Democrat and the San Francisco Chronicle. (5 SuppCT 1309; 35 RT 4770.) He recalled learning about the case when the crime occurred because he was considering moving to the area at that time. (35 RT 4776.) Juror No. 3360 also read an article in the Press Democrat a few days before appearing for jury duty. (35 RT 4776.) He was able to recall specific facts about the crime including appellant's release from Pelican Bay, the shooting of the deputy and the hostage taking. (35 RT 4770.) Juror No. 3360 described the newspaper account as prosecution-oriented. (35 RT 4771.) In his view, the media was broadcasting that "a violent criminal committed another violent crime." (35 RT 4771-4472.) However, juror No. 3360 indicated that one cannot take what is written in the newspaper as a fact. (35 RT 4472.) He found that, based on the articles, it would appear that the accused had committed the crime but qualified that "the paper more often than not gets proven wrong later on." (35 RT 4472.) As an example, he mentioned the O.J. Simpson trial where the paper had declared Simpson guilty but the jury ultimately found he was innocent. (35 RT 4789.) Juror No. 3360 remarked, "people read what they read in the paper and they take it as gospel and it's not true." (35 RT 4790.) He added, "there's been no evidence presented against the accused or anything, so far. So as a juror I would have to say that, you know, what's in the paper doesn't count, that I've read." (35 RT 4773.)

Juror No. 3360 assured the court that he would keep an open mind with regard to the charges against appellant, understanding that appellant is entitled to the presumption of innocence. (35 RT 4773.) He affirmed that he could base his decision only on the evidence, not on what he might have learned from the media. (35 RT 4777.) The juror stated that the evidence will be brought out at trial and the jury decides on guilt or innocence, and

that is how the system works. (35 RT 4778.) The newspapers are often looking for sensationalism to attract attention and sell papers. (35 RT 4778, 4789.) He understood, as one who had debated in high school and college, that arguments could be made on both sides of an issue. (35 RT 4789.) For that reason, he viewed the media with skepticism. (35 RT 4789.)

The defense challenged juror No. 3360 for cause based on his answers regarding pretrial publicity. (35 RT 4839.) The defense argued that this juror was exposed to extensive publicity and, as a result, knew and recalled many of the facts. (35 RT 4839.) The defense was concerned that, because juror No. 3360 knew so much about the case, he had, in some way, prejudged the case. (35 RT 4840.) The court found that, although juror No. 3360 had heard a lot about the case, he presented himself as very intelligent and having an open mind. (36 RT 4991.) Juror No. 3360 remained on the jury panel.

c. Juror No. 3166

Juror No. 3166 was an alternate juror who later served on the jury in the penalty phase. She had heard briefly on the radio news that a sheriff deputy in Sonoma County was shot near Highway 12. (3 SuppCT 656-659; 36 RT 5073.) Juror No. 3166 explained that she did not watch much television and did not to talk to others about the case. (36 RT 5080.) Based on her limited knowledge, juror No. 3166 did not favor either the prosecution or the defense because she did not know any of the circumstances. (36 RT 5074.)

d. Juror No. 3295

Juror No. 3295 had not read any publicity about the case. (35 RT 4797.) She heard on the television news that an officer had been shot, but did not hear any details about the crime. (35 RT 4797.) The juror indicated

that she had a completely open mind about the truth of the charges against appellant. (35 RT 4797.)

The defense challenged juror No. 3295 for cause based on her responses related to the death penalty. (35 RT 4841.) The court, however, found that the juror could be fair and juror No. 3295 remained on the jury. (36 RT 4991-4992.)

e. Juror No. 3353

Juror No. 3353 only remembered learning from a newspaper that appellant had been accused of shooting Deputy Trejo. (35 RT 4821.) He could not recall any other information. (35 RT 4821.) He generally did not have confidence in what is written in newspapers. (35 RT 4821.) The juror indicated that he had a completely open mind with regard to the case. (35 RT 4822.) Nothing about the pretrial publicity affected his ability to give appellant the benefit of the presumption of innocence. (36 RT 4828.) Juror No. 3353 was not challenged by either side. (35 RT 4842.)

f. Juror No. 3726

Juror No. 3726 saw "bits and pieces" on television and mostly read newspaper articles about the case at the time the incident occurred. (10 SuppCT 2641-2644; 43 RT 6448.) She was not that focused on the story because her brother was dying of cancer in the hospital. (43 RT 6449.) Juror No. 3726 recalled coworkers talking about the officer's death and seeing pictures of the funeral in the paper, but otherwise could not remember much about it. (43 RT 6449, 6461.) Her brother, who had wanted to be a police officer years ago, generally commented on the deputy's death and how officers are not protected anymore. (43 RT 6450.) Juror No. 3726 indicated that her brother's opinion did not affect her ability to be impartial. (43 RT 6450.) She did not gain any impression about appellant's guilt or innocence from what she had heard or read about the

case. (43 RT 6451.) The incident did not have much of an impact on her. (43 RT 6451.) Juror No. 3726 agreed that appellant was presumed innocent until the prosecution proved their case beyond a reasonable doubt. (43 RT 6451.)

g. Juror No. 3923

Juror No. 3923 informed the court that he recognized one of the courtroom deputies as a former neighbor. (13 SuppCT 3665; 51 RT 7763.) The court assured him that this deputy would not necessarily be in the courtroom all the time and that deputy was not going to be a witness. (51 RT 7764.) Juror No. 3923 indicated that the deputy's presence would not impact his decision-making should he be chosen to be on the jury. (51 RT 7764.)

h. Juror No. 3971

Juror No. 3971 read about the case in the Press Democrat at the time of the incident. (15 SuppCT 4037; 45 RT 6715.) He recalled only that a police officer was killed and two people were apprehended. (45 RT 6716.) Because the newspaper may not contain all the facts, Juror No. 3971 had not formed any opinion as to appellant's guilt or innocence based on what he had read. (45 RT 6716-6717.) He maintained that his mind was open to be a juror in this case. (45 RT 6717.)

i. Juror No. 4064

Juror No. 4064 read one article about the shooting in the Press Democrat. (16 SuppCT 4316; 43 RT 6363.) He recalled that an officer was shot near Highway 12 but could not remember any more details. (43 RT 6363.) The story was not followed with any interest and no other articles were read. (43 RT 6367.) Juror No. 4064 did not form any opinions about the truth of the charges against appellant based on what he had read. (43 RT 6363-6364.) He understood that under the law appellant

was presumed innocent until proven guilty. (43 RT 6364.) Juror No. 4064 was not challenged by either the prosecution or the defense. (43 RT 6499.)

j. Juror No. 4084

Juror No. 4084 read about the shooting in the San Francisco Chronicle. (16 SuppCT 4471; 43 RT 6296.) He recalled that a suspect shot a police officer, hid in some nearby houses, was later captured and had an accomplice. (43 RT 6296.) He also remembered reading about the funeral in the newspaper. (43 RT 6297.) Juror No. 4084 commented that he did not include that he had learned about the funeral on the jury questionnaire because "it has nothing to do with the defendant that [*sic*] happened that day." (43 RT 6297.) With respect to the funeral, he stated that it was emotional to see the pictures of the family because of their loss. (43 RT 6309-6310.) However, juror No. 4084 indicated he could still presume appellant innocent until proven guilty. (43 RT 6309-6310.) He had not read anything about the case recently. (43 RT 6297.) Juror No. 4084 stated he did not favor either the prosecution or the defense, did not have any opinion about the truth of the charges against appellant, and his mind was open to sit in judgment on the case as a juror. (43 RT 6297-6298.) Juror No. 4084 was not challenged by either the prosecution or the defense. (43 RT 6499.)

k. Juror No. 4350

The only thing Juror No. 4350 knew about the case was from the radio, that an officer was shot and there were hostages. (19 SuppCT 5307-5308; 40 RT 5659.) He did not see anything in the newspapers. (40 RT 5660.) Juror No. 4350 indicated that he could not favor the prosecution or defense based on the little that he knew because he had not heard any evidence yet. (40 RT 5660.) He maintained that the case was very important because someone's life was at stake and, as such, jurors needed

to be very open-minded, keep out all personal opinions and "just stick to the facts." (40 RT 5660.) Juror No. 4350 affirmed that he could give appellant the presumption of innocence and keep an open mind. (40 RT 5661.)

l. Juror No. 4393

Juror No. 4393 recalled from pretrial publicity in the Press Democrat the names of appellant and Brenda Moore, that they had been arrested for shooting an officer, but did not know the details of the incident. (20 SuppCT 5494; 41A RT 5811.) At the time of the news, the juror was a student and did not pay attention to the case. (41A RT 5811.) She heard coworkers talking briefly about the case. (41A RT 5812.) Based on what she heard, Juror No. 4393 did not draw a conclusion about appellant's guilt. (41A RT 5812-5813.) Although she assumed that, given appellant's arrest, "he must be the best suspect the county has," she could not comment on the truth of the charges. (41A RT 5813.) Juror No. 4393 clarified, "my assumptions were that [appellant's] was the best suspect in the case, since he was arrested. . . I'm not saying that I read the paper and go [sic], [O]h, yeah, this person is guilty because of what's written in the article." (41A RT 5822.) She agreed that the newspaper is not always accurate. (41A RT 5816.) Juror No. 4393 indicated that she could be open-minded if selected as a juror, put aside the little that she knew about the case and any assumptions gained from reading the paper, and base her decision on the evidence. (41A RT 5819-5820.)

In ruling on appellant's renewed motion for change of venue, the court separately considered the group of 12 persons who were deemed acceptable by both sides. (51 RT 7898.) Notwithstanding defense counsel's comments that he had stopped exercising peremptory challenges as a strategy decision given the undesirability of the remaining jury pool, the court noted, without giving it special weight or importance, that both

sides had selected the final jury without exercising all their peremptory challenges.[18] (51 RT 7898.) In sum, 12 persons were deemed passed for cause and passed for peremptory challenges by both sides, and an additional 6 alternates were selected in the same manner. (51 RT 7898-7899.)

In this case, the circumstance that most of the actual jurors had some prior knowledge of a case did not necessarily require a change of venue. (See, e.g., *People v. Davis* (2009) 46 Cal.4th 539, 580 [all 12 jurors with prior knowledge of the case]; *People v. Ramirez* (2006) 39 Cal.4th 398, 434 (*Ramirez*) [11 jurors with prior knowledge of the case]; *People v. Bonin* (1988) 46 Cal.3d 659, 678, overruled on other grounds [10 jurors exposed to media coverage of the case]; *People v. Leonard* (2007) 40 Cal.4th 1370, 1396-1397 [eight jurors with prior knowledge of the case].) The relevant question was not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not impartially judge appellant's guilt. (*Patton v. Yount* (1984) 467 U.S. 1025, 1035.)

Only "[i]n exceptional cases, '"adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed," [citation] . . . . ' [Citation.]

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[18] At the close of jury selection, defense counsel informed the court that, although the defense had accepted the group of 12 jurors and the 6 alternates, as a strategic decision he had to stop exercising peremptory challenges because of the large number of potentially biased jurors that would come up for seating in the jury. (51 RT 7886.) Counsel was compelled to do so because of the large number of people who were biased on sequestered voir dire and the numerous members who were challenged for cause of that group. (51 RT 7886.) Counsel noted that there was a substantial group about to take their place in the jury box, many of whom had already been unsuccessfully challenged for cause by the defense. (51 RT 7887.)

'The category of cases where prejudice has been presumed in the face of juror attestation to the contrary is extremely narrow. Indeed, the few cases in which the [high] Court has presumed prejudice can only be termed extraordinary, [citation], and it is well-settled that pretrial publicity itself – "even pervasive, adverse publicity – does not inevitably lead to an unfair trial" [citation].' [Citation.] This prejudice is presumed only in extraordinary cases – not in every case in which pervasive publicity has reached most members of the venire." (*Prince*, *supra*, 40 Cal.4th at p. 1216.) This was not an extraordinary case for purposes of venue change.

Here, all 12 jurors testified under oath that they could put aside outside influences and fairly try the case. Although such assertions of impartiality do not automatically establish that appellant has received a fair trial, "a review of the entire record of voir dire may still demonstrate that pretrial publicity had no prejudicial effect." (*People v. Howard* (1992) 1 Cal.4th 1132, 1168.) The trial court considered not only the questionnaire and voir dire responses, but had the opportunity to observe the prospective jurors' demeanor, their verbal and non-verbal cues, in assessing if they could in fact set aside any prejudgment and be impartial. As such, the court properly credited the jurors' assertions that they could be impartial.

The 12 seated jurors were also subject to challenges by both sides. The fact that the defense did not exhaust all of their peremptory challenges, suggests that the "the jurors were fair, and that the defense itself so concluded." (*People v. Panah* (2005) 35 Cal.4th 395, 448; see also *Zambrano*, *supra*, 41 Cal.4th at pp. 1127-1128 [the court cited the circumstance that the defendant did not challenge any of the sitting jurors for cause or exhaust available peremptory challenges, in support of its conclusion that hindsight demonstrated that retention of the case did not "produce an unfair trial"].) Defense counsel's assertion of futility does not alter the principle that "[r]egardless of the system of jury selection, a

party's failure to exercise available peremptory challenges indicates relative satisfaction with the unchallenged jurors." (*People v. Morris* (1991) 53 Cal.3d 152, 185.)

Thus, the entirety of the record shows that the selection process resulted in a panel of jurors untainted by the publicity surrounding this case and there was no evidence that any of them held biases that the selection process failed to detect. Under these circumstances, appellant has failed to demonstrate a reasonable probability that a fair trial could not be had and was, in fact, not had in Sonoma County in both the guilt and penalty determinations.

II. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF OTHER CRIMES TO ESTABLISH INTENT AND A COMMON SCHEME OR PLAN FOR THE COUNTS OF CONSPIRACY AND ATTEMPTED ROBBERY OF MARIAN WILSON

Appellant argues that the trial court erred in admitting evidence of other crimes to prove intent, and a common scheme or plan with respect to the charges of conspiracy to commit robbery and attempted robbery of Marian Wilson. Appellant claims that the four prior robberies at issue were not sufficiently similar to the current offenses to prove intent, or a common scheme or plan. Further, appellant contends that the evidence was in effect improper character evidence that unduly prejudiced the jury against him. Appellant is mistaken. Appellant's series of robberies in San Diego were sufficiently similar to the instant offenses in that they involved an accomplice, targeted restaurants or bars late at night, utilized a vehicle, and involved a firearm. As such, the prior crimes were properly admitted to establish intent, and a common scheme or plan. Moreover, given that the evidence was not inflammatory in nature and the jury was properly instructed on its limited purpose, the prior crime evidence was more probative than prejudicial under Evidence Code section 352.

A. Background

1. The Conspiracy and Attempted Robbery Charges

In count three of the complaint, appellant and co-defendant Brenda Moore were charged with conspiracy to commit robbery. (9 CT 1662.) The complaint alleged the following overt acts in furtherance of the conspiracy: (1) Defendants armed themselves with a loaded short-barreled shotgun; (2) defendants obtained a street map of Santa Rosa, California, marking potential locations of robbery victims; (3) defendants obtained a mask and gloves to avoid identification as perpetrators of robberies; (4) defendants drove to the location of 6930 Burnett Street, Sebastopol, and

surveiled the area of the Sushi Hana Restaurant, while armed with a loaded shotgun and in possession of a mask and gloves; and (5) defendants drove to 5338 Highway 12, Santa Rosa, and surveiled the area of the R&S Bar, armed with a shotgun and in possession of gloves and mask. (9 CT 1662.)

The complaint also charged appellant and Moore with attempted robbery of Marian Wilson (count fourteen) and of the patrons and employees of the R&S Bar (count 15). (9 CT 1668.) It was further alleged in the fourth special circumstance related to the murder count (count one) that the murder of Deputy Trejo took place during an attempted robbery of the R&S Bar. (9 CT 1661.)

2. Rulings by the magistrate judge and trial court

Following the preliminary hearing, the magistrate judge denied the prosecution's motion to admit prior crime evidence, finding there were not sufficient similarities between the prior crimes and the instant offenses to prove intent, or a common plan or scheme. (9 CT 1626-1627.) The magistrate found insufficient evidence to hold appellant and Moore on the conspiracy charge (count three), the attempted robbery of Marian Wilson (count fourteen), and the attempted robbery of the R&S Bar (count fifteen). (9 CT 1654, 1657.) Similarly, the magistrate found insufficient evidence to support the fourth special circumstance – that the murder took place during the attempted robbery of the R&S Bar. (9 CT 1653.)

In the information, the prosecution recharged conspiracy (count three), attempted robbery of Marian Wilson (count four) and attempted robbery of the R&S Bar (count five). (10 CT 1721-1723, 1724.) The fourth special circumstance in the murder count was also recharged. (10 CT 1720.) Appellant moved under section 995 to dismiss the conspiracy and attempted robbery counts, and the fourth special circumstance. (10 CT 1761, 1765-1766, 1866-1888.)

The trial court denied appellant's section 995 motion as to conspiracy and attempted robbery of Marian Wilson (counts three and four). (7 RT 899.) However, the court granted the motion with respect to the an attempted robbery of the R&S Bar – dismissing count five, and striking overt act No. 5 as alleged in count three and the fourth special circumstance in the murder count. (7 RT 899, 961-962.) In addition, the trial court admitted the prior crimes as sufficiently similar to the charged offenses to prove intent, and a common plan or scheme with respect to the conspiracy and attempted robbery of Marian Wilson. (17 RT 2564-2565, 2568.)

3. Evidence at the Preliminary Hearing

At the preliminary hearing, the prosecution presented the following evidence in support of the attempted robbery and conspiracy charges.

a. Attempted robbery of Marian Wilson

Marian Wilson and Sung Won Kim owned Sushi Hana, a restaurant located at 6930 Burnett Street in Sebastopol. (2 CT 225, 235-236.) On the evening of March 29, 1995, Sushi Hana closed to customers at 9:00 p.m. (2 CT 226.) Wilson and Sung Won Kim remained inside, closing up the restaurant for the night. (2 CT 226.) Wilson left the restaurant at approximately 10:00 p.m. to go shopping at a nearby Safeway located on Main Street. (2 CT 226, 228.) As Wilson was driving back to the restaurant at approximately 10:45 p.m., she observed a green pickup truck parked in the last parking space on Main before Burnett Street. (2 CT 232.) The two people sitting inside caught her attention. (2 CT 232-233.) Wilson assumed the person on the passenger's side was a woman based on her very full head of blonde hair. (2 CT 232.) The person on the driver's side was dark-haired and Wilson assumed was a man. (2 CT 234.) Wilson also noticed the unusual rack on the back of the pickup truck. (2 CT 233.)

Wilson then turned onto Burnett Street back to Sushi Hana. (2 CT 234.) She was driving her Toyota pickup truck. (2 CT 234.)

Wilson parked her truck across from the restaurant. (2 CT 235.) There were no other vehicles in front of her. (2 CT 302.) She explained that she routinely parks across the street because she can see into the restaurant and is able wait for Sung Won Kim to finish closing up the restaurant before they head home. (2 CT 235.) Because there is a large glass window that covers most of the front of the building, it is not difficult to see into the restaurant from the outside or from across the street. (2 CT 227.) During the evening hours, the interior of the restaurant was well lit. (2 CT 236-237.) A cash register that sits on the counter at the front of the restaurant is visible from across the street. (2 CT 237-238.)

After parking across the street, Wilson went inside Sushi Hana for a couple of minutes, picked up a black leather briefcase containing the day's receipts and the mail. (2 CT 238.) On an average Wednesday, the restaurant brings in about $3000. (2 CT 239.) Wilson told Sung Won Kim, who was still closing up the restaurant, that she was going to the corner mailbox and would be return shortly to pick him up. (2 CT 238.) She had placed the money into the briefcase sometime before leaving for Safeway at 10:00 p.m. (2 CT 239.)

Wilson indicated that there were businesses in the immediate vicinity which were still open during that late hour, a Round Table Pizza and a bar, Jasper O'Farrell's. (2 CT 303, 322-323.) Round Table Pizza is on the other side of the alley way adjacent to Sushi Hana on Burnett Street. (2 CT 303, 323, 336.) Jasper O'Farrell's was located behind the Sushi Hana, with its back entrance facing the alley. (2 CT 303-304.) When Wilson left the restaurant and began to cross the street, she saw the same green pickup truck she had seen earlier on Main Street parked in front of her vehicle. (2 CT 302.) She felt uneasy to see this same truck now parked in front of her.

(2 CT 304.) The same individuals were inside, a dark-haired man and a blond woman. (2 CT 304.) The passenger side of the green pickup truck was open and the people were facing straight ahead. (2 CT 304.) When Wilson recognized them as the same individuals, she moved quickly to get into her truck. (2 CT 305.) Although she normally places the briefcase behind the driver's seat, she was scared and threw the briefcase on the passenger side and got inside her truck. (2 CT 305.) As Wilson was getting inside, she saw the two individuals get out of their pickup truck and walk towards her. (2 CT 306.) The man was not tall and was smaller than the woman. (2 CT 330.) Wilson was scared. (2 CT 307.) She started the engine, and drove away quickly without turning on her headlights. (2 CT 307.) She testified, "I didn't know why I was scared, but it scared me that they were in front of me and, um, I just wanted to take off." (2 CT 307.)

Wilson made a turn onto Main Street. (2 CT 309.) She stopped momentarily and looked down the street to see if the green pickup truck was still parked there. (2 CT 309-310.) She saw the truck pulling onto Petaluma Avenue. (2 CT 310.) Wilson circled the block, making a series of left turns due to the one-way streets and proceeded to Petaluma Avenue. (2 CT 310.) She dropped off the mail at the corner mailbox, and drove back onto Burnett Street. (2 CT 310-311.) Wilson did not see the green truck again. (2 CT 311.) She parked in front of Sushi Hana and went inside. (2 CT 311.) At the preliminary hearing, Wilson identified Moore as the woman in the truck but was unsure when asked to identify the man. (2 CT 312.) She identified Moore's green truck in a photograph as the vehicle she had seen across the street from the restaurant. (2 CT 313.) Although Wilson did not see appellant holding a weapon, the prosecution presented evidence that appellant was in possession of a sawed-off shotgun on that evening. (3 CT 406-407; 4 CT 570.)

Approximately five minutes after Wilson returned to Sushi Hana from the mailbox, she and Sung Won Kim left the restaurant together. (2 CT 314.) They drove through the alley way and circled back onto Burnett Street, looking to see if the pickup truck was still around. (2 CT 314.) Not seeing the truck, they drove home. (2 CT 314.) The next morning, Wilson read in the newspaper about the shooting of a deputy sheriff the night before. (2 CT 316.) Recognizing the description of the truck and the people involved, Wilson reported the incident at Sushi Hana to the police. (2 CT 315-316.)

Sung Won Kim testified at the preliminary hearing. He is the head sushi chef and co-owner of Sushi Hana. (2 CT 335.) Kim was working at the restaurant on March 29, 1995 until after closing. (2 CT 335.) At approximately 11:00 p.m., two minutes after Marian Wilson left the restaurant to mail some letters, Kim was behind the counter when he heard a car with a loud engine coming through the alley-way. (2 CT 336, 339.) The vehicle stopped right in front of the restaurant for at least 20 seconds. (2 CT 336.) Kim's attention was drawn to the vehicle because it was 11:00 p.m. and a car was stopping in front of the restaurant for 20 seconds, which seemed to him to be a long time. (2 CT 340.) Kim thought it might be a customer stopping by to say hello. (2 CT 340.) The vehicle then turned toward Petaluma Avenue and Kim observed that it was an older American truck with a lumber rack on the back. (2 CT 341.) Several minutes later, Marian Wilson returned to the restaurant. (2 CT 343.) She told Kim, "you have to get out of the restaurant." (2 CT 344.) They left about 10 minutes later. (2 CT 344.) Kim indicated that cars often used the alley way late at night to access Burnett Street, coming from Round Table, Jasper O'Farrell's, or Highway 12. (2 CT 348.)

b. Attempted robbery of the R&S Bar

On the evening of March 29, 2005, Brian Nelsen saw Moore's green pickup truck parked half-way down the driveway of the Aplum Trucking yard. (9 CT 1582, 1584, 1989.) The trucking yard is located along Highway 12, one mile from the Santa Rosa Saddlery. (7 CT 1255-1256; 9 CT 1582.) There is a Chevron gas station at the entrance of the driveway. (9 CT 1590.) Nelsen observed that the headlights on the truck were off and there were two persons inside. (9 CT 1585-1586.) The driver had long blonde hair. (9 CT 1585-1586.) As Nelsen drove past the truck, the truck started up and drove off towards Highway 12. (9 CT 1586.) He went into the trucking yard to use the restroom and noticed that the gate had been left open. (9 CT 1586.) Nelsen drove around the yard and checked to make sure everything was in order. (9 CT 1586.) After securing the yard, Nelsen drove east on Highway 12 and the same truck he had seen fifteen minutes earlier in the trucking yard was now in the Saddlery parking lot with a deputy's patrol car positioned behind it. (9 CT 1586-1587.)

At approximately 11:30 p.m., Deputy Trejo had called into dispatch the presence of a suspicious green Ford pickup truck with two occupants parked in the Santa Rosa Saddlery and provided a license plate number. (7 CT 1247-1248.) The truck was registered to Brenda Moore. (7 CT 1250.)

c. Conspiracy to commit robbery

In addition to the evidence related to the attempted robbery of Marian Wilson in front of Sushi Hana, the prosecution presented the following evidence in support of the conspiracy count. The evidence showed that upon his release from PBSP, appellant was required to report to his San Diego parole officer by Monday, March 27, 1995. (7 CT 1245.) After driving appellant to Santa Rosa, Brenda Moore phoned her friend Kim Barger, to borrow money to fix her truck. (8CT 1349-1351.) Moore

informed Barger that she was driving appellant to the airport. (8CT 1349-1351.) However, after having her truck repaired at Meineke Muffler on March 28 (8CT 1338-1339), Moore and appellant continued driving around the Santa Rosa/Sebastopol area until the late evening of March 29, where they were seen parked at the Sushi Hana, the Aplum Trucking yard, and the Santa Rosa Saddlery. When they were arrested, appellant had no money and Moore had 46 cents on her person. (7 CT 1260.)

Inside Moore's truck, Detective Schwedhelm found three single white latex gloves inside a bag, and a light brown watchcap under the seat. (7 CT 1280, 1290.) One latex glove was found near the deputy's patrol car at the Santa Rosa Saddlery. (9 CT 1532.) Evidence Specialist Rainwater found two latex gloves, a marked map, and a watchcap inside a plastic bag discovered in the field near the Cooper/King residence. (7 CT 1282; 8 CT 1323-1324, 1325, 1336.) The latex gloves appeared to have been used and one glove had a tip missing. (8CT 1353.) The watchcap had its top entirely cut off, with the opening at the top as large as the opening on the bottom. (9 CT 1523.) The opening was wide enough for the cap to be pulled down to the neck area. (9 CT 1523.)

The marked street map of Napa/Sonoma Wine Country depicted the Santa Rosa area. (7 CT 1290; 8 CT 1324-1326.) On one side of the map, some streets were delineated with dark ink, the words "Redwood Drive" were written on the area over the Pacific Ocean, and other writing was scribbled out. (8 CT 1326.) The other side of the map, which contained a street map of Santa Rosa, had several different areas colored in, underlined, or highlighted. (8 CT 1327-1328.) Detective Schwedhelm testified that there were businesses, including restaurants and bars, within several of the areas marked on the map. (8 CT 1329-1334.) He indicated, however, that the Sushi Hana, R&S Bar, and the Santa Rosa Saddlery were not specifically marked on the map. (8 CT 1331.)

4. Other Crime Evidence

The prosecution moved to admit evidence of appellant's eight prior robberies under Evidence Code section 1101, subdivision (b), to support the charges of conspiracy and attempted robbery of Marian Wilson. (36 SuppCT 9249-9272.) The trial court admitted four of the prior robberies under Evidence Code section 1101, subdivision (b), as evidence of intent and common plan or scheme. (17 RT 2568.) The court found that the four robberies were sufficiently similar to the charged offenses, reasoning that the crimes occurred in bars or restaurants, appellant used a firearm, the robberies occurred very late in the evening or early morning, and they involved an accomplice. (17 RT 2564-2565.)

At trial, the jury heard evidence of four armed robberies of bars and restaurants committed by appellant and an accomplice in December 1981, in San Diego County. Following the prosecution's case, the court granted the defense section 1118.1 motion for acquittal on the attempted robbery of Marian Wilson based on insufficient evidence. (94 RT 14940, 14964-14965.) The jury hung on conspiracy to commit robbery and the court declared a mistrial as to that count. (114 RT 18224.)

a. The Bull Pen Bar – December 10, 1981

On December 10, 1981, Linda Helton was working as a bartender at the Bull Pen Bar in San Diego. (63 RT 9728.) A man and a woman entered the bar at approximately 1:30 a.m. (63 RT 9733-9734.) Helton described the man as short with Latin features and dark eyes. (63 RT 9735.) When the bar closed at 2:00 a.m., both persons left. However, five minutes later, the same man returned accompanied by a taller man. (63 RT 9736.) Both men had guns in their hands. (63 RT 9737.) The shorter man was armed with a large handgun and the taller man had a rifle. The taller man pointed the rifle at Helton who was behind the counter. (63 RT 9739.)

Helton was ordered to take the money out of the register. (63 RT 9739.) She emptied the cash register and handed them the money. (63 RT 9740.) The men directed her to a room where there was floor safe but Helton did not know the combination to the safe. (63 RT 9740-9741.) The men ordered Helton and a friend who was at the bar to get down on the floor. (63 RT 9741.) They took the tip money from her purse. (63 RT 9742.) Appellant was identified at trial as the shorter of the two robbers. (63 RT 9742-9743.)

b. The Bollweevil Restaurant – December 16, 1981

On December 16, 1981, Edythe Gardiner was working as the night supervisor at the Bollweevil Restaurant in Ocean Beach, near San Diego. (57 RT 8878-8879.) When the restaurant closed at 11:00 p.m., Gardiner proceeded to close out the day's receipts. (57 RT 8882.) Several customers, however, remained inside. (57 RT 8882.) When Gardiner went to ring out the register, a man approached her, pointed a gun to her head and said, "This is a hold up." (57 RT 8884-8885.) The man had dark-hair, was slightly taller than 5-feet, and was armed with a long-barreled gun. (57 RT 8885.) Gardiner was ordered to sit on the floor and, shortly after, was instructed to open the cash register. (57 RT 8887- 8888.) Another man who was tall and slender had a knife in his hand. (57 RT 8888.) The man with the gun took the money from the cash register and the office. (57 RT 8890.) A total of $1400 was taken. (57 RT 8892.) Gardiner was then told to get back on the floor and count to one hundred. (57 RT 8892.) Appellant was identified at trial as the man with the gun. (57 RT 8893.)

c. Pizza Hut – December 23, 1981

On December 23, 1981, Terri Ticehurst was working at a Pizza Hut in San Diego when appellant and an accomplice robbed the restaurant. (55 RT 8512.) At approximately 11:00 p.m., the restaurant had closed and

three customers remained inside, a tall man, a shorter man and a woman. (55 RT 8514-8515.) While Ticehurst was in the kitchen, the taller man approached her with a sawed-off shotgun. (55 RT 8515-8516.) Ticehurst was ordered towards the cash register. (55 RT 8516.) The shorter man pointed a gun at the waitress who was also ordered to the cash register. (55 RT 8517; 57 RT 8876-8877.) Either Ticehurst or one of the men took the money out of the register. (55 RT 8518.) The taller man asked Ticehurst to open the safe located in the floor next to the cash register. (55 RT 8518.) Ticehurst opened the safe and, after giving the robbers the money, was ordered to lay face down on the floor next to the waitress. (55 RT 8518.) The robbers told the two women to count backwards from one hundred and then left the restaurant. (55 RT 8519.) They took Ticehurst's wallet from her purse. (55 RT 8519-8520.) Appellant was identified at trial as the person with the handgun. (57 RT 8877.)

d. Pizza Hut – December 29, 1981

Lara Hanssen testified that on December 29, 1981, appellant and an accomplice robbed the Pizza Hut in San Diego were she was employed as an assistant manager. (55 RT 8531.) The evening, Hanssen and a waitress closed the restaurant at midnight. (55 RT 8533.) Two customers, one short man and a taller man, were finishing a meal. (55 RT 8533.) The men had been in the restaurant earlier that evening inquiring about what time the restaurant closed. (55 RT 8534.) The men approached the cash register and, when Hanssen rang up their order, the shorter man removed a sweatshirt laid across his arm to reveal a sawed-off shotgun. (55 RT 8536.) Hanssen was ordered to go to the back of the restaurant and open the safe. (55 RT 8537.) She complied and the shorter man took the money out of the safe. (55 RT 8537.) Hanssen was told to lie down on the floor along with the waitress. (55 RT 8538.) The taller man could not get the cash register opened and instructed Hanssen to open it and give him all the money. (55

RT 8539.) When she removed the last bills from the cash register, an alarm sounded and the robbers became upset. (55 RT 8540.) Hanssen was again ordered to lie on the floor. (55 RT 8540.) She believed they left through the back door. (55 RT 8540.) Hanssen identified appellant at trial as one of the robbers. (55 RT 8543-8544.)

e. Testimony of former robbery accomplice

Stephen Jarrett, appellant's former accomplice, testified that he and appellant committed a string of restaurant robberies in San Diego in December 1981. (74 RT 11316.) Jarrett had been convicted of four felonies involving robberies in 1981, and was currently incarcerated in state prison in Washington. (74 RT 11328-11329.) Jarrett indicated that he and appellant specifically targeted pizza places, restaurants, and bars in their robberies. (74 RT 11317.) These types of businesses were desirable because they were open late and money was easily accessible at those hours. (74 RT 11317.) They looked for places that were isolated, not well lit, and did not have many people around. (74 RT 11317.) Jarrett had been familiar with the Bull Pen Bar and the Bollweevil Restaurant before the robberies. (74 RT 11318-11319.) He could not recall any specific times he used a map in committing the crimes. (74 RT 11319.) However, he and appellant made sure there was easy road access in and out of the business that was being robbed. (74 RT 11319.) Jarrett explained that they used a vehicle in committing the robberies. (74 RT 11320.) The vehicle would be parked close to the targeted building, in front or behind the building. (74 RT 11320-11321.) Sometimes they would stay in the vehicle until the establishment was closed or all the customers had left. (74 RT 11321.) The robberies were committed late in the evening or early in the morning when the business closed to avoid interference from any customers. (74 RT 11322.) The lateness of the hour also ensured that receipts from the beginning of the day would be available. (74 RT 11322.) After the

robberies, Jarrett and appellant would leave the area in the same vehicle. (74 RT 11322.)

Jarrett testified that the main purpose of committing these robberies was to obtain money to buy drugs. (74 RT 11323.) The money was also used for hotels, gas and food. (74 RT 11329.) Jarrett explained that, when they robbed the two Pizza Huts, he and appellant stayed close by the restaurants. (74 RT 11327.) For the Bollweevil robbery, they had previously been inside, eaten a meal and then returned at a later time. (74 RT 11328.) When they robbed the Bull Pen Bar, Jarrett and appellant waited until the bar was completely closed. (74 RT 11328.)

B. Legal Principles

Evidence of other crimes or misconduct is inadmissible when it is offered to show that a defendant had the criminal propensity to commit the charged crime (§ 1101, subd. (a)); however, such evidence is admissible when offered to prove some fact (such as motive, intent, plan) "other than [the defendant's] disposition to commit such [crime or bad act]." (§ 1101, subd. (b).) However, even if the other crimes evidence is relevant to prove one of the facts specified in section 1101, subdivision (b), it must also satisfy the admissibility requirements of Evidence Code section 352. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404 (*Ewoldt*), superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505-506.) "'The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence. [Citation.]'" (*People v. Lindberg* (2008) 45 Cal.4th 1, 22 (*Lindberg*); accord, *People v. Kelly* (2007) 42 Cal.4th 763, 783 (*Kelly*).)

This Court has held that the least degree of similarity between the prior crimes and the charged offense is required to prove intent. (*Ewoldt*, *supra*, 7 Cal.4th at p. 402.) A greater degree of similarity is required to prove the existence of a common design or plan. (*Ibid.*) The highest quantum of similarity between the other conduct and the charged crime is necessary where the evidence is offered to prove identity. (*Ibid.*; see also *People v. Hovarter* (2008) 44 Cal.4th 983, 1003.)

Where a defendant challenges the relevance and admission of evidence under sections 352 and 1101, the trial court's rulings are reviewed under the abuse of discretion standard (*People v. Cole* (2004) 33 Cal.4th 1158, 1195 (*Cole*)), and its decision will not be disturbed on appeal absent a showing that it exercised its discretion in an arbitrary manner resulting in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

C. The Prior Crimes Were Sufficiently Similar to the Charged Offenses

The trial court properly admitted the prior crime evidence under Evidence Code section 1101, subdivision (b), to establish intent and a common plan or scheme based on the sufficient similarities between the prior robberies and the instant offenses.

1. Intent

The prior crimes were probative on the disputed issue of intent for the charged crimes of conspiracy to commit robbery and attempted robbery.[19] Where the other crime evidence is offered to show intent, "[t]he least degree of similarity (between the uncharged act and the charged offense) is

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[19] Appellant's not guilty plea put all elements of the charged crimes at issue, including intent. (§ 1019; *People v. Balcom* (1994) 7 Cal.4th 414, 422 (*Balcom*).)

required." (*Ewoldt, supra*, 7 Cal.4th at p. 402.) The other crime evidence, if offered for this purpose, "must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*Ibid.*; see also *People v. Kipp* (1998) 18 Cal.4th 349, 371.)

Here, the similarities between appellant's four prior robberies and the charged offenses of conspiracy to commit robbery and the attempted robbery of Marian Wilson were sufficient to raise an inference that appellant harbored the same intent in committing these crimes. Most notably, the crimes involved robberies of restaurants or bars late at night after they were closed to customers but still had employees inside. In both instances, appellant and an accomplice surveiled the targeted business, either from within the restaurant or bar, or from a parked vehicle near to the building. The business owners or employees had direct access to the day's receipts. Further, the crimes involved the use or presence of a firearm. A vehicle was also used to facilitate the robbery and make a quick getaway. Given the least degree of similarity required for establishing the same intent, these facts were sufficient to support the trial court's admission of the other crime evidence for that purpose.

Although there were factual differences between the San Diego robberies and the instant offenses– such as the absence of gloves, mask or a map in the priors – the crimes, nevertheless, shared significant features indicating a shared intent. The trial court acknowledged that the former robberies had taken place within the establishments, which was not the case here. (17 RT 2564.) Also, in the priors, a firearm was used but none was used against Marian Wilson or observed by her. (17 RT 2564.) However, the trial court was not persuaded to exclude the prior crimes based on these factual differences. The court observed that in the prior crimes, the firearm was not produced until the last possible moment and a jury could draw an

inference that appellant may have had the firearm in his possession during the instant offenses. (17 RT 2564.) Marian Wilson could not see appellant and Moore well enough to describe their clothing or to view any weapons. But the record contained evidence that appellant was indeed armed that evening. There was also an inference to be drawn from the fact that appellant and Moore had very little money with them and that one purpose of the robbery was to obtain funds. (17 RT 2565.) Under these circumstances, the court properly concluded that the crimes were sufficiently similar to admit evidence of the prior robberies to prove intent.

2. Common scheme or plan

Here, the trial court properly found that the degree of similarity between the prior robberies and the charged crimes was sufficient to raise an inference of a common scheme or plan. "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Ewoldt*, *supra*, 7 Cal.4th at p. 403.)

While the current offenses involving Sushi Hana and Marian Wilson were not factually identical to the robberies of the Bull Pen, Bollweevil and Pizza Huts, the crimes shared sufficient common features from which a jury could infer a common design or plan. In both instances, the crimes involved robberies where appellant and an accomplice targeted restaurants or bars late at night. Witnesses testified that there was always another man or a woman with appellant when the prior robberies occurred. The establishments were closed to customers but an employee was still inside and the day's receipts were accessible. Appellant and his accomplice also used a vehicle in facilitating the robberies, parking close to the targeted building, either in front or behind the business. Stephen Jarrett, appellant's former robbery accomplice, indicated that sometimes he and appellant

would wait in a parked vehicle until closing time while other times they would enter the restaurants and dine. Jarrett explained that they selected restaurants that were close to a freeway for an easy getaway. Appellant's targeting and surveillance of the Sushi Hana with Brenda Moore from a parked vehicle across the street comported with this common plan. The Sushi Hana was also located a street away from Highway 12.
Further, the prior crimes and charged offenses both involved the use or presence of a firearm, in some instances, a shotgun. There was evidence presented that appellant was armed with a sawed-off shotgun that evening although Marian Wilson did not observe one at the time. These facts demonstrate circumstantially that appellant committed the charged offenses pursuant to the same design or plan he used in committing the San Diego robberies.

As the trial court correctly observed, "these common features could certainly negate a random similarity between the circumstances of the old and the new [*sic*] to support the inference that appellant was operating under the same plan." (17 RT 2566.) The court also noted that the time of night in which crimes were committed was one of the main facts that united the prior and current offenses. (17 RT 2566.) The court emphasized that the degree of similarity to support this inference is higher than that required to show intent, but the plan does not need to be particularly imaginative or original. (17 RT 2565.) Rather, a plan simply needs to exist. (17 RT 2565-2566.) Such a common plan was evident here.

Appellant argues that there were significant factual differences between the prior and current offenses to negate the existence of a common design – namely that appellant never entered the Sushi Hana and at no time confronted Marian Wilson at gunpoint with a demand for money. Nonetheless, the shared key elements of the crimes – targeting bars and restaurants late at night with an accomplice, being armed with a shotgun,

and positioning a getaway vehicle in close proximity to surveil the business and effectuate a getaway – strongly indicated the existence of a common plan. Given these facts, the trial court did not abuse its discretion in finding that sufficient similarities showed a common plan or scheme, and admitting the prior crime evidence for that purpose.

D. Prior Crime Evidence Was More Probative than Prejudicial

Appellant argues that the admission of the other crime evidence was more prejudicial than probative under Evidence Code section 352 and on that basis should have been excluded. We disagree. The trial court acted within its discretion under Evidence Code section 352 in finding the probative value of the evidence of the prior robberies was not substantially outweighed by the potential for undue prejudice.

While evidence of uncharged offenses is admissible under the appropriate circumstances, this Court has cautioned that evidence of this kind "'is so prejudicial that its admission requires extremely careful analysis. [Citations.]' [Citations.]" (*Ewoldt*, *supra*, 7 Cal.4th at p. 404.) Thus, not only must the probative value of other crimes evidence be substantial, but that value must not be substantially outweighed by the probability that the admission of the evidence would create a serious danger of undue prejudice under section 352. (*Kipp*, *supra*, 18 Cal.4th at p. 371.)

Here, the trial court expressly found that the prior crime evidence was probative to the issues of intent and common scheme or plan, but was not particularly inflammatory such that a jury would necessarily be inflamed by hearing this evidence. (17 RT 2566.) This Court reviews the trial court's finding that the other crime evidence was more probative than prejudicial within the meaning of Evidence Code section 352 for abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 955, disapproved on another ground in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22; *People v. Paniagua*

(2012) 209 Cal.App.4th 499, 518.) Reversal is not appropriate unless the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Williams* (2008) 43 Cal.4th 584, 634-635.)

Evidence is prejudicial within the meaning of Evidence Code section 352 if it uniquely tends to evoke an emotional bias against a party as an individual, or if it would cause the jury to prejudge a person or cause on the basis of extraneous factors. (*People v. Foster* (2010) 50 Cal.4th 1301, 1331 (*Foster*); *People v. Cowan* (2010) 50 Cal.4th 401, 475.) Thus, in determining whether other crime evidence is prejudicial, one factor to consider is whether that evidence is inflammatory, i.e., likely to inflame the jury's passions. (*Ewoldt*, *supra*, 7 Cal.4th at p. 405.)

Appellant claims that the other crime evidence was highly prejudicial because it portrayed him as a violent individual who robbed people and led the jury to disbelieve his defense that the shooting was accidental. However, in applying section 352, this Court has explained that "prejudicial" is not synonymous with "damaging." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Further, none of the prior crime evidence was particularly inflammatory compared to the brutal manner in which appellant shot and murdered Deputy Trejo. As such, the prior crime evidence did not uniquely tend to evoke an emotional bias against appellant.

Moreover, the trial court's limiting instruction in this case ameliorated any section 352 prejudice by eliminating the danger the jury would consider the evidence for an improper purpose. (*Foster*, *supra*, 50 Cal.4th at p. 1332 ["the jury was instructed not to consider the evidence to prove that defendant was a person of bad character, thereby 'minimizing the potential for improper use'"]; *Lindberg*, *supra*, 45 Cal.4th at pp. 25-26 [instructions eliminated any danger of confusing issues or misleading

jury].) Prior to the presentation of the other crime evidence, the trial court instructed the jury on the limited purpose of this evidence:

> Evidence is about to be introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial. This evidence must be – must only be considered as to Count III, the charge of conspiracy to commit robbery, and Count IV, the charge of attempted robbery of Marian Wilson.
>
> Such evidence, if believed, is not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. Such evidence is received and may be considered by you only for the limited purpose of determining if it tends to show a characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case, which would further tend to show the existence of the intent which is a necessary element of the crime charged, the existence of a conspiracy.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose.

(57 RT 8871-8872; 74 RT 11314-11315.) The instructions were repeated to the jury at the close of trial, prior to their deliberation (111 RT 17625-17626), and hence, eliminated any danger of confusing the issues or of misleading the jury. It should be presumed that the jury followed these instructions. (*People v. Coffman and Marlowe* (2004) 34 Cal.4th 1, 107 (*Coffman.*) In sum, given the non-inflammatory nature of the other crime evidence and the court's limiting instructions to the jury, the trial court did not abuse its discretion in finding the evidence substantially more probative than prejudicial.

E. Harmless Error

Even assuming the trial court abused its discretion in admitting the other crime evidence, the assumed error "does not compel reversal unless a

result more favorable to the defendant would have been reasonably probable if such evidence were excluded. [Citations.]" (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018-1019.) A result more favorable to appellant was not reasonably probable in this case. (*People v. Welch* (1999) 20 Cal.4th 701, 750; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Appellant argues at length that, even though the testimony of the witnesses at the R&S Bar was inconsistent and unbelievable, the prior crime evidence portrayed appellant in such a negative light that the jury was more willing to reject appellant's defense of an accidental shooting. Appellant's claim is flawed. Even absent the prior crime evidence, the evidence of guilt against appellant on the murder and robbery charges remained overwhelming. It is not reasonably likely that the jury would have found appellant's version of the incident more credible because it was simply unsupported by the evidence. None of the numerous witnesses saw appellant trip or fall. The physical and forensic evidence showing that the deputy was shot in the forehead from a close range while he was in an upright position undermined any accident theory. The prosecution demonstrated by proof beyond a reasonable doubt that Deputy Trejo had been disarmed and intentionally shot by appellant. The absence of the prior crime evidence would not have altered this conclusion. As such, any error in admitting the prior crime evidence was harmless.

III. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S SECTION 995 MOTION TO DISMISS THE COUNTS OF CONSPIRACY AND ATTEMPTED ROBBERY OF MARIAN WILSON

A. Background

As discussed in Argument II, Section A above, based on evidence presented at the preliminary hearing, the magistrate judge found that the conspiracy to commit robbery (count three) and attempted robberies of Marian Wilson (count fourteen) and of the R&S Bar (count fifteen) in the complaint were not sufficiently supported by the evidence and did not hold appellant to answer them. (9 CT 1654, 1657.) Nonetheless, after the prosecution recharged appellant in the information, the trial court denied appellant's section 995 motion to dismiss the counts of conspiracy and attempted robbery of Marian Wilson. (7 RT 961-962.) Appellant argues that there was insufficient evidence to charge appellant on those counts. We disagree. There was sufficient circumstantial evidence from which reasonable inferences could be drawn to support each element of conspiracy and attempted robbery. Thus, there was some rational ground for assuming the possibility that the offenses had been committed and appellant was guilty of them.

B. Legal Principles

An information must be set aside if the defendant has been committed without "reasonable or probable cause." (§ 995, subd. (a)(2)(B).) To establish probable cause sufficient to overcome a section 995 motion, the People "must make some showing as to the existence of each element of the charged offense." (*Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 148.) Evidence justifying prosecution need not be sufficient to support a conviction; probable cause exists "if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong

suspicion of the guilt of the accused." (*People v. Chapple* (2006) 138 Cal.App.4th 540, 545.) An information should be set aside "only when there is a total absence of evidence to support a necessary element of the offense charged." (*People v. Superior Court* (*Jurado*) (1992) 4 Cal.App.4th 1217, 1226.)

On review of a section 995 denial, this Court reviews the magistrate's holding order de novo. (*People v. Jones* (1998) 17 Cal.4th 279, 301; *People v. Laiwa* (1983) 34 Cal.3d 711, 718.) "An information will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. [Citations.] [¶] A reviewing court may not substitute its judgment as to the weight of the evidence for that of the magistrate, and, if there is some evidence to support the information, the court will not inquire into its sufficiency. [Citations.] Every legitimate inference that may be drawn from the evidence must be drawn in favor of the information." (*Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474.)

C. There was Probable Cause to Hold Appellant to Answer the Counts of Conspiracy and Attempted Robbery of Marian Wilson

Here, there was probable cause sufficient to overcome a section 995 motion on the conspiracy and attempted robbery of Marian Wilson counts. The prosecution made "some showing as to the existence of each element of the charged offense." (*Thompson v. Superior Court*, *supra*, 91 Cal.App.4th at p. 148.) As this Court has stated: "Any credibility determination to be made at the probable cause stage . . . is a gross and unrefined one. . . . '[T]o reject the prosecution evidence at the probable cause stage, either the evidence presented must be inherently implausible, the witnesses must be conclusively impeached, or the demeanor of the witnesses must be so poor that no reasonable person would find them

credible. Thus, if the prosecution presents evidence a reasonable person could accept over that presented by the defense, probable cause should be found." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 257-258.) As one court has succinctly stated, "[t]he showing required at a preliminary hearing is exceedingly low." (*Salazar v. Superior Court* (2000) 83 Cal.App.4th 840, 846.)

1. Sufficient evidence of conspiracy to commit robbery

The evidence at the preliminary hearing supports a finding that there was probable cause to try appellant for conspiracy to commit robbery. "Pursuant to section 182, subdivision (a)(1), a conspiracy consists of two or more persons conspiring to commit any crime. A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy." (*People v. Morante* (1999) 20 Cal.4th 403, 416, fn. omitted, quoting section 184.)

"Conspiracy is an inchoate crime. It does not require the commission of the target offense. Because it is an inchoate crime, conspiracy fixes the point of legal intervention at the time of the agreement to commit a crime." (*People v. Zacarias* (2007) 157 Cal.App.4th 652, 657.) It is well established that "direct evidence is not required to prove a common unlawful design and agreement to work toward a common purpose; the existence of a conspiracy may be inferred as well from circumstantial evidence." (*People v. Buckman* (1960) 186 Cal.App.2d 38, 47.) Indeed, "[c]ircumstantial evidence often is the only means to prove conspiracy." (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 999.) This is especially

true where, as here, the target offense of the alleged conspiracy has not yet been committed.

Here, there was circumstantial evidence to support that appellant and Moore had the specific intent to agree to commit a robbery, and had the specific intent to commit the elements of the offense. There was also evidence of overt acts committed in furtherance of the conspiracy as alleged in the information, namely that (1) defendants armed themselves with a loaded short-barreled shotgun; (2) defendants obtained a street map of Santa Rosa, California, marking potential locations of robbery victims; (3) defendants obtained a mask and gloves to avoid identification as perpetrators of robberies; and (4) defendants drove to the location of 6930 Burnett Street, Sebastopol, and surveiled the area of the Sushi Hana Restaurant, while armed with a loaded shotgun and in possession of a mask and gloves. (10 CT 1721-1723.)

The existence of the specific intent required for conspiracy was adequately established by the following circumstances and the reasonable inferences that could be drawn from them. The evidence showed that appellant and Moore remained in the Santa Rosa area for two days after appellant's parole reporting date despite Moore having had her truck repaired and phoning a friend that she was going to drive appellant to the airport. Instead, appellant and Moore continued driving around the Santa Rosa/Sebastopol area and were spotted in the late evening parked at the Sushi Hana, the Aplum Trucking yard, and the Santa Rosa Saddlery – all closed businesses within close proximity to each other and Highway 12. Appellant was in possession of a sawed-off shotgun that evening. When arrested, appellant had no money and Moore had 46 cents on her person.

Further, appellant and Moore had access to a marked map of Sonoma County with highlighted business districts in Santa Rosa, several latex gloves, and a cut-off watchcap that could be used as a mask. These items

were found in a plastic bag in a field near the Cooper/King residence. Additional latex gloves and another watchcap were found by police in Moore's truck. Appellant maintains that mere possession of these ordinary items did not raise a reasonable inference of an agreement to commit a robbery or constitute overt acts in furtherance of a conspiracy. He argues that these items were innocuous, noting that the latex gloves appeared used and one had a missing tip, the cut-off watchcap could have been worn by Moore simply to manage her abundant hair, and the supposed targets of the robberies – the Sushi Hana and R&S Bar– were not even marked on the map. Although each object standing alone may be unremarkable, their presence together in Moore's truck and abandoned in a distant field raise a reasonable suspicion that they were artifacts of a conspiracy to commit robbery.

Contrary to appellant's argument, the absence of evidence that appellant and Moore actually wore the gloves or watchcap, or that they specifically marked the Sushi Hana and R&S Bar on the map is not determinative here. Indeed, the prosecution was not required to present the type of evidence that would be sufficient to support a jury finding of conspiracy to commit robbery, but rather, evidence that was sufficient to permit the district attorney to take the allegation to trial. (See *Alvarado v. Superior Court* (2007) 146 Cal.App.4th 993, 999; see also *Williams v. Superior Court* (1969) 71 Cal.2d 1144, 1147 ["evidence which will justify prosecution . . . need not be sufficient to support a conviction"].)

Appellant further contends that there was no evidence of an agreement between appellant and Moore to rob anyone that evening. However, proof of conspiracy does not require evidence of a formal agreement or even one expressed in words. (*People v. Longines* (1995) 34 Cal.App.4th 621, 626; *People v. Jordan* (1937) 24 Cal.App.2d 39, 50.) It may be inferred from coordinated group conduct. (*People v. Lipinski*

(1976) 65 Cal. App. 3d 566, 575-576.) Conspirators may "tacitly come to a mutual understanding to commit a crime." (*People v. Jordan*, *supra*, 24 Cal.App.2d at p. 50.) "It is not necessary . . . to show that the criminal enterprise in its inception had in contemplation a particular crime as against a particular person . . . ." (*Ibid.*) Moreover, "completion of the crime of conspiracy does not require that the object of the conspiracy be accomplished . . . ." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1131.)

In this case, it could reasonably be inferred from their coordinated joint conduct that appellant and Moore were in agreement to commit robbery and acted in furtherance of the conspiracy. Appellant and Moore parked down the street from the Sushi Hana and, a few minutes later, positioned themselves directly across the street from the restaurant and in front of Wilson's truck where one could plainly view the inside of the Sushi Hana. As Wilson walked out of the Sushi Hana with a briefcase in hand and began to cross the street, appellant and Moore remained in the truck with the passenger door opened. When Wilson tried to get into her truck, appellant and Moore, who was seated in the passenger seat, exited the truck and approached Wilson on foot. Wilson testified that appellant was walking on the street, Moore came from the passenger side, but both were walking towards Wilson. Moreover, the timing of when they exited the truck, and the fact that both appellant and Moore got out of the vehicle and walked towards Wilson suggested some coordinated effort. When Wilson quickly drove away, both appellant and Moore got back into the truck and followed in the same direction toward Petaluma Avenue. Instead of driving in the opposite direction, they cut through the alley way adjacent to the Sushi Hana and stopped for at least twenty seconds in front of the restaurant, by which time Wilson was circling the block and was out of their sight. As such, it could be reasonably inferred from this evidence that

appellant and Moore had agreed to commit robbery and engaged in overt acts in furtherance of the conspiracy.

In *People v. Dewitt* (1983) 142 Cal.App.3d 146, 151, the Court of Appeal found that circumstances involving the presence of defendants in a vehicle in front of a targeted residential area while possessing numerous items that could be used to aid in a robbery established sufficient circumstantial evidence to support a conspiracy to commit robbery. The *Dewitt* Court observed:

> The presence of two convicted felons, each in possession of stolen, loaded handguns while either wearing or in possession of disguises, parked in a stolen automobile at the entrance to an expensive residence located in a remote area, with immediate access to gloves and numerous sets of handcuffs, leads to virtually no other conclusion than respondents' having agreed to and embarked upon a robbery foray.

(*Ibid.*) Here, the circumstances taken together raised a reasonable suspicion that appellant and Moore had conspired to commit a robbery given their access to various items that could facilitate the crime, their surveillance of the Sushi Hana from Moore's truck, their physical encounter with Wilson on the street, and their attempt to follow Wilson back to the restaurant.

Appellant's argument that there was no rational basis to find a conspiracy should be rejected. Again, the evidentiary showing required for conspiracy is not substantial. "[A]lthough there must be some showing as to the existence of each element of the charged crime [citation] such a showing may be made by means of circumstantial evidence supportive of reasonable inferences on the part of the magistrate." (*Williams v. Superior Court*, *supra*, 71 Cal.2d at p. 1148.) The prosecution in this case satisfied this low evidentiary standard. Therefore, the trial court did not err in not dismissing the conspiracy count as alleged in the information.

2. Sufficient evidence of attempted robbery of Marian Wilson

Similarly, the prosecution presented sufficient evidence at the preliminary hearing to support the count of attempted robbery of Marian Wilson. Robbery is the felonious taking of another's property against his will by the use of force or fear. (§ 211.) An attempted robbery requires that the defendant both harbor a specific intent to rob the victim and take a direct but ineffectual step to commit the robbery. (*People v. Medina* (2007) 41 Cal.4th 685, 694.)

Based on the surrounding circumstances, there was a rational basis for finding that appellant harbored a specific intent to rob Wilson. Here, appellant and Moore staked out the Sushi Hana after closing hours, parking down the street from the business, and then moving to a location directly across the street where the occupants inside could be seen through its large front window. Appellant and Moore exited their truck and walked towards Wilson at the precise moment when she was hurrying into her vehicle with a briefcase in hand. From this evidence, it could be reasonable inferred that appellant intended to rob Wilson that night. Arguably, even if there was not sufficient evidence of intent for a jury to convict appellant of attempted robbery, there was certainly enough evidence to bring the charge against him.

Additionally, the prosecution presented credible evidence that appellant committed the offense by the use of fear. Appellant contends that Wilson's fear was only subjective and appellant took no actions, such as brandishing a weapon or demanding her money, that would cause Wilson to be afraid. The record, however, suggests otherwise. In view of all the circumstances, it was appellant's presence down the street from the Sushi Hana and his reappearance in front of Wilson's truck, together with his act

of walking towards her, in concert with Moore, as she tried to drive away that caused Wilson to be afraid.

Moreover, the evidence showed that appellant took a direct but ineffectual step to commit robbery. Appellant claims that there was no physical confrontation with Wilson, but that he was merely walking in the direction of Sebastopol which was coincidentally in her direction. However, such an interpretation does not comport with the other circumstantial evidence. Wilson testified that as she was crossing the street she noticed the same green truck with its passenger door opened. The fact that appellant and Moore exited the truck and walk towards Wilson the instant Wilson entered her vehicle suggests that they were targeting her. Although Wilson was able to drive away without incident, appellant's actions here were sufficient to constitute a direct but ineffectual step to commit robbery. Thus, it cannot be concluded that the attempted robbery count should have set aside because there was "a total absence of evidence to support a necessary element of the offense[s] charged." (*Jurado*, *supra*, 4 Cal.App.4th at p. 1226.) Rather, preliminary hearing evidence was sufficient to hold appellant to answer to the count of attempted robbery of Marian Wilson.

D. No Prejudice

Appellant contends that the trial court's failure to dismiss the counts of conspiracy and attempted robbery of Marian Wilson prejudiced him because it was the only avenue by which the damaging evidence of prior crimes was admitted should be rejected. This argument has no merit. As discussed in Argument II above, the admission of other crime evidence did not prejudice appellant under Evidence Code section 352 given that the evidence of the prior robberies was not inflammatory and the jury was properly instructed as to the limited purpose of the evidence to prove intent or a common plan or scheme, and not to prove criminal propensity.

Further, it is not reasonably likely that appellant would have obtained a more favorable result even if the counts had been dismissed from the information. The evidence of guilt on the remaining murder and robbery charges was overwhelming. Therefore, appellant's contention of prejudice with respect to his section 995 motion fails.

IV. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S REFUSAL TO PARTICIPATE IN A LINEUP TO SHOW CONSCIOUSNESS OF GUILT

Appellant argues that the trial court erred in admitting evidence that he refused to participate in a line up because any probative value was outweighed by its prejudicial effect. He contends that the admission of such evidence violated his constitutional rights to due process and a fair trial. Appellant is mistaken. The evidence of appellant's non-participation in a lineup was properly admitted as evidence to show consciousness of guilt.

A. Background

Appellant refused to participate in a lineup on two occasions while in custody in the Sonoma county jail. On April 1, 1995, two days following appellant's arrest, Correctional Officer Helton of the Sonoma County Sheriff's Department approached appellant in his county jail cell and read a prewritten statement asking him if he would participate in a live lineup. (93 RT 14803-14804.) Appellant first asked to speak to an attorney before answering the question. (93 RT 14804.) Later that evening, after Officer Helton went back and consulted with her sergeant about appellant wanting to speak to an attorney, appellant did answer and said that he did not wish to participate in a lineup. (93 RT 14804.) Officer Helton had informed appellant that a representative from the public defender's office would be present and would be willing to answer his questions. (93 RT 14805.)

On April 2, 1995, Sergeant Schwedhelm of the Santa Rosa Police Department asked appellant if he would participate in the lineup process. (93 RT 14788-14789.) In response, appellant shook his head, indicating "no." (93 RT 14789.) Sergeant Schwedhelm advised appellant that his failure to cooperate in this process would indicate a consciousness of guilt on his part and again asked him if he would be willing to participate in the

process. Appellant told him "no." (93 RT 14789.) Sergeant Schwedhelm informed appellant that such a refusal could be admitted in a court of law for purposes of showing a consciousness of guilt. (93 RT 14789.) Appellant responded, "no." (93 RT 14790.)

Sergeant Schwedhelm made another effort to obtain appellant's cooperation on April 11, 1995. (93 RT 14790.) He also asked appellant's counsel if appellant would be willing to participate to which counsel stated, "no." (93 RT 14790.) Sergeant Schwedhelm went through the same process of making personal contact with appellant and read him the following admonition:

> You are being asked to participate in a live lineup. Your failure to cooperate in a live lineup process may be used against you in court to show consciousness of guilt. Will you participate in the live lineup process?

(93 RT 14791.) Again, appellant stated, "no." (93 RT 14791.)

B. Legal Principles

It is well established that a suspect's refusal to participate in nontestimonial evidence gathering procedures such as lineups may be used against him in court. (*People v. Ellis* (1966) 65 Cal.2d 529, 537-538 (*Ellis*).) "There is no Fifth Amendment privilege not to attend a lineup." (*Goodwin v. Superior Court* (2001) 90 Cal.App.4th 215, 220.) Although a defendant may suppress evidence of a demonstrably unfair lineup, there is no concomitant due process right to refuse to participate in a lineup. (*People v. Hart* (1999) 20 Cal.4th 546, 625.) Furthermore, "evidence of a defendant's refusal to participate in a lineup is admissible at his trial. [Citations.]" (*People v. Johnson* (1992) 3 Cal.4th 1183, 1222.)

C. Refusal to Participate in Lineup Was Probative as Evidence of Consciousness of Guilt

Appellant argues that, because identification was not an issue in this case, evidence of his refusal to participate in a lineup was not relevant at trial. He further maintains that the admission of such evidence was also improper given that its prejudicial effect outweighed any probative value under Evidence Code section 352. Appellant's arguments are not well supported.

Here, appellant's refusal to participate in a lineup was both relevant and probative of his consciousness of guilt. Appellant's contention that a refusal to participate in a lineup is only probative of consciousness of guilt where identity is an issue at trial should be rejected. The defense indicated during opening statement that appellant was responsible for shooting Deputy Trejo and appellant admitted the same during his trial testimony. Appellant maintained that the shooting was an accident and disavowed having had any intent to kill the officer. However, there is no evidence that appellant claimed any responsibility for the shooting when he was arrested. During that time, the identity of the deputy's killer had not been confirmed. Detective Schwedhelm testified that he attempted to arrange an in-person lineup so that witnesses could view suspects and to determine whether or not an identification could be made. (93 RT 14788.)

Contrary to appellant's argument, the fact that identity was no longer at issue at trial did not make the evidence irrelevant or inadmissible. Even when the defendant concedes some aspect of the criminal charge, the prosecution is entitled to bolster its case by presenting evidence of consciousness of guilt. (*Zambrano*, *supra*, 41 Cal.4th at p. 1160, overruled on other grounds, *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) In *People v. Thornton* (2007) 41 Cal.4th 391, 439 (*Thornton*), this Court held that it was not improper to give a instruction on consciousness of guilt when a defendant admits some or all of the charged conduct, and merely

disputes its criminal implications since it may be evidence tending to prove the accused knew he committed a crime. Here, although at trial appellant admitted to shooting the deputy, he denied all the charges. Appellant's refusal to participate in a lineup at the time the identity of the shooter was unknown made the evidence probative of his consciousness of guilt. As such, appellant's refusal could be viewed by the jury as an attempt to suppress evidence of guilt. Under these circumstances, the evidence was significantly more probative than prejudicial under Evidence Code section 352.

As shown, appellant's refusal to participate in a line-up was properly admitted at trial as circumstantial evidence of consciousness of guilt. (*People v. Huston* (1989) 210 Cal.App.3d 192, 216; *Ellis*, *supra*, 65 Cal.2d at p. 537.)

D. No Prejudice

Even if the court had not admitted evidence of appellant's failure to participate in a line up to show consciousness of guilt, it is not reasonably probable that appellant would have been obtained a more favorable result. (*Watson*, *supra*, 46 Cal.2d at p. 836.) The evidence supporting the jury's guilty verdict on first degree murder was overwhelming. In particular, the prosecution's physical and forensic evidence showed that Deputy Trejo was shot in the forehead while upright, contrary to the defense theory that he was accidentally shot while prone. This evidence was consistent with the testimony of several witnesses who stated that appellant intentionally shot the deputy when the officer was disarmed and on his knees. There was no testimony from the numerous eyewitnesses that appellant tripped or fell, or that the shotgun accidentally fired. The evidence strongly supported a premeditated and deliberate killing. Thus, any error in admitting the evidence of appellant's refusal to participate in a line-up was harmless.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING CRIME SCENE AND AUTOPSY PHOTOGRAPHS OF THE DEPUTY'S BODY

Appellant argues that the trial court abused its discretion by admitting overly gruesome photographs of Deputy Trejo's body taken at the crime scene and the autopsy. He claims that the photographs were exceedingly more prejudicial than probative under Evidence Code section 352 and their admission violated his state and federal constitutional rights. We disagree.

A. Background

During in limine proceedings, appellant sought to exclude 25 crime scene and autopsy photographs of Deputy Trejo's body considered by the defense to be inflammatory. (20 CT 4013-4016.) Appellant also requested that any photographs if admitted be sanitized by converting them from color to black-and-white. (20 CT 4016.) The trial court reviewed each of the photographs in order to make an Evidence Code 352 evaluation.

Appellant describes the 25 objectionable photographs proffered by the prosecution (Exh. Nos. 163-187) in three categories: (1) 13 photographs of the deputy's body at the crime scene (Exh. Nos. 163-175); (2) 3 photographs of the deputy's body after he was turned onto his back (Exh. Nos. 176-178); and (3) 9 photographs from the autopsy (Exh. Nos. 179-186). (72 RT 10844.)

After carefully weighing their probative value against their prejudicial impact, the trial court admitted 18 of the 25 challenged photographs which were later introduced into evidence by the prosecution. The court excluded seven photographs as overly gruesome or cumulative.

B. Legal Principles

Appellate courts are "'often asked to rule on the propriety of the admission of allegedly gruesome photographs. [Citations.] At base, the applicable rule is simply one of relevance, and the trial court has broad

discretion in determining such relevance. [Citation.] "'[M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant'" [citation], and we rely on our trial courts to ensure that relevant, otherwise admissible evidence is not more prejudicial than probative [citation]. A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value.'" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1282; accord, *People v. Hinton* (2006) 37 Cal.4th 839, 896.)

The discretion applies equally to an autopsy photograph, which may be admitted as "pertinent because it showed the 'nature and placement of the fatal wounds' . . . [or] supported the prosecution's theory of how the murders were committed [citation] [or] illustrated the testimony of the coroner and percipient witnesses." (*People v. Loker* (2008) 44 Cal.4th 691, 705 (*Loker*).)

C. The Trial Court Properly Admitted the Photographs Under Evidence Code Section 352

1. The court carefully considered each photograph, admitting some and excluding others

The record shows that court carefully weighed the probative value against the prejudicial impact of each of the 25 challenged photographs under Evidence Code 352. The 13 photographs of the deputy's body as it was found at the crime scene depicted images, some in close-up views, of Deputy Trejo lying in a pool of his own blood with brain matter and other debris on his hands and body. Appellant objected to these photographs as overly prejudicial and cumulative. (72 RT 10845, 10851-10852.) The

court admitted 10 of the 13 images[20], finding them not overly gruesome and acknowledging the prosecution's need to show the position of the deputy's body in the parking lot, the position of his hands relative to his body, and the placement of blood, tissue fragments, and debris on his body. (72 RT 10850-10851.) The court, however, excluded Exhibit Nos. 165 and 169, which showed similar angles of the deputy's body in a pool of blood, as cumulative and overly gruesome. (72 RT 10855-10856.) Similarly, the court excluded Exhibit No. 174 depicting a close up view of the deputy's face as "extremely gruesome and shocking and inflammatory." (72 RT 10856, 10859.)

The set of three photographs of the deputy's body after he was turned unto his back, Exhibits Nos. 176, 177 and 178, which showed blood and brain tissue on the deputy's face, midsection and chest, were admitted. (78 RT 11870-11872.) The court found these relevant to the pathologist's testimony related to blood and brain matter on the deputy's body. In order to retain their probative value but lessen their gruesomeness, the court, asked the prosecution to crop two of the photographs, Exhibit Nos. 177 and 178, before admitting them into evidence. (78 RT 11871-11872.)

The court also considered nine autopsy photographs, Exhibit Nos. 179 through 187, depicting some close-up images of the deputy's facial wounds that went deep into his skull. The court admitted five of the photographs and excluded four as overly gruesome. (78 RT 11874-11875, 11877-11878.) A cropped version of Exhibit No. 182 was admitted to lessen its gruesome effect. (78 RT 11875.)

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[20] From the set of 13 crime scene photographs, the court admitted Exhibit Nos. 163, 164, 166, 167, 168, 170, 171, 172, 173, and 175. (72 RT 10850-10851.) The court excluded Exhibit Nos. 165, 169 and 174. (72 RT 10855-10856, 10859.)

In sum, not only did the court admit 18 of the 25 challenged photographs, it also excluded 7, or approximately one third, on the basis that the photographs were cumulative or overly gruesome. In some instances, the court had the photographs cropped to lessen their gruesomeness. Given the court's even-handed approach, appellant fails to demonstrate how the court abused its discretion or failed to properly weigh the probative value against the prejudicial impact of the photographs.

2. The admitted photographs were more probative than prejudicial

Although the photographs of the deputy's body may have been graphic and unpleasant, the trial court did not abuse its discretion in permitting the prosecution to introduce them into evidence. "[P]hotographs of murder victims are relevant to help prove how the charged crime occurred." (*People v. Booker* (2011) 51 Cal.4th 141, 170-171 (*Booker*).) Moreover, "[t]he jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case." (*People v. Gurule* (2002) 28 Cal.4th 557, 625 (*Gurule*).)

In this case, the trial court could have rationally concluded that the admitted photographs were relevant and their probative value outweighed any prejudice. Contrary to appellant's claim, the photographs were not "somehow rendered irrelevant simply because [the] defendant did not dispute the cause of death or the nature and extent of the victim's injuries." (*People v. Heard* (2003) 31 Cal.4th 946, 975.) The photographs were properly admitted because they were relevant to the prosecution's case and none were "so gruesome as to have impermissibly swayed the jury." (*People v. Blacksher* (2011) 52 Cal.4th 769, 827 (*Blacksher*).) The photographs, by showing the nature and brutality of the wounds, illustrated the prosecution's theory that appellant killed the deputy with premeditation

and deliberation. The images showed that the deputy was essentially shot in the forehead, straight between the eyes. He was shot at a close range and at such high velocity that the impact caused extensive head damage, distributing blood, brain matter, and debris onto his clothing and the back of his hands. Further, the nature and severity of the injuries depicted in the photographs undermined appellant's defense that the shooting was accidental. The photographs of the injuries, the position of the body, and the location of the blood and expelled tissue and glass supported the testimony of the state's forensic specialists and criminalists that the deputy was upright and not prone when he was shot. Hence, the photographs were properly admitted to support the prosecution theory of how the deputy was murdered.

Appellant argues that despite any probative value, the photographs should have been excluded solely because they were overly gruesome and inflammatory. His argument should be rejected. "Some . . .[photographs] were indeed gruesome, but not unnecessarily so. The challenged photographs simply showed what had been done to the victim; the revulsion they induce is attributable to the acts done, not to the photographs." (*People v. Brasure* (2008) 42 Cal.4th 1037, 1054 (*Brasure*).) ". . . The jury can, and must, be shielded from depictions that sensationalize the alleged crime, or are unnecessarily gruesome, but the jury cannot be shielded from an accurate depiction of the charged crimes that does not unnecessarily play upon the emotions of the jurors." (*Ramirez*, *supra*, 39 Cal.4th at p. 454.) The photographs at issue here did no more than accurately portray the shocking nature of the brutal crime.

3. The prosecution was not limited to testimonial evidence

Appellant contends that the challenged photographs should have been excluded where the prosecution admitted the same evidence through

witnesses and other non-prejudicial means. Appellant is mistaken. "'[P]rosecutors, it must be remembered, are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case.'" (*People v. Roldan* (2005) 35 Cal.4th 646, 713.) The People are entitled to prove their case and need not "'accept antiseptic stipulations in lieu of photographic evidence.' [Citation.]" (*Blacksher*, *supra*, 52 Cal.4th at p. 827; *Loker*, *supra*, 44 Cal.4th at p. 705.) "Despite the graphic nature of some of these photographs, the prosecution may present a persuasive and forceful case, and except as limited by Evidence Code section 352, is not required to sanitize its evidence." (*Booker*, *supra*, 51 Cal.4th at p. 171.) For instance, "[a]utopsy photographs are routinely admitted to establish the nature and placement of the victim's wounds and to clarify the testimony of prosecution witnesses regarding the crime scene and the autopsy, even if other evidence may serve the same purposes." (*People v. Howard* (2010) 51 Cal.4th 15, 33.) Given these wide parameters, the trial court did not abuse its discretion in permitting the prosecution to rely on photographic evidence in addition to witness testimony.

D. No Prejudice

Even where a photograph of the victim is improperly admitted during the guilt phase, reversal is not warranted unless it is reasonably probable that the outcome would have been more favorable to the defendant had the photograph been excluded. (*People v. Wash* (1993) 6 Cal.4th 215, 246-247; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1230; *People v. Anderson* (1990) 52 Cal.3d 453, 474-475.) Although the crime scene and autopsy photographs corroborated and illustrated the testimony of the prosecution's witnesses, they were not determinative of appellant's guilt in this case. Even absent the photographs of the deputy's body, the evidence of guilt

was overwhelming. Several witnesses testified that they saw appellant shoot Deputy Trejo in the face while the deputy was on his knees. Not one of the witnesses who observed the shooting saw appellant trip or fall at any time, or the shotgun fire accidentally. The physical and forensic evidence was consistent with the deputy being shot in the face from a close range while his body was upright, and not in a prone position. Together this evidence was more than sufficient for a jury to find appellant guilty. Thus, any error by the trial court in admitting the challenged photographs was harmless.

VI. THE TRIAL COURT PROPERLY REFUSED TO GIVE PINPOINT INSTRUCTIONS ON APPELLANT'S ACCIDENT DEFENSE

To support appellant's defense that he had accidentally shot Deputy Trejo, defense counsel requested a pinpoint instruction on how a jury finding of accident legally applied to premeditated first degree murder and the felony-murder special circumstance. The court refused to give a pinpoint instruction in both instances. Appellant argues that the trial court's failure to give the pinpoint instructions violated his right to a present a defense. This argument should be rejected.

A. Background

The prosecution pursued a conviction for first degree murder under two theories – premeditated murder and felony-murder. The defense advanced the theory that the killing was an accident. In his defense, appellant testified that the shotgun in his hand accidently discharged when he tripped and fell back, and that he never intended to kill Deputy Trejo. The defense requested that the trial court give the jury a pinpoint instruction explaining that if they found the shooting was an accident then it would negate the intent element for premeditated first degree murder. The standard jury instruction on accident or misfortune, CALJIC No. 4.45, typically provides:

> When a person commits an act or makes an omission through misfortune or by accident under circumstances that show [no] [neither] [criminal intent [n]or purpose,] [nor] [[criminal] negligence,] [he] [she] does not thereby commit a crime.

The defense, however, indicated that the standard CALJIC No. 4.45 would not be appropriate in this case because their theory was not that there was "no criminal intent or purpose, " making accident a complete defense to all crimes, but rather that accident negated only premeditation and deliberation for first degree murder under that theory. As a result, appellant

could be at most found guilty of second degree murder. The defense ultimately proposed a modified version of CALJIC No. 4.45 that provided:

> In considering the prosecution theory of first degree premeditated murder, if there is a reasonable doubt of whether or not the killing of Deputy Trejo was an accident, you must resolve the doubt in favor of the defendant and bring in a verdict of no more than second degree murder.

(18 RT 16980.)

The prosecution objected to the proposed instruction because even if the jury found the shooting was accident, appellant could still be found guilty of first degree murder under the felony-murder theory. (18 RT 16976.) The instruction failed to clarify that accident was not a defense to felony-murder. (18 RT 16976.) Although the proposed instruction began with the limiting phrase, "[i]n considering the prosecution theory of first degree premeditated murder . . .", the jury was nevertheless being instructed that it must find second degree murder. (18 RT 16976.) The trial court agreed that the proposed instruction was problematic in that it was potentially confusing to the jury and an incorrect statement of the law. (18 RT 16976.) The court expressed this concern:

> But the problem with your [defense counsel's] second sentence is that it adds another layer of confusion to what you have to agree, I think, is a fairly sophisticated set of concepts that this jury is going to have to be dealing with. That you have dealt with for, you know, 20 years, they haven't.
>
> And it is not true that if there's a reasonable doubt as to whether or not the killing of Deputy Trejo was an accident they must resolve the doubt in his favor and bring in a verdict of no more than second degree murder if they adopt a felony murder theory with regard to the robbery. That is a completely incorrect statement.

(18 RT 16981.) The court added, "I guess I do agree that there could be confusion on the jury's part in terms of that first – count I, because they

don't – because of the two theories, and there doesn't need to be unanimity." (18 RT 16985-16986.)

The court thus rejected the defense proposed instruction as potentially confusing:

> I'm concerned about confusing the jury. At this point I'm leaning towards not giving anything if there's not going to be a theory that – offered by the defense that they want me to give 4.45 just showing intent or purpose, because – because of the reasons just stated. So either I'll give 4.45 using the words "intent or purpose" or not give anything. I think that we're really getting into an area where we're going to confuse the jury. So do you want 4.45, using the words "criminal intent and purpose"?

(19 RT 17234.) In response, the defense indicated to the court they did not want the standard CALJIC No. 4.45 to be given since it did not apply to this case. (19 RT 17235.) The court also found that a pinpoint instruction on accident related to the felony-murder special circumstance was similarly problematic. (18 RT 17081.) As such, no pinpoint instructions on the defense theory of accident were given to the jury.

B. Legal Principles

This Court reviews de novo claims that a trial court has failed to properly instruct on the applicable principles of law. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) In doing so, this Court ascertains the relevant law and then "'determine[s] the meaning of the instructions in this regard.' [Citation.]" (*Ibid.*) The test for judging the adequacy of instructions "is to decide whether the trial court 'fully and fairly instructed on the applicable law. . . .' [Citation.] "'In determining whether error has been committed in giving or not giving jury instructions, [this Court] must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]"' [Citation.] 'Instructions should

be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*Id.* at pp. 1111-1112.)

It is the trial judge's function to facilitate the jurors' understanding of legal principles they are charged with applying, "by any available means." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.) The trial court should allow pinpoint defense instructions that focus on issues highlighted by the theory of defense, if they "constitute accurate statements of law." The court may, however, "properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation]." (*People v. Moon* (2005) 37 Cal.4th 1, 30 (*Moon*).)

Although a defendant generally has a right to a pinpoint instruction on a particular defense theory (*People v. Earp* (1999) 20 Cal.4th 826, 886), "instructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative [citation], and the effect of certain facts on identified theories 'is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate.' [Citation.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 570.)

C. The Trial Court Properly Rejected a Pinpoint Instruction Related to Premeditated First Degree Murder

Here, the modified version of CALJIC No. 4.45 as proposed by the defense included an incorrect statement of the law and was potentially confusing to the jury. The direction to the jury that they "must resolve the doubt in favor of the defendant and bring in a verdict of no more than second degree murder" was legally inaccurate given the dual theories of first degree murder – premeditated murder and felony-murder – that the

jury could consider. The proposed instruction further risked confusing the jury by not explaining that although accident could negate intent for premeditated murder, it was not a defense to felony-murder. The proposed instruction involved complex legal principles of law that were not fully and accurately conveyed to the jury. As such, the trial court properly rejected the proposed pinpoint instruction. (*Moon*, *supra*, 37 Cal.4th at p. 30.)

Contrary to appellant's argument, the jury was not left without a legal framework in which to consider appellant's accident defense as it related to premeditated murder. Indeed, the trial court admonished the jury to carefully consider the instructions on the law based on their findings of fact, stating: "The purpose of the Court's instructions is to provide with [*sic*] you the applicable law so you may arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist." (111 RT 17653.)

The trial court fully and fairly instructed the jury on the applicable law. The court first instructed on the dual theories of first degree murder:

> There are two theories upon which a conviction of first degree murder can be based. The first theory is the willful, premeditated, deliberate killing of a human being with malice aforethought. The second theory is the killing of that human being during the commission of a robbery. If you find that the evidence proves either one or both of these theories beyond a reasonable doubt, a verdict of guilty for first degree murder is appropriate.

(111 RT 17630.) The court also explained that unanimity was not required among the jurors in reaching a verdict under either first degree murder theory. (111 RT 17630.) Detailed instructions were given on what constitutes the specific intent required for first degree murder where the killing is willful, premeditated, deliberate, and committed with malice aforethought. (111 RT 17630-17632.) In instructing on first degree felony-

murder, the court informed the jury that an intentional, unintentional or accidental killing still satisfies the elements of that crime:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission of the crime of robbery, is murder of the first degree when the perpetrator had the specific intent to commit such crime. The specific intent to commit robbery must be proved beyond a reasonable doubt.

(111 RT 17632.)

As an alternative to first degree murder, the court instructed on second degree murder and its corresponding mental intent requirement. (111 RT 17640-17641.) Specifically, the court instructed on circumstances under which the jury could find appellant guilty of second degree murder if it was convinced the shooting was accidental as follows:

> The unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs during a commission of the crime of drawing /exhibiting a firearm in the presence of a peace officer is murder of the second degree when the perpetrator had the specific intent to commit that crime. The specific intent to commit the crime of drawing/exhibiting a firearm in the presence of a peace officer and the commission of such crime must be proved beyond a reasonable doubt.

(111 RT 17641.)

Moreover, the court informed the jury that "if you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime of first degree murder as charged in Count I and you unanimously so find, you may convict him of any lesser crime provided you are satisfied beyond a reasonable doubt that he is guilty of the lesser crime. (111 RT 17642.)

In view of the court's combined instructions on first and second degree murder, the requisite mental intent for each crime, the legal effect of accident as it related to felony-murder and second degree murder, and the alternative of convicting on a lesser crime, the jury was adequately

provided with the legal framework to consider appellant's accident theory. It should be presumed that the jury understood the entirety of the court's instructions and properly applied them to the evidence. (*People v. Lewis* (2001) 26 Cal.4th 334, 390.) In sum, the trial court committed no error in refusing to give appellant's modified version of CALJIC No. 4.45 since that instruction was confusing and legally inaccurate, and the instructions that were given adequately allowed appellant to present his defense of accident.

D. The Trial Court Properly Rejected a Pinpoint Instruction Related to the Felony-Murder Special Circumstance

Appellant also requested a proposed pinpoint instruction on his accident theory as it related to the felony-murder special circumstance allegation. The standard instruction on the felony-murder special circumstance, CALJIC No. 8.81.17 typically provides:

> To find that the special circumstance referred to in these instructions as murder in the commission of [a robbery] is true, it must be proved:
>
> 1a. The murder was committed while defendant was [engaged in] [or] [was an accomplice] in the [commission] [or] [attempted commission] of a [robbery]; [or] [and]
>
> 1b. The murder was committed during the immediate flight after the [commission] [attempted commission] of a [robbery] [by the defendant] [to which defendant was an accomplice][.] [; and]
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the [robbery or attempted robbery] was merely incidental to the commission of the murder.

The defense proposed this modified version of CALJIC No. 8.81.17:

To find that the special circumstances, referred to in these instructions as murder in the commission of a robbery [], it must be proved:

1. The murder was committed while defendant was engaged in the commission or attempted commission of a robbery []; and

2. Defendant committed the act resulting in the victim's death in order to advance an independent felonious purpose.

An act committed by accident is not committed in order to advance an independent felonious purpose. If you have a reasonable doubt whether the act resulting in the victim's death was committed by accident, you must give the defendant the benefit of that doubt and find the special circumstance untrue.

(23 CT 4737.)

The trial court again rejected appellant's proposed pinpoint instruction on the basis that it was an inaccurate statement of the law. (108 RT 17078.) The court explained that the jury could reach the felony-murder special circumstance after finding first degree murder under either a premeditated murder or felony-murder theory. (108 RT 17081.) Again, no unanimity was required.

Appellant incorrectly contends that the trial court failed to understand the critical distinction between felony-murder as an offense and the requirements of the felony-murder special circumstance. The record demonstrates that the court properly instructed the jury on the union of act and intent required for felony-murder special circumstance allegation:

If you find the defendant in this case guilty of murder of the first degree, you must then determine if one or more of the following special circumstances are true or not true: Murder to avoid or prevent arrest, intentional killing a peace officer while engaged in the performance of his duties, and murder while engaged in the commission of the crime of robbery of Frank Trejo.

> The People have the burden of proving the truth of a special circumstance beyond a reasonable doubt. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true. Unless an intent to kill is an element of a special circumstance, if you are satisfied beyond a reasonable doubt that a defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.

(111 RT 17635-17636.)

> To find that the special circumstance referred to in these instructions as murder in the commission of robbery is true, it must be proved (1) the murder was committed while the defendant was engaged in or was an accomplice in the commission of a robbery of Frank Trejo, and (2) the murder was committed in order to carry out or advance the commission of the crime of robbery of Frank Trejo or to facilitate the escape there from or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder. However, the special circumstance referred to in these instructions is still proven if the defendant had the separate specific intent to commit the crime of robbery, even if he also had the specific intent to kill. Concurrent intent to kill and to commit an independent felony will support a felony murder special circumstance.

(111 RT 17638; 24 CT 4921.)

Here, the court properly set out the law in instructing the jury on the felony-murder special circumstance. (111 RT 17638-17640; 24 CT 4921-4923.) The jury was instructed that, if the felony is merely incidental to achieving the murder, then the special circumstance is not present but, if appellant had an independent felonious purpose, such as robbery, and commits the murder to advance that independent purpose, the special circumstance is present. (*People v. Navarette* (2003) 30 Cal.4th 458, 505; (*People v. Green* (1980) 27 Cal.3d 1, 61.) Appellant fails to give legal support for the proposed instruction, "[a]n act committed by accident is not committed in order to advance an independent felonious purpose. If you

have a reasonable doubt whether the act resulting in the victim's death was committed by accident, you must give the defendant the benefit of that doubt and find the special circumstance untrue." (23 CT 4737.) The trial court was not required to give a pinpoint instruction that misstated the law. As such, appellant's claim of instructional error fails.

E. No Prejudice

Even if the court erred in failing to give appellant's requested pinpoint instructions, any error was harmless because it is not reasonably probable appellant would have received a more favorable result had the instruction been given. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 679 (*McKinnon*) ["[i]n determining whether the failure to instruct requires reversal, '[reviewing courts] apply the normal standard of review for state law error: whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given' [Citation.]".) As discussed, the jury was instructed on two theories of first degree murder – premeditated murder and felony-murder, and also on second degree murder. In finding appellant guilty of first degree murder, the jury necessarily found appellant either intentionally killed Deputy Trejo with premeditation and deliberation, or killed the deputy – whether intentionally, unintentionally or accidentally– in the commission of a robbery. Given that the court fully and accurately instructed the jury on the law, the omitted pinpoint instructions would not have altered the result.

Moreover, the jury found true the allegations that appellant personally used a short-barreled gun during the commission of the crime (§ 12022.5) and intentionally killed Deputy Trejo while the deputy was engaged in the performance of his duties (§ 190.2, subd. (a)(7).) These explicit findings reflect a rejection of appellant's argument that he accidentally shot the deputy. (See *People v. Kobrin* (1995) 11 Cal.4th 416, 428, fn. 8 [failure to give instruction is harmless error if factual question posed by omitted

instruction is necessarily resolved adversely to defendant under other, properly given instructions].) Thus, any error in not giving the pinpoint instructions on appellant's accident theory was harmless.

VII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON EVIDENCE OF CONSCIOUSNESS OF GUILT

Appellant contends that the trial court erred in instructing the jury on appellant's refusal to appear in a lineup and his flight from the crime scene as evidence of consciousness of guilt. Both instructions were proper in this case.

A. Background

The court instructed the jury on nonparticipation in a line up with a modified version of CALJIC No. 2.06 as follows:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by refusing to participate in a line-up, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(93 RT 14828, 111 RT 17611; 24 CT 4852.)

The court also instructed the jury on evidence of flight with CALJIC No. 2.52 as follows:

> The flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(111 RT 17616; 24 CT 4865.) The court gave these instructions over appellant's objection. (107 RT 16930.)

B. The Instructions Were Not Deficient

Appellant argues that the consciousness-of-guilt instructions were impermissibly unfair and argumentative in that they focused on particular evidence and favored the prosecution. Appellant also contends that the instructions permitted the jury to draw improper inferences about

appellant's conduct and lessened the standard of proof for the prosecution. Appellant's claim is without merit. The same challenges to jury instructions on consciousness-of-guilt involving suppression of evidence and flight, have been repeatedly rejected by California courts, and recently by this Court in *People v. Tully* (2012) 54 Cal.4th 952, 1024 (*Tully*). (See also *People v. Jurado* (2006) 38 Cal.4th 72, 125-126; *People v. Benavides* (2005) 35 Cal.4th 69, 100; *People v. Nakahara* (2003) 30 Cal.4th 705, 713; *People v. Kipp*, *supra*,18 Cal.4th at p. 375.) There is no reason to reconsider these decisions.

Acknowledging that the weight of California law is against him on this claim, appellant relies on out-of-state decisions to argue that the instructions violated his constitutional rights to due process, a fair trial and equal protection. (AOB 373-374.) However, California cases on these issues are well-reasoned and control here. This Court has held that the cautionary nature of consciousness-of-guilt instructions benefit the defense by admonishing the jury to be circumspect about evidence that might otherwise be considered decisively inculpatory. (*Thornton*, *supra*, 41 Cal.4th at p. 438.) Numerous cases have held that consciousness-of-guilt instructions do not violate a defendant's constitutional rights. (See *People v. Hughes* (2002) 27 Cal.4th 287, 348 (*Hughes*), *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 (*Boyette*), *People v. Morgan* (2007) 42 Cal.4th 593, 621 (*Morgan*).) Appellant proffers no persuasive basis for reconsideration of these cases. As such, this Court should decline to revisit its prior decisions and should reject appellant's claims.

C. The Instructions Did Not Improperly Duplicate the Circumstantial Evidence Instructions

Appellant argues that the consciousness-of-guilt instructions were improperly given because they were duplicative of the instruction on

circumstantial evidence. Appellant is mistaken. The court was not prevented from giving the instructions simply because they involved a specific type of circumstantial evidence. Rather, whenever the prosecution properly relies on evidence of consciousness of guilt, relevant instructions must be given. (See *People v. Turner* (1990) 50 Cal.3d 668, 694 (*Turner*).) Here, the instruction related to appellant's failure to participate in a lineup was supported by substantial evidence. Before a jury may be instructed that it may draw a particular inference, there must be evidence in the record which, if believed, will support that inference. (*People v. Hannon* (1977) 19 Cal.3d 588, 597.) The record shows that appellant refused to participate in a lineup after being requested and admonished by Detective Schwedhelm and Officer Helton on several occasions. (93 RT 14803-14805, 14788-14791.) As such, there was substantial evidence to support the instruction.

Similarly, "a flight instruction is correctly given 'where there is substantial evidence of flight by the defendant apart from his identification as the perpetrator, from which the jury could reasonably infer a consciousness of guilt.' [Citation.]" (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1245 (*Pesinger*).) "If there is evidence identifying the person who fled as the defendant, and if such evidence 'is relied upon as tending to show guilt, then it is proper to instruct on flight. [Citation.]" (*People v. Mason* (1991) 52 Cal.3d 909, 943 (*Mason*).)

In this case, there was substantial evidence of flight by appellant from which the jury could infer consciousness of guilt. Several witnesses at the R&S Bar testified that, as soon as appellant shot the deputy, he immediately got into Brenda Moore's truck and drove out of the parking lot. Appellant, himself, testified that he quickly left the parking lot in Moore's truck and abandoned the vehicle at a nearby church, knowing that Deputy Trejo had likely called in the vehicle's description and the police would soon be looking for Moore's truck. Appellant's flight took him to the field next to

the Cooper/King residence where he hid in the trees for several hours to avoid arrest and ultimately to the home where he took the Cooper/King family hostage. The circumstances of appellant's immediate departure from the crime scene logically permitted an inference that his movement was motivated by his consciousness of guilt. (*Turner*, *supra*, 50 Cal.3d at p. 694; *Mason*, *supra*, 52 Cal.3d at pp. 942-943.) Thus, the court did not err in giving the jury consciousness-of-guilt instructions along with instructions on circumstantial evidence.

D. The Instructions Taken as a Whole Properly Informed the Jury

In assessing whether or not there was instructional error, the "'test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights.' [Citation.] [This Court] determine[s] the correctness of the jury instructions from the entire charge of the court, not from considering only parts of an instruction or one particular instruction. [Citation.] . . . [Citation.] . . . [I]n examining the entire charge [this Court] assume[s] that jurors are 'intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citations.]" (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.)

Here, there was not a reasonable likelihood that the jury understood or applied the consciousness-of-guilt instructions in a manner that violated appellant's rights. The jury was apprised that the evidence of appellant's failure to participate in a lineup and his flight from the crime scene was to be considered in light of all the evidence and given its appropriate weight. The jury was further informed that such conduct alone could not convict appellant. In view of all the instructions given to the jury including those on circumstantial evidence, it should be presumed that the jury heeded these instructions. Thus, appellant's claim of instructional error fails.

VIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.71 TO DETERMINE THE DEGREE OF MURDER

Appellant argues that the trial court erred in instructing the jury on the process by which it was to decide the degree of murder. He specifically challenges the court's use of the 1996 version of CALJIC No. 8.71 (6th Ed.) which instructed as follows:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

(11 RT 17640; 24 CT 4926.) Appellant contends this instruction was flawed because it included a unanimity requirement that skewed the jury's deliberations toward first degree murder and impermissibly lowered the prosecution's burden of proof. He maintains that it was also error for the court not to give CALJIC No. 17.11, which would have clarified for the jury any confusion caused by CALJIC No. 8.71, and provides as follows:

> If you find the defendant guilty of the crime of murder, but have reasonable doubt as to whether it is first or second degree, you must find him guilty of that crime in the second degree.

However, in view of the entirety of court's instructions, it cannot be said that the jury would have been confused by CALJIC No. 8.71 and would have misapplied it.

A. CALJIC No. 8.71 Was Properly Given in Conjunction With Other Instructions

Appellant argues that the trial court erroneously gave a confusing unanimity instruction when it gave CALJIC No. 8.71. In support of his argument, appellant relies on *People v. Moore* (2011) 51 Cal.4th 386, 411 (*Moore*), in which this Court examined the 1996 revisions of CALJIC Nos. 8.71 and 8.72 (related to manslaughter) and concluded that "the better

practice is not to use the 1996 revised versions . . . as the instructions carry at least some potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder, and between murder and manslaughter."

In *Moore*, this Court examined two prior Court of Appeal cases, *People v. Pescador* (2004) 119 Cal.App.4th 252 (*Pescador*) and *People v. Gunder* (2007) 151 Cal.App.4th 412 (*Gunder*), in which the defendants unsuccessfully raised the same claim as appellant. (*Moore*, *supra*, 51 Cal.4th at pp. 410-411.) In both cases, the Court of Appeal held that there was no instructional error, because CALJIC No. 8.71 had been given in conjunction with other instructions that made it unlikely jurors would believe they had to vote for first degree murder if any other juror found first degree murder had been proven. (*Gunder*, *supra*, 151 Cal.App.4th at pp. 424-425; *Pescador*, *supra*, 119 Cal.App.4th at pp. 255-258.)

In *Pescador*, the trial court had given CALJIC Nos. 17.11 and 17.40 in addition to CALJIC No. 8.71. (*Pescador*, *supra*, 119 Cal.App.4th at p. 257.) CALJIC No. 17.11 states: "If you find the defendant guilty of the crime of [murder], but have a reasonable doubt as to whether it is of the first or second degree, you must find [him] [her] guilty of that crime in the second degree." CALJIC No. 17.40 provides: "The People and the defendant are entitled to the individual opinion of each juror. [¶] Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors. [¶] Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision. [¶] Do not decide any issue in this case by the flip of a coin, or by any other chance determination." The trial court also instructed the jury to "'[c]onsider the

instructions as a whole and each in light of all the others.'" (*Pescador*, *supra*, 119 Cal.App.4th at p. 257.) Viewing CALJIC No. 8.71 in light of the court's entire charge, *Pescador* held that it was not reasonably likely that the jurors misinterpreted CALJIC No. 8.71 as requiring them to unanimously find that they had a reasonable doubt as to the degree of the murder to convict the defendant of murder in the second degree. (*Ibid.*)

In *Gunder*, the jury was also instructed under CALJIC No. 17.40, but it was not instructed under CALJIC No. 17.11. (*Gunder*, *supra*, 151 Cal.App.4th at p. 425.) *Gunder* rejected the defendant's argument that it was error to give CALJIC No. 8.71 in the absence of CALJIC No. 17.11. (*Ibid.*) *Gunder* reasoned that, "[w]hat is crucial in determining the reasonable likelihood of defendant's posited interpretation is the express reminder that each juror is not bound to follow the remainder in decisionmaking. Once this principle is articulated in the instructions, a reasonable juror will view the statement about unanimity in its proper context of the procedure for returning verdicts, as indeed elsewhere the jurors are told they cannot return any verdict absent unanimity and cannot return the lesser verdict of second degree murder until the jury unanimously agrees that the defendant is not guilty of first degree murder. Thus, nothing in the instruction is likely to prevent a minority of jurors from voting against first degree murder and in favor of second degree murder." (*Ibid.*)

As in *Gunder*, the trial court in *Moore* instructed the jury pursuant to CALJIC No. 17.40, but not CALJIC No. 17.11, as had the trial court in *Pescador*. (*Moore*, *supra*, 51 Cal.4th at p. 411.) Although the *Moore* court concluded the "better practice" was to avoid the use of CALJIC No. 8.71, it did not hold the instruction was given in error and declined to decide whether *Gunder* was correct that giving CALJIC No. 17.40 in conjunction with CALJIC No. 8.71 removed the danger of jurors being confused by the unanimity language in CALJIC No. 8.71. (*Moore*, *supra*, 51 Cal.4th at pp.

411-412.) Instead, *Moore* held that any error was harmless beyond a reasonable doubt because, having found that the defendant had killed the victim while committing robbery and burglary, the jury was precluded from finding the defendant guilty of either the lesser offenses of second degree murder or manslaughter. (*Id.* at p. 412.) With respect to the language of CALJIC No. 8.71, the *Moore* court opined that "[t]he references to unanimity . . . were presumably added to convey the principle that the jury as a whole may not return a verdict for a lesser included offense unless it first reaches an acquittal on the charged greater offense. [Citation.] But inserting this language . . . was unnecessary, as CALJIC No. 8.75 fully explains that the jury must unanimously agree to not guilty verdicts on the greater homicide offenses before the jury as a whole may return verdicts on the lesser." (*Id.* at pp. 411-412.)

Appellant asserts that *Pescador* and *Gunder* were wrongly decided but provides no authority in support of his position. As correctly recognized by those cases, the crucial factor in determining whether the jury is likely to be confused by CALJIC No. 8.71 is whether the jury has been properly instructed as to the jurors' duty to make decisions individually. The unanimity language of CALJIC No. 8.71 is framed in terms of returning verdicts, not individual juror decision making. In this case, the trial court's instruction under CALJIC No. 17.40 dispelled any possible confusion from CALJIC No. 8.71. (111 RT 17653-17654.)

Further, the trial court gave CALJIC No. 8.75 which told the jury not to return a verdict for second degree murder unless the jurors unanimously acquit of first degree murder. (111 RT 17642-17643.) Moreover, the jury was instructed to read the instructions as a whole and was generally instructed on reasonable doubt with CALJIC No. 2.90. (111 RT 17619-17620.) Contrary to appellant's argument, the omission of CALJIC No. 17.11 from the instructions does not change the analysis, because, as

Gunder stated, "[CALJIC No. 17.11] does not refute [the proposition that there must be unanimous doubt as to the degree of murder] any more directly than the instruction on the duty to deliberate individually [contained in CALJIC No. 17.40]." (*Gunder*, *supra*, 151 Cal.App.4th at p. 425.) Taking the whole of the instructions to the jury together, it is not reasonably likely that the jurors misinterpreted CALJIC No. 8.71 as requiring them to unanimously find that they had a reasonable doubt as to the degree of the murder to convict defendant of murder in the second degree. Thus, the court committed no error in giving CALJIC No. 8.71.

B. No Prejudice

Even if the trial court had given CALJIC No. 8.71 in error, any such error was harmless. At the outset, appellant's argument that giving CALJIC No. 8.71 constituted error per se is without merit. Structural error requiring reversal exists only when there is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) Improper instructions presented to the jury on a single element of an offense are reviewed for harmless error, where the error does not vitiate all of the jurors' findings and the effect of the error is quantifiable. (See *People v. Avila* (1995) 35 Cal.App.4th 642, 660 (*Avila*).) Here, the jury unanimously agreed that appellant committed the act of murder. The instruction at issue concerned only whether the act was deliberate and premeditated or the killing occurred during the commission of a robbery, an effect that is capable of evaluation. Therefore, any error for prejudice is evaluated under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), to determine whether it is reasonably possible that any instructional error might have contributed to the verdict.

In this case, it is not reasonably possible that any confusion caused by CALJIC No. 8.71 contributed to appellant's conviction. Evaluating the

"'entire record . . .' [and] 'weigh[ing] the probative force of that evidence as against the probative force of the [erroneous instruction] standing alone. . .'" "the evidence and proof of guilt [with respect to deliberation and premeditation] is overwhelming . . . ." (*Avila*, *supra*, 35 Cal.App.4th at pp. 662-663) as was the evidence with respect to felony-murder. The only evidence supporting a conviction of second degree murder is appellant's own testimony that was undermined by eyewitness testimony, and the physical and forensic evidence. In light of the overwhelming evidence supporting first degree murder, any error in instructing pursuant to CALJIC No. 8.71 was harmless beyond a reasonable doubt.

Moreover, any error was harmless given the jury's true findings on the robbery-murder special circumstance. Having found appellant killed Deputy Trejo in the commission of a robbery, the jury must also have found him guilty of first degree murder on the same felony-murder theory. The lesser offense of second degree murder was not a legally available verdict if appellant killed the deputy in the commission of a robbery, as the jury unanimously determined he had. (See § 189; *People v. Bramit* (2009) 46 Cal.4th 1221, 1238 (*Bramit*); P*eople v. Dillon* (1983) 34 Cal.3d 441, 472.) Any confusion generated by CALJIC No. 8.71, therefore, could not have affected the jury's verdict. Accordingly, appellant's claim of instructional error fails.

IX. THE TRIAL COURT DID NOT ERR IN NOT GIVING A UNANIMITY INSTRUCTION AS TO FIRST DEGREE MURDER

Appellant argues that the trial court erred by failing to require unanimous agreement as to which theory of guilt the jury accepted to support a first degree murder verdict, premeditated murder or felony-murder. He contends such error deprived him of his right to have all the elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense. We disagree. As appellant acknowledges this Court has previously rejected similar claims. (See *Cole*, *supra*, 33 Cal.4th at p. 1221; *People v. Kipp* (2001) 26 Cal.4th 1100, 1131; *People v. Box* (2000) 23 Cal.4th 1153, 1212; *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395.) There is no reason for this Court to revisit and alter its prior decisions.

In *Schad v. Arizona* (1991) 501 U.S. 624, 637 (*Schad*), the United States Supreme Court held that a State may determine that "certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime." In *Schad*, Arizona law provided that "[a] murder which is perpetrated . . . by any other kind of willful, deliberate or premeditated killing, or which is committed . . . in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree." (*Id.* at p. 629, fn. 1.) In light of Arizona law, the court rejected appellant's contention that he could be convicted of first degree murder only if the jury unanimously agreed either that he committed the murder with premeditation or that he committed the crime while in the course of committing a robbery. (*Id.* at p. 639.) According to the *Schad* court, "a first-degree murder conviction under jury instructions that did not require agreement on whether the

defendant was guilty of premeditated murder or felony murder" was constitutional. (*Id.* at p. 627.)

California has determined that "[a]ll murder which is perpetrated . . . by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking . . . is murder of the first degree." (§ 189.) This Court, in *People v. Nakahara supra*, 30 Cal.4th at p. 712, noted that it was well-established that "jurors need not unanimously agree on a theory of first degree murder as either felony murder or murder with premeditation and deliberation" in order to convict a defendant of first degree murder. (*Ibid.*) This Court rejected the argument that recent cases such as *Apprendi v. New Jersey* (2000) 530 U.S. 466, suggested a different result.

Here, the prosecution's two theories of murder – premeditated and deliberate murder and felony-murder – are merely alternative means of committing the single offense of first degree murder under California law. (See § 189.) Thus, the jury could convict appellant of first degree murder even if some jurors believed that appellant killed Deputy Trejo in the commission of a robbery. There is no evidence suggesting the jurors were not unanimous in their factual findings. Moreover, based upon the evidence in this case, the jury could unanimously find that appellant was guilty under both theories of murder. Accordingly, the trial court did not err by failing to give a juror unanimity instruction.

Even if the unanimity instruction had been given, there was not a reasonable likelihood that appellant would have obtained a more favorable result. There was overwhelming evidence from which the jury could unanimously find that appellant committed premeditated murder or felony-murder. As such, any error in not giving the unanimity instruction was harmless.

X. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON FIRST DEGREE MURDER WHERE THE INFORMATION CHARGED APPELLANT WITH MURDER UNDER SECTION 187

In count one of the first amended information, appellant and co-defendant Brenda Moore were charged with murder in these terms: ". . . defendants did violate Section 187 (a) of the Penal [*sic*], in that they did willfully and unlawfully and with malice aforethought, murder Frank Vasquez Trejo, a human being." (21 CT 4247.) Appellant argues that the trial court erred in instructing the jury on first degree murder when the information charged him only with second degree, malice murder under section 187 and not with first degree murder under section 189. Appellant thus contends that the trial court lacked jurisdiction to try him for the uncharged crime of first degree murder. We disagree.

Appellant's claim rests upon the premise that first degree murder (including premeditated murder and felony-murder), and second degree murder are separate crimes and cannot be charged together under section 187. Appellant relies on *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*), as implicitly overruling *People v. Witt* (1915) 170 Cal. 104, in which this Court long ago held that a defendant may be convicted of felony murder even though the information charged only murder with malice. Appellant's reliance is misplaced given that this Court has previously rejected appellant's jurisdictional argument. (*Hughes*, *supra*, 27 Cal.4th at pp. 369-370.) Numerous appellate decisions have held likewise. (See *People v. Wilkins* (1994) 26 Cal.App.4th 1089, 1097; *People v. Johnson* (1991) 233 Cal.App.3d 425, 453-457; *People v. Scott* (1991) 229 Cal.App.3d 707, 712-718; *People v. Watkins* (1987) 195 Cal.App.3d 258, 264-268.) Subsequent to *Dillon*, this Court has reaffirmed the rule of *People v. Witt*, that an accusatory pleading charging a defendant with murder need not specify the

theory of murder upon which the prosecution intends to rely. The same principle applies here with respect to the degrees of murder.

A pleading charging murder under section 187 adequately notifies a defendant of the possibility of conviction of first degree murder. Because of the different forms or varieties of murder, it has been acknowledged that an information charging murder without elaboration may not always provide notice sufficient to afford the due process of law guaranteed by the Fourteenth Amendment to the federal Constitution. (*People v. Gallego* (1990) 52 Cal.3d 115, 189; *People v. Murtishaw* (1981) 29 Cal. 3d 733, 751, fn. 11.) However, as observed in *People v. Diaz* (1992) 3 Cal. 4th 495, 557, "generally the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing or at the indictment proceedings." Here, appellant may not complain of inadequate notice. The information alleged the special circumstance of murder in the commission of a robbery as part of the murder charge in count one, and separately charged appellant with robbery in count two. (21 CT 4248-4249.) The preliminary hearing testimony made clear the prosecution's intent to establish that appellant killed with premeditation and deliberation and, alternatively, during the commission of a robbery. The prosecution introduced evidence supporting each crime charged and each special circumstance allegation. The defense made no request for a continuance on the basis of inadequate notice. In any event, appellant waived any claim of insufficient notice by not moving to reopen when he learned that the court would instruct the jury on first degree murder. (*People v. Memro* (1995) 11 Cal. 4th 786, 869.) Appellant does not explain in what manner he might have been prejudiced by the absence of a first degree murder charge in the information. Indeed, appellant received constitutionally adequate notice that the prosecution was seeking a conviction for first degree murder. Thus, appellant's claim that the trial

court erred in instructing on first degree murder where the information charged him only with second degree murder is without merit.

XI. THE TRIAL COURT'S INSTRUCTIONS DID NOT LOWER THE REASONABLE DOUBT STANDARD

Appellant contends that a number of the trial court's standard instructions guiding the jury's evaluation of evidence undermined the requirement of proof beyond a reasonable doubt and impermissibly shifted to appellant the burden of proving his innocence. He claims that the cumulative effect of these instructional errors deprived him of his constitutional rights to due process, a jury trial, and a reliable determination of the special circumstances. We disagree. The jury was given proper standard instructions that have been repeatedly affirmed by this Court as constitutionally sound and consistent with the overriding principle of reasonable doubt.

Appellant specifically takes issue with the trial court's circumstantial evidence instructions, CALJIC Nos. 2.01 (sufficiency of circumstantial evidence – generally), 2.02 (sufficiency of circumstantial evidence to prove specific intent or mental state), 8.83 (special circumstances – sufficiency of circumstantial evidence – generally), and 8.83.1 (special circumstances – sufficiency of circumstantial evidence to prove required mental state). (111 RT 17611, 17623, 17638-17640.) Appellant also contends that the court's instructions related to the jury's consideration of witness testimony and the definition of premeditation and deliberation further diluted the reasonable doubt standard. He challenges CALJIC Nos. 2.21.1 (discrepancies in witness testimony), 2.21.2 (willfully false witnesses), 2.22 (weighing conflicting testimony), 2.27 (sufficiency of testimony of one witness), and 8.20 (definition of premeditation and deliberation). (111 RT 17613-17615, 17631-17632.) Lastly, appellant maintains that the court's motive instruction, CALJIC 2.51, was similarly flawed in lowering the prosecution's burden of proof. (111 RT 17616.)

However, as appellant acknowledges, this Court has previously

considered and rejected similar claims challenging these same jury instructions. (See *People v. McKinzie* (2012) 54 Cal.4th 1302; *Brasure*, *supra*, 42 Cal.4th at pp. 1058-1059; *People v. Rundle* (2008) 43 Cal.4th 76, 154-155; *Riggs*, *supra*, 44 Cal.4th at p. 314; *People v. Guerra* (2006) 37 Cal.4th 1067 (*Guerra*), 1138-1139; *People v. Nakahara*, *supra*, 30 Cal.4th 705, 713-71; *People v. Montiel* (1993) 5 Cal.4th 877, 941; *Turner*, *supra*, 50 Cal.3d at p. 697.) Appellant has failed to provide a compelling reason for this Court to revisit or reconsider its prior decisions. Accordingly, appellant's claims of instructional error should be rejected in their entirety.

XII. THE TRIAL COURT PROPERLY EXCLUDED PROSPECTIVE JUROR NO. 3727 BASED ON HER INABILITY TO IMPOSE THE DEATH PENALTY

Appellant argues that the trial court erred in granting the prosecution's challenge for cause of prospective Juror No. 3727 based on her views on the death penalty. Appellant maintains the error violated his rights to an impartial jury, a fair capital sentencing hearing, and due process of law under the federal and state Constitutions. Appellant is mistaken. Given Juror No. 3727's numerous equivocal statements about her inability to vote for death, the court properly found that she held views on capital punishment that would substantially impair her ability to perform her duties as a juror. There was no error in discharging Juror No. 3727 from the jury.

A. Background

1. Juror Questionnaire

On the jury questionnaire, Juror No. 3727 expressed general opposition to the death penalty. She felt that "the death penalty does nothing to deter murder, and may be more expensive to the community in the long run, due to appeals and court costs." (10 SuppCT 2686-2687.) However, she indicated that there are crimes in which her "knee-jerk reaction is to give the death penalty." (10 SuppCT 2686-2687.) Juror No. 3727 believed it "should be used sparingly, in the most heinous cases, considering the remorse of the criminal and considering his/her background." (10 SuppCT 2686-2687.) With respect to life without the possibility of parole (LWOP), Juror No. 3727 viewed it as "a more humane punishment than the death penalty" because "it protects society from further crimes committed by that person, and gives the person a chance to experience remorse." (10 SuppCT 2687.) LWOP also provided "a loop hole in case a person was found guilty by mistake." (10 SuppCT 2687.)

Juror No. 3727 explained that her views about the death penalty have changed over time. She used to be absolutely opposed to the death penalty, but as she grew older observed "that our society is becoming less respectful of life, and that more thoughtless, violent crimes are occurring [*sic*]." (10 SuppCT 2687.) She admitted that she is more susceptible to emotional reactions. (10 SuppCT 2687) Juror No. 3727 expressed, "If I were to murder someone, I would not be surprised to pay for it with my life – that would be fair and responsible." (10 SuppCT 2687.) Juror No. 3727 viewed the death penalty as a more severe punishment because of the loss of personal control over that aspect of one's life and due to the disproportionate sentencing based on race. (10 SuppCT 2687.) She described her philosophical view on the death penalty as "moderately against." (10 SuppCT 2687.)

Juror No. 3727 indicated that if there were a penalty phase in this case, her views would not necessarily always lead her to impose death. (10 SuppCT 2688.) Rather, she "would consider her intuitive feelings about the possibility that the defendant would/could feel remorse, and the heinousness of the crimes/crime." (10 SuppCT 2688.) She expressed that "life in prison w/o parole takes care of society's problem with that person." (10 SuppCT 2688.) Juror No. 3727 indicated she did not personally belong to a group that advocated the abolition of the death penalty. (10 SuppCT 2688.)

Juror No. 3727 would vote against the death penalty if the issue were on the ballot in the next election. She opposed the death penalty because a death sentence costs more than life in prison, there is the possibility that a jury is wrong, and more people of color are disproportionally sentenced to death. (10 SuppCT 2689.) Juror No. 3727 did not know if she would be able to set aside her personal beliefs about the death penalty and apply the

law, rules and instruction as given to her by the court. (10 SuppCT 2689.) She maintained:

> I would certainly try – but I am subject to emotions like anyone else, and I rely on intuition to guide me through much of life. When looking around this room I'm thinking do we really have the right to decide another person's fate? But I guess the answer is yes – if we lived in a smaller culture that would seem obvious. It's because of our distracted, diffracted [*sic*] society that values independence above all else that confuses these issues for me.

(10 SuppCT 2689.)

2. *Hovey* Voir Dire

During sequestered voir dire, the court and counsel questioned Juror No. 3727 about her death penalty beliefs and her ability to carry out her duties as a juror during the penalty phase. The court asked Juror No. 3727 whether she could be bound by the guidelines or principles in deciding between the death penalty and LWOP, one principle being that you could vote for death if you are convinced that the factors in favor of death substantially outweighed the factors in favor of LWOP. (42 RT 6259.) She responded it would depend on the factors that she had to consider and whether she agreed with the factors. (42 RT 6259.) The court explained that it could not tell her all the jury instructions at that point since the evidence had not yet been presented, but that the court needed to know whether she could decide the case in accordance with the instructions and based on the weight she gave the factors. (42 RT 6261.) She then responded, "yes." (42 RT 6261.)

The court asked Juror No. 3727, if after all the evidence, instructions, arguments by the attorneys and hearing the view of the other jurors whether she could impose the death penalty if warranted. She replied, "I would have a hard time doing that." (42 RT 6262.) Juror No. 3727 explained, "Well, it would be hard to say that someone should be put to death because

then I would be guilty of killing that person. You know, if we all agreed, I would have to share in that responsibility, and I don't know. I mean, there might be times when – I'd have to hear the factors. There might be times when I would say, yes, I think it's warranted. But it would be a hard decision, so I mean, I can't say . . ." (42 RT 6262.)

When the court explained again that the in order to vote for death she would have to be convinced that the factors in favor of death substantially outweighed those in favor of LWOP, and asked whether under those circumstances could she vote to impose the death penalty, Juror No. 3727 replied, "No, I don't think so." (42 RT 6262.)

Juror No. 3727 stated that her belief against the death penalty stemmed from her basic philosophy of life she has held for the past ten years. (42 RT 6263.) Also, as a long time vegetarian, she did not believe in killing animals. (42 RT 6263.) According to Juror No. 3727, it would have to be extremely severe for her to vote for death, and could conceive of a circumstance involving somebody that had "repeatedly committed crimes," "repeatedly murdered people" or a "repeated rapist, or something like that." (42 RT 6265.) She described herself as 80 percent unable to impose the death penalty, and indicated that she could not equally consider both death and LWOP. (42 RT 6265.) "I would always consider life without parole as better, a better option." (42 RT 6265.)

Juror No. 3727 did not want to be responsible for deciding death, as it would not be good for her mental health. (42 RT 6266.) Again, she expressed that it would be very difficult for her to impose the death penalty although she agreed that in some instances when it has been imposed in the past it might have been appropriate. (42 RT 6267.) She made a distinction between being personally involved in the decision-making and others making the sentencing decision. (42 RT 6268.) Juror No. 3727 maintained that she would be willing to weigh the factors in favor and against the death

penalty as instructed by the court. (42 RT 6271-6272.) At the end of Juror No. 3727's voir dire, when asked by the court if she could vote in favor of death, she replied, "It would be a possibility. So I guess that says yes. I mean, it would be a consideration. It would be a possibility." (42 RT 6274.)

3. Trial Court's Ruling

The prosecution challenged Juror No. 3727 for cause based on her inability to impose the death penalty. (43 RT 6500.) The court initially agreed stating, "3727, I gained the distinct impression that she can't do it. I know she said many different things, but that was my strongest impression of her . . . ." (43 RT 6500-6501.) The court later indicated in its tentative ruling that it would deny the prosecution's challenge and keep Juror No. 3727. (44 RT 6558.) The prosecution pointed to numerous equivocal statements made by the juror during *Hovey* voir dire. (44 RT 6593-6594.) The defense argued that she was death qualified because she said she would weigh the factors and consider death. (44 RT 6595-6586.) The court stated that it needed to review the transcript again. (44 RT 6597.) The defense further argued that, on voir dire, the juror had indicated numerous times that she would consider death in certain circumstances. (45 RT 6765-6772.)

Upon further consideration, the court excused Juror No. 3727. (46 RT 6959.) The court concluded: "I did not believe that 3727, on a total balanced view of reviewing again all of her answers, indicates that she could fulfill her duties as a juror. I do believe, if not totally prevented, she is substantially impaired and I'm not going to invite further discussion of 3727, who's been discussed extensively. I just, on balance, do not believe that she can do it." (46 RT 6959.)

B. Legal Principles

A prospective juror in a capital case may be excused for cause on the basis of his or her views regarding the death penalty only if those views would prevent or substantially impair the performance of the juror's duties. (*Wainright v. Witt* (1985) 469 U.S. 412, 424 (*Witt*); *People v. Stewart* (2004) 33 Cal.4th 425, 441; *People v. Cunningham* (2001) 25 Cal.4th 926, 975 (*Cunningham*).) When the prospective juror's answers on voir dire are conflicting or equivocal, the trial court's findings as to the prospective juror's state of mind are binding on appellate courts if supported by substantial evidence. (*People v. Wilson* (2008) 44 Cal.4th 758, 779 (*Wilson*); see *Witt*, *supra*, 469 U.S. at p. 424; accord, *Lewis*, *supra*, 43 Cal.4th at p. 483 [trial court's determination as to prospective juror's true state of mind is binding].)

The appellate court will uphold the trial court's decision to excuse a prospective juror under *Witt* if that decision is fairly supported by the record. (*Stewart*, *supra*, 33 Cal.4th at p. 441; *Cunningham*, *supra*, 25 Cal.4th at p. 975.) The court must have "sufficient information . . . to permit a reliable determination" whether a prospective juror's views would disqualify the juror from service in a capital case. (*Stewart*, *supra*, 33 Cal.4th at p. 445.) Even if the prospective juror has not expressed his or her views with absolute clarity, the juror may be excused if "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." (*Witt*, *supra*, 469 U.S. at p. 426.) If, after reasonable examination, the prospective juror has given conflicting or equivocal answers, and the trial court has had the opportunity to observe the juror's demeanor, we accept the court's determination of the juror's state of mind. (*People v. DePriest* (2007) 42 Cal.4th 1, 20-21; *Moon*, *supra*, 37 Cal.4th at pp. 14, 16.) The U.S. Supreme Court has affirmed that "[c]ourts reviewing claims of *Witherspoon-Witt* error . . . owe

deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror." (*Uttecht v. Brown* (2007) 551 U.S. 1, 22.)

C. Juror No. 3727's Views on the Death Penalty Substantially Impaired Her Ability to Impose a Death Verdict

Here, there is substantial evidence in the record that demonstrates Juror No. 3727 repeatedly expressed doubts regarding her ability to personally impose the death penalty. As such, her death penalty views would have substantially impaired the performance of her duties as a juror. In both the juror questionnaire and during *Hovey* voir dire, Juror No. 3727 made numerous equivocal statements where she was uncertain of whether she could vote for death. Juror No. 3727 explained that, for the last ten years, she has had a philosophical opposition to the death penalty, which was in line with her vegetarian lifestyle and belief in not killing animals. (42 RT 6263.) She viewed the death penalty as more costly than LWOP, as not allowing for the possibility of the jury being wrong, and as having been disproportionally applied to African-Americans. (10 SuppCT 2689.) Although she described herself as "moderately against" the death penalty on the questionnaire, she stated in voir dire that she was 80 to 90 percent unable to vote for death. (10 SuppCT 2687; 43 RT 6265.)

The record further shows that Juror No. 3727 did not want to be personally involved in imposing a death sentence. Although she agreed that some death verdicts in the past may have been appropriate, she was not responsible for those decisions. In response to the court's inquiry of whether she could impose the death penalty if warranted, Juror No. 3727 indicated, "I would have a hard time doing that . . .Well, it would be hard to say that someone should be put to death because then I would be guilty of killing that person. You know, if we all agreed, I would have to share in

that responsibility, and I don't know. I mean, there might be times when – I'd have to hear the factors. There might be times when I would say, yes, I think it's warranted. But it would be a hard decision, so I mean, I can't say . . . ." (42 RT 6262.) The juror added, "My knee-jerk reaction is to say, no, it would be very hard to vote for the death penalty. I would be more apt to argue for life. . . ."

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, the U. S. Supreme Court held that prospective jurors cannot be excluded simply because they "would not 'like to be responsible for ... deciding somebody should be put to death'" (*id.* at p. 515), for "'[e]very right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man' [Citation]." (*Id.* at fn. 8.) However, *Witt* clarified that the standard for excusal of a prospective juror is whether the prospective juror's views would "'prevent or substantially impair the performance of his duties as a juror ....'" (*Witt*, *supra*, 469 U.S. at p. 424; see *People v. Bunyard* (2009) 45 Cal.4th 836, 845-846 [the trial court found the juror's reluctance to serve on a capital jury rendered her substantially impaired]; *People v. Cunningham* (2001) 25 Cal.4th 926, 981 [the trial court did not err in excusing a prospective juror who supported the death penalty but could not personally impose it].)

In this case, the trial court excused Juror No. 3727 not just because she found the prospect of voting for death difficult or painful, but because she repeatedly expressed doubt and equivocated as to whether she could vote for death at all. The trial court properly construed those statements as indicative of her state of mind and, as a result, concluded that her views would substantially impair the performance of his duties as a juror. Appellant argues that Juror No. 3727 was willing to consider the death penalty in certain circumstances such as where someone repeatedly murdered or raped, and did not show any remorse. (42 RT 6265.)

However, such a statement alone does not make the juror death qualified. The fact that a prospective juror might possibly have been able to overcome her views in certain cases does not establish that she could conscientiously consider the death penalty in a case like this where appellant had not committed multiple killings or repeated rapes.[21] (See *People v. Roybal* (1998) 19 Cal.4th 481, 519 [upholding dismissal of juror in a case involving a single victim, even though juror might have been able to impose a death sentence in a case involving multiple victims].)

Appellant contends that Juror No. 3727 had initially misunderstood the court's explanation of weighing the aggravating and mitigating factors that jurors would be required to do in the penalty phase and, on that basis, indicated that her sentencing decision would depend on whether she agreed with the factors. (42 RT 6259-6262.) Appellant points out that, after the court clarified that these factors were the legal guidelines but that she as an individual juror would have to assign the appropriate weight to them, Juror No. 3727 ultimately stated that she would be willing to weigh the factors as instructed by the court and could consider the death penalty as a "possibility." (42 RT 6271-6272, 6275.) His argument fails to take into account the entirety of the juror's responses which show her aversion to imposing the death penalty. Even if a prospective juror expresses a willingness to follow the law, he or she may be excused under *Witt* if other responses "furnished substantial evidence of her inability to conscientiously consider a death verdict." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1114-1115 (*Barnett*) [upholding dismissal of juror even though some of her responses reflected a willingness to follow the law and the court's

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[21] There was evidence that appellant's prior crimes included several armed robberies and one forcible rape. The instant offenses, however, involved only one murder victim.

instructions].) Although, at the end of voir dire, Juror No. 3727 expressed a general willingness to consider the death penalty as a "possibility", it was preceded by numerous statements where she was doubtful of her ability to vote for death. In contrast, she was unequivocal in stating that she "would always consider life without parole as a better . . . option." (42 RT 6265.)

During questioning by the prosecution, Juror No. 3727 could not commit to equally considering the death penalty and LWOP, revealing her true state of mind:

> Q. [Prosecutor] So in reality, when it came down to it, do you think in all honesty that you would be able to sentence anyone to death?
>
> A. [Juror No. 3727] Well, I can't give you just yes or no. I mean, you know, probably 85 percent no, or 90 percent no. I mean, it would depend on what I had heard about the crime and about the person.
>
> [¶] . . . [¶]
>
> Q. Do you understand, as the judge explained to you, the law isn't going to tell you specifically that you must come up with this –
>
> A. Right; right.
>
> Q. – penalty. Or that penalty?
>
> A. Right; I understand that.
>
> Q. You have to make the decision.
>
> A. Right.
>
> Q. Can you equally consider both of those decisions?
>
> A. No. As I said, it would be like 80 percent. I mean, my – no, I can't equally, you know, it wouldn't just be like – it wouldn't be real easy to consider either/or. I would always consider life without parole as better, a better option.

Q. That would be your sentencing of choice, so to speak?

A. That would be my sentencing of choice, yeah, unless I heard, you know, circumstances that I felt like – well, yeah.

Q. Go ahead.

A. Well, I was thinking, I mean, if it's life without parole, then why kill them? You know they're not going to get out and hurt anybody else, so . . .

Q. So that's basically what you feel?

A. That is the way I feel, although – I mean, yes, that's the way I feel. I shouldn't complicate myself. I've certainly heard of death sentences and gone, okay, but I wouldn't want to be the one.

Q. You wouldn't want to be the one that participated in that decision-making?

A. No. I don't think it would be good for my health. I mean, my mental health.

Q. Okay.

(42 RT 6264-6266.)

As the record demonstrates, Juror No. 3727 was "unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*Barnett*, *supra*, 17 Cal.4th at p. 1114.) The juror's responses to voir dire, taken as a whole, support the trial court's conclusion that her views concerning the death penalty would prevent her from voting death in this case and as a result, would substantially impair her ability to perform her duties as a juror. (*People v. Blair* (2005) 36 Cal.4th 686, 741.) Thus, the trial court did not err in excusing Juror No. 3727 from the jury.

XIII. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT THROWING URINE AT CUSTODIAL OFFICERS AS AN ACT OF FORCE OR VIOLENCE UNDER FACTOR (B)

Appellant argues that the evidence of appellant throwing urine at custodial officers in the county jail was erroneously admitted as aggravating evidence under section 190.3, factor (b)[22] because the act did not involve the requisite force or violence. We disagree. Appellant committed an assault or battery against officers that involved the implied threat to use force or violence which was properly admitted as a circumstance in aggravation.

A. Background

At the penalty phase, the prosecution presented evidence in aggravation under factor (b). In an offer of proof, the prosecution established that appellant, while in custody in the Sonoma Count jail during trial, had committed a battery by throwing a milk carton of urine at several custodial officers. (115 RT 18524-18525.) Appellant had told the officers that the liquid thrown was urine. (119 RT 19013.) A presumptive test was performed using a urinalysis strip to confirm the substance was in fact urine. (116 RT 18611-18612, 18613.) The defense objected to the admissibility of the evidence. (115 RT 18379-18380.) The court denied the defense request for a *Phillips*[23] hearing. (116 RT 18608.)

Defense counsel argued that throwing urine was not an act of violence for purposes of factor (b). (116 RT 18609.) He asked the court that, if the evidence was admitted, it be limited to the throwing of a liquid because

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[22] Hereafter, referred to as factor (b).

[23] Pursuant to *People v. Phillips* (1985) 41 Cal.3d 29, 72, fn. 25 (*Phillips*), a trial court may conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove the alleged other criminal activity involving force or violence, specifically, the elements of the underlying offense.

specifically identifying it as urine was not relevant and unduly prejudicial. (116 RT 18609.) The court denied the request that the jury be told it was only a liquid, finding that the probative value outweighed its prejudicial effect. (116 RT 18611.)

The jury was then presented with the following evidence:

On October 13, 1996, Officer Basurto and several other officers conducted a search of appellant's cell in the Sonoma County jail during the trial of this case. (119 RT 19010-19011.) The food port in the cell door was opened for appellant to place his hands to be handcuffed. (119 RT 19011.) Appellant did not submit to the handcuffs. (119 RT 19011.) Once the port was opened, appellant threw a milk carton of urine at the officers. (119 RT 19012.) Some of the urine struck Officer Basurto on the arms, chest, and face. (119 RT 19013.) Some urine also hit Officer Williams in the leg and waist area, and struck Officer Keller. (119 RT 19019.) Appellant was yelling profanities and confirmed that the substance he had thrown was urine. (119 RT 19013.)

B. Legal Principles

Section 190.3, factor (b), permits the prosecution to introduce evidence, during the penalty phase of a capital case, of other "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (*Phillips*, *supra*, 41 Cal.3d at p. 70.) The evidence admitted under this provision must establish that the conduct was prohibited by a criminal statute and satisfied the essential elements of the crime. (*Id.* at p. 72; *People v. Boyd* (1985) 38 Cal.3d 762, 778.) The prosecution bears the burden of proving the other crimes beyond a reasonable doubt. (*Boyd*, *supra*, 38 Cal.3d at p. 778.)

C. Throwing Urine is an Act Involving the Implied Threat of Force or Violence

The trial court properly admitted evidence that appellant threw a carton of urine at custodial officers under factor (b) as criminal activity which "involved the use or attempted use of force or violence or the express or implied threat to use force or violence." "[W]hether a particular instance of criminal activity involved . . . the express or implied threat to use force or violence' (§ 190.3, factor (b)) can only be determined by looking to the facts of the particular case." (*Mason*, *supra*, 52 Cal.3d at p. 955.) Here, the facts so demonstrate. After appellant failed to submit to handcuffs during a cell search, he threw a milk carton containing urine at several custodial officers. (119 RT 19012.) Some of the urine hit one of the officers on the arms, chest, and face, and struck two other officers in the leg and waist area. (119 RT 19013.) Appellant yelled profanities at the officers and specifically told them it was urine. (119 RT 19013.) Given these circumstances, it can be reasonably inferred that appellant's act of throwing urine involved an implied threat to use force or violence.

Appellant argues that, although throwing urine may be a repugnant act, it is nevertheless a nonviolent act that at most constitutes a technical assault or battery. He contends that a technical assault or battery is not sufficient for consideration as aggravating evidence because the meaning of "force or violence" under factor (b) is the common-sense understanding of the phrase, encompassing only conduct that would cause or threaten to cause pain, serious bodily harm, or death. In contrast, appellant maintains that "force or violence" under the battery statute (§ 242) can be established by the slightest harmful or offensive touching. Appellant thus posits that a technical assault or battery does not rise to the level of "force or violence" as contemplated by factor (b). In support of his contention, appellant relies on *Tuilaepa v. California* (1994) 512 U.S. 967, 976 (*Tuilaepa*), where the

High Court noted that "[f]actor (b) is phrased in conventional and understandable terms." The *Tuilaepa* court, however, was addressing a constitutional vagueness challenge to the California death penalty statute and was not distinguishing factor (b) "force or violence" from its meaning in the battery statute. Rather, the court properly observed that the inquiry under factor (b) is primarily a factual one, stating:

> Tuilaepa also challenges factor (b), which requires the sentencer to consider the defendant's prior criminal activity. The objection fails for many of the same reasons. Factor (b) is phrased in conventional and understandable terms and rests in large part on a determination whether certain events occurred, thus asking the jury to consider matters of historical fact.

(*Tuilaepa* , *supra*, 512 U.S. at p. 976.)

Appellant's claim that an assault or battery cannot be considered under factor (b) absent a quantum of actual physical violence should be rejected. It is well established that "'[e]vidence of prior criminal behavior is relevant under section 190.3, factor (b) if it shows "conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute . . . . ." [Citation.]'" (*Pensinger*, *supra*, 52 Cal.3d at p. 1259; *People v. Anderson* (2001) 25 Cal.4th 543, 588; *People v. Lancaster* (2007) 41 Cal. 4th 50, 93.) Here, appellant's conduct constituted an offense proscribed by statute, since it satisfied the elements of a battery (§ 242 [the "willful and unlawful use of force or violence upon the person of another";) or an assault (§ 240 ["an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another"). Accordingly, the evidence was admissible pursuant to factor (b).

This Court has consistently held that an act that constitutes an assault or battery under the criminal statutes can be considered as aggravating evidence for factor (b) purposes. Specifically, acts involving a defendant throwing various items or substances at custodial officers have been held to

constitute assaults or batteries, and therefore admissible criminal activity under factor (b). (See *People v. Moore* (2011) 51 Cal.4th 1104,1136 [throwing a food tray against cell bars aimed at an officer]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1053 [throwing a milk carton and hot coffee at an officer] ; *People v. Pinholster* (1992) 1 Cal.4th 865, 961, [throwing a cup of urine at an officer's face]; *People v. Hamilton* (2009) 45 Cal. 4th 863, 934 [spitting at an officer].) Under this case law, appellant's conduct of throwing urine at the officers was a battery or assault that the jury could consider as an aggravating circumstance.

In addition, appellant contends that because urine is not a caustic substance that would cause or threaten to cause seriously bodily injury, the court erred in admitting the evidence under factor (b). However, as appellant acknowledges, the law currently recognizes the throwing of bodily fluids and/or excrement at a peace officer by an individual in custody as an aggravated battery by gassing. Under section 243.9[24], when a defendant in local custody is charged with battery by gassing, the prosecution must prove: (1) the defendant was confined in a local detention facility; (2) while so confined, the defendant intentionally threw "human excrement or other bodily fluids or bodily substances or any mixture containing human excrement or other bodily fluids or bodily substances" on the body of a peace officer of the local detention facility; and (3) the substance or mixture actually made contact with the skin of the peace officer. (§ 243.9, subd. (b); see CALCRIM No. 2722.) Although section 243.9 was not in effect at the time of appellant's case, the underlying concern of the statute is relevant here to show the dangerous nature of the act, namely, the potential to transmit serious life-threatening diseases

[24] Section 4501.1 corresponds to gassing acts against state prison personnel.

through bodily fluids. Section 243.9, subdivision (c)[25] thus provides that when bodily fluid and/or excrement is thrown at an officer that the inmate may be tested for hepatitis and/or tuberculosis to protect the health of the officer. Even if there was no evidence that appellant had any disease at the time that could be transmitted through bodily fluids, his act of throwing urine at the officers nevertheless exposed them to an unknown health risk. Thus, appellant's conduct amounts to a dangerous act involving an implied threat to use force or violence.

Lastly, appellant's claim that the evidence should have been excluded as more prejudicial than probative under Evidence Code section 352 also fails. The fact that appellant, while refusing to be handcuffed for a cell search, yelled profanities at the officers and specifically told them he had thrown urine was highly probative of the violent nature of the act. Thus, the probative value of the evidence greatly outweighed any prejudice. The court properly concluded that throwing urine was conduct that a jury could reasonably infer is an act of violence:

> I can't believe that you're [defense counsel] arguing to me that urine is no more possibly caustic or dangerous or violent really than water. It's like – I believe that there – I mean, the jury can fairly infer from the act, if they are allowed to hear it, that there's a reason, there's a specific reason why urine is used

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[25] Section 243.9, subsection (c) states in relevant part:

"If there is probable cause to believe that the inmate has violated subdivision (a), the chief medical officer of the local detention facility, or his or her designee, may, when he or she deems it medically necessary to protect the health of an officer or employee who may have been subject to a violation of this section, order the inmate to receive an examination or test for hepatitis or tuberculosis or both hepatitis and tuberculosis on either a voluntary or involuntary basis immediately after the event, and periodically thereafter as determined to be necessary by the medical officer in order to ensure that further hepatitis or tuberculosis transmission does not occur. These decisions shall be consistent with an occupational exposure as defined by the Center for Disease Control and Prevention . . ."

> instead of water. Water might be available. Instead urine is thrown. I think that that's one of the facts that go into the jury's consideration under all those jury instructions that they're going to hear.
>
> And, yes, of course it's prejudicial, it's very prejudicial, but it's also conduct that your client is alleged to have engaged in. If the jury believes it beyond a reasonable doubt, they can take it into account.
>
> I'm going to deny the request that they be told it was just liquid. I have weighed its probative value against its prejudicial effect and I think the probative value is very high in this instance. That request will be denied. They will be told that the officers will testify that it was urine for the reasons why. They smelled it or it looked like it, whatever they're going to say.

(116 RT 18611.)

In sum, appellant's act of throwing urine at the officers constituted a battery or assault that involved an implied threat of force or violence. Therefore, the trial court properly admitted the criminal conduct as evidence in aggravation under factor (b).

XIV. THE COURT PROPERLY ADMITTED EVIDENCE THAT APPELLANT POSSESSED HACKSAW BLADES IN PRISON AS AGGRAVATING EVIDENCE UNDER FACTOR (B)

Appellant argues that the trial court erred in admitting evidence that appellant possessed hacksaw blades while incarcerated at San Quentin State Prison as an act involving force or violence under factor (b). He claims there was insufficient evidence that these items were dangerous weapons and that mere possession constituted an act of force or violence. We disagree. Given that hacksaw blades are sharp cutting instruments capable of inflicting bodily harm, appellant's possession of the blades in prison violated section 4502[26] and served as an implied threat to use force or violence. Thus, appellant's possession of the hacksaw blades while incarcerated at San Quentin was properly admitted as evidence in aggravation.

A. Background

The prosecution sought to admit appellant's possession of hacksaw blades in prison as a violation of section 4502 and as a crime of force or violence under factor (b). Defense counsel argued that there was insufficient evidence that appellant possessed the hacksaw blades and that such possession involved violence or threat of violence. Following a *Phillips* hearing on the issue, the trial court admitted the evidence, finding

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[26] Section 4502, subdivision (a) provides in relevant part:

"(a) Every person who, while at or confined in any penal institution, while being conveyed to or from any penal institution, or while under the custody of officials, officers, or employees of any penal institution, possesses or carries upon his or her person or has under his or her custody or control any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles, any explosive substance, or fixed ammunition, any dirk or dagger or sharp instrument, any pistol, revolver, or other firearm, or any tear gas or tear gas weapon, is guilty of a felony . . ."

the possession of hacksaw blades constituted possession of a weapon. (119 RT 19003.)

The following evidence was admitted at trial:

On May 1, 1984, Correctional Officer Despain conducted a search of appellant at San Quentin State Prison. (119 RT 19006.) The officer placed a metal detector next to appellant's rectum and, after an alarm sounded, appellant voluntarily removed a metal object wrapped in plastic from his rectum. (119 RT 19007.) The plastic contained three hacksaw blades. (119 RT 19007.) The blades were approximately half an inch wide, and four inches long. (119 RT 19008.)

B. The Hacksaw Blades Were Dangerous Weapons

Appellant argues that there was insufficient evidence to establish a violation of section 4502 because hacksaw blades are not dangerous weapons. He also claims that his possession of the blades was not act involving implied threat of force or violence for purposes of factor (b). Appellant further contends that the evidence was prejudicial given that the prosecution argued in closing argument that appellant's possession of the hacksaw blades demonstrated he was an escape risk and influenced the jury's decision to render a death sentence. (128 RT 19901-19902.) These claims should be rejected.

"It is settled that a defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b)" (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 589; see *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1152-1153 (*Gutierrez*)). Possession of a weapon in prison is considered an implied act of force or violence. (See *Harris*, *supra*, 28 Cal.3d at p. 963 [possession of a wire garrote and a prison-made knife while in jail "clearly involved an implied threat to use force or violence"].)

In arguing that a hacksaw blade is not a "sharp instrument" under section 4502, appellant notes that it does not have a "thin keen edge" like a

razor but a "fine tooth saw" used for cutting metals or other hard materials. Appellant maintains that since an ordinary hacksaw blade is not manufactured to be used to cut human flesh, it should not be deemed to be a dangerous weapon without more evidence of its use in this case. (AOB 479.) However, a hacksaw blade, like any razor blade, is both a sharp instrument and a dangerous weapon in that it could be used to slice a victim's throat, wrist, or other vital spot, and has a reasonable potential of causing great bodily injury or death. (See *People v. Martinez* (1998) 67 Cal.App.4th 905, 912; *People v. Savedra* (1993) 15 Cal.App.4th 738, 745.) Appellant admits that hacksaw blades have "small teeth" which can be used with "a back and forth sawing motion to cut through something." (AOB 479.) Appellant's implication that a hacksaw blade could be used to cut through metal, but not through human flesh is not reasonable. Even if the hacksaw blade – like many objects transformed by inmates into weapons – did not have the intended purpose of cutting through human flesh, it could certainly be used precisely for that purpose given that it is a cutting instrument. Moreover, this Court is not bound by the out-of-state cases cited by appellant for the proposition that hacksaw blades are not dangerous weapons per se. (AOB 480-481.)

Appellant incorrectly argues that his mere possession of a hacksaw blade without further evidence that he actually used the blade as a weapon or altered it for use as a weapon was insufficient to establish a violation of section 4502 or render the evidence admissible under factor (b). This Court has held that "mere possession of a potentially dangerous weapon in custody involves an implied threat of violence" and can be considered by the jury as an aggravating offense. (*People v. Martinez* (2003) 31 Cal.4th 673, 697.) The "intent to use the items as weapons is not a necessary element . . . The unauthorized possession of a potentially dangerous instrument, alone, is sufficient to create the security risk sought to be

controlled by that statute." (*Martinez*, *supra*, 67 Cal.App.4th at p. 912.) Here, appellant was not merely handling the hacksaw blades as a tool while working in a metal shop. But rather, appellant's unauthorized possession involved concealing three hacksaw blades wrapped in plastic in his rectum to avoid detection from the prison guards. As such, appellant was in violation of section 4502 and his conduct involved an implied threat to use force or violence admissible under factor (b).

Finally, appellant's claim that the evidence of the hacksaw blades prejudiced the jury to sentence appellant to death because he was portrayed as an escape risk is also unmeritorious. The brutality of Deputy Trejo's murder, the existence of special circumstances, along with appellant's numerous criminal acts involving force or violence provided compelling aggravating evidence to render a death verdict in this case. Thus, it is not reasonably probable that the exclusion of evidence that appellant possessed hacksaw blades in prison would have led to a contrary result.

XV. THE TRIAL COURT PROPERLY ADMITTED PHOTOGRAPHS RELATED TO APPELLANT'S PRIOR CRIMES AGAINST MOODY AND KEOGH UNDER FACTOR (B)

Appellant argues that the trial court erred in admitting five photographs during the penalty phase related to prior acts of violence against victims inmate Moody and Diane Keogh under factor (b). Appellant claims the photographs were highly inflammatory and should have been excluded as more prejudicial than probative under Evidence Code section 352. We disagree. The photographs were properly admitted as more probative in that they showed the nature of the victims' injuries and were not exceedingly gruesome or inflammatory.

A. Background

During the penalty phase, the prosecution offered two of appellant's prior convictions as acts of violence under factor (b). (128 RT 19893-19884.) The crimes involved the November 1978 forcible rape of Diane Keogh and the May 1985 stabbing of inmate Louis Moody at San Quentin State Prison. The prosecution sought to admit several photographs showing the injuries inflicted by appellant on Moody and Keogh. These photographs, demonstrating the nature of appellant's prior acts of violence, were offered as evidence in aggravation.

1. Photographs of Diane Keogh and Appellant

The prosecution offered four photographs related to the rape of Keogh. Three of the photographs showed injuries Keogh sustained during the rape (People's Exh. Nos. 25, 26 and 27) and one photograph showed appellant as he appeared around the time of the crime (People's Exh. No. 28). The photographs of Keogh were close-up views of her face and showed the bruises on her forehead, neck and eye, and her swollen lip. The prosecution argued that the photographs were relevant to show the nature of the Keogh's injuries. (116 RT 18629.) The defense objected that the

photographs were highly inflammatory, and thus more prejudicial than probative. The court determined that if the photographs showed injuries received by the rape victim that they were certainly relevant. (120 RT 18629.) As to their prejudice, the court indicated:

> [The photographs] aren't so horribly ghastly, gruesome or so terribly inflammatory that I think they would shock the normal juror, particularly you may recall this jury has been voir dired on seeing gruesome photographs. The photos they've already seen, in my view, are far worse than these photographs. Thus, I'm going to weigh, and having weighed the probative force of these photos against their prejudice, I am admitting that they are prejudicial, naturally. That's why they're being offered. I'm going to admit them anyway because do find them to be more probative than prejudicial.

(116 RT 18630.) The court admitted three photographs and excluded one, finding it cumulative of another image. (116 RT 18631.)

The prosecution also sought to admit two photographs of appellant as he appeared at the time of the rape. The defense objected, stating that identification of appellant was not an issue, and there was nothing in the record to suggest that there was anything about appellant's appearance that was a relevant circumstance of the crime or that made it more aggravated. (116 RT 18632, 18634-18635.) The defense indicated it would stipulate to identification. The court, however, found the photograph of appellant as he appeared at the time of the Keogh's rape admissible as a circumstance of the crime. (116 RT 18633-18634.) The court stated:

> . . . prior crime victim impact evidence itself is permitted and so it might be one factor for the jury to consider, being assaulted by a person who looks like this, frankly. I'm not commenting on the look. I'm just saying that may be a factor or circumstance for the jury to consider in connection with the assault itself since the jury would be allowed to hear or may yet hear the evidence of the emotional effect of the crimes by the

defendant on the previous victims, which is specifically allowed. . .

(116 RT 18633.)

The court concluded that the admission of one photograph of appellant was sufficient and relevant even if the prosecution was not going to need to establish identity, and excluded the second photograph of appellant. (116 RT 18634.) The court noted that how appellant looked is a pertinent circumstance of the crime that does not "fall outside the pale of evidence." (116 RT 18634.)

At the penalty phase, Diane Keogh testified as follows:

On October 4, 1978, Keogh, who was approximately 24 years old, had recently moved into a studio apartment in Ocean Beach and was living alone. (119 RT 18900.) She had been discharged from the United States Navy, planned to go to college and work as a licensed vocational nurse. (119 RT 18900-18901.) Keogh was awakened at approximately 6:00 a.m. by noises coming from the kitchenette. (119 RT 18910-18911.) A shadowy figure standing in the doorway entered her bedroom area and lunged at her. Keogh screamed but could not get away. (119 RT 18912-18913.) The man, later identified as appellant, forcefully struck her on the right side of her face with a closed fist. (119 RT 18914, 18937.) As they struggled, appellant continued to hit her until Keogh became dazed and went limp. (119 RT 18914.) Appellant dragged her to the bed, got on top of Keogh and began to choke her. (119 RT 18915.) When Keogh screamed, he hit her again in the jaw. (119 RT 18915-18916.) Appellant tore off Keogh's clothes and raped her. (119 RT 18918-18919.) She could not push him away as he pounded his fists at her upper chest. (119 RT 18919.)

Keogh was ultimately able to get to a doctor's office to call the police and receive medical attention for her injuries. (119 RT 18925-18928,

18936-18937.) Keogh testified that the photographs accurately depicted the injuries she suffered when she was raped. (119 RT 18916-18917, 18922-18924, 18928.) She confirmed the photograph of appellant, People's Exhibit No. 28, depicted the person who had raped her. (119 RT 18937.)

2. Photographs of Inmate Moody

The prosecution sought to admit two photographs of inmate Louis Moody, People's Exhibit Nos. 32 and 33. (120 RT 19089-19090.) One photograph of Moody showed his full body, lying on a metal slab on an examination table at a medical facility, naked with his eyes closed. The second photograph was a close-up view of his injuries. The defense objected to its admission as unduly prejudicial, describing them as "morgue-like" in its appearance. (120 RT 19090.) The court commented that it did appear that Moody looked "kind of dead lying there." The prosecution argued that the photographs were not overly prejudicial and they showed the nature of the wounds sustained by Moody. (120 RT 19091.) The prosecution was not intending to call Moody as a witness and would stipulate that Moody did not die as a result of the injuries. (120 RT 19091, 19093.) The court found that photographs were not cumulative of oral testimony and where they assist the trier of fact in understanding the facts are admissible, unless they are inflammatory or extraordinarily gruesome. The court added that that the jury had been voir dired on gruesome photographs and had already seen much worse. (120 RT 19092.)

The court, however, found that the photograph of the close-up view of Moody's neck and shoulder area was more gruesome "because you can see the blood better." (120 RT 19093.) In admitting only the full-body photograph (People's Exh. No. 32), the court concluded "so it seems to me the jury doesn't need to see more than one photo, which shows the wounds to the leg as well. So I'm certainly not going to admit more than one photo. But I want to make sure the jury doesn't think he was lying there dying

when this picture was taken. It looks more – he could just be resting, but it has that impression." (120 RT 19092-19093.) The prosecution withdrew People's Exhibit 33, the close-up photograph of Moody's injuries. (120 RT 19094-19095.)

At the penalty phase, Correctional Officers Wolf, Armbright, and Azarte from San Quentin State Prison testified about the incident where appellant assaulted inmate Moody. On May 19, 1985, inmate Moody was being escorted in handcuffs out of the shower in the adjustment center. (120 RT 19104-19106.) Appellant then ran up the tier towards Moody. (120 RT 19106.) Appellant and Moody began wrestling in the entrance to the shower. (120 RT 19107.) Appellant, using an inmate-manufactured weapon, stabbed Moody. (120 RT 19108.) A correctional officer pulled appellant off Moody who was still in handcuffs. (120 RT 19113.) Moody was rushed out of the unit and taken to the hospital for treatment. (120 RT 19125.) Moody suffered puncture wounds on the right shoulder and a few lacerations on his neck and ear. (120 RT 19126.) He was treated at the prison hospital and did not sustain life threatening injuries. (120 RT 19129.)

Officer Azarte identified People's Exhibit No. 32 as showing the injuries he had observed on Moody. (120 RT 19125-19126.) It was stipulated that Moody's injuries were not life-threatening and that he was currently an inmate in the custody of the California Department of Corrections. (120 RT 19129.)

B. Legal Principles

A trial court's discretion in admitting photographs at the guilt phase also applies to a defendant's penalty phase determination. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169 (*Taylor*).) "A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs

their probative value. [Citation.] . . . [P]rosecutors, it must be remembered, are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case. [Citations.]" (*Gurule*, *supra*, 28 Cal.4th at p. 624.) "To determine whether there was an abuse of discretion, [the reviewing court] address[es] two factors: (1) whether the photographs were relevant, and (2) whether the trial court abused its discretion in finding that the probative value of each photograph outweighed its prejudicial effect." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 211-212.)

The question of whether evidence is unduly inflammatory can arise under factor (b) as it does in the guilt phase of a capital case. The penalty jury must decide whether the factor (b) crime actually occurred beyond a reasonable doubt as well as assess its moral weight for purposes of sentencing. (*People v. Box*, *supra*, 23 Cal.4th at p. 1201; see *People v. Robertson* (1982) 33 Cal.3d 21, 53-55.) The factor (b) evidence, even if it fairly depicts the moral blameworthiness of the defendant, may nonetheless be excludable under Evidence Code section 352 insofar as it unfairly persuades jurors to find the defendant guilty of the crime's commission. (*Box*, *supra*, 23 Cal.4th 1153, 1201.)

C. The Photographs Were More Probative than Prejudicial

Here, the trial court did not abuse its discretion in admitting the five challenged photographs related to appellant's crimes against Moody and Keogh because they were relevant and substantially more probative than prejudicial.

The three close-up photographs of Keogh accurately depicted the facial injuries she sustained during the rape – bruises on her forehead, neck and eye, and a swollen lip. These images were relevant to demonstrate the

nature of Keogh's injuries and the violent nature of the sexual assault. Generally, photographs that show the manner in which a victim was wounded are relevant to the determination of malice, aggravation and penalty. (*People v. Wader* (1993) 5 Cal. 4th 610, 655; *People v. Milner* (1988) 45 Cal.3d 227, 247.) Here, the photographs were relevant to the prosecution's penalty phase case under factor (b), as it tended to show criminal activity by the appellant that involved the use of force or violence. The evidence was particularly relevant to show the great violence appellant used on the rape victim. (*People v. McDowell* (1988) 46 Cal.3d 551, 568.)

Moreover, the court carefully weighed the probative value against their prejudicial effect of the photographs, finding that the photographs of Keogh's injuries were not unduly gruesome or inflammatory as to shock the normal juror. (116 RT 18630.) The court correctly observed that the jury had been voir dired on gruesome photographs and had already seen much more shocking images during the guilt phase. (116 RT 18631.) After excluding one photograph as cumulative, the court found the other images were substantially more probative than prejudicial under Evidence Code section 352.

With respect to the photograph of appellant as he appeared at the time of the offense, that evidence was also properly admitted. Appellant's appearance was a factor or circumstance that the jury could consider as a circumstance of the crime. In admitting the evidence, the court stated:

> These photographs are of a young man with long hair. I mean, I don't think – they're not gruesome. He's not horribly scarred or something. He's just the way he looked then. I mean, one photo it seems to me, not two, would be relevant, even if the People are not going to need to establish identity. But it just – it's a pertinent circumstance of the prior crime so I don't think it falls outside the pale of evidence. It's part of the circumstance of the crime, I think, how he looked.

(116 RT 18634.) Again, the court was even-handed in its approach and excluded an additional photograph of appellant offered by the prosecution, finding one such photograph was sufficient evidence. (116 RT 18634.)

Similarly, the photograph depicting inmate Moody after being stabbed by appellant was relevant to show the nature of the victim's injuries. The evidence showed a puncture wound to Moody's right shoulder, lacerations on his neck and ear. Appellant argues that the image of Moody lying on the examination table was morgue-like in appearance and thus unduly inflammatory. The record reflects, however, that the trial court was aware of its duty to weigh the evidence's prejudicial effect against its probative value, and carefully did so. In weighing the evidence, the court again noted that the jury had been voir dired about gruesome photographs and had already viewed much more gruesome photographs. The court found a close-up photograph of the wounds on the neck and shoulder area as more gruesome and bloody, and on that basis excluded that image. The court concluded that the jury did not need to see more than one photograph of the injuries and the full-body photograph was sufficient as it showed the injury on Moody's leg as well. To avoid any prejudicial impact of the jury perceiving that Moody was dead in the photograph, the jury was informed the injuries were not life threatening and Moody was presently alive in the custody of the Department of Corrections.

Appellant further contends the photographs are not the type of victim impact evidence that is permissible at the penalty phase because they provided no new information beyond the testimony of testifying witnesses and their sole purpose was to inflame the passions of the jurors. Appellant is incorrect. The admission of these photographs did not amount to impermissible victim impact evidence. (*People v. Frank* (1990) 51 Cal.3d 718, 735.) Rather, the photographs were properly admitted to assist the jury in evaluating the circumstances surrounding the prior crimes and were

not the type of images that would divert the jury's attention from its proper role or invite an irrational, purely subjective response. (*People v. Edwards* (1991) 54 Cal.3d 787, 836; *People v. Haskett* (1982) 30 Cal.3d 841, 864.)

In sum, the trial court did not abuse its discretion in admitting the five challenged photographs related to Keogh and Moody given that they were substantially more probative than prejudicial under Evidence Code section 352. Because the evidence was properly admitted, appellant's constitutional claims necessarily fail. (*People v. Cole* (2004) 33 Cal. 4th 1158, 1197, fn. 8.)

XVI. THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE FROM DEPUTY TREJO'S FAMILY

Appellant contends that the trial court, in admitting the victim impact testimony from Deputy Trejo's immediate family members and several family photographs, denied appellant a fair and reliable penalty hearing. He argues that the evidence was so excessive, inflammatory and cumulative that it served to unfairly sway the jury to vote for death. Appellant also maintains that the court failed to give a cautionary instruction to inform the jury on how to consider the victim impact evidence. We disagree. The trial court properly admitted the victim impact evidence. Indeed, the testimony and photographs of the Trejo family were not emotionally overwrought but typical of victim impact evidence routinely permitted as a circumstance of the crime under factor (a). Moreover, the court's standard instructions were sufficient to guide the jury in considering the evidence.

A. Background

At the penalty phase, the prosecution sought to offer victim impact testimony from Deputy Trejo's widow and four adult children. Defense counsel objected, arguing that it was more prejudicial than probative based on the purely emotional impact of the testimony. (121 RT 19139- 19140.) He argued the evidence would not assist the jury in making a rational decision between life and death. (121 RT 19141.) Defense counsel contended that the family members were not actually witnesses nor directly victims of the event and the testimony from more than one of the Trejo children was cumulative. (121 RT 19140, 121 RT 19150.) The defense also objected to the admission of photographs of Deputy Trejo and his family while he was alive because they were designed to elicit a purely emotional response from the jury. (121 RT 19144.) The images included Deputy Trejo in his uniform kissing his grandchild, hugging family

members at a graduation, and playing with his grandchildren. (121 RT 19143-19144.)

The prosecution argued that the photographs illustrated Deputy Trejo's very close relationship with each of his children and his playfulness with his grandchildren. (121 RT 19145-19147.) After reviewing the photographs, the court excluded three photographs (People's Ex. Nos. 48-50), two images of Deputy Trejo with babies and one hugging his daughter, as more prejudicial than probative. (121 RT 19148.) The court admitted five family photographs (People's Ex. Nos. 51-55). (121 RT 19149.) The jury then heard victim impact testimony from the deputy's wife and four children.

Debra Trejo, the deputy's 36-year old daughter, described her father as her friend, biggest supporter, and surrogate father to her two children. Debra's children, Harley and Amanda, were three and four years old at the time of his death. (121 RT 19177.) The children's father had left early in their life and Deputy Trejo stepped in to help her raise his grandchildren, spending five days a week with them. (121 RT 19177.) Debra explained how her father's death has affected her ability to raise her children and how she missed his support. (121 RT 19177.) Since his death, Debra's children have become more possessive of her and afraid to let her out of their sight. (121 RT 19177.) Her oldest child has attended some counseling. (121 RT 19177.) Debra also received counseling. (121 RT 19178.) She shared that the holidays have been very difficult without her father. (121 RT 19178.) Debra expressed that everything in her life involved her father, vacations were spent together, and he would help with any problems and give her advice. (121 RT 19178-19179.) She was now struggling to do things on her own. (121 RT 19178-19179.) Debra and her father enjoyed going to movies, drinking coffee, and talking. (121 RT 19179.) Debra identified a photograph of the deputy with her youngest

daughter Harley and one of Debra's sisters at a family barbeque (People's Ex. No. 51). (121 RT 19179-19180.) She indicated that her father liked to play practical jokes and there was a lot of love between him and her children. (121 RT 19181.) Debra identified a photograph of her father as he appeared in March of 1995 (People's Ex. No. 55). (121 RT 19181.)

Dominique Trejo, the deputy's 26-year old daughter, visited her family often from her residence in Sacramento. (121 RT 19182-19183.) She and her father enjoyed going to bookstores together. (121 RT 19184.) Dominique shared that her father's presence was strongly missed at holidays, particularly at Christmas when he would spend time with the grandchildren. (121 RT 19185.) Dominique had a child since her father's death and he never learned that she was pregnant. (121 RT 19186.) She explained that now she is more aware of her personal safety, more hesitant of going into certain areas, and is overprotective of her family. (121 RT 19186.) Dominique shared that her father had a good relationship with each person in their family. (121 RT 19186.) Her own relationship with her father got stronger as he visited her in Sacramento. (121 RT 19186-19187.)

24-year old Michael Trejo, had last seen his father the evening he was killed before his father left for work. (121 RT 19188.) Since they lived in the same house, Michael routinely woke up his father every night at 7:30 p.m. so the deputy could get ready for work. (121 RT 19188.) Michael stated that he and his father had a good relationship and shared interests like collecting guns, watching football, and talking together. (121 RT 19189.) Since his father's death, Michael has viewed himself as the man of the house and has had to grow up quickly to step into his father's role. (121 RT 19189.) Michael's daughter was born a few months after his father was killed. (121 RT 19189.) He shared how much he missed his father's guidance in his life. (121 RT 19190.) Michael indicated that he had to

drop out of junior college and get a full-time job to help raise his child and support his family. (121 RT 19190.) Michael identified a photograph of himself with his younger sister Deanna, his parents, his ex-wife, and three of his nieces. (People's Ex. No. 53). (121 RT 19190-19191.)

Deanna Trejo, the deputy's 20-year old daughter, was living with her parents and raising her daughter Priscilla. (121 RT 19192-19193.) She testified that because her father helped raise her daughter, he and Priscilla were "like best friends." (121 RT 19193.) After her father's death, Deanna had to quit her job because it was difficult emotionally and she did not have anyone to care for her child. (121 RT 19193.) She shared how she and her father enjoyed going to bookstores together and reading magazines. (121 RT 19194.) Since her father's death, Deanna no longer goes to bookstores. (121 RT 19194.) With her father gone, she and her siblings have had to help each other in order take care of the deputy's grandchildren. (121 RT 19194.) Deanna now has a second child and is attending school. (121 RT 19194.) She reflected how the holidays are different without her father. (121 RT 19196.) Deanna indicated that she has received some counseling after his death. (121 RT 19196.) Deanna identified two photographs of herself, her parents and other family members taken at her high school graduation (People's Ex. Nos. 52, 55). (121 RT 19195.)

Barbara Trejo and Deputy Trejo were married for 40 years. (121 RT 19197.) Mrs. Trejo first met the deputy when she was 13 and he was 17 years old. (121 RT 19197.) Every two weeks when her husband got his pay check, they would share meals together, go shopping, and take the grandchildren out. (121 RT 19198.) Since his death, Mrs. Trejo felt there was a piece of her missing. (121 RT 19199.) She has had to return to work and take on added responsibilities. (121 RT 19199.) She has four children and six grandchildren whom she must support on her own. (121 RT 19199.) Mrs. Trejo expressed how much her husband is missed during

holidays, specifically recalling the Father's Day after his death. (121 RT 19199.) She is now more protective of her grandchildren. (121 RT 19200.) They were planning on the Deputy's retirement in March 1996, hoping to travel and enjoy one another. (121 RT 19200.) She indicated that she was not ready to go to counseling. (121 RT 19200-19201.) Mrs. Trejo identified a photograph of the deputy, herself and their granddaughter Amanda taken on Mrs. Trejo's birthday (People's Ex. No. 54). (121 RT 19200-19201.)

B. Legal Principles

In a capital trial, evidence showing the direct impact of the defendant's acts on the victims' friends and family is not barred by the Eighth or Fourteenth Amendments to the federal Constitution. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825-827 (*Payne*).) "Under California law, victim impact evidence is admissible at the penalty phase under factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180 (*Pollock*); *People v. Edwards* (1991) 54 Cal.3d 787, 835-836 (*Edwards*).) But victim impact evidence does not include characterizations or opinions about the crime, the defendant, or the appropriate punishment, by the victim's family members or friends, and such testimony is not permitted. (*People v. Smith* (2003) 30 Cal.4th 581, 622.)

It is well established that "'the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'"

(*Edwards*, *supra*, 54 Cal.3d at p. 836, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864 (*Haskett*).)

C. The Victim Impact Statements of The Trejo Family Were Properly Admitted

Here, the victim impact testimony was both relevant as a circumstance of the crime under factor (a) and was not so voluminous, cumulative, or inflammatory as to divert the jury's attention from its proper role or invite an irrational response. (*Taylor*, *supra*, 26 Cal.4th at p. 1172.) "This court previously has rejected arguments 'that victim impact evidence must be confined to what is provided by a single witness [citation], that victim impact witnesses must have witnessed the crime [citation], and that such evidence is limited to matters within the defendant's knowledge. . . .'" (*McKinnon*, *supra*, 52 Cal.4th at p. 690.) Indeed, the "People are entitled to present a '"complete life histor[y] [of the murder victim] from early childhood to death."'" (*People v. Garcia* (2011) 52 Cal.4th 706, 751.) The prosecution is also entitled to present the full impact of the victim's death on his or her survivors.

Contrary to appellant's argument, the victim impact evidence here was not unfairly excessive or cumulative. Mrs. Trejo and the four children each testified about the significance of Deputy Trejo's love and guidance in their individual lives. Debra shared how her father was her biggest supporter and the close relationships he developed with her two children as their surrogate father. Dominique indicated how her relationship with her father grew stronger even while she was living in Sacramento. Michael testified that he has had to step up as the man of the household since his father's death. Since Deanna was living with her parents, her father helped to raise her daughter. After his death, however, Deanna had to quit her job because it was difficult emotionally and she did not have childcare. Each Trejo child explained the special relationship she or he had with their father

and their resulting loss. Mrs. Trejo testified about her relationship with the deputy as his spouse of 40 years. The Trejo family also expressed that they were more protective of their family members since the deputy's death, had experienced difficulty in raising the grandchildren without his help, and some, but not all, had sought counseling. Although the Trejo family shared a united feeling of loss for Deputy Trejo, as would be expected in any loving family, the victim impact testimony was also unique as to each individual's life experience. Thus, the trial court properly admitted the evidence from the deputy's wife and four children.

Appellant's claim that the victim impact evidence was emotionally overwrought should also be rejected. Although the evidence from the family was heartfelt, it was not so inflammatory as to unfairly sway the jury to sentence appellant to death. Certainly, the testimony was not as dramatic or heart-wrenching as in other cases involving permissible victim impact evidence. (See, e.g., *People v. Scott* (2011) 52 Cal.4th 452, 466–467, 494-495 [victim's father testified he could not stop thinking about what the victim endured before she died; victim's sister, brother and brother-in-law testified to their residual fear following the murder]; *Booker*, *supra*, 51 Cal.4th at p. 193 [testimony by victim's mother about her suicide attempt and hospitalizations "was relevant victim impact evidence"]; *People v. Cowan*, *supra*, 50 Cal.4th at p. 485 [testimony by victims' daughter and granddaughter about what they imagined the last moments of victims' lives were like "was relevant to the witnesses' own states of mind and the effect that the murders had upon them personally, and therefore was permissible victim impact testimony"]; *People v. Ervine* (2009) 47 Cal.4th 745, 793 (*Ervine*) [victim impact testimony is not limited "to expressions of grief" but "encompasses the spectrum of human responses, including anger and aggressiveness [citation], fear [citation], and an inability to work [citation]"].) Given the substance of the Trejo family's testimony, it was

far from being inflammatory and unduly prejudicial. "The evidence here came well within permissible limits and, indeed, was very typical of the victim impact evidence [this Court] routinely permit[s]." (*People v. Valencia* (2008) 43 Cal.4th 268, 300 (*Valencia*); see also *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at pp. 986-987, 1057.)

Moreover, the trial court placed reasonable limits on the family's testimony, where each member would testify only as to how the deputy's death impacted them individually and not about the other family member's experience. (121 RT 19153.) They were not to testify about the deputy's memorial at the Santa Rosa Saddlery or about how they learned of his death. (121 RT 19153.) The court excluded any testimony about the deputy's hobbies and interests that he enjoyed separately from his family. (121 RT 19154.) As shown,"the victim-impact evidence of this case was unremarkable given the nature of [appellant's] crime. It was entirely admissible." (*People v. Weaver* (2012) 53 Cal. 4th 1056, 1086.)

D. The Family Photographs Were Properly Admitted

Contrary to appellant's claims, the court did not err in admitting five photographs depicting Deputy Trejo with his wife, children and grandchildren. "Although emotion must not 'reign over reason' at the penalty phase [citations], photographs of the victims of the charged offenses are generally admissible." (*People v. Carpenter*, *supra*, 15 Cal.4th at pp. 400-401.) The photographs showed the deputy with his family, interacting with his grandchildren, and celebrating his daughter's graduation. Here, the photographs of ordinary family events were factual, relevant, and not unduly emotional or sentimental. They served simply to "humanize[]" the victim, "as victim impact evidence is designed to do." (*Kelly*, *supra*, 42 Cal.4th at p. 797; *People v. Verdugo* (2010) 50 Cal.4th 263, 298.) As such, the photographs were well within the court's discretion to admit into evidence. The trial court moreover carefully exercised that

discretion. Although it admitted five family photographs, the court excluded three photographs showing Deputy Trejo with his grandchildren as babies and hugging on of his daughters. (121 RT 19148.) Accordingly, appellant's claim that the court abused its discretion in admitting the family photographs should be rejected.

Given that the evidence was more probative than inflammatory, appellant's argument that the victim impact evidence was unduly prejudicial under Evidence Code section 352 also fails.

E. Appellant's Constitutional Challenges to Victim Impact Evidence Fail

Appellant argues that the broad inclusion of victim impact evidence as a circumstance of the crime has rendered factor (a) unconstitutionally vague and overbroad. However, as appellant acknowledges such constitutional challenges have been previously addressed and rejected by this Court. (See *Tully*, *supra*, 54 Cal.4th at p. 1031; *McKinnon*, *supra*, 52 Cal.4th at p. 690.) This Court has explicitly held: "The introduction of victim impact evidence in capital cases does not violate any rights guaranteed by the United States Constitution . . . In *Payne*, the United States Supreme Court explained that '"[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."' [Citation.] 'We have followed the high court's lead [citation] and have also found such victim impact evidence admissible as a circumstance of the crime pursuant to section 190.3, factor (a) [citation].' [Citation.]" (*People v. Mills* (2010) 48 Cal.4th 158, 211 (*Mills*).) "'Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime

under section 190.3, factor (a).' [Citation.] 'The federal Constitution bars victim impact evidence only if it is "so unduly prejudicial" as to render the trial "fundamentally unfair."' [Citation.]" (*Bramit*, *supra*, 46 Cal.4th at p. 1240; see *People v. Stitely* (2005) 35 Cal.4th 514, 565 (*Stitely*.) " [V]ictim impact testimony is not limited to the victims' relatives or to persons present during the crime ... .' [Citation.]" (*Mills*, *supra*, 48 Cal.4th at p. 213.) Nor is victim impact evidence "limited to circumstances known or foreseeable to the defendant at the time of the crime." (*Bramit*, *supra*, 46 Cal.4th at p. 1240; see *Pollock*, *supra*, 32 Cal.4th at p. 1183 ["We have approved victim impact testimony from multiple witnesses who were not present at the murder scene and who described circumstances and victim characteristics unknown to the defendant. [Citation.]"].) There is no reason to revisit these decisions. As such, appellant's constitutional claims are without merit.

F. No Cautionary Instruction on Victim Impact Evidence was Required

Appellant contends the trial court erred in not giving the jury a cautionary instruction on how to consider victim impact evidence. The defense proposed the following additional instruction to CALJIC No. 8.85:

> Evidence has been introduced in this case that may arouse in you a natural sympathy for a victim or a victim's family. Such evidence, was not received and may not be considered by you to divert your attention from your proper role in deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(25 CT 5148.) The prosecution objected to the proposed instruction. (123 RT 19393.) In denying the proposed instruction, the court indicated, "This is a good description of why [victim impact testimony] came in [*sic*] in the first place. It's the subject of legitimate argument. I, as the Court, am not going to instruct the jury in accordance with this [proposed instruction]. I don't believe that it would be proper for me to do so. And it would demean that evidence, in my view. So I'm not going to give this proposed instruction." (123 RT 19393.) Appellant argues that without the cautionary instruction, there was a risk that the victim impact evidence unfairly tainted the jury's sentencing decision to impose death based on purely emotion. We disagree.

As appellant acknowledges, this Court has repeatedly rejected similar cautionary instructions as duplicative, potentially confusing and misleading. (See *People v. Thomas* (2012) 53 Cal.4th 771 (*Thomas*), 825-826; *People v. Zamudio* (2008) 43 Cal.4th 327, 368-370; *People v. Harris* (2005) 37 Cal.4th 310, 359; *People v. Ochoa* (2001) 26 Cal.4th 398, 455 (*Ochoa*).) Appellant provides no legal grounds for this Court to reconsider its prior decisions.

As affirmed in *People v. Tate* (2010) 49 Cal. 4th 635, 708, it is not error for a trial court to refuse an instruction substantially identical to that offered by appellant. The proffered instruction is misleading insofar as it suggests the jury may not be moved by sympathy for the victims and their survivors. (*Ibid.*) "The proposed instruction misstated the law in asserting that the jury, in making its penalty decision, could not be influenced by sympathy for the victims and their families engendered by the victim impact testimony. Although a jury must never be influenced by passion or prejudice, a jury at the penalty phase of a capital case may properly consider in aggravation, as a circumstance of the crime, the impact of a capital defendant's crimes on the victim's family, and in so doing the jury

may exercise sympathy for the defendant's murder victims and for their bereaved family members." (*Pollock*, *supra*, 32 Cal.4th at p. 1195, citing *People v. Stanley* (1995) 10 Cal.4th 764, 831- 832.) Moreover, the standard instructions found in CALJIC Nos. 8.85 and 8.88, as given by the trial court (26 CT 5305-5307, 5337-5338), adequately conveyed to the jurors the proper consideration and use of victim impact evidence. (*People v. Carrington* (2009) 47 Cal.4th 145, *Valencia*, *supra*, 43 Cal.4th at p. 310; *Ochoa*, *supra*, 26 Cal.4th at p. 455.) Given this Court's prior decisions and the trial court's proper instructions to the jury, no additional victim impact instruction was required.

XVII. THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE FROM KAREN KING AND FRANK COOPER

A. Background

In addition to challenging the victim impact evidence discussed above, the defense objected to testimony from Karen King and Frank Cooper as victims of burglary, false imprisonment, and (as to Cooper) assault with a firearm committed by appellant a few hours following the deputy's murder. Defense counsel argued that victim evidence related to the non-capital crimes did not fall under factor (a) and, even if admissible, should also be excluded as more prejudicial than probative under Evidence Code section 352. (115 RT 18442-18444; 121 RT 19160-19164.) Arguing that there was no evidence that the crimes were racially motivated, defense counsel moved to exclude any testimony by Karen King on how the crimes impacted her because they were committed by a person of appellant's race. (121 RT 19162-19164.)

The trial court overruled the objections, finding that evidence of the emotional effect of crimes by appellant on victims other than victims in the current case was admissible. (121 RT 19161.) The court noted the crimes against the Cooper/Kings occurred the very night of the homicide. (121 RT 19161.) In permitting Karen King to testify about how the crimes impacted her current reaction to White people, the court observed " . . . it is one of those you take your victim as you find them situation . [Appellant] happened to break into a house occupied by African-Americans, and they have a different reaction, possibly, apparently Karen does, than a white [*sic*] family might have had, so I don't think that she should be limited from testifying to that reaction." (121 RT 19163.) As such, the court admitted the following victim impact evidence from Karen King and Frank Cooper:

Frank Cooper, who was 68 years old at the time of trial, testified that, since the hostage incident, his health had deteriorated and he did not feel like doing much of anything. (121 RT 19167-19168.) He has been more tired, and no longer buys and sells auto parts and works like he had done in the past. (121 RT 19167-19168.) As a result, his family has suffered financial hardship. (121 RT 19167-19168.) He has been afraid to get out and roam around. (121 RT 19168.) Cooper indicated that he has done more to secure the safety of his home and his family. (121 RT 19169.) He installed a double night-latch on the doors and placed a steel door on the outside entrance way. (121 RT 19169.) Cooper stated that if he hears noises at night, he gets up and is nervous, and checks the house to make sure everything is secure. (121 RT 19169-19170.) He is now more nervous, takes new medication and has changed the way he lives. (121 RT 19169.)

Karen King testified that since the hostage incident, she has not been able to sleep well due to stress and has been taking sleep medication. (121 RT 19171.) She wakes up in the middle of the night to make sure the doors and windows are secure and places furniture in front of her door to make sure it is locked. (121 RT 19171.) Karen has since moved out of the family residence and has not returned because she is afraid. (121 RT 19171-19172.) The incident has impacted her relationship with her mother, and now they are not close as the once were and are communicating less often. (121 RT 19172.) Karen indicated that relationship with her children has also changed. (121 RT 19172.) Her son does not listen to her and her daughter spends most of the time with her grandmother because Karen is too stressed and nervous to care for her. (121 RT 19172.) Karen stated that she stays in the house more and is afraid to meet new people, particularly White people, which was not the case before the crimes. (121 RT 19172-

19173.) She is smoking more now and started drinking alcohol to calm her nerves. (121 RT 19173.)

B. The Cooper/King Victim Impact Testimony Was Properly Admitted under factor (b)

Appellant contends that the admission of Karen King and Frank Cooper's testimony as victim impact evidence from non-capital crimes violated his rights to a fair and reliable penalty determination. He maintains that the crimes against the Cooper/Kings were not relevant to the circumstances of the crime under factor (a) and were not "other crimes" for which appellant was not tried in this proceeding under factor (b). Contrary to appellant's argument, it is well established that victim impact evidence from crimes other than the capital homicide is admissible at the penalty phase. (*Bramit*, *supra*, 46 Cal.4th at p. 1241; *People v. Brady* (2010) 50 Cal.4th 547, 581-582.) This includes continuing victim impact from crimes for which appellant was tried and convicted in the present proceeding and victim impact from prior crimes involving force or violence. Both are considered admissible under factor (b). Although the impact of appellant's crimes on the Cooper/Kings was not relevant to the circumstances of the capital crime under factor (a), it was relevant and admissible as "evidence of the emotional effect" of appellant's other violent criminal acts under factor (b). (*People v. Redd* (2010) 48 Cal. 4th 691, 745-746 ; *People v. Martinez* (2010) 47 Cal.4th 911, 961; *People v. Price* (1991) 1 Cal.4th 324, 479.) This Court has previously rejected the contention that such evidence violates the Eighth Amendment. (*People v. Davis*, *supra*, 46 Cal.4th at pp. 617-618.) Further, appellant's reliance on out-state-cases to exclude victim impact evidence related to the non-capital crimes is not controlling here. Given that there is no reason for this Court to reconsider its prior decisions and the trial court properly admitted the Cooper/King victim impact evidence, appellant's claim should be rejected.

Finally, appellant's argument that the Cooper/King evidence was more prejudicial than probative under Evidence Code section 352 is also unpersuasive. The evidence was highly probative of the effect of appellant's criminal acts under factor (b). It was not so inflammatory or emotional overwrought to warrant its exclusion. Both Cooper and King testified to the continuing impact of being taken hostage in their home by appellant. Their responses were not overly shocking or emotionally-laden but included inability to sleep, stress, anxiety, lack of motivation to work, fear of going outside and meeting strangers, and overprotectiveness of their home and family. Similarly, Karen King's apprehension of White people after the crimes was also unremarkable. Although appellant characterizes the evidence as racially-charged, the testimony on the issue was very brief and raised no improper references that the crimes against the Cooper/Kings were racially-motivated. The prosecution did not capitalize on the remark or advocate racial animus. As such, the Cooper/King victim impact evidence was properly admitted and not reasonably likely to have unfairly skewed the jury toward death.

C. No Prejudice

Even if it was error for the trial court to admit the challenged victim impact evidence, including the testimonies of Keogh, Moody, the Trejo family, Cooper, and King, and related photographs, the error was harmless under both state and federal law. Given that the aggravating factors in this case greatly outweighed any mitigating evidence, the jury's sentencing decision would not have been altered had this evidence not been admitted. The circumstances of the deputy's premeditated and deliberate murder under factor (a) coupled with appellant's numerous prior acts of force or violence including robbery, rape, and assault under factor (b) overwhelmingly supported the jury's decision. The mitigating evidence – the absence of a supportive father, an unstable family life, a troubled

adolescence, early substance abuse, and the effects of long-term SHU incarceration – was on balance not substantially compelling in this case. As such, there is no reasonable possibility that any error by the trial court in admitting the victim impact evidence or failing to give a cautionary instruction affected the jury's death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448 (*Brown*)). Indeed, due to the great weight of the aggravating circumstances, any error alone or cumulatively, was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

XVIII. THE TRIAL COURT DID NOT ERR IN REFUSING APPELLANT'S PROPOSED INSTRUCTIONS ON THE SCOPE OF MITIGATING EVIDENCE, THE JURY'S SENTENCING DISCRETION, AND MERCY AS A CONSIDERATION

Appellant argues that the trial court erred in not giving several proposed instructions during the penalty phase related to the scope of mitigating circumstances, the nature and scope of the jury's sentencing discretion, and the jury's exercise of mercy in its sentencing decision. Appellant contends that the trial court's denial of these instructions violated his constitutional rights to a fair penalty trial and a reliable penalty determination. These arguments are without merit. The requested instructions were either duplicative or unnecessary in light of the standard instructions that were given which sufficiently guided the jury during the penalty phase.

A. The Trial Court Properly Instructed the Jury on the Scope of Mitigating Circumstances

1. Definition of mitigating factors

The trial court properly denied several of appellant's proffered instructions related to the jury's weighing of aggravating and mitigating circumstances. (126 RT 19708.) As an alternative to CALJIC No. 8.88, appellant proposed the following instruction defining mitigating factors:

> Now I will explain to you what the legal term "mitigating factors" means in a case like this. Mitigating factors are the opposite of aggravating factors. That is, in a criminal case such as this one, a "mitigating factor" is any evidence regarding the defendant's character, background or history or the circumstances of that crime that, in your judgment, makes a sentence of LWOP more appropriate for this defendant than a sentence of death.
>
> To decide that something is a mitigating factor which would lessen the penalty, you do NOT have to believe that it excuses or justifies the crime itself.

> The law permits each juror to decide for himself or herself whether mitigating factors exist. Although the jury as a whole can of course discuss these matters, the decision about what counts as a mitigating factor in this case is one which the law leaves to the individual juror. Because of this, the jury does NOT need to reach a unanimous decision about what counts as a mitigating factor.

(25 CT 5182, emphasis in original.) The court denied appellant's instruction, finding CALJIC No. 8.88 was not deficient. (126 RT 19709.)

Appellant claims that CALJIC No. 8.88's definition of mitigating circumstances was confusing and difficult for jurors to understand. The standard instruction provides: "A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (26 CT 5337; 128 RT 19875.) Appellant contends that according to empirical research on the subject, the terms "aggravating", "mitigating", and "extenuating" as used in CALJIC No. 8.88 are not easily understood by educated individuals. (AOB 550-551.) However, as appellant acknowledges, this Court has previously rejected challenges based on such studies finding CALJIC No. 8.88 is sufficiently clear. "'The presumption that the jurors in this case understood and followed the mitigation instruction to them is not rebutted by empirical assertions to the contrary based on research that is not part of the present record and has not been subject to cross-examination.'" (*People v. Jackson* (2009) 45 Cal.4th 662, 695, quoting *People v. Welch*, *supra*, 20 Cal.4th at p. 773.) Appellant's argument that these cases should be reconsidered is unpersuasive. As such, the court was not required to replace CALJIC No. 8.88's definition of mitigating circumstances with appellant's proposed instruction.

In the alternative, appellant requested the following as an addition to CALJIC No. 8.88:

> Mitigating factors are the opposite of aggravating factors. That is, in a criminal case such as this one a mitigating factor is any evidence regarding the defendant's character or the circumstances of the crime that in your judgment makes a sentence of life imprisonment without the possibility of parole more appropriate for this defendant than a sentence of death. In order to that decide that something is a mitigating factor which would lessen the penalty you do NOT have to believe that it excuses or justifies the crime itself.
>
> The law says that you can decide something is a mitigating factor even if the instructions do not mention it specifically and even it is not similar to any of the specific mitigating factors mentioned in these instructions or in the arguments of counsel.

(25 CT 5191, emphasis in original.)

Appellant contends this proposed instruction clarified the meaning of mitigating factors by using understandable language. As with the first proposed instruction, the court properly denied this additional instruction as duplicative of CALJIC No. 8.88. (126 RT 19709; 19729.) This Court has repeatedly held that the standard version of CALJIC No. 8.88 is adequate and correct. (*People v. Souza* (2012) 54 Cal. 4th 90; *Boyette*, *supra*, 29 Cal.4th at pp. 464-465; *Gutierrez*, *supra*, 28 Cal.4th at pp. 1160-1161; *Gurule*, *supra*, 28 Cal.4th at pp. 661-662.) Appellant has advanced no persuasive reason for these cases to be reconsidered. Thus, the trial court did not err in giving CALJIC No. 8.88 as written.

2. Scope of mitigating evidence

Next, appellant proffered the following instruction to emphasize that defendant's background could only be considered as a mitigating factor:

> The permissible aggravating factors are limited to those aggravating factors upon which you have been specifically instructed. Therefore, the evidence which has been presented regarding the defendant's background, character, and personal history may only be considered by you as mitigating evidence.

(25 CT 5163.)

In the alternative, appellant suggested that the first sentence be omitted to avoid any duplication with CALJIC No. 8.85. (126 RT 19684.) However, the court denied the entire proposed instruction, finding it duplicative. The court further indicated that it was not required to enumerate which are mitigating and which are aggravating factors and that any specific reference to appellant's background was more appropriate for argument by counsel. (126 RT 19684-19685.)

Appellant contends that the prosecutor's closing statement exacerbated the harm of the omitted instruction because he argued that appellant's background and history warranted death. (AOB 554.) However, appellant mischaracterizes the prosecutor's argument as advocating that appellant's background should be used as an aggravating factor. The record shows that the prosecutor challenged some of appellant's mitigating evidence including his long-term SHU incarceration and dysfunctional early childhood as being less than compelling, and argued instead that the aggravating circumstances greatly outweighed the mitigating factors such that a sentence of death was appropriate. (128 RT 19906-19916.) Indeed, the prosecutor reminded the jury that it could not regard the absence of a mitigating factor as an aggravating factor:

> Now, the fact that there may be a mitigating factor that doesn't exist in your own mind, you have to remember that the absence of that doesn't mean that the opposite is true, that it must be regarded as an aggravating factor. You can't do that. Okay? You either find out whether or not it applies. If it does, you apply it. If it doesn't, you just leave it alone. You don't say, okay, now I'm going to consider that as an aggravating factor.

(128 RT 19910.)

Here, the trial court properly denied appellant's proposed instruction as duplicative. CALJIC No. 8.85 sufficiently informed the jury that the permissible aggravating factors were limited to those listed in the

instruction. The jury was informed that "[t]he factors in the above list which you determine to be aggravating circumstances are the only ones which the law permits you to consider. You are not allowed to consider any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case." (26 CT 5306-5307; 128 RT 19860.) It is presumed that the jury understood and followed this instruction. Further, it was not necessary for the court to designate which sentencing factors were mitigating and which were aggravating. (*Taylor*, *supra*, 26 Cal.4th at p. 1180; *People v. Lewis*, *supra*, 26 Cal.4th at p. 395.) As such, the court was not required to specifically instruct that appellant's background could only be considered as a mitigating circumstance.

3. Extreme mental or emotional disturbance as a mitigating factor

Appellant proposed two instructions related to extreme mental or emotional disturbance as a mitigator as set out in 190.3, factor (d)[27]. The first proffered instruction stated:

> The mental and emotional disturbance referred to in this instruction is not limited to evidence which excused the crime or reduced defendant's culpability, but includes any degree of mental or emotional disturbance which a juror determines is of a nature that death should not be imposed. Even if a juror concluded that such evidence was not sufficient to reduce the degree of guilt, the evidence may still be sufficient for consideration as a mitigating factor in deciding the appropriate penalty.

(25 CT 5169.) The second proffered instruction provided:

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[27] As set out in CALJIC No. 8.85, factor (d) provides: "Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." (26 CT 5305.)

> A mental or emotional disturbance may be considered as a factor in mitigation even if it did not actually impair the defendant's mental capacity at the time of the offense.

(25 CT 5171.) Appellant requested that alternatively, this second instruction be given in reference to factor (k)[28]. The court denied both instructions as duplicative of CALJIC No. 8.85. (126 RT 19699-19702.)

In addition, appellant proposed that the following instruction be added to factor (h):

> A mental disease or mental defect may be considered as a factor in mitigation even if it did not actually impair the defendant's mental capacity at the time of the offense.

(25 CT 5177.) Factor (h), as given in CALJIC No. 8.85, provides:

> Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to

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[28] As set out in CALJIC No. 8.85, factor (k) provides in relevant part:

> Any other circumstance which mitigates the gravity of the crime even though it is not a legal excuse for a the crime and any sympathetic, compassionate, other aspect of the defendant's background, character, or record or social, psychological history that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle. These aspects of the defendant and his background include but are not limited to:
>
> Whether the defendant committed the offense while under the influence of a mental or emotional disturbance, which disturbance needs to be extreme or amount to legal insanity or an inability to form a specific intent;
>
> Whether the defendant suffered any emotional or psychological problems as an adolescent or young adult that prevented him from acquiring necessary social skills and maturity;
>
> [¶] . . . [¶]
>
> and [t]he defendant's history of alcohol, drug and/or narcotic addiction. (26 CT 5305.)

> conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(26 CT 5305.)

In an additional instruction related to factor (d), appellant requested the following language:

> It is now well settled that mental or emotional disturbance may result from any cause or may exist without apparent cause. For this mitigating factor to exist, it is sufficient that the defendant's mind or emotions were disturbed, that is, interrupted or interfered with, from any cause whether from long-term addiction, extensive incarceration in maximum security prisons and security housing units and/or any other cause.
>
> In deciding whether defendant suffered from a mental or emotional disturbance you should consider all of the relevant circumstances in which the defendant found himself. These circumstances include but are not limited to the impact of chemical addictions and long-term incarceration in maximum security prisons.
>
> If you decide that Defendant Scully was under the influence of extreme mental disturbance at the time of the murder you may consider that as mitigating under this factor.
>
> If you decide either that the disturbance was less than extreme or that it was operative earlier in his life but not the time of the murder then you may consider this as mitigating under factor (k).

(25 CT 5167.)

Appellant argues his proposed instructions related to factors (d), (h), and alternatively (k) were not duplicative but rather explained to the jury that evidence of mental disease or defect, or the effect of intoxication could be considered as a factor in mitigation even if it did not rise to the level of extreme mental disturbance at the time of the offense. These instructions were properly denied. This Court has repeatedly rejected similar claims, holding that the catchall factor (k), referring to "any other circumstance

which extenuates the gravity of the crime," allows consideration of non-extreme mental or emotional conditions. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1227; *People v. Ghent* (1987) 43 Cal.3d 739, 776.) As such, the court was not required to supplement the language of CALJIC No. 8.85.

Lastly, appellant sought pinpoint instructions related to factor (h). The first proposed instruction read:

> In deciding whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired by mental disease, mental defect, or intoxication you should consider all the relevant circumstances in which the defendant found himself. These circumstances include but are not limited to the impact of chemical addictions and long-term incarceration in maximum security prisons.

(25 CT 5173.)

The second proposed instruction provided:

> The mental defect, mental disease or intoxication referred to in this instruction is not limited to evidence which excuses the crime or reduces the defendant's culpability, but includes any degree of mental defect, disease or intoxication which a juror determines is of a nature that death should not be imposed. Even if a juror concluded that such evidence was not sufficient to reduce the degree of guilt, the evidence may still be sufficient for consideration as a mitigating factor in deciding on the appropriate penalty.

(25 CT 5175.)

Appellant maintains that these proposed pinpoint instructions correctly stated applicable law and directly supported the theory of his penalty case that he was under the influence of an "extreme mental disturbance." (AOB 561.) Appellant specifically points to the effects of long-term SHU incarceration, evidence of his intoxication at the time of the crime, and history of chemical addictions. He contends the court's instructions failed to inform the jurors that even if they found that

appellant's impairments did not rise to the level of an "extreme mental disturbance" that the evidence could still be considered as a mitigating factor in their penalty decision. As a result, the court's failure to give appellant's proposed instructions violated his constitutional rights to a fair and reliable penalty determination. Appellant is incorrect.

Appellant's proposed instructions were largely duplicative of CALJIC No. 8.85 and argumentative. It is well settled that CALJIC No. 8.85 is both a correct and an adequate explanation of how jurors should consider aggravating and mitigating factors. (*People v. Virgil* (2011) 51 Cal. 4th 1210, 1279; *People v. Howard*, *supra,* 51 Cal.4th at pp. 38-39; ; *People v. Lomax* (2010) 49 Cal.4th 530, 593 (*Lomax*); *People v. Butler* (2009) 46 Cal.4th 847, 875 (*Butler*).) Accordingly, the court had no obligation to give pinpoint instructions on the extent to which mental or emotional disturbance could be used as mitigating evidence. (See *Riggs*, *supra*, 44 Cal.4th at pp. 328-329.)

B. Special Instructions on the Scope of the Jury's Discretion were Not Required

Appellant requested several instructions related to the scope of the jury's discretion. He contends that his proffered instructions would have clarified for the jury the nature of the weighing process involved in its penalty determination. Appellant is mistaken given that the court's standard instructions sufficiently informed the jury of the scope of their sentencing discretion.

1. Felony-murder special circumstance

Appellant requested the following instruction related to the felony-murder circumstance be added to CALJIC No. 8.85:

> The finding of a felony-murder special circumstance makes the death penalty no more mandatory than the finding of any other special circumstance. Under our penalty scheme, the jurors must weigh the factors in aggravation and mitigation to

> determine penalty. Thus, defendants with a felony-murder special circumstance should be subject to no greater chance of receiving the death penalty than any other defendant against which a special circumstance finding has been made.

(25 CT 5162.) The court questioned whether jurors would necessarily give the felony-murder greater weight as an aggravating factor in imposing a death sentence. (126 RT 19684.) The court commented: "I don't understand this. Why would they – why would they assume that? It might be the other direction, as a matter of fact . . . . They might think that if a felony murder were the only theory they had found the defendant guilty of. Well, you know, he didn't intend to kill anybody, maybe, and so, you know – but they didn't, for one thing. And secondly, I just don't understand the basis of – the logical basis for [the instruction]." (126 RT 19685.) The court denied the instruction reasoning that felony-murder was not the only theory that the prosecution had charged or the jury had found. (126 RT 19684.)

Appellant argues that the instruction was intended to prevent the jury from giving undue weight to the felony-murder special circumstance as an aggravating factor. However, the instruction was properly denied as potentially confusing. This Court has held that consideration of a special circumstance finding in aggravation does not permit the sentencer unbridled discretion that is weighted in favor of death. (*Moon* , *supra*, 37 Cal.4th at pp. 40-41.) Given that the use of a felony-murder special circumstance finding as an aggravating factor does not subject the defendant to a greater likelihood of being sentenced to death than a defendant against whom some other special circumstance allegation has been found true (*People v. Gates* (1987) 43 Cal.3d 1168, 1188-1189), the court was not required to instruct the jury not to give the felony-murder special circumstance undue weight in aggravation.

2. Death as a more severe punishment than LWOP

Appellant also proffered an instruction specifying that death is a more severe punishment than LWOP:

> Some of you expressed the view during jury selection that the punishment of life in prison without the possibility of parole was actually worse than the death penalty.
>
> You are instructed that death is qualitatively different from all other punishments and is the ultimate penalty in the sense of the most severe penalty the law can impose. Society's next most serious punishment is life in prison without the possibility of parole.
>
> It would be a violation of your duty, as jurors, if you were to impose the penalty of death with a view that you were thereby imposing the less severe of the two available penalties.

(25 CT 5137.)

The court found such an instruction was improper in that it referenced statements certain jurors may have made during jury selection. (123 RT 19371-19372.) The court noted that the jurors had already been extensively voir dired about the relative gravity of each of the punishments, and affirmed their duty to vote in accordance with the law. (123 RT 19371-19372.) Further, the proposed instruction was unnecessary in light of the court's other instructions informing the jury that circumstances in aggravation must substantially outweigh those in mitigation in order to impose death. (123 RT 19371-19372.) Implicit in those instructions is the principle that death is the most severe penalty that could be imposed. As such, the court did not err in refusing appellant's proposed instruction. (*People v. Jones* (2012) 54 Cal.4th 1, 80-81; *People v. Cowan*, *supra*, 50 Cal.4th at pp. 500-501; *People v. Harris*, *supra*, 37 Cal.4th 310 at p. 361; see also *People v. Tate*, *supra*, 49 Cal.4th at pp. 706-707.)

3. No parole eligibility

Appellant requested the following instruction informing the jury that parole was not a possibility in this case:

> Some notorious cases, which occurred under older provisions of law, appear in the news from time to time with parole hearings for defendants convicted in those cases. Those cases have no significance in relation to your penalty decision in this case, because they were tried under provisions of law which have been replaced, and which have no application to the defendant in this trial.
>
> If you are aware of any such cases, you are instructed to disregard them and to remember that your penalty decision in this case as to this defendant is governed by the law existing today, which has been stated for you in these instructions.

(25 CT 5139.) In denying the instruction, the court noted it had already informed prospective jurors at the beginning of trial that jurors should assume the sentence they impose will be carried out. (123 RT 19374.) Appellant claims that the given the length of the trial, the court should have repeated the instruction in its final charge to the jury.

However, the jury was instructed in accordance with CALJIC No. 8.84 which specifies that "the penalty for a defendant found guilty of murder of the first degree shall be death or imprisonment in the state prison for life without possibility of parole." (26 CT 5304.) This Court has consistently held that "the phrase 'life without possibility of parole' as it appears in CALJIC No. 8.84 adequately informs the jury that a defendant sentenced to life imprisonment without possibility of parole is ineligible for parole" and nothing alters that conclusion. (*People v. Duenas* (2012) 55 Cal. 4th 1, 28; *People v. Wallace* (2008) 44 Cal.4th 1032, 1091.) This Court has thus rejected claims suggesting that jurors do not understand that life without the possibility of parole actually means no possibility of parole. (*Ervine*, *supra*, 47 Cal.4th at p. 798; *Lindberg*, *supra*, 45 Cal.4th at p. 53.)

In light of these decisions, the trial court was not required to instruct the jury further.

C. An Instruction on Mercy was Not Required

The trial court denied appellant's proposed instruction on mercy which provided: "In determining whether in light of all the circumstances a sentence of death is appropriate, you may decide to exercise mercy on the defendant." (25 CT 5185; 126 RT 19675.) Appellant argues that the court erred in not giving this instruction. We disagree. This Court has consistently held that instructions on mercy are properly denied. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1298; *People v. Leonard*, *supra*, 40 Cal.4th at p. 1420; *People v. Ledesma* (2006) 39 Cal.4th 641, 739.) There is no basis for reconsideration of these decisions.

Moreover, the jury here was instructed with CALJIC No. 8.85, factor (k) which directs the jury to consider "any other circumstance which mitigates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic, compassionate, or other aspect of the defendant's background, character, or record or social, psychological history that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (26 CT 5306.) Thus, CALJIC No. 8.85 adequately instructed the jury concerning the circumstances that may be considered in mitigation, including any sympathetic or compassionate aspect of the defendant's history. (*People v. Ervine*, *supra*, 47 Cal.4th at p. 801; *People v. Burney* (2009) 47 Cal.4th 203, 261.) No separate mercy instruction was required.

D. No Prejudice

Even if the trial court erred in not giving appellant's proposed instructions on mitigating factors, the scope of the jury's discretion, and mercy as a consideration, appellant suffered no prejudice. State law error at

the penalty phase of a capital case requires reversal only when there is a "reasonable (i.e., realistic) possibility" the error affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) That standard is "the same, in substance and effect," as the harmless-beyond-a-reasonable-doubt standard under *Chapman*. (*Chapman*, *supra*, 386 U.S. at p. 24; *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11; *People v. Ochoa* (1998) 19 Cal.4th 353, 479.) Here, any instructional error was harmless under either standard. The instructions that were given, CALJIC Nos. 8.85 and 8.88, as a whole, properly informed the jury of its duty to weigh aggravating and mitigating circumstances in determining the appropriate penalty. It should be presumed the jurors followed these instructions. (*People v. Smith* (2007) 40 Cal.4th 483, 517; *People v. Waidla* (2000) 22 Cal.4th 690, 725.) In light of the overwhelming nature of the aggravating evidence, there is no reasonable possibility that any instructional error, alone or cumulatively, affected the penalty verdict. (*Brown*, *supra*, 46 Cal.3d at pp. 447-448.) Indeed, any such error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

XIX. APPELLANT'S CONSTITUTIONAL ATTACKS ON CALIFORNIA'S SENTENCING SCHEME MUST BE REJECTED

Appellant challenges the California's sentencing scheme on various constitutional bases. (AOB 580-598.) As appellant recognizes, this Court has already considered and rejected each of these claims. Accordingly, reconsideration of its prior decisions is not warranted.

First, appellant contends that section 190.2 is constitutionally defective because it fails to properly narrow the class of death-eligible defendants. (AOB 580-581.) This Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Enraca* (2012) 53 Cal.4th 735, 768-769 (*Enraca*); *People v. Nelson* (2011) 51 Cal.4th 198, 225; *Riggs*, *supra*, 44 Cal.4th at p. 329.)

Second, appellant claims that section 190.3, factor (a) is impermissibly broad and thus licenses the arbitrary and capricious imposition of the death penalty. (AOB 581-583.) This Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Livingston* (2012) 53 Cal.4th 1145, 1179-1180 (*Livingston*); *Enraca*, *supra*, 53 Cal.4th at p. 769; *People v. Stanley* (2006) 39 Cal.4th 913, 967; *Guerra*, *supra*, 37 Cal.4th at p. 1165; *People v. Schmeck* (2005) 37 Cal.4th 240, 304; *People v. Hawkins* (1995) 10 Cal.4th 920, 964; see also *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 975-976, 978.)

Third, appellant contends that the California Death Penalty Statute allows for arbitrary and capricious sentencing because jurors need not find aggravating factors, except evidence of other crimes, beyond a reasonable doubt. (AOB 583-586.) This Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *Livingston*, *supra*, 53 Cal.4th at p. 1180; *Enraca*, *supra*, 53 Cal.4th at p.

769; *People v. Farley* (2009) 46 Cal.4th 1053, 1134 (*Farley*); *People v. Mendoza* (2007) 42 Cal.4th 686, 707 (*Mendoza*).)

Fourth, appellant contends that the California Death Penalty Statute is constitutionally defective because it fails to require juror unanimity on the existence of aggravating factors. (AOB 586-588.) This Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *Livingston*, *supra*, 53 Cal.4th at p. 1180; *Thomas*, *supra*, 53 Cal.4th at p. 835; *People v. Martinez* (2009) 47 Cal.4th 399, 455; *Farley*, *supra*, 46 Cal.4th at p. 1134; *Mendoza*, *supra*, 42 Cal.4th at p. 707; *People v. Snow* (2003) 30 Cal.4th 43, 126 (*Snow*).)

Fifth, appellant contends that the California Death Penalty Statute is constitutionally defective because it allows the jury to consider appellant's unadjudicated criminal activity involving force or violence in aggravation and that there is no requirement that the jury unanimously agree that it has been proved. (AOB 588-589.) This Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Nunez* (2013) 57 Cal.4th 1, 62; *Thomas*, *supra*, 53 Cal.4th at p. 836; *People v. Gonzales* (2011) 52 Cal.4th 254, 333; *People v. Taylor* (2010) 48 Cal.4th 574, 657-658; *Valencia*, *supra*, 43 Cal.4th at p. 311; *People v. Brown* (2004) 33 Cal.4th 382, 402; *People v. Anderson*, *supra*, 25 Cal.4th at p. 584.)

Sixth, appellant claims that the instruction informing the jury that they must be persuaded that the aggravating circumstances are "so substantial" in comparison with the mitigating circumstances that a death sentence is warranted is impermissibly vague and ambiguous. (AOB 589-591.) This Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Whalen* (2013) 56 Cal.4th 1, 89 (*Whalen*); *People v. Lewis* (2011) 52 Cal.4th 610, 693; *People v. Russell* (2010) 50 Cal.4th 1228, 1273 (*Russell*); *People v. Page* (2008) 44

Cal.4th 1, 55-56; *Morgan*, *supra* , 42 Cal.4th at p. 625; *Coffman*, *supra*, 34 Cal.4th at p. 124; *People v. Breaux* (1991) 1 Cal.4th 281, 315-316.)

Seventh, appellant contends that the trial court committed constitutional error in failing to instruct the jury that it must impose a sentence of life without the possibility of parole if it found that mitigating factors outweighed aggravating factors. (AOB 591-592.) This Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Jones*, *supra*, 54 Cal.4th at p. 78; *Foster*, *supra*, 50 Cal.4th at p. 1367; *Russell*, *supra*, 50 Cal.4th at p. 1273; *People v. Friend* (2009) 47 Cal.4th 1, 90; *Bramit*, *supra*, 46 Cal.4th at p. 1249; *People v. Carter* (2005) 36 Cal.4th 1215, 1279; *Coffman*, *supra*, 34 Cal.4th at p. 124.)

Eighth, appellant claims that California's Death Penalty Statute is constitutionally defective because it does not require the jury to be instructed that they need not unanimously find the existence of mitigating factors. (AOB 592-593.) This Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Valdez* (2012) 55 Cal.4th 82, 179-180; *Thomas*, *supra*, 53 Cal.4th at p. 834; *People v. Moore* (2011) 51 Cal.4th 1104, 1140; *Lomax*, *supra*, 49 Cal.4th at p. 594; *Ervine*, *supra*, 47 Cal.4th at p. 779; *Lewis*, *supra*, 43 Cal.4th at p. 534; *People v. Rogers* (2006) 39 Cal.4th 826, 897 (*Rogers*).)

Ninth, appellant argues the jury should have been instructed on the presumption of life. (AOB 593-594.) This Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Geier* (2007) 41 Cal. 4th 555, 618; *People v. Young* (2005) 34 Cal.4th 1149, 1233; *People v. Arias* (1996) 13 Cal.4th 92, 190.)

Tenth, appellant claims that the California Death Penalty Statute is constitutionally defective because it does not require the jury to render written findings on the aggravating factors found. (AOB 594.) This Court

has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *Livingston*, *supra*, 53 Cal.4th at pp. 1179-1180; *Enraca*, *supra*, 53 Cal.4th at p. 769; *Farley*, *supra*, 46 Cal.4th at p. 1134; *People v. Dykes* (2009) 46 Cal.4th 731, 813-814; *Mendoza*, *supra*, 42 Cal.4th at p. 707; *People v. Demetrulias* (2006) 39 Cal.4th 1, 43; *Snow*, *supra*, 30 Cal.4th at p. 126.)

Eleventh, appellant contends that the court's instructions on mitigating and aggravating factors were unconstitutional because they used restrictive adjectives. (AOB 594-595.) This Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Myles* (2012) 53 Cal.4th 1181; 1223; *People v. Murtishaw* (2011) 51 Cal.4th 574, 597; *Lomax*, *supra*, 49 Cal.4th at p. 593; *People v. Wilson* (2008) 43 Cal.4th 1, 32; *People v. Cook* (2007) 40 Cal.4th 1334, 1366; *People v. Yeoman* (2003) 31 Cal.4th 93, 1656; *People v. Box*, *supra*, 23 Cal.4th at p. 1217.)

Twelfth, appellant argues that the trial court unconstitutionally erred by failing to delete inapplicable sentencing factors from its jury instructions. (AOB 595.) This Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *Whalen*, *supra*, 56 Cal.4th at p. 85; *People v. Fuiava* (2012) 53 Cal.4th 622, 733; *Lomax*, *supra*, 49 Cal.4th at p. 593; Rogers, *supra*, 46 Cal.4th at p. 1179; *People v. Lewis*, *supra*, 43 Cal.4th at p. 532; *People v. Wilson* (2008) 43 Cal.4th 1, 32; *People v. Beames* (2007) 40 Cal.4th 907, 935; *People v. Perry* (2006) 38 Cal.4th 302, 319; *Stitely*, *supra*, 35 Cal.4th at p. 574.)

Thirteenth, appellant maintains that the trial court unconstitutionally erred by failing to instruct the jury that statutory mitigating factors are relevant solely in mitigation. (AOB 596.) This Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *Livingston*, *supra*, 53 Cal.4th at p. 1180; *Rogers*,

supra, 46 Cal.4th at p. 1179; *People v. Wilson* (2008) 43 Cal.4th 1, 32; *Mendoza*, *supra*, 42 Cal.4th at p. 708; *People v. Beames* (2007) 40 Cal.4th 907, 935; *People v. Ramos* (2004) 34 Cal.4th 494, 530.)

Fourteenth, appellant claims that the California Death Penalty Statute is constitutionally defective because it does not require intercase proportionality review. (AOB 597.) This Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *Livingston*, *supra*, 53 Cal.4th at pp. 1179-1180; *Thomas*, *supra*, 53 Cal.4th at p. 836; *Enraca*, *supra*, 53 Cal.4th at p. 769; *Mendoza*, *supra*, 42 Cal.4th at p. 708; *People v. Stevens* (2007) 41 Cal.4th 182, 212; *People v. Crittenden*, (1994) 9 Cal.4th 83, 156-157; see also *Pulley v. Harris* (1984) 465 U.S. 37, 50-51.)

Fifteenth, appellant contends that the California Death Penalty Statute violates equal protection by treating capital and non-capital defendants differently in terms of the availability of certain procedural protections. (AOB 597-598.) This Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *Whalen*, *supra*, 56 Cal.4th at p. 91; *Livingston*, *supra*, 53 Cal.4th at p. 1180; *Lomax*, *supra*, 49 Cal.4th at p. 594; *Farley*, *supra*, 46 Cal.4th 1134; *People v. Wilson* (2008) 43 Cal.4th 1, 32; *People v. Manriquez* (2005) 37 Cal.4th 547, 590; *People v. Blair* (2005) 36 Cal.4th 686, 754.)

Lastly, appellant maintains that California's use of the death penalty violates International Law. (AOB 598.) This Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *Livingston*, *supra*, 53 Cal.4th at p. 1180; *Thomas*, *supra*, 53 Cal.4th at p. 837; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1356; *Lomax*, *supra*, 49 Cal.4th at p. 595; *Butler*, *supra*, 46 Cal.4th at p. 885; *Lewis*, *supra*, 43 Cal.4th at p. 538; *Mendoza*, *supra*, 42 Cal.4th at p. 708;

People v. Cook (2007) 40 Cal.4th 1334, 1368; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

As noted by the foregoing, appellant's various constitutional claims should be summarily rejected.

XX. THE JUDGMENT AND SENTENCE NEED NOT BE REVERSED FOR CUMULATIVE ERROR

Appellant argues that the cumulative effect of the guilt and penalty phase errors require reversal and death sentence even if no single error compels reversal. (AOB 599-602.) For the reasons explained in the preceding arguments, all of appellant's claims should be rejected as not error or harmless error. Respondent further submits, "'none of the errors, individually or cumulatively, "significantly influence[d] the fairness of [appellant's] trial or detrimentally affect[ed] the jury's determination of the appropriate remedy."'" (*People v. Coffman* (2004) 34 Cal. 4th 1, 128.) Therefore, appellant's claim of cumulative error fails.

XXI. THE THREE-YEAR PRIOR PRISON TERM ENHANCEMENT UNDER SECTION 667.5 SHOULD BE REMANDED

The jury found true the allegation that appellant suffered five robbery convictions under section 667, subdivision (a). (24 CT 5076; 25 CT 5080-5082.) On that basis, the trial court sentenced appellant to a five-year enhancement for each of the prior serious felony convictions. (129 RT 20135, 20138.)

Further, the jury found true the allegation that appellant served a prior prison term for those convictions and did not remain free from custody or a criminal conviction for 10 years under section 667.5, subdivision (a). (24 CT 5075; 25 CT 5082; 117 RT 18754.) On that basis, the court imposed a three-year enhancement for the prior prison term. (129 RT 20136, 20138.)

Appellant argues that the trial court erred in imposing a three-year prior prison term enhancement under section 667.5, subdivision (a) for the same robberies which served as the basis for the section 667, subdivision (a) five-year enhancement.[29] We submit that the prior prison term enhancement was incorrectly imposed and remand is appropriate.

This Court has ruled that a defendant's sentence cannot be enhanced under both sections 667, subdivision (a) and 667.5 based on the same prior conviction and prison term, and that the defendant may be subjected only to the greater enhancement. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150-1153 (*Jones*).) In *People v. Garcia*, *supra*, 167 Cal.App.4th at p. 1562, the Court of Appeal relying on *Jones* found that a trial court should not impose a prior prison term enhancement on the same robbery conviction which was

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[29] Although appellant failed to object in the trial court, the claim may be considered for the first time on appeal. (See *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1562 [the failure to either impose or strike a section 667.5 prior prison term enhancement pursuant to section 1385, subdivision (a) is a jurisdictional error which may be corrected for the first time on appeal].)

subject to a five-year enhancement under section 667, subdivision (a). The *Garcia* court explained:

> . . . there remains the issue of how many prior prison term enhancements are potentially applicable to each count. The answer is that it depends on whether the present offense is a serious felony within the meaning of section 1192.7, subdivision (c). For example, in count 1, defendant was convicted of robbery, a serious felony. [Citations.] Defendant was found to have previously been convicted of two serious felonies, two prior robberies. [Citations.] Each of these section 667, subdivision (a) serious felonies also served as the basis of two separate prior prison term findings. As to count 1, the prior prison term enhancements for these two serious offenses may not be imposed. This is because the two section 667, subdivision (a) five-year enhancements must be imposed and thus may not also be the subject of prior prison term enhancements resulting from the same convictions. (*People v. Jones*, *supra*, 5 Cal.4th at pp. 1149-1153; *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1659 . . .)

(*People v. Garcia*, *supra*, 167 Cal.App.4th at p. 1562)

Accordingly, the three-year prior prison term enhancement was incorrectly imposed and should be remanded to the trial court for resentencing.

CONCLUSION

Accordingly, respondent respectfully requests a remand for resentencing on the prior prison term enhancement that was incorrectly imposed, and that the judgment be otherwise affirmed.

Dated: September 6, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
GLENN R. PRUDEN
Supervising Deputy Attorney General

JULIA Y. JE
Deputy Attorney General
Attorneys for Respondent

SF1997XS0003

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 63,752 words.

Dated: September 6, 2013

KAMALA D. HARRIS
Attorney General of California

JULIA Y. JE
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Robert Walter Scully**
No.: **S062259**

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 September 6, 2013, 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:

Margot Garey
Supv. Depty. State Public Defender
Office of the State Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94607
(2 copies)

The Honorable Jill Ravitch
District Attorney
Sonoma County District Attorney's Office
Hall of Justice
600 Administration Drive, Room 212J
Santa Rosa, CA 95403

California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3672

County of Sonoma
Hall of Justice
Superior Court of California
600 Administration Drive, #107-J
Santa Rosa, CA 95403-2818

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 September 6, 2013, at San Francisco, California.

Tan Nguyen
Declarant

Signature

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