SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RICHARD LONNIE BOOKER,

Defendant and Appellant.

S083899

CAPITAL CASE

Riverside County Superior Court No. CR67502
The Honorable Edward D. Webster, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

ADRIANNE S. DENAULT
Deputy Attorney General

ELIZABETH A. HARTWIG
Deputy Attorney General
State Bar No. 91991

110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2278
Fax: (619) 645-2271
Email: Elizabeth.Hartwig@doj.ca.gov

Attorneys for Respondent

SUPREME COURT
FILED
SEP 11 2007
Frederick K. Ohlrich Clerk
Deputy

DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **RICHARD LONNIE BOOKER,** Defendant and Appellant.	S083899 **CAPITAL CASE**

STATEMENT OF THE CASE

In a second-amended indictment filed by the District Attorney of Riverside County on September 9, 1999, appellant, Richard Lonnie Booker, was charged with three counts of premeditated murder (counts I, II and III, Pen. Code,[1] § 187, subd. (a)); attempted murder (count IV, §§ 664/187); and arson (count V, § 451, subd. (b)). As to counts one, two and three, it was further alleged as special circumstances that:

(1) each murder was one of multiple murders, within the meaning of section 190.2, subd. (a)(3);

(2) the murders in counts I and III were committed in the commission of and attempted commission of rape, pursuant to sections 190.2, subd. (a)(17)(iii), and 261.2; and

(3) the murder in Count III was committed during the commission of or attempted commission of a forcible lewd act upon a child, sections 288, subd. (b), and 190.2, subd. (a)(17)(v)).

---

1. Unless otherwise noted, further statutory references are to the Penal Code.

Further, it was alleged as to counts I, II and III, that appellant personally used a knife (§§ 12022, subd. (b) and 1192.7, subd. (c)(23)) and as to count II, that appellant personally used a firearm (§§ 12022.5 and 1192.7, subd. (c)(8).) (3 CT 666-668.)

Jury selection began on September 14, 1999. (RT 322; 3 CT 733.) The jury was sworn and the guilt phase of the trial began on September 30, 1999. (RT 859; 3 CT 3677.) On October 13, 1999, the jury found appellant guilty of three counts of first degree murder, and one count each of attempted murder and arson. The jury also found as true the multiple-murders special circumstance as to counts I, II and III, and the allegations of personal use of deadly/dangerous weapons [a firearm as to count II, and a knife as to counts I, II, III]. The jury also found that the murder of Corina Gandara (count III) occurred in the course of lewd acts or attempted lewd acts on a child, and in the commission or attempted commission of rape; but that the murder of Tricia Powalka did not occur in the commission of rape or attempted rape. (RT 1697-1703; 14 CT 3819, 3824-3839.)

The penalty phase of the trial began on October 14, 1999. (RT 1732; 14 CT 3856.) On October 19, 1999, the jury determined that appellant should be sentenced to death. (RT 2033-2035;14 CT 3925-3927.)

On November 22, 1999, the trial court denied appellant's automatic motion to reduce the sentence to life without the possibility of parole (§ 190.4, subd. (e)). (RT 2044-2045; 14 CT 3939.) Thereafter, the court sentenced appellant to death on counts I, II and III, and the multiple-murders and lewd acts special circumstances findings. (RT 2051-2055; 14 CT 3939-3940, 3943-3945.) The court sentenced appellant to the upper term of eight years in prison for arson [count V], followed by a consecutive life term with the possibility of parole, for attempted murder [count IV]. The sentences on counts IV and V

were stayed, pending execution of the sentences for counts I, II and III. (RT 2050-2051; 14 CT 3939-3940.)

This appeal is automatic (§ 1239, subd. (b)).

INTRODUCTION

On August 9, 1995, appellant Richard Lonnie Booker went to the Shelter Creek apartments in Riverside, California at the invitation of his friend, Deverick Maddox. The apartment belonged to nineteen-year-old Tricia Powalka, who lived there with her six-month- old son, Eric. That evening, fifteen-year-old Amanda Elliott was babysitting Eric, until his mother got home from work around midnight. Twelve-year-old Corina Gandara was there to visit Eric and Amanda, her cousin.

Booker, Maddox and the girls, talked, played board games, watched television and movies, and generally relaxed. Things seemingly remained cordial and upbeat until approximately 3:00 a.m., when it grew quiet.

Several hours later, at approximately 7:30 a.m. on the morning of August 10, 1995, the fire department was called because neighbors saw smoke coming from Tricia Powalka's apartment. and told the maintenance manager they were worried about a baby inside.

Firefighters rescued the baby, and put out the fire, caused by a bag of laundry smoldering on the electric range. Once the smoke cleared, the firefighters discovered three bodies: Amanda Elliott in the living room, Corina Gandara in the bathroom, and Tricia Powalka in the bedroom. Each had bled to death from numerous stab wounds. Amanda had also been shot in the back of the head.

That evening, after being advised of and waiving his constitutional rights, Richard Lonnie Booker admitted to police that he had killed all three women, stabbing each and shooting Amanda Elliott as well.

STATEMENT OF FACTS

A. Guilt Phase

1. *Prosecution Evidence*

On August 10, 1995, Steve Kostyshak, maintenance supervisor for the Shelter Creek Apartments in Riverside, California, was at work around 7:45 in the morning, when he was paged and informed that the fire alarm was going off at Building G. (7 RT 891-892, 910.) When he responded, other tenants told him they had knocked on the door of apartment 21-C, the source of the smoke, but no one responded or came out of the apartment. (7 RT 893-894, 906.) Mr. Kostyshak knew Tricia Powalka lived in the apartment. (7 RT 894.) Mr. Kostyshak knocked, and when there was no response, he used his master key to enter. (7 RT 904.) Although he found the apartment full of smoke, he entered and opened some windows, then went back to the door for fresh air. (7 RT 894.) Inside, Mr. Kostyshak could not see more than a foot or so, because there was so much smoke. (7 RT 895, 904.)

When Mr. Kostyshak crawled back into the apartment looking for the occupants, he found one woman lying on the living room floor and not moving. (7 RT 895.) He shook her and tried to pull her toward the door, then yelled for help. (7 RT 896.) He had to go out again for fresh air, then returned, after being told that there were likely other people inside. (7 RT 897.)

The next time inside, Mr. Kostyshak crawled down the hallway toward the master bedroom, where it was still smokey. (7 RT 897-898.) Inside the bedroom, he discovered Tricia Powalka, lying in the doorway at the foot of the bed. (7 RT 898.) She looked badly injured and he did not think he could help her, and he had to leave again for more fresh air. (7 RT 899.)

Mr. Kostyshak had not seen a baby or heard the sound of a baby, so he went back into the apartment once more. (7 RT 899.) He could not see the

baby in Tricia's room and left again, but this time he saw something burning on the stove in the kitchen. (7 RT 899.)

By this time the firefighters had arrived, and Mr. Kostyshak told them he saw two people inside he thought were dead, but he could not find the baby. (7 RT 899-900.)

Riverside City Firefighter Ralph Wilson arrived about 8:00 a.m. and went inside to look for the baby. (7 RT 917.) The apartment was smokey from a foot off the floor to the ceiling, with visibility only 12-18 inches. (7 RT 918, 933.) Inside the bedroom, Wilson could just make out a playpen. When he shook it, a baby started to cry. Firefighter Wilson wrapped blankets around the infant and carried him outside. (7 RT 919.) On the way out of the bedroom, Wilson thought he saw a body on the floor, but no one had mentioned anyone other than the baby being inside. (7 RT 920) Firefighter Wilson definitely saw a body near the front door. (7 RT 920.) He took the baby out and handed him to one of the neighbors, then went back to see if anyone else was alive inside the apartment. (7 RT 921.)

Firefighter Wilson found one girl in the bedroom, lying on her back and covered with a blanket from her knees to her face. (7 RT 921-922, 925.) When he tried to pull her to safety, the blanket shifted and he saw she had been stabbed multiple times. (7 RT 923.) Wilson checked for a pulse, but the girl was dead. (7 RT 924.) A second girl in the living room was also dead. (7 RT 924.)

Across the hall from the bedroom where he found the first body, Firefighter Wilson saw the bathroom door blocked by a chest of drawers. (7 RT 925-926, 934.) With the help of another firefighter, Wilson opened the bathroom door, turned on the light, and discovered the body of a third victim, and a lot of blood. (7 RT 926, 931, 936, 937.)

Firefighter Michael Reynaud ventilated the apartment and extinguished the fire in a bag of materials on the stove, which was the source of the smoke. (8 RT 1043-1049.) He turned off two burners on the electric stove. (8 RT 1048.)

The Fire Investigator Timothy Dale Rise determined that the fire was deliberately set by putting a nylon bag of clothing on hot burners. (8 RT 1053, 1055- 1057.) Besides damage to the stove, there was charring on the cabinets, the overhead fluorescent light fixtures, and the exhaust vent over the stove. (8 RT 1057-1059.) Investigator Rise found no other source of ignition. (8 RT 1060.) Charring on the clothes and cabinets indicated there was an actual fire and not just smoke, and in Rise's opinion, there was enough smoke to be lethal. (8 RT 1061-1062.)

Diana Hamilton lived on the ground floor of Tricia Powalka's apartment building on August 9, 1995. (8 RT 978-981.) Around 10:00 p.m. that evening, Ms. Hamilton was in Tricia's apartment, playing dominos with two cousins of Tricia's baby's father, Corina and Amanda--who took care of the baby (six-month-old Eric) until Tricia got home from work. (8 RT 981, 983.) Two black males arrived after Tricia got home from work. (8 RT 981, 983, 992-993.) Diana could only remember one man's name, "D." (8 RT 983-984.) Diana stayed for several hours then went home; everyone but Diana was drinking. (8 RT 986, 994.) Around 2:00 a.m., Diana saw Tricia near the open front door talking to someone, and heard music, laughing and joking. (8 RT 987, 996, 999.) Around 7:00 or 7:30 that morning (August 10) there was smoke coming from Tricia's apartment. (8 RT 988.) Diane told the manager that there was a baby in Tricia's apartment. (8 RT 988.)

Police detectives interviewed residents and learned there were three girls and two black males in Tricia Powalka's apartment on the evening of August 9, 1995. (8 RT 939, 941, 952, 954.) One of the men, nick-named "D," was

identified as Deverick Maddox. (8 RT 955.) By 5:30 p.m. on August 10, 1995, "D" was detained for questioning at the police station. (8 RT 955.) The other man, later identified as Booker, spoke with detectives in a tape-recorded interview later that same evening. (8 RT 956-958.)

Deverick Maddox, aka "D," identified his friend Richard Lonnie Booker in court. (8 RT 1110-1111, 1121.) Maddox had known 15-year-old Amanda Elliott for several years, and used to date one of Amanda's friends. (8 RT 1112, 1171-1172.) Amanda introduced Maddox to Corina Gandara four months earlier, and to Tricia Powalka four days before the "incident." (8 RT 1113, 1176-1177.) Maddox was aware that Amanda sometimes babysat for Tricia. (9 RT 1173.) He denied any sexual interest in Amanda, Corina or Tricia. (9 RT 1175, 1177.)

Maddox went to Tricia's apartment each of the two nights before the murders. (8 RT 1114-1115, 1174.) The first night, Amanda and Corina were there with Tricia's baby. (8 RT 1115.)

On August 9, Maddox spoke with Amanda after work, and agreed to go to the apartment that evening again. (8 RT 1119-1120, 1186-1187.) His father dropped him off at Tricia's apartment, and he later called home and gave his parents the phone number at the apartment. (8 RT 1106-1107, 1120, 1187.) Later, Amanda asked if Maddox had any friends and Maddox called Booker and invited him to the apartment. (RT 1121, 1188.)

Maddox arranged to meet Booker at a nearby liquor store where they purchased two bottles of Thunderbird wine to take to Tricia's apartment. (8 RT 1123, 1189.) When they got to the apartment, Amanda and Corina were there, but Tricia was still at work. (8 RT 1122, 1190.) Maddox and Booker drank the Thunderbird, the girls did not drink until later; and they all played dominos. (8 RT 1111-1124, 1190-1192.)

After Tricia got home from work, Maddox, Tricia and Booker went to a convenience store and bought two 40-ounce bottles of beer. (8 RT 1125-1126, 1191-1192.) They drank the beer, but Maddox did not see Booker drunk that night, at least not really drunk but maybe "buzzed." According to Maddox, Booker generally did not drink much. (8 RT 1127, 1229-1231, 1237.) However, Maddox testified he drank a bottle of Thunderbird and one 40-ounce bottle of beer. (8 RT 1128, 1241.) Tricia drank the other beer and Booker drank the other bottle of Thunderbird. (8 RT 1140.)

At one point, according to Maddox, Tricia brought out a gun from her bedroom and Booker took the gun, looked at it, then gave it back to Tricia. (8 RT 1137.)

Maddox, Booker, Tricia, Amanda and Corina were simply talking, listening to music, dancing and watching movies. (8 RT 1128-29, 1194.) Eventually, Tricia got tired and went to bed. (8 RT 1130, 1195.) Corina sat in a chair, then lay down on the floor, while she and Amanda watched a movie. (8 RT 1129, 1133, 1195-966.) Booker sat on the couch. (8 RT 1131, 1196.) There were no fights or arguments, and neither Maddox nor Booker attempted any sexual contact with any of the girls. (8 RT 1196.)

Maddox fell asleep. (8 RT 1131, 1196.) He woke up once while the movie was still on, and saw Amanda curled up on the couch, and Corina on the floor. (8 RT 1132-1133, 1197, 1199-1200.) Booker was on the floor this time. (8 RT 1133, 1200.) Maddox fell asleep again.

Maddox woke again early in the morning when he heard Amanda scream, "Oh, my God!" (9 RT 1200.) Maddox saw Amanda standing but holding her neck, and then dropping to her knees. (8 RT 1134; 9 RT 1201-02.) Maddox asked what happened, but neither Amanda nor Booker answered him. (8 RT 1135; 9 RT1203.) Maddox saw Booker holding a knife and gun in his hands. (8 RT 1135; 9 RT 1203.) Booker's hands and his socks were covered

in blood, and he was not wearing a shirt or shoes. (8 RT 1135.) Booker told Maddox that all the girls were dead. (8 RT 1139; 9 RT 1207, 1208.)

Maddox asked Booker if there had been an accident, and Booker replied, no, he did it "on purpose." (8 RT 1136; 9 RT 1206.) Maddox was shocked but asked why Booker did it, and Booker "just said he had–he said he had to kill them." Booker also repeatedly said he was not going to jail. (8 RT 1138.) Even when Maddox said they had to call the police, Booker said, no, he was not going to jail. (8 RT 1139.) Booker tried to hand the gun to Maddox and told him, "Shoot me. I rather you kill me than to go to jail, if you tell them." (8 RT 1139; 9 RT 1210-1211.)

Maddox walked toward the hallway, where he could see Corina Gandara lying in a puddle of blood in the bathroom. Tricia's legs were visible in the bedroom, also covered in blood. (8 RT 1140; 9 RT 1208.) Maddox was scared and finally left the apartment, leaving Booker behind. (8 RT 1141-1142, 1148, 1151; 9 RT 1232.) Maddox did not call the police, or tell his parents what happened. He did wash his clothes, because all his clothes were dirty. (9 RT 1233, 1234.)

Later that morning, Booker called Maddox. (8 RT 1149.) Booker told Maddox that while he was talking to Corina, "the knife came out." Corina thought he was going to cut her and threatened to tell Tricia. (8 RT 1150-1151.)

Maddox admitted on cross-examination that he was aware Amanda had a crush on him, but he denied any sexual relations with any of the girls. (9 RT 1212.) Maddox was impeached with prior convictions for theft and discharging a firearm from a car. (9 RT 1216-1218.)

Robert DiTraglia, M.D. and forensic pathologist, performed the autopsies on the three victims and concluded each bled to death. (10 RT 1376-1377, 1387, 1381-1382, 1395, 1401-1403.) He concluded that neither fire nor

smoke played a role in their deaths since there was neither smoke nor soot in their airways; nor was there soot in the tissue of the trachea or carbon monoxide in the blood. (10 RT 1410.)

More specifically, as to each victim, the doctor testified that:

(1) Twelve-year-old Corina Gandara bled to death from "sharp force injuries" to the neck; i.e., cuts that were longer than they were deep and stab wounds that were deeper than they were long. (10 RT 1376-1377, 1387.) The major wound (No. 1, Exh. 3-K) "transected" or severed the carotid artery and jugular vein, causing her to bleed profusely. (10 RT 1381-1382, 1384.) She would have become dizzy and disoriented as her blood pressure dropped, then lost consciousness and died in less than a minute. (10 RT 1382.) A second wound on the other side of the neck (Exh. 3-J) caused additional bleeding, and damaged her voice box and vertebra. (10 RT 1383.)

Dr. DiTraglia did not find genital trauma on Corina Gandara. (10 RT 1386.)

(2) Dr. DiTraglia concluded that Tricia Powalka bled to death. (10 RT 1395.) During the autopsy, Dr. DiTraglia identified 54 different stab wounds and 52 cut wounds to Powalka. (10 RT 1389.) The right common carotid artery was completely severed in one place, and was three-quarters severed in a second location. (10 RT 1395.) The right internal jugular vein had multiple sharp-force injuries. As with Corina Gandara, the airway, or trachea, was also cut in three places. (10 RT 1395.)

In addition to the wounds to her neck [Exh. 1-A; See 10 RT 1392; Nos. 33 and 34] Dr. DiTraglia identified two sharp force side-by-side injuries to Powalka's chest. (10 RT 1392.) One was short, but the other was a "very big gaping injury" which caused serious internal damage, tearing through the cartilage that joins ribs to the sternum, and ending in two stab wounds to the liver itself. (10 RT 1393, 1404.) It was the doctor's opinion that the wounds

to the liver occurred after the damage to the neck, because there was less bleeding from the liver than expected, consistent with blood pressure falling after the carotid artery was severed. (10 RT 1404.)

Powalka's autopsy also disclosed a "clustering" of sharp force injuries. (See Exhs. 1-G, 1-J; 10 RT 1411.) That is, there were a large number of sharp force injuries across her neck, in a relatively small area where vital structures are located. Dr. DiTraglia explained that a person confronted with someone trying to stab them in neck will try to defend himself or herself. But if a stabbing victim is unable to move (no evidence of that here) or is incapacitated or semi-conscious or unconscious, he or she becomes a stationary target. With the individual no longer moving or trying to block the blows, a knife can be repeatedly used to cause a tight cluster of wounds. (10 RT 1412.)

Dr. DiTraglia found no signs of genital trauma to Powalka. (10 RT 1395.)

(3) Dr. DiTraglia concluded that Amanda Elliott bled to death, from a severed carotid artery and from a gunshot to her neck with the bullet piercing her lungs, causing a separate life-threatening injury. (10 RT 1401-1403.) He found six stab wounds to her head, neck and left hand, and multiple cut wounds. (10 RT 1396.) One large, gaping wound resulted in the fifty percent trans-section of her right carotid artery. (10 RT 1396-1398; Exh. 2-A, Stab wound No. 2.) The injuries to Elliott were consistent with the use of a serrated knife blade, which is somewhat uncommon. (10 RT 1398.) Typically, it cannot be determined whether a straight edge or serrated blade made the cut. (10 RT 1398-1399.) However, if a serrated knife scrapes across the skin, there may be visible scallops with identifiable high points and low points, and parallel linear lines that correspond to the points on the scallops. (10 RT 1399, 1414-1415.) Dr. DiTraglia saw evidence of a serrated edge only in Amanda Elliott's autopsy. (10 RT 1415.)

The doctor did find evidence of defensive wounds on Amanda Elliott's left hand, fingers and wrist. (10 RT 1400-1401.) A bullet was recovered from Elliott's lung. (10 RT 1413.)

a. *Stipulations*

The parties stipulated that at the time of her death, Amanda Elliott, age 15, was 5'4-1/2" tall and weighed 196 pounds; Tricia Powalka, age 19, was 5'5" tall and weighed 127 pounds; and Corina Gandara, age 12, was 5'2" tall and weighed 121 pounds. (11 RT 1432.)

The parties stipulated that at the time of death, Amanda Elliott and Corina Gandara had no detectable drugs or alcohol in their systems; Tricia Powalka's blood alcohol was .08 percent (RT 1433); and that Booker and Maddox had no detectible drugs or alcohol in their blood at 12:45 a.m. or 12:55 a.m. on August 11, 1995. (11 RT 1433.)

b. *Booker's Post-Arrest Admissions To Police*

Riverside Detective Ron Sanfilippo told the jury that Booker was initially calm and unemotional as they spoke on the evening of August 10, 1995. (11 RT 960.) The detective explained Booker's *Miranda*[2] rights to him, after which Booker said he understood and waived those rights. Booker was not under the influence of drugs or alcohol, and was responsive when he spoke to the detective. After initially denying any involvement in the Shelter Creek apartment murders, Booker admitted he killed all three girls and said no one else was involved in the killings. (11 RT 963.)

In his taped statement, Booker admitted being at the Shelter Creek Apartments that day, where his homeboy "D" introduced him to some girls. (9 RT 1263; 3 CT 674-675.) "D" is Deverick Maddox. (3 CT 675.) Booker said

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2. *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].)

they just "kicked back" and had a little party. (3 CT 674, 678.) Then "she" (the 19-year-old woman) drove Deverick and Booker home around 3:00 a.m. (3 CT 678, 681.) He woke up around 6:00 or 7:00 and went back to the apartment to get his pager, but no one answered his knock, so he went home. (3 CT 679.) He revised his story after Detective Sanfilippo told him that was a lie, and they had already spoken with "D." (3 CT 682, 685-686.)

In sum, Booker told the detectives "I already stabbed [the first girl, Corina] once on accident [and] I just stabbed her again." (3 CT 705.) She ran into the bathroom, screaming. (3 CT 706.) "Homegirl" [Tricia] came out of the bedroom and Booker stabbed her and she fell on the bed, then on the floor where they fought. (3 CT 706.) Booker took the gun away from Tricia and threw it across the room. He told her to get down and he stabbed or cut her in the throat, head, shoulder and neck. (3 CT 707.) Booker shot the third victim [Amanda] after cutting her with his knife. (3 CT 707.) According to Booker, "D" just watched. (3 CT 708.)

More specifically, Booker described the murders as follows:

(i) <u>Corina Gandara:</u>

Booker was playing around with his homemade knife when Corina Gandara, the 12-year-old bumped into it. She asked him, "Why are you trying to stab me?" and he said he "cut her on accident." (3 CT 687, 693, 694.) Then she "tried to grab my, she tried to grab me, I went like that and I hit her, I was like oh damn." (3 CT 687.) He said, "One thing led to another, I don't know, my mind went blank on me, I don't know what happened . . . I just seen blood." (3 CT 687.) But when Corina said she was going to tell her friend what happened, Booker "threw" Corina in the bathroom and closed the door. (3 CT 697.)

Booker admitted he took "homegirl's [Corina's] pants off" in the bathroom. (3 CT 697.) When the detective asked if he was going to have sex

with Corina, Booker said: "Nah, I hell no. I wasn't going to do nothing with her, but I mean, I knew I was going to go down and everything, and I was like, I'm fucked." (3 CT 698.) Booker denied Corina was bleeding, contending, "She wasn't like stabbed all the way, I only cut here [sic] a little bit . . . I told her to take her pants off." (3 CT 698.) He said he "kind of helped her" take the pants off while Corina was lying on the bathroom floor, then he hit her again in the neck. (3 CT 698-700.)

(ii) <u>Tricia Powalka:</u>

Booker provided several different explanations for how he killed Tricia Powalka. According to Booker, when Tricia Powalka, the 19-year-old, heard Corina scream for help, Tricia said that she was going to shoot Booker. (3 CT 687, 693.) He said, "you ain't gonna shoot me, . . . and that he "feared for [his] life . . . ." (3 CT 694.) Then Booker described how he hit Tricia in the neck. (3 CT 688.) He denied there was a struggle, and said he left the room. Then "D" asked "why'd you do that. I said I didn't try to. I don't know I had all that alcohol in my system. They was on something else." (3 CT 688.)

As an alternate explanation, Booker said when he came out of the bathroom after stabbing Corina, Tricia "pulled the gun on [him]." (3 CT 696.) He told the detectives how Tricia put the gun to his head and clicked it, but it did not fire. But Booker admitted he hit Tricia with the knife at least twice. (3 CT 696.)

In another explanation, Booker said, Tricia tried to shoot him so he "threw" Corina into the bathroom and locked or closed the door. (3 CT 697.) Then he hit Tricia. (3 CT 697.) He blamed it on the Thunderbird he had to drink. (3 CT 697.)

Booker claimed Tricia took her pants off too. (3 CT 700.)

Then, according to Booker, "everything was already messed up, . . . Came to my senses" and asked D for help. Booker told D, "You need to shoot

me man, I really want to die, I really want to die, I don't know man, I didn't try to do nothin.' You understand. I swear to god I didn't." (3 CT 700.)

(iii) <u>Amanda Elliott:</u>

Booker described how he knocked the gun out of [Tricia's] hand, but did not shoot Tricia. Instead he shot the third girl, Amanda Elliott. (3 CT 701.) Alternatively, Booker claimed he did not know the gun was cocked, but Tricia must have cocked it, and when he squeezed it, it went off. "Pow." (3 CT 701.) He said the last girl just fell down. (3 CT 702.) Alternatively, when Amanda "charged" him, he hit her in the neck with the knife. Two or three times. (3 CT 688, 702.)

Booker told the detectives he heard a baby crying. (3 CT 696.)

Booker thought he remembered putting something on the stove before leaving, maybe a bag, and he may have told D he intended to set the place on fire. (3 CT 689-690.)

Booker described the knife he used as a "double-bladed homemade knife," like a steak knife, one he made by taping two knives together. (3 CT 704.) He told the detectives he threw the knife in a trash can, and threw the gun away somewhere else. (3 CT 690-691.) Then he went home and went to sleep. (3 CT 702.)

After his confession to the police, Booker took the detectives to where he had disposed of the handgun he used to shoot Amanda Elliott, a .22 caliber Beretta handgun. (7 RT 967-968.) The loaded Beretta was recovered. (7 RT 969.)[3/] Booker told the detectives he took the Beretta away from Tricia Powalka. (7 RT 970.)

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3. The .22 caliber Beretta was test-fired and determined to be operable. (RT 1298-1300.) After comparing the test cartridge with the cartridge recovered from the apartment, the criminalist concluded that the bullet was "probably" fired from the Beretta. (9 RT 1300.)

Booker also took the detectives to where he had thrown the knife into a trash can, but the trash had been collected and the homemade knife was not recovered. (7 RT 965.)

(iv) *<u>Booker's Other Post-Arrest Statements:</u>*

(1) Detective Randal Lee Hecht booked Booker into jail on August 11, 1995. (9 RT 1280.) Booker volunteered that "he should get the death penalty and be executed for what he had done; he should be given the gas chamber." (9 RT 1281.) Booker also expressed concern for his own safety in custody. (9 RT 1281-1282.)

(2) On August 11, 1995, at county jail, Booker called out to Deputy Douglas Monte, and said he wanted to die or to kill himself, and he wanted to talk to a priest or pastor. (9 RT 1289-1290.) Booker told the deputy he wanted to die for what he did to the girls. The deputy did not know anything about the charges or the crime. (9 RT 1290.) Booker said they were watching a video, and they both got up at basically the same time to either change the video or shut it off, and he hit her, and the next thing he knew he had blood all over him. (9 RT 1292.)

(3) On August 13, 1995, Booker was placed into a safety cell at county jail, because he had told a doctor he wanted to kill himself. (9 RT 1285.) That morning, he also told a deputy sheriff, "If you just killed three people, wouldn't you want to kill yourself?" (9 RT 1285-1286.) Booker told Deputy Curtis Bright, "I accidentally hit her in the throat," and "there was blood everywhere and on me." (9 RT 1286-1287.) Booker also claimed one of the girls was going to get her friend's gun to shoot Booker, and Booker said, "no, you're not," and hit her again. (9 RT 1287.)

c. **Forensic Evidence**

Marianne Stam, a criminalist with California Department of Justice laboratory in Riverside, examined hair samples from the murder victims and unknown hairs collected at the murder scene. (9 RT 1302-1303.) As to Corina Gandara, the results were inconclusive as to whether several hairs could belong to Maddox or Gandara, although the hairs were inconsistent with Booker's hair. (9 RT 1317.) One hair from the public brushing on Gandara was consistent with Maddox's hair, and inconsistent with Booker or Gandara's hair. (9 RT 1318.) There was no semen found in the rape kits from Gandara or Powalka. (9 RT 1319.)

Chuck Morton, a forensic scientist and criminalist, could not exclude the one lone hair as belonging to Gandara herself, because of similarities between Gandara's and Maddox's hair. (10 RT 1348-1348.) He did exclude Booker as the source of the lone hair found on Gandara. (10 RT 1353.) Morton also testified, in response to a hypothetical question, that if two people were in a bathroom and one sat or lay down on the floor where there was pubic hair present, there could be a transfer of the hair. (10 RT 1350.) That was another reason that he could not exclude either Maddox or Gandara as the source of "VE3," the one lone hair. (10 RT 1352-1355.)

2. *Defense Evidence*

Booker rested without presenting evidence or witnesses. (11 RT 1434.)

B. Penalty Phase Evidence

1. *Prosecution Evidence*

The prosecution presented evidence of the circumstances of the killings, the impact of the victims' deaths on the families, and Booker's other acts of violence.

Robin Stewart, Booker's uncle, testified that Booker was raised by his mother, his grandmother and great-grandmother, that is "lots of people" who cared for him. (13 RT 1758-1762.) Stewart also described an incident on March 22, 1994, when Booker stabbed Stewart, "in self-defense." (13 RT 1763.) Stewart described himself as a big man, 5'10" and weighing 285 pounds, and much bigger than Booker who weighed 120 to 130 pounds. (13 RT 1768.) Stewart said he [Stewart] was throwing his weight around, had "a chip the size of Texas" on his shoulder, and dared anyone to knock it off. (13 RT 1769.) Stewart testified he had been picking on and bullying Booker for months; on March 22, 1994, Stewart shoved Booker, against the wall, then picked him up and threw him out the front door. (13 RT 1770-1771.) Stewart called Booker names and dared Booker to come back so Stewart could kill him. (13 RT 1771-1774.) Booker did come back long enough to stab Stewart, then ran away down the street. (13 RT 1774-1775, 1780.) Stewart discovered "a little cut in his tummy," which turned out to be a hole in his stomach. Stewart testified he told the police Booker stabbed him for no reason, because he was "kind of embarrassed" about the whole thing. (13 RT 1776-1777, 1781.)

Maricely Ascencio, who used to be Booker's neighbor, described an argument between Ascencio and Booker's relative, "Pete." (13 RT 1785-1786, 1994.) Her husband (Armando Ascencio) and her brother (Damian Camacho) were present during some of the argument. (13 RT 1790.) Booker joined in and said he was going to kill them if they were "messing with" his brother. (13 RT 1787.) Booker also said "he was going to kill [her] whole family because he didn't give a fuck," then he left. (13 RT 1788.) The incident scared her sufficiently that she reported it to the police. (13 RT 1788.)

Booker did not have a weapon on that occasion, however, Ascencio had seen Booker with a homemade knife which he would throw against the ground,

pick up and throw again. (13 RT 1790-1791.) It was a knife with two blades and black tape around the middle. (13 RT 1792, 1794-1797.)

Frankie Sanderson, Tricia Powalka's mother, testified that Tricia would have been 20 on August 22, 1995. (13 RT 1807-1808.) Tricia was living on her own, working and raising her two children: Brianna (2) and Eric (7 months old). Brian Stringer was Tricia's boyfriend and the father of Tricia's baby. (13 RT 1809.) Stringer was also related to Corina and Amanda. (13 RT 1812.) Sanderson described her daughter, Tricia, as "feisty, lot of fun, very outspoken, and a good person." (13 RT 1811.)

It was hard for Sanderson to sort through Tricia's things and make the funeral arrangements, go to court for guardianship proceedings for Brianna and Eric, and just get through holidays, Tricia's birthday, and the anniversary of Tricia's death. (13 RT 1820-1821.) There was not a day that Sanderson did not think of Tricia, expect her to call or to see her walk through the door. (13 RT 1821.)

Esther Elliott-Martin, Amanda's mother, described how Amanda babysat Eric at Tricia's apartment. (13 RT 1843.) Corina Gandara was niece, her brother's daughter. (13 RT 1844.) Amanda was "crazy, beautiful, intelligent, caring, helpful," and someone who loved children. (13 RT 1844-1845.) In fact, Amanda would say Eric was her baby. Amanda was good at writing, poetry, music and video games. She wrote a poem about her brother, which Amanda's mother read to the jury. (13 RT 1845.) That Wednesday in August, Mandy told her mother that Deverick was going to come over; they were going to "kick it," and Amanda did not want her little brother to be there. (13 RT 1847.) Amanda's mother missed her terribly. (13 RT 1849-50.)

Ricardo Gandara, described the loss of his two granddaughters, Corina Gandara and Amanda Elliott. (13 RT 1848, 1852.) They were a close family,

and he had to deal with his daughters' loss of their children. (13 RT 1853-54.) He described it as "hell on earth," with holidays being the worst. (13 RT 1854.)

Richard Rene Gandara, described himself as Corina's dad, although not her biological father. (14 RT 1861.) He described his daughter as caring, warm and intelligent. (14 RT 1862.) She was an easy child to raise, although her parents kept tight controls on her. She was a "straight-A" student, who loved school, played clarinet in the band, wrote music, and liked to draw and write. They let her go to Tricia's apartment because she loved Eric. (14 RT 1863.) He went to Tricia's apartment that Wednesday, to pick Corina up, but she asked to stay overnight and her parents agreed. (14 RT 1864.) Corina was their only child. (14 RT 1870.)

Nora Gandara, described her only child as her best friend, and described how she missed their talks about hopes and dreams, those "silly" conversations. (14 RT 1871-1873, 1876.) Corina had a caring heart, and she was a child who felt she had everything, because she was spoiled with love. (14 RT 1873.) Her parents have stayed involved with Corina's school, because her loss was so hard on her friends. (14 RT 1873.) Corina's death led to two suicide attempts by Mrs. Gandara, who sometimes finds it hard to go on living without her daughter. (14 RT 1874.) She has not been able to work, and is struggling to keep her marriage together. (14 RT 1874-1875.)

Video-tapes containing photographs of each of the three victims and their families were shown. (13 RT 1810, 1844-1856; 14 RT 1872.)

2. *Defense Evidence*

Mary Constance Booker-Johnson, Booker's grandmother, testified that Booker's mother is Natalie Booker, Ms. Booker-Johnson's youngest child. (14 RT 1889.) Natalie's only child, Richard Lonnie Booker, was born July 5, 1977, when Natalie was 19. (14 RT 1890.) Problems at the time of Natalie Booker's birth left her brain damaged, disabled, and unable to work or live

independently. (14 RT 1890.) Ms. Booker-Johnson was her caretaker. (14 RT 1892.) She described Natalie as immature, and unable to handle money, make rational decisions or exercise good judgment. (14 RT 1892.) Natalie Booker did not know how to take care of her son, how to keep bottles clean and diapers changed and disposed of, or even how to clean house. (14 RT 1892-1893.) She did learn to write her name, but not to read. (14 RT 1893.)

Booker was put into special education in second or third grade, and had trouble himself with reading comprehension and mathematics. (14 RT 1895.) In 1991, Booker's mother was hit by a car and has been comatose and confined to a convalescent home ever since. (14 RT 1900-1902.) Booker was 12 or 13 and was devastated, and has not been quite the same since the accident. (14 RT 1902-1903.) He struggled in school, was confused and hurt, and missed his mother. (14 RT 1903.) Booker has one son, who was born in 1995. (14 RT 1903-04.) Booker's grandmother described him as helpful, kind, caring, and someone she loves very much. (14 RT 1905.)

ARGUMENT

I.

BOOKER SUFFERED NO PREJUDICE BECAUSE THE TRIAL COURT BELATEDLY SWORE-IN THE GRAND JURY AND HE RECEIVED A FAIR TRIAL. THEREFORE, REVERSAL IS NOT WARRANTED

Booker contends that his conviction must be set aside in its entirety, because the court did not swear in the grand jury with the oath in Penal Code section 911, until mid-way through the proceedings which culminated in the indictment charging him with capital murder. (AOB 16.) He argues that omission of the oath is "fundamental jurisdictional error," and therefore a due process violation which affects both the guilt and penalty phases of his trial, and he is entitled to reversal per se. (AOB 16-18.) He acknowledges that irregularities in the grand jury, which are "not jurisdictional in the fundamental sense," require reversal when raised for the first time on appeal, only if the defendant can show that he was deprived of a fair trial or otherwise suffered prejudice. (AOB 19.) However, he alleges that it is fundamentally unfair to require him to show prejudice, because he raised the issue in a pretrial motion to dismiss and again in a petition for writ of prohibition/mandate, albeit unsuccessfully, where no showing of prejudice was required. (AOB 20.) Finally, he contends, the error was structural error of constitutional magnitude, which again mandates reversal without a showing of prejudice. AOB 20. However, the belated swearing-in of the grand jury was not constitutional or fundamental error, and did not prejudice Booker. Therefore, Booker's conviction and sentence must be affirmed.

Booker is correct that the trial court administered the section 911 oath to the grand jury after some testimony was taken, and before testimony was complete or an indictment returned by the grand jury. However, neither in his

pretrial motions nor in his appeal does Booker argue or establish, that the timing error in administering the oath prejudiced him in any way at trial. Booker's argument notwithstanding, none of the cases he relies on holds that if a defendant unsuccessfully raises grand jury irregularities in a pre-trial motion or petition, then he need not show prejudice to prevail after conviction by a jury. Therefore, since federal and state law each reviews pre-trial irregularities for prejudice, and Booker has failed to allege or prove prejudice at trial, his argument must fail and his conviction must be affirmed.

On February 28, 1996, prospective grand jurors were given preliminary instructions by the Honorable Edward Daniel Webster, Judge of the Superior Court, and introduced to the case of *People v. Richard Lonnie Booker*, Superior Court No. CR-67502. The court explained the duties of the grand jury and the relevant law, and selected the requisite number of grand jurors and their foreperson. (1 ART[4] 24-38.) However, the judge did not swear the jurors pursuant to Penal Code section 911. (1 ART 24.) After the judge departed, the prosecutor summarized the evidence in the case (1 CT 48-56), and called Detective Ron Sanfilippo. The detective described the fire at Tricia Powalka's apartment which led to the discovery of the bodies of the three girls, who had been stabbed to death. He described the investigation that led to Deverick Maddox, and through him to Booker, and the detective played the first part of Booker's taped post-arrest statement. (1 CT 55-76.) Then the grand jury took a lunch break. (1 CT 77.)

After lunch, the judge informed the grand jury of a "slight problem," which was the failure to administer the oath before testimony began. The judge

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4. "ART" refers to the augmented reporter's transcript on appeal which covers the initial grand jury proceedings on the morning of February 28, 1996. The reporter's transcript for the remaining grand jury proceedings for that date are found in the Clerk's Transcript of the trial. (1 CT 43-139.)

then swore the grand jury, in the language of section 911.[5] (1 CT 78-81.) Thereafter, the prosecutor finished playing the tape of Booker's confession. (1 CT 83.) In the taped interview, Booker described how he killed Corina Gandara, Tricia Powalka and Amanda Elliott, and admitted taking off Tricia's and Corina's pants. (1 CT 81-88.) Detective Hector Heredia testified about the autopsies (CT 89-100), the failure to find evidence of sexual assaults, and the possible attempted rape of two of the victims. (1 CT 101-103). The indictment was returned at approximately 3:48 p.m., charging Booker with capital murder and other offenses. (1 CT 33, 135-138.)

Booker brought a motion to dismiss the indictment on April 23, 1996, pursuant to Penal Code section 995 (1 CT 143-163), alleging multiple defects, including the delay in giving the oath to the grand jury. (1 CT 160-161.) The prosecutor filed an opposition to the section 995 motion, arguing the delay in administering the oath did not warrant dismissal of indictment. (1 CT 194-195.) Further, the prosecutor noted that the grand jurors were sworn part way through presentation of evidence, and prior to presentment of the indictment, which could not result in prejudice to Booker (1 CT 195.)

The parties argued the motion on June 21, 1996 before the Honorable Patrick F. Magers. (2 RT 26-32.) Booker argued there was no grand jury until the members took the section 911 oath (2 RT 27) and the prosecutor disagreed

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5. Section 911 provides: "The following oath shall be taken by each member of the grand jury: 'I do solemnly swear (affirm) that I will support the Constitution of the United States and of the State of California, and all the laws made pursuant to and in conformity therewith, will diligently inquire into, and true presentation make, of all public offenses against the people of this state, committed or triable within this county, of which the grand jury shall have or can obtain legal evidence. Further, I will not disclose any evidence brought before the grand jury, nor anything which I or any other grand juror may say, nor the manner in which I or any other grand juror may have voted on any matter before the grand jury. I will keep the charge that will be given to me by the court.'"

(2 RT 31-32). The matter was taken under submission, and on June 27, 1996, Judge Magers denied the motion in a written order stating that:

> The procedural irregularity–failure of the court to swear the grand jury prior to the commencement-- does not render the ultimate indictment invalid. The jury was finally sworn at 1:30 prior to the afternoon session and of course after the morning session. After taking further evidence in the afternoon of 2/28/96 the indictment was returned and at that time the jury had been sworn. [¶] It should also be noted that a review of the evidence presented in the afternoon session by itself is sufficient to support the indictment. (2 CT 287-288.)

Booker filed a Petition for Writ of Mandate or Prohibition in the Fourth District Court of Appeal on August 23, 1996.[6] In the petition, Booker raised numerous complaints, including the failure to administer the section 911 oath until midway through presentation of the evidence to the grand jury. (Pet. at 35.) The petition was summarily denied on September 10, 1996. (3 CT 646.)

Under federal and state law, irregularities in grand jury proceedings are generally subject to analysis for prejudice. (*Bank of Nova Scotia v. United States* (1988) 487 U.S. 250, 254-257 [108 S. Ct. 2369, 101 L. Ed. 2d 228] (violation of federal rule prohibiting unauthorized persons in the grand jury was harmless error, therefore not a basis for dismissing the indictment); *United States v. Plesinski* (9th Cir. 1990) 912 F.2d 1033, 1038-1039 (same); *People v. Jablonski* (2006) 37 Cal.4th 774, 800 (same).) In general:

> A grand jury operates as part of the charging process of criminal procedure, and its function is viewed as investigatory, not adjudicatory, in nature. (*People v. Brown* (1999) 75 Cal.App.4th 916, 931-932.) The grand jury decides if a crime has been committed and whether there is probable cause to indict the accused. (*Id.* at p. 931; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1026.) Probable cause exists if there is a "strong suspicion" of guilt. (*Cummiskey*, at p. 1029.) The grand jury conducts its investigation in secret, without notice to or

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6. At the time Booker filed his opening brief, he moved this Court to take judicial notice of the writ proceedings in the Fourth District Court of Appeals, Division Two, case number E018917. This Court granted the motion.

> participation by the defendant. (*People v. Superior Court (Mouchaourab)* (2000) 78 Cal.App.4th 403, 414-415.) The district attorney may appear before the grand jury to give information or advice or to question witnesses. (*Ibid.*)

(*People v. Berardi* (2007) 149 Cal.App.4th 476 at 489-490.)

Irregularities in pretrial charging proceedings, whether a preliminary examination or grand jury proceeding, may be raised by way of a motion to dismiss (section 995) or pre-trial petition for writ of mandate/prohibition. Thus, as this Court has stated:

> In *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519 (*Pompa-Ortiz*), [we] held that when a defendant presents, by way of a pretrial writ petition, claims that establish irregularities in preliminary hearing procedures, the court may grant relief--for example, dismissal and remand for a new, properly conducted preliminary hearing–"without any showing of prejudice." (*Id.*, at p. 529.) But when such claims are presented for the first time on appeal, "irregularities ... which are not jurisdictional in the fundamental sense[7] shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if the defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination." (*Ibid.*, italics added.) We observed that such an approach "is consistent with the United States Supreme Court's treatment of constitutional error at the preliminary examination. Thus, even in a situation as extreme as the denial of counsel, the U.S. Supreme Court has held that the harmless error rule is applicable." (*Id.,* at p. 530, citing *Coleman v. Alabama* (1970) 399 U.S. 1, 11 [90 S. Ct. 1999, 26 L. Ed. 2d 387].)

(*People v. Stewart* (2004) 33 Cal.4th 425, 461-462 (untimely disclosure of threat to witness and violation of right to continuous preliminary hearing not prejudicial.)

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7. In *Pompa-Ortiz*, this Court explained that "errors in the fundamental sense" are those errors which deprive a trial court of the legal power to hear and determine a cause. Such errors may be raised at any time. (*People v. Pompa-Ortiz*, 27 Cal.3d at p. 529; overruling *People v. Elliot* (1960) 54 Cal.2d 498 and its per se rule of reversal for errors in the grand jury, without assessing prejudice.)

In *Pompa-Ortiz*, this Court concluded that although the defendant's statutory right to a public preliminary hearing had been violated--and the resulting commitment had been "rendered unlawful within the meaning of Penal Code section 995" (*Pompa-Ortiz, supra*, 27 Cal.3d at p. 522)--the defendant was not entitled to relief, because he failed to show that he was subsequently deprived of a fair trial or was otherwise prejudiced by reason of the error. (*Id.* at p. 530.) In *Pompa-Ortiz*, the defendant did not raise objections to the preliminary hearing prior to trial.

The rule in *Pompa-Ortiz* applies to irregularities occurring in the grand jury. (*People v. Towler* (1982) 31 Cal.3d 105, 123 (reversal not warranted where defendant failed to demonstrate prejudice from alleged errors in grand jury).)

The United States Supreme Court has held that most trial errors (including even the denial of counsel at a preliminary hearing) are subject to harmless error analysis. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-308 [111 S. Ct. 1246, 113 L. Ed. 2d 302.) However, some errors--those amounting to a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself "--are reversible per se, without inquiry into prejudice. (*Id.*, at p. 310.) The only structural defects identified by the United States Supreme Court are (i) "total deprivation of the right to counsel at trial;" (ii) trial by a "judge who was not impartial;" (iii) "unlawful exclusion of members of the defendant's race from the grand jury;" (iv) denial of the right to self-representation at trial; and (v) denial of the right to a public trial. (*Id.*, at pp. 309-310.)

Here, Booker claims he is entitled to a new trial because the grand jury was not sworn until midway through the presentation of evidence. He raised the issue prior to trial in a motion to dismiss in the Superior Court, and a petition for writ of mandate/prohibition in the appellate court, both of which

were denied. (2 CT 287-288; 3 CT 646.) On appeal he argues the error was fundamental and structural, and he is not required to show prejudice to prevail. He is incorrect.

Booker has neither alleged nor demonstrated any sort of prejudice at trial, any negative impact whatever on his trial, stemming from the failure to administer the Section 911 oath to the grand jury before the proceedings commenced. Therefore, although he raised the argument before trial, he is not now entitled to a new trial without a showing of prejudice. Since he has now had a trial by jury, he must demonstrate that the error in the grand jury prejudiced the fairness of his trial, notwithstanding the language in *Pompa-Ortiz* that prejudice was required because the preliminary hearing issue was not raised prior to trial. After a defendant has had a jury trial, the societal cost of a new trial is compared to the gravity of the pre-trail errors before overturning a criminal conviction. (*United States v. Mechanik* (1986) 475 U.S. 66, 70-71 [106 S. Ct. 938, 89 L. Ed. 2d 50].)

People v Jablonski, supra, 37 Cal.4th 774 (*Jablonski*) is illustrative and dispositive. In *Jablonski*, several deputy district attorneys were observers while evidence was presented to a grand jury which indicted the defendant. The defendant moved to dismiss the indictment under section 995, alleging violation of section 939, which precludes the presence of unauthorized persons in the grand jury. The trial court agreed there was a violation of section 939, but denied the motion to dismiss, because the defendant had failed to establish prejudice arising from the violation. (*Jablonski*, 37 Cal.4th at p. 799.) On appeal, defendant alleged violation of state and federal due process rights, the eighth amendment right to heightened scrutiny in capital cases, and structural error, all of which required reversal of his conviction without a showing of prejudice. This Court rejected his argument. (*Jablonski*, 37 Cal.4th at p. 799-801.)

Contrary to Booker's contention that this Court has not considered whether prejudice is required when grand jury error is raised prior to trial (AOB 20), *Jablonski*, like Booker, did raise the issue prior to trial, also unsuccessfully. This Court held:

> Where, as here, irregularities in the grand jury proceedings are challenged on appeal, a showing of actual prejudice is required. (*People v. Towler* (1982) 31 Cal.3d 105, 123 [81 Cal.Rptr. 391, 641 P.2d 1253].) Thus, defendant must show the "alleged errors before the grand jury deprived him of a fair trial or otherwise resulted in any actual prejudice relating to his conviction" before reversal on the ground of such irregularity is warranted. (*Ibid.*)

(*People v. Jablonski, supra,* 37 Cal.4th at p. 800.)

Undeterred, *Jablonski*, like Booker, argued alternatively that he did not have to show prejudice, relying on *Vasquez v. Hillery* (1986) 474 U.S. 254 [88 L. Ed. 2d 598, 106 S. Ct. 617]. (AOB at 17, 20.) In *Vasquez*, racial discrimination in the composition of the grand jury that indicted the defendant led the United States Supreme Court to reverse the conviction, without reference to prejudice. (*Vasquez v. Hillery, supra*, 474 U.S. at pp. 263-264.) As the Supreme Court subsequently explained, *Vasquez* exemplified the *rare case* where "[t]he nature of the violation allowed a presumption that the defendant was prejudiced, and any inquiry into harmless error would have required unguided speculation." (See, *Bank of Nova Scotia v. United States, supra,* 487 U.S. at p. 257 (emphasis added); *United States v. Mechanik, supra,* 475 U.S. at 70-71, fn. 1 (noting that the grounds for reversal in *Vasquez* "have little force outside the context of racial discrimination in the composition of the grand jury")]; *Jablonski*, 37 Cal.4th at p. 800.) Racial discrimination in the grand jury is not involved here.

In *Jablonski*, this Court emphasized that under federal law, as under state law, irregularities in grand jury proceedings are generally subject to analysis for prejudice. (*Jablonski*, 37 Cal.4th at p. 800; *Bank of Nova Scotia*, 487 U.S. at

pp. 254-257.) Therefore, here--as in *Jablonski--Vasquez v. Hillery* is inapposite. The administering of the oath after some testimony was taken--but before other testimony and before argument and return of the indictment--like the presence of unauthorized individuals at Jablonski's grand jury proceedings, did not have a structural impact on those proceedings remotely comparable to that of discriminatory selection of grand jurors. Further, the omission of the oath is susceptible to review for actual prejudice, thus prejudice need not be presumed. (Cf. *Bank of Nova Scotia, supra*, 487 U.S. at pp. 257-260; *Jablonski*, 37 Cal.4th at p. 801.)

Further, Booker's argument notwithstanding (AOB 20), *Pompa-Ortiz* did not hold that if a defendant objects to grand jury errors prior to trial, in the trial court or appellate court, he is entitled to per se reversal if he raises the same issues on appeal. *Pompa-Ortiz* overruled the per se reversal established in *People v. Elliot* (1960) 54 Cal.2d 498. (*Pompa-Ortiz, supra,* 27 Cal.3d at p. 529.) This Court has reiterated that under state and federal law, irregularities in grand jury proceedings are generally subject to analysis for prejudice and not per se reversal. (*People v. Jablonski, supra,* 37 Cal.4th at pp. 800-801.)

Finally, as the Supreme Court has explained, the social costs of per se reversal of a conviction after trial are too high, when the errors are non-prejudicial and do not affect the fairness of the trial. As explained in *United States v. Mechanik supra*, 475 U.S. 66:

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. [Citation.] The "[passage] of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." [Citation.] Thus, while reversal "may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution," [Citation.] and thereby "cost society the right to punish admitted offenders." [Citation.] Even if a defendant is convicted in a second trial, the intervening delay may

> compromise society's "'interest in the prompt administration of justice," [Citation.] and impede accomplishment of the objectives of deterrence and rehabilitation. These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial."

(*United States v. Mechanik,* 475 U.S. at p. 72; see also, *People v. Avila* (1995) 35 Cal.App.4th 642, 668, fn. 13.)

On appeal, Booker does not contest the sufficiency of the evidence to return the indictment, thus abandoning the sufficiency argument he raised in pretrial motions. It is obvious the grand jury knew Booker had confessed to stabbing three victims to death. Whether the stabbings were premeditated or not was not a decision for the grand jury to resolve. The timing of the oath to the grand jury did not influence the decision to indict.

Nor has Booker ever pointed to examples of how the error in the grand jury affected the fairness and the outcome of his trial. He has not established federal constitutional error or structural error. Nor has he shown the irregularities were "jurisdictional in the fundamental sense" thus depriving the trial court of the power to hear the case, errors which could be raised at any time. (*Pompa-Ortiz*, 27 Cal.3d at p. 529.) Therefore, this Court should reject Booker's claim that violation of section 911 resulted in constitutional error in the grand jury, which justifies automatic reversal of his conviction without a showing of prejudice. Since Booker has shown no prejudice from the grand jury error, the convictions should be affirmed.

II.

THE TRIAL DID NOT COMMIT *WITT-WITHERSPOON* ERROR, OR VIOLATE BOOKER'S RIGHT TO A FAIR TRIAL, IMPARTIAL JURY AND RELIABLE PENALTY DETERMINATION, BY EXCUSING PROSPECTIVE JURORS BY STIPULATION OF THE PARTIES

Booker alleges that his federal constitutional rights to a fair trial, impartial jury and reliable penalty determination were violated when the court and counsel agreed to stipulate to excuse five prospective jurors based on their opinions of the death penalty as stated in their questionnaires, without further inquiry on voir dire. (AOB 23, 25-27.) He alleges the court did not devote "sufficient" time and effort to determine if those prospective jurors were substantially impaired in their ability to be fair and impartial. (AOB 28.) He is wrong. Not only did Booker invite any purported *Witt-Witherspoon*[8] "error" and waive it by not objecting in the trial court, he affirmatively adopted the complained-of procedure as a "matter of trial tactics" because it was to his benefit. (5 RT 487.) Booker's convictions and sentence must be affirmed.

In the course of establishing the procedures for voir dire, the trial court asked whether the parties would consider stipulating to excuse some potential jurors who were not likely to be selected, based on their extreme views of the death penalty, whether for it or against it. (3 RT 269-270.) Booker's counsel stated he tended "to be broad in that kind of stipulation." (3 RT 269.)

On September 14, 1999, the court began the process of time-qualifying the prospective jurors. (4 RT 322; 3 RT 318-319.) A number of persons in the venire were excused by stipulation, because of financial hardship, medical or child care issues, self-employment or employers who did not pay for jury duty,

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8. *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521 [88 S. Ct. 1770, 20 L. Ed. 2d 776]; *Wainwright v. Witt* (1985) 469 U.S. 412, 416 [105 S. Ct. 844, 83 L. Ed. 2d 841].

and time constraints. (4 RT 322-484.) The original 320 prospective jurors, now reduced to approximately 130, were given questionnaires prepared jointly by the parties (2 RT 189-191, 200, 204-205, 236; 3 RT 239-243) to complete and return to the court. The questionnaire requested juror information ranging from residence, education, employment and family circumstances, to experience with the criminal justice system, prior juror experience, attitudes about the burden of proof, the believability of one witness, the court's instructions, and opinions about the death penalty. There was space on the questionnaire to explain some answers, if needed. (See, e.g., 3 CT 734-755.)

The court and counsel then reviewed the list of prospective jurors who might be excused, based on the questionnaires. (3 CT 733; 3 RT 318-322; 4 RT 327-329, 480-481.) The court felt it was more efficient to excuse some of these jurors, rather than having to clear the courtroom for further questioning. (4 RT 487.) When the prosecutor and Booker agreed to excuse the first of these prospective jurors, the court commented, "[I]t's very clear that we have very pro-death and we have very anti-death. And there is just no way that [this juror] would stay on because he is so anti-death." (4 RT 486-487.) The court observed that the prosecutor would be stipulating to excuse some of the pro-death jurors, just as Booker had stipulated to excuse the first anti-death juror. (4 RT 487.) Booker stated that when he "stipulated" to excuse a prospective juror, without giving a specific reason, it was based on the answers in the prospective juror's questionnaire. (4 RT 485, 492.)

In total, the parties stipulated to excuse approximately 33 prospective jurors, based on their answers in the questionnaires. Five of those prospective jurors are those whom Booker names in his appeal. (AOB 23-25: John Ong, 5 RT 487-88; Gloria Hunter, 5 RT 488-89; Christine Clothier, 5 RT 493-495; Rachel Saldate, 5 RT 505; and Sharon Kay Conklin, 5 RT 506.)

If Booker or the prosecutor objected to excusing a particular juror during this process, there was no stipulation and that juror was later brought back for voir dire. Thus, Beatrice Bravo was retained for more voir dire about her religious objections to the death penalty (5 RT 489-91); Diana Alloway was retained until it could be determined if her employment in the district attorney's office presented a conflict (5 RT 498-499, 523-526); the prosecutor noted that Garth Newberry indicated he would follow his own conscience and thought he was railroaded in his own case and Booker would not stipulate, so Mr. Newberry was not excused at that time (5 RT 503); the court would not excuse Michelle Williams for cause, although noting her written answer about her strong opposition to the death penalty (5 RT 501-502); and John DeMott, Jode Freede and Michael Lynch also all returned for voir dire, when there was no stipulation. (5 RT 508, 510, 512.) The court did not excuse any prospective jurors for cause over Booker's objection during this process.

At the conclusion of the stipulated excusals, one of Booker's attorneys, Mr. Macher, stated:

> Your Honor, for the record, Mr. Gunn and I have both reviewed all of the questionnaires, and I know Mr. Gunn has significant experience in these cases, this is my third death case. [¶] And as a matter of trial tactics, we had agreed to enter into stipulations regarding excusing by my count, 33 of the venire members, as we believe it's to the benefit of our client to do that. (RT 518-519.)

The trial court than began its voir dire with the first group of 20 prospective jurors, to be followed by questions from each counsel. (5 RT 529.) Additional groups of 20 prospective jurors were questioned, until the court could seat 12 jurors and 4 alternates. (6 RT 806, 839.)

A. <u>The Five Prospective Jurors</u>

(a) As to prospective juror **<u>John Ong</u>**, Booker's counsel stated, "Your Honor, the defense would be prepared to stipulate to excusing Mr. Ong based

on his questionnaire and his refusal to answer questions regarding the death penalty." (5 RT 487-488.) The prosecutor stipulated to excuse Mr. Ong. (5 RT 488.) The court noted that it could not determine if Mr. Ong were confused, but Mr. Ong indicated he would not be able to follow the law that the district attorney has the burden of proof (question #33; 8 CT 2286); he automatically would believe an expert (#39;[9] 8 CT 2287); he would not be able to discuss his position with other jurors (#40; 8 CT 2287); and his opinion of the death penalty was confidential (#45; 8 CT 2288). (5 RT 488.)

Other answers in the questionnaire indicated that Mr. Ong was not sure he could rely on the testimony of only one witness (8 CT 2287); he felt he could be fair and impartial, because he would "evaluate the case by the evidence presented" (#43; 8 CT 2288); he rated himself at 7 out of 10, where 10 meant being strongly in favor of the death penalty (#45(a); 8 CT 2289); he did not have a particular reason for his views of the death penalty (#45 (b); 8 CT 2289); he had "no comment" about whether his views about the death penalty had changed or what purpose it might serve (#45(f) and (g); 8 CT 2289). He stated he would consider the evidence and the instructions and impose the penalty he thought would be appropriate. (#47(c); 8 CT 2290.) But then he wrote that he "cannot discuss death penalty at this time. Evidence needs to be presented in front of the jury prior to to [sic] a conclusion." (8 CT 2295.)

As to prospective juror **Gloria Hunter**, the trial court noted that in answering question #29, she stated the reason the charges would make it difficult or impossible for her to be fair and impartial, was that she has grandchildren, and "just reading the description was shocking" to her. (5 RT 488-489.) Booker's counsel stated, "Defense will be prepared to stipulate;" the prosecutor also stipulated. (5 RT 489.)

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9. The number after the number symbol (#) refers to the number of the question in the juror's questionnaire.

In her questionnaire, Ms. Hunter also indicated that if the judge's instructions differed from her beliefs or opinions, she "hoped" she would be able to follow the law as given. (#29; 10 CT 2839.) She understood the prosecution had the burden of proof and the defendant had no duty to prove he was not guilty. (#33; 10 CT 2839.) She explained she would follow this rule because she had heard of cases where an innocent person has been wrongfully accused and did not want to be placed in that situation. (#33; 10 CT 2839.) She was not sure that testimony of a single witness would be sufficient. (#35; 10 CT 2840.) She was possibly equivocal as to the death penalty, saying it has a place in justice, if a case should warrant it, but also, "it depends." (# 45; 10 CT 2841.) She rated herself as 8 out of 10 in favor of the death penalty. (#45(a); 10 CT 2842.) She thought the "death penalty should be a deterrent, but was not." (#45(g), emphasis in original; 10 CT 2842.) She viewed the death penalty as more severe, since is final and cannot be revoked (#50); thought that we make our own choices in life, and can overcome our environment (#51); she agreed that people today do not take enough responsibility for themselves (# 52); and she noted her son's close friend was involved in a murder and was guilty, but she would still "deal" with the evidence in this case (#53). (10 CT 2844.)

When discussing prospective juror **Christine Clothier,** the trial court noted that she had many friends and family who had been victims or witnesses of crimes. (5 RT 493-494.) The prosecutor noted Ms. Clothier preferred not to address violence, and did not know what her views were on the death penalty. The court commented that Ms. Clothier's husband was on Prozac; that she believed in the death penalty, but did not particularly want to be one to impose it; that she was raised to respect life; and that she was raised Roman Catholic and was not sure she could vote for the death penalty. (5 RT 494.) However, the court would not excuse her for cause. Defense counsel stated he

would stipulate, for all the reasons stated, and because Ms. Clothier would not survive a challenge for cause if her answers were the same. (5 RT 493-494.) The prosecutor stipulated to excusing Ms. Clothier. (5 RT 495.)

Ms. Clothier's questionnaire (10 CT 2649-1673) disclosed that she had a degree in nursing and an MBA, and taught severely handicapped children. (10 CT 2654.) She considered herself spiritual and a humanitarian; she was raised Roman Catholic but attended the Episcopal church. (#14; 10 CT 2658.) Her brother-in-law, a lawyer, was convicted of embezzlement and imprisoned. (#19, 10 CT 2660.) She had a good friend in the LAPD, and her husband was a member of the Narco Mounted Posse. (#20; 10 CT 2660.) But she indicated she was reluctant to be a juror in a case with violence and graphic photographs. (Question #30.) Her answers indicated she would do her best to follow the court's instructions, even if different from her personal opinions. (#32.) She felt she could be fair and impartial, and would do her very best to do so. (#42, 43; 10 CT 2665.) She believed in the death penalty but did not particularly want to be the one to decide if someone lives or dies; she thought that decision was up to God. (#45, 10 CT 2665.) She rated herself 7 out of 10 in favor of the death penalty; but stated it would be a difficult decision to make, given her Catholic upbringing and her strong respect for life; she was not sure she could vote for the death penalty, and it would definitely depend on the evidence. (# 45(a), (b), (c); 10 CT 2666.) She thought she could easily support life without parole if the evidence supported it. (#45(d).) She thought with time she was tending to be more pro-life. (#45(f); 10 CT 2666.) She thought that life without parole was a more just punishment, because it would make the person deal every day of their life with what they did. (#45(h); 10 CT 2667.) She stated she would consider all the evidence and impose the penalty she thought was appropriate. (#47(c); 10 CT 2667.) She volunteered that she was

concerned about the impact on her students, if she were absent for a long trial, worried they might feel abandoned. (10 CT 2672.)

When the prosecutor brought up the name of **Rachel Saldate,** Booker's counsel, Mr. Gunn, stated he would stipulate to excusing her, "[b]ased on some of her responses, she is in the middle of the road on the death penalty. But she indicates on question 29, based on the nature of the charges she couldn't be fair. She indicated, you know, she believed the death penalty might bring closure for the victims' families, those kind of answers. I would agree to strike her." The prosecutor stipulated to excuse her. (RT 505-506.)

In her questionnaire (9 CT 2341-2361) Ms. Saldate indicated involvement of a seven-month old victim would make it difficult to be impartial. (#29; 9 CT 2352.) She indicated that graphic photos would be upsetting, but not enough to impair her ability to be fair. (#30, 31; 9 CT 2352.) She rated herself 5 out of 10 on the death penalty, or middle of the road. (#45(a); 9 CT 2355.) She thought the death penalty provided closure for the victim's family. (#45(g)) However, she also thought life without parole was a just punishment. (#45(h); 9 CT 2356.)

The parties stipulated to excuse prospective juror **Sharon Kay Conklin** without discussion and without objection. (5 RT 506.) Review of her questionnaire disclosed Ms. Conklin had possibly heard something about the case; she did not answer question #29 about whether the nature of the charges would be a problem; she indicated she would be reluctant to serve on a case involving violence where graphic photographs were in evidence, because she "can't take the sight of blood on peoples' faces;" her feelings were strong enough that they could likely impair her ability to be fair and impartial, because she "probably would think their [sic] guilty whatever even with the evidence presented because of the pictures." (#30, 31; 10 CT 2685.) She would not be able to follow the instructions about the defendant not having to present

evidence and having no duty to prove he is not guilty, because she thinks "a person has a right to prove their [sic] not guilty, no matter what." (#33, 10 CT 2685.) She would automatically believe an expert; and was unsure she could discuss the case with other jurors (#39, 40; 10 CT 2686.) She was not sure she could give both parties a fair trial. (#41, 42, 43; 10 CT 2687.) She noted that if justice prevails she is "all for the death penalty," but rated herself a 5 out 10, thus having "no opinion" about it. (#45 and 45(a); 10 CT 2687-2688.) However, she would consider all the evidence and instructions and impose the penalty she personally felt was appropriate. (# 47(c); 10 CT 2689.)

B. Booker Waived His *Witt-Witherspoon* Complaints And Invited The Error He Alleges In His Opening Brief

On appeal, Booker complains that the trial court committed *Witt-Witherspoon* error in excusing prospective jurors John Ong, Gloria Hunter, Christine Clothier, Rachel Saldate, and Sharon Conklin "for cause," by stipulation, based solely on the answers and written explanations in their questionnaires. (AOB 23-25, 27, 29.) Further, he alleges, his own failure to object and actual acquiescence in the excuses "for reasons of judicial efficiency," does not constitute a waiver of the right to raise the issue on appeal. (AOB 27; citing, *People v. Schmeck* (2005) 37 Cal.4th 240, 262 (counsel did not object but did not stipulate, thus did not waive issue on appeal).) Asserting that the incorrect exclusion of one juror is per se reversible error, he asks this Court to reverse the death penalty judgment, relying on *People v. Stewart, supra,* 33 Cal.4th at pp. 454-455 (finding it was reversible error to excuse juror for cause based solely on questionnaire, and over defense objection, without any voir dire). (AOB 27.) However, here, Booker invited the purported "error," and waived it as a matter of tactical choice. Thus, Booker's argument is without merit, and the conviction and penalty must be affirmed.

In *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841], the United States Supreme Court held that a prospective juror could be excused because of his views against the death penalty, if those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Id.* at p. 424; accord, *Morgan v. Illinois* (1992) 504 U.S. 719, 728 [112 S.Ct. 2222, 119 L.Ed.2d 492]; *People v. Lewis* & Oliver (2006) 39 Cal.4th 970, 1006-1007; *People v. Earp* (1999) 20 Cal.4th 826, 853; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140; *People v. Wader* (1993) 5 Cal.4th 610, 652-653.) This Court first adopted the *Witt* standard in *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

The *Witt* test repeatedly has been described as a "clarification" of the test earlier articulated in *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 170, 20 L.Ed.2d 776], where the Supreme Court implied it would violate the defendant's rights to excuse a juror who did not make it 'unmistakably clear' that he would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial. (*Witherspoon*, 391 U.S. at p. 522, fn. 21.) *Witt* recognized that despite the lack of clarity encountered in the printed record of a trial, "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . [T]his is why deference must be paid to the trial judge who sees and hears the juror." (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 425-426.)

As the United States Supreme Court has recently explained in *Uttecht v. Brown*, (2007) 551 U.S. ___, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (June 4, 2007) (overruling *Brown v. Lambert* (9th Cir. 2006) 451 F.3d 946), summarizing *Witt-Witherspoon*:

> First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by

> selective prosecutorial challenges for cause. (*Witherspoon*, 391 U.S., at 521 [88 S. Ct. 1770, 20 L. Ed. 2d 776]. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. (*Witt*, 469 U.S., at 416 [105 S. Ct. 844, 83 L. Ed. 2d 841]. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. (*Id.*, at 424.) Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts. (*Id.*, at pp. 424-434.)

(*Uttecht v. Brown, supra,* 127 S.Ct. 2218, 2224, slip opinion at pp. 15-16.)[10]

Booker claims that his failure to object to the procedure proposed by the trial court is not a waiver of the *Witt-Witherspoon* issue on appeal. (AOB 27; *People v. Schmeck, supra,* 37 Cal.4th 240, 262; *Witt*, 469 U.S. at pp. 434-435.) In support of that position, he cites *Brown v. Lambert* (9th Cir. 2006) 451 F.3d 946. (AOB 28, 31.) However, after he filed his opening brief, *Brown v. Lambert* was overruled in *Uttecht v. Brown*, supra, 127 S.Ct. at p. 2218, 2222, slip opinion at p.8. *Uttecht v. Brown* reached the Supreme Court after the Ninth Circuit reversed Brown's death penalty, upon finding the Washington state supreme court improperly applied *Witt* and excusing one juror for cause, with the defendant's acquiescence.

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10. *Uttecht v. Brown* came before the Supreme Court on appeal from the Ninth Circuit, which had granted a federal habeas corpus petition and reversed Brown's death penalty. The Ninth Circuit concluded the state supreme court had incorrectly and unreasonably applied controlling Supreme Court precedent in finding the trial court properly excused one juror for cause, because of conflicting and equivocal answers about applying the death penalty. The United States Supreme Court held the federal appellate court failed to accord proper deference to the state trial court and state supreme court finding that the juror was "substantially impaired" in his ability to impose the death penalty.

As explained in *Uttecht*, Juror Z. there gave answers, which on their face, could have led the trial court to believe that Juror Z would be substantially impaired in his ability to impose the death penalty, unless he was convinced there was no possibility that Brown would be released and would reoffend. The Supreme Court held that the state trial court was entitled to deference because it had an opportunity to observe the demeanor of Juror Z, which was not discernable from the transcripts, and "also because the defense did not object to Juror Z's removal." The Supreme Court concluded that the State's challenge to the juror, the defendant's waiver of an objection, and the trial court's excusal of Juror Z, all supported the conclusion that "the interested parties present in the courtroom all felt that removing Juror Z was appropriate under the *Witherspoon-Witt* rule." (*Uttecht*, 127 S.Ct. at p. 2229, slip opinion at pp. 29-30; *see, Darden v. Wainwright* (1986) 477 U.S. 168, 178 [106 S. Ct. 2464, 91 L. Ed. 2d 144] (emphasizing the defendant's failure to object and the judge's decision not to engage in further questioning as evidence of impairment); see also, *People v. Rogers* (2006) 39 Ca.4th 836, 857 [agreeing to excuse jurors for hardship]; *People v. Ledesma* (2006) 39 Cal.4th 641, 668; *People v. Ervin* (2000) 22 Cal.4th 48, 72-79.)

As this Court explained in *People v. Ervin, supra*, 22 Cal.4th 48, which is on-point and instructive:

> Defendant asserts the court erred in allowing the prosecutor and defense counsel to screen out, by stipulation, . . . more than 600 prospective jurors whose questionnaires showed they were probably subject to challenge and excusal. The court initially set a goal of 129 death-qualified prospective jurors before random selection and peremptory challenges. With the agreement of all counsel, and to avoid further lengthy delays during the jury selection process, the court developed a screening procedure that allowed counsel jointly to review the questionnaires and by stipulation to screen out the "strong candidates" for excusal, i.e., those whose questionnaire answers clearly showed they (1) would automatically vote for death, (2) would never vote for death, or (3) suffered a financial or physical hardship preventing jury service.

> Under the agreement approved by the court, these persons then could be excused without conducting any individual voir dire examination.

* * * * *[11]

None of these arguments have merit. The Attorney General first observes that defendant, through his counsel, stipulated to every aspect of the challenged procedure and further agreed to excuse every prospective juror he now asserts was improperly excused. Accordingly, defendant is barred from raising on appeal defects in the procedure in which he acquiesced. (See, e.g., *People v. Cudjo* (1993) 6 Cal. 4th 585, 627-628 [waiver of defects in death-qualifying voir dire]; *People v. Visciotti* (1992) 2 Cal. 4th 1, 38, 41-42 [acquiescence in capital case jury selection procedure]; *People v. Mickey* (1991) 54 Cal. 3d 612, 664-665 [waiver of defects in personal hardship excusal procedures].) As we stated in *Visciotti*,

> counsel acquiesced in the [voir dire] procedure of which defendant now complains. . . . [¶] . . . [¶] . . . While the parties are not free to waive, and the court is not free to forego, compliance with the statutory procedures which are designed to further the policy of random selection, equally important policies mandate that criminal convictions not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced. [Citations.]

(*People v. Visciotti, supra*, 2 Cal. 4th at pp. 37-38; see also Cal. Const., art. VI, § 13 [no reversal for procedural errors absent a "miscarriage of justice"].)

> The Attorney General also notes that the stipulated procedure benefited all parties by screening out overzealous "pro-death" as well as "pro-life" venirepersons, and by substantially expediting the jury selection process, "culling out" prospective jurors who probably would have been unable

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11. In the omitted portion of the opinion, this Court summarized the defendant's arguments that the stipulation procedure (1) tended to produce a pro-death jury; (2) the questionnaires were insufficient to determine "hardship;" (3) the court abdicated its responsibility and improperly delegated the selection of "hardship" or death penalty excuses to counsel; and (4) defendant was not present for the screening process. (*People v. Ervin, supra*, 22 Cal.4th at pp. 72-73.)

to serve as jurors in any event. We also observe that, once the preliminary screening process had concluded, the court and counsel then conducted the usual voir dire examination of the remaining prospective jurors in selecting the actual jurors who would serve on defendant's jury.

(*People v. Ervin*, 22 Cal.4th at pp. 72-73.)

Here, just as in *Ervin*, not only did Booker agree to stipulate with the prosecutor to excuse some prospective jurors without voir dire, he affirmatively indicated this was a tactical choice, based on a perceived benefit to him. (5 RT 518-519.) Furthermore, Booker invited the error he now complains of on appeal. For example, in *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, this Court found the alleged error–for excusing a prospective juror for cause--had been invited:

> As articulated in *People v. Wickersham* (1982) 32 Cal.3d 307, 330, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201: "The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the Booker cannot be heard to complain on appeal. ... [I]t also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake." In cases involving an action affirmatively taken by defense counsel, we have found a clearly implied tactical purpose to be sufficient to invoke the invited error rule. (See *People v. Catlin* (2001) 26 Cal.4th 81, 150 ; *People v. Wader* (1993) 5 Cal.4th 610, 657-658; *People v. Hardy, supra*, 2 Cal.4th at p. 152.) Here, Coffman's counsel did not merely acquiesce, but affirmatively joined in the challenge to Prospective Juror B., and thus cannot be heard to claim the court erred in excusing her.

(*People v. Coffman & Marlow*, 34 Cal.4th at p. 49, emphasis added.)

Thus, here as in *Coffman & Marlow*, since Booker's counsel "did not merely acquiesce, but affirmatively joined in the challenge" to the five prospective jurors, he cannot be heard to claim the court erred in excusing them. (*Id.*)

Furthermore, Booker's reliance on *People v. Stewart, supra*, 33 Cal.4th at pp. 441-444, to support his *Witt-Witherspoon* argument, is misplaced. In

Stewart, the penalty verdict was reversed because the trial court granted five prosecution challenges for cause--over defense objection--in reliance upon checked answers in a questionnaire and brief written explanations. In *Stewart,* this Court noted that in general, except for prospective jurors who both parties stipulate should be excused for cause (citing *People v. Ervin*, 22 Cal.4th at pp. 73-74, 78, emphasis added), a juror's written questionnaire will not obviate the need for oral voir dire, but instead merely will shorten the time necessary to be spent on oral voir dire.[12] (*People v. Stewart*, *supra,* 33 Cal.4th at p. 451.)

Thus, Booker's argument must be rejected and conviction and penalty affirmed.

III.

THE TRIAL COURT PROPERLY REJECTED BOOKER'S *BATSON-WHEELER* OBJECTIONS TO THE PROSECUTOR'S PEREMPTORY STRIKES

Booker contends that the trial court erred in denying his *Batson-Wheeler*[13] motions. Specifically, Booker argues that the prosecutor improperly challenged Johnny M., Michelle W., Monique W. and Darryl J., based on an alleged systematic and unconstitutional exclusion of African-American jurors. (AOB 33-43, 45.) Booker claims that the trial court erred when it found no prima facie case of group discrimination and failed to ask the prosecutor to state race-neutral reason for the peremptory challenges. (AOB 46, 50.) He argues

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12. See Cal. Center for Judicial Education and Research (CJER), Death Penalty Benchguide 98: Pretrial and Guilt Phase (2001) § 98.24(1), p. 98-27: ["[U]se of a jury questionnaire substantially shortens the jury selection process . . . . Oral voir dire, whether by judge or counsel, may be largely limited to clarifying unclear or incomplete questionnaire responses"]; *id.*, § 98.35, p. 98-35 ["[T]he court should follow up on ambiguous answers or give counsel an opportunity to do so"].

13. *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct 1712, 90 L.Ed.2d 69]; *People v. Wheeler* (1978) 22 Cal.3d 258.

that the bare statistical anomaly between the number of potential African-American jurors and the number stricken by the prosecutor is sufficient to establish the prima facie case for a *Batson-Wheeler* violation. (AOB 46, 48.) Further, he complains, the trial court's speculation about the prosecutor's possible reasons for the challenged peremptory strikes "does not matter a tinker's damn." (AOB 48-49.) He alleges that the record in the case is unreliable, therefore this Court cannot reach the third stage of the *Batson-Wheeler* analysis, particularly in light of the pretextual reasons for the peremptory challenges offered by the prosecutor. (AOB 49-50.)

Booker's contentions should be rejected. The trial court correctly found that Booker failed to show a *prima facie* case of group bias as to any or all of the four African-American prospective jurors, and Booker's right to a fairly balanced jury and equal protection was not impaired. Thus, the guilt and penalty convictions should be affirmed.

On September 14, 1999, jury selection began with an initial 320 prospective jurors. (4 RT 322.) After excusing those with time-related, health-related, occupational or other hardships, the remaining 129 prospective jurors completed and returned a comprehensive questionnaire, designed to elicit general information regarding their ability and willingness to serve as jurors in this case. (3 RT 239-243; 5 RT 485.) Counsel and the trial court reviewed the questionnaires and stipulated to excuse another 33 prospective jurors, after which the remaining persons returned for individual voir dire. (3 RT 267-270, 318-319, 321.) The procedure provided for the court to inquire first, with counsel for each party subsequently allowed 45 minutes of questioning for the initial group of 20, and 20 minutes per party for succeeding groups of prospective jurors. Some prospective jurors were excused for cause during those inquiries. (5 RT 519, 527.)

The jurors who returned for peremptory challenges were seated in random order. Twenty names were called, and peremptory challenges were to be exercised toward the twelve people in the permanent seats, who would be replaced with someone else from the group of twenty as jurors were excused. (5 RT 666.)

During voir dire, the jury was made aware that Booker was African-American and the three murder victims were Caucasian. (5 RT 629.)

The prosecutor first excused juror Rudy F. after which Booker accepted the panel. (5 RT 666-667.) With his second peremptory strike, the prosecutor excused prospective juror Michelle W., and Booker objected. (5 RT 667.) At sidebar, pursuant to a *Batson-Wheeler* challenge, the court found Michelle W. was African American, and Rudy F. was Hispanic, and that Booker had not established a *prima facie* case of racial discrimination. (5 RT 668-669.) The court also noted that based on her questionnaire, Michelle W. was against the death penalty for religious reasons, and Rudy F. had many relatives on both sides of the criminal justice system, although Booker had not objected to excusing Rudy F. (5 RT 534, 668-669.)

The prosecutor used four more strikes without objection, even though one of the four strikes excused Garth N., an African-American male. Booker did make a second *Batson-Wheeler* objection when the prosecutor used a peremptory strike to excuse Johnny M., who was also African-American. (5 RT 669-670.) The court stated its ruling was the same as before, and the discussion for the record would occur at the recess. (5 RT 670.) Booker excused a third juror. The prosecutor used his next peremptory strike to excuse Monique W. and Booker objected for a third time. (5 RT 670-671.) The court called the next group of prospective jurors and then called a recess. (5 RT 671-672.)

At sidebar, Booker told the court that his review of the juror questionnaires disclosed that 65% of the panel was Caucasian, 15% Hispanic, 8% African-American, 2% other, and 10% undeclared. (5 RT 672.) Ten of the prospective jurors were African-American, as was Booker (5 RT 672.) Counsel told the court that Johnny M., Michelle W. and Monique W. looked like acceptable jurors to him, therefore the only basis for the prosecutor to exclude them must be because they were African-American, contrary to the federal and California constitutions. (5 RT 672-673.)

The court established that Johnny M., Monique W. and Michelle W. were African-American, and again noted that Rudy F. appeared to be Hispanic. (5 RT 673.) The trial court observed that Garth N. appeared to be African-American as well, but he had not disclosed his race on the written questionnaire. (5 RT 673.) The court stated it saw compelling non-racial reasons for excusing these prospective jurors, and found Booker had not established a *prima facie* case of improper racial exclusion. (5 RT 673, 675.)

Additionally, the court noted that Michelle W. wrote in her questionnaire "I am against the death penalty." She rated herself a 3 on a scale of 10, with 10 being absolutely in favor of the death penalty, so she was solidly against the death penalty. (5 RT 674.) The court also observed, Michelle W. "put a religious overtone on to [the basis of her opposition], which I would guess causes real concern by Mr. Soccio. So I believe that would be a basis to excuse that [juror]." (5 RT 674.)

As to Johnny M., the court commented, "he was obviously hiding something. And when we found out his son had a juvenile history and he didn't think he was accused of a crime, and then there was some defensiveness in his posture, I could see no alternative but to–for the prosecution to excuse him as well." (5 RT 674.)

As to Monique W., the court recalled asking her about the statement on her questionnaire that she thought "the death penalty should only be used in instances where there can be no rehabilitating that individual and danger to others are at stake." (5 RT 674.) After some clarifying information from the court, Monique W. had said in voir dire, she understood there was no requirement that rehabilitation be impossible before the death penalty could be imposed, and she could follow the law. (5 RT 598-599, 674.)

The court also noted that Garth N. was "far out on the outlying end of the bell curve," with many things going in with religion and other issues, even though Booker did not object to excusing him. (5 RT 674-675.) As set out in more detail, infra, on voir dire, Garth N. described how he had been "railroaded" by the legal process when he was arrested and charged with trying to run over a Department of Forestry officer. He was irritated and frustrated by having to pay an attorney, but he pleaded no contest to the charges after his attorney told him race might be an issue. (5 RT 565-569, 659-660.)

The court concluded there had been no showing of a prima facie case of group bias in any of the prosecutor's peremptory strikes. (5 RT 675.) The court also found "compelling non-racial reasons" for excusing each of these potential jurors. (5 RT 675.) Therefore, the court did not require the prosecutor to state reasons for his peremptory strikes, although he permitted the prosecutor to do so, if he wished. (5 RT 675.)

The prosecutor took the opportunity to state that he agreed with the court's observations. He added that, Johnny M.'s son had a very lengthy criminal record and Johnny M. could not have misunderstood the obligation to disclose that on the questionnaire, which had to be completed under penalty of perjury. Instead Johnny M. left that question blank, which was an initial red flag for the prosecutor. (5 RT 675.) Then when the court asked him point-blank about whether any family members had been accused of a crime, Johnny

M. lied to the court and said no, and said no again when the prosecutor asked the same question. (5 RT 675.) The prosecutor stated he would not keep Johnny M. on the jury, no matter what his explanation for the omission at that point. (5 RT 675.)

As to Monique W., the prosecutor stated she gave the "correct verbal answers," but he did not get a feeling from her that she was really able to vote for death, because she said "I honesty believe a person is innocent" and she said, that if there was any chance of rehabilitation, she wouldn't vote for death. (5 RT 676.) That Monique W. said the "right thing" was not enough to overcome his concerns about her opposition to the death penalty. (5 RT 676.)

The prosecutor also noted that Michelle W. said she was against the death penalty, and gave conflicting answers on her questionnaire, although she said she could set aside her personal views. However, the prosecutor stated he had great concerns about someone feeling they have sinned or are going to hell if they vote for death, and he was unwilling to take that chance with that juror. (5 RT 676-677.)

Booker's counsel stated that he was primarily concerned with the removal of Monique W., and he had not heard the prosecutor's objections to her. However, the court recalled that it was Monique W. who had focused on the absence of possible rehabilitation as a requirement for imposing the death penalty. (5 RT 677.)

Voir dire resumed, and Booker excused four more prospective jurors. (6 RT 744-745, 745-747.) The prosecutor used his eighth, ninth and tenth challenges without objection. (6 RT 744-745). More prospective jurors were seated, and the court and the parties again conducted individual voir dire. When the prosecutor used his eleventh peremptory to challenge Darryl J., Booker objected and again alleged *Batson-Wheeler* error. (6 RT 805.) (There was no discussion of the objection until after jury selection was completed.)

After the prosecutor used the twelfth of his twenty allotted peremptory challenges, and Booker used his seventh of twenty peremptory challenges, the jury of twelve who would hear and decide the case was completed. (5 RT 529; 6 RT 805-806.)

The prosecutor used all four peremptory challenges, and Booker used two of four, before four alternate jurors were selected. There was no objection to the prosecutor's peremptory challenge to prospective alternate juror, Michael R., who was African-American. (6 RT 837-839, 842.)

After the jury and the alternates had been selected, at sidebar there was a discussion about Booker's *Batson-Wheeler* objection to the prosecutor excusing Darryl J. (6 RT 841-845.) Booker acknowledged that the final jury included two African-Americans. (Jurors 1 and 8; 6 RT 842.) However, Booker's counsel expressed his opinion that Darryl J. appeared to be competent, middle-of-the-road at least, had worked nineteen years in "loss prevention" and said he could follow the law, and therefore the strike against him was improper and racially based. (6 RT 842.)

The trial court noted that two of twelve seated jurors were African-American, or approximately sixteen percent of the jury, and that the African-American population of Riverside County was approximately six to seven percent. The court concluded that the African American population was fairly represented, and noted that was "an indication that race didn't really play a role in this." (6 RT 842-843.) The court also noted conflicting answers given by Darryl J., including his "rather surprising" statement that "a Christian does not believe in the death penalty" in the questionnaire, although he changed that somewhat on voir dire. (6 RT 843.) Further, Darryl J.'s brother had been convicted of voluntary manslaughter for the death of his child. The court also observed that the prosecutor had exercised peremptory challenges for other

people with religious objections or concerns about the death penalty.[14] (6 RT 843.) The court found the prosecutor was concerned with prospective jurors who had problems with the death penalty, particularly when the problems were based on religious grounds. (6 RT 843.)

The trial court concluded that Booker had failed to demonstrate a *prima facie* case of illegal and purposeful exclusion of potential African-American jurors by the prosecutor. (6 RT 843, 844.) However, the court again allowed the prosecutor to make a record, if he chose to do so. (6 RT 844.)

The prosecutor stated none of his peremptory challenges involved race. Also, he conceded he was ambivalent about Darryl J. as a juror, given his occupation in loss prevention. However, he viewed Darryl J.'s body language as being angry and uncomfortable. He pointed out that Darryl J. had a brother who was convicted of manslaughter and Darryl J. seemed quite concerned about that. (6 RT 844.) But the biggest fear for the prosecutor was Darryl J.'s answers or omissions regarding questions addressed to his religious concerns about the death penalty. The prosecutor expressed his particular discomfort with a prospective juror who stated that no Christian church favors the death penalty, who identified himself as a Christian over and over, and thus who "might fear losing his immortal soul" if he were to sit as a juror in a death penalty trial. (6 RT 845.) The fact that Darryl J. was a loss prevention officer did not overcome the prosecutor's concern about Darryl J.'s answers about the relationship between the death penalty and his faith. Frankly, the prosecutor stated, he was concerned about a hidden agenda to try to save somebody, and did not want to chance putting Darryl J. on the jury. (6 RT 845.)

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14. The court volunteered that, in his experience, African-Americans as a group are less inclined to strongly favor the death penalty. (6 RT 843-844.)

> A prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias–that is, bias against "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds"–violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. (*Wheeler, supra*, 22 Cal.3d at pp. 276-277; see *People v. Griffin* (2004) 33 Cal.4th 536, 553.) Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. (*Batson, supra*, 476 U.S. at p. 88; see also *People v. Cleveland* (2004) 32 Cal.4th 704, 732.)

(*People v. Avila* (2006) 38 Cal.4th 491, 541.)

As this Court recently explained in *People v. Bell* (2007) 40 Cal.4th 582: Batson described the procedure and standard to be used by trial courts when motions challenging peremptory strikes are made.

> '. . . First, the defendant must make out a *prima facie* case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]' (*Johnson v. California* (2005) 545 U.S. 162, [162 L. Ed. 2d 129, 125 S. Ct. 2410], fn. omitted.)' (*People v. Avila, supra*, 38 Cal.4th at p. 541.) We have endorsed the same three-part structure of proof for state constitutional claims. (*People v. Snow* (1987) 44 Cal.3d 216, 222; *Wheeler, supra*, 22 Cal.3d at pp. 280-282.)

(*People v. Bell, supra*, 40 Cal.4th at p. 596.)

Proof of a *prima facie* case may be made from any information in the record available to the trial court. Such proof may include a showing that the opponent has struck most or all of the members of the identified group from the venire; has used a disproportionate number of his peremptories against the group; demonstrating that the jurors in question share only their membership in the group--and that in all other respects they are as heterogeneous as the

community as a whole; a showing the opponent failed to rigorously question these same jurors, or ask them any questions at all. Lastly; a showing that the defendant is a member of the excluded group and the victim is a member of the majority group. (See, *People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281, fn. omitted; see also *Batson v. Kentucky, supra*, 476 U.S. at pp. 96-97 [in assessing a prima facie case, the trial court should consider "all relevant circumstances," including "a 'pattern' of strikes against black jurors" and "the prosecutor's questions and statements during voir dire examination"]; *People v. Bell, supra*, 40 Cal.4th at p. 597.)

The role of the reviewing court considering a trial court's denial of a *Batson-Wheeler* motion is a limited one. This Court reviews the trial court's ruling on the question of purposeful racial discrimination for substantial evidence. (*People v. McDermott* (2002) 28 Cal.4th 946, 971.) It is presumed that the prosecutor uses peremptory challenges in a constitutional manner, and this Court gives deference to the court's ability to distinguish "bona fide reasons from sham excuses." (*People v. Burgener* (2003) 29 Cal.4th 833, 864; *Batson, supra*, 476 U.S. at p. 98, fn. 21.) When the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. (*People v. Boyette* (2002) 29 Cal.4th 381, 421; *People v. Alvarez* (1996) 14 Cal.4th 155, 193.)

After *Johnson v. California* (2005) 545 U.S. 162 [25 S.Ct. 2410, 162 L.Ed.2d 129], this Court reviews the record independently to resolve the legal question whether the record supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis. (*People v. Cornwell* (2005) 37 Cal.4th 50, 73; accord, *People v. Avila, supra*, 38 Cal.4th at p. 554; *People v. Bell, supra*, 40 Cal.4th at p. 597.)

There were ten African Americans in the group of prospective jurors subjected to voir dire to hear Booker's case. According to Booker's analysis

of the members of the panel who completed questionnaires, 65% of the panel was Caucasian, 15% Hispanic, 8% African-American, 2% other, and 10% undeclared. (5 RT 672.) The prosecutor exercised peremptories as to six African-Americans, five in the original group and one in the group from which the alternate jurors were selected. Booker objected to four of the six excusals on *Batson-Wheeler* grounds. There were two African-Americans in the jury seated to hear the case. Booker is African-American and the three murder victims were Caucasian. (5 RT 629.)

According to the trial court, the two African-American jurors seated to hear the case constituted 16% of the jury, the African-American population of Riverside County was approximately 6 or 7%, at least as of the 1990 census, and African-Americans were fairly represented on the jury as seated. (6 RT 842-843.)

In denying each of Booker's *Batson-Wheeler* motions, the trial court found that Booker failed to demonstrate a *prima facie* case. (5 RT 668-669, 675; 7 RT 843-844.)

> When a trial court denies a *Wheeler* motion because it finds no prima facie case of group bias was established, the reviewing court considers the entire record of voir dire. [Citation.] If the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question, [the reviewing court will] affirm. [Citations.]

(*People v. Box* (2000) 23 Cal.4th 1153, 1188.) Thus, the ultimate issue to be addressed on a *Batson-Wheeler* motion "is not whether there is a pattern of systematic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of group bias." (*People v. Avila, supra*, 38 Cal.4th at p. 549.)

Booker claims that the prosecutor challenged Johnny M., Michelle W., Monique W. and Darryl J. because of group-bias, and solely because they were African-Americans. (AOB 72-83.) African-Americans are a protected class for *Wheeler* purposes. (*People v. Catlin* (2001) 26 Cal.4th 81, 116; *People v.*

Alvarez, supra, 14 Cal.4th at pp. 192-193.) However, the record suggests group-neutral reasons for the prosecutor's challenges, and the trial court's conclusions, that there were no strikes based on group bias, were well-reasoned and were amply supported by the record. The prospective jurors will be discussed in turn.

A. Johnny M.

The questionnaire completed by Johnny M. disclosed he had a grown child. (#2, 1529; 6 CT 1527.) He did not answer the question about whether any member of his family had "ever been accused of a crime (other than minor traffic) even if the case did not come to court." (#19; 6 CT 1535.) Other questionnaire answers showed that he had served on a prior civil jury (#26; 6 CT 1537); and that he would follow the law about the prosecution's burden of proof, "because I think it's very important to prove that a person is guilty before they are charged." (#33; 6 CT 1538). He also wrote that "The death penalty is the ultimate price one pays for vicously [sic] taking the life of others depending on the circumstances" (#45; 6 CT 1540), and rated himself as 5 out of 10 *vis-a-vis* the death penalty, or neutral (#45(a); 6 CT 1541). He wrote that he had no opinion about the death penalty, "Because my opinion does [sic] not count only the evidence and the facts matter." (#45(c); 6 CT 1541.)

On voir dire by the court, when asked about the failure to answer the question about a family member being accused of a crime, Johnny M. denied any member of his family had been accused of a crime. (5 RT 600.)

Later, the prosecutor also asked Johnny M. "Do you have anybody in your family that has been accused that you are aware of?" (5 RT 656-657) He answered, "No, not that I know of. Not that I know of." (5 RT 657.) After establishing that Johnny M. had a son, also named Johnny, the prosecutor asked if his son had been in trouble, had he been "prosecuted in Riverside several times?" (5 RT 657.) Johnny M. finally admitted that his son had been

prosecuted as a juvenile, but stated he "didn't know if [the questionnaire] counts for juvenile or what" and therefore he did not answer question number 19. (5 RT 657.) The prosecutor then asked if other jurors would change their answers based on his conversation with Johnny M. about the importance of that question. (5 RT 658.)

At the sidebar discussion about Johnny M., the court commented, "he was obviously hiding something. And when we found out his son had a juvenile history and he didn't think he was accused of a crime, and then there was some defensiveness in his posture, I could see no alternative but to–for the prosecution to excuse him as well." (5 RT 674.) The prosecutor stated that Johnny M.'s son had a very lengthy criminal record and Johnny M. could not have misunderstood the obligation to disclose that on the questionnaire, which had to be completed under penalty of perjury. Instead Johnny M. left that question unanswered, then when the court asked him point-blank about whether any family members had been accused of a crime, Johnny M. lied to the court, and denied it again to the prosecutor. (5 RT 675.) The prosecutor stated he would not keep Johnny M. on the jury, no matter what his explanation might be at that point. (5 RT 675.)

No reasonable prosecutor would retain a prospective juror who was concealing information on voir dire, particularly information about his offspring's criminal record which could possibly indicate the juror's bias against the district attorney's office which prosecuted his son and was presently prosecuting the murder case which the juror might be selected to hear. The prosecutor's explanation was race-neutral, was not pretextual, and there was substantial evidence in the record to support the court's denial of the *Batson-Wheeler* motion as to Johnny M.

B. <u>Michelle W.</u>

The questionnaire completed by Michelle W. indicated she was a young African-American woman who worked for Riverside County, was an active

church member, had a brother who had been arrested for drugs and gone to prison where she visited him, had been the victim of a highway shooting, and said she would listen to all the evidence before rendering her decision. It also showed that she felt the death was not an appropriate penalty for a crime and that wrongdoers will answer to a higher source;[15/] and she rated herself as 3 out of 10 and thus firmly against the death penalty.[16/] (#45 & #45(a); 8 CT 2068-2069.) But the questionnaire also indicated she would set her personal beliefs aside as a juror. (#45(c); 8 CT 2069.) In the questionnaire, she also noted that a person who does not ask for forgiveness will answer to God, and her opinion was that would be much worse than death. (#46, #50; 8 CT 2070, 2071.)

On voir dire, Michelle W. told defense counsel that life without parole is more severe than death. She also responded to a question about her opposition to the death penalty, that "Due to my religion I don't really believe in it, but as a juror I have to set it aside." She said she was willing to set her belief aside and be fair to both sides, and, despite her views on the death penalty, she would follow the court's instructions. (5 RT 621.)

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15. In answer to question number 45, Michelle W. wrote,

> "I'm against the death penalty. An individual convicted of a crime should pay for what they have done. I feel death isn't one of them. I'm a firm believer that if a person doesn't ask for forgiveness he/she will answer to a much higher source."

(6 CT 2068.)

16. Question number 45(a) asked:

> "On a scale of 1-10, with 10 being strongly in favor of the death penalty, 5 having no opinion, and 1 being strongly against the death penalty, how would you rate yourself?
>
> (circle one)
> 1 2 3 4 5 6 7 8 9 10"

Defense counsel asked if any juror had concerns because the defendant was an African American male, and the victims were not African-American. He then asked Michelle W. what she thought. (5 RT 629.) She answered: "It should have no factor on the case, because the situations as far as being a juror you are–you are not suppose to take that into consideration." (5 RT 629.)

When the prosecutor began his voir dire, he asked the first group of twenty prospective jurors to consider whether he or she could really vote to put someone to death, because this was not a movie or television, this was "for real." (5 RT 640.) After questions to Garth N., the prosecutor asked Michelle W., if she was aware anyone accused of a crime has a constitutional right to a trial with proof beyond a reasonable doubt, the same standard applied in all criminal cases. She answered yes. (5 RT 642.)

After questions to other jurors, the prosecutor asked Michelle W. about her position against the death penalty. (5 RT 649.) She repeated that she had strong beliefs against it, explaining, "I feel that, depending on the circumstances, that–and the evidence that's–the evidence and the testimony that's been given you need–a person should go by that." (5 RT 650.)

MR. SOCCIO: Why are you against it?

MICHELLE W.: I feel that a person for their actions that they take, they – they have to answer to someone else as well, regardless if they get the death penalty or not. If they don't ask for forgiveness, they are still going to – they are beyond, to me, in my –

MR. SOCCIO: Now, [Booker] just heard you say that. Suppose he gets up and says I have asked for forgiveness, would that be enough for you to say, well, then no death penalty?

MICHELLE W.: No. He doesn't have to ask for forgiveness from me. He has to ask for forgiveness within himself to his almighty God.

MR. SOCCIO:	What I'm trying to find out from you is whether your feelings are so strong against the death penalty that my job is going to be an uphill job persuading you right from the beginning even before you know the facts.
MICHELLE W.:	No.
MR. SOCCIO:	It's okay. Some people want no hand in recommending someone's death.
MICHELLE W.:	No. As I stated in my questionnaire, I am willing to put my beliefs aside in order to be a fair juror.

(5 RT 650-651.)

The prosecutor's questioning of Michelle W. was hardly perfunctory, and was clearly focused on her professed position against the death penalty based on strongly held religious beliefs. Although Michelle W. stated she would set her personal beliefs aside, obviously the prosecutor was concerned that her intentions might well be overridden by her personal beliefs, if there were a penalty phase of the trial. That was a clearly stated, non-pretextual basis for this prosecutor and any prosecutor in a capital trial.

The trial court properly found no *prima face* case of group discrimination in the exercise of a peremptory challenge to excuse Michelle W. on the basis of her beliefs about the death penalty, and there was no error. (*People v. Robinson* (2005) 37 Cal.4th 592, 624, fn. 15; *People v. Champion* (1995) 9 Cal.4th 879, 907; *People v. Pinholster* (1992) 1 Cal.4th 865, 913.)

C. <u>Monique W.</u>

The questionnaire completed by Monique W. showed she belonged to a Baptist church, and considered herself religious, although that would not make it difficult to be a juror. (#12 & #14; 12 CT 3411.) She disclosed that an aunt was charged with child neglect, when the aunt's three-year old child was murdered by the aunt's boyfriend. (#17, #19 & #21; 12 RT 3412-3414.) She

wrote that she could be fair because she honestly believed that "a person is innocent until proven guilty." (#43;12 CT 3418.) However, she also wrote, "The death penalty should only be used in instances where there can be no rehabilitating that individual and the danger of others are at stake." (#45; 12 CT 3418.) On a scale of 1 to 10, with 10 being absolutely in favor of the death penalty, she rated herself a 6, or slightly in favor, "because it protects the lives of others." (#45(a); 12 CT 3419.)

The trial court asked Monique W. about her position that the death penalty was appropriate only if there were no likelihood of rehabilitation, explaining that there was no requirement to find a person cannot be rehabilitated in order to impose the death penalty.[17] She said she understood

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17. The court asked Monique W. the following:

Q. And then on question No. 45, you answered this: "When a person deliberately and maliciously causes severe harm to others and affects other lives that are uncalled for, the death penalty should only be used in instances where there can be no rehabilitating that individual and the danger to others are at stake."

It may well be that factors you can consider may involve rehabilitation and may involve danger to others. That may be something you can consider in the overall picture to what's appropriate, but that is not the standard–the only standard. For example, there will be no requirement that you make a finding that the person can never be rehabilitated in order to come back with a death penalty. Do you understand that?

A. Yes, I understand. (RT 598.)

Q. There will be aggravating and mitigating circumstances, and even though you think a person can be rehabilitated, the death penalty may be the appropriate punishment given the crime of the person. Do you understand?

A. I understand.

the explanation, and told the court she could set aside her personal feelings and follow the guidance of the law. (5 RT 598-599.)

On voir dire, Booker's counsel pointed out to her that prison is primarily for punishment, and not rehabilitation. (RT 636.) The prosecutor asked Monique W. if she thought that a conflict in the evidence would constitute reasonable doubt, and she answered that it would. (5 RT 644.) He explained to all prospective jurors that jurors must determine if a witness is credible, not just that two different versions of evidence meant reasonable doubt and the was the end of the matter. (5 RT 645.) He also asked Monique W. if she believed everyone is presumed innocent, even if they actually committed a crime; she said yes. (5 RT 647.) Further, the prosecutor pointed out that there was no test for rehabilitation and there might not even be evidence about rehabilitation as a factor in deciding on the death penalty, and she said she understood. (5 RT 666-667.)

Again, there were obviously non-pretexual, non-biased reasons for exercising a peremptory strike, as opposed to a prima facie case of group bias for excusing Monique W. A prosecutor in any case would be concerned about a juror who was confused about conflicting witnesses automatically creating reasonable doubt. (5 RT 644.) A prosecutor in a capital case would be very

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> Q. On the other hand, the fact the person can be rehabilitated may be a factor in mitigation and may be considered as well. Do you understand that?
>
> A. I understand.
>
> Q. Do you think you would set aside your general feelings and follow in good faith the guidance given to you by the law?
>
> A. I could do that.
>
> (RT 598-599.)

concerned about a juror who had said, that if there were any chance of rehabilitation, she would not vote for death. (5 RT 676.) That Monique W. said the "right thing" was not enough to overcome this prosecutor' concerns about her opposition to the death penalty. (5 RT 676.) There is substantial evidence in the record to support the trial court's determination that the peremptory strike excusing Monique W. was not based on group bias.

D. Darryl J.

The questionnaire for Darryl J. indicated that he belonged to the Church of Christ. (#12; 6 CT 1511.) He answered also that, "Death penalty is needed but it must be rendered fairly." (#45; 6 CT 1518.) He rated himself at 6 out of 10, or mildly in favor of the death penalty. (#45(a); 6 CT 1519.) He indicated that he had religious affiliations that take a stance against the death penalty (#46; 6 CT 1520 ["Church of Christ is against it."]), but he personally would consider all evidence and jury instructions, before deciding the appropriate penalty (#47(c); 6 CT at 1520).

The court went over Darryl J.'s questionnaire, and asked about his career in loss prevention (19 years with a private company), which, he testified, would not affect his fairness. (5 RT 701.) Admittedly, he was usually a prosecution witness when he testified at trial. (5 RT 702.) His wife was a traffic officer; his sister was a bailiff; his younger brother was convicted of manslaughter in the death of the brother's child. (5 RT 704.) Darryl J. testified that would not affect his fairness, and the brother had turned his life around. (5 RT 704-705.) Darryl J. testified he is a Christian, although not highly religious, however his church is against the death penalty. (5 RT 706.) When asked, Darryl J. stated, "But one of the basic things about being a Christian is you don't kill people." (5 RT 706.) When the court asked if he knew some churches did support the death penalty, he answered, "Then it's not a true Christian–" (5 RT 706.)

However, he said he could follow the law, regardless of the position of his church. (5 RT 707.)

Defense counsel asked Darryl J. about his religious views also, and whether they would interfere with his ability to follow and apply the law. (6 RT 729-730.) Darryl J. answered, "You're probably referring to what I said about Christians don't believe in putting people to death." (6 RT 730) He explained further that, "There's the overriding part to being a Christian is that you follow the laws of the land and follow the laws of whatever jurisdiction that you're living in. If you don't like those laws, then you move or do something to try to change it." (6 RT 730.) Darryl J. testified that he understood that the law of the land prevails in the courthouse, separate from religion, and said he would follow the law of the land. (6 RT 730.)

The prosecutor asked another juror about the conflict between the "law of the land" and his own personal values and religious beliefs and affiliation, then addressed the same question to Darryl J., who responded: (6 RT 739.)

> It's not a matter of it conflicts. It's a matter of the prevailing sentiment that you follow the laws of the land. If the laws of the land and voters like you and me say California is going to have the death penalty and I'm sitting on a trial that's part of it, then I follow the law of the land. I can deal with the conflict between myself and the laws.

(6 RT 739.) He denied he said no Christian church would approve of the death penalty, and said in fact he had told the judge there were no Christians in the Old Testament. (6 RT 739.)[18] There were additional questions about his

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18. Actually, in answers to the court's voir dire, he said both:

> Q. [by the court] Well, there are some Christian churches that support the death penalty. Did you know that?
>
> A. [Darryl J.] Then it's not a true Christian –
>
> Q. Again , sometimes it depends on what part of the Bible they decide to go and follow. If they are more Old

experience testifying in court, and his brother's manslaughter conviction, where Darryl J. thought the original charge against his brother was unjust [murder] but the conviction was appropriate [manslaughter] because the brother played roughly with his son and caused his death. (6 RT 739.)

As stated at the time of the Batson-Wheeler motion, the prosecutor was ambivalent about Darryl J. as a juror, despite his occupation. However, he viewed Darryl J.'s body language as angry and uncomfortable; recalled Darryl had a brother who was convicted of manslaughter which concerned him; but the biggest concern was a prospective juror who identified himself clearly as a Christian, and stated that no Christian church favors the death penalty, despite his professed intent to follow the law of the state. (6 RT 844-845.) Thus there is substantial evidence in the record to support the trial court's finding that the peremptory strike against Darryl J. was not racially biased, and the reasons were not pretextual. (6 RT 843-844.)

Booker acknowledges that the prosecutor excused two African-American prospective jurors without objection, but comments no further. (AOB 42.) Respondent submits that the circumstances of those two strikes are illuminating in evaluating Booker's *Batson-Wheeler* argument.

E. <u>Garth N.</u>

Garth N. did not specify his race on the questionnaire, but the court concluded he was African-American, without dispute. (#1(D); 6 CT 1727; RT 673.) Garth N. was an art teacher (#5; 6 CT 1729), and active in Democratic politics (#12; 6 CT 1731; he had entered a nolo plea to assault with a deadly

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Testament than New Testament –

A. In the Old Testament, there are no Christians. In the New Testament –

(RT 706-707.)

weapon in 1995, and believed he was "railroaded" and unfairly accused, while conceding he had received a "lesson in the legal process." (#19; 6 CT 1733.) He felt he had been "hassled" by the California Highway Patrol in an unrelated event (#22; 6 CT 1734); and in his opinion, the state correctional facility was a "warehouse for the economically and socially disenfranchised," and failed to provide rehabilitation (#23; 6 CT 1734). He liked psychologists who might provide remedies and important testimony (#25(A); 6 CT 1735) and he thought his religious beliefs would affect his decision (#33; CT 1736). He was mildly in favor of the death penalty (6 out of 10) but did not want someone to die if wrongly accused. (#45(a) & (b); 6 CT 1739.) He noted his religion had taken a stance on the death penalty, but he personally thought its use depended on the circumstances of the crime. (#46; 6 CT 1740.)

On voir dire, Garth N. described how he had been "railroaded" by the legal process after being arrested, because he had to pay an attorney and use up his own time, which irritated and frustrated him. He pleaded no contest to charges involving an attempt to run over a Department of Forestry officer on the highway, after his attorney told him race might have an impact on the case. (5 RT 565-567.) He also thought he had been mistreated by a Highway Patrol Officer on a different occasion. (5 RT 568-569, 659-660.)

No prosecutor is going to retain a prospective juror who has had very negative experiences with law enforcement, who thinks he was "railroaded" by the system in a criminal matter, who resents lawyers and law enforcement officers alike, and who thinks that race was a factor in being arrested himself, when the murder case he might be selected to hear involves an African-American defendant and Caucasian victims. Clearly, the questioning was incisive and responded to the answers in the questionnaire, disclosing a non-pretextual basis for the prosecutor's peremptory strike to excuse Garth N. The

lack of group bias was clear to Booker as well, because he did not object to the strike to excuse Garth N.

F. Michael R.

The questionnaire for Michael R. disclosed a 37-year-old African-American man, a construction foreman, who liked to spend time at church and with his wife and kids. (#1(A); 7 CT 1837 and #13; 7 CT 1841.) However, Michael R. had what he described as a "bad experience" with a judge in divorce court, and with law enforcement officers who misidentified him. (#22; 7 CT 1844.) Michael R. claimed he could be a fair juror because he had God in his life. He was neutral on the death penalty. (#43, #45 & #45(a); 7 CT 1848-1849.)

When the court asked questions on voir dire, Michael R. acknowledged that his older brother had been in and out of prison on drug charges. Michael R. was accused of a crime himself in 1984-1985. He explained he found a gun in an alley, and the police just happened to stop him and check him out, and he told them he had the gun, and he ended up going to jail. (6 RT 812-814.) He also had had a bad experience with a judge in divorce court, when he was ordered to pay additional child support. (6 RT 816.) Further, he described being stopped by police officers in Portland, Oregon, once or twice a month for six years or so when he lived there, and surmised they did not like people from California. (6 RT 816-817.) Both counsel waived the opportunity to address questions to the prospective alternative jurors, including Michael R. (6 RT 833-834, 836.) Booker did not object to the prosecutor's challenge to Michael R. or allege the strike was race based. (6 RT 837.) Considering the answers on Michael R.'s questionnaire and his answers to the court's voir dire, no prosecutor would seat Michael R. on a death penalty jury, given his unhappy experience with courts and counsel and cops. Again there were obvious non-pretextual reasons for the peremptory strike, and the lack of a *Batson-Wheeler*

challenge as well, which underscore the propriety of the strikes which Booker now challenges.

There were few questions by the parties to the two African-American jurors who were seated on the jury. (Juror #1; 6 RT 758-762, 784-785; 11 CT 2940.) Even the court could not think of questions for Juror # 8 (5 RT 595-596) and there were only a few from either counsel (5 RT 633-636, 662; 4 CT 911).

In sum, Booker failed to establish a *prima facie* case of group bias as to any or all of the disputed peremptory strikes exercised by the prosecutor. The only basis for Booker's objections was that the four disputed prospective jurors were African-American, and he presumed they were excused because of their race and for no other reason. However, as to each of the four disputed jurors, there were obvious and not pretextual, race-neutral reasons for the prosecutor's peremptory strikes.

The most obvious reason for the peremptory strikes as to Michelle W., Monique W. and Darryl J. was the impact of their individual religious beliefs on their views of the death penalty, and ultimately their capacity to impose it, contrary to strongly held, important personal beliefs. They might not have been subject to being excused for cause, but each was an obvious candidate for a peremptory strike, based on the record. Monique W.'s focus on rehabilitation in lieu of the death penalty was not what the prosecutor sought in a capital case juror. Michelle W. was strongly against the death penalty, although she stated she could set aside her religious objections. The obvious reason for the strike as to Johnny M. was his stubborn reluctance to disclose his son's criminal activity, and an inference that he was hostile to the legal system. Further, Booker did not object to the prosecutor's peremptories to excuse Garth N. or Michael R., who were equally and obviously hostile to attorneys, judges and the law, based on their own personal experiences. Finally, two of the seated jurors

were African-American, and the questioning as to those two was brief for the court and counsel, because of the absence of the concerns raised with Monique W., Michelle W., Johnny M. and Darryl J.

The prosecutor's questioning of the disputed prospective jurors was not desultory but pointed and as lengthy as necessary, in light of the answers in their questionnaires, and previous questions from the court and defense counsel. There was nothing in the voir dire or the reasons provided by the prosecutor to establish any reason other than those obvious in the record, for the strikes. The prosecutor's explanations, even if echoed by the court, showed non-pretexual bases for the strikes that were certainly not racially based. The prosecutor's overriding concern was with the juror's opposition to the death penalty based on religious grounds, alternatively it was with the juror's negative experience with -- and inferentially negative opinion of -- law enforcement, attorneys and the courts in general.

The court did not err in finding no prima facie case of group bias, in not requiring a race-neutral explanation from the prosecutor and in not reaching the third stage of *Batson-Wheeler* analysis.

Booker concedes that the prosecutor consistently excused prospective jurors who opposed the death penalty on religious grounds. (AOB 52.) He even makes a brief comment about a White Catholic juror who was also excused. After a passing reference to *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196] (2005), he concludes that all religious-based strikes were also impermissible, because they merely substituted religious-affiliation group bias for racial group bias. (AOB 52.) Thus, he argues all prospective Catholic jurors would be automatically excludable, based on the Catholic church's opposition to the death penalty. However, he waived that argument because he did not make it in the trial court, further, it is contradicted by the record. (*People v. Staten* (2000) 24 Cal.4th 434, 451-452; *People v.*

Hart (1999) 20 Cal.4th 546, 588-589.) Here, the prosecutor's concern was not with religious affiliation, but with the impact of closely-held religious belief on the juror's ability to return a death verdict. While exclusion of a prospective juror on grounds of religious <u>affiliation</u> is improper (see, *In re Freeman* (2006) 38 Cal.4th 630, 643), inquiry into such affiliation may be appropriate during voir dire, where, as here, <u>religious belief</u> may indicate potential bias in favor of or against the death penalty that requires further exploration. (See *People v. Catlin, supra*, 26 Cal.4th at p. 118 [prospective juror identified himself with a particular denomination that believes that only God may take someone's life]; *People v. Williams* (2006) 40 Cal.4th 287, 308.)

Booker's arguments notwithstanding, there was nothing in the record to establish a *prima facie* showing of group bias, particularly in light of the two African-American prospective jurors who ultimately sat on the jury (*People v. Avila, supra*, 38 Cal.4th at p. 556), and two more who were excused without objection by Booker. Thus the court correctly determined there was no *prima facie* case of group discrimination in the prosecutor's peremptory strikes.

While not required to do so, the prosecutor gave reasons showing that he viewed the prospective jurors he challenged as problematic, not because of their race, but because of negative experiences with law enforcement or the courts; or because their religious beliefs, might impact on their view of the death penalty or court proceedings in general. The trial court accepted those reasons, and substantial evidence in the record supports the court's rulings. A review of the record makes it clear that the prosecutor was looking, without regard to race, for jurors who could participate in court proceedings, listen to the judge and the attorneys and the evidence, and impose the death penalty if the evidence warranted it. The prospective jurors, including African-Americans, whom he accepted were of that type, and those he rejected were lacking in the essentially pro-death-penalty qualities he was seeking, or were

hostile to the criminal justice system. (5 RT 653.) Accordingly, Booker's *Batson-Wheeler* claim is without merit, and the guilt and penalty verdicts should be affirmed. (See *People v. Huggins* (2006) 38 Cal.4th 175, 236.)

IV.

BOOKER WAIVED ANY CLAIM THAT THE TRIAL COURT AND COUNSEL FAILED TO ADEQUATELY QUESTION THE JURY ABOUT RACIAL BIAS BECAUSE HE DID NOT REQUEST ADDITIONAL QUESTIONS FOR THE QUESTIONNAIRE OR DURING VOIR DIRE, AND NONE WERE DENIED BY THE COURT, AND THE CLAIM ALSO FAILS ON THE MERITS

Booker contends that he was denied a fair trial by an impartial jury, contrary to the United States and California constitutions, because the court and counsel did not conduct an adequate voir dire of the prospective jurors on the issue of their racial bias. (AOB 56, 58-60.) Respondent disagrees. The record shows the jurors were adequately questioned regarding bias.

On August 17, 1999, Booker filed a Motion for Right to Voir Dire. (2 CT 458-466.) In the motion he asked for an order permitting counsel to conduct reasonable voir dire of the prospective jurors, to protect his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth amendments of the United States Constitution, and article I, sections 1, 7, 13, 15, 16, 17, and 27 of the California Constitution and the statutory right to an impartial jury, and to facilitate informed exercise of peremptory challenges and inquire about bias. (2 CT 458-461.) The court granted the motion, telling both counsel to use as much time as they desired over the two days allocated for voir dire. (3 RT 267.)

The trial court and counsel also discussed preparation of a juror questionnaire, and exchanged drafts of the juror questionnaire (2 RT 189-191, 200, 204-205; 3 RT 240-242) until Booker told the court "we are fine with the

questionnaire." (2 RT 236.) Neither side requested changes to the questionnaire. (3 RT 242-243.)

The final questionnaire asked a number of background questions, including place of residence, education, occupation and the race of each juror #1(D); 3 CT 736); whether religion would make it difficult to sit as a juror (#14; 3 CT 740); whether the prospective juror had knowledge of any of the participants, including the defendant (#15; 3 CT 741); whether the prospective juror or family or friends had experience with the criminal justice system (##16-23; 3 CT 741-743); and whether the juror had any knowledge of the case (## 28-31; 3 CT 743-744).

Question No. 44 asked, "Is there anything about the appearance of the defendant(s) that might bias you for or against either side?" There was space for a response. (3 CT 747.)

The court outlined the procedure for voir dire, that after the court's questions to the first group of twenty prospective jurors, each attorney would have forty-five minutes of individual voir dire. Attorneys would have twenty minutes of voir dire each for successive groups of twenty prospective jurors, considering the amount of information available in the questionnaire. (3 RT 267.) The court asked counsel to tell the court what additional areas of inquiry the court should cover. (3 RT 268-269.) The court intended to ask about matters not completed in the questionnaire or answers which were equivocal, and the prospective juror's ability to be fair. (3 RT 269; 5 RT 519.) The questionnaire was distributed on September 14, 1999. (3 RT 322, 329.)

Each side had 20 peremptory challenges. (5 RT 529.)

According to defense counsel's count, the original group of 320 was reduced to 132 prospective jurors, after time-qualification and hardship excusals, and consisted of 64% Caucasian and 8% African-American prospects. (2 RT 233-234, 672, 841.) Two African-American jurors were seated to hear

the case. (6 RT 842-844 [#8, #1].) The prosecutor exercised six peremptory strikes against African-American jurors, and Booker objected to four of those six strikes on *Batson/Batson*[19] grounds, alleging the strikes were made on racial grounds alone. (5 RT 667, 670, 671; 6 RT 805.)

Booker contends that the trial court failed to conduct an adequate general voir dire because it failed to ask prospective jurors, inter alia, if they thought African-Americans had a propensity to violently attack Caucasians. (AOB 59-60.) He contends the extra questions were required because he is an African-American being tried in a predominantly Caucasian community, on charges he murdered three Caucasian young women, and facing the death penalty. He speculates that more questions would have ferreted out the hidden prejudice and bias, thus he was denied an impartial jury and a fair trial. He does not specify any questions, nor any basis for concluding the questions were necessary or would have changed the outcome of the trial. However, Booker waived the issue for appeal by not requesting further questioning on racial bias in the questionnaire or during voir dire, and by accepting the jury after exercising only 7 of his 20 allotted peremptory challenges. Moreover, the argument fails on the merits.

Booker did not raise the issue of inadequate voir dire about racial bias in the trial court, and thus has waived the issue on appeal. (AOB 60-61.)

Here, not only did Booker fail to challenge the panel, he accepted the jury after using only seven of his allotted twenty peremptory challenges. (5 RT 529, 6 RT 806.) The prosecutor and Booker's counsel worked together to complete the questionnaire to be given to prospective jurors. (2 RT 189-190, 200, 204-205, 236; 3 RT 242-243.) The trial court agreed to Booker's motion

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19. *People v. Wheeler* (1978) 22 Cal. 3d 258, 280, 583 P.2d 748, 764, 148 Cal. Rptr. 890, 905 (1978); *Batson v. Kentucky, supra*, 476 U.S. 79, 96 (1986).

for attorney voir dire, and established a procedure allocating twenty to forty-five minutes of voir dire by each counsel for each group of prospective jurors, before peremptory strikes were exercised. (3 RT 267; 5 RT 529.) Booker did not request additional specific questions for the questionnaire to probe potential racial bias, thus no such questions were refused by the court. Booker did not request that the court ask particular questions about potential racial bias and none were rejected; Booker was not prevented by the trial court from asking such questions in his own voir dire. In fact, the court solicited questions from both parties, to be asked by the court on voir dire. (3 RT 268-270.)

Contrary to Booker's argument, he has waived the claim that the trial court failed to conduct an adequate inquiry about jurors' racial biases. (AOB 61; *People v. Staten, supra,* 24 Cal.4th 434, 451-452; *People v. Hart, supra,* (20 Cal.4th at pp. 588-589.) He has also failed to allege or show what additional or different questions would have ferreted out the racial bias he alleges existed in the jury panel. (*People v. Staten, supra*, 24 Cal.4th at p. 452.)

Booker should not now be allowed to raise speculative claims about jurors whom he never challenged, and even now does not expressly claim were unacceptable to him. "A party's failure to exercise available peremptory challenges indicates relative satisfaction with the unchallenged jurors. Having so indicated in this case, defendant cannot reasonably claim error." (*People v. Hart, supra,* 20 Cal.4th at p. 589, citing *People v. Morris* (1991) 53 Cal.3d 152, 185.) The argument is waived.

Even if this Court reaches the merits of the argument, it fails. Booker contends that the voir dire was inadequate because the trial court did not sufficiently question the jurors about racial bias, as required by *Mu'min v. Virginia* (1991) 500 U.S. 415, 425 [111 S.Ct. 1899; 114 L.Ed.2d 493], *Turner v. Murray* (1986) 476 U.S. 28, 35-36 [106 S.Ct. 1683, 90 L.Ed.2d 27], and

Ham v. South Carolina (1973) 409 U.S. 524, [93 S.Ct. 848, 35 L.Ed.2d 46]. (AOB 58, 61-62.) He is incorrect.

The trial judge's exercise of discretion in conducting voir dire is entitled to "considerable deference" on appeal. (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 189 [101 S.Ct. 1629, 68 L.Ed.2d 22, 29]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1157; *People v. Wash* (1993) 6 Cal.4th 215, 253; *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1313.) The trial judge "is in the best position to assess the amount of voir dire required to ferret out latent prejudice, and to judge the responses." (*People v. Taylor*, *supra*, 5 Cal.App.4th at p. 1313.) Abuse of discretion is only found where the questioning is not reasonably sufficient to test the jury for bias or partiality. (See *People v. Cardenas* (1997) 53 Cal.App.4th 240, 247; *People v. Chaney* (1991) 234 Cal.App.3d 853, 861.) Finally, "Unless the voir dire conducted by the court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal. [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 661.)

In *People v. Holt*, 15 Cal.4th 619, this Court said:

> [A]dequate inquiry into possible racial bias is . . . essential in a case in which an African-American defendant is charged with commission of a capital crime against a White victim. (*Mu'min [sic] v. Virginia* (1991) 500 U.S. 415, 425 []. The defendant is entitled to have prospective jurors told the race of the victim and to have them questioned on the issue of possible racial bias. (*Turner v. Murray* (1986) 476 U.S. 28, 36-37 []; *People v. Kelly* (1992) 1 Cal.4th 495, 517 [].

(*People v. Holt*, *supra,* 15 Cal.4th at pp. 660-661.)

In *Mu'min*, the United States Supreme Court held that the trial judge's <u>refusal to question prospective jurors</u> about the specific contents of the news reports to which they had been exposed did not violate the defendant's right to an impartial jury or his right to due process under the Fourteenth Amendment. (*Mu'min v. Virginia*, *supra*, 500 U.S. at pp. 422-432, emphasis added.) In

reaching its holding, the court reviewed previous cases which had dealt with the extent of voir dire examination. (*Id.* at pp. 422-430.) The court noted that in one of those cases, *Turner v. Murray, supra*, 476 U.S. at pp. 36-37, it had held that "in a capital case involving a charge of murder of a white person by a black defendant" a trial judge must question prospective jurors as to racial prejudice. (*Mu'min, supra*, 500 U.S. at pp. 423-424.)

In *People v. Kelly*, (1992) 1 Cal.4th 495, 517-518, this Court discussed *Turner*, stating:

> In *Turner v. Murray, supra*, 476 U.S. at pages 36-37 [], the high court held that a 'capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.' The court also limited the scope of the holding: 'The rule we propose is minimally intrusive; as in other cases involving "special circumstances," the trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively. [Citation.] Also, a defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry.' (*Id.* at p. 37 [].)" (Italics omitted.)

Here, Booker cannot complain that the trial court failed to adequately interrogate prospective jurors on Booker's race, or question them on racial bias, because he did not specifically ask that an additional inquiry be made, and the trial court did not deny any such questions. (*People v. Kelly, supra*, 1 Cal.4th at p. 518, citing *Turner v. Murray, supra*, 476 U.S. at pp. 36-37.) "Should defendant's counsel decline to request *voir dire* on the subject of social prejudice, we in no way require or suggest that the judge breach the topic *sua sponte*." (*Turner v. Murray, supra*, 476 U.S. at p. 37, fn. 10, italics in original.)

Here, the voir dire was constitutionally adequate. The juror questionnaire prepared by the parties contained a question relating to race which was relevant to the evidence in this case, i.e., an African-American defendant and Caucasian victims. Thus No. 44 asked, "Is there anything about

the appearance of the defendant that might bias you for or against either side?" (3 CT 734.)

During attorney voir dire, Booker's counsel also asked the following:

> You can all see that my client is an African-American male. I believe that you will hear, should you sit as a juror in this case, that the victims are not African-American. Now, is there anybody in this group of 20 [prospective jurors] that has a reaction to the fact that the victims are of a different race than my client?
>
> Miss Williams, what do you think?" (5 RT 629.)
>
> PROSPECTIVE JUROR MICHELLE WILLIAMS: "No. It should have no factor on the case, because the situations as far as being a juror you are – you are not suppose to take that into consideration." (RT 629.)
>
> MR. MACHER: Right.
>
> Miss Amato, what do you think of that?
>
> PROSPECTIVE JUROR AMATO: I don't – there is no reaction to it. I mean, if a life was taken, it doesn't matter on their skin. (RT 629.)

When counsel asked if anyone disagreed with the prospective jurors' answers, no other prospective juror responded. (RT 629.)

The trial court and counsel both complied with the dictates of *Turner v. Murray*, *supra*, 476 U.S. at pp. 36-37 and *Mu'min v. Virginia* (1991) 500 U.S. 415.

Cases relied upon by Booker do not change the outcome. (AOB 58-59.) What is consistent about the cases he cites is that in each instance, the trial court refused to permit any questioning about possible racial bias. That is in stark contrast to the situation at Booker's trial, where the parties agreed on the racial bias question to be included in the questionnaire; where Booker's counsel asked the prospective jurors if anyone had a problem with the fact that Booker is African-American and the victims were not; and, where the trial court asked for questions and areas of inquiry counsel wanted the court to explore, and further, the court did not refuse any proposed questions about possible racial bias. Thus:

In *Ham v. South Carolina, supra,* 409 U.S. at pp. 526-527 (AOB 58) the trial court asked general questions about juror prejudice, but refused to ask specific questions about racial bias. Defendant was a young black male, well known locally as a civil rights activist. He was convicted of possession of marijuana, over a defense that he had been framed because of his civil rights activities. His prominence and reputation, plus his defense, led the court to conclude that racial issues were inextricably bound up with the trial. (*Ham*, 409 U.S. at pp. 596-597.) The Supreme Court reversed because the trial court refused to inquire about racial prejudice, but the Supreme Court did not specific any particular number of questions or form of questioning for the inquiry.

In *Turner v. Murray*, 476 U.S. at pp. 35-36 (AOB 58), the Supreme Court reversed the death penalty for a black man who was sentenced to death for killing a white storekeeper, after the trial court refused to ask about racial prejudice, and because the jury was not informed during voir dire that the victim was white.

In *Ristaino v. Ross* (1976) 424 U.S. 589 [96 S.Ct. 1017, 47 L.Ed.2d 258], distinguished in *Taylor*, 476 U.S. at pp. 31-32, the Supreme Court held that the trial court's refusal to inquire about racial bias may not have been tactically wise, but was not unconstitutional, absent special circumstances such as those in *Ham*. In *Ristaino*, the black defendant was accused of robbery and assault on a white university security guard. The Supreme Court upheld the conviction, despite the trial court's refusal to ask questions about racial prejudice, finding race was not intertwined in the trial, as it was in *Ham*. *Ristaino* held that the fact of interracial violence alone is not a "special circumstance" entitling a defendant to have prospective jurors questioned about racial prejudice. (*Ristaino*, 424 U.S. at p. 598; *Taylor*, 476 U.S. at p. 35, n.7.) *Ristaino* left it to the judge's discretion to determine what measures might be necessary to discover racial prejudice, absent a showing of a significant

likelihood that racial prejudice might affect the outcome of the trial. (*Ristaino*, 424 U.S. at p. 598.) *Taylor* noted there is a special concern that racial bias not intrude when the penalty is death. (*Taylor*, 476 U.S. at p. 36.)

In *People v. Wells* (1983) 149 Cal.App.3d 721, 725-727 (AOB 58-59), the black defendant was convicted of kidnapping and killing a white woman. The trial court refused to ask the potential jurors why there were so few black corporate presidents, so few blacks in professional golf and tennis and no black governor of California. The Court of Appeal found the questions were relevant to uncovering racial bias, and the trial court abused its discretion by refusing to allow counsel to make the inquiries, requiring reversal.

In *People v. Taylor, supra,* 5 Cal.App.4th 1299 (AOB 58) days after passage of Proposition 115, the trial court opted to conduct all of the voir dire, but offered to ask questions requested by counsel or expand voir dire at their request. The defendant was black, the victim was Hispanic, and the court asked if that would be a problem, and whether each juror could set aside any prejudices or biases and be neutral. Two prospective jurors were excused for cause on the bias issue.

In *Taylor*, neither side exhausted its peremptory challenges, but the court reached the merits of the argument and concluded that while there is no single, correct way to conduct voir dire, defense counsel is not required to be the "proverbial potted plant." (*Taylor*, 5 Cal.App.4th at pp. 1312-1313.) However, the sufficiency of voir dire to empanel an impartial jury is the responsibility of the trial court and left largely to the court's discretion, despite the difficulty of measuring the "adequacy" of voir dire on appeal. (*Rosales-Lopez* (1981) 451 U.S. 182, 188-189 [101 S.Ct. 1629, 68 L.Ed.2d 22]; see, *Taylor*, 5 Cal.App.4th at 1313-1314.) Therefore, review is analogous to that in the *Wheeler/Batson* context, where the trial court is entitled to great deference, and is upheld absent a showing of manifest error. (*Patton v. Yount* (1984) 467 U.S. 1025, 1031

[104 S.Ct. 2885, 81 L.Ed.2d 847]; *Taylor*, 5 Cal.App.4th at p. 1314.) In *Mu'min* the Supreme Court also pointed out it has supervisory power over voir dire in federal courts, but it may only ensure adherence to the federal constitution in state courts. (*Mu'min*, 500 U.S. at 424-426.)

In *Mu'min v. Virginia*, 500 U.S. at p. 424-427, the United States Supreme declined to make "content" questions about pretrial publicity a constitutional requirement, since peremptory challenges are not required by the Constitution. (*Ross v. Oklahoma* (1988) 487 U.S. 81, 88 [108 S. Ct. 2273; 101 L. Ed. 2d 80].) Moreover, despite possibly aiding in assessing whether a juror is impartial, such questions are constitutionally compelled only if the trial court's failure to ask them renders the defendant's trial fundamentally unfair. (See *Murphy v. Florida* (1975) 421 U.S. 794, 799 [95 S. Ct. 2031, 44 L. Ed. 2d 589].) In *Aldridge v. United States* (1931) 283 U.S. 308, 311-313 [51 S.Ct. 470, 75 L.Ed.2d 1054] the Supreme Court held that a trial court's voir dire must cover the subject of racial bias, although the court did not specify any particular questions that must be used. (See, *Mu'min*, 500 U.S. at pp. 424-427.)

Here, the trial court imposed no barriers to further exploration of possible racial bias by either counsel. The court did not refuse to ask the jurors any questions about racial bias requested by Booker, nor did the court refuse to permit Booker to ask such questions himself. The court did not refuse to add any questions to the questionnaire which were suggested by Booker to explore racial bias. Prospective jurors were informed that the defendant was African-American and that he was accused of killing three Caucasian young women, and after reading the questionnaire they were fully aware the death penalty was a possibility. However, there was no evidence of race as a motive in the killings, or any special circumstance beyond the different races of the defendant and the victims, in the context of a capital case.

Booker acknowledges that the trial court did not refuse to allow voir dire about racial bias. (AOB 61.) Booker's argument that the trial court had a sua sponte duty to adequately probe Caucasian jurors' attitudes about African-Americans. to guarantee Booker a fundamentally fair trial was rejected in *People v. Taylor*, 5 Cal.App.4th at p. 1317, citing *People v. Chaney* (1991) 234 Cal.App.3d 853, 862. (AOB 61.)

As this Court stated in *People v. Holt*:

> Here, unlike *Mu'Min*, the inquiry was not conducted by the judge alone. Both sides were afforded unlimited opportunity to inquire further into the views of the prospective jurors and to probe for possible hidden bias and took advantage of that opportunity. The voir dire conducted in this case covered all of the expected areas of inquiry, and followed the completion by each prospective juror of a questionnaire that covered an even broader range of topics. Those inquiries were supplemented by additional questioning of the jurors by the court and both counsel. Unless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal.

(*People v. Holt*, *supra*, 15 Cal.4th at p. 661, citing, *Mu'min v. Virginia*, *supra*, 500 U.S. at pp. 425-426.) *A fortiori*, the same standard of review applies when both the court and counsel participate in the voir dire. Given the entire voir dire of all prospective jurors, including those eventually seated, respondent submits that the inquiry into possible racial bias was more than adequate to meet the demands of the Sixth and Fourteenth Amendments to the United States Constitution.

Even assuming that the trial court should have asked additional questions regarding possible racial bias, it cannot be said that the voir dire examination that was conducted here was "so inadequate that ... the resulting trial was fundamentally unfair." (*People v. Holt, supra*, 15 Cal.4th 619, 661; *People v. Robinson, supra,* 37 Cal.4th 592, 621.) Even at this late date, Booker does not suggest the perfect question to reach racial bias concealed by prospective jurors.

In sum, the general voir dire conducted by the trial court was constitutionally adequate. Booker had ample opportunity to inquire into all subjects about which he now complains. "If defendant felt the court's voir dire was inadequate, he could have probed more deeply when given the opportunity to question each prospective juror." (*People v. Holt*, *supra*, 15 Cal.4th at p. 663.) Booker's claims fail to establish error, let alone reversible error. Accordingly, his contentions should be rejected and the conviction and penalty affirmed.

V.

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS AND THE SPECIAL CIRCUMSTANCES FINDINGS

Booker contends that there was insufficient evidence to support the convictions of first degree murder, attempted murder and arson, as well as the special circumstances of murder in the commission of or attempted commission of rape or child molestation, or multiple murders, in violation of his constitutional right to due process. (AOB 64.) Not so. The evidence was not only sufficient, it was overwhelming, and the convictions and special circumstances findings must be affirmed.

The rules governing appellate review of sufficiency of the evidence are well established.

> [T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

(*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *People v. Ledesma, supra,* 39 Cal.4th 641, 722-723; *People v. Jurado* (2006) 38 Cal.4th 72, 118; *People v. Marshall* (1997) 15 Cal.4th 1, 31.)

A reviewing court must "presume in support of the judgment the existence of every fact the jury could reasonably infer from the evidence." (*People v. Bloyd* (1987) 43 Cal.3d 333, 346-347 [citations omitted]; see also *People v. Rayford* (1994) 9 Cal.4th 1, 23; *People v. Johnson, supra*, 26 Cal.3d at p. 576.) The question is, after drawing all inferences in favor of the judgment, could *any* rational trier of fact have found Booker guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact's verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Redmond* (1969) 71 Cal.2d 745, 755.) This is an "enormous burden" for a defendant to overcome on appeal. (*People v. Vasco* (2005) 131 Cal.App.4th 137, 161.)

In a case where findings of the trial court are based upon circumstantial evidence, the reviewing court "must decide whether the circumstances reasonably justify the findings of the trier of fact. . . ." (*People v. Proctor* (1992) 4 Cal.4th 499, 528-529.) If the reviewing court finds "that the circumstances also might reasonably be reconciled with a contrary finding [it] would not warrant reversal of the judgment." (*Id.* at p. 529; accord, *People v. Cain* (1995) 10 Cal.4th 1, 39; see *People v. Ceja* (1993) 4 Cal.4th 1134, 1138 [a review of circumstantial evidence uses the same standard as sufficiency of the evidence].)

Although the reviewing court must ensure the evidence is reasonable, credible, and of solid value, it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) Thus, if the verdict is supported by substantial evidence, the reviewing court must give due deference

to the trier of fact and not substitute it's evaluation of a witness's credibility for that of the fact finder. (*Ibid.*)

Respondent will discuss each of Booker's contentions, in order, under the same standard of review. Each contention is without merit, and the three counts of first degree murder, and the true findings of the special circumstances must be affirmed.

A. <u>There Was Sufficient Evidence That The Murders Were Premeditated</u>

A murder that is premeditated and deliberate is murder in the first degree. (Pen. Code, § 189.) "Premeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (*People v. Mayfield* (1997) 14 Cal.4th 668, 767, quoting CALJIC No. 8.20 (5th ed. 1988); see also *People v. Jurado*, *supra*, 38 Cal.4th at pp. 118-119.) An intentional killing is premeditated and deliberate "if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543 [108 P.3d 182, 26 Cal.Rptr.3d 1].) This Court has explained that:

> The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity, and cold, calculated judgment may be arrived at quickly."

(*People v. Mayfield*, *supra*, 14 Cal.4th at p. 767, quoting *People v. Thomas* (1945) 25 Cal.2d 880, 900.)

A reviewing court typically considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported: preexisting motive, planning activity, and manner of killing. (*People v. Stitely, supra*, 35 Cal.4th at p. 543.) However, these factors "are not

exclusive, nor are they invariably determinative" (*People v. Combs* (2005) 34 Cal.4th 821, 850), and they "need not be present in any particular combination to find substantial evidence of premeditation and deliberation." (*People v. Stitely*, *supra*, 35 Cal.4th at p. 543; *People v. Silva* (2001) 25 Cal.4th 345, 368.) The aforementioned three factors serve to "guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse." (*People v. Bolin*, *supra,* 18 Cal.4th 297, 331-332.) In fact, "the method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder." (*People v. Memro* (1995) 11 Cal.4th 786, 863-864.) In conducting this analysis, a reviewing court draws all reasonable inferences necessary to support the judgment. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 543.)

All three factors identified by this Court as an aid to determining premeditation and deliberation: preexisting motive, planning activity, and the manner of killing, support Booker's conviction for first degree murder in the instant case. (*People v. Stitely, supra*, 35 Cal.4th at p. 543.) Booker's cold and calculated killing of three girls by stabbing each one multiple times--first to silence then to kill them--and even shooting one girl in the head after stabbing her, is itself sufficient to support the jury's verdict. Each girl died from stabbing, slashing wounds to her throat which severed the carotid artery and jugular vein, causing each to bleed to death. Tricia suffered more than 100 wounds, some which were so deep and so powerful they lacerated internal organs causing further bleeding. Amanda was bleeding to death when Booker shot her in the back of the head. Any one of these murders would be sufficient to prove premeditated murder; all three together are without question intentional, deliberated and premeditated. (*People v. Memro*, *supra*, 11 Cal.4th at pp. 863-864 [sufficient evidence of premeditation because defendant

confessed after he killed one man, he had to kill second man because he started screaming and could identify the killer]; see *People v. Koontz* (2002) 27 Cal.4th 1041, 1082 [defendant's act of "firing a shot at a vital area of the body at close range" supports finding of premeditation and deliberation]; *People v. Welch* (1999) 20 Cal.4th 701, 759 [defendant's act of shooting victim, crouching over her, and shooting her again sufficient to support finding of premeditation and deliberation]; *People v. Bolin, supra*, 18 Cal.4th at pp. 331-332 [defendant's act of shooting victim at close range as wounded victim fled supported finding of premeditation and deliberation]; see (*People v. Marks* (2003) 31 Cal.4th 197, 232 [sufficient evidence of premeditation when defendant brought gun to place of business and opened fire on workers].) Here, Booker came armed with a knife which he put to lethal use, and when a gun became available, he took the opportunity to execute the last witness who could identify him and send him to jail. This evidence supports an inference that the killings occurred "as the result of preexisting reflection rather than unconsidered or rash impulse." (*People v. Bolin*, *supra*, 18 Cal.4th at pp. 331-332.)

Further, Booker came to the apartment armed with his homemade double-bladed knife. He supposedly carried the knife for "self-defense," but never explained why he anticipated the need to defend himself against several girls he had never met before. The act of bringing his knife with him to the apartment makes it "reasonable to infer that he considered the possibility of homicide from the outset." (*People v. Alcala* (1984) 36 Cal.3d 604, 626; see also *People v. Marks*, *supra*, 31 Cal.4th at p. 232; *People v. Steele* (2002) 27 Cal.4th 1230, 1250 [defendant's act of carrying knife to victim's residence demonstrates planning].)

Finally, Booker had a motive to kill all of the girls, once he initiated the disastrous assault on Corina Gandara. That led to a confrontation with Tricia, over her possession of and supposed threat to use a firearm, since he admittedly

did not intend to go to jail for his crimes. Then, having murdered Corina and Tricia, Booker had to finish off the one remaining eyewitness, Amanda Elliott.

Booker's argument ignores the standard of review for allegedly insufficient evidence, and instead argues his version of the events rather than facts and inferences to be drawn in favor of the verdict. Thus, he contends the evidence showed only an "accidental" stabbing of Corina, then a need to hit Tricia to take her gun in self-defense, and similarly, a need to kill Amanda when she refused to heed his warning and supposedly "charged" at him, what he called "kill or be killed." AOB 66-67; RT 1134, 1286-1287.) He also contends his ability to reflect was supposedly reduced by his immaturity and alcohol intake, despite the utter absence of evidence of debilitating intoxication. The jury heard and rejected Booker's version of events. Rather than applying the standard of review for insufficient evidence, he contends the prosecutor's argument was pure speculation. (AOB 68-69.) However, in reviewing a sufficiency claim, a court does not focus on the arguments set forth by the prosecutor below, but on the totality of the evidence in the record and the reasonable inferences to be drawn therefrom. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125-1126 [831 P.2d 1159, 9 Cal.Rptr.2d 577].)

Further, Booker relies on an improper standard of review in setting forth his claim, asserting the killings were the result of rash impulses or [imperfect] self defense, rather than intentional deliberation, despite his expressed intent not to go to jail. (AOB 67.) This is not the proper standard of review and it is irrelevant that evidence presented at trial was possibly consistent with a different interpretation that the one found by the jury. (*People v. Proctor*, *supra*, 4 Cal.4th at p. 529.) Instead, a reviewing court presumes the existence of every fact in support of the judgment than the jury "could reasonably infer from the evidence." (*People v. Bloyd* (1987) 43 Cal.3d 333, 346-347.) After having drawn all inferences in favor of the judgment, the reviewing court then

determines whether "*any* rational trier of fact" could have found the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at pp. 318-319.)

The jury was instructed that, "To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill;" that it is the result of deliberation, and not a sudden heat of passion; the result of a cold and calculated decision and not a rash impulse. (RT 1557.)

Booker contends the prosecutor simply speculated that when Booker stated he "had to kill the girls," that was proof of premeditated murder, to avoid going to jail. (AOB 69.) Further, according to Booker, it fails to explain why Booker did not kill Deverick Maddox as well. (AOB 69.) Booker concludes the evidence shows imperfect self-defense manslaughter or second degree murder, at worst. (AOB 68.) He is simply repeating his closing argument at trial, not evaluating the sufficiency of the evidence to sustain his conviction. As to why Booker did not feel compelled to kill Deverick Maddox, he trusted his homeboy to not report the murders to the police. (AOB 69-70.) Booker's trust was justified, in the short run, because Maddox went home and did not tell anyone what had happened. However, when the police caught up with him later that same day, although he initially denied knowing anything about the murders, he quickly reversed himself and named Booker as the killer. Booker simply put his trust in the wrong person.

Regardless, considering the totality of the evidence here, and presuming the existence of every fact in support of the judgment that the jury could reasonably infer from the evidence here, substantial evidence of Booker's premeditation and deliberation existed, and his claim must be rejected.

People v. Perez, supra, 2 Cal.4th 1117, illustrates the analysis. To paraphrase *Perez,* from the evidence presented, the jury reasonably could have inferred the following: Regardless of defendant's motive for entering the house, once confronted by [Corina] after an initial--supposedly accidental--stabbing, Booker decided he had to kill her to avoid identification. [] As so viewed, the evidence is sufficient to support the jury's findings of premeditation and deliberation. Evidence of planning activity is shown by the fact that Booker brought a weapon with him and used it to coerce [Corina] or silence her when she screamed at him. (See *People v. Wharton* (1991) 53 Cal.3d 522, 546- 548; *People v. Haskett* (1982) 30 Cal.3d 841, 849-850.)

As to motive, regardless of what inspired the initial entry and attack, it is reasonable to infer that defendant determined it was necessary to kill Corina to prevent her from identifying him, or telling the others what he did. When her screams caused Tricia Powalka to try to intervene, Booker had to kill Tricia too, and incidentally obtained her gun. Once Amanda Elliott woke up, she also had to be eliminated as a witness, so Booker stabbed her, then shot her with Tricia's gun. (See *People v. Bonillas* (1989) 48 Cal.3d 757, 792; *People v. Alcala, supra,* 36 Cal.3d 604 at p. 627 [205 Cal.Rptr. 775, 685 P.2d 1126]; *People v. Haskett, supra,* 30 Cal.3d at p. 850.) The manner of killing is also indicative of premeditation and deliberation. Booker used his knife to repeatedly stab each victim to make sure she would bleed to death, and when he got his hands on a gun, he used that to execute Amanda Elliott, who was already incapacitated from having her throat slashed. Each of the three murders was clearly premeditated; the three taken together, demonstrate sheer, brutal, unrelenting and deliberate murders. Thus the evidence of intentional, premeditated killing is not only sufficient, it is overwhelming.

B. There Was Sufficient Evidence Of Felony Murder Based On Actual Or Attempted Rape And Forcible Molestation Of Corina Gandara, As Well As The Special Circumstance Of Murder In The Course Of Actual Or Attempted Rape Or Forcible Molestation

Booker contends there was insufficient evidence the murder of Corina Gandara was committed in the commission of rape or attempted rape, or attempted or actual forcible lewd conduct with a child under fourteen, and therefore there was insufficient proof of first degree felony murder. Further, he argues, the paucity of evidence of actual or attempted rape or child molestation means there was insufficient evidence of the special circumstance of actual or attempted rape/molestation as to Gandara. He submits there was no forensic evidence of rape, and finding her partially undressed in a suggestive pose was insufficient proof of actual or attempted rape or molestation. Further, he argues, there was no proof of whether she was alive at the time of any actual or attempted sexual assault. (AOB 74-75.) He misconstrues the evidence and the standard of review.

A killing which is committed "in the perpetration of, or attempt to perpetrate" rape or child molestation is first degree felony murder. (§ 189.) The required mental state is the specific intent to commit the underlying felony. (*People v. Hart, supra*, 20 Cal.4th at p. 608.) The homicide is considered to be committed in the perpetration of the felony if the two were parts of "one continuous transaction." (*People v. Sakarias* (2000) 22 Cal.4th 596, 624, quoting *People v. Mason* (1960) 54 Cal.2d 164, 168-169.) "'There is no requirement of a strict "causal" [citation] or "temporal" [citation] relationship between the "felony" and the "murder."'" (*People v. Hart, supra*, 20 Cal.4th at pp. 608-609, citing *People v. Berryman* (1993) 6 Cal.4th 1048, 1085; see also *People v. Sakarias, supra*, 22 Cal.4th at p. 624.)

Admittedly here, the coroner did not find evidence of a completed rape, no semen, no physiological evidence of intercourse, according to the testimony. (10 RT 1319, 1350-1355, 1386.) However, Gandara and Powalka were each found with their pants pulled down to one knee, their legs splayed, and there were bloody hand prints on Corina's thighs. (7 RT 921-924, 9 RT 1267.) The positions of the two girls (Corina Gandara and Tricia Powalka) and the statements of Booker, after his arrest indicated possible sexual assault, but the detectives could not determine if either girl had been raped. (8 RT 1095-1096, 9 RT 1266-1268.) Defendant seizes upon the absence of physical evidence of a completed rape to allege the insufficiency of the evidence in support of the special circumstances of actual or attempted rape or child molestation. (AOB 74-75.) However, the jury reasonably could certainly have found attempted rape or child molestation from the other evidence recited above, that Booker sexually assaulted the twelve-year old girl, and ultimately killed her to keep from being caught and jailed for that crime.

Booker also challenges the adequacy of the evidence in support of the rape/molest special circumstance, contending that the prosecution failed to establish that Corina was alive when the sexual assaults allegedly were committed. (AOB 75.) The evidence, however, refutes that argument as well. Again Booker's own statement was that Corina was not that badly hurt when he left her in the bathroom, and then returned to "help her" undress, and ultimately kill her. Thus, the jury reasonably could conclude that Corina was alive during defendant's sexual attack.

Moreover, when an individual attempts to rape or molest a victim, reasonably or mistakenly believing that the victim is alive, the perpetrator is guilty of having attempted the underlying felony. (See *People v. Thompson* (1993) 12 Cal. App. 4th 195, 203; *People v. Kelly, supra,* 1 Cal. 4th 495, 525 ["it . . . does not matter whether actual penetration did not occur until after

death for purposes of the special circumstance"]; *People v. Guzman* (1988) 45 Cal. 3d 915, 949-952 [248 Cal.Rptr. 467, 755 P.2d 917] [explaining the scope of the rape special circumstance].)

Therefore, the actual or attempted rape/molest special circumstance finding must be affirmed as well.

C. <u>There Was Sufficient Evidence Of Arson</u>

Booker attacks his conviction for one count of arson as having insufficient factual support. (AOB 76.) An examination of the record defeats this argument.

Penal Code section 451, subdivision (b), provides that any person who willfully and maliciously sets fire to or burns or causes to be burned any structure and by so doing causes an inhabited structure to burn is guilty of arson. Arson requires the general intent to commit the criminal act, there is no specific intent element. (*People v. Atkins* (2001) 25 Cal.4th 76, 88.) The jury was instructed that "willfully" means intentionally, and "maliciously" means with a wish to vex, annoy or injure another person, or with an intent to do a wrongful act. The words "willfully and maliciously" mean an intent to set fire to or burn or cause to be burned any structure. (RT 1562.) The jury was not instructed it had to find the reason or motive for setting the fire in order to convict, because the reason or motive for setting fire to a structure is not an element of the offense. (Pen. Code, § 451, subd. (b).) That portion of Booker's argument is frivolous.

The evidence showed that on the day of the murders, the apartment manager was told there was smoke and entered Tricia Powalka's apartment to find her infant son. He testified he could not see more than a foot or so, because there was so much smoke. In fact he had to leave more than once for fresh air. (7 RT 895, 904.) On one trip back inside, he still could not find the

baby, but did see something burning on the stove. (7 RT 899.) Mr. Kostyshak told the fire fighters he could not find the baby. (7 RT 899-900.)

Riverside City Firefighter Ralph Wilson went inside to look for the baby. (7 RT 917.) The apartment was filled with smoke from a foot off the floor to the ceiling, with visibility only 12-18 inches. (7 RT 918, 933.) Inside the bedroom, Wilson could just make out a playpen. When he shook it, a baby started to cry. Firefighter Wilson wrapped blankets around the infant and carried him outside. (7 RT 919.) When he went back inside, Wilson discovered one body in the bedroom, a second near the front door, and the third in a bathroom, after removing a chest of drawers of drawers to get into the bathroom. (7 RT 920-926.)

Firefighter Michael Reynaud ventilated the apartment and extinguished the fire in a bag of materials on the stove, which was the source of the smoke. (8 RT 1043-1049.) He turned off two burners on the electric stove. (8 RT 1048.) The fire investigator, Timothy Dale Rise, determined that the fire was deliberately set by putting a nylon bag of clothing on hot burners. (8 RT 1053, 1055-1057.) Besides damage to the stove, there was charring on the cabinets, the overhead fluorescent light fixtures, and the exhaust vent over the stove. (8 RT 1057-1059.) Investigator Rise found no other source of ignition. (8 RT 1060.) Charring on the clothes and cabinets indicated there was an actual fire and not just smoke, and in Rise's opinion, there was enough smoke to be lethal. (8 RT 1061-1062.)

Booker told the detectives he heard a baby crying. (3 CT 696.)

Booker thought he remembered putting something on the stove before leaving, maybe a bag, and he may have told D he intended to set the place on fire. (3 CT 689-690.) It was obvious that this apartment was an inhabited "structure."

The parties stipulated that "The infant rescued from the apartment was Tricia Powalka's son, Eric Stringer," and that examination of the infant disclosed soot in his nose. (10 RT 1429-1432.) The murder victims did not have smoke or soot in their airways; nor was there soot in the tissue of the trachea or carbon monoxide in their blood. (10 RT 1410.) Nonetheless, Booker contends there was no evidence of intent to start a fire to "destroy the crime scene." The argument is without merit.

Respondent disagrees with Booker's evaluation of the quantity of evidence and also with his premise that there had to be proof of the purpose of starting the fire. (AOB 76.) Arson is a general intent crime, and the only mental element required is to intentionally start the fire intending to burn an inhabited structure. There is no requirement of proof of intent to harm a particular person or proof of the motive for the fire.

Clearly, a fire started in Tricia Powalka's apartment when a bag of clothing was placed on top of two hot burners on the stove. There was fire damage on the kitchen cabinets, the exhaust vent for the stove, and the overhead fluorescent lights. The smoke filled the apartment, and there was enough of it to be lethal to anyone alive in the apartment, and eventually to anyone in nearby apartments.[20]

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20. See, *People v. Stanley* (1995) 10 Cal.4th 764, 823-824 [burning the murder victim's house and car], and *People v. Lewis* (2001) 26 Cal.4th 334, 391 [jail inmates threatened to start a fire and then threw a burning sheet into a trash can near his cell], finding evidence of prior arson to be admissible under Penal Code, section 190.3, factor (b), as evidence in aggravation, because the arson clearly involved an implied threat of violence against a person. One may reasonably infer from the evidence that the arson was directed against a person, such as the owner of the property (as in *Stanley*), or endangered persons whom the defendant had reason to know would be endangered (as in *Lewis*) including the other inmates and the guards fighting the fire.

A reasonable juror could conclude that there was evidence beyond a reasonable doubt that Booker set fire to the apartment. This evidence showed beyond a reasonable doubt that Booker was guilty of arson, in violation of section 451, subdivision (b). The arson conviction must therefore be affirmed.

Moreover, when Booker set this fire, he created an obvious risk of serious injury or death by fire or smoke inhalation to the infant still inside, to the residents of the other apartments in the structure, and to the manager and the firemen who had to fight the fire and endure the smoke. Perhaps, as Booker suggests, a bag of clothing on two hot burners was not the "quickest of surest way to start a fire." but it was surely successful on this occasion. (AOB 76-77.) The crime was complete when Booker put the bag of clothing on the stove and turned on the burners, and the jury so found.

The evidence of arson was not only sufficient but overwhelming.

D. <u>There Was Sufficient Evidence Of Attempted Murder</u>

Having argued there was insufficient evidence of arson, Booker extends the argument to contend there was insufficient evidence of the attempted murder of the baby, Eric Stringer, by arson. He contends there was no evidence of his specific intent to kill the child. (AOB 78.)

Attempted murder requires the specific intent to kill, and the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Smith* (2005) 37 Cal.4th 733, 739; *People v. Lee* (2003) 31 Cal.4th 613, 623.) Specific intent to kill may often be inferred from surrounding facts and circumstances. (*People v. Lee* (1987) 43 Cal.3d 666, 669.) Here Booker's acts, setting fire to the apartment with the baby in it, was substantially certain to result in the death of the baby, absent some unintentional intervening event. The jury was instructed that attempted murder in violation of Penal Code sections 664 and 187, requires proof that a direct but ineffectual act was done by one person toward killing another person, and the person committing the act

harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being. (12 RT 1559.) The jury was further instructed on the necessity of distinguishing between mere preparation on the one hand and the actual commencement of the doing of the criminal deed on the other. That is,

> mere preparation, which may consist of planning the killing or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. However, acts of a person who intends to kill another human being will constitute an attempt where those acts clearly indicate a certain unambiguous intent to kill. The acts must be an immediate step in the present execution of the killing, the progress of which would be completed unless interrupted by some circumstances not intended in the original design.

(12 RT 1559-1560.)

The prosecutor contended this was attempted murder because Booker set a fire with the baby in the apartment. The baby was going to die from the fire or smoke, unless someone put out the fire. (12 RT 1580.) Booker argued at trial, and in his opening brief, there was no evidence he knew the baby was even in the apartment. (12 RT 1622; AOB 79.) However, in Booker's post-arrest statement, he told detectives that he heard a baby crying. (3 CT 696.)

Nevertheless, a reasonable juror here could conclude that there was evidence beyond a reasonable doubt that Booker attempted to murder the infant, Eric Stringer, by setting fire to the apartment, after committing three other murders.

Booker still argues that putting the bag of clothes on the stove was not a direct but ineffective act toward killing the baby in the bedroom, apparently because he concludes there was little likelihood the baby would be affected. (AOB 80.) It is an untenable argument. Obviously putting the bag of clothes and turning on the burners under it started the fire. If the fire continued to produce smoke, which it did, and actually burn the residence, which it did, it

was only a matter of time before it destroyed the apartment, and killed the child with the smoke if not the fire itself. The fire could easily then spread to adjoining apartments. The very evidence of setting fire to an occupied apartment, which could kill all the occupants and others nearby is sufficient to support an inference of intent to kill. (See, *People v. Smith, supra*, 37 Cal.4th at p. 742; *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690 [evidence defendant fired one bullet at two police officers was sufficient for two counts of attempted murder].)

Booker went beyond preparation and intentionally started a fire in an inhabited apartment when he turned on the burners under a bag of clothing. All that remained was for the fire or smoke to reach the baby to convert the attempted murder into a completed one. The only reason the fire did not kill the baby or anyone next door or fighting the fire, was the fortuitous intervention of the neighbors and the fire department. Moreover, his argument that there was insufficient evidence to show the arson was likely to set "any portion of the apartment ablaze" is baffling, and clearly in error, considering in fact the fire in the clothing did actually set parts of the kitchen "ablaze" and created enough smoke to be lethal, to the baby, along with the firefighters, and next door neighbors. (AOB 80.) His additional argument that there was an extreme improbability of fire reaching the bedroom, for which there is no evidence in the record, supposedly undermines the idea Booker intended that the clothing on the stove would somehow result in the baby's death. To make the argument Booker has to become his own unsworn expert, and then ignore the actual testimony in the record that the level of smoke was lethal and the baby had soot in his nose.

On the facts of this case, there was sufficient evidence that it was just a matter of time from when Booker started the fire to when the child died, absent intervention by the manager and the fire fighters.

A reasonable juror could conclude that there was evidence beyond a reasonable doubt that Booker attempted to kill Eric Stringer. The evidence was more than sufficient to sustain the verdict of attempted murder.

E. Sufficient Evidence Supports The Jury's True Finding Of The Multiple Murders Special Circumstance

Contending that he has shown that none of the three murders was of the first degree, Booker argues that the multiple murders special circumstance must be stricken. (AOB 81.) Alternatively, he suggests that only one multiple murder special circumstance is permissible, and two of the three findings must be set aside. (AOB 81-82.) He is wrong on both counts.

After the guilt phase verdicts, the court explained to the jury that although they found that the special circumstance of multiple murders was true as to each of the three murder counts, only one such finding ultimately would apply to all three murders. (12 RT 1706 1743-1744.) In the judgment, there is recited only one special circumstance of multiple murders, within the meaning of pursuant to Penal Code Section 190.2, subdivision (a)(3). (15 RT 2052.)

More importantly, as explained above, since the evidence was overwhelming that the three murders were intentional and premeditated, and the murder of Corina Gandara was also first degree felony murder because it occurred in the commission of an actual or attempted rape or sexual molestation of a child under fourteen, there was not just sufficient but overwhelming evidence to support the multiple murders special circumstance finding.

More than sufficient evidence supports Bookers' first degree murder, arson and attempted murder, and the true findings of the special circumstances. Therefore, his convictions and sentence must be affirmed in its entirety.

VI.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION, AND AFFORDED BOOKER DUE PROCESS AND A FUNDAMENTALLY FAIR TRIAL, WHEN IT ADMITTED RELEVANT PHOTOGRAPHS WHICH ILLUSTRATED THE METHOD AND FEROCITY OF THE THREE MURDERS

Booker claims that the trial court abused its discretion and committed prejudicial error, when it admitted into evidence multiple photographs of the murder victims and the murder scene, over his objections under Evidence Code, section 352. The error, he alleges, also violated his constitutional right to due process and a fair trial. (AOB 84-87, 91-92.) He contends that the photographs were not relevant to any disputed issue, and were cumulative to other evidence. (AOB 87-91.) Therefore, he concludes, his conviction must be reversed, because the prosecution cannot prove the error was harmless beyond a reasonable doubt, or rebut the reasonable probability he would have obtained a more favorable result absent the photographs. (AOB 92-93.) He emphasizes that the prosecutor was required to accept his proposed stipulation in lieu of the photographs. (AOB 89-90.) He is incorrect. He also has failed to specify which photographs he now objects to on appeal. Nevertheless, the trial court properly exercised its discretion in admitting crime scene and autopsy photographs, after finding the probative value of the photographs outweighed any prejudice to Booker Thus, there was no constitutional error. Further, any error was harmless.

In his opening brief, Booker does not specify which particular photographs he claims should have been excluded from the trial. Respondent assumes those discussed below are the correct ones.

Prior to trial, Booker moved to exclude autopsy photographs and photographs of the deceased victims at the murder scene, and a videotape of the murder scene, contending they were excessively gruesome and prejudicial

under Evidence Code, section 352, and violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution and art. I, sections 1, 7, 13, 15, 16, 17 and 22 of the California constitution. (2 CT 522-530.) He offered to stipulate that the victims were alive before August 10, 1995, making the photographs irrelevant. (2 CT 525.) He conceded that some of the photographs might be relevant to the cause of death and/or the nature and extent of the wounds inflicted, but the probative value was outweighed by their prejudicial impact on the jury, because they were gruesome and not relevant to a disputed, material issue. (2 CT 526-527.) Further, he alleged, the photographs were cumulative to expert and lay testimony about the cause of death and how the victims were killed. Even if some of the photographs might be relevant, he asserted, the majority were inflammatory and cumulative and must be excluded. (2 CT 528-529.)

The prosecutor opposed the motion, arguing the photographs were relevant to the manner of killing and ferocity of the murders, and their probative value outweighed any prejudicial impact. (3 CT 635-641.)

At the motion hearing, Booker repeated that the photographs must be excluded under Evidence Code, section 352, to prevent them from overwhelming the passions of the jurors, and violating his rights under the Sixth, Eighth and Fourteenth Amendments. (3 RT 275.) He argued that many of the photographs were repetitive and cumulative. (3 RT 276.) He concluded that admission of the photographs would violate his rights to a fair trial and a fairly determined penalty phase. (3 RT 277-278.)

The trial court reviewed all of the disputed photographs, which were presented in three groups, one for each victim:

A. <u>First Series: Tricia Powalka</u>

Booker objected to photos 1-B, 1-E through 1-I, and 1-M through 1-P of the Powalka photographs. (3 RT 275.) The prosecutor responded that the

proffered photographs of Tricia Powalka were the least gruesome and were essential to illustrate the location and extent of her injuries, and to corroborate the type of knife which Booker admitted he had used. (Exh. 1-B; 3 RT 276-277.) The photographs also would help to explain the pathologist's testimony about Powalka's numerous injuries. (3 RT 277.) 1-E was a photograph of the bloody scene discovered by the responding firefighters. (3 RT 277.) There were photographs of Powalka and Gandara, which showed them with their clothing pulled down around their ankles, which were relevant to the special circumstances allegations of rape or lewd conduct with a child under 14. (3 RT 277-278.) Photo 1-F showed Powalka after the autopsy and after the blood was cleaned away, illustrating the nature of her wounds and the severity of the attack, which was relevant to intent, motive and deliberation. (3 RT 278.) Exhibit 1-G showed the stab wounds to her neck which caused her to bleed to death. (3 RT 279.)

The trial court found the jury was entitled to see one photo of the injuries to the throat of each victim, and the characteristic slashing injuries to all victims, and stated there was "clear relevance in my mind to some photographs that demonstratively show that." (3 RT 279.) Further, the court did not know how else to show that there has been a slashing attack to the throats without showing the photographs. (3 RT 279.) Despite Booker's objection, the court observed, "That's a characteristic method of attack and fairly unique under these circumstances. And it also clearly shows intent to kill in my mind because I don't know what would be a more vulnerable point of attack for a knife attack than a person's throat." (3 RT 279.) The court also found admissible photographs of different wounds on the other side of the neck, forehead and ear; and one showing the gaping hole in the neck and puncture wounds to the ear and skull. (3 RT 280; 1-F, 1-G, 1-H, 1-I, 1-M.) The court ultimately admitted photos 1-A (RT 282); 1-B through 1-D (RT 283), 1-E through 1-J and

1-M (RT 285); and excluded photographs 1-L, 1-N, 1-O, 1-P, 1-Q and1-R. (3 RT 285, 11 RT 1445-1447; 14 CT 3918.)

Photograph 1-A showed one of the possibly fatal wounds, and Booker did not object to that photograph so it was admissible. (3 RT 282.)

The court admitted 1-B over objection: "I can't imagine how you can do it any–they are awful wounds, but I mean awful wounds will make awful pictures. And given the nature of the wound, I don't think that anybody can [sic] has done anything to make–enhanced or make it like Hollywood or make it worse than it actually was." (3 RT 283.) Exhibits 1-C and 1-D were admitted because there was no objection, and they showed defensive wounds, and relatively speaking, they were not "as disturbing as some of the other photographs, which they are all disturbing." (3 RT 283.)

The court admitted 1-E, finding it did not show the wounds too graphically, and was disturbing only because it showed a naked woman, dead on the floor. The court stated:

> But it clearly shows her in a compromising position, which would suggest sexual assault. And I think this is a situation where one picture is more persuasive than a thousand words when you actually see it, as opposed to describing it. (RT 284.) [¶] Even when you visually hear about it–well, her pants were pulled down on one leg–that is different than seeing the nudity there. And that will be the case of any sexual assault. So I have little hesitation in finding the relevance of 1-E, given that's one of the allegations. And clearly that would be probably what the district attorney argues as part of the motive for the attacks. There is sexual assault overtones to all of this. [¶] 1-F, again, that's not a duplicate photograph. It does show the injury. It shows the viciousness of the attack. It currently is evidence of intent to kill, not to wound, not to do anything else. So I would allow 1-F into evidence.

(3 RT 283-284.)

The court admitted 1-G, 1-H and 1-I to illustrate the extent of the attack to Powalka's throat, other injuries to her head, and found they were not duplicative of other evidence. Thus, despite their graphic nature, the court

stated they illustrated the injuries suffered by the victim. (3 RT 285.) Therefore, the court overruled the Evidence Code, section 352, objection, finding that probative value outweighed any prejudicial effect. (3 RT 285.)

The court also found there was no defense objection to 1-J, 1-K and 1-L, admitted 1-M, but excluded exhibits 1-N, 1-O, 1-P, 1-Q and 1- R because they were cumulative. (3 RT 285.) The court stated the admissibility ruling was subject to later reconsideration, if necessary. (3 RT 286-287.)

B. <u>Second Series: Amanda Elliott</u>

Booker objected to photographs of Amanda Elliott as overly prejudicial, and also violative of his Sixth, Eighth and Fourteenth Amendment rights to fundamental due process at trial. (RT 287.) He again argued the photographs could overwhelm the passions of the jurors. (RT 287.) While recognizing some photographs had "great evidentiary value" and were relevant, he suggested it would be preferable to have the doctor testify to Elliott's injuries and not use the photographs at all. (3 RT 288.)

Booker objected to photographs 2-C and 2-D, 2-Q, 2-R and 2-S as cumulative. (3 RT 288.) The prosecutor argued that 2-D provided a better view of he gunshot wound, and was preferable to 2-C. (3 RT 289.) He explained that 2-Q, 2-R and 2-S showed defensive wounds. (3 RT 289.)

The court found nothing particularly disturbing about photographs 2-E through 2-Q and admitted them. (3 RT 291-292.) Photograph 2-J showed Elliott's whole hand, 2-Q, 2-R and 2-S were close-ups of defensive injuries to her hand, and not particularly gruesome in the overall scheme of things. (3 RT 292.) Therefore, the court overruled Booker's section 352 objections and allowed the photographs to be used. (3 RT 292.) Number 2-T was withdrawn; both 2-C and 2-D were both allowed at this point, to show the bruising and stippling from the gunshot. (3 RT 292.)

At trial, photographs 2-A, 2-C, 2-E, 2-F, 2-H, 2-J through 2-S, 2-U and 2-V were admitted. (11 RT 1449-1450; 14 CT 3918-3919.)

C. Third Series: Corina Gandara

Booker objected to admitting photographs of Corina Gandara on section 352 grounds and Sixth, Eighth and Fourteenth amendment grounds. He complained that photographs 3-B, 3-D, 3-G, 3-H, 3-L, 3-M, 3-P and 3-Q were cumulative and inadmissible. (3 RT 293.) The "cumulative" photographs, except for 3-G, were excluded at trial. (14 CT 3919-3920.)

The prosecutor withdrew photograph 3-A, in favor of 3-I which also showed Gandara in the bathroom. (3 RT 294.)[21] He argued that 3-B was relevant to the issue of the single pubic hair found on Gandara, which was the crux of Booker's defense to the rape and child molest special circumstances. (3 RT 294.) Further, he argued 3-B showed the way the bathroom appeared and Corina Gandara's position and the manner in which she bled, both of which was important to the jury's understanding of the murder. Photograph 3-B showed her lying on her back with her pants pulled down, illustrating the attack in that bathroom. (3 RT 294-295.) Photograph 3-D showed her shorts and underwear on her left leg, similar to how Tricia Powalka was found. Photograph 3-G was an autopsy photo, with the blood cleaned up to show cut to her neck. (3 RT 296.) 3-H showed the slash in her throat, but more

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21. The prosecutor referred to a videotape taken of the crime scene, including the bathroom where Corina Gandara's body was found. (3 RT 294-295.) Booker objected to playing that video for the jury on the same grounds as he objected to the photographs: Evid. Code, § 352 and his constitutional rights to a fair trial, a reliable penalty determination, and due process. (7 RT 945-947.) The court concluded the prosecutor could use both the video, and some photographs because of technical problems with having to replay the video to find a particular image, which could itself be cumulative and potentially prejudicial. (7 RT 950-951, 973-974, 8 RT 976-977.) However, the videotape was not offered into evidence at trial.

importantly the very large puncture wound to her neck, which was one of several potentially fatal wounds. (3 RT 296.) Photograph 3-I showed the cut on her neck, which was similar to that of other victims, and showed only one person was the killer. Photograph 3-M showed a different puncture wound, deep enough to also be fatal. Photograph 3-Q is another photo of her on the floor, illustrating the violent nature of the killings. (3 RT 296.)

The court inquired about the cumulative nature of some of the photos. (3 RT 297.) The court excluded 3-H, 3-M and 3-L as cumulative, but conditionally admitted 3-G and 3-K. (3 RT 298-299.) The court allowed 3-D to show the position of the body with the pants pulled down on one leg, and excluded 3-C as cumulative. (3 RT 300.) The prosecutor argued to admit 3-B, because it showed the amount of blood split which was significant to the nature of the killing. Photograph 3-B was also useful to experts who would testify about evidence transfer and how she might have picked up the single pubic hair. (3 RT 301.) There was a discussion about 3-B, 3-C and 3-D and their relevance to showing the violence, and how a pubic hair could be tossed around and transferred.

The court tentatively excluded 3-D, 3-P and 3-Q, but admitted 3-B, 3-C and 3-E over Booker's objections, finding despite being graphic, those photographs might help explain how a pubic hair could be moved from the toilet or shower to some place else in the bath room. (3 RT 303.) Ultimately, the court allowed 3-D and excluded 3-B. (5 RT 516-517.) The court admitted photographs 3-C, 3-D, 3-E, 3-G, 3-I, 3-J, 3-K and 3-J at trial. (14 CT 3919-3920; 11 RT 1447-1448, 1451-1452.) The court stated that counsel could ask the jury about gruesome photographs on voir dire. (RT 303.)

In summary, the trial court stated it had weighed probative value against prejudice for purposes of section 352, and whether admission of the photographs would necessitate undue consumption of time, create a substantial

danger of undue prejudice, confuse issues or mislead the jury. The court found the probative value outweighed any risk of prejudice. Even with photograph 3-B, the court found it showed to some extent the degree of violence involved, the victim's state of undress and relevant sexual overtones, and an indication of how vicious the attack was, and how quickly Corina Gandara might be incapacitated, given the nature of the injuries that caused the bleeding, and the possible contamination or transfer of evidence such as the pubic hair. (3 RT 305-306.)

There was a brief discussion about photographs 9-E [blood on the bedroom floor], and 10-A through 10-C [blood in the bathroom] after which the court overruled Booker's section 352 objection, finding if the photographs were relevant they were admissible. (7 RT 849-855, 8 RT 976.) These four photographs were admitted. (14 CT 3921-3922.)

Later, Booker proposed a stipulation to the cause of death of each of the three victims, in lieu of photographs. (10 RT 1367.) He conceded that the prosecutor was not required to accept the stipulation. (10 RT 1367.) The prosecutor declined the offer, choosing instead to have the pathologist, Dr. DiTraglia, testify not only about the cause of death, but also about some of the other mechanisms that led up to the deaths, and to illustrate his findings with the photographs. (10 RT 1367-1368.)

The court noted that the photographs showed injuries to the victims which might have been caused by two points of the knife which was introduced at trial, a compelling type of demonstrative evidence that the jury was entitled to see. (10 RT 1368.) The court noted Booker's objections on state and federal grounds, as previously made, overruled them and again found the photographs admissible. (10 RT 1368.)

The pathologist used photographs of each victim to explain his findings and the cause of death of each. (10 RT 1375-1379 (Corina Gandara); 10 RT 1388-1393, 1411-1412 (Tricia Powalka); 10 RT 1396-1399 (Amanda Elliott).

The prosecutor referred to the photographs during trial and in his closing argument in the guilt phase of the trial. (7 RT 887, 921; 9 RT 1264; 12 RT 1580-1585, 1593, 1598.)

The court admitted photographs 1-A through 1-K and 1-M, and excluded 1-L and 1-N through 1-R. (11 RT 1445-1446, Tricia Powalka.) The court admitted photographs 2-A, 2-D, 2-E, 2-F, 2-H, 2-J to 2-S, 2-U and 2-V; and excluded 2-B and 2-C, 2-G, 2-H, 2-T (11 RT 1448-1450, Amanda Elliott); and admitted 3-C, 3-D, 3-E, 3-G, 3-I, 3-J, 3-K, 3-N, and excluded 3-A, 3-B, 3-H, 3-L, 3-M and 3-O through 3-S (RT 1451-1452, Corina Gandara). The court admitted photographs 9-A through 9-K as well as 10-A, 10-B and 10-C. (11 RT 1454-1455; 14 CT 3918-3924.)

Whether a trial court errs in admitting challenged photographs of a murder victim over a section 352[22] objection, depends upon two factors: (1) whether the photographs were relevant, and (2) whether the trial court abused its discretion in determining that the probative value of each photograph outweighed its prejudicial effect. (*People v. Ramirez* (2006) 39 Cal.4th 398, 453; *People v. Carter* (2005) 36 Cal.4th 1114, 1166.) Relevant evidence is evidence . . . "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

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22. Evidence Code section 352, provides:
The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The prejudice that section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) "Prejudicial" in this context is "evidence that uniquely tends to evoke an emotional bias against a party as an individual," and has only slight probative value. (*People v. Carey* (2007) 41 Cal.4th 109, 128; *People v. Crittenden* (1994) 9 Cal.4th 83, 134.)

A trial court's decision to admit or exclude evidence under section 352 is a question of relevance and is reviewed for abuse of discretion (*People v . Ramirez,* 39 Cal.4th at p. 453; *People v. Carter, supra*, 36 Cal.4th at p. 1166; *People v. Marshall* (1996) 13 Cal.4th 799, 832-833; *People v. Clair* (1992) 2 Cal.4th 629, 654-655) and that ruling will be upset only if there is a clear showing of abuse. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.) A court may admit even "gruesome" photographs if the evidence is highly relevant to the issues raised by the facts, or if the photographs would clarify the testimony of a medical examiner. (*People v. Ramirez, supra*, 39 Cal.4th at p. 453; *People v. Heard* (2003) 31 Cal.4th 946, 973; *People v. Crittenden, supra,* 9 Cal.4th at pp. 132-133; *People v. Coleman* (1988) 46 Cal.3d 749, 776.)

This Court has consistently upheld the introduction of autopsy photographs disclosing the manner in which a victim was injured as relevant not only to the question of deliberation and premeditation but also aggravation of the crime and the appropriate penalty. (*People v. Ramirez, supra*, 39 Cal.4th at p. 453; *People v. Cox* (1991) 53 Cal.3d 618, 666.) To overturn a conviction, the defendant must show that "the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest

miscarriage of justice." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.[23]) Booker has not made the necessary showing, and therefore his claim fails.

Further, Booker's argument that the prosecutor was required to accept his proposed stipulation and withdraw the photographs is without merit. (AOB 90.) A defense offer to stipulate to the cause of death or manner of death does not negate the relevance of photographs. (*People v. Scheid* (1997) 16 Cal.4th 1, 16.) The prosecutor is not obliged to prove relevant facts from testimony alone, or be compelled to accept an antiseptic stipulation. The jury is entitled to see how details of the murder scene and the victims' bodies support the prosecution theory, and photographs are one kind of physical evidence which may be introduced. (*People v. Pride* (1992) 3 Cal.4th 195, 243; *People v. Price* (1991) 1 Cal.4th 324, 433-435.) Nor may the prosecution be compelled to accept a defendant's offer to stipulate to the cause of death, in lieu of the disputed photographs, where the effect would be to deprive the state's case of its persuasiveness and forcefulness. (*People v. Arias* (1996) 13 Cal.4th 92, 131; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1007.) As one appellate court has explained:

> [A] defendant has no right to transform the facts of a gruesome real-life murder into an anesthetized exercise where only the defendant, not the victim, appears human. Jurors are not, and should not be, computers for whom a victim is just an "element" to be proved, a "component" of a crime. A cardboard victim plus a flesh-and-blood defendant are likely to equal an unjust verdict.

(*People v. Thompson* (1992) 7 Cal.App.4th 1966, 1974.)

Booker claims that the trial court's decision to admit certain autopsy and crime scene photographs violated Evidence Code, section 352, and also the

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23. An allegation of abuse of section 352 discretion in admitting allegedly prejudicial photographs is sufficient to preserve a due process argument on appeal, if the basis for the due process argument is the same evidentiary ruling. (*People v. Partida* (2005) 37 Cal.4th 428, 435-437.)

Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB 84, 86-87, 92-93.) Booker also argues that the photographs had little, if any, relevance to the determination of guilt. (AOB 86, 90.) To the contrary, the photographs were highly relevant to show the manner in which the victims were killed, the severity of their injuries, and whether the murders were premeditated and deliberate. (*People v. Heard*, 31 Cal.4th at p. 973; *People v. Crittenden, supra*, 9 Cal.4th at pp. 132-133.) The photographs also were properly admitted to help clarify the coroner's testimony. (*People v. Ramirez, supra*, 39 Cal.4th at pp. 451-453; *People v. Thomas* (1992) 2 Cal.4th 489, 524.) The victims had similar injuries, such as distinctive neck wounds, which supported the conclusion that these crimes were committed by the same person, and illustrated the kind and degree of force used. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403; *People v. Crittenden, supra*, 9 Cal.4th at p. 134.) Some of the photographs certainly were gruesome, and disturbing as victim photographs are likely to be in murder cases, but they were not unduly so. Here, the court carefully reviewed each photograph and, excluded those that were cumulative or too graphic. (*People v. Thomas, supra*, 2 Cal.4th at p. 524.)

Ultimately, the photographs at issue here are gruesome because the charged offenses were gruesome, but the photographs did no more than accurately portray the shocking nature of the crimes. While the jury can, and must, be shielded from depictions that sensationalize an alleged crime, or are unnecessarily gruesome, the jury cannot be shielded from an accurate depiction of the charged crimes that does not unnecessarily play upon the emotions of the jurors. The record here reflects that the experienced trial judge was well aware of his duty to weigh the prejudicial effect of the photographs against their probative value, and expressly and carefully did so. (*People v. Coleman, supra*, 46 Cal.3d at p. 776.)

Booker's reliance on cases such as *People v. Burns* (1952) 109 Cal.App.2d 524, 541-542 [concluding autopsy photographs were too grotesque and horrible for the jury to look at and therefore were admitted in error, only to inflame the jury, and contributed to cumulative reversible error] is misplaced. As set out below, photographs of a murder victim are always relevant to show how a crime occurred. (*People v. Ramirez, supra,* 39 Cal.4th at p. 453.)

Booker's argument that the photographs were not relevant to any material disputed issue is wrong. (AOB 90; *People v. Ramirez, supra,* 39 Cal.4th at p. 453.) His reliance on *People v. Poggi* (1988) 45 Cal.3d 306, 322-323 is misplaced. In *Poggi*, this Court held that a photograph of the victim while alive, and a, post-autopsy photo showing a tracheotomy incision, but not the wounds from the murder, were admitted in error, but the error was harmless, under *People v. Watson* (1956) 46 Cal.2d 818, 836. The two photographs were admitted only for "identification," and were not relevant to any disputed material issue, in view of Poggi's offer to stipulate the victim was alive one day and dead the next. In that case, the prosecution was required to accept the stipulation admitting to an element of the offense. (AOB 90.) However, this Court distinguished *Poggi* in *People v. Heard* (2003) 31 Cal.4th 946, 977, fn. 13. Moreover, the trial court clearly and properly could find that the photographs were not so gruesome as to have impermissibly swayed the jury in light of testimony detailing each and every fact relating to the crime scene and victims. (*People v. Heard*, 31 Cal.4th at p. 977, citing *People v. Scheid*, 16 Cal.4th at p. 20; *People v. Allen* (1986) 42 Cal.3d 1222, 1258 [inflammatory nature of nine photographs was relatively slight in comparison to heinous nature of crime described by witness testimony.] Nor, as *Heard* makes clear (*id.*, at pp. 977-978), were the photographs unduly prejudicial because they were cumulative, that is corroborated facts independently established by testimony.

(*People v. Hart, supra,* 20 Cal.4th at p. 616.) Even cumulative evidence may be admitted if it is relevant. (*People v. Thompson* (1988) 45 Cal.3d 86 at p. 115.) And as *Heard* pointed out, even if the photographs prompted a disturbing response among the jurors, the risk of prejudice was minimal, because the jury knew Booker killed the three victims from testimony of witnesses at trial. (*People v. Heard*, 31 Cal.4th at p, 978.)

Thus, as summarized in *People v. Heard*, "[T]he trial court reasonably could determine that the probative value of the photographic evidence outweigh its potentially prejudicial effect. We thus determine that the trial court did not abuse its discretion under Evidence Code section 352 in admitting the photographs into evidence. [Citations.]

(*People v. Heard, supra*, 31 Cal.4th at p. 978.)

Even if there were error in admitting the photographs, it would not require reversal of the convictions because it is not reasonably probable the jury would have reached a different result had the photographs been excluded. (*People v. Heard*, 31 Cal.4th at p. 978; *People v. Scheid*, 16 Cal.4th at p. 21; *People v. Watson*, *supra,* 46 Cal.2d at p. 836.) The photographs were unpleasant but not unduly gruesome, and were no more inflammatory than the graphic testimony of the prosecution's witnesses. They were also highly relevant to issues in dispute at the trial. (*People v. Ramirez, supra*, 39 Cal.4th at p. 454.) Thus, it is not reasonably possible admission of the photographs affected the jury's verdict.

Finally, Booker argues that his offer to stipulate to the cause of death removed the issue from the jury's consideration and made the photographs irrelevant. (AOB 90.) Again he is incorrect. Booker's not-guilty plea put all elements of each offense in issue, including cause of death, intent, deliberation and premeditation, which were the main issues at trial and in this appeal. (*People v. Steele, supra,* 27 Cal.4th 1243; *People v. Catlin* (2001) 26 Cal.4th

81, 146; *People v. Balcom* (1994) 7 Cal.4th 414, 422; *People v. Carpenter* (1997) 15 Cal.4th 312, 379; *People v. Daniels* (1991) 52 Cal.3d 815, 857-858.) Even if the defendant chooses to concede some of the issues, the prosecution is still entitled to prove its case, and especially to prove a fact as central to its case as intent. (*People v. Steele, supra*, 27 Cal.4th at p. 1243; *People v. Scheid* (1997) 16 Cal.4th 1, 16-17.)

Thus, the trial court did not err in admitting the challenged photographs despite the section 352 objection. The photographs were highly relevant to show the manner in which the victims were killed and the severity of the injuries, to clarify the pathologist's testimony, to illustrate similar injuries which supported the prosecutor's argument the same person committed the crimes, and to prove deliberation and premeditation and the appropriate penalty, all of which were at issue at trial and in this appeal. (*People v. Ramirez, supra*, 39 Cal.4th at pp. 453-454; *People v. Cain* (1995) 10 Cal.4th 1, 29 [no prejudice in admitting autopsy photos when there was strong, circumstantial evidence defendant murdered the victim].) Even if admission of some of the photographs was error, it was harmless on this record.

Therefore, Booker's convictions must be affirmed.

VII.

THE COURT WAS NOT REQUIRED TO INSTRUCT, SUA SPONTE, THAT RAPE OR LEWD ACT ON A CHILD UNDER FOURTEEN CAN ONLY BE ACCOMPLISHED WITH A LIVE VICTIM, BECAUSE THAT WAS NOT BOOKER'S THEORY OF DEFENSE, AND THERE WAS NO EVIDENCE TO SUPPORT THAT PINPOINT INSTRUCTION

Booker contends that the trial court erred when it failed to instruct the jury sua sponte that there can be neither rape nor a forcible lewd act on a child under fourteen when that child is not alive. (AOB 94.) He contends the error requires that his conviction for the murder of Corina Gandara, the special circumstance allegation that her murder occurred during the commission of or attempted commission of rape or forcible lewd act, and the death penalty for all three murders must be reversed, because the error violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15 and 17 of the California Constitution. (AOB 95.) Not so. There was no evidence to support the instruction, and it was never Booker's theory that intent to rape or molest was formed after the child's death. Thus, there was no basis for a pinpoint instruction on after-formed intent, no error in not giving such an instruction sua sponte, and the first-degree murder verdict and special circumstance allegation, as well as the death penalty should be affirmed.

The guilt phase evidence disclosed that Booker stabbed three young women to death early in the morning hours of August 10, 1995, before going home to take a nap. Tricia Powalka was found in her apartment's bedroom; she had been stabbed more than 100 times, and was partially undressed. Twelve-year-old Corina Gandara was found dead in the bathroom, stabbed to death, and also partially undressed. Amanda Elliott was found stabbed and shot in the living room.

There were photographs from the murder scene showing, inter alia, Corina Gandara on the bathroom floor with her pants pulled down to her left knee, legs splayed and bloody handprints on her thighs. (7 RT 921-924, 1267.) Another photograph showed Tricia Gandara, also with her with shorts and underwear pulled down to her left knee. (9 RT 1265.) The positions of the two girls and the statements of Booker, after his arrest, indicated possible sexual assault, but the detectives could not determine if either girl had been raped. (8 RT 1095-1096; 9 RT 1266-1268.)

The coroner did not find genital trauma on Corina Gandara. (10 RT 1376-1377, 1386.) One pubic hair was found on Gandara, which prosecution witnesses testified was similar to that of Maddox or Corina Gandara, although inconsistent with Booker (10 RT 1317.) There was no semen found in the rape kits taken from Gandara or Powalka. (10 RT 1319.)

Booker did not testify at trial, but his various versions of the murders were introduced through his tape-recorded post-arrest statement to the police detectives. (3 CT 674-712; 7 RT 963; 9 RT 1263.) Booker admitted he killed all three girls (3 CT 705-707), and admitted that he "helped" Corina and Tricia to undress. (9 RT 1267-1268.)

Further, Booker described how he was "playing around" with his homemade knife when Corina Gandara, the 12-year-old supposedly bumped into it. When she asked him, "Why are you trying to stab me?" he supposedly told her he "cut her on accident." (3 CT 687, 693, 694.) However, she "tried to grab my, she tried to grab me, I went like that and I hit her, I was like oh damn." (3 CT 687.) He said, "One thing led to another, I don't know, my mind went blank on me, I don't know what happened . . . I just seen blood." (3 CT 687.) However, he told the detectives, when Corina told him she was going to tell "her friend" what happened, he interrupted what he was doing, threw

Corina in the bathroom and closed the door, so that he could take care of the "friend," Tricia Powalka. (3 CT 697.)

According to Booker, when Tricia Powalka heard Corina Gandara scream for help, Tricia said that she was going to shoot Booker. (3 CT 687, 693.) When he came out of the bathroom, Tricia "pulled the gun on [him]." (3 CT 696.) Later, Booker described a slightly different sequence of events, saying Tricia tried to shoot him so he "threw" Corina into the bathroom and locked or closed the door, then hit Tricia. (RT 697.) Booker said Tricia took her pants off too. (3 CT 700.)

Booker admitted he took "homegirl's [Corina's] pants off" in the bathroom. (3 CT 697.) When the detective asked if he was going to have sex with Corina, Booker said: "Nah, I hell no. I wasn't going to do nothing with her, but I mean, I knew I was going to go down and everything, and I was like, I'm fucked." (3 CT 698.) . . . However, Booker denied Corina was bleeding, contending, "She wasn't like stabbed all the way, I only cut here [sic] a little bit . . . I told her to take her pants off." (3 CT 698.) He added that he "kind of helped her" take the pants off while Corina was lying on the bathroom floor, then he "hit" her again in the neck. (3 CT 698-699, emphasis added.)

> It is fundamental that a defendant charged with a crime is entitled to have the jury determine guilt or innocence. (Cal. Const., art. I, § 16; see also *Cabana v. Bullock* (1986) 474 U.S. 376, 384 [88 L.Ed.2d 704, 715, 106 S.Ct. 689].) Due process forbids conviction unless the jury finds each element of the crime charged beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368, 375]; *People v. Dillon* (1983) 34 Cal.3d 441, 473; see Pen. Code, § 1096.) The trial court has a duty to instruct the jury on all elements of the case submitted to it. (Citations.)

(*People v. Shade* (1986) 185 Cal.App.3d 711, 714.)

As a matter of state law, the trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence,

including defenses, whether or not the defendant makes a formal request. (*People v. Rogers* (2006) 39 Cal.4th 826, 867.) However, a trial court's duty to instruct, sua sponte, or on its own initiative, on particular defenses is limited. It arises "only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Sedeno* (1974) 10 Cal. 3d 703, 715-716, overruled on other grounds, *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [requiring "substantial" evidence, rather than "any evidence no matter how weak" for sua sponte instructions]; see also *People v. Montoya* (1994) 7 Cal. 4th 1027, 1047 [874 P.2d 903, 31 Cal. Rptr.2d 128].)

To require trial courts to ferret out all defenses that might possibly be shown by the evidence, even when inconsistent with the defendant's theory at trial, would not only place an undue burden on the trial courts but would also create a potential of prejudice to the defendant. (*People v. Barton* (1995) 12 Cal.4th 186, 195.) As stated in *Sedeno, supra*, 10 Cal. 3d at pages 716-717, appellate insistence upon sua sponte instructions which are inconsistent with defense trial theory or not clearly demanded by the evidence would hamper defense attorneys and put trial judges under pressure to glean legal theories and winnow the evidence for remotely tenable and sophistical instructions.

A "pinpoint" instruction relates particular evidence to an element of the offense, and therefore need not be given on the court's own motion. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119-1120.) Pinpoint instructions are required to be given upon request, when there is evidence supportive of the theory, but they are not required to be given sua sponte. (*People v. Saille, supra*, 54 Cal.3d at p. 1119.) Even when a pinpoint instruction is requested and then not given for some reason, there is no error if there is no evidence to support giving the instruction. (*People v. Rogers, supra,* 39 Cal.4th at p. 878; *People v. Mayfield, supra,* 14 Cal.4th 668, 678.)

Felony murder is a killing "which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288. . . ." (Pen. Code, § 189.) For a felony-murder rape and felony-murder child-sexual-molestation special circumstance to be found true, a jury has only to find that the rape is an "'independent purpose'" in the killing of the victim (*People v. Carpenter* (1997) 15 Cal.4th 312, 387), such that the defendant intended to commit rape or molest and the rape or molest and killing were part of one continuous transaction. (*People v. Proctor, supra,* 4 Cal.4th 499, 536; *People v. San Nicolas* (2004) 34 Cal.4th 614, 660-661.)

As explained in *People v. San Nicolas, supra,* 34 Cal.4th at pp. 660-661: The crime of rape requires a live victim, therefore the intent to have sexual intercourse with a dead body qualifies as neither rape nor attempted rape. (*People v. Kelly*, *supra,* 1 Cal.4th 495, 524.) Intent to rape may "be inferred from all of the facts and circumstances disclosed by the evidence" (*People v. Matson* (1974) 13 Cal.3d 35, 40-42) and is proven by "acts, conduct and circumstances connected with the offense." (*People v. Van Wyke* (1949) 91 Cal.App.2d 839, 843.) Where the defendant does attempt to rape, "reasonably or mistakenly believing that the victim is alive, the perpetrator is guilty of having attempted the underlying felony." (*People v. Hart, supra,* 20 Cal.4th at p. 611.) After intent to rape is established, the special circumstance–and felony murder–are applicable, regardless of whether actual penetration occurred before or after death. (See, *People v. Kelly, supra*, 1 Cal.4th at p. 525.)

Booker contends that the trial court erred in failing to instruct sua sponte that the victim must be alive for there to be a rape or lewd acts on a child, or an attempt to commit either offense, for purposes of felony murder or the murder special circumstance. (AOB 94-95, 105.) However, under the particular facts of this case, there was no evidence of an after-formed intent to sexually assault

any victim, and his belated suggestion that the court was required to give such an instruction is contrary to the defense Booker presented at trial. Accordingly, the trial court had no sua sponte duty to give an instruction pinpointing that a rape victim must be alive. Moreover, even assuming the trial court erred, such error could not have been prejudicial here.

Booker contends there was substantial evidence underlying the omitted instruction, consisting of his taped post-arrest statement to police with the multiple versions of how Corina Gandara died, none of which specifically stated he sexually assaulted Gandara after she died and not before. One scenario was that Booker stabbed Gandara, then put her in the bathroom or left her in the bathroom, while he dispatched Tricia Powalka. After Powalka's death, according to Booker's statement, he returned to Gandara, helped her remove her clothes, and stabbed her to death, before killing Amanda Elliott.

Thus, there was no evidence there was sexual contact initiated after Gandara's death; there was certainly no contention that Booker was a necrophiliac. In fact, Booker's defense was that the only sexual predator was Deverick Maddox, and there was insufficient evidence of premeditated murder, or first degree felony murder, and the killings were second degree murder only. Therefore, there was no basis to argue after-formed sexual intent and no sua sponte pinpoint instruction was required.

The trial court instructed the jury fully on the required elements of first-degree premeditated murder and first-degree felony-murder, as well as the elements of rape and child molest including coercion, the lack of consent, and force or duress. The trial court did not have a sua sponte duty to further explain the self-evident principle that if the absence of lack of consent was the result of the victim having died, there was no rape or molest and there could be no felony murder, nor a special circumstance finding based on that theory.

Certainly, if Booker felt that the jury might not understand that a rape victim or a victim of lewd acts on a child must be alive, he should have requested the clarifying instruction at trial.[24] That he did not make the request did not make the court's failure to give the instruction sua sponte reversible error, but only illustrates that it was not Booker's theory of defense. Additionally, it was not supported by the evidence.

Here, an after-formed-intent instruction would have served to explicitly relate particular evidence to the generally applicable instruction on rape or child molestation. As such, the after-intent pinpoint instruction Booker claims was required sua sponte, would have only been required upon defense request, if there were sufficient evidence to support it. (See *People v. Saille*, *supra*, 54 Cal.3d at pp. 1117-1119; see also, *People v. Cash* (2002) 28 Cal.4th 703, 736 [denying requested pinpoint instruction--on after-formed intent to steal for robbery-murder special circumstance--was harmless in light of other instructions and theory of defense]; *People v. Lewis* (2001) 25 Cal.4th 610, 647 [trial court properly denied pinpoint instruction on after-formed intent to steal, since other instructions informed the jury that first degree felony murder applies if the defendant formed intent to steal before or contemporaneously with the killing].)

Moreover, the correctness of jury instructions is determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Burgener* (1986) 41 Cal.3d 505, 538.) Thus, "[t]he absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." (*Burgener*, *supra*, 41 Cal.3d at p. 539.) The argument of counsel is also relevant in determining

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24. By way of analogy, a trial court who has instructed that robbery requires a finding of force or fear need not also instruct sua sponte that the absence of force or fear means a robbery has not occurred.

if the jury was adequately informed of a point allegedly omitted from the court's charge. (See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248; *People v. Prettyman* (1996) 14 Cal.4th 248, 273; *People v. Avena* (1996) 13 Cal.4th 394, 417.) Since the instructions explaining the required elements of first degree murder and first-degree felony murder and the instructions explaining the rape/child molest special circumstance readily encompassed Booker's theory that this was second-degree murder and the only evidence of sexual assault implicated Deverick Maddox, nothing in the court's instruction prevented the jury from applying those instructions to the defense. Both the prosecutor and defense argued their respective positions on the facts. The requirement that a rape/molest victim must be alive was conveyed adequately on the existing record.

Booker nonetheless contends that *People v. Sellers* (1988) 203 Cal.App.3d 1042 dictates a different result, because it is "remarkably similar and directly on point." (AOB 102, see also, AOB 102-107.) He is incorrect. In *Sellers*, the defendant gave a post-arrest statement in which he denied having sexual intercourse with the woman he admittedly murdered. Next, he claimed the sex was consensual. In his final version of events, the defendant said he went home, "then returned to the scene after an hour or two, washed the victim's body, laid it back on the bed and had intercourse with it." (*Id.*, at p. 1049.) The defendant requested an instruction that the victim must have been alive at the time of the rape for the jury to convict.

In *Sellers*, the trial court denied the request for the pinpoint instruction and precluded defense argument that there can be no rape of a dead body. Further, the trial court instructed that as a matter of law it was irrelevant whether sexual penetration took place before or after the victim was dead, and the prosecution could prove rape, if it showed the defendant intended to rape the victim while she was alive, and the actual intercourse was part of a

"continuous course of conduct." The appellate court concluded that, in those circumstances, the trial court's denial of the defendant's requested jury instruction constituted prejudicial error, therefore reversed the judgment and remanded for a new trial. (*People v. Sellers, supra*, 203 Cal.App.3d at p. 1050.)

The *Sellers* appellate court relied on the "persuasive dictum" in *People v. Stanworth* (1974) 11 Cal.3d 588, to hold that "rape, as defined by the Penal Code, may not be accomplished with a dead person. . . ." (*Id.* at p. 604.) In *Stanworth*, the defendant contended his rape conviction should be reversed because he shot his victim in the head, causing almost instantaneous death, prior to having intercourse with the body. *Stanworth* was precluded from making this argument because he pled guilty. Nevertheless, as a matter of "first impression," this Court concluded the crime of rape required a live victim. Thus, *Stanworth* reasoned that,

> Rape as defined in Section 261 is an act of sexual intercourse, accomplished with a [person] not the [spouse] of the perpetrator. The statute, on its face, did not indicate whether the victim must be alive at the time the act of sexual intercourse is performed. However, section 263 states that '[the] essential guilt of rape consists in the outrage to the person and feelings of the [victim]. Any sexual penetration, however slight, is sufficient to complete the crime.' [Citations.] It is manifest that the 'feelings' of a [rape victim] cannot be offended nor does the victim suffer 'outrage' where she [or he] is dead when sexual penetration has occurred. Thus it appears that a [rape victim] must be alive at the moment of penetration in order to support a conviction of rape under section 261.

(*People v. Stanworth, supra,* at p. 605, fn. 15; cited in *People v. Sellers*, 203 Cal.App.3d at pp. 1050-1051.)

In *Sellers*, the defense was entitled to sua sponte instructions on its theory that there could be no rape of a dead body, and there was substantial evidence to support the theory. Therefore, the trial court's refusal to give defendant's requested instructions and denial of the related argument, together

with instructions contrary to the defense theory and incorrect in themselves, constituted prejudicial error beyond a reasonable doubt. The error was so pervasive it affected the rape conviction, the special circumstance finding and the first-degree murder conviction as well. The appellate court reversed and remanded to the trial court. (*Sellers, supra,* 203 Cal.App.3d at pp. 1050-1055.)

This Court distinguished *Sellers* in *People v. Kelly, supra,* 1 Cal.4th 495, noting however, that even *Sellers* recognized, that "if the victim dies during an attempted rape which is only consummated after death, the felony-murder rule is fully applicable." (*People v. Kelly, supra*, 1 Cal.4th at p. 527, citing *People v. Sellers, supra*, 203 Cal.App.3d at p. 1054)

In *Kelly,* defense counsel argued that no sexual intent arose until after the victim's death, which--if believed--would have avoided the felony-murder rule and the special circumstance allegation. However, at trial there was no argument that the defendant's intent was always to rape a dead body, and there was no hint that Kelly was a necrophiliac. (*Kelly*, 1 Cal.4th at p. 527 and fn. 8.) Thus, in *Kelly*, this court concluded that a reasonable juror would have understood that for the felony-murder rule and the special circumstance to apply, the defendant must have been attempting to rape the victim at the time of the killing; and it would not suffice if, after the killing, defendant acquired the intent to have intercourse with the dead body. (*People v. Kelly, supra,* 1 Cal.4th at pp. 526.)

This Court has established that rape requires a live victim. (*People v. San Nicolas, supra,* 34 Cal.4th 614, 660.) With regard to attempted rape, "a person who attempts to rape a live victim, kills the victim in the attempt, then has intercourse with the body, has committed only attempted rape, not actual rape, but is guilty of felony murder . . . ." (*People v. Kelly, supra*, 1 Cal.4th at p. 525, quoted in *People v. Huggins*, *supra*, 38 Cal.4th at pp. 217-218.)

People v. Jones (2003) 29 Cal.4th 1229, 1258-1259 is more to the point. There the defendant contended the trial court should have instructed the jury that the specific intent to rape must be formed before or during the killing. This Court found no merit to the argument, stating an after-formed intent instruction is a pinpoint instruction that a trial court has no obligation to give, absent a request. (Citing, *People v. Silva*, *supra,* 25 Cal.4th 411, 443.) Moreover, the trial court in *Jones* gave the standard jury instruction on felony murder and burglary, rape, and robbery, which stated that a killing "which occurs during the commission or attempted commission of a crime as a direct causal result of burglary, rape and/or robbery is murder of the first degree when the perpetrator had the specific intent to commit such crime." Thus, as in *Kelly*, a *reasonable juror* would necessarily have understood from this instruction that the defendant was guilty of rape felony murder only if the intent to rape was formed before the murder occurred. (*People v. Jones, supra,* 29 Cal.4th at pp. 1256-1257, emphasis added.)

Like defendant *Jones*, Booker contends that the court erred in not instructing sua sponte on after-acquired intent to commit rape or lewd acts on a child under 14 years of age, for first-degree felony murder. Thus, he argues, the conviction for the first degree murder of Corina Gandara, the special circumstance of murder in the course of rape or child molestation, and the death penalty must be reversed because omitting the instruction violated his constitutional rights. He argues further that it cannot be determined whether the jury relied on the felony murder theory or a theory of premeditation in finding Booker guilty of first degree murder on those charges. He concludes the murder convictions must be reversed, citing *People v. Guiton* (1993) 4 Cal.4th 1116, 1122. (AOB 106-107.) He is incorrect legally and factually.

First, there was no substantial evidence that Corina Gandara was dead when the intent to commit rape or molest the child was formed. Moreover, the

rule Booker cites from *Guiton* is inapplicable. Guiton provides that when alternate theories are presented, and some are legally correct and some legally incorrect, if the reviewing court "'cannot determine from the record on which theory the general verdict of guilt rested, the conviction cannot stand.'" (*Guiton, supra,* at p. 1122, quoting *People v. Green* (1980) 27 Cal.3d 1 at p. 69.) The rule does not apply here, because Booker's situation did not involve a legally incorrect theory, but only possibly belated argument there was evidence the victim was not alive at the critical time, to support the legally correct theory of felony murder based on rape or attempted rape, child molest or attempted child molest. Therefore, as in *People v. Johnson* (1993) 6 Cal.4th 1, any such insufficiency was harmless because there was the valid alternative theory of premeditated murder that was presented to the jury. (*Id.* at p. 38; see also *Guiton, supra*, at p. 1129.)

The argument that the court was required to give a sua sponte pinpoint instruction on after-acquired intent to commit rape or child molestation must be rejected and Booker's conviction and sentence must be affirmed in its entirety.

VIII.

THE TRIAL COURT CORRECTLY CONCLUDED THAT THERE WAS INSUFFICIENT EVIDENCE FOR INSTRUCTIONS ON VOLUNTARY MANSLAUGHTERS BASED ON IMPERFECT SELF-DEFENSE OR HEAT OF PASSION

Booker contends that the trial court was required to instruct on voluntary manslaughter as a lesser-included-offense of murder, based on imperfect self-defense and heat of passion. (AOB 108, 113-116.) He alleges that omitting the manslaughter instructions was constitutional error. (AOB 108, 111-113.) He concludes that the failure to sua sponte give such instructions requires reversal of his murder convictions, on state and federal grounds. (AOB 120-122.) He argues that the record is "replete with evidence" that he killed Tricia Powalka

and Amanda Elliott because of an actual belief in the need for self-defense against the girls who unlawfully attacked him. (AOB 116, 118, 122.) He adds that because the girls unlawfully attacked him, even if he were arguably responsible for initiating the violence--although he contends it was an accident--he was still entitled to instructions on imperfect self defense and heat of passion, and his own "testimony" supports the instructions. (AOB 118.)

Booker is incorrect. In order to show the court had a sua sponte obligation to instruct on manslaughter, Booker has to point to substantial evidence of victim provocation and heat of passion in the record, or unreasonable self-defense. He has not done so. Further, the evidence showed Booker was the initial aggressor, and that if any victim used force against him it was a lawful act by the victim, in self-defense or defense of others. In any case, any error in omitting the instruction was harmless, and the convictions should be affirmed.

In Booker's taped statement, he told the detectives "I already stabbed [the first girl, Corina] once on accident [and] I just stabbed her again." (3 CT 705.) He said she ran into the bathroom, screaming. (3 CT 706.) "Homegirl" [Tricia Powalka] came out of the bedroom and Booker stabbed her and she fell on the bed, then on the floor where they fought. (3 CT 706.) Booker claimed he took the gun away from Powalka and threw it across the room, then he stabbed or cut her in the throat, head, shoulder and neck. (3 CT 707.) Booker shot the third victim [Amanda] after cutting her with his knife. (3 CT 707.)

As to Corina Gandara, Booker stated he was playing around with a homemade knife when 12-year-old Gandara bumped into it. She asked him, "Why are you trying to stab me?" and he said he "cut her on accident." (3 CT 687, 693, 694.) Then she "tried to grab my, she tried to grab me, I went like that and I hit her, I was like oh damn." (3 CT 687.) He said, "One thing led to another, I don't know, my mind went blank on me, I don't know what

happened, I just seen blood." (RT 687.) But when Gandara said she was going to tell Powalka what happened, Booker "threw" Gandara in the bathroom and closed the door. (RT 697.)

According to Booker, when Tricia Powalka, the 19-year-old, heard Gandara scream for help, Powalka said that she was gonna shoot Booker. (3 CT 687, 693.) He said, "you ain't gonna shoot me, . . . and that he "feared for [his] life . . ." (3 CT 694.) Then Booker stabbed Tricia in the neck. (3 CT 688.) He denied there was a struggle, and said he left the room. When "D" asked why he hurt the girls, Booker said didn't try to, he just had all that alcohol in his system. (3 CT 688.) Alternatively, Booker said when he came out of the bathroom after stabbing Gandara, Powalka "pulled the gun on [him]." (3 CT 696.) He told the detectives Powalka put the gun to his head and pulled the trigger but it did not fire. Finally, Booker said, Powalka tried to shoot him so he "threw" Gandara into the bathroom and locked the door, he then stabbed Powalka, because of all the Thunderbird he drank. (RT 697.)

In another version of events, Booker said he knocked the gun out of Tricia's hand, but did not shoot Tricia. Instead he shot Amanda Elliott. (3 CT 701.) Alternatively, when Amanda "charged" him, he hit her in the neck with the knife, two or three times. (3 CT 688, 702.)

Deverick Maddox testified that Booker called Maddox after leaving the apartment and said, while he [Booker] was talking to Corina Gandara, "the knife came out," and Corina threatened to tell Tricia what happened. (8 RT 1149-1151.) In the apartment, Booker could not give Maddox a reason for the killings, and he did not mention being in fear for his life, although he said he feared going to prison.

Later, in police custody, Booker told one deputy sheriff he "accidentally hit [Gandara] in the throat," and "there was blood everywhere and on me." (9 RT 1286-1287.) Further, Gandara said she was going to get her friend's gun

to shoot [Booker], and Booker said, no, you're not and hit [stabbed] her again. (9 RT 1287.) He told another deputy, a similar story, that after he hit [stabbed] Gandara, she threatened to get somebody to get him with a handgun, or something like that. (9 RT 1291.)

In early discussions about jury instructions, Booker declined to ask for an instruction on voluntary manslaughter, based on imperfect self-defense. Counsel explained, "I didn't ask for the unreasonable self-defense instructions because I didn't feel I could argue that." (11 RT 1464-1465.) The court observed that the only other theory of voluntary manslaughter would be provocation, but there was no evidence of provocation, even from Booker's own post-arrest statements. (11 RT 1465.)

While conceding it was a "stretch," defense counsel speculated that, if Corina Gandara were accidentally cut, as Booker said, and then she went to get Tricia Powalka and everything "snow-balled" from there, exploding from his effort to stop her, that would support the instruction. (11 RT 1465.) Defense counsel stated he was basing his provocation argument on a "literal reading" of Booker's post-arrest statement. (11 RT 1466.) Again, the court concluded there was not enough evidence to argue or instruct the jury on voluntary manslaughter. (11 RT 1464-1465.) However, the court gave Booker the opportunity to show how he was legally entitled to a manslaughter instruction. (11 RT 1466.)

Later, Booker did request voluntary manslaughter instructions on the theory of sudden quarrel and heat of passion, specifically, CALJIC Nos. 8.37, 8.42, 8.43, 8.44 and 8.50. The court recalled initially rejecting manslaughter instructions, because there were no facts to support them, and was still not inclined to give them, but listened to counsel's reasons for the request. (11 RT 1499.) Booker argued that the instructions were required if there were any evidence to support them, even if it was not the defense theory of the case, and

even if it would not be argued by the defense. (11 RT 1499-1500.) Booker pointed to his post-arrest statements to Deputy Monte, that when Booker stabbed Corina Gandara who began to bleed, she threatened to get someone "to shoot him with a gun," and "the next thing he knew, he was covered with blood." Booker argued this was "sudden rage" for purposes of CALJIC No. 8.44, that is emotions including fear, which can constitute heat of passion to reduce murder to manslaughter. (11 RT 1500.) He argued there was at least "some" evidence that Tricia Powalka was going to get a weapon and Booker reacted in a very violent and sudden manner to the threat. (11 RT 1500.) Counsel conceded he might not argue heat of passion, and that it was "certainly not the actual defense theory of the case." (11 RT 1500.)

The court pointed out that manslaughter would not apply to Amanda Elliott at all. Booker conceded Elliott's killing would be a "stretch," unless he was still operating under the same mental state, or reacting violently to the whole situation. (11 RT 1501.)

The prosecutor argued that Gandara's being cut with a knife and saying she would go for help was not a "provocative act" of the kind that reduces malice-murder to manslaughter. (11 RT 1502.) In any case, it was belied by Booker's own statements on the tape which disclosed no provocative acts by the victims. (11 RT 1502-1503.) The prosecutor objected to manslaughter instructions as to any victim. (11 RT 1503.) Booker indicated for the record that his request for instructions (CALJIC Nos. 8.37-8.50) were based on the Sixth Amendment right to trial and assistance of counsel, the Eighth Amendment right to a reliable penalty determination, and the Fourteenth Amendment right to due process, without further elaboration. (11 RT 1505.)

The court concluded there was no evidence of provocation, and found the law did not allow someone to stab another with a knife and then claim unreasonable self-defense, and denied the requested instructions. (11 RT 1503-

1505.) Later, the court again reiterated it would not instruct on voluntary manslaughter. (11 RT 1520-1521.) The court stated it was absolutely convinced that there was no factual basis for voluntary manslaughter, nor was it a viable argument to make. There was no evidence Booker was in subjective fear at the time he took the gun away from Tricia Powalka and stabbed her to death, then returned to Corina Gandara and finished stabbing her to death, before stabbing and shooting Amanda Elliott. (11 RT 1465, 1530-1531.)

The jury was instructed on the definition of first degree murder and malice (acting on preexisting reflection rather than "heat of passion" (14 CT 3737-3740; RT 1555-1557); capital murder with special circumstances (14 CT 3750-3758; felony murder (14 CT 3741; RT 1557-1558); and second-degree murder (RT 1558, 1563-1568; 14 CT 3742-3743). Further, the jury was told, if it found Booker guilty of murder, but there was doubt as to the degree, the jury would have to return a verdict of second-degree murder. (14 CT 3748; 12 RT 1561-1562.)

The court gave no instructions on voluntary manslaughter. Booker argued in closing that the evidence supported second-degree murder instead of first-degree, because there was no evidence of premeditation and planning, as opposed to rash acts caused by an explosion of anger or "heat of passion." (12 RT 1615-1617, 1621-1623.)

Generally, where a defendant unlawfully intends to kill, the crime is murder, because the intent to kill reflects malice, and an unlawful killing with malice is murder. (*People v. Lee* (1999) 20 Cal.4th 47, 58-59.) However, if there is evidence negating malice, such as a defendant acting upon a sudden quarrel or heat of passion on sufficient provocation, or imperfect self-defense, the crime may be reduced to voluntary manslaughter, a lesser, necessarily included offense of intentional murder. (*Ibid.*)

To negate malice and reduce murder to voluntary manslaughter on an imperfect self-defense theory, the trier of fact must find that a defendant killed because of an actual, but unreasonable belief of imminent danger of death or great bodily injury. (*People v. Michaels* (2002) 28 Cal.4th 486, 529, quoting *In re Christian S.* (1994) 7 Cal.4th 768, 771.) The doctrine is narrow, and "requires without exception" that the defendant entertain an actual belief in the imminent need for self-defense based upon imminent peril, one that must be dealt with instantly. (*In re Christian S., supra*, at p. 783; *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1269.) "Fear of future harm–no matter how great the fear and no matter how great the likelihood of the harm–will not suffice." (*Ibid.*) The trial court is required to give a requested imperfect self-defense instruction only if there is substantial evidence to support it. (*People v. Michaels, supra*, 28 Cal.4th at p. 529; *In re Christian S., supra*, 7 Cal.4th at p. 783.)

To negate malice and reduce a murder to voluntary manslaughter on a heat of passion theory, two requirements must be satisfied: (1) the defendant must actually, subjectively kill under the heat of passion, and (2) the facts and circumstances giving rise to heat of passion must, as an objective matter, be the result of sufficient provocation such as to arouse heat of passion in the mind of an ordinarily reasonable person. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1143-1144 (court denied pinpoint instruction on provocation which perhaps accrued over a long period of time, and was requested to offset fact that defendant laid in wait outside ex-wife's house until she and boyfriend arrived, then killed boyfriend and kidnapped ex-wife); *People v. Steele, supra,* 27 Cal.4th at pp. 1252-1253 (subjective heat of passion element requires an objective showing that the victim did something sufficient to provoke a reasonable person to react as "passionately" as defendant did); *In re Christian S.*, 7 Cal.4th at p. 773, fn. 1 (defendant, whose own wrongful conduct--or initial

assault--created circumstance justifying his victim's response, cannot claim imperfect self-defense.)

A trial court must instruct on a lesser included offense where there is substantial evidence that the defendant is guilty only of the lesser offense, and not the greater. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Substantial evidence, in this context, means evidence from which a reasonable jury could conclude that the lesser offense, but not the greater, was committed. (*Ibid.*) The trial court's duty to instruct arises only if there is evidence substantial enough to merit consideration by the jury, i.e., evidence that a reasonable jury could find persuasive. However, the mere existence of any evidence, no matter how weak, will not justify the giving of lesser included offense instructions. (*Ibid.*) On appeal, the reviewing court employs the de novo standard and independently determines whether a lesser included offense instruction should have been given. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

On the record here, based on Booker's versions of events, he was the initial aggressor and there were no illegal or provocative acts by any of the victims. Nor did any of the three victims use illegal force and thereby justify Booker acting in actual but unreasonable self-defense. Corina Gandara never had an opportunity to defend herself, let alone illegally attack Booker so that he would be justified in killing her in self-defense, reasonable or not. Nor did Gandara "provoke" Booker in any way that would justify a reasonable person in his situation in responding passionately or violently, by yelling for help once she had been stabbed. Tricia Powalka was justified in defending herself and Corina Gandara against Booker, after he initiated the violence with his armed attack on Gandara. Amanda Elliott was stabbed and shot to death for no reason, and certainly not because she provoked any action by Booker which would enable him to claim imperfect self-defense or heat of passion.

The jury rejected Booker's argument that this was murder without premeditation, and instead found actual malice and intent to kill and thus, first-degree murder. The jury rejected second-degree murder. The jury surely would have returned the same verdict if it had been given an additional instruction asking it to consider a voluntary manslaughter verdict based on non-existent evidence of killings committed under an honest but unreasonable belief in the necessity for self-defense (see *People v. Koontz* (2002) 27 Cal.4th 1041, 1086-1087; *People v. Sakarias* (2000) 22 Cal.4th 596, 621) or heat of passion; *People v. Rogers* (2007) 39 Cal.4th 826, 883-884; *People v. Gutierrez, supra,* 28 Cal.4th at pp. 1144-1145.)

The trial court was correct in concluding there was no evidence of provocation to support voluntary manslaughter on a heat of passion theory. Moreover, the court correctly concluded, that there was insufficient evidence to support an imperfect self-defense theory. Booker came to the apartment armed with his home-made knife. Booker admitted the whole melee began when he stabbed Corina Gandara, "accidentally" or otherwise. Corina was not required to accept his supposed explanation about the "accident," and a twelve-year-old is certainly entitled to yell for help from her friend, Tricia Powalka. Powalka was entitled to come to Gandara's defense, when awakened in the middle of the night by a twelve-year-old yelling for help, after she has been stabbed and while she was being pursed by the stabber. Powalka was entitled to try to use deadly force in self-defense and defense of others. Unfortunately, Powalka was overwhelmed and was viciously stabbed more than 100 times by Booker Gandara was locked in the bathroom, mortally wounded, and certainly was no threat to Booker when he returned and dispatched her. Amanda Elliot did not initiate any of the violence, was never armed with any weapon, and was still stabbed and shot to death.

Moreover, while Booker requested a series of instructions on manslaughter on the theory of imperfect self-defense, he conveniently overlooked CALJIC No. 5.17, which provides:

> A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. . . . [¶] [However, this principle is not available, and malice aforethought is not negated, if the defendant by [his/her] [unlawful] [or] [wrongful] conduct created the circumstances which legally justified [his/her] adversary's [use of force], [attack] [or] [pursuit]) (emphasis added).

Therefore, since Booker's own version of events showed him to be the initial aggressor and the victims' responses to be legally justified, Booker was not entitled to rely on unreasonable self-defense to reduce murder to manslaughter. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581; *People v. Seaton* (2001)26 Cal.4th 598, 664.)

Booker's constitutional arguments fare no better. (AOB 111-113.) Citing *Beck v. Alabama* (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed.2d 392], Booker contends the trial court's failure to instruct on manslaughter as a lesser included offense violated his rights to due process under the Fifth and Fourteenth Amendments, and his right to a reliable determination under the Eighth Amendment. (AOB 111-113,120-122.) In *Beck*, the United States Supreme Court held unconstitutional an Alabama statute that prohibited instruction on lesser included offenses in capital cases, even though a conviction would effectively mandate the death penalty. (*Beck v. Alabama*, *supra*, at pp. 627-629, 638.) As the high court later explained, "'The goal of the *Beck* rule . . . is to eliminate the distortion of the fact-finding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence.'" (*Schad v. Arizona* (1991) 501 U.S. 624, 646-647 [111

S.Ct. 2491, 115 L.Ed.2d 555], quoting *Spaziano v. Florida* (1984) 468 U.S. 447, 455 [104 S.Ct. 3154, 82 L.Ed.2d 340].) This concern is not present where, as here, a jury is not faced with an all-or-nothing choice between capital murder and innocence, Booker's argument notwithstanding. (AOB 122; *Schad v. Arizona*, *supra*, at p. 647.)

As this Court has found, unlike *Beck*, California does not have a statute or law prohibiting instructions on lesser included offenses in capital cases, but not in noncapital cases. (*People v. Waidla, supra*, 22 Cal.4th at p. 736, fn. 15.) Further, as in *Schad* and *Waidla*, the jury here "was not forced into an all-or-nothing choice between conviction of murder that would legally compel it to fix the penalty of death, on the one side, and innocence, on the other." (*Ibid.*) The trial court instructed the jury on the lesser included offense of second degree murder with respect to all deaths. As the high court has held, the *Beck* rule is satisfied where the trial court properly instructs a jury on second degree murder as well as on first degree murder. (*Schad v. Arizona*, *supra*, 501 U.S. at pp. 647-648; accord, *People v. Dennis* (1998) 17 Cal.4th 468, 503.) Moreover, even if it found him guilty of first degree murder, and found the multiple murder special circumstance true, the jury was not legally compelled to fix the penalty at death, as was the jury in *Beck*. It could instead fix it as a term life imprisonment without the possibility of parole. As this court has found, under such circumstances, the *Beck* rule is not implicated. (*People v. Valdez* (2004) 32 Cal.4th 73 at pp. 118-119; *People v. Waidla*, 22 Cal.4th at p. 736, fn. 15.)

Moreover, where the *Beck* rule does not apply, any error in failing to instruct on a lesser included offense constitutes state error alone and "must be reviewed for prejudice exclusively under *Watson*."[25] (*People v. Breverman*,

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25. *People v. Watson*, *supra*, 46 Cal.2d 818, 836.

supra, 19 Cal.4th at pp. 149, 165-172, 178.) Under *Watson*, any error here was harmless, as there is no reasonable probability the error affected the outcome.

Booker's invocation of *People v. Vasquez* (2006) 136 Cal.App.4th 1176 is also unavailing. (AOB 118-119.) He contends that he was entitled to imperfect self-defense instructions, even if he did initiate the violence, because the victims unlawfully attacked him. *Vasquez* is factually distinguishable. When Vasquez confronted the victim with an accusation, the victim began to choke Vasquez, who pulled out a gun and shot the victim to death. The trial court rejected a request for imperfect self-defense instructions for lack of evidence. The jury deliberated three days on one count of first-degree murder to determine Vasquez's state of mind when he fired the gun, concluding he formed the lethal intent during the confrontation, rather than before it, and convicting on second-degree murder. The appellate court reversed, finding the failure to give imperfect self-defense manslaughter instructions was not harmless. (*Id.*, 136 Cal.App.4th at p. 1180.) *Vasquez* noted that imperfect self-defense is not available if a defendant's conduct creates circumstances where the victim is legally justified in resorting to self-defense against the defendant. (*Vasquez*, 136 Cal.App.4th at pp. 1179-1180; *In re Christian S.*, 7 Cal.4th at p. 773, fn. 1.) *Vasquez* was the exception, because it was the victim in *Vasquez* who first used unlawful force. (*Vasquez*, 136 Cal.App.4th at p. 1180; compare, *People v. Rogers* (2006) 39 Cal.4th 826, 883-884 (court not required to instruct sua sponte on imperfect self-defense because insufficient evidence of actual but unreasonable belief in need to shoot unarmed 15 year old girl, who was approaching defendant and pointing her finger at him); see also, *People v. Randle* (2005) 35 Cal.4th 987, 991-993 (error to refuse to instruct on imperfect defense of another).)

There is no evidence in this record that the girls unlawfully attacked Booker, and it does matter that he created the situation and was the first to use

unlawful and deadly force, thus precluding him from instructions on imperfect self-defense. There is no evidence that one of the girls overreacted and a reasonable person, in his position, would kill all three girls in the heat of passion. Any "heat of passion" was of his own making, and was not provoked by any of the victims. In his statement to police, the only thing Booker feared was what would happen to him in prison. There is no support in the record for his argument that Amanda, who was unarmed, "charged" at him and he feared she would kill him; there w as no support for his argument that Corina "overreacted" to being stabbed, or that Tricia Powalka acted unlawfully in coming to her own defense or than of Corina. (AOB 118-119.) Booker's "kill or be killed" scenario is a sad fabrication, contrived after the fact to explain the inexplicable.

Since there was no evidence to support imperfect self-defense or heat of passion manslaughter instructions, the court did not err in refusing the instructions or not giving them sua sponte. Booker's convictions should be affirmed.

IX.

THE PROSECUTOR'S COMMENT ON THE PRESUMPTION OF INNOCENCE IN HIS CLOSING ARGUMENT WAS NOT REVERSIBLE MISCONDUCT, AND WAS HARMLESS

Booker alleges that the prosecutor committed misconduct in closing argument, when he claimed the presumption of innocence vanished before the jurors began their deliberations, thus shifting the burden of proof, in violation of due process. (AOB 123, 129, 132.) He claims the only remedy for this error is reversal of all of his convictions, under federal and state standards. (AOB 132-135.) Not so. There was no error, and even if this Court were to disagree, any error was harmless on the record here.

The trial court instructed the jury on the presumption of innocence and reasonable doubt as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge. (CALJIC No. 2.90; 14 CT 3729; 12 RT 1549[26].)

During the prosecutor's closing argument in the guilt phase of the trial, the following occurred before the jury:

> [**MR. SOCCIO**] I had the burden when this trial started to prove the defendant guilty beyond a reasonable doubt, and that is still my burden. It's all on the prosecution. I'm the prosecutor. That's my job.
>
> The defendant was presumed innocent until the contrary was shown. That presumption should have left many days ago. He doesn't stay presumed innocent.
>
> **MR. GUNN**: Your Honor, I'm going to object to that, because I don't think they can make that decision until they are all together. (12 RT 1586.)
>
> **THE COURT**: Well, ladies and gentlemen, the presumption of innocence is the point at which you start the case. At some point you come to the conclusion the person is guilty, the presumption, the

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26. The jury was also instructed multiple times about proof beyond a reasonable doubt. (12 RT 1541, 1546, 1554, 1561, 1562, 1563, 1567, 1568, 1569-1570.)

presumption is gone. On the other hand, if you find the person not guilty, the presumption of innocence is always still there. Again, you have to interpret how to use that. (12 RT 1586-1587.)

Go ahead Mr. Soccio.

MR. SOCCIO: Thank you, your honor. I appreciate it.

As the Court instructed you, I was correct that the defendant starts out with the presumption of innocence. That doesn't stay. That isn't an automatic thing forever. That's why we have a trial. <u>Once the evidence convinces you he is no longer innocent, that presumption vanishes</u>. That's all it is. (12 RT 1587.)

What does beyond a reasonable doubt mean? You've heard the instruction over and over. Ask yourselves this: After listening to all the evidence and interpreting in your own minds and listening to argument today, is it okay for you to have some possible or imaginary doubt? The law said yes. You can have some. Reasonable doubt doesn't go to necessarily every detail of the case. In other words, it would be nice to know how everything occurred in that apartment that night, wouldn't it? It would be nice to know the times. It would be nice to know who said and did what, exactly in order which wound was inflicted, which girl was killed first, really. That would be nice, but there's no requirement that every single thing be proven beyond a reasonable doubt. My burden is to prove each of the elements of the crimes, the things that make the crime true, beyond a reasonable doubt. (12 RT 1587-1588.)

* * * * *

If you read histories about the theory of reasonable doubt – not theory, the facts and the presumption of innocence, you'll understand that when the law tried many centuries ago to prove – there was a requirement at one time that everything had to be proved absolutely. They found they couldn't do it. They could never prove everything absolutely to anybody as long as it had to do with human affairs. There was no way to ensure that, so you were allowed some possible or imaginary doubt. The real test, as the law says, is do you have an abiding conviction as to the truth of the charges. Don't you already before we go through it? (12 RT 1588.)

The prosecutor continued with his closing argument until the trial court excused the jury for lunch. Then the court wanted to put the following on the record:

> **THE COURT**: The jurors have left the courtroom, Counsel and the defendant are present.
>
> [Mr. Gunn] [y]ou made an objection to Mr. Soccio's characterization of when the presumption of innocence vanishes, and I hadn't ever really thought of that. Clearly it vanishes once the jury decides beyond a reasonable doubt. I don't know if it still stays there when they walk into the jury room. If you really think about it, once you get past the 1118.1, the presumption of innocence is almost a useless concept in real application, perhaps just to confirm the burden of proof lies with the People. When you argue the case and they deliberate, no one is going to talk about whether there's a presumption of innocence. The discussion is about if the district attorney proved the case. I don't think the discussion is on is the defendant still innocent, and he is presumed to be innocent. Has the district attorney proved the case beyond a reasonable doubt? So I'm no sure that we aren't talking about angels on the head of pins where it's an interesting concept conceptually because it's not anything in practicality.
>
> Say you heard this and had not deliberated. Jurors are going to have to come to some conclusion or thoughts at some point in time. I guess technically in sense of the minuet, maybe the presumption lasts all the way until you get to the jury room. I have a hard time answering the question. Since I really didn't know the answer, I kind of overruled it. I figured the case would take care of it if you want to make the linchpin argument of when the presumption of innocence ceases.
>
> **MR. GUNN**: That isn't the linchpin of my argument. The Court does admonish the jury they are not to decide the case until they are all together in the deliberation room. Our position is they didn't make that decision until they are on the deliberation process.
>
> I think there was a further characterization about – the way I have it down – I may have – haven't you already decided guilt beyond a reasonable doubt? So it's along the same lines. I didn't object to it at that time because I didn't want to interrupt further Mr. Soccio's argument, and the suggestion about the defense presenting evidence,

again shifting the burden of proof. So I would object on those same lines but submit it.

THE COURT: I think he was very careful to say that if you disagree with what the witness said – he brought that thing in. They were very clearly not mentioning Mr. Booker or anything like that. I guess it's debatable because it's the kind of debate that lawyers can talk about but reality has very little application.

Again, your objection is noted for the record, and I'll overrule it.

MR. GUNN: Sixth, Eighteenth [sic], Fourteenth –

THE COURT: On all state and federal grounds. See you back here at 1 o'clock. (12 RT 1600-1602.)

(Recess taken.)

Following the recess, the prosecutor completed his argument:

[**MR. SOCCIO**] The one thing I want to make clear to you about reasonable doubt and presumption of innocence is something that I would like you to keep in mind throughout all of this afternoon, what's left of today, and that is this: Until you reach a verdict, of course the defendant is not guilty. <u>If a presumption attaches to a defendant when the trial starts, if they are then found guilty somewhere along the way, of course that presumption has vanished</u>.

If there were no evidence presented, nothing happened, I didn't meet my burden beyond a reasonable doubt, for instance, or just didn't do anything, then of course your verdict would have to be not guilty.

What I am suggesting to you – and it's even stronger than suggesting, but that's a polite way of saying this – is that the evidence in this case is so vastly overwhelming, it isn't like the sides in this trial didn't know what the evidence was. You all didn't know, but we have known for a long time.

. . . And I never want to minimize in anything I might have said this morning, or particularly when I do my closing this afternoon, in case I forget this – it's your individual responsibilities to deliberate and come up with a verdict. (RT 1603-1604.)

In closing argument, Booker's counsel emphasized that the defendant had no burden of proof whatsoever. (12 RT 1606.)

Criminal defendants have a constitutional right to the presumption of innocence and to have the government prove guilt of each element of each charged offense beyond a reasonable doubt. (*Estelle v. Williams* (1976) 425 U.S. 501, 503 [96 S.Ct. 1691, 48 L.Ed.2d 126]; *In re Winship* (1970) 397 U.S. 358, 362 [90 S.Ct. 1068, 25 L.Ed.2d 368]; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-78 [113 S.Ct. 2078, 124 L.Ed.2d 182.) "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." (*Estelle v. Williams,* 425 U.S. at p. 503.)

> 'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.] [Citation.] "[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." [Citation.]'

(*People v. Smithey* (1999) 20 Cal.4th 936, 960, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

As a general rule, a defendant may not complain about prosecutorial misconduct on appeal unless he has objected on the same ground in a timely fashion, and requested that the jury be admonished to disregard the impropriety. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.)

Booker contends that the prosecutor committed misconduct in his closing remarks by stating: "The defendant was presumed innocent until the

contrary was shown. That presumption should have left many days ago. He doesn't stay presumed innocent." (AOB 129; 12 RT 1586.) Booker objected to the statement, but did not ask for a mistrial or admonishment to the jury, nor did he object to the court's curative comments. (12 RT 1586.) However, he alleges on appeal that the court's comments about the presumption vanishing were improper, because they implied that the jury could decide guilt or innocence before hearing all the evidence or beginning their deliberations. (AOB 134; 12 RT 1586-1587.) He focuses on the prosecutor's statement that the presumption was overcome many days before [the closing argument], and urges this Court to reverse his conviction. (AOB 134.)

Booker concedes that the court's instruction on reasonable doubt was correct, but complains there was no additional instruction about when the presumption of innocence vanishes. (AOB 131.) Contending the prosecutor's remarks were egregious, he asks this Court for per se[27] reversal; or to reverse because the People cannot demonstrate beyond a reasonable doubt[28] that the error did not contribute to the verdict, or alternatively because the trial was fundamentally unfair.[29] (AOB 132-133.) He relies on *People v. Hill* (1998) 17

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27. See, *Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 114 L. Ed.2d 182]; state court gave reasonable doubt instruction found unconstitutional in *Cage v. Louisiana* (1990) 498 U.S. 39 [111 S.Ct. 328, 112 L.Ed.2d 339]), which permitted verdict of guilt on less than beyond a reasonable doubt standard; instruction not harmless because verdict undoubtedly was attributable to the error. (AOB 132.)

28. See, *Neder v. United States* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827, 144 L.Ed.2d 35] holding that omission of materiality element from tax fraud instructions was subject to harmless error analysis, because the error did not render the trial fundamentally unfair. Thus, under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] if it appears beyond a reasonable doubt the error did not contribute to the verdict, the error is harmless. (AOB 133.)

29. See, *People v. Watson* (1956) 46 Cal.2d 818, 836. (AOB 133.)

Cal.4th 800, and two federal appellate opinions for his argument (*United States v. Cummings* (9th Cir. 1972) 468 F.2d 274, 280, and *United States v. Perlaza* (9th Cir. 2006) 439 F.3d 1149). (AOB 129-133.) His reliance is misplaced, as set out below.

Respondent would first like to direct this Court's attention to the case which is not cited by Booker, where a similar misconduct claim was made and rejected: *People v. Goldberg* (1984) 161 Cal.App.3d 170, where the prosecutor argued:

> And before this trial started, you were told there is a presumption of innocence, and that is true, but once the evidence is complete, once you've heard this case, once the case has been proven to you - and that's the stage we're at now - the case has been proved to you beyond any reasonable doubt. I mean, it's overwhelming. There is no more presumption of innocence. Defendant Goldberg has been proven guilty by the evidence. . . .

(*People v. Goldberg*, 161 Cal.App.3d at p. 189.)

The *Goldberg* Court found this remark did not constitute misconduct. The court reasoned that "once an otherwise properly instructed jury is told that the presumption of innocence obtains until guilt is proven, it is obvious that the jury cannot find the defendant guilty until and unless they, as the fact-finding body, conclude guilt was proven beyond a reasonable doubt." (*People v. Goldberg, supra*, 161 Cal.App 3d at pp. 189-190.) The *Goldberg* Court also found it significant that the trial court instructed the jury on CALJIC No. 2.90 and the prosecutor twice reminded the jury that the government had the burden of proving guilt beyond a reasonable doubt. (*Id.* at p. 189.)

The prosecutor here used language akin to that in *Goldberg*. He argued there was no longer a presumption of innocence, because the jury had heard all the evidence, and the facts overwhelmingly proved Booker's guilt. Thus, the prosecutor basically restated CALJIC No. 2.90's fundamental principle that a criminal defendant is innocent, until proven guilty beyond a reasonable doubt.

Moreover, here as in *Goldberg*, the jury was properly instructed with CALJIC No. 2.90; the instructions repeated the People's burden of proof beyond a reasonable doubt (12 RT 1541, 1546, 1554, 1561, 1562, 1563, 1567, 1568, 1569-1570); the prosecutor emphasized he had the burden of proof beyond a reasonable doubt (12 RT 1586-1588, 1603-1604); and defense counsel pointed out he had no burden of proof whatsoever, and argued the prosecutor had failed to prove each element of each offense (12 RT 1606, 1623). Under these circumstances, it is not reasonably likely the prosecutor's statements misled the jurors or caused them to believe the presumption of innocence terminated before they had reached a verdict of guilt beyond a reasonable doubt, based on the evidence.

In addition to CALJIC No. 2.90 (RT 1549), here the trial court instructed the jury with CALJIC No. 1.00 that "[i]f anything concerning the law said by the attorneys in their arguments or at any time during the trial conflicts with my instructions on the law, you must follow my instructions" (12 RT 1538). This Court presumes the jury followed the trial court's instructions and not the argument of counsel. (*People v. Gray* (2005) 37 Cal.4th 168, 217; see also *People v. Valdez* (2004) 32 Cal.4th 73, 114, fn. 14 [rejecting claim that prosecutor's argument caused a legally correct instruction to mislead the jury, because court also instructed jury with CALJIC No. 1.00]; *People v. Mayfield, supra,* Cal.4th 142, 179, quoting *People v. Clair* (1992) 2 Cal.4th 629, 633, fn. 8 ["The court's instructions, not the prosecutor's argument, are determinative, for 'We presume that jurors treat the court's instructions as a statement of law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.'"].) As the high court has stated, "arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of

advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law." (*Boyde v. California* (1990) 494 U.S. 370, 384 [110 S.Ct. 1190, 108 L. Ed. 2d 316].)

To the extent Booker contends the trial court should have instructed on just when the presumption of innocence vanishes, or specifically that "the presumption of innocence goes with the jury when it deliberates," he has waived the contention for appeal. (AOB 129.) If he thought such an instruction was necessary initially, or after his objection to the prosecutor's argument, he should have requested a clarifying instruction, but did not. (*People v. Weaver* (2001) 26 Cal.4th 876, 986; *People v. Arias* (1996) 13 Cal.4th 92, 171.)

Booker relies primarily on two federal appellate cases to support his demand for a new trial: *United States v. Cummings* (9th Cir. 1972) 468 F.2d 274; *United States v. Perlaza* (9th Cir. 2006) 439 F.3d 1149. (AOB 129-135.) His reliance is misplaced. The cases are distinguishable, and they are not controlling in California courts. I

In *United States v. Cummings, supra,* 468 F.2d 274, the Ninth Circuit Court of Appeals reversed a conviction, because the prosecutor argued that the defendant was guilty, otherwise the grand jury would not have indicted him and the agents and prosecutors would not have asked for an indictment. (*Id.*, 468 F.2d at p. 278.) Further, the district court had given conflicting--although harmless--instructions on the presumption of innocence, and the appellate court recommended that the instructions be modified if there were a retrial. (*Id.*, 468 F.2d at p. 280-281.) The appellate court explained, inter alia, that the district court had muddled the presumption of innocence with ordinary evidentiary presumptions. On appeal, the Ninth Circuit noted that the presumption of innocence does not disappear with contrary evidence, but only after evidence convinces the jury, beyond a reasonable doubt, that the defendant is guilty. In

dictum, the Ninth Circuit stated that in the event of a new trial, the district court should modify the instruction to state that the burden of proof beyond a reasonable doubt, and the presumption of innocence, both go with the jury when it deliberates. (*United States v. Cummings*, 468 F.2d at p. 280.) It is the dictum that Booker relies on here, to argue that the trial court should have instructed that the presumption of innocence goes into the jury room. (AOB 129, 131.) However, the dictum in *Cummings* is not a constitutionally mandated instruction for a federal criminal trial, let alone a criminal trial in state court.

Booker then argues that *United States v. Perlaza* (9th Cir. 2006) 439 F.3d 1149, is "remarkably similar to the instant case and directly on point." (AOB 129-130.) Actually, *Perlaza* is distinguishable, because the reversal there was due to the lack of trial court's jurisdiction over a ship loaded with narcotics, and alternatively for the prosecutor's argument that when the presumption of innocence disappears, it is replaced with a "presumption of guilt." (*Id.*, 439 F.3d at p. 1172, emphasis added.) The *Perlaza* trial court gave a curative instruction that there is no presumption of guilt, and the presumption of innocence is not overcome until evidence proves the defendant guilty. However, the curative instruction did not state that the proof to overcome the presumption must be proof beyond a reasonable doubt, nor did it state the presumption of innocence "goes with the jury when it deliberates." (*United States v. Perlaza*, 439 F.3d at pp. 1171-1172, relying on *United States v. Cummings, supra*.) Moreover, in *Perlaza*, the Ninth Circuit found that the trial court had ratified the prosecutor's intentional and improper burden-shifting argument. Therefore, since the *Perlaza* court could not conclude the error was harmless under any standard, it found reversible error. The prosecutor here never argued there was a presumption of guilt, and *Perlaza* is clearly distinguishable.

What the prosecutor did do here is argue that the jury should already be convinced, beyond a reasonable doubt, that Booker was guilty as charged, given the overwhelming evidence, before the jury began deliberating. Thus the disputed statements:

> (1) The defendant was presumed innocent until the contrary was shown. That presumption should have left many days ago. He doesn't stay presumed innocent. (12 RT 1586.)
>
> And,
>
> (2) The defendant starts out with the presumption of innocence. That doesn't stay. That isn't an automatic thing forever. That's why we have a trial. Once the evidence convinces you he is no longer innocent, that presumption vanishes. (12 RT 1587.)

However, theses statements cannot be viewed in isolation and must be recognized in context. Thus, the prosecutor also argued:

(1) "The burden is on me." (12 RT 1573.)

(2) "I had the burden when this trial started to prove the defendant guilty beyond a reasonable doubt, and that is still my burden." (12 RT 1586.)

(3) He discussed "reasonable doubt" at length. (12 RT 1587-1588.)

(4) "My burden is to prove each of the elements of the crime, the things that make the crime true, beyond a reasonable doubt." (12 RT 1587.)

(5) What I want to make clear about reasonable doubt and the presumption of innocence . . . "Until you reach a verdict, of course the defendant is not guilty. If a presumption attaches to a defendant when the trial starts, if they are then found guilty somewhere along the way, of course then the presumption has vanished." (RT 12 1603.)

(6) "It is your individual responsibilities to deliberate and come up with a verdict." (RT 12 1604.)

The prosecutor here never referred to a presumption of guilt, and he reminded the jury it was always his burden to prove Booker's guilt beyond a reasonable doubt. *Cummings* and *Perlaza* are inapposite and factually distinguishable.

Booker also refers to *People v. Hill* (1998) 17 Cal.4th 800, to support his misconduct argument. (AOB 131, 133) In *Hill*, this Court reversed the guilt and penalty phases of a capital case, because of what it characterized as "unrelenting" prosecutorial misconduct--not just a misstatement about the presumption of innocence--which was combined with other serious trial errors. (*Id.*, 17 Cal.4th at pp. 843-844.)

One of the findings of prosecutorial misconduct in *Hill* involved a statement in closing argument which incorrectly and improperly implied that "reasonable doubt" could only be based on affirmative evidence from the defense. (*Id.*, at p. 830-832.) This Court held that misstatement was only one example of continuous, serious and blatant prosecutorial misconduct occurring throughout the trial. (*Id.*, at pp. 819-839). In fact, this Court concluded the continuous misconduct was so egregious, and had so tainted the proceedings, that defense objections were futile and the trial court's admonitions would not have cured the resulting prejudicial atmosphere. (*Id.*, at pp. 819-820.) In *Hill*, the combination of prosecutorial misconduct, and other serious trial errors resulted in a miscarriage of justice under the federal and state constitutions, and the conviction and sentence were reversed. (*Id.*, at p. 844-846.)

By contrast, in Booker's trial, in addition to CALJIC No. 2.90 defining reasonable doubt (12 RT 1549), the jury was repeatedly instructed it must find the elements of each offense beyond a reasonable doubt before it could convict Booker of any offense. (See 12 RT 1541, 1546, 1554, 1561, 1562, 1563, 1567, 1568, and 1569-1570.) The prosecutor repeatedly acknowledged his burden to prove the offenses beyond a reasonable doubt in closing argument. (12 RT 1573, 1586-87, 1603-1604.)

On this record, even if the prosecutor made a misstatement which implied the presumption of innocence vanished at some time before deliberations began, the error was harmless under any standard, federal or state.

Viewing the complained-of statement "in the context of the argument as a whole," the jury was fully informed of its duty to find the elements of the offenses proven beyond a reasonable doubt before convicting Booker of any offense. Therefore, here there was no misconduct warranting reversal of the conviction. (*People v. Dennis* (1998) 17 Cal.4th 468, 522; *People v. Avila* (2006) 38 Cal.4th 491, 610.)

As stated in *Goldberg*, "once an otherwise properly instructed jury is told that the presumption of innocence obtains until guilt is proven, it is obvious that the jury cannot find the defendant guilty until and unless they, as the fact-finding body, conclude guilt was proven beyond a reasonable doubt." (*People v. Goldberg, supra*, 161 Cal. App. 3d at pp. 189-190.) Booker's jury was so instructed.

Booker's conviction must be affirmed.

X.

THERE WAS NO CUMULATIVE ERROR .IN THE GUILT PHASE AND THE VERDICTS SHOULD BE AFFIRMED

Booker alleges that the cumulative impact of the admission of inflammatory and gruesome photographs, omitted instructions on "after-formed intent" and the lesser offense of manslaughter, and misconduct during the prosecutor's closing argument, when considered collectively are error of constitutional proportion, and mandate that the guilt judgment be reversed. (AOB 136-137.) Booker is clearly wrong. The trial court properly exercised its discretion in admitting the evidence and instructing the jury, and the prosecutor's argument to the jury was proper.

Assuming for the sake of argument that those claims of error Booker ascribes to the guilt phase of his trial were in fact error, each would be harmless under the applicable standard of review, thus there is no collective error.

(*People v. Cunningham* (2001) 25 Cal.4th 926, 1009, 1038; see *People v. Heard* (2003) 31 Cal.4th 946, 982; *People v. McDermott*, *supra*, 28 Cal.4th 946, 1005 [no individual error, rejecting claim of cumulative error]; accord, *People v. Slaughter* (2002) 27 Cal.4th 1187, 1223 [taken individually or cumulatively, errors are harmless].) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Box* (2000) 23 Cal.4th 1153, 1214; *People v. Jackson* (1996) 13 Cal.4th 1164, 1245 [what few errors occurred at Booker's trial were harmless, singularly or cumulatively]; *People v. Lucas* (1995) 12 Cal.4th 415, 475-476 ["We have considered each claim on the merits, and neither singly nor cumulatively do they establish prejudice requiring the reversal of the convictions"].)

The guilt phase judgments must be affirmed.

XI.

THE TRIAL COURT DID NOT "RE-ADMIT" THE DISPUTED PHOTOGRAPHS IN THE PENALTY PHASE, THEREFORE NO ABUSE OF DISCRETION OR VIOLATION OF THE RIGHT TO A FAIR TRIAL AND RELIABLE PENALTY DETERMINATION OCCURRED

Booker complains that the trial court again abused its discretion by allowing the reintroduction of the overly gruesome autopsy and crime scene photographs in the penalty phase of his trial. (AOB 138.) He contends the photographs served only to remind the jurors of how the victims were slaughtered, as demonstrated by one juror becoming ill during Booker's closing argument, which caused both counsel to waive rebuttal argument. He concludes the evidentiary error deprived him of due process, a fair trial, and a reliable penalty determination, in violation of the Eighth and Fourteenth Amendments. Therefore, he states, his death sentence must be reversed. (AOB 139-140.) Booker is incorrect. The trial curt properly exercised its discretion in admitting the photographs at the guilt phase, and the photographs were

evidence of the circumstances of the crime, which was relevant and admissible at the penalty phase.

In his summary of the trial record, Booker carefully refers to the prosecutor in an opening statement in the penalty phase "reminding" the jury of the photographs of the victims' corpses (13 RT 1745), and "reminding" them again during closing argument, in the penalty phase, of the cruel, savage and monstrous nature of the murders "as depicted in the photographs introduced during the guilt phase." (AOB 138, 139; 13 RT 1990, 1995.) He notes that the trial court commented that "the photographs tell their own tale," during the instruction conference, out of the jury's presence. (AOB 139; 14 RT 1935-1936.) And he notes the jury was correctly instructed, that it could consider the circumstances of the crime in deciding the appropriate penalty. (AOB 139; 14 RT 1966.)

Booker then repeats his argument that the introduction of the photographs in the guilt phase was an abuse of discretion. He argues that the use of these photographs again during the penalty phase, served only to remind the jurors of the manner in which the victims had been horribly slaughtered. (AOB 140.) All of this, he concludes, deprived him of his right to due process, a fair trial, and a reliable penalty determination, in violation of the Eighth and Fourteenth Amendments. (AOB 140.)

Not so. The admission of allegedly gruesome photographs at the penalty phase of a capital trial is a question of relevance, over which the trial court has broad discretion. (*People v. Bonilla* (2007) 41 Cal.4th 313, 354; *People v. Roldan* (2005) 35 Cal.4th 646, 713.) The decision whether to exclude relevant photographs which are unduly prejudicial is also committed to the court's discretion, and will be upheld on appeal unless the prejudicial impact outweighs probative value. (*People v. Gurule* (2002) 28 Cal.4th 557, 624.) However, the discretion to exclude photographs under section 352 is much narrower at the

penalty phase, because the prosecution has the right to establish the circumstances of the crime, including its gruesome consequences in the penalty phase (Pen. Code, § 190.3, factor (a)), and the risk of an improper guilt finding based on a visceral reaction is no longer present (*People v. Bonilla*, 41 Cal.4th at pp. 354-355).

Here, the photographs were not "introduced" in the penalty phase, although they were referred to. But even if the photographs had been "introduced," over Booker's objection, there still would have been no error. Here, as in *Bonilla*, the photographs were not substantially more prejudicial than probative. And as *Bonilla* stated, "Murder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant." (*People v. Moon* (2005) 37 Cal.4th 1, 35; *People v. Roldan, supra*, 35 Cal.4th at p. 715.) The photographs would do no more than demonstrate the real-life consequences of Booker's acts, the circumstances of the murders which the jury could properly consider in fixing his sentence. Moreover, this Court has consistently upheld the introduction of autopsy photographs to disclose the manner in which the victim was wounded, as relevant not only to deliberation and premeditation, but also to aggravation of the crime and the appropriate penalty. (*People v. Ramirez* (2006) 39 Cal.4th 398, 453; *People v. Cox* (1991) 53 Cal.3d 618, 666.)

Booker's argument is without merit. The death penalty must be affirmed.

XII.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ADMITTING EVIDENCE OF UNCHARGED CRIMES. BOOKER RECEIVED A FUNDAMENTALLY FAIR TRIAL AND A RELIABLE PENALTY DETERMINATION

Booker argues that allowing a jury to consider unadjudicated other crimes evidence undermines the reliability of the penalty determination, because such evidence creates a significant likelihood that a jury will unfairly impose the death penalty. He contends that such evidence in the penalty phase of his capital case violated the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and his death penalty must be reversed. (AOB 141, 146-147, 152-153.) In essence, he asks this Court to ignore Penal Code, section 190.3 subdivision (b)), and reconsider its previous rejection of his arguments, based on his speculation that jurors might be unfairly persuaded by such evidence. His argument is without merit.

Penal Code section 190.3, factor (b) makes "the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" relevant to the penalty determination and admissible in evidence in the penalty phase of a capital trial. This Court has previously rejected the argument that admission of such evidence violates state or federal constitutional rights. Thus the trial court did not err in admitting such evidence, and Booker's right to a fair trial, due process and a fundamentally fair penalty trial were not violated. The conviction and penalty must be affirmed.

The prosecutor notified Booker that he intended to offer evidence of uncharged crimes in the penalty phase of the trial, pursuant to Penal Code section 190.3, subdivision (b). (2 CT 297; first amended notice, 2 CT 301; second amended notice, 2 CT 323-325.) The notice disclosed the intent to offer

five instances of prior acts of the use of actual or attempted force or violence, or threats of force or violence, in addition to the circumstances of the three charged murders, and victim impact evidence.

Booker filed a motion to exclude the evidence of uncharged crimes of violence. He argued that such evidence would violate his right to a fair trial, due process, equal protection and heightened evidentiary reliability in the penalty phase, as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and related sections of the California Constitution. He requested a "*Phillips*" hearing to determine if there were sufficient evidence to prove the other crimes beyond a reasonable doubt, if the court did not exclude it altogether. (*People v. Phillips* (1985) 41 Cal.3d 29.) (2 CT 567-581.)

The court listened to the prosecutor's proffer of evidence and requested testimony on two of the alleged incidents: one where Booker stabbed his uncle, although the uncle had stated Booker stabbed him in self-defense, and a second where Booker threatened to get a gun and kill the neighbors he thought had sent an offensive letter to his family. (12 RT 1674-1676, 1689-1681.) Other incidents, where Booker wielded a broomstick or brandished a knife, were found admissible without a *Phillips* hearing. (12 RT 1677-1678.)

Before the hearing, Booker reiterated that the motion to exclude evidence was made to protect his rights to a fair trial, due process and an accurate penalty determination. (13RT 1715-1716.)

At the hearing, Robin John Stewart testified that Booker was his nephew and Booker stabbed him on March 22, 1994. (13 RT 1719-1720, 1722, 1725.) However, Stewart explained that Booker was just "trying to protect hisself [sic] pretty much." (13 RT 1720.) Stewart had told the police that Booker stabbed him "for no reason," but testified it was pretty much Stewart's own fault, because he was bullying and baiting Booker (13 RT 1722, 1726). The court

concluded the evidence had positive and negative aspects which counsel could explore in front of the jury, and the jury could determine if Stewart were truthful in his statement to the police, and whether there was a reason to modify his statement for trial. (13 RT 1727.) The court noted Booker's objections under state and federal grounds.

Damian Camacho testified that when he lived next door to Booker, Booker's brother came over and was angry about an offensive letter the brother thought had been penned by Camacho's family. (13 RT 1728-1731.) Booker joined in the argument and threatened to get a gun and kill the whole family. (13 RT 1732.) Camacho's sister was afraid for herself and her children and called the police, although Camacho said he was not afraid. (13 RT 1732, 1735-1736.) Camacho's brother in law, Armando Ascenscio, came late but heard at least a portion of Booker's threats as well. (13 RT 1734-35.) The court ruled the evidence admissible. (13 RT 1738.)

Before the jury, Robin Stewart, Booker's uncle, again described the incident on March 22, 1994, when Booker stabbed Stewart in the stomach, and Stewart again testified that Booker was acting "in self-defense." (13 RT 1763.) Stewart described himself as much bigger than Booker, with "a chip the size of Texas" on his shoulder, who dared anyone to knock it off. (13 RT 1769.) Stewart testified he had been picking on and bullying Booker for months, and on March 22, 1994, Stewart shoved Booker, against the wall, then picked him up and threw him out the front door. (13 RT 1770-1771.) Stewart called Booker names and dared Booker to come back so Stewart could kill him. (13 RT 1771-1774.) Booker did come back long enough to stab Stewart, then ran away down the street. (13 RT 1774-1775, 1780.) Stewart discovered "a little cut in his tummy," which medical professionals treated as a stab wound to his stomach. Stewart testified he told the police that Booker stabbed him for no

reason, because he was "kind of embarrassed" about the whole thing. (13 RT 1776-1777, 1781.)

Damian Camacho's sister, Maricely Ascencio, described the argument with Booker's relative, known as "Pete" or Perseus. (13 RT 1785-1786.) Booker joined in and said he was going to get a gun and shoot the Ascencio's if they were "messing with" his brother. (13 RT 1787.) Booker said "he was going to kill [her] whole family because he didn't give a fuck," then he left. (13 RT 1788.) The incident scared her sufficiently that she reported it to the police. (13 RT 1788.) Her brother (Damian Camacho) was present during the argument, and her husband (Armando Ascencio) joined them before it was over. (13 RT 1790.) Damian Camacho testified he was not afraid, but his sister was. (13 RT 1796, 1800.) Booker did not have a weapon on that occasion, however, Mrs. Ascencio had previously seen Booker with a homemade knife which he would throw against the ground, pick up and throw again. (13 RT 1790-1791.) It was a knife with two blades and black tape around the middle. (13 RT 1792, 1794-1797.)

Damian Camacho described how Booker threatened to get a gun and shoot the whole Ascensio family. (13 RT 1796.) Camacho previously saw Booker chase someone while carrying a stick or broomstick, although Booker did not strike the person he chased. (13 RT 1797-1798.)

Ronald Maxim testified about incident where Booker held a knife while watching a fight, although Booker did not participate in the fight. (13 RT 1804-1806.)

After the testimony at the *Phillips* hearing, Booker moved again to strike the evidence of other offenses, or a mistrial, arguing that submitting the uncharged acts to jury in the penalty phase would violate his rights to a fair trial, due process, equal protection, and heightened evidentiary reliability. (14 CT 3858-3865.) He also challenged the sufficiency of evidence for all of the

prior offenses. After argument, the court found the evidence more than sufficient as to the most serious of the incidents (stabbing Robin Stewart, threatening the Ascencios), as well as the more trivial events, and denied the motions to exclude it. (14 RT 1878-1885.)

In his closing argument in the penalty phase, the prosecutor referred to the other crimes evidence, identifying the assault with a deadly weapon, terrorist threats, attempt battery and brandishing a weapon. (14 RT 1983.) He referred to Robin Stewart's testimony about the stabbing, and cautioned the jury it did not have to find Booker guilty of assault with a deadly weapon, but the evidence could be considered, if the jurors found -- beyond a reasonable doubt-- that the crimes occurred. (14 RT 1983-1986.) He referred to the threats to get a gun and kill the Ascencios and Camacho. He noted that Maricely Ascensio had seen Booker with a homemade knife on other occasions. (14 RT 1985.) He argued that when Booker gets angry, he hurts people, he stabs people. (14 RT 1988.) He argued that by the time Booker was 18 years old, he had exhibited a knife in a fight; stabbed a relative, and killed three people. (14 RT 1994.) But primarily, he stressed the inexplicable and brutal circumstances of the murders of the three girls.

Booker argued there was insufficient proof of any of the incidents: there was no sustained fear of Booker after the purported threat to kill the Ascencios, that Robin Stewart said Booker stabbed him in self-defense, that Maxim said Booker merely held a knife, and that Booker never hit anyone with the broomstick, therefore the evidence was immaterial and was not aggravating. (14 RT 2005-2008.) He suggested the evidence of other offenses merely illustrated the extraordinary lengths to which the prosecution would go to obtain a death penalty. (14 RT 2008.)

The trial court instructed the jury that when determining the penalty, it should consider all the evidence during any part of the trial. Further, the court

explained, "You shall consider, take into account and be guided by the following factors, if applicable:

"(a) The circumstances of the crime . . .

"(b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or implied threat to use force or violence." (14 RT 1970-1971.)

Additionally, the court instructed:

> "Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: assault with a deadly weapon, making terrorist threats, brandishing a deadly weapon and attempted – and attempt battery, which involved express or implied use of force or violence or the threat of force or violence." [¶] Before a juror may consider any criminal acts as an aggravating circumstance in this case a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance. [¶] It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced that juror must not consider that evidence for any purpose. (14 RT 1972-1973.)

The court defined reasonable doubt (14 RT 1973) and the elements of each crime [assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)); terrorist threats (§ 422); brandishing a deadly weapon (§ 417); attempt battery (§ 242); as well as self-defense]. (14 RT 1970-1980; CALJIC Nos. 8.85 and 8.87.)

The jury returned a verdict of death after three-and-one-half hours of deliberation. (14 CT 3869; 14 RT 2031-2034.)

Penal Code Section 190.3, factor (b) requires the trier of fact to take into account, if relevant, "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Under this factor, the term

"criminal activity" is limited to conduct that violates a penal statute. (*People v. Rodrigues, supra,* 8 Cal.4th 1060, 1169; *People v. Phillips, supra,* 41 Cal.3d at p. 72.) To be admissible, such uncharged violent criminal activity requires substantial evidence that a crime was committed (*People v. Boyd* (1985) 38 Cal.3d 762, 778; *People v. Phillips*, 41 Cal.3d at p. 72), and that the crime involved the use or threat to use force or violence directed toward some person. (See, *People v. Padilla* (1995) 11 Cal.4th 891, 963; *People v. Belmontes* (1988) 45 Cal.3d 744, 809; *People v. Boyd*, 38 Cal.3d at p. 776.) The evidence must be sufficient to allow a reasonable juror to determine beyond a reasonable doubt that the defendant committed the uncharged offense. (*People v. Hart*, *supra,* 20 Cal.4th 546, 648-650.) That is:

> Substantial evidence of other violent criminal activity is evidence that would allow a rational trier of fact to find the existence of such activity beyond a reasonable doubt. (*People v. Rodrigues*, supra, 8 Cal.4th at pp. 1167-1168; *People v. Clair* (1992) 2 Cal.4th 629, 672-678; see also *People v. Boyd* (1985) 38 Cal.3d 762, 778.) Before an individual juror may consider evidence of other violent criminal activity in aggravation, he or she must find the existence of such activity beyond a reasonable doubt. (See *People v. Benson* (1990) 52 Cal.3d 754, 809-811.) There is no requirement, however, that the jury as a whole unanimously find the existence of other violent criminal activity beyond a reasonable doubt before an individual juror may consider such evidence in aggravation. (See *ibid.*)

(*People v. Griffin* (2004) 33 Cal.4th 536, 585; quoted in *People v. Huggins, supra,* 38 Cal.4th at pp. 239-241.)

This Court has long held that admitting evidence of uncharged offenses in the penalty phase does not violate due process, or the Eighth Amendment's guarantee of a reliable penalty verdict. (*People v. Gallegos* (1990) 52 Cal.3d 115, 194 (rejecting due process, Eighth Amendment reliability and equal protection objections to section 190.3, subdivision (b) evidence).

If the trial court holds a "Phillips" to determine if there is enough evidence of the other offenses to submit to the jury, the court's rulings at the hearing are reviewed for abuse of discretion; there is no abuse if the evidence is in fact legally sufficient. (*People v. Boyer* (2006) 38 Cal.4th 412, 476-477, fn. 51, citing *People v. Clair* (1992) 2 Cal.4th 629, 676-678.)

Booker makes two complaints about the trial court admitting evidence of his prior uncharged offenses: that the court erred because the evidence was insufficient, and that the admission of such evidence is unconstitutional. He concludes that this Court should overrule its precedents, find the admission of other crimes evidence is unconstitutional, and reverse his death penalty verdict. This Court has previously rejected his arguments, and Booker does not present a compelling reason for this Court to revisit its prior decisions.

Booker suggests that the United States Supreme Court and federal Circuit Courts of Appeal "disapprove" of propensity evidence as violative of due process, thus his penalty verdict must be reversed. (AOB 145.) He cites *Spencer v. Texas* (1967) 385 U.S. 554, 558, 563-564 [87 S.Ct. 648, 17 L.Ed.2d 606], to support his argument, but *Spencer* says no such thing. Rather than rejecting the admissibility of other crimes evidence in a penalty trial, in *Spencer v. Texas*, the Supreme Court expressly declined to create a rule banning all evidence of prior crimes. In fact the Supreme Court stated that:

> Cases in this Court have long proceeded on the premise that the Due Process clause guarantees the fundamental fairness elements of fairness in a criminal trial. [Citations] But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority.

(*Spencer v. Texas, supra*, 385 U.S. at pp. 563-564.) In *Spencer*, the issue was a recidivist statute, not admission of other acts evidence in a capital proceedings after guilt had been determined.

Similarly, Booker cites *Estelle v. McGuire* (1991) 502 U.S. 62, 74-75 [112 S.Ct. 475, 116 L.Ed.2d 385] for the proposition that it is unconstitutional to admit evidence of uncharged crimes in the penalty phase of a capital trial. (AOB 145.) Again, the case does not stand for that proposition. True, the Ninth Circuit reversed a conviction for second-degree murder on finding that admission of evidence of prior injuries to the dead child violated due process, when admitted to prove a propensity to commit such crimes. (*McGuire v. Estelle* (9th Cir. 1990) 902 F.2d 749.) However, the United States Supreme Court reversed, finding the Ninth Circuit had improperly intruded on the state court's interpretation of state evidence law, and that prior acts evidence was relevant and nothing in the Due Process clause prohibited its admission to prove guilt. The Supreme Court reiterated that it has defined the category of infractions that violate "fundamental fairness" very narrowly, and does not permit federal courts to make a finely-tuned review of the wisdom of state rules of evidence. (*Estelle v. McGuire*, 502 U.S. at pp. 72-73.) The issue in *Estelle* was the validity of a particular jury instruction which McGuire argued permitted the jury to convict him of the murder of his child, based on evidence of prior non-accidental injuries supposedly indicative of "battered child syndrome." However, the Supreme Court found the instruction was proper, and the evidence relevant and of the type traditionally admissible as circumstantial evidence of intent, identity, motive or plan. It also pointed to the admissibility of comparable evidence for similar relevant purposes in federal trials, Rule 404(b), Fed. Rules of Evid. (*Id.*, 502 U.S. at pp. 74-75, concluding CALJIC No. 2.50 was not a "propensity" instruction, and properly limited admissible evidence of other crimes to proof of method, plan, scheme or intent.)

In *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, another case relied on by Booker, the Ninth Circuit distinguished *Estelle* on remand from the Supreme Court. The Ninth Circuit again granted habeas relief to the state

prisoner, finding *Estelle* did not decide whether the admission of character evidence to show propensity would violate Due Process.[30] (*McKinney v. Rees* (1993) 993 F.2d 1378, 1379 (finding impermissible propensity inference offered to corroborate testimony of witness who purportedly saw defendant with a knife, when defendant was charged with stabbing his child.) *McKinney* reviewed the common law rules of evidence, the requirement for proof beyond a reasonable doubt to convict of a crime, and the general exclusion of propensity evidence, under California Evidence Code, section 1100, subdivision (a) and Rule 401, Federal Rules of Evidence. (*McKinney v. Rees*, 993 F.2d at p. 1380.) The appellate court did acknowledge that while propensity evidence is generally not admissible under California or federal rules of evidence, prior bad acts may be relevant and admissible for other purposes, such as knowledge, intent and plan. (Cal. Evid. Code, § 1101, subd. (b) and Fed. R. Evid. 404(b).)

The knife used to kill McKinney's mother was never found. The coroner said the murder weapon could have been like one of the knives found in a kitchen drawer in the victim's house, or could have been the Buck knife on her husband's belt. The trial court admitted evidence that a knife was confiscated from the defendant the year before, that he had owned but given

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30. See *Alberni v. McDaniel* (9th Cir. 2006) 458 F.3d 844, 862-866 and cases cited therein for discussion of whether admission of prior act evidence violates due process. The court notes that the United States Supreme Court has not decided the question reserved in *Estelle v. McGuire*, 502 U.S. 62, 70, 75, n. 5, whether admitting evidence of prior acts--which is not relevant--is a violation of due process. In fact, on four occasions, the Supreme Court has denied *certiorari* on that issue. (*Hawkins v. California* (2003) 537 U.S. 1189 [123 S.Ct. 1256, 154 L.Ed.2d 1021]; *duPont v. Pennsylvania* (2000) 530 U.S. 1231 [120 S.Ct. 2663, 147 L.Ed.2d 276]; *Olivarez v. McKinney* (1993) 510 U.S. 1020 [114 S.Ct. 622, 126 L.Ed.2d 586]; *Jacobson v. Illinois* (1993) 509 U.S. 923 [113 S.Ct. 3038, 125 L.Ed.2d 725]; *Alberni v. McDaniel, supra,* 458 F.3d at p. 866, fn. 1.)

away another knife, and that he wore a knife strapped under camouflage pants, and he was proud of his knife collection. The Ninth Circuit found the evidence was irrelevant propensity evidence, and granted habeas corpus relief, even after *Estelle v. McGuire*.

The reliance on *McKinney v. Rees* does not help Booker, because the evidence of the stabbing and the terrorist threats admitted here was not offered to prove Booker's character for force and violence, to support his conviction of murder or any other crime. Instead the evidence was admitted, with limiting instructions that it could not be considered for any purpose until a juror found the offense was proven beyond a reasonable doubt, as relevant to the jury's determination of the appropriate penalty. Thus Booker's character, which was not at issue in the guilt phase trial, was at issue in the penalty phase, to the extent it illuminated his culpability for the three murders for which he was convicted, and could guide the jury in determining whether death or life without parole should be imposed.

Moreover, as the this Court explained in *People v. Balderas* (1985) 41 Cal.3d 144, 204, nothing in United States Supreme Court jurisprudence prohibits introduction of other crime evidence to be considered by a jury which has convicted a defendant of murder, in determining the appropriate penalty. "The Court has often declared that states have the broadest possible range in deciding what negative aspects of the defendant's character and background are relevant to the sentencing determination." (*People v. Balderas*, 41 Cal.3d at p. 204.) Further, "[t]he evidence of criminality, if proven beyond a reasonable doubt (*People v. Robertson* (1982) 33 Cal.3d 21, 53-55), is simply one factor the penalty jury is to consider in deciding the appropriate penalty for the capital offense." (*Balderas*, at p. 205.) This Court has found no basis for changing its view that such evidence is relevant, because the penalty phase of a capital trial is unique, and it is intended that all evidence relevant to the penalty decision

should be made available to the jury. (*People v. Griffin, supra,* 33 Cal.4th 536, 588, and n. 23.)

Nonetheless, Booker asks this Court to reconsider and repudiate *Balderas* and find other act evidence per se violates the Eighth Amendment and Due Process, at least in the penalty trial. (AOB 148-149.) This Court has declined previous invitations to reverse *Balderas* and should again do so here. (See, *People v. Hughes* (2002) 27 Cal.4th 247, 384; *People v. Williams* (1997) 16 Cal.4th 153, 236, 239; *People v. Avena, supra,* 13 Cal.4th at p. 427.)

Here the evidence and argument properly focused the jury's attention on the moral assessment of defendant's actions and culpability in the prior incidents and the weight, if any, the jury chose to assign to these prior actions in determining the proper penalty for the three murders of which Booker now stood convicted.

Thus, the court admitted evidence of uncharged offenses involving allegations of assault with a deadly weapon, terrorist threats, brandishing a deadly weapon and attempt battery. As to each, Booker argues that there was insufficient evidence of the uncharged crimes to meet the beyond-a-reasonable-doubt standard. (AOB 149-152.) As to each offense however, the evidence was sufficient and properly admitted, and once it was introduced, a rational juror could have found the essential elements of each unadjudicated crime beyond a reasonable doubt.

The evidence adduced at the *Phillips* hearing and replicated at trial amply established that Booker stabbed his uncle, Robin Stewart, even if the uncle tried to assume responsibility and excuse Booker's actions. To establish an assault with a deadly weapon, the evidence must show that: (1) a person willfully [and unlawfully] committed an act which by its nature would probably and directly result in the application of physical force on another person; (2) the person committing the act was aware of facts that would lead a reasonable

person to realize that as a direct, natural and probably result of this act that physical force would be applied to another person; (3) at the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another; and (4) the assault was committed with a deadly weapon, here with a knife. (*People v. Colantuono* (1994) 7 Cal.4th 206, 212-213; CALJIC Nos. 9.00 and 9.02; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.)

Stabbing someone in the torso with a knife is certainly an act of physical force capable of causing serious bodily injury, and thus meets the definition of assault with a deadly weapon. The court correctly found there was sufficient evidence of assault with a deadly weapon, a knife, and properly allowed the jury to consider the evidence. The jury was instructed with the elements of assault, assault with a deadly weapon, and self-defense. It was up to the jury to determine if this prior act of violence would be a factor in their determination of a penalty of death or life in prison.

Maricely Ascencio testified that Booker and his brother were ranting about a letter they thought had been written by her family. Booker threatened to get a gun and shoot her whole family in retaliation. Ms. Ascensio was sufficiently scared for her safety and that of her children, that she reported the threat to the police, even if her brother Damian was not afraid. As the trial court correctly found, this evidence established terrorist threats, and it was for the jury to determine what if any impact that would have on their deliberations. (Pen. Code, §§ 190.3(b), 422; *People v. Bolin, supra,* 18 Cal.4th 297, 337-340; *People v. Ortiz* (2002) 101 Cal.App.4th 410, 417; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1011 (CALJIC No. 9.94).)

The crime of battery simply requires a showing that a person used force or violence upon another and the use was willful. (CALJIC No. 16.140.) The words "force" and "violence" are "synonymous and mean any . . . application

of physical force . . . even though it causes no pain or bodily harm or leaves no mark . . . ." (CALJIC No. 16.141.) A battery requires that the defendant actually intend to commit a "'willful and unlawful use of force or violence upon the person of another.' [Citations omitted.] In this context, the term 'willful' means 'simply a purpose or willingness to commit the act . . . .' [Citation omitted.]" (*People v. Lara* (1996) 44 Cal.App.4th 102, 107.) An attempt to commit a crime involves a specific intent to commit the crime and a direct but ineffective act toward that result, some act that goes beyond mere preparation. (*People v. Kipp* (1998) 18 Cal.4th 349, 376.) When Booker chased a person down the street and attempted to hit the person with a stick, that was evidence of an attempted battery. Similarly, when Booker pulled a knife out while watching other people fighting, he had gone beyond being a spectator and was displaying a deadly weapon in a rude and threatening manner, as the court determined in admitting that evidence. Thus, Booker's contention that the evidence was insufficient to present to the jury is without merit.

Even assuming, merely for the sake of argument, that the trial court erred in admitting this testimony, the error was harmless. It is not reasonably possible the jury's penalty verdict would have been more favorable absent this evidence. (See, for example, *People v. Avena, supra,* 13 Cal.4th at p. 433 [failure to instruct on finding proof beyond a reasonable doubt of other offenses was harmless, because defendant offered no contradictory evidence, there was no reasonable likelihood jury would have achieved different result with additional instruction].) Two of the incidents here were trivial in nature, the broomstick wielding and knife display. The stabbing incident was obviously serious, and was proven absolutely by Mr. Stewart's testimony, even though he tried to minimize Booker's responsibility by characterizing it as needing to protect himself from Stewart. It was for the jury to determine whether the stabbing was for "no reason" or for self-defense.

There were more serious aggravating factors for the jury to consider, the most obvious was being extremely brutal manner in which Booker stabbed and killed Corina Gandara, Tricia Powalka and Amanda Elliott, cutting short three young lives for no reason. The viciousness of the killings, and the attempt to cover them up by setting fire to the apartment, with complete disregard for the safety of the baby inside, indicate Booker's utter lack of compassion for anyone other than himself. After three bloody murders, Booker simply went home and took a nap, then went out with his girlfriend, without so much as a blip on his emotional radar or a thought for the anguish he caused the victims or their families. In light of these compelling factors calling for the imposition of the death penalty, and the absence of any compelling "mitigating" factor other than that he was 18-years-old when he committed the murders, the inclusion of the incidents involving Mr. Stewart, the Ascencios, and several others were necessarily harmless, even if the evidence were admitted in error.

However, there being no evidentiary error in admitting the evidence, nor constitutional error in allowing the jury to consider the evidence with the guidance of the instructions given, the penalty of death must be affirmed.

XIII.

BOOKER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE ADMISSION OF VICTIM IMPACT EVIDENCE

Booker contends that admission of highly emotional and inflammatory victim impact evidence in the penalty phase of his trial was erroneous and unduly prejudicial. (AOB 154, 166-169.) He claims he is entitled to a new penalty trial, because the error violated his federal constitutional rights to a fair penalty trial and a reliable penalty determination, under the Eighth and Fourteenth Amendments. (AOB 169-171.) He is incorrect. The evidence was within the guidelines, established by the United States Supreme Court and this

Court, for admitting evidence of the circumstances of the crime, within the meaning of Penal Code section 190.3, factor (a).

Prior to trial, the prosecutor filed a second amended notice of evidence to be introduced in aggravation during the penalty phase of the trial, including "The effect of each victim's death, including, but not limited to the manner of death, notification of fact of the killing, and the circumstance regarding the impact of the killings on families, friends, and acquaintances of the victim." (2 CT 323-324.) Booker responded with a motion to exclude evidence in aggravation, including the victim impact evidence. (3 CT 583-584.) He alleged the evidence would violate his right to a fair trial, due process of law, equal protection and heightened evidentiary reliability as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment to the United States Constitution and article I, sections 1, 7, 13, 15, 16, 17 and 22 of the California Constitution. (3 CT 583-584.)

In a trial brief, the prosecutor argued the victim impact evidence was admissible (*Payne v. Tennessee* (1991) 501 U.S. 808, 826-827 [111 S.Ct. 2597, 115 L.Ed.2d 720] and *People v. Edwards* (1991) 54 Cal.3d 787, 832-836), and that he could review the impact of the murders on the victims' families in closing argument for the penalty phase. (3 CT 615-618.)

At a hearing on the motions, Booker asked the trial court to limit the number of victim impact witnesses, and the scope of their testimony, relying on a New Jersey case.[31] He conceded there were no such limiting rules established

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31. Booker referred the trial court to *N.J. v. Muhammad* (1996) 145 N.J. 23, 45-46, 678 A.2d 164, which rejected defendant's argument that state's victim impact law violated the state and federal constitutions. Instead, the court found the state statute allowed a "brief statement" of impact on the family to rebut the defendant's "brief statement" of mitigating factors. The evidence must be relevant and reliable, and may not include the victim's opinion of the defendant, the crime, the appropriate punishment, or be unduly inflammatory. (*Id.* at p. 47-48.) The court suggested that absent special circumstances, the

in California yet, but argued as the number of witnesses increased, so did the chance of undue prejudice to the defendant. (12 RT 1683-1684.) The rule in New Jersey was that only one parent survivor per victim could testify, and no children or siblings were allowed. (12 RT 1685.) Acknowledging this was an extraordinary crime and a grievous loss to the families, Booker nonetheless argued that venting the families' anguish publicly before the jury would be unduly prejudicial to him. (12 RT 1685.) The court thought that eight or nine witnesses (no more than three witness for each victim) would be appropriate; defense counsel could ask to be heard if the testimony became cumulative. (12 RT 1685-1686.)

Later, the prosecutor informed the court that he and defense counsel had viewed three videotapes prepared by the district attorney's office, one video for each victim's family, and that he was requesting a ruling on the admissibility of the videos. (RT 1707.) The videos consisted of photographs of the victims, plus background music. The court concluded the photographs were admissible, but expressed concern with the music, which could have too much of an emotional impact, and which was not part of the case. (12 RT 1707-1708.)

Booker objected to admitting either the music or the photographs, arguing that both violated his Sixth Amendment right to a fair trial, the Eighth Amendment right to a reliable penalty determination, and the Fourteenth Amendment right to due process. (12 RT 1709.)

The court ruled the photographs were admissible to show the victims as human beings going through life, "the same way you're looking at defendant as a human being and his life." (12 RT 1710.) Some of the family members would be allowed to explain what it meant to have their lives and dreams

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testimony of one survivor should be sufficient to give the jury a glimpse of each victim's uniqueness, and the defendant's moral culpability. (*N.J. v. Muhammad*. at p. 54.) Minors would generally be precluded from testifying. (*Id.* at p. 55.)

ended. However, the court was still inclined to exclude the music. (12 RT 1710.)

In his brief opening statement, the prosecutor reminded the jurors that since they had found Booker guilty of capital murder, the purpose of the penalty phase was to present evidence to aid their determination of the appropriate sentence. To that end, the jury would hear about the circumstances of the crimes and Booker's prior acts of violence. They would hear from the families about their loss and the impact on birthdays, holidays, their emotions, as the result of Booker's cold, calculated slaughter of the three girls. (13 RT 1744-1746.)

Booker candidly stated that the killings could not be justified, excused or explained, and must be punished severely, whether by life in prison or death. However, asking for a fair-minded consideration of all the circumstances, including some trauma and tragedy in Booker's life as well, counsel asked the jury to consider the message for life, in prison without parole. (13 RT 1746-1749.)

Frankie Sanderson then testified about the loss of her daughter, Tricia Powalka. Tricia had been living on her own, working and raising her two young children, Brianna, age two years, and Eric, seven months old. Tricia's boyfriend was Brian Stringer, who was Eric's father; he was also related to Amanda Elliott and Corina Gandara. (13 RT 1809, 1812.) The video of photographs, minus the music, was played for the jury. (13 RT 1810; Exhs. 37 and 37A.) Ms. Sanderson described her daughter as feisty, lots of fun and outspoken; she said they talked every day. (13 RT 1811-1812.) She described how she learned that her daughter was dead, but that her daughter's death did not seem real until she saw her daughter in the casket. (13 RT 1815, 1817-1818.) She described the difficulty of making funeral arrangements for her daughter, and then making living arrangement for her two grandchildren. (13

RT 1818-1820.) She described the three years since Tricia's death as plain hell. She testified that Tricia's two children were split up and living in separate homes. She said she missed her daughter's teasing and her smiles. (13 RT 1821-22.) She testified that waiting for the trial and the death of her daughter had an impact on her family's health, her blood pressure was up and she thought it had accelerated her mother's death. (13 RT 1821, 1823.) She was devastated by seeing the photographs of her daughter's mutilated body. (13 RT 1824.)

The day of the murder, Ms. Sanderson learned there had been an altercation at Tricia's apartment, but it took hours to find out her daughter was dead. (13 RT 1813.) When she arrived at the apartment, there was yellow tape all around. (13 RT 1815.) She learned there had been a stabbing, and her grandson Eric was in the hospital, but she did not know who was stabbed. (13 RT 1814-1815.) She was put in a trailer to wait, but it was hours before she talked to a detective and finally learned what had happened. (13 RT 1815, 1917.)

Ms. Sanderson testified the hardest part was sorting through Tricia's belongings and making the funeral arrangements, going to court to protect Brianna and Eric, and mostly just getting through holidays, Tricia's birthday, and the anniversary of Tricia's death. (13 RT 1820-1821.) She testified there was still is not a day that she did not think of Tricia, and expect her to call or to see her walk through the door. (13 RT 1821.)

Booker asked no questions, and made no objections. (13 RT 1824.)

At sidebar however, Booker complained that the prosecutor said the victim impact testimony would be brief, but this witness testified for a half hour. (13 RT 1825.) He said it was difficult to object to this kind of evidence, but the testimony had gone beyond the scope permitted by *Payne*. He argued *Payne* permitted evidence of the unique individual who had been lost, but not

details about a casket or funeral. He contended the evidence prevented the defense from suggesting a different punishment. (13 RT 1825.) The court overruled the objection, adding he did not know where to draw the line, but said that the prosecutor "went too far." (13 RT 1816-1826.) The court left it to the prosecutor's discretion, but suggested limiting the testimony before having "everybody in the audience like they are, crying and teary-eyed like they are you are running a risk." (13 RT 1826.) The prosecutor did not think the testimony took too much time, but would consider the court's remarks seriously. The court reiterated, it was admissible impact evidence, but in totality, the impact had been communicated, and the remaining testimony should be limited. (132 RT 1827.)

Booker moved for a mistrial, which was denied. (13 RT 1827.) The court cautioned, it was permissible for testimony that Ms. Sanderson missed her daughter every day, but the delay in getting to trial was not relevant and there was to be no suggestion that the delay was Booker's fault. (13 RT 1828.) The prosecutor contended the four-year delay was a direct result of the daughter's murder, but asked for time to talk to the next witness and streamline the testimony. (13 RT 1830.)

During the break, a courtroom observer approached a deputy sheriff in the elevator, and asked what it would cost to get the deputy to leave the courtroom; a juror was also in the elevator. The deputy reported the incident to the judge, who interviewed the juror and observer. The juror said he had not heard what the man said, and it would not impact on the ability to deliberate. (13 RT 1831-1837.)

The penalty phase resumed with the testimony of Tricia Powalka's sister who recalled how the two were pregnant at the same time, and how she learned about her sister's death from her grandmother. (13 RT 1838-1839.)

Esther Elliott-Martin, Amanda's mother, explained that Corina Gandara was her niece. (13 RT 1844.) She testified that Amanda was staying at Tricia's apartment to babysit for Eric on the night Amanda died. (13 RT 1843.) She described Amanda as "crazy, beautiful, intelligent, caring, helpful," and someone who loved children. (13 RT 1844-1845.) In fact, Amanda would say Eric was her baby. Amanda was good at writing poetry, music and video games. She wrote a poem about her brother, which Amanda's mother read to the jury. (13 RT 1845.) That Wednesday in August, Mandy told her mother that Deverick was going to come over; they were going to "kick it," and Amanda did not want her little brother to be there. (13 RT 1847.) She missed Amanda terribly. (13 RT 1849-50.) A video with pictures of Amanda was played for the jury, without the music. (Exh. 38A; 13 RT 1844, 1856.)

Ricardo Gandara, described his family's loss of two granddaughters, Corina Gandara and Amanda Elliott. (13 RT 1848, 1852.) His was a close family, and he had had to deal with each of his two daughters who had lost a child. (13 RT 1853-1854.) He described it as hell on earth, with holidays being the worst. (13 RT 1854.) A videotape with photographs of Corina was played for the jury, without the music. (Exh. 36A; 13 RT 1857.)

Richard Rene Gandara, described himself as Corina's dad, although not her biological father. (14 RT 1861.) He described his daughter as caring, warm and intelligent, and their only child. (14 RT 1862, 1870.) He testified it was easy to raise her, although he and her mother kept tight controls on Corina. He said she was a straight "A" student, who loved school, played clarinet in the band, wrote music, and liked to draw and write.

He described how they had let Corina go to Tricia's apartment that Wednesday, because she loved to be with Eric. (14 RT 1863.) When Mr. Gandara went to Tricia's apartment to pick Corina up, she asked to stay overnight and her parents agreed. (14 RT 1864.)

On Thursday morning, he drove by the Shelter Creek apartments, on the way to help someone move, but stopped when he saw a lot of emergency vehicles. (14 RT 1865.) He tried to call Tricia's apartment but the line was busy. (14 RT 1865.) He tried to find Corina, and after a while, someone asked him for a picture of Corina for identification. (14 RT 1867-68.) By now, his wife was distraught, and eventually they learned Corina was dead. (14 RT 1868.) He described the horrible loss, and the agony of the four years since her death, including multiple career changes, an inability to concentrate, thinking about Corina all the time, and the difficulty he had supporting his wife through it all. (14 RT 1869-70.)

Nora Gandara, described her only child as her best friend, and described how she missed their talks about hopes and dreams, those "silly" conversations. (14 RT 1871-1873, 1876.) Mrs. Gandara described Corina's "caring heart," and recalled her daughter as a child who felt she had everything because she was "spoiled with love." (14 RT 1873.) She and her husband have stayed involved with Corina's school, because Corina's death was so hard on her friends. (14 RT 1873.) Corina's death led Mrs. Gandara to make two suicide attempts, because sometimes she just did not want to go on without her daughter. (14 RT 1874.) She had not been able to work, and struggled to keep her marriage intact, because of the difficulty of grieving together. (14 RT 1874-1875.) She testified that Corina was their drive to live and now that's gone. (14 RT 1876.)

In closing, the prosecutor reviewed the brutal circumstances of the three murders, and Booker's other acts of violence. (14 RT 1982-1986, 1990-1993.) He also told the jury in closing argument that, "Emotion has been a big part of this trial, because there is no way to talk about the death of children or anybody, and not have it be emotional. But emotion alone isn't what you should base your decision on." (14 RT 1986.) He added:

> You can consider other emotion that we are going to talk about that was expressed by the family and the hurt done to them, but as judges here, you need to be more neutral than that. You need to be able to say, okay, if I look at this case and I take into account the factors that are allowed to me under the law, what should I do? What would be the right thing to do? The instruction says to you, you can even consider sympathy, just – just straight sympathy, just because you want to be nice. (14 RT 1986-1987.) [¶¶] For a little while the last few weeks, Tricia and Amanda and Corina kind of came back to life. You got to see photographs of them. You got to see photographs of them alive, because there is no way to explain to a jury what they were like as whole people, as hopeful, living, loving creatures, as people whose families adored them. There is no way to bring that back totally. But you got to sit and for weeks, look at this defendant and see him breathe and move and look, and he was real. But a murderer robs the dead person of being real anymore. They become a statistic. They become the victim. (14 RT 1988.)

Finally, he stated that victim impact evidence was the most emotional evidence there was. There was nothing worse than to hear about the families, because it was real. "The hurt doesn't end. The reason for living sometimes ends, but the hurt doesn't end . . . ." "You saw the remnants of a family that has been destroyed. Well, they are alive. They are still together. And they share one more thing in common, daily heartaches, daily thoughts about what it would have been like." (14 RT 1994.)

He asked the jury to think about what Booker had done to deserve spending his life in prison where he will have visitors, food, TV's, books and thoughts and laughter. (14 RT 1994.)

The United States Supreme Court and this Court have generally upheld the admission of victim impact evidence, and related arguments, against constitutional and statutory challenge. In *Payne v. Tennessee, supra,* 501 U.S. 808, 826-827 [111 S.Ct. 2597, 115 L.Ed.2d 720], the High Court held that the Eighth Amendment erects no bar to the admission of evidence about the impact of the murder on the victim's family. In *People v. Edwards, supra,* 54 Cal.3d 787, 832-836, this Court concluded, inter alia, that victim impact evidence and

argument are admissible as bearing on section 190.3, factor (a), circumstances of the crime. However, in *People v. Sanders* (1995) 11 Cal.4th 475, this Court recognized that *Payne* only encompasses evidence that logically shows the harm caused by the defendant and does not mean there are no limits on emotional evidence and argument. (*Id.*, at p. 549.) On the one hand, 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, are permissible. (*Ibid.*) However, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational and purely subjective response must be curtailed. (*Id.*, at pp. 549-550; see also, *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1056-1058 [failure to object to specific testimony or witness forfeits claim on appeal, but victim impact evidence did not surpass constitutional limits]; *People v. Jurado* (2006) 38 Cal.4th 72, 131-134 [mother-in-law and both parents of one murder victim testified, 25 pages, no error].).

Booker invokes the Fifth, Eighth, and Fourteenth Amendments to the federal Constitution and sections 7, 15, 17, and 24 of article I of the California Constitution, and alleges that the death judgment must be set aside because the victim impact testimony admitted during the penalty phase was too voluminous and inflammatory, and rendered the penalty phase of his trial fundamentally unfair, diverted the jury's attention from its proper role and invited a purely emotional response. He contends the photographic videos should not have been admitted, the testimony of the "mothers" was cumulative, other testimony about the impact on the health of survivor's was speculative; and the testimony of Corina Gandara's distraught and "mentally unstable" mother should not have been permitted at all. (AOB 166-168.) Booker also complains that the prosecutor's argument improperly reminded jurors about the emotional harm to the families and the brutality of the murders. (AOB 169-170.)

Booker concludes he is entitled to a new penalty phase trial because it cannot be said that the aggravating factors were so overwhelming that the jury would necessarily have concluded they outweighed the mitigating evidence, absent the victim impact evidence. As mitigating evidence, he points to his youth and immaturity (he had turned 18 just shortly before the murders) and claims he expressed remorse over the deaths of his 12, 15 and 19 year old victims. (AOB 170.)

Booker's complaints are without merit. On this record, the victim impact testimony fell well within the parameters set forth by the United States Supreme Court and this Court.

Thus, in *People v. Taylor* (2001) 26 Cal.4th 1155, this Court ruled that evidence from the victim's wife and son about the "various ways they were adversely affected by their loss of [the victim's] care and companionship" was properly admitted. This Court held that evidence of this kind, directed towards showing "the impact of the defendant's acts on the family of his victims is admissible at the penalty phase of a capital trial." (*Id.*, at p. 1170.)

In *People v. Marks* (2003) 31 Cal.4th 197, 235, this Court ruled that victim impact statements are not even limited to relatives of the deceased. In *Marks*, this Court upheld the victim impact testimony of an individual who had been employed by the slain victim, despite a seizure disorder. He testified the victim had helped him get financial assistance for his disability, and had treated him as a human being. He further advised the jury that since the victim's death, he had lost his job, he had been unable to find any work, his physical condition had deteriorated, and his fiancee had left him. This Court upheld this testimony reasoning the jury was entitled to know:

> . . . . the full extent of the harm caused by the crime, including its impact on the victim's family *and community*. [Citation omitted.] Murderers know that their victims "probably ha[ve] close associates, 'survivors,' who will suffer harms and deprivations from the victim's

> death . . . . [T]hey know that their victims are not human islands, but individuals with parents or children, spouses or *friends* or dependents."

(*People v. Marks*, *supra*, 31 Cal.4th at pp. 235, quoting *Payne v. Tennessee*, *supra*, 501 U.S. at 838.)

In *People v. Boyette* (2002) 29 Cal.4th 381, where the defendant killed two individuals, Gary Carter and Annette Devalier, the trial court admitted testimony to show the effect the deaths had had on both their families. This Court upheld the admission of this testimony over claims that the extent and nature of the victim impact evidence was improper. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 443.) Annette's father testified about the close relationship he had had with his daughter, how Annette had been in a drug rehabilitation program, and how her eight-year-old son had said he wanted to die so he could be with his mother, how her six-year-old son had nightmares and would telephone wanting to know where his mother was. (*Id.*, at p. 440.) Annette's brother testified that he dreamed a lot about Annette. (*Id.*, at p. 441.) Gary's brother-in-law testified Gary's death had been devastating to the entire family. Gary's sister testified she would wake in the middle of the night crying about Carter's death; she had problems at work because of the killing; she was depressed all the time; she was in therapy; she lost lots of weight, and had problems caring for her own child. (*Ibid.*) Gary's brother was so distraught about the slaying he moved out of the area. (*Id.*, at p. 441.) One of Gary's sisters testified that her father had been so heartbroken by Gary's death that it was too painful for him to look at his other children and he no longer wanted to be around any of them. (*Id.*, at p. 441.) One of Gary's children also explained she had nightmares following the killing; her brother (she added) was too upset to come to court to testify, and she related her sister looks at their father's picture and cries. (*Ibid.*)

In *People v. Huggins, supra,* 38 Cal.4th 175, 238, the defendant, like Booker, asserted that some of the victim testimony was outside the ambit of what is permitted elsewhere, relying on *Cargle v. State* (1995) 1995 OK CR 77 [909 P.2d 806] (which held there was error in admitting victim impact testimony that the victim "saved the county thousands of dollars by a personal fund-raising effort . . . and was thoughtful and considerate to his family . . ." but that the error was harmless given other aggravating circumstances). (*Id.* 909 P.2d at p. 829; AOB 165-166.) However, *Cargle* is consistent with this Court's reasoning in admitting victim impact evidence, within certain limits. Here, the victim impact evidence did not exceed constitutional limits, or was harmless, given the underlying circumstances of three brutal murders.

Booker also points to *Salazar v. State* (Texas Crim. App. 2002) 90 S.W.3d 330, 333-336, to illustrate his argument that the videotapes were too inflammatory and should have been excluded. (AOB 165.) *Salazar* was explained in *People v. Robinson, supra,* 37 Cal.4th 592, 652, as an extreme example of due process infirmity caused by the admission of a 17-minute "video montage"of 140 photos and emotional music, prepared in tribute to the murder victim. The Texas court pointed out that a capital case is not a memorial service for the victim. This Court distinguished *Salazar* in *People v. Prince* (2007) 40 Cal.4th 1179, 1288-1290, noting how different courts view the admissibility of such videotape evidence. Thus, in *Prince*, a videotaped interview with one murder victim was not an overly emotional tribute, nor was it set to overly emotional music. Whatever the cautionary value of *Salazar*, here, the trial court did excise the music from the video-photograph presentation, to preclude an overly emotional result. Thus, *Salazar* does not help Booker's argument.

Most of Booker's complaints about specific testimony cannot be addressed in this appeal because he did not object to the specific evidence on

the same grounds in the trial court. Thus, he failed to object to testimony about an open casket funeral, and cites *People v. Harris* (2005) 37 Cal.4th 310. However, in *Harris*, this Court did hold that testimony about a grave-side incident was prejudicial, too remote because it was caused by funeral home personnel, and was not relevant to the defendant's moral culpability. Since there was no objection, the issue was waived. In *Harris*, this Court also held that, even if counsel should have objected, there was no reasonable probability of prejudice because the disputed testimony was brief and was not significant, in light of the impact of the crime itself on the family, the brutality of the murder, and the paucity of mitigating evidence. Therefore, evidence of that specific grave-site event was held to be harmless beyond a reasonable doubt in *Harris*. (*People v. Harris, supra*, 37 Cal.4th at pp. 351-352; *Chapman v. California, supra,* 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].)

Here, there was also no objection at trial to Nora Gandara's belief that her high blood pressure and her mother's death were caused by Corina's murder and their grief. (AOB 169.) And although Booker did object to a potential inference that the delay in starting the trial might have been caused by Booker, there was no motion to strike and admonish the jury, and no further reference to the delay, and the isolated reference could not have changed the outcome of the penalty proceedings, given the circumstances of the murders. (AOB 169-170.) Booker's uncharitable comments that Nora Gandara's testimony was "cumulative and unnecessary," and should have been precluded because she was "clearly distraught and mentally unstable" are too mean-spirited for further comment. (AOB 168.) Furthermore, there was no objection at the time of the testimony, so even this complaint has been waived for appeal.

Booker also complains that the trial court did not hold an evidentiary hearing on the potential evidence. (AOB 170.) He misstates the record. The court had several hearings, although witnesses were not called. The court ruled

that the video-photographs were admissible, the music was not because the sound track was removed from the videotape. Booker did not ask for a offer of proof or a preview of the victim impact witnesses' testimony. He could certainly anticipate the testimony of three sets of parents who lost a 12-year-old, a 15-year-old, or a 19-year-old child. But, ultimately, the victim impact testimony from the family members, and the photographs were the kind of victim testimony admitted time and again under Penal Code section 190.3, factor (a), as circumstances of the crimes themselves.

As in *Marks, Huggins* and *Boyette*, the victim impact testimony presented in the instant case simply explained the "impact" that the three murders had on many aspects of their relatives' lives: family life; mental and physical well-being, and even the ability to hold a job. There was nothing unduly emotional or inflammatory about the evidence.

Furthermore, there was no fundamental unfairness from admission of photographs of the victims. (*People v. Lewis & Oliver, supra,* 39 Cal.4th 970, 1055-1056 [crime scene photographs excluded at the guilt phase at defendant's request were admitted at the penalty phase to complete an accurate picture of the brutality of crime]; *People v. Lucero* (2000) 23 Cal.4th 692, 715.) The victims' family members testified about their love for the victims. (See *People v. Martinez* (2003) 31 Cal.4th 673, 692.) The prosecutor incorporated the three videos into testimony by a relative of each of the three murder victims. There was no danger that the jury's rationality was overborne and thus no constitutional violation. (*People v. Boyette, supra*, 29 Cal.4th at p. 444.) Even if there were error as to the number of pictures, it was manifestly harmless in light of the overwhelming evidence of guilt, including defendant's confession. (*People v. Watson, supra,* 46 Cal.2d 818, 836.)

If Booker is claiming that the prosecutor committed misconduct by urging the jury to consider the brutality of the crimes and the families' suffering

in deciding between life in prison and death, the claim is waived because Booker did not object in the trial court on this ground. (AOB 169; *People v. Sanders*, *supra*, 11 Cal.4th at p. 549; *People v. Zapien, supra,* 4 Cal.4th 929, 992.) Further, Booker's claim fails on the merits. Nothing the prosecutor said during his closing argument encouraged the jury towards "irrationality and an emotional response untethered to the facts of the case." (*People v. Boyette, supra,* 29 Cal.4th at p. 444.) Like the prosecutor in *Boyette*, here the prosecutor in Booker's case spoke of the impact of the three murders on the three families, but emphasized the brutality of the crime itself, as well as other events about in defendant's past that demonstrated why the death penalty was appropriate, and a life sentence was not. The evidence was relevant and the argument appropriate. There was no danger that the jury's rationality was overborne and thus no constitutional violation.

Moreover, aside from the victim impact evidence, there were compelling aggravating facts which individually and collectively warranted the imposition of the death penalty, the most obvious of which were the circumstances of the three inexplicable and violent murders themselves. In any event, assuming the trial court erred in admitting some of the victim impact evidence or in failing to limit some of it, the error was harmless. When the victim impact evidence is considered in light of the record as a whole, and the absence of anything to mitigate Booker's conduct other than being 18 years old, it is not reasonably possibly the admission of this evidence affected the verdict. The testimony, though emotional at times, fell far short of anything that might implicate the Eighth Amendment. It was traditional victim-impact evidence, "permissible under California law as relevant to the circumstances of the crime, a statutory capital sentencing factor." (*People v. Cole* (2004) 33 Cal.4th 1158, 1233; cited in *People v. Huggins, supra*, 37 Cal.4th at pp. 238–239.)

Even without the victim impact evidence, the prosecutor was entitled to "urge the jury to draw reasonable inferences concerning the probable impact of the crime on the victim and the victim's family." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017.) Any reasonable juror could imagine the immense and insurmountable loss experienced by the members of three families and their unending grief, directly attributable to the murders committed by Booker. The entire presentation by the members of the three different families, each of whom lost at least one daughter, and one grandfather who lost two granddaughters, covered only 68 pages of testimony in the penalty phase. (RT 1807-1875.)

There was no evidentiary or constitutional error in admitting the victim impact evidence and testimony in Booker's trial. The death penalty judgment must be affirmed.

XIV.

THE TRIAL COURT DID NOT REFUSE TO INSTRUCT THE JURY THAT AGE WAS ONLY A MITIGATING FACTOR, BECAUSE BOOKER WITHDREW HIS REQUEST TO MODIFY CALJIC NO. 8.85(I)

Booker complains that the trial court deprived him of a fundamentally fair trial and a reliable penalty determination, in violation of the Eighth and Fourteenth Amendments, by refusing to instruct at the penalty phase--at his request--that age may be only a factor in mitigation, under CALJIC No. 8.85, factor (i). (AOB 172.) He is incorrect.

In item number 20 of his Memorandum of Law on Penalty Phase Jury Instructions, relating to CALJIC No. 8.85(i), Booker argued that "factor [i] should be deleted or the court instruct the jury that age is a mitigating factor that they may consider." (2 CT 441, emphasis added.) However, during the discussion on penalty phase instructions, the court asked if Booker wanted an unmodified CALJIC No. 8.85(i) given to the jury. Booker said yes, and

withdrew his request No. 20 in the Memorandum. (14 RT 1941.) Thus he canceled any request that factor (i) be limited to a factor in mitigation, and his argument on appeal is frivolous.

Even if the argument were valid, it would fail on the merits.

Pursuant to CALJIC No. 8.85(i), the jury was instructed:

> In determining which penalty is to be imposed on defendant, you shall consider all the evidence which has been received during any part of the trial in this case. You shall consider, take into account and be guided by the following factors, if applicable: [¶] (i) The age of the defendant at the time of the crime. (14 RT 1970, 1971; 14 CT 3885.)

In closing, Booker argued for life in prison, emphasizing he was barely 18-years-old at the time of the murders, immature, and prone to impulsive, thoughtless and reckless behavior, all of which mitigated in favor of life in prison instead of death. (14 RT 2019.)

Booker argues now that the trial court was required to give an instruction that the jury could consider Booker's age only as a mitigating factor in the penalty phase, in light of *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1]. (AOB 173.) In *Roper v. Simmons*, the United States Supreme Court held that the Eighth Amendment to the United States Constitution prohibits the execution of a juvenile under the age of 18, as cruel and unusual punishment. (*Id.*, 543 U.S. at p. 568.) Booker reasons that since he was barely over age eighteen, his young age could only be a mitigating factor. (AOB 173.)

However, as Booker acknowledges, before *Roper v. Simmons*, this Court rejected a similar instruction in *People v. Brown* (2003) 31 Cal.4th 518, 564-565. ("An individual under 18 is not subject to the death penalty. You may consider the fact that Mr. Brown was 19 at the time of his offense.") This Court concluded that the proposed instruction highlighted a single, mitigating factor, that Brown had just barely passed the cutoff age, and therefore was improperly argumentative. A defendant is not entitled to instructions that

simply recite favorable facts. Thus a defendant is entitled to argue his youth in mitigation, but not that those under 18 are not subject to execution or life in prison without parole. Therefore the instruction in *People v. Brown* was properly rejected by the trial court.

Booker reasons that his requested instruction is sufficiently different from that rejected in *People v. Brown*, 31 Cal.4th 518, and that it is appropriate in light of *Roper v. Simmons*. (AOB 173.) He is incorrect. The instruction in *Brown* was intended to point out the Legislative conclusion that those under 18 years of age could not be executed, and highlight the fact that Brown was just barely past that age. Booker tries to distinguish his variation on that argument, by limiting age to solely a mitigating factor only. While his proposed instruction did not mention the statutory cutoff, it was intended to accomplish the same result, and was still argumentative.

Moreover, the argument that age is only a mitigating factor has been rejected by this Court. CALJIC No. 8.85(i) permits the jury to take into account, "[t]he age of the defendant at the time of the crime." (*People v. Smithey, supra*, 20 Cal.4th at p. 1004. It may be an aggravating or a mitigating factor, it may or may not be relevant. (*Id.*, citing, *People v. Lucky* (1988) 45 Cal.3d 259, 301-302 (rejecting argument that age should be considered only in mitigation.) "The word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case." (*People v. Lucky*, at p. 302.)

Thus, this Court has previously rejected Booker's argument and he provides no reasoned basis for changing the Court's position now, even after *Simmons*. (*People v. Smithey, supra*, 20 Cal.4th at p. 1004; *People v. Osband* (1996) 13 Cal.4th 662, 708; *People v. Lucky, supra,*, 45 Cal.3d at pp. 301-302.)

In closing, Booker argued his age and lack of maturity was one of many factors which mitigated in favor of life in prison. (RT 2019.) In light of Booker's argument and the instructions as a whole, there is no reasonable likelihood that the jury was misled into thinking it could not consider Booker's age in mitigation. There was no instructional error.

Therefore, the death sentence must be affirmed.

XV.

THERE IS NO CUMULATIVE ERROR TO COMPEL REVERSAL OF THE PENALTY PHASE AND THE JUDGMENT MUST BE AFFIRMED

Booker alleges that the admission of the "gruesome" photographs, emotion-laden victim impact testimony, evidence of prior acts portraying Booker as an "habitually violent knife wielding assassin," and the refusal to instruct on age as a mitigating factor, considered cumulatively, resulted in the unconstitutional deprivation of a fair and reliable penalty determination. (AOB 175-176.) His argument is unpersuasive.

As shown in response to Booker's individual claims of penalty phase error, no such errors occurred. Because there were no errors, there can be no cumulative penalty phase error, and thus no basis to reverse Booker's death sentence. (See *People v. Geier* (2007) 41 Cal.4th 555, 620; *People v. Stanley* (2006) 39 Cal.4th 913, 966; *People v. McDermott*, *supra,* 28 Cal.4th 946, 1005.) Further, assuming arguendo any errors occurred, even viewed cumulatively, such errors would not have significantly influenced the fairness of Booker's trial or detrimentally affected the jury's determination of the appropriate penalty. (*People v. Avila, supra*, 38 Cal.4th 491, 615.) Therefore, the penalty judgment must be affirmed. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1038.)

XVI.

CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Booker makes a number of arguments generally challenging the constitutionality of California's death penalty statute. (AOB 177-229.) None of the arguments were raised in the trial court, and thus they have not been preserved for appeal. This Court should rest its ruling on this procedural default, an independent and adequate state ground for denial of the claims, which Booker notes he intends to raise later in federal habeas corpus proceedings. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) Also, as Booker acknowledges, the arguments have previously been rejected by this Court. (AOB 177, fn. 10.)

In any event, this Court has upheld California's death penalty law many times over, and should do so again here. (See e.g. *People v. Farnam* (2002) 28 Cal.4th 107, 192-193; *People v. Hughes, supra,* 27 Cal.4th at pp. 404-406; *People v. Weaver*, *supra*, 26 Cal.4th at pp. 991-993; and cases cited below.) Booker has not presented any reason for reconsideration of these settled issues. (*People v. Ayala* (2000) 24 Cal.4th 243 at p. 290.)

A. California's Death Penalty Law Is Not Inherently Cruel And Unusual And Does Not Violate The State And Federal Constitutions

Relying on the opinions of Justices Brennan and Marshall in *Furman v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346], Booker argues that the death penalty is unconstitutionally cruel and unusual punishment. Even after California reinacted the death penalty in 1977-1978, he submits, it remained unconstitutional. (AOB 177-179.) He alleges the death penalty is degrading, physically cruel, psychologically traumatic, and serves no necessary or legitimate social or legal purpose at all. Therefore, he asks this Court to

reconsider *People v. Frierson* (1979) 25 Cal.3d 142, 174, 185, and find, declare California's death penalty statute unconstitutional. This request was rejected in *People v. Bradford* (1997) 14 Cal.4th 1005, 1058, and Booker has presented no new argument for why *Bradford* or *Frierson* should be reconsidered.

B. <u>The Death Penalty Can Be Imposed Within Constitutional Constraints</u>

Booker alleges the death penalty cannot be fairly imposed within constitutional constraints, particularly in view of increasing procedural barriers to meaningful federal habeas corpus review. (AOB 181.) He also complains there are increasing procedural barriers in state court. (AOB 181.) Moreover, he contends that the backlog of cases make the death penalty so arbitrary and unreliable as to preclude meaningful post-conviction relief altogether. (AOB 182.) His argument is predicated on the dissents in *Sawyer v. Whitley* (1992) 505 U.S. 333, 357-360 [112 S.Ct. 2514, 120 L.Ed.2d 269] [complaining about petty procedural barriers in the path of a defendant seeking review of a capital case]; and the narrowing of avenues of post-conviction review] and *Jeffers v. Lewis* (9th Cir. 1994) 38 F.3d 411, 425-427 [three judges questioning sua sponte whether Arizona's failure to execute more than one inmate over 15 years, while adding 117 defendants to death row indicates the administration of the death penalty in Arizona is so arbitrary as to constitute cruel and unusual punishment]. This argument was rejected in *People v. Demetrulias,* (2006) 39 Cal.4th 1, 44, and *People v. Snow* (2003) 30 Cal.4th 43, 127, and Booker provides no reason to reconsider it again.

C. <u>California's Homicide And Death Penalty Laws Are Not Vague And Overbroad And They Properly Perform The "Narrowing" Function Required By The Eighth Amendment</u>

Booker's complains notwithstanding, California's death penalty statute properly narrows the class of persons eligible for the death penalty and provides

an objective basis for appellate review. The statutory criteria defining murder, and enumerating special circumstances, and aggravating and mitigating criteria for the choice between death or life in prison without parole, are not so broad and amorphous they deprive jury of any meaningful guided discretion. (AOB 185.) *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750] forecloses Booker's argument, and his "broad attack" on the statute is not well taken. (AOB 185-186)

As this Court stated in *People v. Boyette, supra,* 29 Cal.4th 381 when rejecting this argument:

> The Eighth Amendment to the United States Constitution requires that the 1978 death penalty law serve a narrowing function to 'circumscribe the class of persons eligible for the death penalty.' (*Zant v. Stephens* (1983) 462 U.S. 862, 878 [103 S. Ct. 2733, 77 L. Ed. 2d 235].) This function is performed by the requirement that a capital jury sustain at least one statutorily enumerated special circumstance. *People v. Bacigalupo* (1993) 6 Cal.4th 457, 467-468 [24 Cal.Rptr.2d 808, 862 P.2d 808].) Defendant contends the law contains so many special circumstances that it fails to provide the constitutionally required narrowing function and thus violates the Eighth Amendment by permitting the death penalty to be imposed in an arbitrary and unpredictable fashion. (*California v. Brown* (1987) 479 U.S. 538, 541 [107 S. Ct. 837, 93 L. Ed. 2d 934] ['The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion'].)
>
> We have held many times that the 1978 law is constitutional. Specifically, as defendant concedes, we have rejected the claim that the number of special circumstances set forth in section 190.2 fails to provide sufficient narrowing of the death-eligible class. (*People v. Bolin* (1998) 18 Cal.4th 297, 345 [75 Cal.Rptr.2d 412, 956 P.2d 374].) Because we conclude the 1978 law is sufficiently narrow to satisfy the Eighth Amendment, we reject defendant's further argument that there is '[b]lanket eligibility for the death sentence' in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

(*People v. Boyette, supra,* 29 Cal.4th at pp. 439-440.)

The more specific complaints fare no better.

1. <u>The Definition Of First Degree Murder Is Not Vague Or Overbroad</u>

a. <u>*Perez* Did Not Overrule *Anderson*</u>

Booker's complaint notwithstanding, *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, was not "all but overruled" in *People v. Perez, supra,* 2 Cal.4th 1117, 1125, and *Perez* did not expand the definition of premeditation so that almost any homicide is premeditated, the dissent in *Perez* notwithstanding. (AOB 187-189.) *Perez* reiterated that *Anderson* was a framework for analysis of premeditation, but was neither exclusive nor exhaustive. (*Ibid.*) Booker's complaint that the Legislature's narrowing of certain statutory mental defenses violated due process was considered and rejected in *People v. Saille, supra,* 54 Cal.3d 1103, 1116. (AOB 189.)

b. <u>Lying In Wait</u>

Booker's argument that the definition of first degree murder by lying in wait is constitutionally overbroad has consistently been rejected by this Court, and he provides no good reason to reconsider it now. (AOB 190-191; *People v. Geier, supra,* 41 Cal.4th at p. 617; *People v. Carpenter, supra,* 15 Cal.4th at p. 419.)

c. <u>Murder By Torture</u>

This Court has rejected Booker's argument that the definition of murder-by-torture is stated in such sweeping terms that almost any homicide can be included. (AOB 191-192; *People v. Chatman* (2006) 38 Cal.4th 344, 394 [rejecting argument that definition is vague or fails to establish nexus between torture act and murder itself]; *People v. Bemore* (2000) 22 Cal.4th 809, 843-844 [requiring some proximity in time and space]; *People v. Barnette* (1998) 17 Cal.4th 1044, 1061 [statute provides sufficiently narrow and rational basis on which to base death penalty, therefore satisfies Eighth and Fourteenth

amendments].) Thus section 190.2, subdivision (a), subsection (18), renders death eligible only those murderers who "intentionally performed acts which were calculated to cause extreme physical pain to the victim and which were inflicted before death." (*People v. Davenport* (1987) 41 Cal.3d 247, 270.)

d. Felony Murder

Booker contends that Penal Code section 190.2, subdivision (a), subsection (17), "obliterates" the distinction between first and second degree murders, by indefinite expansion of the number of eligible felonies. (AOB 192.) He even speculates it is "extremely common" that victims may be "unintentionally" killed during these offenses, which apparently makes them ordinary murder rather than first degree murder. (AOB 192.-193) This court has rejected this argument repeatedly and Booker presents no reason to revisit those decisions. (*People v. Boyer, supra,* 38 Cal.4th 412, 483; *People v. Stitely, supra,* 35 Cal.4th 514, 573; *People v. Anderson* (2001) 25 Cal.4th 503, 601.)

e. First Degree Murder Criteria Considered Collectively

Booker's argument that the combined impact of the expansion of categories of first degree murder makes section 189 [all other kinds of murders are of the second degree] superfluous. (AOB 193.) This argument was rejected in *People v. Benevides* (2005) 35 Cal.4th 69, 104.

2. California's Death Penalty Law Properly Performs The Constitutionally Required "Narrowing" Function

Booker complains that the statutory list of 14 special circumstances passed in 1977-1978 has been expanded to 33 today. (AOB 194.) He contends the result is consistent with the intent of the drafters of the 1978 Proposition was to make the death penalty applicable to every murder, but inconsistent with the constitution. (AOB 194.) Only the felony-murder and multiple-murder

special circumstances were alleged in Booker's case, therefore other special circumstances are irrelevant to his appeal.

Moreover, the United Supreme Court has held that California's requirement of a special-circumstance finding adequately "limits the death sentence to a small sub-class of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29].) Likewise, this Court has repeatedly rejected challenges that section 190.2 fails to adequately perform the narrowing function mandated by the Eighth Amendment and that the sentencing scheme contains so many special circumstances that it fails to perform the constitutionally required narrowing function. (*People v. San Nicolas, supra,* 34 Cal.4th at pp. 676-677; *People v. Crittenden, supra,* 9 Cal.4th at pp. 155-156.) Given the well-settled authority contrary to Booker's position, the argument must again be rejected.

Booker contends that an Oklahoma statute identical to section 190.2, subd. (a)(14), penalizing a murder that is especially "heinous, atrocious or cruel," was found to be unconstitutional by the United States Supreme Court in *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-364 [108 S.Ct. 1853, 100 L.Ed.2d 382] (unconstitutionally vague under Eighth Amendment). (AOB 195-197.) He is correct. Prior to *Maynard,* this Court invalidated the comparable California law (§ 190.2, subdivision (a)(14)) in *People v. Superior Court* (*Engert*) (1982) 31 Cal.3d 797 (upholding Superior Court order to strike 190.2, subd. (a)(14) special circumstances allegation because it was unconstitutionally vague, and violated the Due Process clause of the Fourteenth Amendment of United States Constitution, and article I, sections 7, subdivision (a) and 15 of California Constitution).

This Court has repeatedly rejected arguments that Penal Code, section 190.2, subdivision (a)(15), lying in wait special circumstance, is unconstitutional, and there is no need to reconsider it. (AOB 197; *People v.*

Jurado, supra, 32 Cal.4th at p. 127; *People v. Nokahara* (2003) 30 Cal.4th 705, 721; *People v Vieira* (2005) 35 Cal.4th 264, 303.)

This Court has found that section 190.2, subd. (a)(17), felony murder special circumstances, adequately narrows the class of murderers subject to the death penalty, and need not reconsider the argument. (AOB 197-198; *People v. Stitely, supra,* 35 Cal.4th at p. 521; *People v. Anderson, supra,* 25 Cal.4th 543, 601.)

Booker's complaint that section 190.2, subd. (a)(18), murder by torture, is hopelessly vague was rejected in *People v. Chatman, supra,* 38 Cal.4th 344, 394; *People v. Cole, supra,* 33 Cal.4th 1158, 1234; and *People v. Davenport, supra,* 41 Cal.3d 247, 265-271.) There is no need to reconsider these holdings. (AOB 198-199.)

In *People v. Cook* (2006) 39 Cal.4th 566, 617 and *People v. Harris, supra,* 37 Cal.4th at p. 365, this Court rejected Booker's contention that the sheer number of special circumstances is cause to invalidate the death penalty scheme. He provides no basis for reconsidering the rulings. (AOB 199-200.)

3. Factor (a) Or "Circumstances Of The Crime" Is Not Vague And Overbroad And Does Perform The Requisite Narrowing Function Required By The Constitution

Penal Code section 190.3 specifies multiple factors for consideration by the jury in determining whether the penalty for first degree murder with special circumstances should be life without parole or death. Booker argues that factor (a) is unconstitutional because it allows the jury to consider the "circumstances of the crime." (AOB 201-203.) Booker acknowledges that the United States Supreme Court validated California's statutory scheme, including factor (a), in *Tuilaepa v. California, supra*, 512 U.S. 967, finding the statute was not vague or overbroad on its face. (AOB 201.) Nonetheless, he contends the statute impermissibly leads to the arbitrary and capricious infliction of the death

penalty, relying on the dissent of Justice Blackmun in *Tuileapa*, and arguing that this Court should find the statute invalid under the California Constitution (AOB 202-203.) This Court has repeatedly rejected the precise argument Booker makes here, and should again do so. (*E.g. People v. Geier*, *supra,* 41 Cal.4th at p. 620; *People v. Brown, supra,* 33 Cal.4th 382, 401; *People v. Prieto* (2003) 30 Cal.4th 226, 276.)

4. **California's Statutory Death Determination Scheme Considered In Its Entirety Is Constitutional**

As set out above, and contrary to Booker's argument, the California death penalty statute does not make all murder defendants subject to the death penalty. (AOB 203-204.) The death penalty law adequately narrows the class of death-eligible offenders. (*People v. Williams, supra,* 40 Cal.4th 287, 339; *People v. Marks, supra*, 31 Cal.4th at p. 237; *People v. Snow, supra,* 30 Cal.4th at p. 125; *People v. Burgener*, *supra*, 29 Cal.4th at p. 884; *People v. Mendoza,* (2000) 24 Cal.4th 130, 191-192; *People v. Champion, supra,* 9 Cal.4th 879, 951; *People v. Crittenden, supra,* 9 Cal.4th at pp. 154-155; see also, *McCleskey v. Kemp* (1987) 481 U.S. 279 [107 S.Ct. 1756, 95 L.Ed.2d 262] [summarizing the constitutional prerequisites which a state must satisfy before a sentence of death can be lawfully imposed].)

In California, the narrowing function occurs at the guilt/special circumstances phase of the capital trial. Before a defendant can become death-eligible, he must be convicted of first degree murder, and at least one special circumstance must be found true beyond a reasonable doubt. The United States Supreme Court has held that the latter requirement adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris, supra,* 465 U.S. at p. 53.) The statute thus survives any federal constitutional claim advanced by Booker, assuming arguendo that Booker preserved such a claim.

5. Professor Shatz' Article Should Be Rejected, Because California Law Adequately Narrows The Class Of Death Eligible Murderers

Booker argues that a law review article has proven that California's death penalty scheme is unconstitutional. (S. Shatz & N. Rivkin, The California Death Penalty Scheme: Requiem for Furman, (1997) 72 N.Y.U. L.Rev. 1283; AOB 204-205.) The authors attempted to demonstrate that, aside from cases where death was adjudged in this state between 1988-1992 (and, therefore, necessarily, where the trier of fact found at least one special circumstance allegation true), a large percentage of California first degree murder cases have "factually" been special circumstance cases. This, the authors suggest, reflects a failure of the special circumstances to significantly narrow the class of death-eligible murderers, as *Furman v. Georgia, supra*, 408 U.S. 238, and *Zant v. Stephens* (1983) 462 U.S. 862 [103 S.Ct. 2733, 77 L.Ed.2d 235], require for a constitutional death penalty. According to Booker, therefore, "these failures result in the arbitrary death penalty condemned" by the High Court. (AOB 204-205.)

Nonetheless, this Court has continually rejected arguments such as those of Booker and Professor Shatz, that the California scheme for death eligibility fails adequately to narrow the class of murderers exposed to capital punishment. Repeatedly, this Court has held that the death penalty law, as a whole, adequately narrows the class of death eligible murderers. (E.g., *People v. Gurule, supra,* 28 Cal.4th at pp. 663-664; *People v. Koontz, supra,* 27 Cal.4th at p. 1095; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050.) The special circumstances are not over-inclusive in number, or the expansiveness of their terms, as construed (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1095; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1050), despite the asserted breadth of the felony-murder special circumstances (*People v. Gurule*, *supra*, 28 Cal.4th at p.

663; *People v. Koontz, supra*, 27 Cal.4th at p. 1095; *People v. Jenkins, supra*, 22 Cal.4th at p. 1050).

D. **The Due Process Clause Of The Fourteenth Amendment Does Not Require A Jury To Find Particular Facts To Be True Beyond A Reasonable Doubt**

Booker mounts a major campaign to convince this Court that recent United States Supreme Court decisions have invalidated the rationale underlying its previous determinations that the death penalty passes Constitutional muster. (AOB 206-222.) He maintains that this Court must reconsider its rulings, in light of *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 148 L.Ed.2d 435] and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]. (AOB 206.) This Court has found that *Ring*, and *Apprendi* "do not affect California's death penalty law." (*People v. Smith* (2003) 30 Cal.4th 581, 642.) Nor does *Blakely* compel a different result. (*People v. Morrison* (2004) 34 Cal.4th 698, 730.) Therefore, Booker's argument must fail. (AOB 206, 209-221.)

The sentencing decision in a capital case is not a mere factual finding, as Booker suggests. Rather, it is "inherently moral and normative, not factual" (*People v. Rodriguez* (1986) 42 Cal.3d 730, 339) "and hence, not susceptible to burden of proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79; *People v. Brown* (1985) 40 Cal.3d 512, 540-545.) California's standard penalty phase instructions are adequate to guide "the jury in carrying out their 'moral and normative' function." (*People v. Jenkins, supra,* 22 Cal.4th 900, 1053.)

Related claims have also been previously rejected by this Court: the requirement of written findings by the jury (see *People v. Snow, supra*, 30 Cal.4th at p. 126); the necessity for jury unanimity as to aggravating factors (see

People v. Maury (2003) 30 Cal.4th 342, 440); a proof-beyond-a-reasonable-doubt requirement for finding the existence of an aggravating circumstance (see *People v. Snow, supra*, 30 Cal. 4th 43), that aggravating circumstances outweigh mitigating ones (*ibid.*), and that death is the appropriate punishment (see, *People v. Box, supra*, 23 Cal.4th at p. 1216; *People v. Carpenter, supra*, 15 Cal.4th at pp. 417-418).

E. Prosecutorial Charging Discretion Does Not Render The Death Penalty Statute Unconstitutional

Booker complains that it is unconstitutional to permit independent district attorneys unbridled discretion to decide whether or when the death penalty will be imposed. (AOB 222.) Such discretion, he argues, creates the risk of county by county arbitrariness, because district attorneys can use race or economic status improperly in making those decisions. (AOB 222-224.) As Booker correctly concedes (AOB 223), this Court previously has rejected this claim. As held in *People v. Crittenden, supra*, 9 Cal.4th 83:

> Prosecutorial discretion to select those eligible cases in which the death penalty actually will be sought does not, in and of itself, evidence an arbitrary and capricious capital punishment system, nor does such discretion transgress the principles underlying due process of law, equal protection of the laws, or the prohibition against cruel and unusual punishment. [Citations.]

(*Id.* at p. 152; see also *People v. Koontz, supra*, 27 Cal.4th at p. 1095; *People v. Steele, supra,* 27 Cal.4th at p. 1269; *People v. Earp, supra*, 20 Cal.4th at p. 905 ["There is no constitutional proscription against delegating to each district attorney the power to effectively decide in which cases to seek the death penalty"]; *People v. Ochoa, supra,* 19 Cal.4th 353, 479; *People v. Ray* (1996) 13 Cal.4th 313 at p. 359.) Booker provides no persuasive basis for his request that this Court reconsider its prior holdings on this issue. Accordingly, his claim should be rejected.

F. Booker's Catch-all Argument Also Fails

Booker provides a laundry list of additional reasons why the California death penalty statute violates the constitution of the United States and the State. (AOB 224-226.) He candidly admits these arguments have been previously rejected, but presents them to preserve them for future federal review, if appropriate. (AOB 224.)

All of the claims should again be denied, as they were in *People v. Stanley, supra,* 39 Cal.4th. 913. (AOB 226.) Thus, the trial is not required to instruct that the absence of a mitigating factor is not an aggravating factor, or that a single mitigating factor may outweigh the aggravating factors; the jury does not have to unanimously agree on the specific aggravating factors relied on; the jury does not need to be instructed on the burden of proof for aggravating and mitigating evidence; the trial court does not have to instruct that the prosecutor has the burden of persuasion; the jury is not required to make specific findings about the aggravating and mitigating factors relied on in reaching a death verdict; inter-case proportionality review is not required; section 190.3 adequately narrows the jury's discretion to choose between death and life in prison without parole; and comparative review is not required. (*People v. Stanley, supra,* 39 Cal.4th at pp. 962-968.)

G. The Delay Between Sentence And Execution Is Due To The Careful Review Of The Constitutionality Of Death Penalty Cases And Is Not Cruel And Unusual

Relying on *Lackey v. Texas* (1995) 514 U.S. 1045 [115 S.Ct. 1121, 131 L.Ed.2d 304] [mem. opn. on denial of cert. by Stevens, J.], and, *Ceya v. Stewart* (9th Cir. 1998) 134 F.3d 1368, 1369, Fletcher J. dissenting, Booker argues that the delay between sentence and execution is itself cruel and unusual punishment. In fact, he asserts, it is recognized internationally as "torture" to leave an inmate worrying about pending execution. (AOB 227-228.)

Moreover, he points out, conditions on San Quentin's death row are recognized by the Ninth Circuit Court of Appeals as so cruel and inhuman as to require the presence of a special monitor for more than a decade. (AOB 229; *Thompson v. Enomoto* (9th Cir. 1990) 915 F.2d 1383 [civil rights suit over inmate housing and privileges].) He submits that no human being should be subjected to this torture. (AOB 227-229.)

His argument was rejected in *People v. Carter, supra,* 36 Cal.4th 1114, 1213 [matters outside trial record] and *People v. Anderson*, supra, 25 Cal.4th 543, 606 [automatic appeal is constitutional safeguard, not constitutional defect]. Further, this Court has held, that the argument that the delay in execution is cruel and unusual punishment is untenable: if the appeal results in reversal, there is no conceivable prejudice; if the judgment is affirmed, the defendant's life has been prolonged. (*People v. Hill* (1992) 3 Cal.4th 959, 1015-1016; *People v. Boyer, supra*, 38 Cal.4th at p. 489.)

XVII.

DESPITE THE ADDITIONAL ARGUMENTS IN BOOKER'S SUPPLEMENTAL OPENING BRIEF, CALIFORNIA'S DEATH PENALTY STATUTES AND THEIR APPLICATION ARE CONSTITUTIONAL UNCONSTITUTIONAL

In a supplemental opening brief, Booker reiterates his argument that California's death penalty statute, as interpreted by this Court and as applied at his trial, violates the United States Constitution. (SAOB 2.)[32/] He suggests this Court must address the cumulative impact of all the dangers he perceives, which contribute to the "flawed functioning" of the capital system as a whole.[33/]

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32. "SAOB" refers to Booker's supplemental opening brief.

33. Booker states the supplemental brief is brought pursuant to *People v. Schmeck* (2005) 37 Cal.4th 240. (SAOB 2.) In *Schmeck*, this Court stated

Thus, Booker repeats his contention that the statute's definitions of those eligible for death is so broad and so lacking in procedural safeguards, that there is no meaningful and reliable basis for identifying the relatively few offenders subjected to capital punishment. (SAOB 2.) He repeats that the special circumstances listed in Penal Code section 190.2 sweep so broadly that virtually every murderer is eligible for death. He complains that the statute allows circumstances of the crime to have an impact on the sentencing determination, while denying comparative proportionality review. (SAOB 3.) He alleges that there are no procedures built into the system to guarantee the reliability of the outcome, and some procedural safeguards available to noncapital defendants are denied to those facing the death penalty, in violation of the guarantee of equal protection. (SAOB 4.)

As Booker concedes, this Court has previously denied his claims, but he does ask this Court to reconsider its rulings on the constitutionality of the death penalty. This Court's previous rejection of these claims was proper and correct, and because Booker presents no valid reason to revisit those prior decisions, respondent respectfully request the Court to again affirm them. In a supplemental opening brief, Booker reiterates his argument that California's death penalty statute, as interpreted by this Court and as applied at his trial, violates the United States Constitution. (SAOB 2.) He suggests this Court

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that generic claims which are routinely presented to preserve the issue for federal review, and which have repeatedly been rejected, will be deemed to be "fairly presented" so long as the claim is stated in a straightforward manner accompanied by a brief argument, which (i) identifies the claim in the context of the facts; (ii) notes that this Court has previously rejected the same or a similar claim; and (iii) asks this Court to reconsider the issue. (*Id.*, at p. 304.)

must address the cumulative impact of all the dangers he perceives, which contribute to the "flawed functioning" of the capital system as a whole.[34]

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34. Booker states the supplemental brief is brought pursuant to *People v. Schmeck* (2005) 37 Cal.4th 240. (SAOB 2.) In *Schmeck*, this Court stated that generic claims which are routinely presented to preserve the issue for federal review, and which have repeatedly been rejected, will be deemed to be "fairly presented" so long as the claim is stated in a straightforward manner accompanied by a brief argument, which (i) identifies the claim in the context of the facts; (ii) notes that this Court has previously rejected the same or a similar claim; and (iii) asks this Court to reconsider the issue. (*Id.*, at p. 304.)

A. The Special Circumstances In Penal Code Section 190.2 Are Not Impermissibly Broad

Booker complains again that the special circumstances set out in section 190.2 fail to perform the requisite narrowing function required by the constitution. (SAOB 5.) In fact, he reiterates, the stated purpose of the 1978 proposition reinstating the death penalty was to make it applicable to nearly every murderer. (SAOB 6.) He complains that nearly all felony murders are special circumstances murders, even when they involve accidental or unforeseeable deaths. (SAOB 5.) Booker claims the statute also allows virtually all murders to be swept in under the lying-in-wait special circumstance. (SAOB 6.) Therefore, he argues, this Court must limit the statute which has expanded beyond constitutional bounds. (SAOB 6.)

This Court has repeatedly rejected this argument and found that section 190.2 adequately narrows the class of murders for which the death penalty will be imposed. (*People v. Alfaro* (2007) 41 Cal.4th 1277, slip opinion at p. 117, No. S027730, August 7, 2007; *People v. Bell, supra,* 40 Cal.4th 582, 619; *People v. Demetrulias, supra*, 39 Cal.4th 1, 43; *People v. Snow*, *supra*, 30 Cal.4th 43, 125.) Respondent requests that the Court do so again here.

B. Penal Code Section 190.3, Factor (a), Properly Allows Consideration Of The Circumstances Of The Crime As An Aggravating Factor At The Penalty Phase

Booker argues that section 190.3, factor (a), violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because it allows unlimited evidence of the "circumstances of the crime" and inflammatory "victim impact" evidence at the penalty phase, which serves only to distort the jury's sentence determination. (SAOB 8.) While acknowledging that the United States Supreme Court found section 190.3 to be facially valid, despite a challenge under the Eighth Amendment in *Tuilaepa v. California,*

supra, 512 U.S. 967), it has been applied arbitrarily and in contradictory ways and violates due process and the Eighth Amendment. (SAOB 8.) He complains that virtually every fact that is part of a murder becomes a fact in aggravation, allowing arbitrary and capricious sentences to result. (SAOB 9.)

This Court has repeatedly rejected Booker's argument, and correctly found that section 190.3 adequately narrows the class of death eligible defendants. (*People v. Robinson, supra,* 37 Cal.4th 592, 655; *People v. Griffin, supra,* 33 Cal.4th 536, 596; *People v. Prieto, supra,* 30 Cal.4th 226, 276.) This Court has also found that section 190.3, factor (a), is not impermissibly overbroad, facially or as applied, and should do so again here. (*People v. Brown, supra,* 33 Cal.4th 382, 401; see, *Tuilaepa v. California, supra*, 512 U.S. at p. 987-988.)

C. The Constitution Does Not Require The Jury To Unanimously Find Beyond A Reasonable Doubt That Aggravating Factors Exist And That Aggravating Factors Outweigh Mitigating Factors

Booker complains that the jury was not required to unanimously find that any allegation of aggravating factors was true beyond a reasonable doubt and also find that aggravating factors outweighed mitigating factors beyond a reasonable doubt, before returning a death verdict. He acknowledges this was consistent with prior authority of this Court. (SAOB 11.) However, he argues again, as he did in Argument XVI, supra, that after *Apprendi v. New Jersey, supra,* 530 U.S. 466 ["*Apprendi*"]; *Ring v. Arizona, supra*, 536 U.S. 584 ["Ring"]; *Blakely v. Washington, supra,* 542 U.S. 296 and *Cunningham v. California* (2007) 549 ___ U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] ("*Cunningham*"], all aggravating factors are the functional equivalent of an element of the offense, and must unanimously be found true beyond a reasonable doubt, before the death penalty may be imposed. (SAOB 11-12.) He states that only the fact of a prior conviction is exempt from the rule that any

fact that increases the penalty over the statutory maximum which may be imposed based on the original jury verdict, must be submitted to a jury and found true beyond a reasonable doubt. (*Apprendi*, 530 U.S. at p. 478.)

Therefore, Booker again contends that the existence of an aggravating circumstance, and whether aggravating factors substantially outweigh any and all mitigating factors, are facts which are essential to imposing a death penalty, and therefore must unanimously be found true, beyond a reasonable doubt, before a death verdict may be returned. (SAOB 14-15.)

This Court has repeatedly held that *Apprendi* and *Ring* to not apply to capital sentencing proceedings. (*People v. Demetrulias, supra*, 39 Cal.4th 1 at p. 41; *People v. Snow, supra*, 30 Cal.4th at p. 126, fn. 32; *People v. Prieto*, *supra*, 30 Cal.4th at p. 275; SAOB 16.) Contrary to Booker's view, when the United States Supreme Court reversed *People v. Black* (2005) 35 Cal.4th 1238, 1254 in *Cunningham v. California, supra*, slip opinion at p. 13, as to the Determinate Sentencing Law, it did not reject this Court's reasoning that *Apprendi* and *Ring* did not apply to capital cases. (SAOB 16-18.)

Finally, according to Booker, this Court is simply wrong in holding that the maximum penalty for one convicted of first degree murder with special circumstances is death, therefore *Apprendi* does not apply. (SAOB 18.) He analogizes section 190, subdivision (a), to the range of three sentences provided in the Determinate Sentencing Law, and reasons that life in prison is the maximum penalty, absent fact findings of aggravating factors which permit the imposition of the "upper term," or death. (SAOB 17-18.) He contends that *Ring* has expressly rejected the reasoning in *Prieto* and *Demetrulias*, because the death penalty requires addition factual findings, which must be found beyond a reasonable doubt. (SAOB 19-20.)

Booker's argument is without merit. This Court continues to reject his contention that *Apprendi* and *Ring* require that aggravating factors must be tried

to a jury and found true beyond a reasonable doubt, before a death sentence may be imposed. (SAOB 22; *People v. Tafoya* (2007) 42 Cal.4th 147 (No. S047056, 2007 Cal. Lexis 8907 (*101), *People v. Davis* (2005) 36 Cal.4th 510, 571-572; *People v. Smith, supra,* 30 Cal.4th 581, 642; *People v. Ochoa* (2001) 26 Cal.4th 398, 453-454.)

Booker asserts that the facts relevant to a penalty phase trial must be found beyond a reasonable doubt. (SAOB 22-23.) This Court has repeatedly rejected the argument, finding the death penalty statute is constitutional, despite not assigning a burden of proof, whether preponderance of the evidence or beyond a reasonable doubt, as to the existence of aggravating factors, the relative weight between aggravating and mitigating factors, or the appropriateness of a death sentence. (*People v. Alfaro, supra*, slip opinion at p. 119; *People v. Stanley, supra,* 39 Cal.4th 903, 963; *People v. Brown, supra,* 33 Cal.4th at p. 401.) Booker provides no basis for revisiting that position.

Contending that the requirements of due process depend on the importance of the interest being protected, Booker argues that there is no interest more important than human life, and therefore the decision to take a life must be made by no less than proof beyond a reasonable doubt. (RT 23-24.) Thus, since the decision to take away a person's liberty must be made by proof beyond a reasonable doubt, he stresses that no lesser standard can be tolerated when the taking of a life is at stake. (SAOB 24.) Further, application of such a standard would not impinge on any State interest, and would ensure any death verdict was reliable and minimize any risk of imposing it in error. The only risk to the State from the enhanced burden of persuasion, in the event of an incorrect result, would be the confinement of the defendant to prison for life. (SAOB 25.)

This Court has repeatedly rejected this claim (*People v. Stanley, supra*, 39 Cal.4th at p. 964; *People v. Kipp, supra,* 18 Cal.4th 349, 381), and should continue to do so.

Booker contends that due process and the Eighth Amendment are violated because a death penalty jury is not required to make written findings and state reasons for its choices, which would facilitate meaningful appellate review. (SAOB 26-28.) This Court has repeatedly rejected this argument, and rejected its companion equal protection allegation. (*People v. Geier*, *supra,* 41 Cal.4th at p. 620; *People v. Stitely*, *supra,* 35 Cal.4th at p. 574.) No written jury findings are required.

Although Booker argues that a reliable death verdict requires comparative or inter-case proportionality review, this Court has declined to impose such a requirement. (SAOB 29-30; *People v. Lewis & Oliver*, *supra,* 39 Cal.4th 970, 1067; *People v. Stanley, supra*, 39 Cal.4th at p. 966; *People v. Jablonski, supra,* 37 Cal.4th 774, 837.) However, this Court does undertake intracase proportionality review when appropriate to determine whether a particular defendant's death sentence is so "grossly disproportionate" to the offense as to constitute cruel and unusual punishment under article I, section 17 of the California Constitution. (*People v. Stanley*, supra, 39 Cal.4th at p. 966.) Here, Booker's sentence is not grossly disproportionate to his crimes of slaughtering three young ladies.

Booker makes a categorical statement that it is unconstitutional to admit unadjudicated criminal acts as an aggravating factor in determining if a defendant will be put to death. (SAOB 31-32.) He adds that even if it were constitutionally permissible to admit such evidence, after *Apprendi*, *Ring*, *Blakely* and *Cunningham*, the jury would have to find beyond a reasonable doubt that the other crimes were committed, before considering it in their penalty determination. This contention has also been repeatedly rejected by this

Court. (*People v. Stanley, supra*, 39 Cal.4th at p. 962; *People v. Bolin, supra,* 18 Cal.4th 197, 335.) It is not unconstitutional to admit evidence of unadjudicated criminal acts in a penalty phase trial.

The Legislature's use of restrictive adjectives in describing mitigating circumstances is not unconstitutional. (*People v. Cook* (2007) 40 Cal.4th 1334, 1366; *People v. Panah* (2005) 35 Cal.4th 395, 499.)

This Court has rejected Booker's speculative argument that a jury faced with a determining "whether or not" a mitigating factor exists, would become confused and assume that if it did not exist as a mitigating factor, it must be an aggravating factor. (SAOB 32-35; *People v. Ramos* (2004) 34 Cal.4th 494, 530; *People v. Frye* (1998) 18 Cal.4th 894, 1027.) The trial court was not required to instruct that statutory mitigating factors were relevant solely as potential mitigators.

D. California's Death Penalty Scheme Does Not Violate The Equal Protection Clause Because It Does Not Require All Of The Procedural Safeguards Applicable To Noncapital Cases

Booker expresses concern that the California death penalty scheme seemingly provides more procedural protection to noncapital defendants than to those facing death. (SAOB 35-38.) Thus, he argues, enhancing allegations in non-death cases must be found true unanimously and beyond a reasonable doubt, and the court must state its sentencing choices on the record (SAOB 37), in the penalty phase of a capital case, the jurors need not agree on which factors are relevant or true, and need not provide a written finding of the reasons for their decision. (SAOB 38.) This Court has previously rejected Booker's argument. Thus, persons convicted under the death penalty law are manifestly not similarly situated to person convicted of a non-capital offense, and the equal protection argument is not persuasive. (*People v. Smith* (2007) 40 Cal.4th 483,

527; *People v. Stanley, supra*, 39 Cal.4th at p. 963; *People v. Rogers* (2006) 39 Cal.4th 826, 893; *People v. Blair* (2005) 36 Cal.4th 686, 754.)

E. **California' S Death Penalty Law Does Not Violate International Law**

This Court has said repeatedly that international law does not compel the elimination of capital punishment in California. (*People v. Geier, supra*, 41 Cal.4th at p. 620; *People v. Ramos* (2004) 34 Cal.4th 494, 533; *People v. Snow, supra*, 30 Cal.4th at p. 127.)

CONCLUSION

Therefore, for the foregoing reasons, respondent respectfully requests that the convictions and penalty judgment be affirmed.

Dated: September 10, 2007

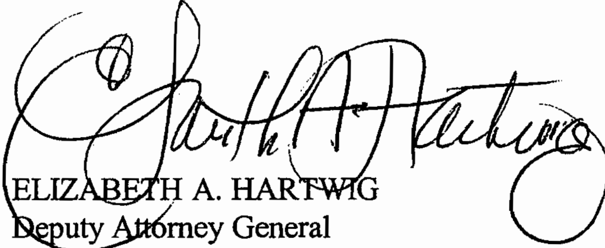
Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

ADRIANNE S. DENAULT
Deputy Attorney General



ELIZABETH A. HARTWIG
Deputy Attorney General

Attorneys for Respondent

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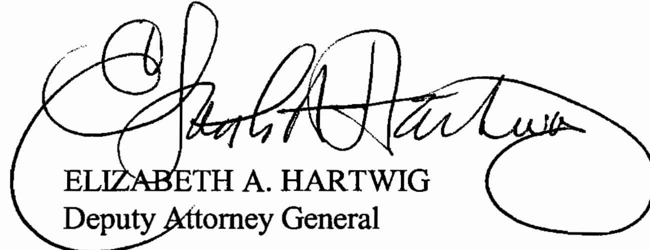
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF [CAPITAL CASE] uses a 13 point Times New Roman font and contains 72,802 words.

Dated: September 10, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



ELIZABETH A. HARTWIG
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Richard Lonnie Booker** No.: **S083899**

I declare:

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

On September 11, 2007, I served the attached **RESPONDENT'S BRIEF [CAPITAL CASE]** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Jonathan P. Milberg
Attorney at Law
300 North Lake Avenue, Suite 320
Pasadena, CA 91101
[Attorney for Appellant,
Richard Lonnie Booker - 2 Copies]

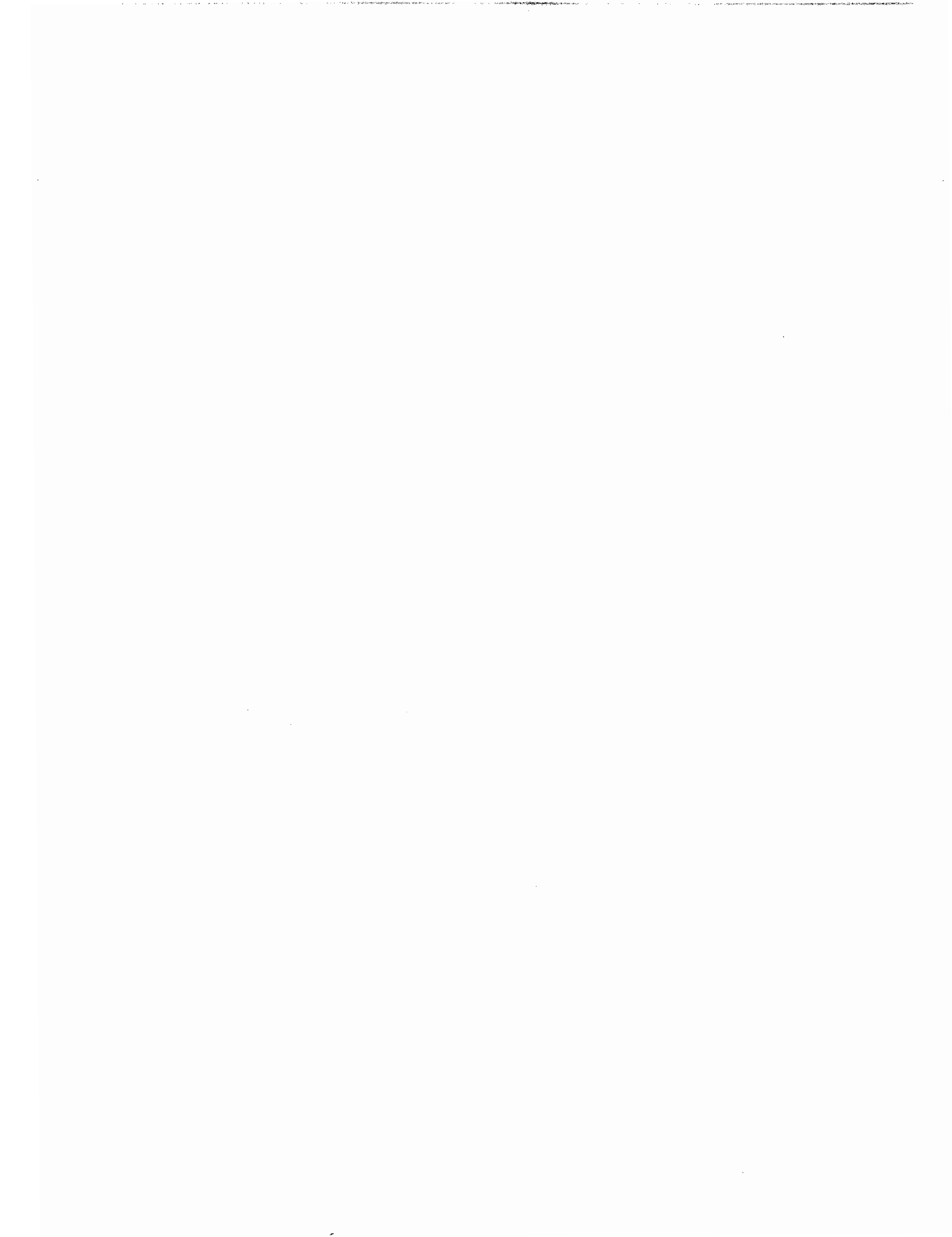
Clerk of the Court - For Delivery To:
The Honorable Edward D. Webster
Riverside County Superior Court
4050 Main Street
Riverside, CA 92501-3703

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

Valerie Hriciga, Esq.
Staff Attorney
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

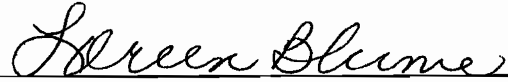
The Honorable Rod Pacheco
Riverside County D.A.'s Office,
Attention Capital Appeals
4075 Main Street
Riverside, CA 92501

[Information Copy to:
Governor's Office
Attention: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814]



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 11, 2007,** at San Diego, California.

Loreen Blume
Declarant


Signature

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