S048763 SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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**PEOPLE OF THE STATE OF CALIFORNIA,**

Plaintiff and Respondent,

**v.**

**SERGIO D. NELSON,**

Defendant and Appellant.

S048763

**CAPITAL CASE**

Los Angeles County Superior Court No. KA019560
The Honorable Clarence Stromwall, Judge

# RESPONDENT'S BRIEF

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

| PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SERGIO D. NELSON, Defendant and Appellant. | S048763 **CAPITAL CASE** |
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**PEOPLE OF THE STATE OF CALIFORNIA,**

Plaintiff and Respondent,

**v.**

**SERGIO D. NELSON,**

Defendant and Appellant.

S048763

**CAPITAL CASE**

## STATEMENT OF THE CASE

On November 18, 1993, the Los Angeles County District Attorney filed an information charging appellant in count 1 with the murder of Robin Shirley (Pen. Code, § 187), and in count two with the murder of Lee Thompson (Pen. Code, § 187). As to each count, the information further alleged the special circumstances of multiple murder (Pen. Code, § 190.2, subd. (a)(3)) and lying-in-wait (Pen. Code, § 190.2, subd. (a)(15)). Each count also alleged the personal use of a firearm (Pen. Code, § 12022.5, subd. (a). (1CT 149-151.)

On November 10, 1994, the guilt trial commenced with jury selection. (1CT 230.) On December 13, 1994, the jury found appellant guilty on both counts of murder, and found the special circumstance and firearm-use enhancements true. (2CT 365-366.)

The penalty phase began on December 14, 1995. (2CT 367.) The jury failed to reach a verdict, and the trial court declared a penalty mistrial on December 20, 1994. (2CT 417.)

On July 5, 1995, the penalty phase retrial commenced with jury selection. (2CT 435.) On August 14, 1995, the trial court dismissed one of the jurors for misconduct. (2CT 470.) On August 15, 1995, the jury returned a death verdict (2CT 526.)

On September 7, 1995, the trial court denied appellant's motions to modify the verdict and for a new trial, and imposed a sentence of death. (2CT 547.)

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

## STATEMENT OF FACTS

## I.

## GUILT PHASE

### A. Introduction

This is a case about a man who murdered his coworkers after being denied a promotion. Before the killings, appellant was an enthusiastic, dedicated worker who enjoyed his job at Target. After he applied for a promotion, he repeatedly bragged to his coworkers that he would receive the position. When Robin Shirley, an employee with more experience, was selected instead of him, he was crestfallen. He cried to his supervisor, worried that his fellow workers were taunting him, and stopped putting any effort into his job. Appellant was so upset, he confronted Shirley, angrily telling her that she did not deserve the promotion. During the confrontation, Target employee Lee Thompson, tried to defend Shirley, and appellant later threatened him, stating that he would "get him back one day." The manager disciplined appellant for his behavior, and he quit Target the next day. Appellant then embarked on a methodical plan to seek revenge against the woman who had taken the promotion he so desired. Twenty days after quitting, he dressed completely in black, armed himself with his holster and fully loaded nine-millimeter handgun, and rode his bicycle, which he had painted completely black, directly to Target in the middle of the night. He went to the exact location where he knew Shirley and Thompson, the victims, waited in the Target parking lot each day for the store to open, sneaked up on them from

behind as they sat in a car, and shot them both execution style multiple times. Appellant then fled the scene, hide the holster, gun, and bicycle, and lied to the police about his involvement in the case.

### B. Prosecution Evidence

#### 1. Appellant's Work History At Target

On May 4, 1992, appellant was hired at the Target store in La Verne located on Foothill between White and Town Center. (5RT 1482.) Appellant worked on the "push team" unloading trucks and stocking shelves. (4RT 1121.) At that time, he was living with 37 year-old Karen Horner in San Bernadino. The two were involved in an intimate relationship and had been living together since November of 1991. (4RT 1117-1118, 1208.) A few weeks after appellant was hired at Target, Horner also started working there, although in a different capacity. (4RT 1121.)

Appellant and Horner stopped living together in November or December of 1992. Appellant moved into his grandmother's house in Pomona. Horner also moved to Pomona, but she did not live with appellant. Around this time, Horner became a member of the push team at Target with appellant. While working together, appellant and Horner remained friends.[1] (4RT 1118-1122, 1230.)

Alejandro Sandoval worked as the "push team leader."[2] He supervised appellant and the other 15 to 20 members of the push team. The push team worked under receiving manager Kristin Strickland. (4RT 1120-1121, 1130, 1408-1409, 1454.) Appellant was an "excellent worker, great listener, always performing [,] always hustling, doing as he [was] told." (5RT 1410.) He was

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1. According to Horner, she and appellant socialized together and occasionally were intimate. (4RT 1118-1122.)

2. Sandoval and appellant also socialized outside of work and played basketball together about two times a week. (5RT 1421.)

eager to learn, ambitious, and he regularly assumed additional responsibilities. (5RT 1457.) On one occasion, appellant acted as the push team leader while Sandoval was on vacation. (5RT 1433-1434.)

At times, appellant raised his voice and acted demanding towards his co-workers. He sometimes assumed the posture of a supervisor despite not having that position; appellant's demeanor in this regard caused conflicts. Strickland and Sandoval spoke to appellant about these issues and offered him suggestions about ways to improve his interpersonal skills. Appellant seemed receptive to the advice and he continued to work hard. (5RT 1410-1411, 1433-1434, 1457-1458, 1460-1462.)

### 2. The Promotion Opportunity

In June of 1993, Sandoval received a promotion to department manager of home decor. As a result, his position as push team leader was vacant. The vacancy was advertised to employees in mid-June on a bulletin board inside the store. Strickland and the store manager had the responsibility of hiring the new push team leader. (5RT 1408-1410, 1435, 1454-1455.)

On June 18, 1993, appellant applied for the position. Push team member Robin Shirley (count 1) also applied for the promotion. (5RT 1412-1413, 1456, 1482.) Shirley was an excellent worker. She had worked at Target since April 22, 1991, and she got along well with her co-workers. Shirley was outgoing and a strong leader. She and appellant were "real good friends at work," and

she occasionally gave appellant a ride to work.[3] (5RT 1411-1412, 1457; 6RT 1785A.)

Even though Sandoval was not responsible for deciding who would receive the promotion, he told appellant that he thought appellant would get the job. Appellant believed that he would be awarded the promotion. He regularly told the other members of the push team that they should not apply for the team leader position because he was going to receive the promotion. Appellant expressed to Karen Horner that he wanted the position. (4RT 1125; 5RT 1414-1415.)

### 3. Appellant Fails To Receive The Promotion

Manager Kristin Strickland seriously considered both appellant and Shirley for the push team leader position. Strickland and Target's general manager ultimately chose Shirley for the promotion because she had better interpersonal skills than appellant, was able to deal effectively with different types of people, and had the ability to inspire workers. (5RT 1458-1459.)

The day before the official announcement regarding the promotion, Strickland privately advised appellant that he would not receive the position. Strickland wanted to increase appellant's self-esteem and help him understand that many people are not promoted the first time that they apply. Appellant expressed concern that his co-workers would make fun of him. He told Strickland that he no longer wanted to work at Target. Strickland encouraged

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3. Karen Horner thought that "something was going on" between appellant and Robin Shirley. Horner formed this opinion because appellant and Shirley frequently socialized at work and she knew that appellant had been to Shirley's house. Horner was jealous of Shirley. Appellant and Shirley did not invite Horner to eat lunch with them and this upset Horner. (4RT 1215-1216, 1235.) Horner did not tell anyone at Target that she and appellant previously had a romantic relationship, and she thought that appellant also did not tell any of the Target employees about their past. (4RT 1231.)

appellant not to give up and told him that she felt he had the drive and eagerness necessary for gaining a promotion someday. She explained that she had not been promoted on her first attempt. Appellant called Strickland the next day at home and told her that he did not intend to quit. He reported for work on his next scheduled day, July 11, 1993.[4] (5RT 1462-1466.)

On July 11, 1993, at approximately 6:30 a.m., Strickland announced over the store loudspeaker that Shirley received the promotion. Some members of the push team taunted and teased appellant because he had been bragging that he would get the job. (5RT 1417-1419, 1431, 1445; 6RT 1785A.)

After not receiving the promotion, appellant's performance at Target steadily declined and the conflicts he was involved with increased in severity. (5RT 1522-1523.) Appellant acted "down" and "not happy." (4RT 1128.) He told Karen Horner that he was not going to work as hard as he had previously, and Horner told appellant that he should have been promoted because he was quicker and knew the job better than Shirley. (4RT 1127, 1129, 1133-1134, 1136.) Appellant's work performance dropped noticeably. "[H]e was . . . real slow, sluggish, didn't move too much," and he no longer volunteered for extra work. (5RT 1419-1420.) Appellant was depressed all of the time. He kept to himself, and his friendly relationship with Shirley ended. Shirley asked Karen Strickland for advice regarding how she should handle appellant's performance issues. (5RT 1419-1420, 1512, 1523)

About one week after Shirley received the promotion, Sandoval was working in the receiving area when appellant walked into the room. He appeared angry and told Sandoval that he deserved the promotion. Then, appellant started to cry. About two and a half weeks later, when the two men

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4. Appellant submitted a form indicating that he intended to resign and that his last day of work would be July 10, 1993. However, appellant changed his mind and continued working at Target. (5RT 1484-1486.)

were alone again in receiving, Sandoval asked appellant if he could do anything to help. Appellant remained quiet and did not respond. (5RT 1421-1424.)

On August 23, 1993, about six weeks after Shirley had received the promotion, Lee Thompson (count 2) started working at Target. (5RT 1525-1526.) Thompson's friend, Robert Comeau began working at Target on September 4, 1993. The two men had been friends for one-and-half years and they were both members of the push team.[5] (5RT 1375-1377; 6RT 1786.) A few days after Comeau started working, he was in the stockroom with Shirley and Thompson when appellant entered the room. Appellant appeared aggravated and angry. Appellant told Shirley that he deserved the promotion and that she "did not deserve the dollar a [sic] hour raise or promotion." Thompson said to appellant, "Why don't you leave, stop - - it's like bugging her, like harassing," and also stated that he did not want any problems to start. When Comeau moved forward from where he had been standing behind Shirley, appellant left the stockroom. (5RT 1375-1384, 1392.)

A few days later, Comeau was in the housewares area of the stockroom when he heard the radio "flick" on and off, and heard Thompson speaking in an upset tone. Comeau also heard another voice that he could not identify. When Comeau walked closer to the voices, he saw Thompson and appellant standing face to face a few feet from each other. Appellant told Thompson that he "will get him, he will get him back one day." It appeared as though the men were about to physically fight. Comeau told Thompson not to fight because

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5. According to Robert Comeau, a group of workers, including himself, Lee Thompson, and Shirley, often spent time together during lunch and breaks. Sometimes Shirley and Thompson ate lunch alone. (5RT 1405-1406.)

they would all get fired, and then he pushed Thompson away from the area.[6] (5RT 1384-1387.)

The next day, September 11, 1993, appellant received a "phase two warning notice" for engaging in "conduct that causes the work place to be intolerable for other workers." Strickland had learned from various employees that appellant had been a problem in the workplace. She explained to appellant that he was receiving the notice because of negative comments he made in the workplace about Shirley. Throughout the meeting appellant sat with his arms crossed. As to the specific allegations, he either denied knowing about the incidents or denied that he engaged in the conduct. Appellant signed the phase two warning which stated that if he did not comply with company requirements within 15 days he would be terminated. That same day, appellant submitted a resignation form and that was that last day he worked at Target. (5RT 1486-1493, 1496-1499.)

**4. The Day Before The Murders**

On October 1, 1993, appellant was living with his cousin, Alexander Cosey, and other family members in a house on Lebee Street in Pomona. Cosey and appellant shared a bedroom. At approximately 2:00 p.m., appellant's friend, Johnny Lopez, arrived at appellant's house so they could install a radio in Lopez's truck. Cosey arrived home at about this time and went into his bedroom. Appellant entered the room for less than two minutes sometime between 4:00 and 4:30 p.m. (4RT 1287-1291, 1324.)

Appellant and Lopez worked at the house for a few hours and then went to Lopez's house where they continued working on the truck. Sometime

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6. Comeau was later fired from Target for his participation with other employees in a fraudulent credit card scam. He signed an agreement to repay Target for the loss, and at the time of trial, was making payments towards that debt. (5RT 1387-1389.)

between 7:00 and 8:00 p.m., Lopez drove appellant back to his house, and then dropped him off at Ontario High School for football practice. Throughout their time together that day, appellant appeared "normal." (4RT 1325-1327.)

Later than evening, at approximately 8:00 p.m., Cosey saw appellant in the living room watching a movie with Cosey's mother and siblings. Appellant appeared "normal" that evening. Cosey left the house at 10:00 p.m. He spent the night at a friend's house and when he returned at 6:00 a.m. appellant was not at the house. (4RT 1292-1293.)

**5. The Murders**

On October 2, 1993, at approximately 3:30 a.m., Richard Hart and an acquaintance were at a 7-Eleven store near Foothill and Town Center Drive in La Verne when Hart heard a sound similar to gunfire emanating from the area of Target. He heard the sound between 5 and 8 times. When he looked towards Target, he saw a "muzzle flash" coming from the area where appellant[7] was standing next to Robin Shirley's silver truck and a brown Plymouth that belonged to Lee Thompson's mother.[8] (4RT 1141; 5RT 1377, 1446-1447.) Appellant appeared to be firing the gun into the Plymouth. After firing,

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7. At trial, appellant's counsel conceded that appellant was the shooter and that he killed the victims. (10RT 2811-2862.) In addition, Hart identified appellant as the shooter in court during the trial and during a live, six-person lineup at the Los Angeles County jail on October 14, 1993. At the live lineup, Hart noted that appellant's hair was shorter than on the night of the murders when it stuck out of his baseball cap and hung down to his shoulders. (3RT 1039, 1044-1048.)

8. Shirley regularly parked her truck in that area of the Target parking lot. Shirley and Lee, as well as other employees who arrived early, would gather in that area and sit in their cars while talking or listening to the radio. It was not uncommon for Shirley and Thompson to be together outside the store before work. (4RT 1142; 5RT 1377, 1404, 1446.)

appellant walked about 10 or 15 feet away from the car towards the sidewalk in front of Target. Hart heard a "gurgling" or "rumbling" noise coming from the area of the cars. Appellant immediately walked back to the car and fired two or three more rounds into the Plymouth. Appellant again walked towards the sidewalk. When Hart's acquaintance yelled out, "You shouldn't have done it that way," appellant turned and Hart saw his face. Appellant was wearing all black clothing and a black baseball cap. When appellant arrived at the end of sidewalk, he appeared to either adjust his pants or put something into his pants. Hart called 911 from a payphone in the 7-Eleven parking lot. (3RT 1027-1040.)

Police Officer Larry Ross responded to the radio call regarding the shooting at Target. When he arrived he observed Robin Shirley in the front passenger seat of the brown Plymouth. Her head was tilted towards the left, her body leaned towards the center console, and she had a bullet wound to her head. Lee Thompson was in the driver's seat, slumped over with his bloody head on the right floorboard. The driver's seat was somewhat reclined. All of the car doors were closed. Both of the front windows were rolled up and the two rear windows were each rolled about halfway down. Officer Ross smelled and saw smoke from recent gunfire inside the car. The radio was on and the car keys were in the ignition. After checking Shirley and Thompson for vital signs, Officer Ross concluded that they were dead. Officer Ross photographed the victims' bodies to record their positions in the car. Later, when the coroner removed the victims from the car, Officer Ross noted that Shirley wore a fanny pack with her wallet and identification inside, and that Thompson had a wallet in his back pocket. None of the victims' personal items appeared to have been disturbed. Once the victims' bodies were removed from the Plymouth, it was impounded at the La Verne Police Department. (4RT 1080-1088, 1090, 1092; 5RT 1578, 1581.)

Sergeant Carlton Williams responded to the murder scene at Target and observed a man resembling appellant [9] traveling southbound on the west side of White Avenue on a dark black G.T. bicycle.[10] When Sergeant Williams illuminated the man on the bicycle with a spotlight, he abruptly made a U-turn and quickly rode northbound on White Avenue. Sergeant Williams pursued the bicyclist for approximately one and a half miles. When the bicyclist reached a dirt field, he abandoned the bicycle. Sergeant Williams exited his car as the bicyclist ran across the field and disappeared into a commercial complex. The bicyclist was not found, but Sergeant Williams confiscated the bicycle. (4RT 1102-1114.)

### 6. Events Following The Murders

Karen Horner arrived for work at Target at 4:30 a.m. (4RT 1140.) She saw the crime scene and heard a rumor that two people had been killed. (4RT 1140, 1174.) A co-worker named Carlos commented to Horner that appellant may have been involved in the incident. (4RT 1174.) At approximately 5:30 a.m., Horner asked manager Karen Strickland if she could use the telephone so

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9. At trial, Sergeant Williams testified that he could not identify the man on the bicycle. However, he testified that appellant's physical stature was consistent with the man who fled from him on the bicycle on October 2, 1993. (4RT 1113-1114.)

10. The bicycle belonged to appellant's cousin, Alexander Cosey. Cosey, his brother, and appellant used the bicycle. (4RT 1309-1310.) Prior to the murders, the bicycle had been in Michelle Horner's backyard, but she did not want it there anymore, so she asked her mother-in-law, Karen Horner, to have appellant remove it. Michelle Horner's husband had painted the bicycle green and it had flat tires. (4RT 1242-1245.) A couple of weeks before the murders appellant painted the bicycle black using paint that Karen Horner had purchased. (4RT 1194-1195.) Appellant also owned a mountain bicycle that was at Cosey's house at the time of the trial. (4RT 1310.)

that she could locate appellant. Horner was shaking and crying. Strickland allowed Horner to use the telephone in the receiving office to make two calls. Horner told Strickland that she wanted to leave Target, and Strickland advised her to have someone pick her up because she was so upset. (5RT 1449-1452.)

Horner called Alex Cosey and asked him to pick her up because she wanted to leave work to look for appellant. (4RT 1145-1146, 1148-1149, 1164-1165, 1175-1176, 1288.) Horner was extremely nervous and frantic. She told Cosey that two people were dead at Target. (4RT 1294-1295.) Cosey told Horner that he had not seen appellant. (4RT 1175, 1288, 1294.) Horner then called Johnny Lopez, who told her that he had not seen appellant. Horner sounded scared during the conversation. (4RT 1177, 1328-1329.) At that same time, Cosey called Lopez and said that he thought something might have happened to appellant. (4RT 1327-1328.)

Lopez picked up Cosey in Lopez's mother's Toyota Corolla, and they drove to Target where they picked up Horner. (4RT 1296, 1329-1330.) At Horner's request, they drove to the area of White and First Streets where Horner had seen police activity as she was driving to work earlier that morning. They then drove to a pay phone at a 7-Eleven on Dudley Street where Lopez called appellant's pager at approximately 7:24 a.m. (4RT 1178-1183, 1297-1299, 1330-1335; 6RT 1791-1793.) At that same time, appellant appeared across the street. He was wearing a dark baseball cap and dark clothing.[11] His shirt looked dusty as if it had been on the ground. Horner approached appellant and asked where he had been, but he did not answer her question. When Horner told him that there were two dead people at Target, appellant responded, "Who? Robin and Lee?" (4RT 1183-1186, 1301, 1335-1337, 1340.)

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11. Cosey and Lopez testified that most of appellant's clothes were dark. (4RT 1314-1315, 1355.)

Horner and appellant then drove with Cosey and Lopez towards appellant's house on Leebe Street located approximately six miles from Target. (4RT 1203, 1299-1302, 1341; 6RT 1805.) Horner and appellant sat in the backseat of the vehicle. While in the car, Horner asked appellant where his gun was, and he responded by pulling down his waistband and showing her where he had it concealed. Horner had previously seen the gun and a black nylon holster that appellant owned.[12] (4RT 1187-1189.) At appellant's direction, Lopez drove on back streets towards appellant's house until appellant told him to stop at the railroad tracks behind his house. Appellant exited the car, and walked along the railroad tracks towards the back of his house.[13] (4RT 1189-1191, 1337-1340, 1350.) Appellant had the gun with him when he left the car, and as he exited, Horner observed what appeared to be the straps of the black holster. (4RT 1192, 1195-1196.)

Horner, Cosey, and Lopez then drove to the front of appellant's house. Cosey entered the house and retrieved a cordless phone so that Horner could call her daughter-in-law, Michelle. Appellant was inside the house. While Lopez and Horner were alone in the car, Horner started talking about the need

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12. Alexander Cosey gave appellant the gun in June of 1993 after the Cosey family was threatened by a local gang. (4RT 1316-1320.) Cosey saw appellant with the gun a couple of weeks before the murders and, on other occasions, he had seen the gun under appellant's pillow. (4RT 1308-1309.) Johnny Lopez had seen appellant with a nine-millimeter gun in June of 1993. He also saw a dark-colored holster that appellant owned. (4RT 1343-1344, 1360.) Appellant's cousin, Philip Davis, thought that appellant carried the gun for protection. (5RT 1695-1697.)

13. Horner and Cosey contradicted Lopez's testimony that appellant requested to be dropped off at the railroad tracks; they each claimed that it was their idea to leave appellant at the railroad tracks. (4RT 1202, 1302-1303.) However, Lopez told the police on October 2, 1993, that appellant asked to be dropped off at the railroad tracks and confirmed this fact during his testimony at trial. (4RT 1350.)

to create an alibi for appellant. She asked Lopez if he knew any girls that would lie and say that they had been with appellant that night. Lopez told Horner he did not want to be involved in creating an alibi for appellant. (4RT 1192-1193, 1304-1307, 1341-1343.)

Appellant stayed home and watched television for the remainder of the day. (5RT 1649.) When Cosey returned to the house at 6:00 p.m., appellant was in the bedroom watching television. (4RT 1307-1308.)

### 7. The Autopsies And Crime Scene Investigation

On the day of the murders, Detective Dale Nancarrow recovered seven silver expended shell casings from the following locations in and around the Plymouth: (1) on top of a pair of socks that were on the back seat of the car; (2) underneath the socks that were on the back seat of the car; (3) under the seat near the left rear floor board; (4) on the rear seat; (5) on top of a black and white plaid jacket that was laying on the back seat; (6) on the driver's seat behind Thompson's slumped over body; and (7) outside of the car on the ground, directly behind the rear quarter panel of the vehicle. An expended bullet was found on the front passenger seat behind Shirley's body, and a second was discovered inside the front passenger side door panel. (5RT 1575-1589.)

On October 4, 1993, Detective Pickwith discovered appellant's black nylon holster hidden in some bushes in the area near the railroad tracks off Ridgeway Street where appellant had exited the Toyota Corolla on October 2, 1993. On October 5, 1993, Community Service Officer William Witzka discovered appellant's silver, Tarus nine-millimeter semi-automatic handgun, buried in sand under a cinder block in the same area which was approximately 335 feet from appellant's house. When Detective Nancarrow seized the gun, he discovered a magazine in the holder and a live round in the chamber. The

casings on the ammunition inside the gun were silver. Later, fingerprint expert Detective James O'Brien found six live rounds of ammunition in the magazine. He did not recover any fingerprints from the gun. (4RT 1362-1366; 5RT 1591-1594, 1598, 1607, 6RT 1787-1790, 1796-1798.) Appellant's cousin, Philip Davis, identified the gun at trial as belonging to appellant. (5RT 1693-1694.)

Based on a diagram depicting the car and location of the shell casings, firearms examiner Deputy Van Horn opined that it would be possible for the casing found outside the car to land on the ground if the gun had been fired from close to the open left rear window into the Plymouth. The other casing would have landed inside the car if the weapon was fired from more inside the car. Deputy Dwight Van Horn determined that the seven live rounds found in appellant's gun and two of the shell casings recovered from the murder scene were Winchester nine-millimeter caliber, marketed as black Talon ammunition. He was unable to make an absolute comparison between the shell casing and the gun. However, the widths of the land and groove measurements on the gun were the same as the expended bullets. All seven of the expended nine-millimeter caliber cartridge cases came from the gun and the expended bullets were consistent with having come from the cartridge cases. The test results were conclusive as to whether the expended bullets recovered by the coroner came from the gun. (5RT 1658-1692.)

October 3, 1993, Los Angles County Senior Deputy Medical Examiner Dr. James Ribe performed autopsies on Robin Shirley and Lee Thompson. He concluded that the cause of death for each victim was multiple gunshot wounds. Shirley suffered three gunshot wounds: (1) an entrance wound to her upper, middle forehead that was inflicted from a distance of one to four inches (the bullet traveled from the top of her head down through her brain, slightly to the right, and lodged in her throat); (2) an entrance wound to the left, backside of her neck (the bullet traveled through her spinal cord and neck, then exited on

the right side of her lower jaw); and (3) a grazing wound on the top of the left shoulder (the bullet traveled in a left to right direction). The first two gunshots were concurrent causes of death and killed Shirley within seconds or minutes. (5RT 1544-1558, 1572.)

Thompson suffered five gunshot wounds: (1) an entrance wound to the left temple that was inflicted from a distance of one-half an inch to 24 inches (the bullet traveled behind the left eye socket, through the brain, and exited in the right, upper back of the head); (2) an entrance wound below the left shoulder blade in the upper left back (the bullet traveled upwards and lodged between the left shoulder blade and back); (3) an entrance wound to the left back, several inches below wound number two (the bullet traveled sharply upward through the left lung and neck until it lodged in the nasal cavity); (4) an entrance wound one and a half inches to the right of gunshot number 3 (the bullet traveled through the lower left lung and lodged in the back bone behind the heart); and (5) an entrance wound to the lower left back (the bullet traveled upwards through the left lung, bounced off the right collar bone, and lodged in the right base on the neck). The four wound wounds to the back were similar in that all of the bullets traveled from the back of Thompson's body to the front in an upwards direction which was consistent with Thompson being tilted forward as the wounds were inflicted. Dr. Ribe could not determine the distance from which the four back wounds were inflicted. All of the gunshot wounds were fatal, except for gunshot number 2, and all of the shots were inflicted before Thompson died. (5RT 1558-1573.)

Senior criminalist Elizabeth Devine examined photographs of the victims and the car, inspected the car, reviewed the autopsy reports and protocol, talked with the detectives who investigated the murders and to the pathologist who performed autopsies, and visited the scene of the crimes. Based on her investigation, Devine concluded that all of the bullets were fired

from the left rear open window of the vehicle, that the first round fired was the through-and-through bullet wound to Robin Shirley's neck, that the second round fired was to Thompson's temple, and that the other rounds were fired afterwards. (5RT 1607, 1632-1647.)

Throughout the investigation, which included interviews with numerous Target employees as well as appellant's family members and friends, the investigating officers never uncovered any evidence of a romantic or dating relationship between appellant and Robin Shirley. In addition, the police never discovered any evidence of a "lover's triangle" between appellant, Robin Shirley, and Lee Thompson. (6RT 1760-1762.)

### 8. Appellant's Arrest And Statements To The Police

At 8:00 p.m., on October 2, 1993, Lieutenant Carl Brubaker and other police officers executed a search warrant at appellant's house. They recovered a pager in appellant's bedroom and arrested appellant. After appellant was advised of and waived his *Miranda* rights, he provided the following information during an interview conducted by Lieutenant Brubaker at 11:15 p.m. (5RT 1703-1709; 6RT 1726.)

Appellant denied that he was angry when Robin Shirley received the promotion. He claimed that he "just didn't feel much, I didn't feel myself . . . I wasn't angry or nothing, I just didn't feel all capable of performing the way I used to . . . ." Appellant denied knowing that Shirley had been murdered. He claimed that his aunt, Yvonne, told him at 1:00 or 2:00 p.m. that she heard on the radio that two people who were not Target employees had been killed and dumped at Target. Upon being told that he was the suspect, appellant denied committing the crimes and denied being present at the murder scene.

Appellant said that he had gone to sleep at 12:30 a.m., the night of the murders, that he woke up at 7:00 a.m., went running, returned to the house at

7:30 a.m., and then went back to sleep until 11:00 a.m. He stated that he stayed home all day. Appellant claimed that his cousin Alex's bicycle had been stolen two days earlier at the Indian Hill Mall, but he did not report the theft to the police. Appellant said that he had recently painted the bicycle black. Appellant said that Alex had been home the night of the murder and that he went running with appellant the next morning. Appellant denied talking to or seeing Karen Horner that day. He said that he talked to her the night of the murders at 10:00 or 11:00 p.m. (Supp. III 1CT 269-279, Ex. 35, transcript of 10/2/93 interview.)

On October 4, 1993, at 10:00 a.m., the police interviewed appellant again at the La Verne Police Department. Appellant had been in custody since the first interview and he again was advised of and waived his *Miranda* rights. He told the police the following information.

Appellant said that from the time he went to bed on the night of the murders until his arrest the following day, he never left his neighborhood. His cousin Alex went running with him by the railroad tracks the morning after the murders. He told the police that two of his bicycles had been stolen at the Indian Hill Mall. When the police showed appellant the bicycle that had been recovered on the night of the murders, appellant identified it as belonging to his cousin Alex. Appellant said that he did not know Lee Thompson and that Thompson had only worked at Target for a few days before appellant quit. Appellant explained that he quit Target because he "couldn't work there mentally" and because Kristin Strickland had accused him of "bad mouthing the other employees." Appellant said that he had stopped socializing with other employees about two weeks before Robin Shirley received the promotion because the other employees were "talking too much and saying a bunch of lies." Appellant said that Strickland told him that one of the reasons he did not receive the promotion was because he had been bragging to the employees that he was going to get the job; appellant denied any such bragging. Appellant said

that he and Shirley had been friends and socialized before she was promoted, but after the promotion they did not talk. Appellant said that before the promotion, he, Alex Sandoval, and Shirley would arrive at Target early in the morning and wait for Strickland to open the store. Appellant knew that Shirley had three cars, including a silver truck that she had driven sometimes when she gave appellant a ride to work. Appellant did not know who committed the murders and commented that it was a "sad situation."

Appellant's Volkswagen car had not been running properly, and he had a suspended driver's license, so he had been getting rides from Karen Horner, Johnny Lopez, and his cousin, Alex. He claimed that he only rode the black bicycle for two days after he painted it and fixed the flat tire before it was stolen. Appellant said that he used to own a chrome nine-millimeter gun with a rosewood grip that he bought from his cousin Alex three or four months earlier for $100, but that he never bought any bullets for the gun. Appellant also owned a black nylon holster his friend Victor Gomez gave him. Appellant claimed that he threw the gun away in the trash the day after he quit Target because the Pomona police had confiscated another gun from his house the night before. That gun was a 38 revolver and belonged to his cousin's friend. When appellant's uncle saw the gun in the house he called the police.

Appellant explained that he used to live with Karen Horner in San Bernadino and that they had a romantic relationship, but had broken up in December of 1992. The day of the murders, Johnny Lopez gave appellant a ride to football practice and his cousin Philip Davis gave him a ride home. Appellant denied ever getting mad at or threatening Robin Shirley or telling anyone that he was mad at her for receiving the promotion. Appellant admitted owning a pager but denied that the code 007 which the police had found on the pager when they seized it meant anything to him. Appellant did not know what kind of car Lee Thompson drove, but he saw him arrive at work on one

occasion on a motorcycle. (Supp. III 2CT 281-315; Ex. 37, transcript of 10/4/93 interview.)

Later in the day on October 4, 1993, the police spoke with appellant again, but the interview was not recorded. When Lieutenant Brubaker showed appellant the black holster that the police had recovered during their investigation appellant admitted he owned it. (6RT 1727-1729.)

On October 5, 1993, Detectives Nancarrow and Coyles showed appellant the nine-millimeter Tarus gun recovered during the investigation. Appellant admitted that he owned the gun, but claimed that he had not seen the gun since the previous week when he threw it in a trash dumpster in front of his house. The gun did not contain any rounds of ammunition when appellant threw it away. Appellant threw the gun away because Pomona police officers had been at his house and told him that if the gun ended up in the wrong hands, appellant could be charged with second degree murder. When the detectives asked for details about that incident, appellant said that he did not want to discuss the matter any further and the interview ended. (Supp. III 1CT 18, 208-210; Ex. 43.)

## C. Defense Evidence

Appellant did not testify at trial. Appellant's trial counsel presented very limited evidence regarding the murders. The majority of the defense evidence consisted of testimony from appellant's friends and co-workers regarding his character, problems with depression, relationship with Karen Horner, and friendship with Horner's daughter, Valerie. In addition, three doctors testified about appellant's mental health.

### 1. Testimony Regarding Events Preceding The Murders And The Day Of The Murders

Karen Horner's daughter-in-law, Michelle Horner, testified that appellant's bicycle was at her house for about four to six months. Her husband, Alan Horner, and his father had painted the bicycle green "as a joke" in 1989 or 1990. Two or three weeks before the murders, on a Thursday, Michelle told her mother-in-law, Karen Horner, to remove the bicycle or she would put in the trash which would be collected on the following Tuesday. Thereafter, Michelle observed appellant spray paint the entire bicycle black, including the wheels. (7RT 2007-2046.)

Michelle Horner also testified that the day before the murders (Thursday), appellant accompanied Alan, Michelle, Karen, and Michelle's younger sister to the Los Angeles County Fair from 11:00 a.m. to 11:00 p.m. The group stayed together the entire time. Appellant did not act in any unusual manner; he appeared to be the "same person" Michelle had always known. She never knew appellant to take drugs or drink alcohol.

At 6:50 a.m., on October 2, 1993, Karen Horner called Michelle in "hysterics" saying something about appellant and asking Michelle to pick her up at Target. When Michelle arrived at Target, Karen was not there. Michelle eventually found her at appellant's house. They went back to Target where

Karen was approached by detectives who wanted to interview her. Michelle went back to her house. Appellant called the house once or twice that day looking for Karen, and Michelle told him that Karen was at a birthday party even though she knew that Karen was at the police station. (7RT 2007-2046.)

**2. Testimony Regarding Target And Appellant's Work Habits**

Tracy Robinson was friends with Robin Shirley and a member of the push team when appellant worked at Target. Robinson testified that she was not friends with appellant, but she knew that he was a hard worker. Robinson knew that Robin Shirley was separated from her husband and she described Shirley as "flirty." Shirley told Robinson that she thought Target employees Ray Nieto and Justin McGruder were cute. Robinson described Shirley as acting very friendly with a lot of the new male employees at Target, including Lee Thompson. Shirley told Robinson that Thompson was "very cute" and that she liked him a lot. Robinson observed Shirley and Thompson eat lunch together and talk a lot at work, but she never saw them leave work together. (6RT 1834-1857.)

Shirley also told Robinson that appellant liked her and had made an advance towards her, but that she did not like him in a romantic sense. Despite this, the two remained friends. Robinson observed appellant and Shirley eat lunch together and share rides to work, but never knew of them dating or socializing outside of Target. (6RT 1834-1857.) Appellant's cousin, Alexander Cosey, characterized appellant's relationship with Robin Shirley as "a little buddy, buddy relationship." (6RT 1965-1975.)

Elizabeth Rylander worked at Target until May 1993. She was friends with Robin Shirley, but not with appellant. Rylander testified that Shirley told her that appellant had touched Shirley and pinched her buttocks; Rylander claimed to have seen this occur. Even though Shirley did not have romantic

feelings for appellant, they remained friends at work. Rylander and appellant once visited Shirley in the hospital. Shirley told Rylander that she liked Target employee Justin McGruger. (6RT 18970-1906.)

In May 1993, Ray Nieto started working at Target on the push team. At the time of trial, Nieto had known appellant for 13 years. Starting in third grade, appellant often lived with Nieto and his family because appellant's mother was not around. Nieto resigned in early August of 1993, due in part to appellant constantly pressuring him at work and telling him what to do. Nieto did not know of any kind of dating relationship between appellant and Robin Shirley. Shirley flirted with Nieto and told him that he was cute, but Nieto had a girlfriend, so he told Tracy Robinson that he was not interested in Shirley. Nieto did not know if appellant was aware of Shirley's flirtation with him. (6RT 1859-1889.)

Tracy Robinson testified that she once saw appellant tell Lee Thompson how to stack boxes and Thompson was annoyed at the comment. Robinson was present during the incident involving appellant, Thompson, and the radio. She did not hear the details of the dispute, but Thompson walked by her after the fight and said that he could "take care of it later and that he was pissed." After appellant failed to receive the promotion, he appeared sad and did not seem to care about his work. She no longer saw appellant and Shirley have lunch together or share rides to work. (6RT 1834-1857.)

Frances Voss worked at Target and was friends with appellant. After appellant failed to receive the promotion to push team leader, he was "devastated" because he really believed that he would get the job. Appellant wanted to quit, but Voss urged him to stay at Target. Voss felt uncomfortable around Lee Thompson because he once asked her if she had a happy marriage. Voss thought that Robin Shirley was very friendly to everyone at Target and she never saw evidence that Shirley was intimate with any of the employees.

Shirley never expressed to Voss that she had feelings for Lee Thompson. Voss supervised Karen Horner and characterized her as a very good worker but a "slow learner." Voss only knew that appellant and Horner were friends; she did not know of their romantic history. (6RT 1907-1935.)

Charles McGruder testified that his son, Justin McGruder, worked at Target in 1992. During that time, Robin Shirley called the McGruder house several times a week to speak with Justin, but he would tell his parents that he did not want to talk to her. When Justin was admitted to the hospital in late 1992, appellant and Shirley visited him. On one occasion, Karen Horner spoke rudely to Charles McGruder's daughter, Karen McGruder, about appellant being infatuated with Karen McGruder. Charles McGruder got the impression that appellant was interested in Karen McGruder. (7RT 1999-2006.)

### 3. Testimony Regarding Appellant's Friendship With Karen Horner's Daughter, Valerie

Karen Horner's daughter, Valerie Horner, testified that she met appellant in 1987 or 1988 when they attended junior high school together. Appellant and her older brother, Alan, were very close friends, and appellant was at the Horner's house almost daily during the summer of 1991. Valerie and appellant became very close friends. They talked to each other about "practically everything" and they "understood each other." Appellant told Valerie that he did not get along with his mother's boyfriend and that his mother did not pay attention to him.

During August of 1991, Karen Horner became upset when daughter Valerie, appellant, and Valerie's cousins were in Valerie's bedroom with the door closed. Valerie was sent to Santa Rosa to stay with her cousins until school started in the fall. Valerie and appellant were both 17 that fall and seniors at Ganesha High School. Appellant started skipping classes and

eventually dropped out of school at the end of the fall semester. Valerie and appellant were very good friends, but they never had a sexual relationship even though appellant expressed that he liked Valerie as more than a friend. Throughout their friendship, Valerie maintained romantic relationships with other boys.

Around September 19, 1991, Valerie's sister-in-law and father told her that her mother and appellant were having an affair. Karen Horner moved out of the family's house about a month later and started living with appellant in San Bernadino. Valerie told appellant that she no longer wanted to be friends, but she would still speak to appellant when he called her about once a month. (7RT 2080-2127.)

Valerie testified that one evening in February of 1992, appellant called Valerie and he seemed very depressed. He picked her up from school the next morning and they drove to the trailer park in San Bernadino where appellant was living with her mother. Once they arrived, appellant confirmed that Karen was not in the trailer before allowing Valerie to enter. Appellant talked about feeling depressed and that he felt there was not reason to live. Appellant looked very thin. Valerie testified that appellant often spoke this way. During the course of the conversation, the two engaged in sexual intercourse because Valerie felt sorry for appellant and she wanted to "get back" at her mother. Appellant told Karen about the sexual incident with her daughter. Karen tried to physically hurt Valerie and when her father found out, he told Valerie not to see appellant anymore.

After the incident, appellant would call Valerie about once a month. The two continued to talk to each other about their respective personal problems, but they never had sex again. Valerie discovered she was pregnant and thought that appellant might be the father. Appellant expressed that he hoped he was the baby's father, however, it was ultimately determined that he was not the father.

When she first became pregnant, Valerie learned that her mother had had an abortion, and that Karen did not know who fathered the child. Valerie and appellant never discussed her mother's abortion.

In April of 1993, appellant and Valerie stopped talking to each other. They did not speak the entire summer of 1993. At that time, Valerie had delivered her baby and started living with the baby's father. Appellant called Valerie while he was in jail after the murders. (7RT 2080-2127.)

#### 4. Testimony Regarding Appellant's Relationship With Karen Horner

Ray Nieto testified that appellant moved out of his mother's house in 1992 because he was angry at her for interfering in his relationship with Karen Horner. Nieto knew that appellant's mother did not approve of his relationship with Horner. While appellant was involved with Horner, Nieto and appellant did not socialize very often because Nieto did not like appellant spending time with Horner. Neito thought that Horner was possessive of appellant and that she dominated him. Nieto did not approve of the relationship because Horner was older and "she wasn't all there in a way." (6RT 1859-1889.)

Michelle Horner, Karen Horner's daughter-in-law, testified in detail about appellant and Karen Horner's relationship. The couple lived with Michelle Horner and her husband, Alan Horner, in September and October of 1992. Appellant and Karen Horner then moved into a trailer owned by Michelle in San Bernadino. In November or December of 1992, appellant kept hanging up the phone while Alan was trying to talk with his mother, so he and Michelle drove to the trailer. When they arrived, appellant would not allow them into the trailer, nor allow Karen to leave the trailer. After an hour and a half, appellant allowed Michelle to enter to use the bathroom.

Michelle testified that throughout appellant and Karen's relationship, appellant was controlling of Karen. Appellant would not allow Karen to visit her son, Alan, or attend family events. Michelle observed bruises on Karen's hands that she believed appellant inflicted. Karen did not push appellant around, nor influence him while the two lived with Michelle. Karen moved back in with her son and daughter-in-law in March of 1993 and was still living with them at the time of the trial. (7RT 2007-2046.)

Michelle Horner testified that between the time that appellant quit working at Target and the murders, Karen called appellant on a daily basis. During the telephone conversations, she accused appellant of flirting with his co-workers, she called Robin Shirley a "whore" and a "bitch," and she said that appellant should have received the promotion to push team leader. Michelle testified that Karen "accused everyone" and was a jealous person. Karen did not seem mad during the telephone conversations with appellant. (7RT 2007-2046.) Yvonne Cosey testified that during this time, Karen often came to the house on Lebee and that she frequently called the house looking for appellant. According to Cosey, Karen appeared to care a great deal for appellant and gave him rides to work at Target. (6RT 1937-1964.)

Appellant's cousin, Alexander Cosey, shared a bedroom with appellant while appellant lived at the house on Lebee. Karen Horner frequently visited the house. Cosey heard appellant have telephone conversations with Karen, her daughter Valerie, and Robin Shirley. He observed appellant and Karen Horner argue sometimes at the house. Appellant maintained secret contact with Valerie through phone calls and letters. After appellant stopped working at Target, Karen Horner called the house five or six times a day. (6RT 1965-1975.)

### 5. Testimony Regarding Appellant's Mental Health

#### a. Opinions Of Appellant's Friends And Co-Workers Regarding His Depression

Appellant's aunt, Yvonne Cosey, testified that appellant's mother (Cosey's sister) kicked appellant out of her home on Thanksgiving in 1991. At that time, appellant appeared depressed and he looked anorexic. Cosey asked appellant's mother if appellant could live with her family, but she said "no." Cosey felt that appellant's mother neglected appellant and his older brother, and that her priorities were with her job and boyfriend. The boyfriend was verbally abusive to appellant. Sometime after the incident on Thanksgiving, appellant began living with Horner in San Bernadino. Appellant never told Yvonne Cosey that the two were involved in an intimate relationship. (6RT 1937-1964.)

Yvonne Cosey testified that appellant moved in with her family at the house on Lebee in June of 1993. Appellant bought a Volkswagon car in July of 1993 and spent a lot of time restoring it. During September of 1993, appellant became very quiet and withdrawn. Appellant stopped eating dinner with the family and no longer spent time working on his car. Cosey did not know that appellant had quit his job at Target on September 11, 1993. She thought that she may have caused the changes in appellant because in early September she was laid off from her job and asked appellant, as well as her sons, to contribute financially to the household. (6RT 1937-1964.)

Ray Nieto testified that a few months after he started working at Target, he thought that appellant seemed depressed. Appellant also seemed depressed in April or May of 1992 when Valerie Horner did not want to date him anymore; appellant tried to starve himself. At that time, appellant began seeing Valerie's mother, Karen Horner. (6RT 1859-1889.)

Appellant told his cousin and roommate, Alexander Cosey, about his problems at Target and that he had been in fights at work. Cosey testified that he was with appellant when he called Target to resign. Despite the issues involving Target, appellant appeared "normal" throughout September 1993. (6RT 1965-1975.)

Johnny Lopez and appellant attended Ganesha High School together in 1991. At that time, appellant spent a lot of time at Valerie and Karen Horner's house. In early 1992, appellant appeared upset about problems with his mother, Maria Nelson, and her boyfriend, Earl. Appellant started to change and seemed "in disarray." In January and February of 1992, he talked about killing himself and said that he was going to starve himself to death. Appellant was living with Karen Horner in San Bernadino at the time and Lopez thought that they were fighting a lot. Lopez visited appellant in San Bernadino four or five times. In February 1992 he started giving away his belongings. Lopez did not like Karen Horner; he believed that she was the cause of the negative changes in appellant. Appellant went to Lopez's house on Thanksgiving 1992 after a fight with his mother and he appeared very upset. In June 1993, Lopez and appellant began spending time together and appellant seemed "back to normal." (6RT 1976-1991.)

Michelle Horner testified that appellant "constantly" talked about committing suicide, sometimes while holding a knife. Michelle and Alan Horner spent many hours telling appellant not to and after these conversations appellant would go to bed, "like it was nothing." Michelle could not count the numbers of times appellant threatened to commit suicide. She did not consider his threats serious and thought that he made the statements because he wanted to be the center of attention. (7RT 2007-2046.)

**b. Medical Testimony**

On March 29, 1992, eighteen months before the murders, Dr. Robert Frost examined appellant when he was admitted to the emergency room at Kaiser in Fontana. Appellant claimed that he had purposefully consumed approximately 10 tablets of Robaxin, a muscle relaxant, that had been prescribed to him on March 14, 1992, after he was involved in a car accident. Appellant did not tell Dr. Frost why he consumed the medication. Dr. Frost testified that the usual dosage for Robaxin was one tablet. Other than exhibiting a high pulse rate, all of appellant's vital signs were normal and Dr. Frost could not determine if appellant had actually consumed the Robaxin. The results of appellant's blood work did not reveal any drugs in his system. Appellant's stomach was pumped, and in compliance with standard hospital procedure, he was referred for a psychological consultation.[14/] (7RT 2047-2060.)

Dr. Herb Glazeroff conducted a psychological consultation with appellant at Kaiser after he was treated for the alleged overdose on March 29, 1992. Dr. Glazeroff diagnosed appellant as having "adjustment disorder with depressed mood" and referred him to a clinic in San Bernadino. Dr. Glazeroff based his diagnosis on only appellant's statements. Dr. Glazeroff concluded that appellant's actions were not a serious suicide attempt, in part because appellant had impulsively consumed the alleged drugs, as opposed to contemplating the suicide attempt for a period of time, and because he had voluntarily come to the hospital, as opposed to being brought by ambulance. Appellant told Dr. Glazeroff that he attempted to commit suicide because he felt that he was a burden to the people around him. Appellant did not indicate that

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14. Karen Horner took appellant to the hospital that day because he told her that he had taken some pills. She did not observe him consume any pills. (4RT 1218, 1253.)

he had previously attempted to commit suicide. Dr. Glazeroff concluded that appellant was not suffering for any psychotic disorders, such as hallucinations, and that his ability to perform cognitive functions was intact. Dr. Glazeroff discharged appellant because he did not think that appellant was at risk of harming himself. (7RT 2063-2079.)

Dr. Stephen Wells, the chief forensic psychologist for Orange County, testified that, beginning approximately eight months after the murders, he saw appellant on five occasions for a total of ten and half hours. In addition to interviewing appellant, Dr. Wells administered appellant several standardized psychological personality tests. Dr. Wells also reviewed the police reports regarding the murders, appellant's medical records, and high school records, and interviewed appellant's mother, Maria Nelson. (7RT 2128-2133.)

Dr. Wells opined that appellant was in the early stages of paranoid schizophrenia on the morning that he committed the murders. Dr. Wells also believed that for most of appellant's adolescence he had suffered from a type of long standing depression known as dysthymia and that appellant manifested a number of personality disorders. (7RT 2155-2156.) Dr. Wells testified that when appellant was a child he observed his alcoholic father physically abuse his mother on several occasions, including pushing her, kicking her, setting her hair on fire, and stabbing her with a knife. Appellant's father stole money from him, as well as appellant's car. Dr. Wells' also opined that appellant was deprived of affection from his mother and that he lacked interpersonal skills and maturity. Dr. Wells also believed that appellant suffered from anxiety and had feelings of helplessness and hopelessness. (7RT 2156-2161.)

Appellant told Dr. Wells that he had a friendly relationship with Robin Shirley, but that it was not an intimate or romantic relationship. Dr. Wells described appellant's relationship with Valerie Horner as negative and "pathological." Dr. Wells characterized appellant's relationship with Karen

Horner as "extremely sick" and "pathological," and opined that appellant was seeking a substitute for his mother in Karen. Dr. Wells testified that Karen Horner became pregnant with appellant's child and had an abortion in February 1992, which greatly upset appellant. Appellant's mother did not approve of his relationship with Karen Horner and repeatedly asked him to stop seeing her. Appellant ultimately moved out of his mother's house to be with Karen Horner. Dr. Wells never talked with Karen Horner, but based on his review of other material in the case, concluded that she manipulated appellant. Dr. Wells also testified that appellant doubted himself as a man, doubted himself sexually, and doubted himself because of his short stature and ethnicity. (7RT 2163-2169, 2174, 2258-2259, 2265.)

Dr. Wells believed that the incident where appellant consumed 10 tablets of Robaxin was an impulsive suicide gesture that indicated appellant did not intend to kill himself, but that he was trying to express his feelings and get help. (7RT 2171-2172.) Dr. Wells testified that appellant felt like a failure after he quit working at Target and that he developed symptoms of insomnia, anxiety, and agitation, as well as the "early stages of the schizophrenic process." (7RT 2175-2177.)

Dr. Wells administered three standardized tests to appellant: (1) the Million Clinical Multi-Axial test ("MCMI"); (2) the Minnesota Multi-Phasic Personality test ("MMPI"); and (3) the California Psychological Inventory test. Dr. Wells testified that each test was not more than 85 to 90 percent reliable. (7RT 2191.) Based on the results of the tests, Dr. Wells diagnosed appellant as suffering from paranoid schizophrenia and dysthymia. He also testified that a person suffering from appellant's personality disorders could experience disordered thinking and have the potential to act on "disillusional" ideas. Dr. Wells also opined that such a person would tend to misinterpret social situations. The test results also indicated that a person with appellant's

disorders would have difficulty handling anxiety and distinguishing between alternatives during a conflict. Based on an "I.Q." test administered to appellant, Dr. Wells opined that a person with appellant's score would have a diminished capacity to think logically. Dr. Wells also administered the Structured Interview of Reported Symptoms ("SIRS") test to appellant to determine if he was malingering and trying to deceive Dr. Wells into thinking that he had a mental illness. Based on the results, Dr. Wells concluded that appellant was not attempting to exaggerate psychiatric symptoms or fake a mental illness. During the first three times that Dr. Wells met with appellant he did not detect any signs of schizophrenia. Dr. Wells did not conclude that appellant suffered from schizophrenia until after he received the results of the psychological tests. Dr. Wells was "surprised" by the results of the tests. (7RT 2196, 2198-2199, 2201-2208, 2231-2234.)

Dr. Wells did not include in his report that the computerized results from appellant's MCMI test indicated that appellant had a "broad tendency to magnify [his] level of experience in the illness or characterlogical inclination to complain and be self serving." (7RT 2236-2238.) Dr. Wells testified that the validity scales of appellant's results on the MMPI were very high and would cause most psychologists to be concerned that appellant was lying in his responses on the tests. Dr. Wells conceded that it was possible appellant had lied. (7RT 2239-2243.)

Appellant told Dr. Wells that on the night of the murders he had trouble sleeping so he rode his bicycle to Target. Appellant did not know what he was going to do, although he contemplated killing himself; he had his gun with him. When appellant approached the Plymouth, he thought he saw Lee Thompson in the driver's seat, bending down as if he was picking something up from the floor. Appellant thought that Thompson was reaching for a gun, so he fired at him. Appellant claimed that he could not remember what happened next,

although he accepted the fact that after firing the initial shots, he walked away from the Plymouth and then returned to fire additional shots. Dr. Wells testified that some people loose temporary awareness during traumatic events and that appellant had perceived Thompson as a threat based on Thompson's prior threats to appellant on two occasions. (7RT 2212-2214, 2381-2382, 2376-2378.)

Dr. Wells explained that even though he believed appellant suffered from schizophrenia at the time of the murders, he considered appellant "sane." Dr. Wells also believed that, at the time of the murders, appellant was able to think, make decisions, rationalize, make choices, and carry out plans. (9RT 2360-2361.)

**D. Rebuttal Evidence**

Mary Borger worked as the personnel manager for Target in May of 1992. She explained that if a person was under the age of 18 at the time he or she applied for a job at Target, the applicant was required to provide a work permit to the store. When appellant applied to work at Target, he was 17 years old. Appellant's work file contained three work permits that limited his work hours to 32 hours per week and 40 hours per week during a holiday. Because appellant was under 18, he was also restricted from working before 5:00 a.m. and past 10:00 p.m., and he could not work overtime or operate power equipment. A minor could avoid these work restrictions by providing Target with a copy of their high school diploma or by becoming emancipated. Appellant's work file also contained an emancipation document which allowed him to avoid the work restrictions placed on minors. (8RT 2276-2287.)

Karen Horner's son, Allen, testified that he had been close friends with appellant since 1988 or 1989, and that they spent time together on a daily basis until 1991. Appellant and Allen were not friendly during the time that appellant

lived with Karen Horner in San Bernadino. In 1992, Karen and appellant moved from San Bernadino and stayed at Allen's house for a period of time. During this time, appellant and Allen mended their friendship. Two days before the murders, on Thursday, September 30, 1993, Allen spent the day with appellant and Allen's family at the fair. Allen was with appellant from 10:00 a.m. until 1:00 a.m. and he never noticed anything unusual about appellant. Appellant seemed "normal" and "happy" throughout the day, and Allen did not see appellant carrying a gun. Allen never knew appellant to use drugs or alcohol, or to carry a gun. (8RT 2287-2303.)

Monica Vergara, Lee Thompson's finance, testified that she and Thompson became engaged to be married on September 23, 1993. Whenever Thompson was not working, he and Vergara spent time together. Vergara knew that Thompson was friends with his Target co-worker, Robin Shirley. Thompson liked Shirley and often talked about her. Vergara never knew Thompson to own a gun. (8RT 2447-2449.)

Psychiatrist Dr. Ronald Markham testified that after reviewing the history of the case, Dr. Wells' report regarding appellant, and the results of the psychological tests that Dr. Wells administered to appellant, he could not conclude that appellant suffered from schizophrenia because the results from the scales that measured the validity of the tests to determine if appellant had lied were the worst that Dr. Markham had ever seen. The validity scales from the MMPI suggested that appellant was malingering in that he was not being truthful in his responses and was trying to appear as though he had symptoms of mental illness. As such, the results of the tests were invalid. Dr. Markham also did not disagree with Dr. Wells' diagnosis that appellant suffered from depression. Dr. Markham further testified that if he were to interview a person with paranoid schizophrenia, he would "absolutely" be able to detect symptoms of the illness during the first meeting with the individual. Dr. Markham also

explained that paranoid schizophrenia did not develop suddenly in a person. Rather, the illness developed over time through an "ongoing, downhill process." Dr. Markham testified that paranoid schizophrenics are able "to think in very exact terms," make plans and decisions, and weigh and consider the decisions they make in their daily lives; such individuals have a "higher sensitivity to reality." (8RT 2453-2489.)

Detective Dale Nancarrow testified that when he searched the Plymouth on the night of the murders after the victims' bodies were removed, he did not locate any weapons inside the vehicle. He also testified that there were no bullet holes anywhere on the outside of the Plymouth. (9RT 2585-2587.)

Robin Shirley's mother, Ellis Verdugo, testified that Robin lived with her for two weeks before Easter in 1993 because Robin was having problems with her husband. Robin and her husband saw each other daily during that time. At the end of the two week period, Robin moved back in with her husband and children. She lived with them until she was killed. (9RT 2589-2590.)

Deputy Robert Fowler testified that he worked in the Superior Court supervising the "in custody" defendants who came to court for appearances. Deputy Fowler had known appellant since November of 1993 when appellant started appearing in court on the murder charges. Appellant was always cooperative with Deputy Fowler. Appellant had never been classified as requiring "special handling" due to mental problems or suicidal tendencies. (9RT 2596-2599.)

## II.

## PENALTY PHASE

### A. Prosecution Evidence[15]

#### 1. The Murders Of Shirley And Thompson

At the penalty phase retrial, the prosecution presented evidence about the murders that was essentially the same as that presented at the guilt trial, including evidence of appellant's work history at Target, the promotion opportunity, the events leading up to appellant quitting Target, and the details of appellant's actions before, during, and after the murders. (22RT 4028-27RT 4839.) The prosecution also presented evidence that appellant confessed to his cousin, Alexander Cosey, that he had shot two people at Target, and that when the woman he shot made a noise, he went back and shot her again. (22RT 4488-4836.)

#### 2. Victim Impact

Robin Shirley's husband, Robert Shirley, testified that he and his wife were married for 11 years, that Robin was his best friend, and that they did everything together. He felt that his life would never be the same without Robin. Robert Shirley also testified that the couple had two young children who were the most important thing in Robin's life. The children were devastated about their mother's murder. Appellant had met the children on several occasions, and Robin often gave appellant rides to work. Robin had been "thrilled" when she recieved the promotion at Target. (25RT 4672-4691.)

Ellis Verdugo, Robin Shirley's mother, testified that she and Robin visited daily, they were very close, and she missed her terribly since she was

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15. Appellant's first penalty phase trial ended in a mistrial when the jury was unable to reach a verdict, and the following section is limited to the evidence presented at the second penalty phase trial.

killed. Robin had three siblings who would also never see her again because of the murder. (27RT 4814-4822.)

Monica Vergara, Lee Thompson's fiancé, testified that they were to have been married in the fall of 1993. They did everything together and he was the only person in her life that she could truly depend on for support. Lee was like "Superman" because he was always trying to help people. Lee's family was very close, and she and Lee spent a lot of time with his them. (25RT 4697-4702.)

Clara Thompson, Lee Thompson's mother, testified that Lee was a wonderful son who had two brothers and a sister. Lee was never in trouble with the law and was always very helpful to his family. Lee's family loved and missed him tremendously. His mother was devastated by her son's murder and she felt as though her life had ended since he was killed. Lee had planned to get married, get a good job, go to college, and start his own family. (27RT 4822-4836.)

**B. Defense Evidence**

Appellant presented several witnesses who testified about his good character, as well as witnesses who explained that appellant was under a great deal of financial and personal stress at the time of the murders.

Frances Voss worked with appellant at Target and believed that he was a caring person. Appellant was a good worker. Voss testified that appellant was dependable, reliable, and had potential to succeed. After appellant did not receive the promotion he became very sad. (27RT 4862-4897.)

Robert Griffith worked with appellant at Target on the push team. He thought that appellant was a "nice boy" who worked hard and he was very helpful. (27RT 4903-4908.)

Tracy Robinson worked with appellant at Target. She testified that he was helpful and a hard worker. (27RT 4910-4938.)

Charles McGruder testified that his son, Justin, worked with appellant at Target. When Justin was in the hospital, appellant visited Justin several times. McGruder thought that appellant was good-natured and motivated in his career. (29RT 5115-5120.)

Joseph Kinney, the executive director for the National Safe Workplace Institute, testified that employees who have a strong emotional attachment to their jobs can react by committing violence in the workplace when they suffer a setback at work. Kinney testified that such workers often have a variety of problems including a lack of interpersonal skills and an inability to control themselves. These workers can lose the ability to control their impulses and may act irrationally. Kinney based his opinions on studies that he conducted. (28RT 4977-5081.)

Elisabeth Temme, a real estate loan officer, testified that she met with appellant and his grandmother on September 10, 1993, to sign documents to refinance the grandmother's house. The loan officer believed that appellant wanted to assist his grandmother by making the payments on the loan. (28RT 5081-5087.)

Raymond Nieto testified that his sons, Ray and Eric, were good friends with appellant. Nieto had known appellant since he was in third grade and considered him to be a "good kid." Appellant often stayed at Nieto's house and was always polite and helpful. Appellant was mild-mannered and happy. Appellant called Nieto and his wife his "mom and dad." On one occasion in August of 1992, appellant's father, who Nieto had only met once, took appellant's car without permission for a week. The incident greatly upset appellant and he talked about killing himself. Appellant told Nieto that he was upset about not receiving the promotion at Target and he seemed depressed all

of the time. Nieto thought that it was out of character for appellant to commit the crimes. (29RT 5121-5172.)

Appellant's aunt, Yvonne Cosey, testified that appellant was very upset about a fight with his mother and her boyfriend on Thanksgiving in 1992. Appellant's mother said that she wanted appellant to move out of her house when he became eighteen. Appellant lived with Cosey, his grandmother and his cousins in June 1993. Appellant had a very good relationship with his grandmother and was very helpful. Cosey was laid off from her job and her unemployment payments stopped in August 1993. She asked appellant to help the household financially and this caused tension between them. Appellant did not tell Cosey that he had quit his job at Target. He acted withdrawn and depressed and stopped eating. Cosey testified that it was out of character for appellant to have committed the murders because he always apologized when he hurt someone, and he was a very helpful person. (28RT 5090-5091; 29RT 5172-5189, 5222-5252.)

Appellant's aunt, Consuelo Garcia, testified that appellant had a very good relationship with his grandmother. Appellant was affectionate, mild-mannered, and she loved him very much. (30RT 5261-5270.)

Appellant's grandmother, Catalina Miller, testified that appellant was a respectful, kind, and "sweet" boy who spent a lot of time in her home. She loved him very much. Appellant always helped her with chores at the house and took her to appointments and grocery shopping. Appellant secured a loan for her on her house and he agreed to help her with the mortgage payments. However, after he signed the loan documents his grandmother realized that he had lost his job. Appellant became sad and withdrawn. (30RT 5274-5286.)

Appellant's mother, Maria Nelson, testified that she and appellant and her other son were very close when the boys were young. She often worked several jobs and was not able to spend a lot of time with her sons. The family

lived with her mother for a period of time. Appellant often spent time with the Neito family. Appellant was a good student and enjoyed going to church. Nelson testified that she "lost" appellant when, against her wishes, he started living with Karen Horner. After appellant started living with Horner and became emancipated, Nelson did not see her son again until after he committed the murders. (30RT 5329-5335.)

# ARGUMENT

# I.

## THE TRIAL COURT PROPERLY REJECTED APPELLANT'S REQUEST FOR JURY INSTRUCTIONS CONCERNING HEAT OF PASSION BECAUSE NO SUBSTANTIAL EVIDENCE SUPPORTED THE THEORY THAT APPELLANT WAS PROVOKED INTO MURDERING THE VICTIMS

In Argument 1 of his opening brief, appellant contends the trial court committed state constitutional error, and that he was deprived of due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution when the trial court erroneously refused to instruct the jury on heat of passion. According to appellant, the trial court's actions precluded the jury from finding that heat of passion negated appellant's malice and prevented it from reaching a verdict of voluntary manslaughter. (AOB 30-60.) Appellant's contention is without merit because the evidence did not warrant instruction on heat of passion. Thus, the trial court's refusal to instruct on heat of passion was not error under state law, nor did it result in a violation of appellant's state or federal constitutional rights.

### A. The Relevant Proceedings

Appellant's trial counsel argued that the trial court should instruct the jury on voluntary manslaughter based on heat of passion as to both victims and cited *People v. Berry* (1976) 18 Cal.3d 509, 515 [defendant acted in heat of passion under uncontrollable rage, brought on by sexual taunts and incitements, when he killed wife; 20 hours elapsed between her conduct and killing did not dissipate "long course of provocatory conduct, which had resulted in intermittent outbreaks of rage under specific provocation in the past"] in support of his argument. (8RT 2535-2549.) The trial court rejected the argument, stating the "classic case" of killing in a heat of passion is where a

husband discovers his wife engaged in a sexual act with another man. The trial court stated, "I don't think there's anything that even comes close to that [in this case]" (8RT 2537), and "I don't know that [the victims] were lovers or paramours or anything." (8RT 2547.) The trial court further commented on the lack of evidence that the victims were engaged in intimate or sexual conduct, noting that they were "[j]ust sitting there waiting for the [store] to open . . . ." (8RT 2548-2549), and concluded by stating, "I . . . don't see [how] manslaughter in any stretch of the imagination would apply." (8RT 2549.)

In addition, appellant's trial counsel argued that the court should instruct the jury that heat of passion negates malice for purposes of first and second degree murder, and that the prosecution had to prove beyond a reasonable doubt that the killings were not done in a heat of passion, pursuant to CALJIC Nos. 8.42 [Explaining Heat Of Passion] and 8.44 [No Specific Emotion Alone Constitutes Heat Of Passion]. (9RT 2626, 2627A-2527A, 2652-2657, 2669.) The trial court rejected the proposed instructions finding that no evidence had been presented at trial that appellant acted in the heat of passion. (RT 2628A, 2657, 2669-2672.) Appellant's trial counsel also proposed four additional

pinpoint instructions on heat of passion that the trial court rejected.[16] (9RT 2670-2672.)

The trial court thereafter instructed the jury with a modified version of CALJIC No. 8.50:

> The distinction between murder and manslaughter is that murder requires malice while manslaughter does not. When the act causing the death, although unlawful, is done in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury the offense is manslaughter.

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16. The four instructions proposed by appellant's trial counsel and rejected by the trial court read as follows:

> In deciding whether or not you are convinced beyond a reasonable doubt that the defendant deliberated and premeditated, you should consider the affect of provocation upon the defendant at the time of the killings. This provocation may come from any person including persons other than the victim.

(9RT 2671.)

> More specific time of provocation is required to generate the passion necessary to constitute heat of passion and verbal provocation may be sufficient.

(9RT 2671A-2672.)

> The passion necessary to constitute heat of passion need to have not been in rage or anger but maybe [sic] any violent intent or enthusiastic emotion which causes a person to act rationally and without deliberation and reflection.

(9RT 2672.)

> A defendant may act in the heat of passion at the time of the killing as a result of a series of events which occur over a considerable period of time. Where the provocation extends for a long period of time you must take such period of time into account in determining whether there was a sufficient cooling period for the passion to subside. The burden is on the prosecution to establish beyond a reasonable doubt that the defendant did not act in heat of passion.

(9RT 2672.)

> In such a case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.
>
> To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the honest, even though unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury.

(9RT 2723-2724.)

The trial court instructed the jury on first degree murder based on a premeditated and deliberate theory, and on a lying-in-wait theory. (9RT 2716-2719.) The court also instructed the jury on unpremeditated second degree murder (9RT 2719), second degree malice murder (9RT 2719-2720), voluntary manslaughter (as to Lee Thompson only) committed with the honest but unreasonable belief in the need to defend oneself (9RT 2722-2723; 10RT 2892A), and involuntary manslaughter (9RT 2725-2726.)

**B. The Applicable Law**

A trial court has a duty to instruct on all theories of a lesser included offense which are supported by substantial evidence in the record. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Substantial evidence is evidence from which a jury composed of reasonable persons could find the lesser offense, but not the greater, was committed. (*Id.* at p. 162.) This duty to instruct on a lesser included offense arises even when the defendant objects to such an instruction and regardless of the trial theories or tactics the defendant has actually pursued. (*Id.* at p. 160.) On the other hand, a trial court is not required to instruct on a theory of a lesser included offense which finds no support in the evidence. (*Id.* at p. 162.)

"'Murder is the unlawful killing of a human being with malice aforethought.'" (*Id.* at p. 153, quoting Pen. Code, § 187, subd. (a).) Malice is the intent to unlawfully kill. (*Id.* at p. 153, citing Pen. Code, § 188.) Voluntary manslaughter is a lesser included offense of murder. (*Id.* at p. 154.) Manslaughter is the unlawful killing of a human being without malice. (Pen. Code, § 192.) "When a killer *intentionally* but unlawfully kills in a sudden quarrel or heat of passion, the killer lacks malice and is guilty only of voluntary manslaughter." (*People v. Lasko* (2000) 23 Cal.4th 101, 104; see also *People v. Rios* (2000) 23 Cal.4th 450, 460-461.)

*Breverman*, described the heat of passion theory as follows:

> "An intentional, unlawful homicide is 'upon a sudden quarrel or heat of passion' (§192 [, subd.] (a)), and is thus voluntary manslaughter ..., if the killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an "ordinary [person] of average disposition ... to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." [Citations.]

(*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1411.)

> "The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must, subjectively and actually, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are viewed objectively."

(*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) The provocation must be caused by the victim and must be such as to "cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*People v. Lee* (1999) 20 Cal.4th 47, 59; *People v. Lucas* (1997) 55 Cal.App.4th 721, 739.)

## C. Legal Analysis

In this case, the evidence demonstrated that (1) the victims did nothing to provoke appellant so as to justify a heat of passion instruction, and (2) the victims' conduct was not such as to cause an ordinary person of average disposition to act rashly and without due deliberation or reflection. The evidence in this case demonstrates a calculated plan motivated by appellant's anger and disdain over not receiving the promotion at Target. A plan directed precisely at the person who received the promotion he so desired - - Robin Shirley. This evidence, coupled with the absolute lack of evidence of provocation, demonstrates that the trial court properly refused the requested heat of passion instructions. The record supports only that appellant was guilty of murder, not the lesser offense of voluntary manslaughter. Evidence of provocation is wholly lacking. In contrast, evidence demonstrating appellant murdered the victims with malice is overwhelming.

The strongest indicator that the victims did not provoke appellant to kill in a heat of passion lies in the lack of evidence that appellant was romantically involved with Robin Shirley, and/or that Shirley and Lee Thompson were engaged in conduct that would lead a reasonable person to kill in a heat of passion. Absent evidence on these factors, appellant's claim fails. Significantly, appellant offers a contradictory thesis as to the murders: self defense and heat of passion. However, that appellant shot the victims in a heat of passion either because he believed Lee Thompson was reaching for a gun, or because he believed the victims were engaged in an "intimate moment," is not supported by the physical or circumstantial evidence.

First, the physical evidence does not support either of appellant's versions of the events leading to the murders. The story appellant told Dr. Wells wherein he shot Lee Thompson through the front windshield because he thought Thompson was reaching for a gun, is not supported by the physical

evidence. There was absolutely no damage to the Plymouth's front windshield. The physical evidence supported only one conclusion–that the shots were fired from the rear left window as appellant approached the victims from behind. Furthermore, the expert testimony established that appellant shot Shirley, the person who received the promotion he desperately coveted, first as opposed to Thompson, the person who was allegedly reaching for the gun. Moreover, the victims were sitting in a relaxed position in the car, Thompson slightly titled back, Shirley's arms folded across her chest, both fully clothed, facing forward, with the radio playing. An objective, reasonable person knowing of the platonic nature of the victims' relationship and seeing them in the physical positions described, would not be aroused to kill in a heat of passion. Even assuming that upon observing this scenario appellant somehow unreasonably believed the two were being "intimate," a person acting in the heat of passion would not have taken the time to creep up on the victims from a calculated position behind them to ensure that they could not see him before killing them.

Second, the circumstantial evidence also fails to support appellant's claim that he killed in a heat of passion after being provoked by the victims. There was no evidence that the victims were engaged in a romantic relationship or that appellant believed that to be the case. Nor did the evidence establish that appellant had romantic feelings for Robin Shirley. In fact, the investigating officer testified that the police never discovered any evidence of a "love triangle" scenario. Moreover, appellant told Dr. Wells that he did not have an intimate or romantic relationship with Robin Shirley.

Furthermore, after shooting the victims multiple times, appellant walked away from the car, and when a "gurgle" noise emanated from the vehicle, he turned, walked back, and shot the victims several more times. Appellant's actions demonstrate a deliberate plan to kill. Upon hearing what were arguably sounds of life coming from the car, he returned to shoot the victims multiple

times to ensure that his plan to kill was fulfilled; these acts do not demonstrate killing in the heat of passion. Similarly, appellant's actions after the murders demonstrate that he killed with malice rather than in a heat of passion. He immediately fled the scene of the murders, evaded police, hid the gun and holster, and then hid at his house until being arrested. He never admitted the killings to the police, or expressed remorse as would be expected from someone who killed in a heat of passion.

Furthermore, the events leading up to the murders also support the conclusion that appellant premeditated the murders, acted with malice, and did not kill in the heat of passion when he "stumbled" upon the victims. Before the promotion opportunity, appellant demonstrated an excellent work ethic and above average job performance. He was eager to learn and often assumed extra responsibilities. After applying for the promotion to push team leader, he repeatedly bragged to his coworkers that he would receive the promotion. When appellant was not awarded the promotion, the evidence showed that his disdain, disappointment, and embarrassment grew exponentially until the time of the murders. He admitted that he was embarrassed to Karen Strickland over his failure, and in fact, other employees laughed at him when he was not awarded the promotion. Appellant cried in front of Alex Sandoval about not receiving the promotion and his productivity dramatically declined. Appellant confronted Robin Shirley, telling her that she did not deserve the promotion until Lee Thompson ordered appellant to leave Shirley alone. Appellant later threatened Thompson, saying that he would "get him back one day."

Appellant ultimately quit after not receiving the promotion. He then methodically painted his entire bicycle black, dressed completely in black clothing and a black hat, armed himself with the fully loaded nine-millimeter semiautomatic handgun which he placed in his black nylon holster, and rode six miles on his bicycle in the middle of the night directly to Target where he knew

the victims regularly waited to be let into the store at 4:00 a.m. These actions were not coincidences. The evidence did not support the inference that appellant fortuitously "stumbled" upon the very people he was angry with and had previously threatened while he happened to be armed with a fully loaded semi-automatic weapon.

Based on these circumstances, the killings did not arise from a heat of passion. There simply was no substantial evidence that the victims were engaged in provocative conduct so as to warrant heat of passion voluntary manslaughter instructions. (*People v. Lee*, *supra*, 20 Cal.4th at p. 59.) Appellant's actions were not provoked by the victims. Rather, they were the result of premeditation and deliberation. Based on the evidence in the record, there is no substantial evidence from which the jury could reasonably conclude the lesser offense of manslaughter, but not the greater offense of murder, was committed. Thus, instruction on provocation and heat of passion would not have been appropriate. (See *People v. Breverman, supra*, 19 Cal.4th at p. 162.)

Appellant argues that the evidence presented by the prosecution was sufficient to establish a triable question whether a reasonable person would be provoked into a heat of passion. (AOB 38042.) He is wrong. An ordinary person of average disposition would not have responded to two platonic coworkers sitting in a car, fully clothed, and not physically touching each other by viciously shooting them execution style multiple times. Even if appellant was emotionally hurt by seeing Thompson and Shirley together, this alone does not constitute provocation in the context of heat of passion voluntary manslaughter. (See *People v. Lujan*, *supra*, 92 Cal.App.4th at p. 1414, ["It is not provocative conduct for a woman who has been separated from her estranged husband for four or five months and who has filed a petition for dissolution of marriage to later develop a romantic relationship with another individual."].) As a matter of law, the innocuous conduct of the victims was

not adequate provocation to warrant heat of passion voluntary manslaughter instructions. (See *People v. Hyde* (1985) 166 Cal.App.3d 463, 473 [new boyfriend's mere act of dating the defendant's former girlfriend did not constitute provocation for heat of passion voluntary manslaughter].)

Appellant also contends that the trial court improperly rejected trial counsel's reliance on *People v. Berry, supra,* in support of his argument that there was sufficient evidence to warrant a voluntary manslaughter instruction. (AOB 37-38.) However, *Berry* recognizes that the killer's reason must actually have been obscured as a result of the strong passion which was aroused by a provocation sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection, and from this passion rather than from judgment. (See *People v. Berry, supra*, 18 Cal.3d at p. 515.) In *People v. Marshall* (1996) 13 Cal.4th 799, 849, this Court described the facts in *Berry* as:

> [T]he victim wife had engaged in a two-week pattern of sexually arousing the defendant husband and taunting him into jealous rages over her love for another man, conduct we concluded would stir such a passion of jealousy, pain and sexual rage in an ordinary man of average disposition as to cause him to act rashly from this passion. [Citation.]

As shown above, in this case there was absolutely no evidence of provocation justifying a manslaughter instruction, much less the type of provocation found sufficient in *Berry*. Instead, the record shows appellant acted with premeditation and deliberation.

Appellant further argues that "the trial court's misunderstanding of heat of passion was clearly wrong" because heat of passion and provocation can arise in a broad range of circumstances. (AOB 37.) First, even if the trial court's discussion of heat of passion focused on a scenario where a husband discovers his wife in a sexual situation with another man when, in fact, the

courts have found heat of passion in a wider range of situations, the fact remains that there simply was no substantial evidence of provocation in this case. Second, the distinction between the present case and those cited by appellant (AOB 34-37) is clear--those cases involved evidence of actual provocation by the victims. None of the cases appellant cites remotely involve the factual scenario in this case: two platonic coworkers sitting in a car, fully clothed, not physically touching each other, listening to the radio, and being "discovered" by a defendant who had no history of a romantic relationship with the female victim.

The most appellant can derive from the evidence is that he was provoked when he "unexpectedly came upon Robin Shirley and Lee Thompson sitting close together in the front seat of Mr. Thompson's car." (AOB 36 fn. 8.) As set forth above, such an innocuous situation is not sufficient to provoke a reasonable person. Contrary to appellant's repeated assertions, there was no substantial evidence that he had "romantic feelings" for Shirley, that he was in love with her, or that he killed the victims because he felt "betrayal and extreme jealousy." In fact, appellant told Dr. Wells that he did not have an intimate or romantic relationship with Robin Shirley. That Karen Horner, appellant's ex-girlfriend, was jealous of Shirley offers nothing towards proving that appellant was in love with Shirley. Appellant also argues that Karen Horner's repeated disparaging comments about Shirley aroused his passions and provoked him. These arguments have no merit because the provocation must be caused by the victim. (*People v. Lee*, *supra*, 20 Cal.4th at p. 59.)

Appellant also claims that clothing in the back seat of the Plymouth was evidence that the victims had been "having an affair." (AOB 41.) However, the clothing consisted of nothing more than a jacket and a pair of socks; the victims were fully clothed when appellant shot them. Appellant's repeated characterization of the victims as being engaged in "an intimate moment" (AOB

42) or "romantic situation" (AOB 42), and of him stumbling upon "the object of his desire cuddling with . . . [his] rival" are again mischaracterizations of the circumstantial and physical evidence. Based on the infliction of the wounds and the trajectory of the bullets, the criminalist concluded that the victims had been seated upright when they were killed, not intertwined in some sort of sexual position. (See respondent's Argument III, *infra*, for a detailed discussion.) Appellant's argument that "a fair inference is that Mr. Thompson was bent over into Ms. Shirley's lap when they were shot" (AOB 41), again, is not supported by the physical evidence. It would not have been possible for appellant to shoot Thompson in the back before the shooting him in the temple (such as if he were bending over in Shirley's lap), because there would have been no way for Thompson to return to the upright position for infliction of the temple shot since the back shots were fatal.

Finally, throughout appellant's argument attempting to characterize the evidence as some sort of jealous love triangle, he *never* mentions the fact that after shooting the victims multiple times, he walked away only to deliberately return to finish carrying out his plan with multiple additional shots when "gurgling" sounds emanated from the vehicle. Two of the three shots to Shirley and four of the five shots to Thompson were fatal. This calculated move of returning to shoot the victims yet again supports the only rational conclusion based on the record: appellant was not provoked by the victims, he did not kill in the heat of passion, but rather killed with malice.

**D. Harmless Error**

Even assuming the trial court erred in failing to instruct the jury on voluntary manslaughter, reversal of appellant's murder convictions still would not be required. Any "error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions

posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1086-1087 [harmless error to fail to instruct on voluntary manslaughter where jury's unanimous conclusion was that killing occurred during the commission of robbery].)

Here, the jury rendered true findings on both lying-in-wait special circumstance allegations. (10RT 2899-2901.) Therefore, the jury necessarily determined that appellant committed first degree murder as to both victims, and any error was harmless. (See *People v. Earp* (1999) 20 Cal.4th 826, 884-886 [failure to give lesser offense instructions on second-degree murder and involuntary manslaughter harmless where jury's special-circumstance findings meant it necessarily determined the killing was a first-degree felony murder committed during the course of sexual offenses].) There is no substantial evidence that appellant committed any lesser act. This claim is based on speculation, not evidence, and should be rejected. (*People v. Lewis* (1990) 50 Cal.3d 262, 276-277.)

In this case, there was no reasonable probability the trial court's failure to give the requested voluntary manslaughter instruction affected the outcome of the trial, and any error was harmless. (*People v. Sakarias* (2000) 22 Cal.4th 596, 621 [state standard for harmless error analysis is appropriate where court fails to give lesser offense instructions, citing *People v. Breverman*, *supra*, 19 Cal.4th at p. 167].) For the same reasons, even assuming the failure to instruct on manslaughter violated appellant's federal constitutional rights, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

## E. No Due Process Or Federal Constitutional Error

Appellant contends that the trial court's failure to instruct on heat of passion deprived him of his rights to due process, a fair trial, trial by jury, confrontation and cross-examination, presentation of a defense, effective assistance of counsel, equal protection, and reliable guilt and penalty phase verdicts in a capital case, guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution. (AOB 42-55.)

Citing *Beck v. Alabama* (1980) 447 U.S. 625, appellant contends the federal Constitution requires instruction on lesser included offenses in capital cases. Appellant is incorrect. As this Court

> pointed out in *People v. Breverman, supra*, 19 Cal.4th at page 167, the high court held in *Schad v. Arizona* (1991) 501 U.S. 624, 647 . . . that *Beck's* principles were satisfied if the jury was provided some noncapital third option between the capital charge and acquittal.

(*People v. Sakarias, supra*, 22 Cal.4th at p. 621 fn.3.)

Contrary to appellant's assertions, the jury was not left with the option of only convicting him of capital murder or acquitting him when the trial court refused to instruct on heat of passion and manslaughter. (AOB 45-55; see *Beck v. Alabama, supra*, 447 U.S. at pp. 633-635 [sentence of death violates the Fourteenth Amendment when the jury was not permitted to consider a verdict of guilt of a lesser included noncapital offense and the evidence would have supported such a verdict].) In this case, the jury had the choice of finding appellant guilty of first degree murder without special circumstances or second degree murder on two different theories. (9RT 2719, 2722.) Thus, the trial court did not commit constitutional error.

## II.

## THE TRIAL COURT PROPERLY REFUSED APPELLANT'S PROPOSED PINPOINT INSTRUCTIONS ON PROVOCATION

In Argument 2 of his opening brief, appellant contends that the trial court erred when it refused to instruct the jury with CALJIC No. 8.73 (Evidence of Provocation May Be Considered in Determining Degree of Murder) which would have told jurors to consider evidence of provocation in deciding whether the killings, if they amounted to murder, were willful, deliberate, and premeditated. He also argues that the trial court erroneously rejected a proposed pinpoint instruction that would have told the jury that provocation could come from persons other than the victims. (AOB 61-70.) Appellant contends the failure to give the instructions deprived him of his federal constitutional right to adequate instructions on the defense theory of the case, and his rights under the Eighth and Fourteenth Amendments of the United States Constitution. (AOB 67-68.) Appellant is wrong. The giving of CALJIC No. 8.73 and the other pinpoint instruction was not warranted because the instructions were not supported by the evidence presented at trial. In any event, any error in refusing to give the instructions was harmless.

## A. The Relevant Proceedings

Appellant's trial counsel requested CALJIC No. 8.73[17] (8RT 2327; 9RT 2664) which he contends sets forth a lesser degree of provocation which is measured by a subjective standard, and may act to raise a reasonable doubt that he killed with deliberation and premeditation. (AOB 63.) Appellant's trial counsel also requested the following instruction:

> In deciding whether or not you are convinced beyond a reasonable doubt that the defendant deliberated and premeditated you should consider the effects of provocation on the defendant at the time of the killings. This provocation may come from any person including person other than the victims.

(9RT 2671A.) The trial court rejected both instructions. (9RT 2664, 2671A-2672.)

## B. The Applicable Law

A pinpoint instruction "relates particular facts to an element of the charged crime and thereby explains or highlights a defense theory." (*People v. Mayfield* (1997) 14 Cal.4th 668, 778.) A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142 citing *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) However, even when requested, the pinpoint instruction need be

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17. CALJIC No. 8.73 provides,

> If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation.

(8RT 2327.)

given only if it is supported by substantial evidence. (*People v. Ward* (2005) 36 Cal.4th 186, 214-215 citing *People v. Marshall* (1997) 15 Cal.4th 1, 39.)

This Court has held that CALJIC No. 8.73 is a pinpoint instruction (see *People v. Steele* (2002) 27 Cal.4th 1230, 1250-1251; *People v. Ward, supra*, 36 Cal.4th at p. 214; *People v. Saille, supra*, 54 Cal.3d at p. 1119), but that the instruction is not *sua sponte* required where there is no evidence of provocation. (See *People v. Perez* (1992) 2 Cal.4th 1117, 1129-1130 [no evidence of provocation to justify instruction with 8.73].)

> The evidentiary premise of a provocation defense is the defendant's emotional reaction to the conduct of another, which emotion may negate a requisite mental state. . . . However, [where] the record contains no evidence of what, if any, response defendant had to the purported [conduct] . . . there was no error in the failure to give CALJIC 8.73.

(*People v. Ward, supra*, 36 Cal.4th at pp. 214-215.)

### C. Legal Analysis

Appellant argues that even if there was insufficient evidence of provocation to warrant voluntary manslaughter instructions, sufficient evidence of provocation existed to reduce the murders from first to second degree. (AOB 63.) However, as discussed at length in respondent's Argument I, there was no evidence of provocation to warrant instruction thereon. The evidence of provocation was nonexistent, and thus did not warrant the giving of CALJIC No. 8.73 or the other proposed pinpoint instruction on provocation. (*People v. Gutierrez, supra*, 28 Cal.4th at pp. 1142-1143.)

Appellant argues that his "hyper vigilant, emotionally unbalanced" state of mind caused him to be provoked by seeing Lee Thompson and Robin Shirley merely sitting together in the car. (AOB 67.) This argument is pure speculation as there is no credible evidence that appellant found the victims' actions, if any,

provoking in any way or that he acted under such provocation. Any possible provocation appellant can conjure would be merely speculative and not a proper basis for instruction. (See *People v. Wilson* (1992) 3 Cal.4th 926, 941.) The prosecution's evidence justified only one reasonable conclusion, i.e., that appellant acted with premeditation and deliberation. Furthermore, even if provocation were somehow applicable to the conduct for which appellant was convicted, it could apply only to the first victim murdered.[18] The second victim was necessarily the subject of ample premeditation and deliberation on appellant's part. Thus, appellant's argument at best would relieve him of only one of his two murder convictions.

Lastly, the trial court also properly refused appellant's proposed instruction that provocation may come from a person other than the victims (9RT 2671A) because the instruction was an incorrect statement of the law. (*People v. Lee, supra,* 20 Cal.4th at p. 59 [the provocation must be caused by the victim].)

**D. Harmless Error**

Assuming that the trial court erred in refusing to instruct the jury with CALJIC No. 8.73, there was no prejudice. As discussed in the preceding section of this argument, the trial court instructed the jury on unpremeditated murder of the second degree, requiring a finding that appellant intentionally killed the victims with malice but the evidence was insufficient to establish deliberation and premeditation. Appellant's trial counsel thoroughly argued his theory to the jury during closing arguments. The jury was also instructed on premeditation and deliberation, requiring the jury to find:

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18. As set forth in respondent's Argument III, the criminalist rendered the opinion that Robin Shirley was killed first.

> the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and *not under a sudden heat of passion or other condition precluding the idea of deliberation* . . . .

Moreover, the jury found the lying-in-wait special circumstance allegations true. (10RT 2899-2901.) Thus, the factual question posed by CALJIC No. 8.73 was necessarily resolved adversely to appellant under other instructions given at trial. (See *People v. Berryman* (1993) 6 Cal.4th 1048, 1089, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 [jury's determination the defendant had intent to kill under other properly given instructions met the standard set forth in *Chapman v. California, supra,* 386 U.S. at p. 24.) In addition, the evidence of premeditation and deliberation was overwhelming in comparison to the lack of any evidence of provocation. (See respondent's Argument I.) Clearly, the jury considered the facts and determined that they did not constitute such provocation as to diminish appellant's culpability. For the same reasons, even assuming the alleged error violated appellant's federal constitutional rights, the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) In sum, the evidence in this case does not demonstrate the provocation or heat of passion necessary to justify the trial court instructing the jury with CALJIC No. 8.73.

## III.

## THE TRIAL COURT PROPERLY ADMITTED CRIMINALIST ELIZABETH DEVINE'S TESTIMONY REGARDING THE SEQUENCE OF SHOTS AT THE MURDER SCENE

In Argument 3 of this opening brief, appellant contends that he was deprived of due process and a fair trial when the trial court allowed the prosecution to present evidence from a criminalist regarding the sequence of the shots fired by appellant at the victims. (AOB 78-80.) Appellant contends that the expert was not qualified to render such an opinion, and that her opinion was impermissibly based on speculation. (AOB 74-78.) Appellant also asserts that the erroneous admission of the expert's testimony requires reversal of the death verdict. (AOB 84-92.) All of appellant's arguments lack merit.

### A. Waiver

Appellant contends that admission of the expert testimony violated his right to due process and a fair trial, as well as his rights under the Eighth and Fourteenth Amendment requirements for heightened reliability standards for both guilt and penalty determinations in capital cases. (AOB 78-79.) Appellant did not object to the admission of the evidence on these grounds at trial. Therefore, his constitutional claims have been waived because he failed to raise those grounds in the trial court. (See *People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3.) In any event, the evidence was properly admitted expert testimony, and any error was harmless.

## B. The Relevant Proceedings

### 1. The Prosecutor's Offer Of Proof And The Defense Objection

The prosecutor's offer of proof regarding senior criminalist Elizabeth Devine's testimony was that she had examined photographs of the victims, photographs of the car, the car, the autopsy reports, talked to the pathologist who performed autopsies, and visited the scene of the crimes, and that she would render an opinion that all of the bullets were fired from the left rear open window of the vehicle, that the first round fired was a through-and-through bullet wound to Robin Shirley, that the second round fired was to the head of Lee Thompson, and that the other rounds were fired afterwards. (5RT 1608-1610.) Appellant's trial counsel objected on the grounds of "foundation and expertise," arguing that Devine's area of expertise was serology, not ballistics or reconstruction, and that her testimony regarding the sequence of the shots would be speculative and lack foundation. He further stated that he had no objection to Devine's testimony about visiting the scene or her rendering an opinion that all of the shots were fired from outside the vehicle in a left to right direction. (5RT 1610.)

### 2. The Prosecution's Direct Examination

During direct examination by the prosecutor, senior criminalist Elizabeth Devine testified that she had been employed for nine years at the Los Angeles County Sheriff's Department. She defined a criminalist as "an individual who analyzes, collets, and uses scientific means to come to some determination about evidence." (5RT 1612.) She had a bachelor's degree in biology from UCLA and a master's degree in science and criminalistics from California State University at Los Angeles. Her course work included death investigations, sex crimes investigation, serology, microscopy, and other types of examination. At

the time of trial, she was assigned to the serology section of the crime lab. A serologist responds to crime scenes to collect blood and other physical evidence such as semen, perspiration saliva, and bodily fluids. The seroligist then analyzes the samples to determine their source. Serologists also interpret blood stain patterns to determine a suspect's position and location during a shooting, where the victim was located, and if the victim moved during or after the crime. (5RT 1615.)

Devine had been trained in blood stain pattern interpretation and she completed advanced course work at the California Criminalistics Institute in Sacramento on topics including crime scene reconstruction, bullet trajectories, and computer work. (5RT 1612-1614.) Devine had also completed additional advanced course work in crime scene reconstruction, but she testified that the primary means of learning crime scene reconstruction comes from visiting numerous crime scenes to gain experience. Devine estimated conservatively that she had collected evidence from, and examined, 300 crime scenes including five years of instruction in the field with Ron Lenhart, an internationally renowned expert in blood stain pattern and reconstruction. Devine's practice was to review all of her reconstruction cases with Lenhart including the photographs, the language used in her reports, and her conclusions. Based on her training and experience, Devine also reviewed witness statements regarding how a crime occurred and correlated or disputed those statements with the physical evidence recovered from the crime scene. (5RT 1616-1620.)

In this case, Devine met with the detectives investigating the murders on October 7, 1993, in La Verne. She examined the interior and exterior of the Plymouth and the photographs taken by the officers depicting the position of the victims at the time police discovered them at the crime scene. Devine also took her own photographs of the car, read the autopsy reports, reviewed the autopsy protocols, examined the autopsy photographs, and reviewed a witness

statement. The detectives described to her the condition of the car and the victims when they were discovered, as well as the location of the shell casings and spent rounds found in and around the car. Based on the totality of the evidence, including the position of the bullet recovered inside the car and the positions of the seats, she was able to render an opinion as to which shot was fired first. Devine had been previously qualified as an expert approximately 75 to 100 times. (5RT 1620-1624, 1627-1628.)

### 3. The Defense Voir Dire

During voir dire examination by appellant's trial counsel, Devine testified that she had spent the nine years prior to the trial responding to crime scenes and analyzing samples in the laboratory. The areas of expertise for which she had previously qualified included bullet trajectories and bullet impacts within the context of evaluating the totality of circumstances at a crime scene. She studied crime scene reconstruction using trajectories at the California Criminalist Institute, however trajectories were not specifically her expertise. Devine testified that she had wanted a "firearms person" to look at the bullet hole in the front door of the car, but that the detectives did not agree with her. She based her ultimate opinion in the case on where the bullet was found in the car as opposed to basing her opinion on the bullet's trajectory. As she explained, "bullets travel in straight lines and the bullet was recovered from the door, and it doesn't take a brain surgeon to figure out where the bullet came from." (5RT 1624-1629.)

### 4. The Trial Court's Ruling

After ending his voir dire, appellant's trial counsel told the court that he "would still challenge the lack of foundation of the trajectory issue." (5RT 1631.) The court ruled as follows:

I think based upon her education, training and experience that she's qualified to testify as an expert, and assume that you can develop us a scenario of some sort from known facts and opinions with reference to the sequence at least [sic] the first shots.

(5RT 1631.)

### 5. The Expert's Opinion

After the trial court's ruling, Devine opined that the first shot fired at the murder scene was the bullet that caused a through-and-through wound to Robin Shirley's neck as it passed through her body from left to right and then lodged in the front passenger door. Devine based her opinion on the position of that wound, the recovery of the bullet in the front passenger door, and primarily, on the through-and-through head wound that Thompson received to his temple. The bullet that passed through Thompson's temple exited his body and caused a grazing wound to Shirley's upper left shoulder, before landing on the front passenger's seat behind Shirley's body. When the shot to Thompson's temple was fired, he had the driver's seat slightly reclined, thereby making Shirley's shoulder inaccessible to the bullet as she sat in the passenger's seat. In order for the bullet to graze Shirley's shoulder as it did, she had to have been slightly slumped forward to expose her shoulder. That slumping forward was caused when Shirley was shot in her neck. If Thompson had been shot first, Shirley's shoulder would not have been grazed by the bullet that passed through Thompson's temple because her shoulder would have been inaccessible to the bullet. (5RT 1632-1634, 1638.)

Devine further opined that the bullet which passed through Shirley's neck, caused her to slump forward, and then lodged in the front passenger door. The bullet was fired from the left, and from behind Shirley, in an upwards direction. Assuming the front windows were rolled up, the rear windows were

partially down, and the victims were seated in the positions depicted in the photographs, Devine concluded that the shot to Shirley's neck was fired through the left rear window. The physical evidence in the car, the blood spatter, and the photographs were consistent with her opinion. In fact, based on those factors, she concluded that all of the shots were fired from the left rear window. Regardless of whether the gun was inside or outside of the car, all of the shots were fired from the area of the left rear window. (5RT 1634-1636, 1642.)

Devine concluded that the second shot fired was the through-and-through wound to Thompson's temple. When the shot was fired, the driver's seat was slightly reclined and Thompson's head was turned to the left. After the bullet passed through Thompson's temple, it grazed Shirley's shoulder, slowed down, and fell behind her body onto the front passenger's seat. (5RT 1640-1644.)

Devine could not determine the order in which the remaining shots were fired. However, she concluded that all four of the wounds to Thompson's back had to have been inflicted after the shot to his temple because when his body was flat against the back of the driver's seat, his back would have been inaccessible unless the shots were fired through the back of the seat and there was no damage to the back of the driver's seat. Thompson had to have first been shot in the temple which caused him to slump forward and thereby expose his back for infliction of the four wounds to his back. (5RT 1644-1645.) The clustered nature of the four back wounds suggested that the shots were fired in succession. Devine could not determine when the shot to Shirley's forehead was inflicted. (5RT 1646-1647.)

Devine did not think that reconstructing the scene by shooting at dummies would have aided her in forming any further opinions as to what occurred. It would not have been possible for the shots to Thompson's back to

be inflicted before the temple shot (such as if he were leaning over to expose his back) because there would have been no way for him to return to the upright position for infliction of the temple shot since the back shots were fatal. There was no blood spatter evidence from the back shots because the bullets lodged in Thompson's body. Devine believed the blood spatter on the right door frame was from Shirley's head wound. (5RT 1649-1653.) She relied on Dr. Ribe's report for information regarding the direction and angles that the bullets traveled through the bodies. (5RT 1652-1653.)

**C. The Applicable Law**

A trial court has considerable discretion to allow expert testimony. (Evid. Code, § 352; *People v. Carpenter* (1997) 15 Cal.4th 312, 403; *People v. Rowland* (1992) 4 Cal.4th 238, 266.) The opinion of an expert must be related to a subject sufficiently beyond the common experience so as to assist the trier of fact. (Evid. Code, § 801.) "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (*People v. Davenport* (1995) 11 Cal.4th 1171, 1207, internal quotation marks and citation omitted.) "Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805.) A trial court's determination to admit expert evidence will not be disturbed on appeal absent a showing that the court abused its discretion in a manner that resulted in a miscarriage of justice. (*People v. Catlin* (2001) 26 Cal.4th 81, 131; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

### D. Legal Analysis

Appellant's contention that Elizabeth Devine was not qualified to render an opinion regarding the sequence of shots and that her opinion in that regard was speculative lacks merit. (AOB 74-78) Devine had extensive training and field experience in the area of crime scene reconstruction. She had completed course work at the California Criminalistics Institute in Sacramento in crime scene reconstruction and bullet trajectories, as well as additional advanced course work in crime scene reconstruction. (5RT 1612-1614.) In addition, she had collected evidence from, and examined, 300 crime scenes, including five years of instruction in the field with Ron Lenhart, an internationally renowned expert in crime scene reconstruction. As Devine testified, the best way of gaining experience in crime scene reconstruction was by actually visiting crime scenes and conducting investigations. (5RT 1616-1620.) Based on her experience, the trial court properly ruled that Devine was qualified to testify, and to offer an opinion regarding the sequence of the shots fired.

Appellant's contention that this opinion could be given only by a "crime scene reconstructionist" per se is incorrect. (AOB 74-75) Contrary to appellant's contention, the fact that Devine was employed in the serology section of the crime lab at the time of trial did not render her unqualified in the area of crime scene reconstruction. Devine was employed as a senior criminalist – "an individual who analyzes, collets, and uses scientific means to come to some determination about evidence." (5RT 1612.) Based on Devine's training and experience in investigating crime scenes, those conclusions necessarily included the expertise to render an opinion regarding the sequence of shots in this case. Moreover, her opinion was based on the totality of her investigation at the crime scene, and her qualifications in terms of crime scene investigation were not disputed as she had previously investigated over 300 crime scenes. "[T]he opinion evidence here at issue did not require that the

witness have expertise *beyond* that which was shown . . .," that is, that she was an experienced criminalist who also possessed extensive familiarity specifically with determining gunshot sequence. (*People v. Robinson* (2005) 37 Cal.4th 592, 632 citing *People v. Farnam* (2002) 28 Cal.4th 107, 162, [error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness "clearly lacks qualification as an expert"].) As such, the trial court did not abuse its discretion when it qualified Devine as an expert.

Contrary to appellant's assertion, the expert's testimony that appellant shot Shirley first did not cause the jury to reject "out of hand any evidence that [appellant] shot . . . Thompson in imperfect self-defense." (AOB 79.) Even without the testimony regarding the sequence of shots, the jury could have still reasonably rejected appellant's claim that he shot Thompson first through the front windshield because *all* of the physical evidence contradicted appellant's version of the events. There was no damage to the front windshield of the car. Furthermore, if Thompson had been shot in the back while bending over to retrieve a gun, he could not have returned to an upright position to receive the shot to his temple because the shots to his back were fatal. In addition, regardless of the sequence of the shots, the physical evidence undisputedly showed that all of the shots were fired from behind the victims at virtually point blank range, as opposed to being fired from the front of the car in response to Thompson allegedly reaching for a gun.

In addition, the expert's testimony did not "negate[] the substantial evidence that [appellant] was psychologically predisposed to acting impulsively." (AOB 81-84.) It was not the admission of the expert's testimony that negated any evidence that appellant tended to act impulsively, but rather the overwhelming evidence that appellant methodically planned the attack when, dressed in black, on a black bicycle, and armed with a loaded nine-millimeter gun in his holster, he purposefully went to the exact location in the Target

parking lot where he knew Robin Shirley waited each morning, sneaked up on the victims from behind, shot them multiple times, and then returned to shoot them several more times. Absent the expert's testimony about the sequence of the shots, it is not likely the jury would have overlooked this evidence of calculated planning and premeditation, and found appellant guilty of anything less than first degree murder.

Finally, the jury was instructed with CALJIC Nos. 2.80[19] (Expert Testimony) and 2.82[20] (Expert Testimony Concerning Hypothetical Questions),

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19. The trial court instructed the jury pursuant to CALJIC No. 2.80 as follows:

> A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training or education sufficient to qualify him or her as an expert on the subject to which his or her testimony relates. [¶] A duly qualified expert may give an opinion on questions in controversy at a trial. [¶] To assist you in deciding such questions, you may consider the opinion with the reasons given for, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert. [¶] You are not bound to accept an expert opinion as conclusive, but should give to it the weight to which you find it entitled. You may disregard any such opinion if you find it to be unreasonable.

(9RT 2710-2711.)

20. The trial court instructed the jury pursuant to CALJIC No. 2.82 as follows:

> In examining an expert witness, counsel may propound to him or her a type of question known in the law as a hypothetical question. By such a question the witness is asked to assume to be true a set of facts and to give an opinion based upon that assumption. [¶] In permitting such a question, the court does not rule and does not necessarily find that all the assumed facts have been proven. It only determines that those assumed facts are within the probable or possible range of the evidence. It is for you, the jury, to find from all the evidence whether or not the facts assumed in a hypothetical question have been proved. If you should find that any assumption in such a question has not

informing the jury that it must assess the weight of expert opinion evidence. (9RT 2710-2712.) As the trial court explained to appellant's trial counsel, "based upon her education, training and experience . . . she's qualified to testify as an expert . . . with reference to the sequence at least [sic] the first shots." (5RT 1631.) The trial court properly exercised its discretion.

**E. Harmless Error**

In any event, even if the trial court erred in permitting Devine to testify as to the sequence of the shots, any error was harmless. (See *People v. Prieto* (2003) 30 Cal.4th 226, 247 [standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836, governs erroneous admission of expert witness testimony].) The evidence demonstrating appellant intended to unlawfully kill *both* Thompson and Shirley, regardless of which victim he shot first, was overwhelming. (See respondent's Argument I, *supra*.) Moreover, even absent the expert's testimony, based on the physical evidence, the jury still would have rejected appellant's version of events. The jury could have concluded without the assistance of the expert that appellant did not fire through the front windshield as Thompson allegedly reached for a gun because there was no damage to the windshield. Similarly, even without the expert's testimony, the jury could have discerned that Thompson had to have been seated upright in order for the bullet that passed through his temple to graze Shirley's shoulder, and that Shirley must have been shot before Thompson in order for her body to slightly slump forward and expose her shoulder. Lastly, the jury did not need the expert's assistance to conclude that the shots to Thompson's back were

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> been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based upon the assumed facts.

(9RT 2711-2712.)

inflicted after the shot to his temple because the back shots were fatal and thereby rendered him incapable of returning to an upright position to receive the shot to his temple. Thus, even if the expert's testimony regarding the shot sequence had been excluded, it is not reasonably probable, in light of the other physical evidence negating appellant's version of events, that the jury would have believed appellant's story and a different result would have occurred.

Appellant claims that there is a reasonable probability that if the expert's testimony regarding the sequence of shots had been excluded during the penalty phase retrial, the jury would have returned a verdict of life in prison. (AOB 84-93.) Appellant's claim should be rejected. State law error occurring during the penalty phase will be considered prejudicial when there is a reasonable possibility such an error affected a verdict. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) The reasonable possibility standard for assessing prejudice in the penalty phase is the same in substance and effect as the beyond a reasonable doubt standard of *Chapman v. California, supra*, 386 U.S. at p. 24. (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11.)

Here, for the same reasons that admission of the expert's testimony was harmless in the guilt phase of the trial, it was also harmless beyond a reasonable doubt in the penalty phase retrial. Even without the expert's testimony about Robin Shirley being shot first, it is not reasonably possible that the jury would have voted for life in prison rather than death in light of the aggravating evidence that appellant planned and premeditated, committed multiple murders, and committed the murders while lying-in-wait (see respondent's Argument VIII).

## IV.

## THE MODIFIED VERSION OF CALJIC 2.02, AND THE INSTRUCTION COMBINING CALJIC NOS. 3.31 AND 3.31.5, DID NOT RELIEVE THE JURY FROM FINDING BOTH THE SPECIFIC INTENT AND THE MENTAL STATE OF FIRST DEGREE MURDER

In Argument 4 of his opening brief, appellant contends that the trial court's modified instruction on CALJIC Nos. 2.02 (Sufficiency of the Evidence to Prove Specific Intent or Mental State), and instruction combining CALJIC Nos. 3.31 (Concurrence of Act and Specific Intent) and 3.31.5 (Mental State), relieved the jury from finding the requisite specific intent and mental states of first degree murder.[21] (AOB 94-100.) Appellant's claim should be rejected because the jury was not misled, and the evidence of deliberation was overwhelming.

### A. Waiver

Appellant's trial counsel did not object to CALJIC No. 2.02 (8RT 2522), or to the combined version of CALJIC Nos. 3.31 and 3.31.5. (8RT 2563-2564.) As such, appellant's claims as to these instructions have been waived. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 503 ["A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial."].)

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21. Appellant asserts that the trial court created the combined version of CALJIC Nos. 3.31 and 3.31.5. However, the prosecutor and appellant's trial counsel jointly fashioned the combined jury instruction. (8RT 2563-2564.)

## B. Legal Analysis

Despite the explicit requirements for finding willful, deliberate, and premeditated murder set forth in CALJIC No. 8.20[22], appellant claims that the parties' modified version of CALJIC No. 2.02[23], and the combined version of

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22. The trial court instructed the jury with CALJIC No. 8.20 as follows:

> All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree. [¶] The word "willful," as used in these instructions, means intentional. [¶] The word "deliberate" means formed or arrived at or determined upon as a result of the careful thought and weighing of consideration for and against the proposed course of action. The word "premeditated" means considered beforehand. [¶] If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder in the first degree. [¶] The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill, which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. [¶] The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree. [¶] To constitute a deliberate and premeditated killing, a slayer must weigh and consider the question for killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.

(9RT 2717-2718.)

23. The trial court instructed the jury with CALJIC No. 2.02 as follows:

> The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the

CALJIC Nos. 3.31 and 3.31.5[24], in this case "relieved the jury from the requirement of finding both specific intent and the mental states of first degree murder" (AOB 97) and "permitted the jury to find first degree murder without finding deliberation so long as the jury found a specific intent to kill." (AOB 98.) He argues that the language "specific intent *or* mental state" in CALJIC No. 2.02, and the combined version of CALJIC Nos. 3.31 and 3.31.5, misled the jury as to the requirements for first degree murder. Appellant's argument is speculative and not supported by the record. Regardless of the modified instructions, the jury plainly found the necessary specific intent and mental

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> commission of the act. However, you may not find the defendant guilty of the crimes charged unless the proved circumstances are not only consistent with the theory that the defendant had the required specific intent or mental state, but cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state. [¶] If, on the other hand, one interpretation of the evidence as to such specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable. [¶] The specific intent or mental state as to each crime or lesser crime is defined elsewhere in these instructions.

(9RT 2699-2700.)

24. The trial court read the jury the following instruction drafted by the parties which combined CALJIC Nos. 3.31 and 3.31.5:

> In the crimes charged in the information and the lesser crimes there must exist a union or joint operation of act or conduct, and a certain mental state or specific intent in the mind of the perpetrator. Unless such mental state or specific intent exists, the crime to which it relates is not committed. [¶] The mental state or specific intent required are included in the definitions of the crimes set forth elsewhere in these instructions.

(9RT 2714.)

states for first degree murder because the trial court separately instructed the jury on the lying-in-wait theory of first degree murder as to both victims, and the jury returned true findings on those allegations. (10RT 2899-2901.)

In addition, in *People v. Smithey* (1999) 20 Cal.4th 936, this Court upheld a modification to CALJIC No. 8.20 involving an analogous mental state issue. In *Smithey*, the trial court modified the standard instruction on deliberate and premeditated murder (CALJIC No. 8.20) to include the statement: "To prove the killing was deliberate and premeditated, it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his act." (*Id.* at p. 979.) Similar to appellant's current complaint, the defendant in *Smithey* contended that the modified version of the instruction was reasonably likely to have misled the jurors into believing that they could find premeditation and deliberation if there was evidence that defendant simply committed the killing. This Court held that:

> Considering the instruction as a whole, we find no reasonable likelihood that the jury misunderstood the phrase "maturely and meaningfully reflected" in the manner suggested by defendant. The instruction made clear that reflection must have preceded commission of the crime and could not have been unconsidered or rash, but rather must have resulted from careful thought and a weighing for and against the chosen course of action. *There is no reasonable likelihood that the jury believed it could find deliberation and premeditation solely from evidence that defendant intended to kill, or solely from evidence that he committed the act*, as defendant contends. We conclude that the trial court did not err in giving only the modification proposed by the prosecutor, and that the instruction did not mislead the jury regarding the requisite mental states for first degree murder or any of the other charged crimes.

(*Id.* at pp. 981-982, emphasis added.)

As in *Smithey*, here, there is no reasonable likelihood that the jury believed it could find first degree murder without finding deliberation so long as the jury found a specific intent to kill. (AOB 98.) CALJIC No. 8.20, as well as the instructions on lying-in-wait, explicitly informed the jury that it must find both the required specific intent *and* mental states of first degree murder. Those instructions were more specific than the modified version of CALJIC No. 2.02 and the combined version of CALJIC Nos. 3.31 and 3.31.5, so the jurors were more likely to focus on those instructions. In addition, CALJIC No. 2.02, and the combined version of CALJIC Nos. 3.31 and 3.31.5, instructed the jury that the specific intent or mental state as to each crime or lesser crime is defined elsewhere in the instructions. (9RT 2699-2700, 2714.) Thus, the jury knew to look elsewhere for the specific requirements of first degree murder and would not have relied solely on the more general statements about specific intent and mental state set forth in the allegedly erroneous instructions. Ultimately, there can be no question that the jury found true all of the requirements for first degree murder, including deliberation, when it returned the true findings on the lying-in-wait allegations.

Contrary to appellant's contention, the evidence of deliberation in this case was strong. (AOB 98-99; see respondent's Argument I.) Appellant meticulously planned to exact revenge on the person who had received the promotion he so desired. He did not randomly stumble upon Robin Shirley and Lee Thompson on the morning of October 2, 1993. He deliberated each detail of the killings, including painting his bicycle black, arming himself with the holster and loaded nine-millimeter gun, dressing in black, and arriving at the exact time and place where he knew Shirley would be waiting for the store to open as she did each day. He deliberately surprised the victims by hiding his bicycle and then approaching them from behind to catch them in the most vulnerable of positions. And, he ensured that his plan was fully executed by

returning to shoot them again when gurgling sounds emanated from the car.

On this record, the allegedly erroneous instructions did not present a substantial risk of actually misleading the jury into believing that it could find appellant guilty of first degree murder without finding the requisite specific intent *and* mental states. Moreover, both the prosecutor and appellant's trial counsel repeatedly explained and argued the requirements of first degree murder both under the premeditated and deliberate theory, and the lying-in-wait theory. Thus, even if the trial court erred by reading the modified version of CALJIC No. 2.02 and the combined version of CALJIC Nos. 3.31 and 3.31.5, reversal is not required because the record supports the conclusion that the jury likely was not misled. (*People v. Hughes* (2002) 27 Cal.4th 282, 341.) As such, appellant was not prejudiced. (*Ibid.*)

V.

## THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC 2.70

In Argument 5 of his opening brief, appellant contends that the trial court erred when it instructed the jury with CALJIC No. 2.70 (Confessions and Admissions-Defined) because there was no evidence of a confession presented at trial. Appellant argues that the instruction impliedly directed a verdict and that the instruction was prejudicial. (AOB 101-108.) He also contends that the instruction violated his rights "under the Sixth and Fourteenth Amendments, and deprived him of his right to reliable fact-finding in a capital case under the Eight and Fourteenth Amendments." (AOB 106.) Appellant's claims should be rejected because it is not likely the jury was misled, and furthermore, he was not prejudiced.

### A. The Relevant Proceedings

Appellant's trial counsel objected to the trial court instructing the jury with CALJIC 2.70, arguing that appellant had not made a confession. (8RT 2530-2533.) Appellant's trial counsel asserted that appellant had only made admissions, not a confession, in the case. The trial court stated that instructing the jury with CALJIC 2.70, which defines both admissions and confessions, " . . . may enlighten the jury and tell them that there is, in fact, a difference [between admissions and confessions], rather than they get back there and they are talking about confessions, which [sic] really all they are taking about is admissions." (8RT 2531.) The court thereafter instructed the jurors with CALJIC Nos. 2.70[25] and 2.71[26] (Admission-Defined). (9RT 2707-2708.)

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25. The trial court instructed the jury with CALJIC No. 2.70 as follows:
A confession is a statement made by a defendant, other than at his trial, in which he has acknowledged his guilt of the .

## B. The Applicable Law

The trial court must instruct the jury sua sponte in the language of CALJIC No. 2.70 when a defendant made a confession. (*People v. Hudson* (1981) 126 Cal.App.3d 733, 742.) However, "[i]t is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 citing *People v.*

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> . . crimes for which such defendant is on trial. [¶] In order to constitute a confession, such a statement must acknowledge participation in the crimes as well as the required criminal intent and state of mind. An admission is a statement made by the defendant which does not by itself acknowledge his guilt for the crimes for which such defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. [¶] You are the exclusively [sic] judges as to whether the defendant made a confession or an admission and if so, whether such statement is true in whole or in part. [¶] You should find - - if you should find that the defendant did not make the statement, you must reject it. If you find that it is true in whole or in part, you may consider that part which you find true. [¶] Evidence of an oral confession or an oral admission of the defendant should be viewed with caution.

(9RT 2707-2708.)

26. The trial court instructed the jury pursuant to CALJIC No. 2.71 as follows:

> An admission is a statement made by the defendant other than at this trial which does not by itself acknowledge his guilt of the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether such statement is true in whole or in part. [¶] If you should find that the defendant did not make the statement, you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true. Evidence of an oral admission of the defendant should be viewed with caution.

(9RT 2708-2709.)

*Eggers* (1947) 30 Cal.2d 676, 687.) An erroneous instruction requires reversal only if it appears that the error was likely to have misled the jury. (*People v. Malone* (1988) 47 Cal.3d 1, 52.)

**C. Legal Analysis**

In this case, appellant presented evidence of his statement to Dr. Wells that he shot Lee Thompson because he believed Thompson was reaching for a gun. (7RT 1083-1084.) Even if this statement was not a confession, it is not likely that the trial court's instruction with CALJIC No. 2.70 mislead the jury or prejudiced appellant.

Appellant contends that instructing the jury with CALJIC No. 2.70 amounted to an implied directed verdict from the trial court. (AOB 103-106.) Appellant argues that the instruction must have caused the jurors to believe that his statement to Dr. Wells that he shot Thompson constituted a confession to first degree murder because he was only charged with two counts of first degree murder. (AOB 103.) Appellant's argument is speculative and incorrect. It is not reasonably likely that this single instruction caused the jury to believe that the trial court was directing a first degree murder verdict. CALJIC No. 2.70 expressly informed the jurors that they were the exclusive judge of whether a confession or an admission was made, "and if so, whether that statement is true in whole or in part." In addition, the trial court instructed the jury pursuant to CALJIC No. 17.31 that "[w]hether some instructions apply will depend upon what you find to be the facts. You are to disregard any instruction which applies to facts determined by you not to exist. Do not conclude that because an instruction has been given I am expressing an opinion as to the facts." (10RT 2883-2884.)

Appellant also claims that the instruction was prejudicial because "[b]y instructing the jury with CALJIC No. 2.70, the court suggested to the jury that

[appellant] had confessed to first degree murder and therefore admitted the essential component of deliberation." (AOB 106.) Contrary to appellant's contention, this case was not "close" on the issue of deliberation. (See respondent's Argument I.) In light of the state of the evidence, and considering the instructions as a whole, there is no likelihood the jury was misled into believing that appellant confessed to first degree murder or admitted the element of deliberation. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1153-1154.) Furthermore, appellant's contention that the instruction's directive to view an oral confession with caution could have caused the jurors to view with suspicion appellant's statement that he shot Lee Thompson in self defense is purely speculative. (AOB 107.) Appellant provides no reasonable explanation why the jury would select only that small portion of his statement to view with caution. It is impossible appellant was prejudiced by the instruction, because it was beneficial to him, in that it informed the jury to consider *any* admissions or confessions with caution.

Even if the jury had not received the instruction, it is not reasonably probable that it would have overlooked the compelling evidence of appellant's planning, premeditation, and deliberation and found him either innocent or guilty of a lesser crime. The record supports the conclusion that the jury likely was not misled. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 341.) As such, appellant was not prejudiced. (*Ibid.*)

VI.

## THE TRIAL COURT PROPERLY DID NOT ORDER A COMPETENCY HEARING BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE THAT APPELLANT WAS INCOMPETENT TO STAND TRIAL

In Argument 6 of his opening brief, appellant contends that the trial court improperly denied his trial attorney's request for a competency hearing on three occasions. Appellant claims that he presented substantial evidence that he was mentally incompetent to stand trial, and that the trial court erred in failing to hold competency hearings in view of the evidence establishing that he was unable to understand the nature of the proceedings and rationally assist in his own defense. (AOB 109-123.) Appellant asserts that the trial court's failure in this regard violated his rights "to due process of law, a fair trial, trial by jury, confrontation and cross-examination, effective assistance of counsel, equal protection and a reliable penalty verdict as guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." (AOB 109.) The record fails to support appellant's claim of incompetency to stand trial. Because appellant failed to present substantial evidence of mental incompetence, the trial court was not obligated to initiate formal competency proceedings.

### A. The Relevant Proceedings

#### 1. The May 15, 1995 Hearing

On May 10, 1995, approximately six weeks before the scheduled beginning of the penalty phase retrial, appellant's trial counsel filed a motion requesting a competency hearing pursuant to Penal Code section 1368. The moving papers included a declaration from defense counsel summarizing the guilt phase mental health testimony and asserting that appellant suffered from

"deep-seated emotional trauma" which was preventing him from cooperating with the defense team. (2CT 424-426.)

On May 15, 1995, the trial court held a hearing on the defense motion. Dr. Michael Coburn, a psychiatrist, testified for the defense. (14RT 3307-3308.) Dr. Coburn met with appellant on February 24 and March 17, 1995. (14RT 3308.) During the meetings, appellant expressed that he did not want to participate in the psychiatric evaluation. Dr. Coburn did not observe any evidence of psychosis, active delusions, hallucinations, or grossly illogical thinking. (14RT 3309.) Dr. Coburn opined that appellant suffered from depression and anxiety which inhibited appellant's ability to cooperate in the evaluation. However, Dr. Coburn stated that he had no data to explain why appellant refused an evaluation, and that he had "no idea" what had caused appellant to act in that manner. (14RT 3310.)

At the February 24, 1995, meeting, appellant acted respectful and polite. When Dr. Coburn explained that he wanted to complete a psychiatric evaluation, appellant responded that he hated psychiatrists and doctors, and that he wanted the death penalty. (14RT 3312-3314.) Dr. Coburn testified that appellant's decision that he wanted the death penalty was not indicative of incompetence, and that he knew of other individuals who had made the rational choice not to fight the death penalty. (14RT 3319-3320.) Appellant did not tell Dr. Coburn any of his history. Dr. Coburn decided not to question appellant any further. The meeting lasted approximately 20 minutes. Dr. Coburn did not reach any conclusions about appellant's mental state. (14RT 3315-3316.)

At the March 17, 1995, meeting, Dr. Coburn had "a small degree of substantive interview with [appellant], very minimal" about contact with appellant's family. Appellant did not want to talk about any issues involving emotions, memories, or the details of the murders. Dr. Coburn ended the meeting after approximately 20 or 30 minutes. (14RT 3317-3319.)

Throughout both interviews, there was never any indication that appellant was disoriented, unaware of Dr. Coburn's presence, or that he could not understand Dr. Coburn. (14RT 3320.) Dr. Coburn opined that appellant's "choosing not to cooperate is more a function of terrible psychological discomfort than it is a rational decision to merely die in some rational way." (14RT 3321.)

Dr. Coburn testified that on March 22, 1995, he was present for a 45 minute meeting between appellant and Ms. Contreras, the defense team's paralegal. Dr. Coburn did not attempt to collect any data from appellant. Instead, he observed the conversation between appellant and Ms. Contreras, but at the hearing he could not recall the substance of their conversation. Appellant had no difficulty understanding or responding to questions. (14RT 3322-3327.)

Dr. Coburn went to the jail on a few other occasions, but the deputies told him that appellant did not want to speak with him. Dr. Coburn never received any history of the case from appellant. (14RT 3327-3328.) Dr. Coburn did not have enough data to determine whether appellant's choice to accept the death penalty was rational, although in Dr. Coburn's "value system," appellant's reasons were not rational. (14RT 3330.)

The trial court denied the motion, stating:

> Well, I can indicate to you that I have at this point in time at least no doubt as to his competency. The fact remains he apparently has made a decision that he prefers the death penalty. I don't find that troublesome. The problem is that what I get from Dr. Coburn is that he's not willing to discuss it and explain why, basically.
>
> Now, I don't know whether that makes him incompetent. I don't think that makes him incompetent, just, you know, it may be strange. [¶] [¶] [¶]

> I don't - - don't have a doubt as to his competency. I think to pursue the death penalty hearing, that - - that it would be at least, quote, nice to know as to why he came to the conclusion that he came to, though, I don't think that makes him incompetent.
>
> I may - - my views may be different were I so situated as maybe yours. But I don't think that affects his competency.

(14RT 3336-3337.) Appellant's trial counsel argued that appellant was not voluntarily deciding not to cooperate with Dr. Coburn, but rather, he was unable to cooperate due to "some emotional discomfort." (14RT 3339.) The trial court responded, "I don't find based upon the information I have that he is incompetent." (14RT 3341.) The court further stated, "If anything, I think he is probably quite competent" 14(RT 3342), and "I have no doubt in my mind he completely understands what it is we're talking about" (14RT 3344).

**2. The June 28, 1995 Hearing**

On June 28, 1995, appellant's trial counsel again requested that the trial court hold a formal competency hearing based on counsel's belief that appellant was not competent. When counsel had attempted to interview appellant, appellant stated that he could not speak because "it hurts." (15RT 3352-3353.) Dr. Coburn again testified for the defense. He briefly spoke to appellant in a "one-way" conversation before the hearing that day, but otherwise had not met with appellant since the May 15, 1995 hearing. (15RT 3358-3360.) Dr. Coburn testified that a female psychologist had attempted to interview appellant, but appellant only minimally communicated with her. (15RT 3355-3356.) Dr. Coburn knew that appellant had been speaking with Ms. Contreras. (15RT 3360.) The morning of the hearing, Ms. Contreras told Dr. Coburn that appellant had said that he felt "some kind of conspiracy against him was afoot."

Dr. Coburn testified that he thought appellant was correct because the defense team was "in conspiracy to get him to open up to us . . . ."

Dr. Coburn had a suspicion, although not to a level of medical certainty, that appellant might be paranoid. He did not know the reason for appellant's refusal to talk, although he believed it was volitional because appellant did not have any speech impairment or neurological reason for not speaking. Dr. Coburn could not determine if appellant's motivation for not communicating in the psychiatric interviews was rational or not. (15RT 3355-3356.) He did not offer an opinion as to appellant's competency, but in response to a defense question about whether he would urge the court to declare a doubt about appellant's competency, Dr. Coburn responded, "Given the fact that it's a life versus death situation, I would, yes." (15RT 3362.)

The trial court ruled that it did not have a doubt as to appellant's competency, and that the defense had failed to present substantial evidence that there was an issue as to appellant's competency. (15RT 3365.) Regarding appellant's choice not to communicate, the court further stated,

> . . . I think choice, the word choice, itself, implies voluntary. And I'm convinced that it is. As to whether it is rational or irrational, I don't know. I guess, again, that depends on the subjective evaluation of what it is that [appellant's] goal happens to be.
>
> I think the goal of further delaying the proceeding is one that is uppermost in his mind. Therefore, I think the choice that he makes not to speak to us, at least, in his view is a rational one, hoping that it will delay the proceedings infinitum. . . .

(15RT 3366.)

### 3. The July 5, 1995 Hearing

On July, 5, 1995, the day scheduled for the penalty retrial, appellant's trial counsel asked the court to consider a doubt as to appellant's competency. He stated that appellant was not communicating, and that it was his good faith belief that the lack of communication was due to a metal disorder as opposed to voluntary will. (16RT 3379.) The trial court stated that the issue had previously been resolved. (16RT 3380.)

## B. The Applicable Law

Trial of an incompetent defendant violates the due process clause of the Fourteenth Amendment to the United States Constitution. (*Godinez v. Moran* (1993) 509 U.S. 389, 396; *Drope v. Missouri* (1975) 420 U.S. 162, 171) and article I, section 15 of the California Constitution. Those protections are implemented by statute in California. A defendant is presumed competent unless it is proved otherwise by a preponderance of the evidence. (Pen. Code, § 1360, subd. (f).) A criminal defendant is incompetent and may not be "tried or adjudged to punishment" if "as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (Pen. Code, § 1367, subd. (a); *People v. Koontz*, *supra*, 27 Cal.4th at p. 1063.) Penal Code section 1368 mandates a competency hearing if a "doubt" as to a criminal defendant's competence arises during trial. (Pen. Code, § 1368, subds. (a) & (b).)

A "doubt" sufficient to trigger the obligation to suspend criminal proceedings and hold a hearing to determine a defendant's competence to proceed means the existence of *substantial evidence* of incompetence. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1281; *People v. Pennington* (1967) 66 Cal.2d 508, 518, applying *Pate v. Robinson* (1966) 383 U.S. 375.) "'Substantial

evidence is evidence that raises a reasonable doubt about the defendant's competence to stand trial.'" (*People v. Hayes*, *supra*, 21 Cal.4th at p. 1281, quoting *People v. Frye* (1998) 18 Cal.4th 894, 952.)

In the *absence* of substantial evidence requiring a hearing, the decision to hold a hearing to assess a defendant's competence to stand trial is left to the sound discretion of the trial court. (*People v. Gallego* (1990) 52 Cal.3d 115, 162-163.) As this Court has noted,

> [s]ince neither abuse of discretion nor a doubt as a matter of law can possibly appear absent substantial evidence of incompetence, appellate court inquiry need go no further than a determination of whether such substantial evidence was adduced.

(*People v. Laudermilk* (1967) 67 Cal.2d 272, 283, fn. 10.) A trial court's decision whether to grant a competency hearing is reviewed under an abuse of discretion standard. (*People v. Ramos* (2004) 34 Cal.4th 494, 507.)

### C. Because There Was No Substantial Evidence Of Incompetence, The Trial Court Properly Did Not Hold A Competency Hearing

Appellant contends that the trial court erred when it denied his counsel's requests for a formal competency hearing on May 15, June 28, and July 5, 1995. (AOB 109-122.) On each occasion, the trial court properly denied appellant's request because he failed to present substantial evidence that raised a reasonable doubt as to his competence to stand trial. As such, the trial court's decision was not error.

At each of the three hearings, appellant failed to present evidence that raised a reasonable doubt about his competence. At the May 15, 1995, hearing, Dr. Coburn testified that he had only met with appellant on three occasions, for a total of only approximately 1 hour and 35 minutes, 45 minutes of which Dr. Coburn simply observed appellant interact with the defense paralegal. While

with appellant, Dr. Coburn never observed him exhibit any evidence of psychosis, active delusions, hallucinations, or grossly illogical thinking. (14RT 3309.) Dr. Coburn never opined that appellant was unable to understand the nature of the trial proceedings or to assist his attorney. Rather, Dr. Coburn's testimony focused on appellant's unwillingness to participate in a psychological exam. However, as Dr. Coburn admitted, this unwillingness to cooperate was not necessarily a sign of incompetence.

At the June 28, 1995, hearing, the evidence presented was even more minimal. Appellant's trial counsel told the court that when he had attempted to interview appellant, he stated that he could not speak because "it hurts ." (15RT 3352-3353.) Dr. Coburn testified that he had only briefly spoke to appellant in a "one-way" conversation before the hearing that day (RT 3358-3360), and he did not offer an opinion as to appellant's competency.

Finally, at the July 5, 1995, hearing, appellant's trial counsel presented no evidence, and instead merely asked the trial court to consider a doubt as to appellant's competency based on appellant's lack of communication. (16RT 3379.)

Whether considered cumulatively or individually, each reason that appellant now argues mandated a competency hearing was insufficient. As the record reflects, Dr. Coburn never expressed the opinion that appellant could not understand the nature of the proceedings, nor did he expressly comment on appellant's ability to rationally assist in his defense. Dr. Coburn's testimony primarily focused on appellant's unwillingness to engage in a psychological exam or discuss the murders, and his decision to not oppose the death penalty. As the trial court found, none of these facts compels the conclusion that appellant was incompetent. In fact, respondent submits evidence of appellant's unwillingness to talk about the gruesome facts of the murders and to accept the

death penalty is indicative of his understanding as to the gravely serious nature of his situation.

Appellant also asserts that his trial attorney's complaints about his lack of cooperation was a sufficient basis to hold a formal competency hearing. (AOB 122.) He is wrong. Penal Code section 1368 requires a formal competency hearing *only* if a doubt arises *in the mind of the judge* as to the defendant's competence or the court is presented "evidence that raises a reasonable doubt about the defendant's competence to stand trial." (*People v. Hayes, supra*, 21 Cal.4th at p. 1281.) A court is not required to hold a competency hearing based solely upon counsel's view that a defendant is incompetent. (*People v. Frye, supra*, 18 Cal.4th at p. 953.) Indeed, this Court has noted that an attorney's statements that his client is incapable of cooperating in his defense can be insufficient to require a hearing. (See *People v. Laudermilk, supra*, 67 Cal.2d at p. 285, citing *People v. Dailey* (1959) 175 Cal.App.2d 101, 108-109.)

In addition, as Dr. Coburn testified, appellant's decision not to oppose the death penalty was not indicative of incompetence. (14RT 3319-3320.) This Court also has "rejected the notion that a defendant's choice not to present a defense, even at the penalty phase, amounts to substantial evidence of incompetence." (*People v. Blair* (2005) 36 Cal.4th 686, 718 citing *People v. Bradford* (1997) 15 Cal.4th 1229, 1373 [defendant's choice not to present a defense at the penalty phase did not compel a doubt as to his competence to stand trial and represent himself].) "A defendant's preference for the death penalty and overall death wish does not alone amount to substantial evidence of incompetence or evidence requiring the court to order an independent psychiatric evaluation." (*People v. Ramos, supra*, 34 Cal.4th at p. 509 citing *People v. Guzman* (1988) 45 Cal.3d 915, 963-965.)

Furthermore, appellant failed to present substantial evidence that his choice not to oppose the death penalty was involuntarily caused by mental illness, as opposed to being a voluntary decision. As the trial court noted, while it may have been "nice to know as to why he came to the conclusion he came to . . . that [doesn't] make him incompetent." (14RT 3336.) Here, Dr. Coburn never testified that appellant's choice was involuntary due to mental illness. Furthermore, appellant's refusal to cooperate with Dr. Coburn's psychological evaluation does not conclusively indicate a lack of competence to stand trial. (*People v. Blair*, *supra*, 36 Cal.4th at p. 719 [defendant's refusal to be examined by a psychiatrist, incarceration at a prison for the mentally ill, insistence on remaining in propria persona, and filing numerous motions did not compel a doubt concerning defendant's competence].)

In addition, contrary to appellant's contentions, there was no conclusive evidence that he was suicidal or a paranoid schizophrenic prior to, or at the time of the murders. (AOB 120-121.) Even assuming appellant suffered from these conditions, the record does not indicate that the disorders rendered him mentally incompetent to understand the proceedings or assist defense counsel at the time of the penalty phase retrial in 1995. Appellant relies on Dr. Wells' testimony at the guilt phase regarding appellant's mental condition at the time of the murders (AOB 121), yet that testimony offers nothing to support his argument that he was incompetent for purposes of the penalty phase retrial two years after the murders when counsel brought the motion. "[E]vidence regarding past events that does no more than form the basis for speculation regarding possible current incompetence is not sufficient." (*People v. Hayes, supra,* 21 Cal.4th at p. 1281.) As Dr. Coburn stated at the May 15, 1995, hearing, the psychological data from the guilt phase of the trial was of no value in determining appellant's competency for the penalty phase. (14RT 3331.)

Moreover, appellant's claims of prior mental illness pale in comparison to other defendants' histories of mental illness in cases where this Court has found those defendants competent to stand trial. In *People v. Blair, supra*, 36 Cal.4th 686, 714, this Court noted that "even a history of serious mental illness does not necessarily constitute substantial evidence of incompetence that would require a court to declare a doubt concerning a defendant's competence and to conduct a hearing on that issue." (See also *People v. Ramos, supra*, 34 Cal.4th at p. 508 [defendant must exhibit more than a preexisting psychiatric condition to be entitled to a competency hearing; a death wish, a history of psychiatric treatment, planned suicide attempt, propensity for violence, and psychiatric testimony that defendant was physically abused as a child and suffered from a paranoid personality disorder did not constitute substantial evidence of incompetence requiring court to conduct a competency hearing]; *People v. Grant* (1988) 45 Cal.3d 829 [defendant's propensity for violence, hoarding medication for an alleged suicide attempt, and history of psychiatric treatment did not indicate he was incompetent at the time he pleaded guilty].)

Finally, although a trial court

> may not rely solely on its observations of a defendant in the courtroom, if there is substantial evidence of incompetence, the court's observations and objective opinion do become important when no substantial evidence exists that the defendant is less than competent to plead guilty or stand trial. [Citation.]

(*People v. Ramos, supra*, 34 Cal.4th at p. 509.) As set forth *supra*, evidence of appellant's incompetence was not substantial. As such, the trial court's observations and objective opinion are relevant. Here, the trial court observed appellant on a daily basis over an extended period of time, and concluded that based on those observations, "I have no doubt in my mind he completely understands what it is we're talking about . . . " (14RT 3344), and, "I think the

choice that he makes not to speak to us, at least, in his view is a rational one, hoping that it will delay the proceedings infinitum . . . ." (14RT 3366.)

Thus, appellant failed on each of the three occasions to present substantial evidence that raised a reasonable doubt as to his competence. "[W]hether the facts outlined above are considered separately or cumulatively, 'the record in the present case does not indicate that a reasonable doubt existed [or should have existed] as to [appellant's] ability to understand the proceedings against him.'" (*People v. Blair*, *supra*, 36 Cal.4th at p. 719 citing *People v. Bradford*, *supra*, 15 Cal.4th at p. 1373.) Thus, the trial court properly exercised its discretion in declining to order a further hearing on the matter, and appellant's claim herein must be rejected.

## VII.

## CALJIC 3.32 PROPERLY INSTRUCTED THE JURY TO CONSIDER APPELLANT'S ALLEGED MENTAL DISORDERS IN DETERMINING THE ISSUES OF DELIBERATION, INTENT TO KILL, MALICE, AND PREMEDITATION

In Argument 7 of his opening brief, appellant contends that the trial court erred by instructing the jury with a version of CALJIC No. 3.32 (Evidence of Mental Disease-Received for Limited Purpose) that stated the jury's consideration of appellant's alleged mental disorder was permissive rather than mandatory. (AOB 124-128.) Appellant also asserts that the jury was likely confused by the use of the language "and/or" in the instruction. (AOB 128-130.) Appellant claims that the erroneous instruction violated his right to due process, and deprived him of his right to reliable fact-finding in a capital case under the Eighth and Fourteenth Amendments. (AOB 130.) Appellant's claims should be rejected as there is no reasonable likelihood that the jury was misled by the instruction.

### A. The Relevant Proceedings

The trial court instructed the jury with CALJIC 3.32 as follows:

> Evidence has been received regarding a mental disease, mental defect, or mental disorder of the defendant, Sergio Nelson [at] the time of the crimes charged, namely first degree murder in count 1 and 2, and the lesser crimes thereto, namely second degree murder, voluntary manslaughter and involuntary manslaughter.
>
> You may consider such evidence solely for the purpose of determining whether of [sic] the defendant, Sergio Nelson, actually premeditated, deliberated, harbored malice aforethought, and/or intent to kill, which are elements of the crimes charged in counts 1 and 2, and

> one of which namely malice aforethought is an element of the lesser crime of second degree murder.

(9RT 2724-2725.)

Appellant's trial counsel requested an instruction that would have informed the jurors that they "should consider" appellant's alleged mental disorder.[27] (9RT 2673.) The trial court instead instructed the jury with the 1994 version of CALJIC No. 3.32 which stated the jury "may consider" evidence of appellant's alleged mental disorder.[28] (9RT 2724-2725.)

**B. The Instruction Did Not Compel The Jury To Ignore Evidence Of Mental Disease**

Appellant contends that the words "may consider" in the instruction permitted the jury to ignore evidence (his alleged mental illness) that he did not have the mental state required for first degree murder by telling the jury that such evidence was permissive rather than mandatory. (AOB 126-127.)

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27. The proposed instruction stated:

> In the crime of murder, which the defendant is accused, in count 1 and 2 of the information, express malice aforethought premeditation, and deliberation are necessary mental state [sic] to a finding of first-degree murder. [¶] If you find that the defendant had a mental defect, disease, or disorder, at the time of the alleged crime, you should consider that fact in determining whether the defendant had such mental state. [¶] If from all the evidence you have a reasonable doubt whether the defendant formed any such mental state, you must find that he did not have such a mental state.

(9RT 2673.)

28. Appellant contends that the trial court instructed the jury with a "modified" version of CALJIC 3.32. He is incorrect. At the time of appellant's trial in December 1994, CALJIC No. 3.32 contained the term "may consider," and this is the version read by the trial court. The instruction was modified in 1996 to state "should consider." (CALJIC 3.32 (6th ed. 1996).)

Contrary to appellant's assertion, the instruction did not tell the jury to ignore the evidence of his alleged mental illness. Regardless of whether the jurors are told that they "should" or "may" consider evidence of a mental disease, the fact remains that they *are* being told that a mental disease can affect the defendant's mental state. When read in the context of the entire instruction, the use of "may" does not give the jury discretion to disregard the evidence of mental disease or defect. Rather, the instruction informs the jurors that they can only consider the evidence for determining the defendant's mental state and not for any other purposes.

In *People v. Smithey, supra*, 20 Cal.4th at p. 986, the defendant claimed that his trial counsel was ineffective for not requesting a pinpoint instruction advising the jury that it could consider his mental disorders in combination with his intoxication when determining his mental state at the time of the crime. The jury was instructed with the same version of CALJIC No. 3.32 as in the present case, and "another instruction allowing it to consider evidence of intoxication in determining whether defendant possessed such mental states." (*Ibid.*) This Court held that:

> The instructions as a whole adequately informed the jury that it could consider the evidence of defendant's mental disease or defect, together with the evidence of his intoxication, in deciding whether the prosecution had carried its burden of proving the mental elements of the charged crimes beyond a reasonable doubt. The instructions did not hinder defense counsel from emphasizing to the jury during the closing guilt phase argument that the requisite mental states had not been proven because defendant's mental disease, defect, or disorder had exacerbated the effects of his intoxication. [Citations.] There is no reasonable likelihood that the jury was led to believe that it could not consider evidence of the combined effect of defendant's mental disorder and

> intoxication in determining his mental state. [Citation.] Therefore, defendant was not prejudiced by his counsel's failure to request an additional instruction.

(*People v. Smithey*, *supra*, 20 Cal.4th at pp. 986-987.)

As in *Smithey*, here, there is no reasonable likelihood that the jury was led to believe that it could not consider evidence of appellant's mental disease in determining his mental state. In this case, the court instructed the jury as to the various mental states and specific intents required to establish the crimes charged, including premeditation and deliberation. The instructions further explained that if the evidence regarding an intent or mental state is susceptible of two reasonable interpretations, the jury must adopt the one favorable to the defendant. "'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.]" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) Furthermore, appellant's defense counsel argued that the requisite mental states had not been proven when he stated that due to appellant's paranoid schizophrenia, he misconstrued the situation involving the victims.

In any event, any error in failing to instruct under CALJIC No. 3.32 was harmless in light of the other instructions in the case and defense counsel's argument, as set forth above. (*People v. Ervin* (2000) 22 Cal.4th 48, 91.) On this record, it was not reasonably probable the jury would have reached a different verdict had the trial court substituted "should consider" for "may consider." (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

**C. The Term "And/Or" Did Not Render The Instruction Confusing**

Appellant contends that the words "and/or" as used in CALJIC No. 3.32 are "hopelessly ambiguous," and likely confused the jury. (AOB 128-130.) However, as set forth, *supra*, the instruction states a correct principal of law,

and if appellant wanted a clarification he needed to request such clarification as to those specific words. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503 ["A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial."].) Here, appellant did not specifically raise an objection to the "and/or" language. As such, his claim should be rejected. Moreover, as previously discussed, in light of the other instructions, it is not reasonably probable that the jury considered the evidence of mental illness only in regards to negating premeditation, but not the specific intent to kill or deliberation as appellant contends. (AOB 130.) Even if the "and/or" language had been modified, it is not reasonably probable that appellant would have received a more favorable verdict in light of the overwhelming evidence of premeditation and deliberation. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

## VIII.

## SUFFICIENT EVIDENCE SUPPORTED THE LYING-IN-WAIT FIRST DEGREE MURDER THEORY AND THE LYING-IN-WAIT SPECIAL CIRCUMSTANCES

In Argument 8 of his opening brief, appellant contends that the trial court improperly instructed the jury on the first degree murder theory of lying-in-wait and the special circumstance of lying-in-wait because the evidence was insufficient to show that he killed Robin Shirley and Lee Thompson by means of lying-in-wait or that he intentionally killed them while lying-in-wait. (AOB 131-141.) Appellant further asserts that because the jury acted unreasonably in finding true the lying-in-wait special circumstance allegations, the first degree murder convictions and special circumstances findings were obtained in violation of his right to due process of law under the Fourteenth Amendment to the United States Constitution and article 1 Section 13 of the California Constitution. (AOB 131.) All of appellant's claims lack merit.

## A. The Relevant Proceedings

The trial court instructed the jury with CALJIC No. 8.25[29/] (Murder by Means of Lying In Wait) on the lying-in-wait theory of first degree murder (9RT 2718-2719), and CALJIC No. 8.81.15[30/] (Special Circumstances - -

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29. The trial court instructed the jury pursuant to CALJIC No. 8.25 as follows:

> Murder, which is immediately preceded by lying-in-wait is murder of the first degree. [¶] The term "lying-in-wait" is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying-in-wait need not continue for any particular period of time, provided its duration is such as to show a state of mind equivalent to premeditation or deliberation. [¶] The word "premeditation" means formed or arrived at or determined upon as a result of careful thought and weighing of conditions for and against the proposed course of action.

(9RT 2718-2719.)

30. The trial court instructed the jury pursuant to CALJIC No. 8.81.15 as follows:

> In the guilt phase of this trial, the jury was instructed also as follows: [¶] To find that the special circumstances referred to in these instructions as murder while lying-in-wait is true each of the following facts must be proved: [¶] The term "lying-in-wait," is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying-in-wait need not continue for any particular period of time, provided its duration is such as to show a state of mind equivalent to premeditation or deliberation. [¶] Thus, for a killing to be perpetrated while lying-in-wait, both the concealment and watchful waiting, as well the killing, must occur during the same time period or in an uninterrupted attack commencing no later than the moment concealment ends. [¶] If there is a clear interruption separating the period of lying-in-wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the

Murder While Lying in Wait), on the lying-in-wait special circumstance. (32RT 5421-5423.) Appellant's trial counsel objected to CALJIC No. 8.25 on the grounds of insufficient evidence (9RT 2583), however he did not object to CALJIC No. 8.81.15. (31RT 5363-5365.)

**B. The Applicable Law**

In an insufficiency of the evidence claim, the reviewing court must determine

> "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citations.] [The court] examine[s] the record to determine "whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] Further, "the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."

(*People v. Catlin*, *supra*, 26 Cal.4th 81, 139, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

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> uninterrupted lethal events, the special circumstance is not proved. [¶] . . . A mere concealment of purpose is not sufficient to meet the requirement of concealment as set forth in this special circumstances. However, when a defendant intentionally murders another person under the circumstances which include a concealment of purpose, a substantial period of watching and waiting for an opportune time to act and immediately thereafter a surprise attack upon an unsuspecting victim from a position of advantage, the special circumstances of murder while lying in wait has been established.

(32RT 5421-5423.)

> To prove [first degree murder under a] lying in wait [theory], the prosecution must prove there was a concealment of purpose, a substantial period of watching and waiting for a favorable or opportune time to act, and that immediately thereafter the defendant launched a surprise attack on an unsuspecting victim from a position of advantage.

(*People v. Gurule* (2002) 28 Cal.4th 557, 630.)

> "[M]urder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death. [Citations.]" [Citation.] In contrast, the lying in wait special circumstance requires "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage...."

(*People v. Gutierrez*, *supra*, 28 Cal.4th at pp. 1148-1149, fn. omitted.) Therefore, if this Court finds that "the evidence supports the special circumstance, it necessarily supports the theory of first degree murder." (*People v. Carpenter* (1997) 15 Cal.4th 312, 388.)

**C. Legal Analysis**

Appellant contends that there was insufficient evidence to prove that he spent a "substantial period" period of time watching and waiting for a favorable or opportune time to act, and that the prosecutor conceded this lack of evidence during his closing argument when he stated that it was "possible" that appellant "might" have left his house early enough so that he would not miss the victims. (AOB 131-137.)

Contrary to appellant's contention, there is no requirement that the killer spend a defined amount of time watching and waiting before committing the murders. As set forth in CALJIC No. 8.25 (Lying In Wait Theory of First

Degree Murder), "[t]he lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." The instruction for the lying-in-wait special circumstance, CALJIC No. 8.81.15.1, states the same language.

Moreover, although the period of watching and waiting must be "substantial" (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 500), this Court has "never placed a fixed time limit on this requirement." (*People v. Moon* (2005) 37 Cal.4th 1, 23 [finding sufficient evidence of the watching and waiting for a substantial period of time under the special circumstance allegation where defendant testified that he waited only 90 seconds after the victim returned home before killing her].) "The precise period of time [for watching and waiting] is also not critical." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1145.) In fact, "a few minutes can suffice." (*People v. Moon*, *supra*, 37 Cal.4th at p. 23 citing *People v. Edwards* (1991) 54 Cal.3d 787, 825-825 [wait was only a matter of minutes] and *People v. Superior Court (Lujan)* (1999) 73 Cal. App.4th 1123 [two minutes sufficed].)

In this case, the jury could reasonably infer that appellant spent substantial time watching and waiting before killing the victims. The evidence is clear that appellant rode his bicycle to Target before 3:30 a.m. to commit the murders. Yet, after he killed the victims, eyewitness Richard Hart observed appellant walk away from the murder scene to the end of the nearby sidewalk. (3RT 1027-1040.) Several minutes later, Sergeant Williams observed appellant traveling on the bicycle southbound on White Avenue. (4RT 1102-1114.) Clearly, the bicycle was not in the immediate vicinity of the victims' cars because appellant had to walk away from the scene to retrieve it. The jury could reasonably infer that appellant had concealed the bicycle elsewhere before the victims arrived, otherwise they would have seen him peddle up and hide the bicycle.

Moreover, appellant was familiar with Robin Shirley's silver truck because she had driven him to work on several occasions, and he knew exactly what time she arrived each day because they started their shifts at the same time. He admitted to the police that he and Shirley frequently arrived at Target early in the morning to wait for the manager to open the store. (Supp. III 2CT 281-315; Ex. 37, transcript of 10/4/93 interview.) It was common knowledge to many employees that Shirley regularly parked her truck in the exact area of the Target parking lot where appellant committed the murders. Shirley and Thompson, as well as other employees who arrived early, often gathered in that area to sit in their cars and talk or listen to the radio before the store opened. It was not uncommon for Shirley and Thompson to be together outside the store before work. (4RT 1142; 5RT 1377, 1404, 1446.) The jury could reasonably conclude that based on appellant's knowledge of what time Shirley arrived for work, and the location where she always parked, he knew exactly where to position himself as he watched and waited for the victims to arrive on the morning of the murders.

In addition, the physical evidence strongly supports the conclusion that appellant was watching and waiting before he killed the victims. Before the shootings, enough time passed for Shirley to exit her truck and enter the Plymouth. More time passed as the victims rolled the rear windows down and turned on the radio. The victims' bodies were found in positions which indicate that they had been caught unaware: Thompson's seat was slightly reclined, both victims were facing forward, and their arms were relaxed. In addition, the shots were fired from the rear left window at an extremely close range. (4RT 1080-1088, 1090, 1092; 5RT 1607, 1632-1647.) The manner of the killing suggests that appellant waited to strike until the victims were relaxed, vulnerable, and completely unaware of his presence. To commit the killings from such an advantageous position, the jury could reasonably infer that appellant watched

the victims and waited until the most opportune moment to surprise and attack them.

Appellant also contends that under the rule set forth in *People v. Green* (1980) 27 Cal.3d 1, and *People v. Guiton*, *supra*, 4 Cal.4th at p. 1132, the trial court's instructional error requires reversal of the first degree murder verdicts and lying-in-wait special circumstances. (AOB 138-140.) Under the rule in *People v. Green*, *supra*, 27 Cal.3d at p. 69,

> when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.

Appellant argues that even if there is sufficient evidence of the alternative theory of first degree premeditated murder, the verdicts must be reversed. He contends that because sufficient evidence did not support the lying-in-wait theory of first degree murder or the lying-in-wait special circumstance, the jury acted "unreasonably," and there is "an affirmative indication" that the verdict rested on an inadequate ground. (AOB 139-140 citing *People v. Guiton*, *supra*, 4 Cal.4th at p. 1129.)

First, as set forth in respondent's Argument I, *supra*, there is a remaining valid theory of premeditated first degree murder. Second, because respondent has demonstrated that the evidence was sufficient to warrant the trial court's instructions on the lying-in-wait theory of first degree murder and the lying-in-wait special circumstance, as set forth above, this Court need not decide "the second question" of whether reversal is required under the remaining valid theory of first degree murder. (*People v. Ceja*, *supra*, 4 Cal.4th at p. 1137.) Third, because the evidence supported the lying-in-wait special circumstance finding, this finding "show[s] the jury necessarily concluded the killing was committed . . . by lying in wait. Thus, we know that the first degree murder

verdict rested on at least one correct theory." (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 499 citing *People v. Kelly* (1992) 1 Cal.4th 495, 531 and *People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.) Finally, even if the lying-in-wait special circumstance is reversed, the death judgment may still be upheld based on the jury's true finding on the multiple murder special circumstance. (*People v. Silva* (1988) 45 Cal.3d 604, 632.)

The evidence in this case "logically supports the inference [citation] that the shooting was not a sudden outburst of provoked passion, but was the culmination of a plan to take [the] victim[s] by surprise from a position of advantage." (*People v. Ceja, supra*, 4 Cal.4th at p. 1143; see respondent's Argument I.) More than substantial evidence supported the jury's true finding on the lying-in-wait special circumstance. As such, the evidence "necessarily supports the theory of first degree [lying in wait] murder." (*People v. Carpenter* (1997) 15 Cal.4th 312, 388.)

## IX.

## THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON EFFORTS TO SUPPRESS EVIDENCE AND CONSCIOUSNESS OF GUILT

In Argument 9 of his opening brief, appellant contends that instructions regarding evidence of consciousness of guilt prejudicially violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the parallel provisions of the California Constitution. Specifically, appellant contends that instructing the jury with CALJIC Nos. 2.03[31] [Consciousness of Guilt--Falsehood], 2.06[32] [Efforts to Suppress Evidence], and 2.52[33] [Flight After Crime] were unfairly argumentative in

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31. The trial court instructed the jury pursuant to CALJIC No. 2.03, as follows:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove the consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(9RT 2700.)

32. The trial court instructed the jury pursuant to CALJIC No. 2.06, as follows:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by [concealing] evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. [¶] However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(9RT 2700-2701.)

33. The trial court instructed the jury pursuant to CALJIC No. 2.52, as follows:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in

favor of the prosecution and permitted the jury to draw an irrational permissive inference of consciousness of guilt. (AOB 142-156.) Appellant further claims that because he conceded committing the shootings at trial, but the degree of the crimes was at issue, the instructions were prejudicial. Appellant's arguments should be rejected because, as he concedes, this Court has repeatedly rejected identical claims as to the consciousness of guilt instructions.

**A. Legal Analysis**

First, appellant contends that CALJIC Nos. 2.03 and 2.06 are unfairly partisan and argumentative. (AOB 144-149.) Appellant concedes that this Court has rejected a challenge to the consciousness of guilt instructions on these same grounds in *People v. Nakahara* (2003) 30 Cal.4th 705, 713. (AOB 145.) In addition, this Court has repeatedly rejected similar claims. (See *People v. San Nicolas* (2004) 34 Cal.4th 614, 666-667 [consciousness of guilt instructions proper regarding post-crime statements, even when defendant had confessed]; *People v. Coffman* (2004) 34 Cal.4th 1, 102-103 [CALJIC No. 2.06 proper, even though not specific as to which counts they applied, because they do not direct the jury to infer guilt of all crimes charged]; *People v. Holloway* (2004) 33 Cal.4th 96, 142 [consciousness of guilt instructions neither argumentative nor fundamentally unfair]; *People v. Yeoman* (2003) 31 Cal.4th 93, 131-132; *People v. Boyette* (2002) 29 Cal.4th 381, 438 [CALJIC Nos. 2.03, 2.06, and 2.52 did not improperly endorse prosecution's theory or lessen its burden of proof in capital murder prosecution and were not improper pinpoint

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> itself to establish his or her guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

(9RT 2706.)

instructions].) Moreover, "'[t]he cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory.'" (*People v. Holloway* (2004) 33 Cal.4th 96, 142, quoting *People v. Jackson* (1996) 13 Cal.4th 1164, 1224.)

Appellant also contends that the consciousness of guilt instructions permitted the jury to draw improper permissive inferences about his guilt. (AOB 149-155.) Again, appellant concedes that this Court has rejected the claim that consciousness of guilt instructions permit irrational inferences concerning a defendant's mental state. (AOB 152 citing *People v. Hughes, supra,* 27 Cal.4th at p. 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52].) Having offered no compelling reasons why this Court's previous holdings should be overruled, appellant's claims should be rejected.

**B. Harmless Error**

Finally, any error in the giving of the instructions was harmless under the *Watson* standard of prejudice. (See *People v. San Nicolas* (2004) 34 Cal.4th 614, 667.) The evidence of appellant's guilt was overwhelming. Moreover, even absent the instructions appellant challenges, the jury would still have been instructed regarding circumstantial evidence pursuant to CALJIC Nos. 2.00, 2.01, and 2.02, such that the prosecutor could still have argued that appellant's actions after the murders were circumstantial evidence of appellant's guilt *without* the benefit of the cautionary language in CALJIC Nos. 2.03, 2.06, and 2.52, that such evidence is not sufficient by itself to prove guilt. (See *People v. Holloway, supra,* 33 Cal.4th at p. 142 [even without consciousness of guilt instructions, jury would draw the same inference and prosecutor could argue

guilt based on willful falsehood or suppression of evidence].) In sum, any error in giving the instructions was harmless.

## X.

## THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.51

In Argument 12 of his opening brief, appellant contends that trial court erred when it instructed the jury with CALJIC No. 2.51.[34], the standard instruction on motive. Appellant asserts that the instruction was improper because: (1) it "allowed the jury to determine guilt based upon the presence of an alleged motive"; and (2) it "shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof." (AOB 157-162.) Appellant's arguments fail because this Court has previously rejected similar contentions.

### A. Waiver

Appellant's claim is not cognizable on appeal because he did not object to CALJIC No. 2.51 at trial. This Court found a similar claim waived in *People v. Cleveland* (2004) 32 Cal.4th 704, 750. There, the defendants requested CALJIC No. 2.51 at trial, but on appeal claimed that the instruction implied that evidence of motive alone was sufficient to prove guilt. (*Ibid.*) This Court concluded that the claim was waived because such an "argument merely goes to the clarity of the instruction." (*Ibid.*; see *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 503 ["A party may not argue on appeal that an instruction correct

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34. The trial court instructed the jury pursuant to CALJIC No. 2.51, as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(9RT 2705-2706.)

in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial."].) This Court explained that, "[i]f defendants had thought the instruction should be clarified to avoid any implication that motive alone could establish guilt, they should have so requested. They did not. [Citation.]" (*People v. Cleveland, supra*, 32 Cal.4th at p. 750, citing *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 504.) As such, appellant has failed to preserve this claim on appeal. (*People v. Cleveland, supra*, 27 Cal.4th at p. 750.)

## B. The Instruction Did Not Allow The Jury To Determine Guilt Based On Motive Alone

Appellant claims CALJIC No. 2.51 was erroneous, in part, because it "improperly allowed the jury to determine guilt based upon the presence of an alleged motive . . . ." (AOB 157.) Notwithstanding appellant's waiver, his claim that the instruction allowed the jury to determine guilt based on motive alone is meritless. In *People v. Snow* (2003) 30 Cal.4th 43, 97-98, this Court rejected an identical argument, explaining:

> If the challenged instruction somehow suggested that motive alone *was* sufficient to establish guilt, defendant's point might have merit. But in fact the instruction tells the jury that motive is not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish *all* the elements of murder. When CALJIC No. 2.51 is taken together with the instruction on the concurrence of act and specific intent (CALJIC No. 3.31) and the instruction outlining the elements of murder and requiring each of them to be proved in order to prove the crime (CALJIC No. 8.10), there is no reasonable likelihood (*People v. Frye, supra*, 18

Cal.4th at p. 958) it would be read as suggesting that proof of motive alone may establish guilt of murder.

(Italics in original; see *People v. Cleveland, supra*, 32 Cal.4th at p. 750 [CALJIC No. 2.51 was not erroneous because it was not reasonably likely that the jury would infer CALJIC No. 2.51 implied that motive alone was sufficient to prove guilt in light of the reasonable doubt instruction, and it was not prejudicial "given the strong evidence of guilt aside from motive"].)

Here, the trial court instructed the jury on the concurrence of act and specific intent with CALJIC No. 3.31, on the elements of murder with CALJIC No. 8.10, and on reasonable doubt with CALJIC No. 2.90. Given the entire charge, CALJIC No. 2.51 was not erroneous or ambiguous. (*People v. Snow, supra*, 30 Cal.4th at pp. 97-98; see *People v. Cleveland, supra*, 32 Cal.4th at p. 750.) Also, the instruction was not prejudicial because there was substantial evidence of appellant's guilt (see Arg. I, *ante*) such that "the jury certainly did not base its verdicts solely on motive." (*People v. Cleveland, supra*, 32 Cal.4th at p. 750.) Thus, just as in *Snow* and *Cleveland*, this Court should reject appellant's challenge to CALJIC No. 2.51.

**C. The Instruction Did Not Lessen The Prosecutor's Burden Of Proof Or Violate Due Process**

Appellant also claims that CALJIC No. 2.51 violated his rights because by stating that "motive was not an element of the crime," the instruction lessened the prosecution's burden of proving beyond a reasonable doubt that he harbored malice aforethought because "[t]here is no logical way to distinguish motive from intent in this case." (AOB 159-161.)

CALJIC No. 2.51's statement that "motive is not an element of the crime charged" did not serve to lessen the prosecution's burden of proving beyond a reasonable doubt that appellant harbored maliceaforethought. This Court

rejected a similar argument in *People v. Cash* (2002) 28 Cal.4th 703, 738-739. Contrary to appellant's present contention that "[t]he distinction between 'motive' and 'intent' is difficult" (AOB 159), in *Cash*, this Court reiterated that "motive" and "intent" are *not* synonymous because "motive is the 'reason a person chooses to commit a crime,' but it is not equivalent to the 'mental state such as intent' required to commit the crime. [Citation.]" (*People v. Cash, supra*, 28 Cal.4th at p. 738; see *People v. Hillhouse, supra*, 27 Cal.4th at pp. 503-504 [reiterating that the terms "intent," "motive," and "malice" are not synonymous].) Thus, because "motive" and "intent" are not interchangeable, CALJIC No. 2.51 could not have confused the jury regarding the prosecution's burden of proving intent.

Notwithstanding the distinction between "motive" and "intent," appellant claims that there existed a "potential for conflict and confusion in this case." (AOB 161.) In making his argument, he relies on *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127, a child molest case where giving CALJIC No. 2.51 was prejudicial error under the facts of that case. (AOB 161.) But, this Court has repeatedly rejected the application of *Maurer* beyond child molest cases, where motive (unlike other crimes) is an element of the case. (See, e.g., *People v. Cash, supra*, 28 Cal.4th at pp. 738-739; *People v. Hillhouse, supra*, 27 Cal.4th at p. 504.) This Court has explained:

> [In *Maurer*,] the defendant had been convicted of misdemeanor child annoyance under section 647.6. The court found that, although motive is not generally an element of a criminal offense, "the offense of section 647.6 is a strange beast," and it did have a motive as an element -- an unnatural or abnormal sexual interest. [Citation.] Thus the court found the instructions contradictory, and thereby erroneous. [Citation.] This case is distinguishable. Here, although malice and intent or purpose to steal were elements of the offenses, motive was not.

(*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 504; see *People v. Cash, supra*, 28 Cal.4th at p. 738-739 [*Maurer* distinguishable because, in the case at bar, "the instructions as a whole did not use the terms 'motive' and 'intent' interchangeably, and therefore there is no reasonable likelihood the jury understood those terms to be synonymous"].) Thus, here, appellant's reliance on *Maurer* is misplaced because appellant was convicted of murder, not child molest or annoyance. Because motive is not an element of murder (*People v. Hillhouse, supra*, 27 Cal.4th at pp. 503-504), there was no conflict between CALJIC No. 2.51 and the elements of the crime.

**D. The Instruction Did Not Shift The Burden Of Proof To Imply Appellant Had To Prove Innocence**

Appellant also claims that CALJIC No. 2.51 violated his right to due process because it impermissibly shifted the burden of proof because the instruction shifted the burden to appellant "to show an alternative motive," i.e., that the instruction implied that he had to prove his innocence. (AOB 161-162.)

This Court rejected a similar argument in *People v. Prieto*, *supra,* 30 Cal.4th at p. 254. There, the defendant argued that the phrase "tend to establish innocence" in CALJIC No. 2.51 implied that he had to establish his innocence. (*Ibid.*) This Court disagreed, explaining:

> "CALJIC No. 2.51 [does] not concern the standard of proof . . . but merely one circumstance in the proof puzzle-motive." (*People v. Estep* (1996) 42 Cal.App.4th 733, 738 . . . .) "[T]he instruction merely uses innocence as a direction signal or compass. It does not tell the jurors they must find innocence, nor does it lighten the prosecution's burden of proof, upon which the jury received full and complete instructions." (*People v. Wade* (1995) 39 Cal.App.4th 1487, 1497 . . . .) Thus, no reasonable juror would misconstrue CALJIC No. 2.51 as "a standard of

> proof instruction apart from the reasonable doubt standard set forth clearly in CALJIC No. 2.90." (*Estep*, at p. 739.) Accordingly, the instruction did not violate defendant's right to due process.

(*Ibid.*, brackets and first ellipses in original.)

Appellant fails to acknowledge this Court's decisions upholding the propriety of CALJIC No. 2.51. In light of this Court's repeated rejection of claims identical to appellant's, his challenge to this instruction should be summarily rejected.

## XI.

## CALJIC NO. 2.90 IS CONSTITUTIONAL

In Argument 11 of his opening brief, appellant contends the standard reasonable doubt instruction used at his trial, former CALJIC No. 2.90 (1979 rev.), was constitutionally defective. (AOB 163-178.) He raises various complaints regarding the constitutionality of CALJIC No. 2.90 even though this version of the instruction has repeatedly been upheld as constitutional.

The jury was instructed in the language of then CALJIC No. 2.90,

> 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, and depending upon moral evidence, 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 to a moral certainty of the truth of the charge.

(9RT 2713-2714.)

First, respondent submits that "this claim has not been preserved for review because the defense failed to object or to request an admonition on the point." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1156.) Next, as appellant acknowledges, the United States Supreme Court has upheld the constitutionality of CALJIC No. 2.90. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6, affg. *People v. Sandoval* (1992) 4 Cal.4th 155, 185-186.) In addition, this Court consistently has affirmed the validity of the instruction and held that it correctly defines reasonable doubt. (*People v. Heard* (2003) 31 Cal.4th 946, 979; *People v.*

*Lewis* (2001) 25 Cal.4th 610, 651-652; *People v. Jennings* (1991) 53 Cal.3d 334, 385-386; *People v. Turner* (1994) 8 Cal.4th 137, 203; *People v. Webb* (1993) 6 Cal.4th 494, 531.) Furthermore, this Court has held that "[n]o additional instructions on reasonable doubt [are] necessary." (*People v. Turner*, *supra*, 8 Cal.4th at p. 203.)

> The plain meaning of [the reasonable doubt] instructions merely informs the jury to reject unreasonable interpretations of the evidence and to give the defendant the benefit of any reasonable doubt. No reasonable juror would have interpreted these instructions to permit a criminal conviction where the evidence shows defendant was "apparently" guilty, yet not guilty beyond a reasonable doubt.
>
> By parity of reasoning, we reject defendant's argument that the reasonable doubt instructions "mandated" the jury to draw a particular inference pointing towards guilt. Read in context, the instructions merely require the jury to reject unreasonable interpretations of the evidence, and to accept the reasonable version of the events which fits the evidence.

(*People v. Jennings*, *supra*, 53 Cal.3d at p. 386.)

Because the "instruction[] correctly described the law, [appellant] ha[d] no right to restatement of the reasonable doubt standard expressed in CALJIC No. 2.90." (*People v. Ochoa* (2001) 26 Cal.4th 398, 445 citing Pen. Code, § 1096a and *People v. Wright* (1988) 45 Cal.3d 1126, 1134.) Appellant has not submitted any argument that would undermine the numerous prior decisions upholding the constitutionality of the instruction. As such, his claim should be rejected.

## XII.

## THE REASONABLE DOUBT INSTRUCTION AND OTHER RELATED INSTRUCTIONS PROVIDED TO THE JURY DID NOT DILUTE THE PROSECUTION'S BURDEN OF PROOF

In Argument 12 of his opening brief, appellant contends that the trial court's instruction on reasonable doubt (CALJIC No. 2.90), when combined with the circumstantial evidence instructions (CALJIC Nos. 2.01, 2.02, 8.83, 8.83.1), undermined the prosecution's burden of proof, and that other standard instructions (CALJIC Nos. 1.00, 2.22, 2.27, 2.51, and 8.20) also "vitiated" the reasonable doubt standard. (AOB 179-191.) This Court has rejected identical contentions in a number of other cases. Appellant provides no reason for this Court to overrule these other cases.

### A. The Claim Has Been Waived

At trial, appellant's trial counsel did not object to CALJIC Nos. 1.00, 2.01, 2.02, 2.22, 2.27, 2.51, 2.90, 8.20, 8.83, or 8.83.1. (8RT 2520, 2522, 2528; 9RT 2666.) Because these instructions are correct in law, appellant has forfeited any claim that the instructions either standing alone or in combination, were erroneous. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 503 ["A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial."].)

## B. CALJIC No. 2.90, When Combined With CALJIC Nos. 2.01, 2.02, 8.83, And 8.83.1, Did Not Undermine The Prosecution's Burden Of Proof

Appellant claims that CALJIC No. 2.90 (1979 rev.) – when combined with the circumstantial evidence instructions (CALJIC Nos. 2.01[35] [Sufficiency of Circumstantial Evidence Generally], 2.02 [Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State], 8.83[36] [Sufficiency of

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35. The trial court instructed the jury pursuant to CALJIC No. 2.01, as follows:

> A finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt. [¶] If, on the other hand, one interpretation of such evidence appears to you to be reasonable, and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(9RT 2697-2699.)

36. The trial court instructed the jury pursuant to CALJIC No. 8.83, as follows:

> You are not permitted to find a special circumstance alleged in this case to be true, based on circumstantial evidence unles the proved circumstance is not only consistent with the theory that the special circumstance is true, but cannot be reconciled with any other rational conclusion. [¶] Further, each

Circumstantial Evidence to Prove the Special Circumstance], 8.83.1[37/]

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> fact which is essential to complete a set of circumstances necessary to establish the truth of the special circumstance must be proved beyond a reasonable doubt. [¶] In other words, before an inference essential to establish a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the truth of a special circumstance, and the other to its untruth, you must adopt the interpretation which points to its untruth, and reject the interpretation which points to its truth. [¶] If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(9RT 2732-2733.)

37. The trial court instructed the jury pursuant to CALJIC No. 8.83.1, as follows:

> The specific intent or mental state with which an act is done may be shown by the circumstances surrounding its commission, but you may not find a special circumstance alleged in this case to be true unless the proved surrounding circumstances are not only consistent with the theory that the defendant had the required specific intent or mental state, but cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to any such specific intent or mental state is susceptible to two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state. [¶] If, on the other hand, one interpretation of the evidence as to such specific intent or mental state, appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(9RT 2733-2735.)

[Sufficiency of Circumstantial Evidence to Prove Mental State]), diluted the prosecution's burden of proof. (AOB 219-220.) His argument fails.

First, the terms "moral evidence" and "moral certainty" in CALJIC No. 2.90 do not dilute the prosecution's burden of proof. (*Victor v. Nebraska*, *supra*, 511 U.S. at p. 6 [observing that the terms "moral evidence" and "moral certainty" in the former version of CALJIC No. 2.90 were antiquated, but did not suggest a standard of proof lower than due process requires].)

With respect to the circumstantial evidence instructions – CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1 – this Court has "repeatedly rejected defendant's argument" that they dilute the reasonable doubt standard, explaining:

> Those instructions, which refer to an interpretation of the evidence that "appears to you to be reasonable" and are read in conjunction with other instructions, do not dilute the prosecution's burden of proof beyond a reasonable doubt. [Citations.]

(*People v. Maury* (2003) 30 Cal.4th 342, 428 [former version of CALJIC No. 2.90 with "moral evidence" and "moral certainty" terms], citing *People v. Hughes, supra*, 27 Cal.4th at pp. 346-347, *People v. Osband* (1996) 13 Cal.4th 622, 678-679, and *People v. Ray* (1996) 13 Cal.4th 313, 347.) Thus, because CALJIC No. 2.90 correctly defined reasonable doubt and the circumstantial evidence instructions did not dilute the prosecution's burden, the instructions, in combination, were proper. (See *People v. Maury, supra*, 30 Cal.4th at p. 429 ["Because the [standard reasonable doubt] instruction, individually, correctly defines reasonable doubt, we reject defendant's claim that this instruction, when considered together with the other complained-of instructions [CALJIC Nos. 2.01, 8.83, and 8.83.1, plus, CALJIC Nos. 2.21.2 (witness willfully false), 2.22 (Weighing Conflicting Testimony)], was improper. [Citation.]"].)

Appellant has presented no compelling reason for this Court to overrule the long line of cases upholding the propriety of these instructions. Accordingly, his claim must be rejected.

**C. Other Standard Instructions – CALJIC Nos. 1.00, 2.22, 2.27, 2.51 And 8.20 – Did Not "Vitiate" The Reasonable Doubt Standard**

Equally unavailing is appellant's argument that other standard instructions – CALJIC Nos. 1.00, 2.22, 2.27, 2.51 and 8.20 – "vitiated" the reasonable doubt standard. (AOB 183-187.) Similar arguments have been rejected by this Court. (*People v. Frye, supra*, 18 Cal.4th at p. 958 [involving CALJIC Nos. 1.00, 2.51, and 2.52]; accord, *People v. Crew* (2003) 31 Cal.4th 822, 847-848 [rejecting defendant's argument that CALJIC Nos. 1.00, 2.01, 2.51 and 2.52, which referred to "guilt or innocence," relieved the prosecution of its burden of proof]; *People v. Nakahara*, *supra*, 30 Cal.4th 705, 714 [following *Frye* in rejecting defendant's claim that CALJIC Nos. 1.00 and 2.51 misled the jury].)

For example, in *Frye*, the defendant implicitly referenced CALJIC No. 1.00[38] and other jury instructions (CALJIC Nos. 2.51 [Motive] and 2.52 [Flight

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38. The trial court instructed the jury pursuant to CALJIC No. 1.00, as follows:

> You must accept and follow the law as I state it to you, whether or not you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions. [¶] You must not be influenced by pity for a defendant, or by prejudice against him. You must not be biased against the defendant because he's been arrested for this offense, charged with a crime or brought to trial. [¶] None of these circumstances is evidence of guilt, and you must not infer or assume from any or all of them, that he's more likely to be guilty than innocent. You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public

After Crime]) when arguing that such instructions improperly shifted the burden of proof because they referred to "innocence" and thus improperly "placed on him the burden of establishing his innocence of the charged crimes" rather than have the prosecution prove his guilt beyond a reasonable doubt. (*People v. Frye, supra*, 18 Cal.4th at p. 958.) This Court rejected the defendant's argument for the following reasons: (1) the jury had been instructed with "CALJIC No. 2.90 on the presumption of innocence and its corresponding burden on the prosecution to prove defendant guilty beyond a reasonable doubt"; (2) the trial court emphasized the prosecution's burden of proof through other jury instructions; and (3) the prosecutor emphasized the People's burden of proof during closing arguments. (*Ibid.*) Thus, this Court concluded:

> Viewing the instructions as a whole, and in light of the record at trial, we conclude it is not reasonably likely the jury understood the challenged instructions to mean defendant had the burden of establishing his innocence. [Citation.]

(*Ibid.*)

In light of this Court's decision in *Frye,* and as this Court recently reaffirmed in *Nakahara* and *Crew*, appellant's contention is unavailing.

The trial court also instructed the jury on weighing conflicting testimony with CALJIC No. 2.22 as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number of witnesses, which appeals to

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> opinion or public feeling. [¶] Both the people and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict, regardless of the consequences.

(9RT 2693-2694.)

your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side as against the other. You must not decide an issue by the simple process of counting the number of witnesses. The final test is not in the number of witnesses, but in the convincing force of the evidence.

(9RT 2704-2705.) Appellant contends this instruction "replaced the constitutionally-mandated standard of 'proof beyond a reasonable doubt' with something that is indistinguishable from the lesser 'preponderance of the evidence standard'. . . ." (AOB 186.) He also asserts that CALJIC No. 2.22 lessened the reasonable doubt standard because it "instruct[ed] that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater 'convincing force.'" (*Ibid.*) This Court has recently rejected these very contentions and should do so again. (*People v. Maury, supra*, 30 Cal.4th at p. 429; *People v. Nakahara, supra*, 30 Cal.4th at p. 714.)

In *Nakahara,* the defendant argued that CALJIC No. 2.22 "improperly 'replaced' the beyond reasonable doubt standard with a standard akin to a preponderance of evidence standard." (*People v. Nakahara, supra*, 30 Cal.4th at p. 714.) This Court rejected the argument, explaining: "CALJIC No. 2.22 is appropriate and unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof (see CALJIC No. 2.90). [Citations.]" (*Ibid.*) Similarly, in *Maury,* this Court rejected the "convincing force" argument appellant asserts on appeal, explaining:

[W]hen this instruction is considered with CALJIC Nos. 1.01 and 2.90, " '[i]t is apparent that the jury was instructed to weigh the relative convincing force of the evidence (CALJIC No. 2.22) only as part of the

process of determining whether the prosecution had met its fundamental burden of proving defendant's guilt beyond a reasonable doubt . . . .'"
[Citations.]

(*People v. Maury, supra*, 30 Cal.4th at p. 429, original internal brackets omitted, ellipses in original.) In light of this Court's holdings in *Nakahara* and *Maury*, appellant's claim must be rejected.

Appellant further argues that CALJIC No. 2.27[39] was "flawed" because it suggested "that the defense, as well as the prosecution, had the burden of proving facts." (AOB 186.) This Court has previously rejected such challenges to CALJIC No. 2.27. (See, e.g., *People v. Turner, supra*, 50 Cal.3d at p. 697; accord, *People v. Montiel* (1993) 5 Cal.4th 877, 941.) CALJIC No. 2.27 simply advises the jury on how to evaluate a fact proved solely by one witness's testimony. (*People v. Gammage* (1992) 2 Cal.4th 693, 700.) Although the instruction does not refer to the prosecution's burden of proving each element beyond a reasonable doubt, the instruction, when read in context with the other instructions, in no way lessens the prosecution's burden of proof. (*People v. Montiel, supra*, 5 Cal.4th at p. 941.) Because this Court has previously rejected arguments identical to the one advanced by appellant, who provides no compelling reasoning for revisiting this settled issue, this Court should summarily reject appellant's claim.

Appellant also claims that the trial court's instruction on willful, premeditated, and deliberate murder under CALJIC No. 8.20 "misled the jury

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39. The trial court instructed the jury pursuant to CALJIC No. 2.27, as follows:

> You should give the testimony of a single witness whatever weight you think it deserves. However, testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. [¶] You should carefully review all the evidence upon which the proof of each fact depends.

(9RT 2705.)

regarding the prosecution's burden of proof" because the instruction used the word "precluding," which appellant asserts "could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, rather than to raise a reasonable doubt about that element. [Citation.]" (AOB 187, citing *People v. Williams* (1969) 71 Cal.2d 614, 631-632.) This Court recently rejected a similar challenge. (*People v. Crew, supra*, 31 Cal.4th at p. 848.)

In *Crew*, the defendant claimed that CALJIC No. 8.20, among other instructions, lessened the prosecution's burden of proof. (*People v. Crew, supra*, 31 Cal.4th at p. 848.) This Court rejected the argument, explaining:

> [CALJIC No. 8.20] requires the jury to find the killing was preceded by a clear and deliberate intent to kill that must have been formed upon preexisting reflection and not precluded by conditions that negate deliberation. There is no reasonable likelihood that any jury would misconstrue this instruction as lessening the prosecution's burden of proof in any respect.

(*Ibid.*) In light of this Court's holding in *Crew*, appellant's claim must be rejected.

## XIII.

## THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON FIRST DEGREE MURDER

In Argument 13 of his opening brief, appellant contends that the trial court erred by instructing the jury on first degree premeditated murder and first degree lying-in-wait murder because the information alleged murder in violation of section 187, rather than specifying first degree murder in violation of section 189. (AOB192-199.) He asserts that he was "charged exclusively with second degree malice murder," and thus the trial court lacked jurisdiction to try him for first degree murder. (AOB 194.) As such, he claims that the failure to specifically allege first degree murder in the charging document violated his federal constitutional rights because he was convicted of "an uncharged crime." (AOB 199.) Appellant's argument fails because, as he concedes (AOB 194), this Court has repeatedly rejected the argument that malice murder and first degree felony murder are separate offenses, and this Court has reaffirmed that an accusatory pleading charging murder need not specify the theory of murder upon which the prosecution intends to rely. (See, e.g., *People v. Hughes, supra,* 27 Cal.4th at pp. 368-370 and cases cited therein.) As this Court explained in *Hughes*:

> [W]e reject, as contrary to our case law, the premise underlying defendant's assertion that felony murder and malice murder are two separate offenses. Accordingly, we also reject defendant's various claims that because the information charged him only with murder on a malice theory, and the trial court instructed the jury pursuant to both malice and a felony-murder theory, the general verdict convicting him of first degree murder must be reversed.

(*Id.* at p. 370.) In light of *Hughes*, appellant's claims that the trial court lacked jurisdiction to try him for first degree murder (AOB 194) and that he was

convicted of an "uncharged crime" in violation of his constitutional rights (AOB 199), must be rejected.

While appellant acknowledges this Court has held that a defendant may be convicted of first degree murder where the charging document alleges murder in violation of section 187, he argues that the cases so holding – including this Court's *Hughes* decision – rest on faulty reasoning. (AOB 194-197.) Specifically, he claims that these cases are premised on *People v. Witt* (1915) 170 Cal. 104, in which this Court held that a defendant may be convicted of felony murder even though the information charged only murder with malice, but that *Witt* was "undermined" by *People v. Dillon* (1983) 34 Cal.3d 441, 472, which construed "'section 189 as a statutory enactment of the first degree felony-murder rule in California.'" (AOB 194-197.)

However, the defendant in *Hughes* made an identical argument, which this Court rejected. (*People v. Hughes, supra*, 27 Cal.4th at p. 369.) In *Hughes*, this Court explained that, "subsequent to *Dillon, supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt, supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely." (*Ibid.*) Accordingly, appellant's reassertion of this previously-rejected argument lacks merit.

Moreover, as in *Hughes, supra*, 27 Cal.4th at 369-370, and *People v. Diaz* (1992) 3 Cal.4th 495, 557, appellant received adequate notice that the prosecution was attempting to prove first degree murder from the time of the filing of the felony complaint, throughout the numerous court proceedings and appearances, and up until the time of trial. The entirety of the record clearly demonstrates that appellant was well aware of the capital nature of his trial at the time of jury voir dire. As such, appellant received adequate notice of the

prosecution's first degree murder theory. (See *People v. Hughes, supra*, 27 Cal.4th at p. 370.)

Nor does appellant's invocation of *Apprendi v. New Jersey* (2000) 530 U.S. 466, add anything of substance to his claim. (See AOB 202-204.) In *Apprendi*, the court held that the Fourteenth Amendment's due process clause requires "any fact [other than the fact of a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 490.) There can be no serious question as to whether that occurred in this case:

> Under the law of this state, all of the facts that increase the punishment for murder of the first degree -- beyond the otherwise prescribed maximum of life imprisonment with possibility of parole to either life imprisonment without possibility of parole or death -- already have been submitted to a jury (and proved beyond a reasonable doubt to the jury's unanimous satisfaction) in connection with at least one special circumstance, prior to the commencement of the penalty phase.

(*People v. Griffin* (2004) 33 Cal.4th 536, 595.) Appellant had adequate notice, as well as actual, and timely knowledge of the specific facts upon which he was subject to conviction for first degree murder based on both a premeditated and deliberation theory and a lying-in-wait theory. Accordingly, appellant's claim must fail.

## XIV.

## THE TRIAL COURT PROPERLY REFUSED THE DEFENSE REQUEST TO INSTRUCT THE JURY ON VOLUNTARY MANSLAUGHTER BASED ON MENTAL ILLNESS

In Argument 14 of his opening brief, appellant contends that the trial court erred when it refused to instruct the jury on the theory of voluntary manslaughter based on evidence that appellant's alleged mental illness negated malice. (AOB 200-205.) The trial court properly rejected the proposed instruction because diminished capacity is no longer a viable defense theory.

### A. The Relevant Proceedings

On several occasions, appellant's trial counsel requested that the trial court instruct the jury on voluntary manslaughter as to both victims based on the theory that appellant's mental illness prevented him from forming the requisite intent to kill. (9RT 2570-2578, 2612-2630A, 2631-2642, 2659-2663, 2766-2768.) The trial court denied the requests and instead instructed the jury that mental illness could negate malice and intent to kill, and reduce the murders to involuntary manslaughter.

> Every person who unlawfully kills a human being without malice aforethought, and without an intent to kill is guilty of the crime of involuntary manslaughter in violation of . . . Penal Code section 192 subdivision (b).
>
> In order to prove such a crime each of the following elements must be proved:
>
> Number one, a human being was killed, and number two, the killing was unlawful.
>
> If you find that the defendant was suffering from a mental illness at the time of the acts alleged and because of the mental illness did not

> actually have the mental state of malice and did not intend to kill, the defendant is not guilty of murder but is guilty of involuntary manslaughter.

(9RT 2725-2726.)

## B. The Applicable Law

Diminished capacity was eliminated by the Legislature in 1981. (See *People v. Saille*, *supra*, 54 Cal.3d at pp. 1111-1112.) In *Saille*, this Court recognized that Penal Code sections 25, 28 and 29, removed a defendant's ability to use evidence of a mental disorder to negate the capacity to form a requisite mental state. (*Ibid.*) Thus, the law no longer "permits a reduction of what would otherwise be murder to nonstatutory voluntary manslaughter due to voluntary intoxication and/or mental disorder." (*Id.* at p. 1107.) Moreover,

> once the trier of fact finds a deliberate intention unlawfully to kill, no other mental state need be shown to establish malice aforethought. Whether a defendant acted with a wanton disregard for human life or with some antisocial motivation is no longer relevant to the issue of express malice. [Citation.]

(*Id.* at pp. 1113-1114.) Since malice aforethought is established once an intentional unlawful killing is shown, the concept of "'diminished capacity voluntary manslaughter,'" i.e., nonstatutory manslaughter, is no longer valid. (*Id.* at p. 1114.)

## C. Legal Analysis

Appellant concedes that diminished capacity is no longer a viable defense to show that mental illness prevented him from having the *capacity* to kill, yet he argues that evidence that he *actually* did not form the intent to kill due to his alleged mental illness is a proper defense. Appellant is correct that

a defendant "is still free to show that because of his mental illness or voluntary intoxication, he did not in fact form the intent unlawfully to kill (i.e., did not have malice aforethought)." (*People v. Saille*, *supra*, 54 Cal.3d at p. 1117; see Pen. Code, §§ 22, subd. (b), and 28, subd. (a) [evidence of mental illness is admissible solely on the issue of whether the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged].) However, if a jury believed such evidence of mental illness, the only supportable verdict would be involuntary manslaughter, not voluntary manslaughter as appellant contends. (*People v. Saille*, *supra*, 54 Cal.3d at pp. 1116-1117.) Here, the trial court properly instructed the jury on involuntary manslaughter. (9RT 2725-2726.) Moreover, appellant did not request an instruction stating that evidence of his mental illness could be considered on the issue of whether he *actually* had the intent to kill. Rather, he requested an instruction based on the impermissible concept of diminished capacity voluntary manslaughter. (9RT 2570-2578, 2612-2625, 2631-2642, 2659-2663, 2766-2768.)

In addition, the trial court instructed the jury with CALJIC No. 3.32 (Evidence of Mental Disease-Received for Limited Purpose) which explained that the jury could consider evidence of a mental disease, defect, or disorder "for the purpose of determining whether appellant *actually* premeditated, deliberated, harbored malice aforethought and/or intent to kill." (9RT 2724-2725, emphasis added.) Thus, the jury was instructed that it could consider whether appellant actually did not form the intent to kill due to his alleged mental illness.

### D. Harmless Error

Finally, even assuming the trial court erred in refusing to give the requested instruction, appellant suffered no prejudice as a result. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) There was no credible evidence that appellant suffered from a mental illness that *actually* prevented him from acting with malice. Despite Dr. Wells' testimony that appellant suffered from the early stages of paranoid schizophrenia, there was absolutely no evidence that appellant was delusional, a key requirement of the illness. In addition, although the illness is progressive, there were no signs of the illness developing in the years, months, or days leading up to the murders. This fact is emphasized by the testimony of appellant's friends who were with him the day before and in the hours leading up to the murders. Each of those individuals described his demeanor as normal. There was no evidence from the witnesses who saw appellant at or near the time of the murder that he seemed not to know what he was doing. Further, Dr. Wells testified that even with the alleged mental illness, it did not preclude appellant from the ability to rationalize, plan, or make choices. Dr. Wells never stated that the paranoid schizophrenia prevented appellant from premeditating or deliberating, or from forming any other required mental state or specific intent. This is reflected by each of the deliberate steps appellant executed leading up to and during his attack, including his choice to return to shoot the victims after the initial shooting when he heard the gurgling noise. In addition, appellant's detailed alibi presented during three separate interviews with the police belied any claim he did not know what he was doing due to a mental illness. Finally, any error is harmless because when the jury found the lying-in-wait special circumstance allegations true (10RT 2899-2901) it necessarily had to reject any mental illness finding.

## XV.

## THE TRIAL COURT DID NOT COERCE THE DEATH VERDICT

In Argument 15 of his opening brief, appellant contends that the trial court coerced the jury into reaching a death verdict by (1) informing the jury they were making progress towards unanimity; (2) requiring the jury to answer a questionnaire drafted by the prosecutor; (3) permitting the questionnaire to include questions that probed the jurors' thought process; (4) discovering that the majority of the jurors favored death; (5) instructing the jurors to ignore their philosophical, moral, and religious beliefs, and implicitly threatening to discharge any juror who did not; (6) threatening to question each juror individually and suggesting the process would be embarrassing; (7) examining the foreperson and permitting the prosecutor to examine him; (8) allowing the prosecutor and appellant's trial counsel to question two additional jurors, including a minority juror; (9) not instructing the three jurors who were questioned to not discuss the process with the other jurors; (10) discovering the identity of one, and possibly both minority jurors; (11) declaring the two holdout jurors to be "problems" and discharging one of them; and (12) instructing the jury to deliberate as long as necessary to reach a verdict. (AOB 208-209.) Appellant's claims are without merit. None of these events or comments by the trial court coerced a verdict or violated appellant's constitutional rights in any manner. An examination of each of the alleged errors reveals that the trial court did not coerce the jury's penalty phase determination, and whether viewed separately or cumulatively, appellant's claims are without merit.[40]

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40. Respondent submits that appellant's contention that the trial court's actions listed above in numbers 1 though 11 improperly coerced a death verdict on August 15, 1995, is a red-herring. All of those comments and actions, including the questionnaire and the questioning of jurors, occurred on August

## A. The Applicable Law

Penal Code section 1140 provides: Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

The trial court's decision to declare a deadlock and dismiss the jury is a task delegated to its discretion. (*People v. Sheldon* (1989) 48 Cal.3d 935, 959.) "The court may ask jurors to continue deliberating where, in the exercise of its discretion, it finds a 'reasonable probability' of agreement." (*People v. Pride* (1992) 3 Cal.4th 195, 265; Pen. Code § 1140.) "[T]he court may direct further deliberations upon its reasonable conclusion that such direction would be perceived 'as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.' [Citations.]" (*People v. Proctor* (1992) 4 Cal.4th 499, 539.)

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11 and 14, 1995, and did *not* result in any penalty verdict, and therefore, cannot under any scenario be considered coercive. After all of those events, juror Annora Hall was excused on August 14, 1995, without any penalty verdict being reached. At that time, the penalty jury commenced its deliberations "anew from the beginning." The jury was specifically instructed that it "must, therefore, set aside and disregard deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place." (35RT 5824.) Given the instructions on August 14, 1995, to commence "deliberations anew from the beginning," the earlier statements by the trial court, the questionnaire, and the questioning of jurors on August 11 and 14, 1995, cannot possibly be considered to have, in any manner whatsoever, influenced or coerced the newly-constituted jury in reaching the penalty verdict. In any event, respondent will demonstrate that the trial court did not coerce the jury through any of its statements, the questionnaire, or inquiry of the jurors.

"The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.'" (*People v. Breaux* (1991) 1 Cal.4th 281, 319, quoting *People v. Carter* (1968) 68 Cal.2d 810, 817.) "Such a displacement may be the result of statements by the court constituting undue pressure upon the jury to reach a verdict, whatever its nature, rather than no verdict at all." (*People v. Carter, supra*, 68 Cal.2d 810, 817.) The question of coercion is necessarily dependent on the facts and circumstances of each case. (*People v. Breaux, supra*, 1 Cal.4th at p. 319.)

**B. Legal Analysis**[41/]

**1. The Trial Court's Statements To The Jury After Learning Of The Possible Deadlock Did Not Coerce The Jury Or Endorse The Majority Position**

On Tuesday, August 1, 1995, at 2:40 p.m., the jury began their penalty phase deliberations. (2CT 458.) Thereafter, the jury deliberated for seven court days. On the eighth day of deliberations, Thursday, August 10, 1995, at approximately 3:30 p.m., the jury informed the trial court that they appeared to be deadlocked.[42/] (34RT 5661.) The trial court requested the results of the last

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41. In appellant's introduction to Argument 15, he lists eleven specific ways that the trial court allegedly coerced the death verdict. (AOB 208-209) However, within the body of his argument, appellant sets forth his contentions under only eight subheadings. (AOB 210-242.) To ensure clarity for the Court, respondent has set forth arguments under an identical structure with eight subheadings.

42. Throughout Argument 15 of appellant's opening brief, he contends that the series of events that allegedly coerced the death verdict began after nine days of deliberation. (AOB 206-242.) He is incorrect. The jury began deliberations on Tuesday, August 1, 1995, and deliberated through Friday, August 4, 1995, until breaking at 12:00 p.m., for the weekend. The jury resumed deliberations on Monday, August 7, 1995, and continued until

four ballots and the numerical breakdown, but not information about the direction of the split. (34RT 5662.) The jury responded with the following note:

> After considerable deliberation, we appear to be deadlocked.
>
> The ballots were broken down as follows:
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> 1) 7-3-2
>
> 2) 9-3-1
>
> 3) 9-3
>
> 4) 10-2

(2CT 467; 34RT 5666.)

In the presence of the entire jury, the foreman stated that the ballots had been taken during the course of the previous week. The trial court responded, "Okay. And it appears that you have made some progress." (34RT 5667.) When the trial court asked if all of the jurors were still discussing the case, the foreman responded, "I think we have gotten to the point where – and some of the jurors have already said that they have gotten to the point where they have talked and talked and there is no more changing their mind." (34RT 5667-5668.) The trial court agreed that the jurors had been discussing the case at "great length," and stated that he would release the jurors and order them back the following morning at 9:00 a.m. (RT 345668.) The court concluded by stating:

> And let me indicate to you in the event that there is – there is any confusion as to, you know what the facts are or the – you know, your

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Thursday, August 10, 1995, when they first announced they were deadlocked. This time period constitutes eight court days. On each court day, the jury routinely deliberated for approximately 5 ½ hours, commencing at 9:00 a.m., breaking from 12:00 p.m. to 1:30 p.m. for lunch, and concluding at approximately 4:00 p.m., except for Fridays, when the trial court dismissed the jurors at noon. (2CT 458-460, 462-463, 465-466, 468.)

duties are, I think they are spelled out in the instructions that you received about mitigation and aggravation. And, as to – and I think the instructions spell out what are mitigating factors and what are aggravating factors.

And [sic] give you a chance to kind of get a fresh start in the morning. And [sic] we will find out before the morning is over whether or not we are getting anywhere.

(34RT 5668.)

Initially, respondent notes that appellant has forfeited any objection to the trial court's remarks by his failure to object at trial. (See *People v. Anderson* (1990) 52 Cal.3d 453, 468 ["objections to noninstructional statements or comments by the trial court must be raised at trial or are waived on appeal"].) Given that appellant failed to object to the trial court's remarks, appellant has forfeited this claim on appeal. (*People v. Anderson*, *supra*, 52 Cal.3d at p. 468.) Assuming appellant has preserved his claim with respect to the trial court's remarks, his claim fails nonetheless.

Appellant contends that the trial court's comments after the jury announced it appeared deadlocked constituted "in essence an *Allen* instruction."[43] (AOB 211.) However, his assertion that the trial court's comments regarding "progress" and "getting anywhere" conveyed a message to the jury that they should work towards unanimity and that the court endorsed movement towards unanimity, similar to a prohibited *Allen* instruction, is without merit.

In *Allen*, the United States Supreme Court approved a charge which encouraged the minority jurors to reexamine their views in light of the views

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43. *Allen v. United States* (1893) 157 U.S. 675.

expressed by the majority.[44] In *People v. Gainer* (1977) Cal.3d 835, this Court specifically disproved two elements of the typical "*Allen* charge." First, this Court found "the discriminatory admonition directed to minority jurors to rethink their position in light of the majority's views" was improper in that, by counseling minority jurors to consider the majority view, whatever it might be, the instruction encouraged jurors to abandon a focus on the evidence as the basis of their verdict. (*Id.* at p. 848.) Second, this Court took issue with the direction that the jury "should consider that the case must at some time be decided." (*Id.* at p. 845.) This Court also noted that

> [a] third common feature of the *Allen*-type instructions is a reference to the expense and inconvenience of a retrial. While such language was absent from the charge in this case, it is equally irrelevant to the issue of defendant's guilt or innocence, and hence similarly impermissible.

(*Id.* at p. 852.)

None of the vices condemned by this Court in *Gainer* are present in the instant case. First, the trial court's comments did *not* contain a discriminatory admonition directed to the minority jurors to rethink their position in light of the views of the majority. Second, the trial court did *not* inform the jury that the case must at some time be decided. And, third, the trial court's comments did *not* make reference to the expense and inconvenience of a retrial. Here, the trial

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44. As this Court explained:

> In the *Allen* opinion this concept is expressed in the following passage: if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

(*People v. Gainer* (1977) 19 Cal.3d 835, 845.)

court did not direct its comments to the minority jurors, or even mention the split. Rather, the trial court addressed the jury as a whole and acknowledged that they had been discussing the case at great length. The trial court's comment regarding "progress" simply reflected that the jury's split had become smaller with each successive ballot. The trial court did not qualify the statement in any manner to suggest that it approved of the direction in which the votes had shifted.

Stating the obvious, simply that the voting had progressed, hardly qualifies as a discriminatory admonition to the minority jurors to rethink their position in light of the views of the majority. Similarly, the trial court's statement that "we will find out before the morning is over whether or not we are getting anywhere," did not, in any way, imply that the trial court was endorsing or encouraging "movement" towards unanimity as appellant contends. The comment, viewed within the context of the trial court's comments, is most reasonably interpreted to mean that the trial court wanted to find out if the jurors were able to continue communicating and deliberating amongst themselves or if they truly had reached an impasse.

In addition, contrary to appellant's assertion, the trial court's comments were not rendered more coercive simply because the court polled the jury regarding their numerical split. (AOB 212.) Although appellant may find some support for his view in the federal arena (see *Brasfield v. United States* (1926) 272 U.S. 448, 449-450), established California law does not support such a view as long as the court's inquiry is neutral and causes no coercion (see *People v. Rodriguez* (1986) 42 Cal.3d 730, 776; *People v. Carter, supra*, 68 Cal.3d at p. 815). As this Court noted in *Rodriguez, supra*, 42 Cal.3d at p. 776 and footnote 14, the federal rule prohibiting an inquiry into the numerical division of a jury has been held to be a matter of federal criminal procedure and, therefore, not required to be followed by the states, whereas in California "a

neutral inquiry into numerical division, properly used, is an important tool in ascertaining the probability of agreement."

Such an inquiry is justified in the discharge of the court's "statutory responsibility of assuring that a verdict is rendered 'unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.' (Pen. Code, § 1140.)" (*People v. Carter*, *supra*, at p. 815.) Thus, the court may inquire into the jury's numerical division when it investigates the possibility of a deadlock, but it cannot ask which result is favored. (*People v. Proctor, supra,* 4 Cal.4th at pp. 538-539.) Here, the trial court's inquiry into the numerical division was at all times neutral and was helpful in assessing the probability of agreement. The inquiry into the numerical division of the jury's votes did not cause any coercion of the jury independently, nor when considered with the trial court's comments.

Appellant asserts this case is similar to *Jiminez v. Myers* (9th Cir.1993) 40 F.3d 976, in which the Ninth Circuit held that the trial judge improperly made a "de facto" *Allen* charge under the circumstances, by telling the jurors he approved of the fact they were gradually reaching unanimity, apparently by forcing the holdout defense juror to capitulate.[45] (*Jiminez v. Myers*, *supra*, 40 F.3d at p. 980.) Appellant's reliance on *Jiminez* is misplaced. (AOB 37.) The court in *Jiminez* found that the defendant was entitled to relief after the trial court expressly commented on the "movement" of the jury from a numerical division of seven to five, to a division of eleven to one, and encouraged the "movement" to continue in further deliberations. (*Id.* at pp. 978-980.) In *Jiminez*, the court said, "'Due to the fact we have had that type of movement, I would request, then, to finish the rest of today and see where we are at that

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45. The Ninth Circuit decision in *Jiminez* is not binding on this court. (*People v. Zapien* (1993) 4 Cal.4th 929, 989.)

point in time.'" (*Id.* at p. 979.) One hour and 48 minutes later, the jury reached a verdict. (*Ibid.*) The *Jiminez* court found that the trial court's "comments to the jury strongly implied the jury's movement from an initial division of seven to five to a division of eleven to one should continue toward unanimity." (*Id.* at 979.)

Appellant asserts the trial court's comments herein were similar to those which occurred in *Jiminez*. However, in this case the trial court made no similar statements that it approved of the jury's "movement" towards unanimity with each successive ballot. The comment that there had been "progress" merely stated the obvious--that the jury had progressively continued deliberating from day to day, and that they had continued to take ballots. The comments did not suggest in any manner that a verdict should be reached. Instead, the trial court merely requested, commensurate with its duty, that the jury continue deliberations upon returning the following morning.

Appellant asserts that the trial court's comments amounted "in essence" to an *Allen* instruction, yet as this Court stated in *Gainer*, it must be "clear from the record" that an instruction is coercive. Appellant's attempt to parse together two phrases from an entire dialogue by the trial court as constituting a coercive instruction is not persuasive. In reviewing a claim that a trial court's comments coerced a deadlocked jury's verdict, this Court should not focus on isolated portions of the trial court's statements, but should look at the entire statement in context, and assess the effect of the totality of the trial court's statements under the circumstances in which the statements were offered. (See *Lowenfield v. Phelps* (1988) 484 U.S. 231, 237; *People v. Keenan* (1988) 46 Cal.3d 478, 534.)

Here, rather than exalting compromise and expediency over a juror's individual verdict, the trial court encouraged jurors to return the next morning to continue deliberations. Based on the totality of the trial court's remarks,

jurors would have "understood that the court's intent was to provide an opportunity for them to enhance their understanding of the case rather than to coerce them to abandon the exercise of individual judgment." (*People v. Price* (1991) 1 Cal.4th 324, 467; see also *People v. Keenan, supra*, 46 Cal.3d at pp. 534-536 [no error where trial court told jury to take time off from deliberations to spend time with family, "search your conscience . . . and recall your oath," and "take care of you own personal business"]; *People v. Rodriguez, supra*, 42 Cal.3d at p. 769 [trial court's remarks urged "proper attention to the evidence and its value"]; *People v. Cole* (1982) 31 Cal.3d 568, 582 [no error where trial court told deadlocked jury to go home for the weekend and resume deliberations the following week].)

In sum, the trial court's comments plainly did not constitute an improper *Allen*-type charge or suffer from the defects condemned in *Gainer*. The court did not direct the jurors to re-examine the issues in consideration of their numerical division or the majority's views. Nor did the court direct the minority to conform to the majority's opinions or reach an agreement in the interests of expediency. Finally, because the trial court's comments did not violate this Court's prohibitions in *Gainer*, it also did not violate appellant's federal constitutional rights. (See *Early v. Packer* (2002) 537 U.S. 3, 7 [California law offers greater protection to a criminal defendant under a claim of a coerced verdict stemming from an *Allen* instruction than does the United States Constitution].)

### 2. The Jury Questionnaire Did Not Coerce The Jury Towards A Verdict

Appellant contends that a questionnaire drafted by the prosecutor, and presented to the jurors the day after they had indicated they appeared

deadlocked, improperly coerced their death verdict. (AOB 214-217.) The questionnaire requested responses to the following questions:

1. "Do you believe that there is any reasonable likelihood that further deliberations will result in a unanimous verdict?"

2. "Do you feel that there is any clarification of the jury instructions or your duties as jurors [that] would assist you in arriving at a unanimous verdict?

3. "Do you feel that the read back of the testimony of any witness or witnesses or portion thereof would assist you in arriving at a unanimous verdict?"

4. "Have any of the jurors refused to deliberate? That includes a refusal to be involved in the discussion and reasoning process."

5. "Has any juror based their present position on cases, information, or influence from any outside sources. That is, anything other than the evidence received in this courtroom or the jury instructions which I have given you. If so, in what manner has this occurred."

6. "Has any juror expressed the view that the death penalty is inappropriate in this case and based that view on anything other than the evidence and the law presented in this case? And if so, what?"

7. "Has any juror expressed a view that life without parole is inappropriate in this case and based that view on anything other than the evidence and the law presented in this case? And if so, what?"

8. "Is there anything you might suggest that could possibly be done to assist you in achieving a unanimous verdict? If so, what?"

(34RT 5687-5688.) Appellant's trial counsel objected to questions 2 through 8 on the grounds that they would intimidate the jurors and were similar to an *Allen* instruction. (34RT 5676.) He also objected to the use of the term

"unanimous" and to the questions that sought to uncover juror misconduct. (RT 5677, 5679.) Prior to handing the jurors the questionnaire, the foreman told the trial court that the jury had taken a fifth vote and that the result was 10 to 2. (34RT 5685.)

Appellant contends that the questionnaire "took a hammer to the jury in an effort to force it to reach a unanimous verdict," and specifically argues that questions 1, 2, 3 and 8 pressured the two holdout jurors to side with the majority to reach a unanimous verdict. (AOB 216.) Appellant is incorrect. None of the questions urged agreement or encouraged the majority to hold fast to its position. The mere use of the word "unanimous" is not tantamount to coercion. Based on CALJIC No. 8.88 [Penalty Trial - Concluding Instruction], the jury already knew that in order to make a penalty determination, they must unanimously agree. (33RT 5626-5628.) The questionnaire served to reiterate that duty. None of the questions directed the minority to conform to the opinions of the majority or to the interests of expediency, nor did the questions urge agreement, try to influence the jury's decision, or pressure the jury to reach an agreement.

The questionnaire also inquired if the jury needed any assistance and asked if any jurors had considered impermissible factors during deliberations, again reflecting instructions previously read by the trial court. While the fact that these questions were put forth to the jury in the format of a questionnaire might be unique, the substance of the inquiry was permissible--the same as it would have been if the trial court had verbally asked the questions. This Court has found that a trial court has "broad latitude" in commenting to a deliberating jury, "so long as it does not effectively control the verdict." (*People v. Rodriguez, supra*, 42 Cal.3d at p. 768.) Here, the questionnaire cannot be considered to have "displace[ed] the independent judgment of the jury '"in favor of considerations of compromise and expediency."' (*People v. Gainer*,

*supra*, 19 Cal.3d at p. 850, quoting *People v. Carter*, *supra*, 68 Cal.2d at p. 817.)

Appellant also claims that the questionnaire, combined with the trial court's comments the previous day regarding "progress" and "movement," were coercive. (RT 216-217.) As set forth above, the trial court's comments did not amount to an improper *Allen* instruction, thus those comments added no coercive affect to the questionnaire.

### 3. The Jurors' Responses To The Questionnaire Did Not Cause The Trial Court To Invade The Sanctity Of The Jury

Appellant contends that the jurors' responses to the questionnaire revealed that the two minority jurors favored a life sentence and revealed the jurors' thought processes, thereby causing the trial court to invade the "sanctity of the jury," and affect deliberations. (AOB 217-219.) These contentions are meritless.

First, there is no possibility that the questionnaire affected deliberations, because the jury did not deliberate again after turning in the questionnaires until *after* one of the jurors was dismissed and the jury was instructed to start deliberations anew. Second, it is not entirely clear that the jurors' responses revealed that the two minority jurors favored life. Appellant claims that the following juror responses revealed that the two minority jurors favored life. One juror's response to question 6 that, "The juror claims that individuals (she/he) knows would have preferred the opposite of the majority vote at this time." (Supp. CT III 398) And another juror's responses to questions 4 and 6, respectively, that, "one juror . . . has stated she can't even argue her decision of life because the rest of us don't understand," and "getting the 2 people opposing to validate there [sic] decission [sic] or give reasoning within the law." (Supp. CT III 399.) Lastly, a juror's response to question 8, that the court could assist

the jury by "dismiss[ing] 2 jurors who are not fair to both sides and are unreasonable in thinking-they lack common sense & are more responsive to their feelings instead of the law." (Supp. CT III 408.)

The most these responses reveal is that one member of the jury may have favored life. There was no way for the trial court to determine if the remaining comments about two jurors who were not "validating" their decisions, and not being "fair to both sides" even referred to the same two people because those responses were from two different jurors. Moreover, the responses did not state, or suggest, that the two minority jurors favored life. Lastly, even if the responses are construed to reveal the position of the two minority jurors, the inadvertent discovery of the nature of the jury's division is not grounds for mistrial, but simply requires close focus on the court's subsequent conduct *from the perspective of the holdouts* in order to determine if it coerced a unanimous vote. (*People v. Sheldon*, *supra*, 48 Cal.3d at pp. 959-960; *People v. Carter*, *supra*, 68 Cal.2d at p. 816.)

Even if the trial court knew the nature of the jury's division, it is not "'necessarily coercive' to refuse to discharge the jury after the court learns about an 11-to-1 vote favoring a death sentence." (*People v. Pride, supra,* 3 Cal.4th at p. 265.) In *People v. Sheldon*, *supra*, 48 Cal.3d 935, the jury in the penalty phase of a capital trial deliberated for two days and sent a note to the court: "'We, the jury, are at an 11 to 1 vote. The one vote is for life and will not change. The other 11 hold firm for the death penalty. We feel we will be unable to reach a verdict.'" (*Id.* at p. 958.) The court reread some of the instructions and ordered further deliberations, and the jury returned a verdict of death two days later. (*Id.* at pp. 958-959.) *Sheldon* rejected the defendant's argument that the court's decision to reinstruct the jury, and order further deliberations, essentially coerced the jury into returning the death verdict even though the court knew the jury's numerical division.

As in *Sheldon*, the trial court herein did not specifically inquire into or demand to know the jury's numerical division or which way the jury was leaning. Rather, responses to the questionnaire may have inadvertently revealed the nature of the numerical division, although respondent submits the division was not definitively revealed. In any event, the trial court's receipt of this information did not inherently have a coercive affect on the jury. The individual jurors did not know the content of their fellow jurors' responses, and therefore had no way of knowing that the trial court may have learned about the nature of the split by piecing together the jurors' responses. The trial court's subsequent comments and actions were not rendered coercive simply because the court was aware of the exact nature of the jury's numerical division. (See, e.g., *People v. Breaux*, *supra*, 1 Cal.4th at p. 319.)

Lastly, contrary to appellant's assertion, the questions did not improperly reveal the jurors' mental processes by asking questions about the *content* of the deliberations jurors. (AOB 217-218 citing *People v. Engleman* (2002) 28 Cal.4th 436, 442-443.) Rather, as set forth *infra*, the questions revealed improper *conduct*.

**4. Questions 5 And 6 Of The Questionnaire Did Not Instruct The Jurors To Ignore Their Own Philosophical, Moral, And Religious Beliefs**

Appellant contends that questions 5 and 6 of the jury questionnaire "implied that it was improper for [jurors] to base their vote against the death penalty in any part on their moral and religious beliefs," and thus encouraged jurors who based their vote for life on moral or religious beliefs to abandon their position in favor of the majority. (AOB 219.) The questions stated:

5. "Has any juror based their present position on cases, information, or influence form any outside sources. That is, anything other than the evidence received in this courtroom or

the jury instructions which I have given you. If so, in what manner has this occurred."

6. "Has any juror expressed the view that the death penalty is inappropriate in this case and based that view on anything other than the evidence and the law presented in this case? And if so, what?"

(34RT 5687-5688.)

The plain language of these questions in no way implied that jurors should abandon their religious or moral beliefs. Rather, the questions sought to determine if jurors had improperly based either their position or their view that the death penalty was inappropriate in the case on any *impermissible* outside influences, rather than the permissible bases of the evidence and law. These questions reflected the trial court's previous instructions to the jurors that they must base their decision on the facts and the law, that they must follow and accept the law even if they did not agree with it, and that they must not conduct any investigation into the facts or the law. (CALJIC Nos. 1.00, 1.03, 8.84.1.) Nor did the questions impermissibly inquire into the content of the deliberations. Rather, the questions sought to determine if any jurors had engaged in impermissible conduct. Contrary to appellant's assertion, nothing in the language of questions 5 or 6 amounted to a threat by the trial court to remove any juror who relied on their own philosophical, moral, or religious beliefs in determining the penalty verdict. (AOB 221.)

### 5. The Trial Court Did Not Refer To The Jurors As A "Problem" Or "Threaten" Them

Appellant contends that after the jurors returned their questionnaires, the trial court improperly referred to the hung jury as a "problem" and "threatened" to subject the jurors to "embarrassing" individual questioning. (AOB 221-223.) Respondent submits that the trial court did nothing improper.

After the jury returned the questionnaires, the prosecutor informed the trial court that the responses revealed that some jurors may not be deliberating, and that other jurors had possibly committed misconduct during voir dire. The prosecutor further explained that it appeared jurors had provided false or misleading statements in voir dire, and he requested time to review the original questionnaires that the jurors completed during voir dire. (34RT 5692.) The trial court stated that the responses "probably" made it clear that further deliberations would not result in a verdict. (34RT 5694.) The prosecutor specifically pointed to the response that there was a juror who "might make a mistake and that guilt feeling of sentencing somebody to death would be hard to live with even though the aggravating factors are overwhelming," as demonstrating that the juror lied in voir dire when she responded that she could impose the death penalty. (34RT 5695.) He also argued that the following response indicated a juror was refusing to deliberate, "The juror gets very defensive, just shuts you out if she doesn't like what she hears, she just stated she can't argue her decision of life because the rest of us don't understand her decision is final." (34RT 5694-5695.) The prosecutor further represented that although one of the responses described a juror who was taking multiple medications and psychotropic drugs, and carried a gun, he did not recall selecting a juror who had revealed those facts. (34RT 5698.)

The trial court ultimately agreed to consider any information the prosecutor could present on the next court day, stating, ". . . the least we can do is give [the jury] the benefit of exploring something that would make that eight or nine days [spent deliberating] other than wasted." (34RT 5699.) Appellant's trial counsel suggested questioning the juror who had made the allegations about another juror taking medications and psychotropic drugs, and the trial court indicated that it would do so after considering any information the prosecutor provided. (34RT 5700.)

The trial court then brought the jurors into the courtroom and stated:

> Ladies and gentleman of the jury, thank you very much for having answered these questions.
>
> The questions, however, instead of resolving the problem has raised an issue or two, which we need to resolve. So what I'm going to do is release you, order you back Monday morning.
>
> Let me indicate to you that we will attempt to resolve it as early as we possibly can. I know that we had earlier indicated to you that the trial should not have lasted past today's date. And, of course, the trial didn't. But your earnest effort back in the jury room had brought it to today's date, for which we collectively thank you. But we do have this -- the legal issue to resolve, and we're going to try and do that over the weekend and make a decision Monday morning as to how we next proceed.

(34RT 5702.)

On Monday, appellant's trial counsel requested that the court excuse the jury because it was deadlocked. (35RT 5705.) The prosecutor argued that several of the jurors' responses indicated possible misconduct during voir dire and a refusal to deliberate, and that there may be good cause to remove a juror who had not revealed information regarding gun ownership and possible mental illness during voir dire. (35RT 5706-5713.) The trial court agreed it was appropriate to question some of the jurors to determine if misconduct had occurred. After initially objecting, appellant's trial counsel agreed that the jury should be questioned, and he suggested the trial court's objective could be satisfied by questioning the foreman. (35RT 5719-5720.) The trial court indicated that it intended to question the jurors individually in camera. Appellant's trial counsel objected that the procedure should occur in open court. (35RT 5721.) The court assured the parties that the questions would not accuse

the jurors of misconduct and stated that the inquiry would be conducted in camera so the jurors would feel more comfortable than in open court. (35RT 5721-5722.)

The trial court then brought the jurors into the courtroom and stated:

> The questionnaire that we passed around to you Friday, rather than resolving issues, it raised some. So, unfortunately - - so we're going to have to resolve those before we continue.
>
> What I intend to do is to discuss some of the issues one at a time with each of the jurors.
>
> Let me indicate to you that I am not inferring by this that anybody had done anything wrong. It's just that we have to make sure that what we do is right, if that makes any sense to you.
>
> So I'll start - - I'll start with our foreman, Mr. Rodriguez. And we're going to do that in chambers. And we're going to discuss it with you one at a time so as not to embarrass anyone and to make you feel more comfortable.

(35RT 5723-5724.)

First, appellant does not explain how the trial court's comments coerced the death verdict. (AOB 221-223.) He simply alleges that based on the trial court's comments, the jurors must have believed that one or all of them were being investigated for misconduct. (AOB 223.) Appellant fails to articulate how the trial court's statements alone could have had a coercive affect on the minority jurors. Second, the trial court did not threaten the jury. Rather, the court's comments clarified that there was a *legal* problem, as opposed to a problem with one of the jurors, and the court emphasized that, "I am not inferring by this that anybody had done anything wrong." (35RT 5723; see cf. *People v. Carter*, *supra*, 68 Cal.2d 810, 814 [the court improperly coerced the jury, concentrated its remarks on the lone dissenting juror, and couched its

comments almost in terms of a threat when at 8:45 p.m., the jury advised the court it possibly could reach a verdict within two or three hours, the court refused to remain there that long, gave the jury another half hour to deliberate, remarked the case was not that complicated, and said it would "hate to lock you up tonight"].)

In *People v. Keenan*, *supra*, 46 Cal.3d 478, this Court rejected a similar contention where the defendant argued that the trial court's "threat" during penalty phase deliberations to "investigate" the jury's "problem" (a juror misleading the court during voir dire) before dismissing the jury for the weekend unfairly coerced the dissenting juror. This Court stated "that the court must investigate reports of juror misconduct to determine whether cause exists to replace an offending juror with a substitute." (*Id.* at p. 532.) In this case, the trial court did not threaten the jury. The trial court did not focus its comments on the minority jurors, speak derisively to the jury, or threaten to confine the jurors until they reached a verdict. Instead the trial court reassured the jurors that they had done nothing improper, but that the court needed to "make sure that what we do is right" in resolving the legal issues. While the trial court suspected misconduct based on the jurors' responses to the questionnaire, this suspicion was never revealed to the jurors. The statements could not have been perceived by the jury as coercive, and in fact, appellant fails to explain how the comments coerced the verdict. (AOB 221-223.) Here, after learning of possible juror misconduct, the trial court did not "threaten" the jury, but rather, as set forth in the next argument, commenced a proper inquiry into the alleged misconduct. (*People v. Keenan*, *supra*, 46 Cal.3d p. 532.)

### 6. The Trial Court Properly Questioned The Foreman To Determine If Juror Misconduct Had Occurred

Appellant contends that the jurors' responses to the questionnaire did not warrant the trial court's subsequent investigation into alleged juror misconduct, and that the court's inquiry could have pressured the minority jurors to conform to the majority's position. Appellant further argues that the trial court's inquiry impermissibly focused on the content of the deliberations. (AOB 223-231.) Appellant is incorrect. The trial court had a duty to investigate after learning of possible misconduct, and exercised that duty discretely so as to minimize any possible coercive impact on the minority jurors.

As set forth *supra*, after learning that jurors might not be deliberating, and that a juror may have provided misleading information during voir dire, the trial court decided to investigate by individually speaking to jurors in camera with both attorneys present. (35RT 5721-5722.) First, the trial court asked the foreman about several jurors' responses to various questions in an effort to determine if any jurors were refusing to deliberate. (35RT 5725-5736.) After the foreman clarified that no one had refused to deliberate (35RT 5727, 5730) or based their position on impermissible influences (35RT 5729, 5732), the court focused on the issue of possible misconduct during voir dire. The trial court asked the foreman about a response which stated, "This particular juror is on multiple medications and psychotropic [sic] drugs. This juror has told us that she carries a weapon and understands the defendant carrying a weapon and will not under any circumstances change his/her mind regardless of what anyone says." (35RT 5736-5745) The foreman confirmed that a juror had volunteered that he or she was taking medications, and had carried a gun for work purposes. (35RT 5736-5738.) Before sending the foreman back into the jury room, the trial court advised him not to talk about his interactions with the court and the attorneys. (35RT 5747.)

Preliminarily, respondent notes that although appellant's trial counsel objected to the proceedings being held in camera, he suggested that the trial court should question the foreman (35RT 5719-5720), and he then actively participated in that inquiry by asking the foreman questions. (35RT 5745-5746.) Appellant now complains that the prosecutor asked the foreman questions (AOB 227-228), yet appellant's trial counsel engaged in the same conduct. While this Court has stated that "permitting the attorneys for the parties to question deliberating jurors is fraught with peril and generally should not be permitted . . . the [trial] court may allow counsel to suggest areas of inquiry or specific questions to be posed by the court." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.) When appellant's counsel requested that the trial court limit its inquiry to issues regarding a juror's alleged failure to disclose ownership of a weapon and use of psychotropic medications, the court, as well as the attorneys, complied. (35RT 5721.)

Contrary to appellant's contention, the record is clear that the trial court had a duty to conduct an inquiry into the alleged juror misconduct.

> [O]nce the court is put on notice of the possibility a juror is subject to improper influences it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error. [Citation.]

(*People v. Burgener* (1986) 41 Cal.3d 505, 520.) Here, the trial court had received clear evidence of possible misconduct during voir dire, as well as an indication that some jurors might not be deliberating. The court had a duty to investigate, and due to the nature of the alleged misconduct, the court was required to ask direct questions about the jurors' statements during deliberations.

> Claims of misconduct may merit judicial inquiry even though they may implicate the content of deliberations. For example . . . a juror is

> required to apply the law as instructed by the court, and refusal to do so *during deliberations* may constitute a ground for discharge of the juror. [Citation.] Refusal to deliberate also may subject a juror to discharge [citation] even though the discovery of such misconduct ordinarily exposes facts concerning the deliberations-if, after *reasonable inquiry* by the court, it appears "as a 'demonstrable reality' that the juror is unable or unwilling to deliberate." [Citiation.]

(*People v. Engleman, supra,* 28 Cal.4th at p. 484.)

> For example, during a post-verdict inquiry into the validity of a verdict Evidence Code section 1150, while rendering evidence of the jurors' mental processes inadmissible, expressly permits, in the context of an inquiry into the validity of a verdict, the introduction of evidence of "statements made ... within ... the jury room." But statements made by jurors during deliberations are admissible under Evidence Code section 1150 when "the very making of the statement sought to be admitted would itself constitute misconduct." [Citation.]

(*People v. Cleveland* (2001) 25 Cal.4th 466, 484.) "In rare circumstances a statement by a juror during deliberations may itself be an act of misconduct, in which case evidence of that statement is admissible. [Citation.]" (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419 [ jurors could be compelled to testify at a post-verdict evidentiary hearing regarding allegations of juror misconduct].)

In this case, although the inquiry did not occur post-verdict, the necessity of determining the juror's specific statements during deliberations was similar to an Evidence Code section 1150 inquiry because the "very making of the statements" constituted the misconduct. The juror's statements during deliberations that she carried a gun and understood why appellant carried a gun, as well as her revelations about mental illness and medications, constituted the very acts of misconduct because those statements revealed that she had not been

forthcoming during voir dire. Similar to an investigation into a failure to deliberate, here the trial court had a duty to inquire about the statements. Asking the foreman to confirm the juror's comments did not reveal the content of the jury's deliberations about the death verdict, but rather only revealed the juror's prior misrepresentations during voir dire. Furthermore, the foreman did not reveal if the juror in question was in the minority, he merely confirmed that she was the person who had made statements about taking medications, carrying a gun, and understanding appellant's decision to carry a gun.

Appellant also contends that the trial court erred when it discovered the identity of the juror who had made the statements about gun ownership and medications. (AOB 228.) During the inquiry, the foreman stated that he knew the juror's identity, but not her last name. When the prosecutor asked the foreman if the juror's name was Annora Hall, the foreman responded affirmatively. (35RT 5745.) Appellant relies on *People v. Barber* (2002) 102 Cal.App.4th 145, 149, as support for his contention that the question improperly revealed the identity of a minority juror. *Barber* is not analogous to the current case. In *Barbe*r the trial court's questions revealed the identity of a *single* holdout juror. Here, there were two minority jurors. In addition, although the foreman responded affirmatively to the court's question that juror Hall was "one of the two" (35RT 5745), this statement did not reveal Hall's position on the issue of death or life in prison; it only revealed her status as being one of the two minority jurors. Further, appellant again fails to articulate how this event had a coercive affect on the other minority juror, especially when the trial court never revealed to the jury that it knew of Hall's status as a minority juror, and the foreman was admonished not to reveal the substance of his examination by the trial court.

Appellant also asserts that the trial court's comment in the presence of the foreman that the jury had been good and worked hard could have been

interpreted by the foreman to mean that the court thought a death verdict was "a very good decision" (AOB 228), and that the foreman "very likely" passed on the court's comment to the other jurors. First, this contention is purely speculative. Nothing in the record supports appellant's conclusion that the foreman interpreted the trial court's comments in that manner or that he told the other jurors about the comments. Second, before sending the foreman back into the jury room, the trial court advised him that while he could tell the other jurors that the court had questioned him about the questionnaire, he was not to discuss the substance of his discussions with the court and the attorneys. (35RT 5747.)

The record reveals that the trial court conducted a proper inquiry, as was its duty upon learning of alleged misconduct, and the inquiry was limited to the narrow issues of possible juror misconduct. (*People v. Burgener*, *supra*, 41 Cal.3d at p. 520.)

#### 7. The Trial Court Properly Questioned Two Additional Jurors

Appellant contends that the trial court improperly questioned jurors Jackson and Hall regarding Hall's statements that revealed her possible misconduct during voir dire, and improperly declared that the minority jurors were "problems." (AOB 229-231.) These contentions lack merit.

First, the trial court did not refer to the minority jurors as "problems" in the presence of any jurors. Rather, in the presence of only the attorneys, the trial court clarified that juror Hall appeared to be one of the two jurors that the *other jury members* were having problems with, not that the court had a problem with them. (35RT 5750-5751.) Second, appellant fails to explain the allegedly coercive affect of the court's inquiry on the minority jurors other than to speculate that all three questioned jurors were "free" to tell the other jurors that they had been questioned by the prosecutor. (AOB 230.) As was the case

with the foreman, the trial court again properly carried out its duty to investigate possible juror misconduct by questioning jurors Jackson and Hall. The inquiry of juror Jackson was required because her responses to the questionnaire set forth juror Hall's statements which revealed the possible misconduct during voir dire, and clearly, the inquiry of Hall was necessary as she was the individual alleged to have withheld information in voir dire.

Upon being questioned by the trial court, the prosecutor, and appellant's trial counsel, juror Jackson clarified that juror Hall had stated that she was using eight or nine psychotropic medications per day, including lithium. Jackson had personally observed Hall consume the medications. Jackson also informed the court that Hall had said that she had been in therapy for years. Based on Jackson's professional experience as a nurse, she characterized juror Hall as exhibiting extreme "highs and lows" during deliberations. In addition, Jackson explained that Hall could not rationalize or explain herself during deliberations, and would literally communicate with the words "blah, blah, blah." Jackson also confirmed a response in one of the questionnaires that Hall had said that she had friends who would rather remain incarcerated than die. Lastly, Jackson confirmed that Hall had stated, "Well, I understand why he's carrying that weapon . . . I carry a weapon myself," and that Hall stated she was ready at all times to use the weapon. (35RT 5752-5756, 5758-5759, 5762-5765.) At the end of the inquiry, the trial court admonished Jackson not to reveal the substance of the examination to the other jurors, and she stated, "Oh, I'm not saying anything." (35RT 5768.) Plainly, the trial court's questions were not aimed at discovering the substance or content of the jurors' deliberations regarding the death penalty, nor was that information revealed.

After Jackson returned to the jury room, the trial court stated that it was satisfied that Hall had misstated information on her voir dire questionnaire. (35RT 5769.) Appellant's trial counsel agreed that juror Hall should be

examined. (35RT 5770.) After the inquiry of Hall, appellant's trial counsel moved for a mistrial on the grounds that the sanctity of the jurors' deliberations had been violated by the examination of the three jurors. (35RT 5815.) The trial court denied the motion (35RT 5816), and thereafter properly excused juror Hall based on her misrepresentations during voir dire. (35RT 5820; see respondent's Argument 16.) Regarding the remaining minority juror, the trial court stated that it did not have "the vaguest idea who the other one might be, nor do I intend to conduct a . . . search. . . . [¶] in order to find out." (35RT 5813.)

Appellant claims that the remaining minority juror was left "isolated and intimidated." (AOB 229.) This argument is pure speculation. Nothing about the trial court's dismissal of juror Hall indicated to the remaining holdout juror that Hall was excused based on her status as a minority juror. If anything, based on the questionnaire which focused on determining improper conduct, and Hall's statements during deliberations, the remaining minority juror likely would have speculated that Hall was excused for misconduct.

This case presented one of the "rare circumstances [where] a statement by a juror during deliberations . . . itself was an act of misconduct . . ." (*People v. Hedgecock*, *supra*, 51 Cal.3d at p. 419.) Pursuant to its duty, the trial court conducted a proper inquiry into the juror misconduct without unnecessarily delving into the content of the jurors' deliberations. (*People v. Burgener*, *supra*, 41 Cal.3d at p. 520.) Appellant has failed to demonstrate how the trial court's inquiry into juror misconduct coerced the death verdict.

### 8. The Trial Court's Instruction To The Jury Following The Dismissal Of A Juror Was Not Coercive

Appellant contends that the court's instruction to the jury after dismissing juror Hall was misleading, inadequate, and lead the jury to believe

that deliberations could continue indefinitely. (AOB 231-242.) Appellant is incorrect. The trial court's instruction properly informed the newly-constituted jury to start their deliberations anew. On its face, the instruction's language is not coercive, nor can appellant demonstrate a coercive affect on the jury.

The trial court dismissed juror Hall before the noon recess on Monday, August 14, 1995. When the jury returned from lunch, the trial court instructed the jury as follows:

> One of your number has been excused for legal cause and replaced with an alternate juror. You must not consider this fact for any purpose. You must not speculate as to why this juror has been replaced.
>
> The People and the defendant have a right to a verdict reached only after full participation of the 12 jurors who returned the verdict. This right may be assured only if you begin your deliberations again from the beginning.
>
> You should not feel like you are under any pressure to reach a verdict, if one can be reached, with any particular amount of time.
>
> You should take whatever time you need to discuss the case. You must, therefore, set aside and disregard deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place.
>
> You should not surrender a conscientiously held belief simply to secure a verdict for either side, but you may change your decision after the newly constituted jury deliberates anew if you feel it appropriate.
>
> The fact that I have spoken with some of the jurors should have no impact on your deliberations and may not be considered in deciding this case.

> You should not consider the short questionnaire you answered on Friday or the questions asked of the jurors this morning in chambers for any purpose in your deliberations.
>
> You shall now retire and begin anew your deliberations in accordance with the instructions previously given.
>
> And the jury is specifically instructed they are not to speculate as to the purpose of the in camera inquiry and for the exclusion of a particular juror. This fact should not enter into your deliberations, nor should you speculate as to the reasons why these proceedings occurred.

(35RT 5824-5826.) After the instruction, the court stated:

> Let me indicate to you that as I have earlier indicated, you are required to start your discussions anew. I think the fact remains is although - because you only have one additional juror, that, perhaps, you collectively can bring him up to speed and in the process cover what it is that you have covered previously in a matter of days and perhaps do it in a shorter period of time. Take all the time you need.

(35RT 5826.) The jury then deliberated until 4:00 p.m and recessed for the evening. (35RT 5827.) The next day, August 15, 1995, the jury resumed deliberations at 9:00 a.m., and returned the death verdict at 11:36 a.m. (36RT 5828.)

Respondent submits that despite appellant's numerous assertions that it simply was not feasible for this jury to commence deliberations anew, his claims are without merit. Appellant's arguments are based entirely on surmise and speculation as to what appellant thinks might have happened in the jury room when the newly-constituted jury commenced its deliberations "anew." This, of course, is not the law on which to evaluate appellant's claim.

The law is clear that on appeal it is presumed that jurors follow the court's instructions and directions. (See *People v. Maury*, *supra*, 30 Cal.4th at

pp. 439-440.) The presumption that the jurors in this case understood and followed the trial court's instructions to commence deliberations "anew" is not rebutted by anything except appellant's speculation. Appellant presents not one record-based reason to believe the jurors did not follow the trial court's instruction to (1) commence deliberations anew, (2) disregard the fact that the court spoke with some of the jurors, (3) not consider the questionnaire, and (4) not speculate as to the reason for the exclusion of the excused juror. Moreover, because the jurors are presumed to have followed the court's instruction to begin deliberations anew, none of the trial court's prior comments or actions, or the questionnaire, could have had a coercive affect on the new jury. Appellant's claims must, therefore, be rejected.

First, appellant contends that the discharge of juror Hall and the court's instructions thereafter put additional pressure on the remaining minority juror to capitulate. (AOB 232-235.) However, the minority juror did not know why juror Hall was excused. The court never communicated to the foreman or Jackson that Hall was excused based on her minority position. And, even assuming the foreman or Jackson revealed the substance of the court's inquiry to the other jurors, from the perspective of the remaining holdout, there was no reason to think that juror Hall was removed because of her holdout status. Rather, it would have been apparent from Hall's comments during deliberations and the court's inquiry into possible misconduct in questions 5 through 8 of the questionnaire that if anything, Hall was removed due to her misconduct. Further, there was no pressure because the holdout would likely conclude that if Hall's minority status had been the reason for her removal, the trial court would have removed the remaining holdout as well.

Second, appellant claims that the trial court's instruction pressured the holdout juror to surrender to the majority by stating that the jurors "may change your decision after the newly constituted jury deliberates anew if you feel it

appropriate." (AOB 235.) However, the instruction clearly told the jurors not to surrender their conscientiously held beliefs simply to secure a verdict for either side. The presumption is that the remaining minority juror followed this instruction. (See *People v. Maury*, *supra*, 30 Cal.4th at pp. 439-440.) Appellant also asserts that the trial court's failure to include, in the supplemental instruction, the portion of CALJIC No. 17.40 instructing jurors that they must "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision," may have had the effect of causing jurors to "think their responsibilities had changed and that now the minority could be influenced by the majority." (AOB 235.) Nothing in the trial court's supplemental instruction informed the jurors that the court's prior instructions had been superceded by the supplemental instruction. In any event, the supplemental instruction cannot be reasonably construed as encouraging the minority juror to be influenced by the views of majority jurors on the basis of the number of jurors favoring one penalty over another, as the supplemental instruction directed the jurors that their verdicts must not be the result of mere acquiescence for the purpose of securing a verdict.

Third, appellant contends that trial court's comment to the jury to "take all the time you need" added more pressure to the minority juror to relent in light of the amount of time the jury had already spend deliberating. To the contrary, the court's admonition assured the minority juror that there was *no* pressure to reach a verdict within any set time frame. Appellant's assertion that the court's comment constituted a "threat of indefinite confinement" that the majority could use against the minority juror, is not a reasonable interpretation of the court's comments. (AOB 236.) The court was not setting a time frame in which the jurors must deliberate. (AOB 237, fn. 58.) Rather, the trial court left that decision to the jury's discretion.

Fourth, appellant claims that the trial court's instruction, coupled with the prior standard instructions setting forth the jurors' duties to determine which penalty was appropriate, improperly encouraged the jurors to reach a unanimous verdict. (AOB 237.) Appellant has not shown that the standard instructions were impermissibly coercive. Further, the court's instruction after juror Hall was excused did not remotely convey improper pressure from the trial court to reach a unanimous verdict. In addition, contrary to appellant's assertion (AOB 238), the prior actions and comments of the trial court are not properly considered here, as the jury was explicitly told to disregard those comments and events.

Fifth, appellant complains that the trial court's comment that the original juror's might "collectively . . . bring [the new juror] up to speed and in the process cover what it is that you have covered previously in a matter of days and perhaps do it in a shorter period of time" was improper. However, the comment did not imply that the new jury should continue with deliberations where the previous jury had left off; the jurors knew they must begin anew as a whole. (ABO 239.) Nor, did the comment impair appellant's right to the independent judgment of each juror because the court instructed the jurors that the parties had a right to a verdict reached only after full participation of each of the 12 jurors. (AOB 239.) Again, the jurors are presumed to have followed the court's instruction. (See *People v. Maury*, *supra*, 30 Cal.4th at pp. 439-440.)

Sixth, appellant claims that the same statement by the trial court regarding bringing the new juror up to speed failed to inform the jury that the jurors were to consider each other's views. (AOB 240.) This claim fails for the same reason set forth above because the court expressly told the jurors that all 12 of the juror's must fully participate.

Lastly, appellant contends that the trial court should have told the jury that they had the choice not to reach a verdict. (AOB 240.) Appellant is incorrect. The jury did not need to be told that they could remain deadlocked as the law "'does not require a broad hint to a juror that he can hang the jury if he cannot have his way." (*People v. Dixon* (1979) 24 Cal.3d 43, 52, quoting *Andres v. United States* (1948) 333 U.S. 740, 766.)

**C. Conclusion**

Appellant's claims of coercion fail, whether viewed cumulatively or individually. Appellant's jury deliberated anew following the initial announcement of deadlock and the subsequent constitution of a new jury. Under the totality of the circumstances presented in the instant case, the jury's determination of death as the appropriate penalty for appellant was not coerced by the trial court. (*People v. Proctor*, *supra*, 4 Cal.4th at p. 538; *People v. Pride*, *supra*, 3 Cal.4th at pp. 265-266; *People v. Price*, *supra*, 1 Cal.4th at p. 467; *People v. Rodriguez*, *supra*, 42 Cal.3d at pp. 774-775.)

## XVI.

## THE TRIAL COURT PROPERLY DISCHARGED JUROR HALL BECAUSE SHE MISREPRESENTED AND CONCEALED MATERIAL INFORMATION DURING VOIR DIRE

In Argument 16 of his opening brief, appellant contends that the trial court erroneously discharged juror Annora Hall after it was revealed that she had misrepresented information about her background during voir dire. (AOB 243-258.) Appellant asserts that Hall's misrepresentations about her gun ownership, mental illness, and arrested friends did not constitute material information that showed bias against the prosecution. Appellant's arguments lack merit and should be rejected.

### A. The Relevant Proceedings

As set forth in respondent's Argument XV, the jurors' responses to the questionnaire following their purported deadlock caused the prosecutor to suspect that juror Annora Hall had misrepresented information during voir dire about her gun ownership, mental illness, and arrested friends. When questioned by the trial court, Hall confirmed that despite her responses to the contrary (1) she owned a gun and had carried it for personal protection; (2) she suffered from a mental illness, namely bipolar disorder, for the past 19 years for which she took numerous medications including lithium; and (3) one of her acquaintances had been incarcerated for all of his life. Hall did not reveal any of this information during voir dire. The trial court discharged Hall from the jury for making intentional misrepresentations regarding all three issues on her jury questionnaire which precluded the prosecutor from asking her questions about these issues during voir dire. The trial court further ruled that, based on the prosecutor's representations to the court, Hall's failure to disclose her mental health disorder prevented the prosecutor from likely exercising a

peremptory challenge based on that disability. Lastly, the court found that Hall was not impartial. (35RT 5820-5822.)

## B. Waiver

Appellant contends that the trial court's erroneous discharge of juror Hall violated his federal and state constitutional rights to trial by jury and a unanimous reliable verdict, his Sixth and Fourteenth Amendment rights, and his right to due process. (AOB 244-245.) However, appellant did not raise these constitutional objections at trial. Therefore, the claims are waived because appellant failed to object on these grounds in the trial court. (See *People v. Sanders, supra*, 11 Cal.4th at p. 510, fn. 3.)

## C. The Applicable Law

Penal Code section 1089 authorizes a trial court to discharge a juror

> [i]f at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.

A trial court's determination of good cause under section 1089 is subject to the deferential abuse-of-discretion standard. Therefore, this Court must uphold the trial court's decision to discharge a juror if there is substantial evidence supporting it. (See *People v. Marshall, supra,* 13 Cal.4th at p. 843.)

A juror's duty is to weigh the evidence and credibility of witnesses with impartiality and to reach a fair and unbiased verdict. (*People v. Compton* (1971) 6 Cal.3d 55, 59-60.) It is well settled that a sitting jurors' actual bias,

which would have supported a challenge for cause, renders him or her "unable to perform his [or her] duty," and thus subject to discharge and substitution under Penal Code section 1089. (*People v. Keenan*, *supra*, 46 Cal.3d at p. 532.)

In *People v. Price, supra,* 1 Cal.4th at p. 400, this Court explained the law governing removal of a juror who has withheld information during the selection process:

> When the trial court discovers during trial that a juror misrepresented or concealed material information on voir dire tending to show bias, the trial court may discharge the juror if, after examination of the juror, the record discloses reasonable grounds for inferring bias as a "demonstrable reality," even though the juror continues to deny bias.

The juror in *Price* failed to disclose that he had a criminal history, that a prosecution witness had previously served as his parole officer, and that he had previously filed a lawsuit against the judge presiding in the trial. (*Id.* at p. 399.) After explaining why he had not relayed this information during jury selection, the juror insisted he could be fair and impartial to both sides. This Court found the concealed information material and held the failure to disclose provided sufficient grounds to conclude the juror was biased, despite his insistence he could be fair. (*Id.* at pp. 400-401.)

**D. Legal Analysis**

First, appellant contends that Hall's allegedly inadvertent failure to disclose that she owned a gun was not a material misrepresentation that tended to show bias against the prosecution. (AOB 247-250.) The questionnaire that Hall filled out during jury selection asked the following questions regarding guns and firearms:

> 15. Do you own a gun or have any special knowledge or training with respect to guns?

a) If so, what type?

b) Have you ever used a weapon for any purpose?

If so, what?

34. Do you own, or have you ever owned any type of firearm?

If yes, what types?

(Supp. II CT 3324, 3330.)

Thus, Hall had two opportunities to disclose her ownership of the gun. First, in response to question 15 , and again in response to question 34, yet she answered "no" to each question. (*Ibid.*) The fact that Hall claimed she "simply didn't think about the gun" because it was in a closet in her house, does not render the withheld information immaterial. In addition, Hall also failed to truthfully answer question 15, subsection (b), which asked if she had ever used a weapon, and if so, for what purpose. By her own admission in the jury room and to the court, Hall had used the gun for protection. This is exactly the same purpose for which appellant claimed he carried the murder weapon on the day of the killings.

Appellant claims that because the prosecutor did not question any of the other jurors about their use or ownership of guns, he likely would not have questioned Hall. First, this argument is speculative. Second, four out of five of the jurors that appellant claims owned guns, did not, in fact, personally own guns at the time of the penalty phase. (Supp. II CT 2960 [juror Dobard- did not own a gun at the time of trial, her husband owned a gun]; 3492, 3498 [juror Almagro-did not own a gun at the time of trial, her ex-husband owned a gun]; 3940 [juror Crow-did not own a gun at the time of trial, used to own a rifle, pistol, and shotgun]; 4002 [juror Hetch-did not own a gun at the time of trial, used to own a rifle].) In contrast, Hall owned a gun at the time of the penalty phase, yet affirmatively represented that she did not. Third, and most importantly, in contrast to Hall, none of the other jurors that the prosecutor

accepted indicated they used a gun for the purpose of personal protection. (Supp. II CT 2651 [juror Bays-used a gun in Army training and for target practice years ago]; 2932 [juror Reyes-used a gun for military training only]; 3296 [juror Webb-used a gun for military duty]; 4024 [juror Dimmick-used a gun for military duty from 1961-1965]; 4108 [juror Ballard-used a gun during army nurse training in World War II].) None of these jurors used guns in any manner that was even remotely similar to the reason that appellant claimed he was armed on the night of the murders--for personal protection. However, Hall had used her gun for personal protection. As the prosecutor stated, he "would have wanted to know why . . . she carries a gun." (35RT 5807.)

Further, while juror Hall insisted that her failure to disclose the evidence of her gun ownership was inadvertent, this did not alter the fact that such information was material, especially where appellant presented evidence about his practice of carrying a weapon for protection. Hall exposed her bias on this issue when she told the other jurors that she understood why appellant carried a weapon for personal protection. Yet, as the prosecutor stated, he "had no opportunity to . . . use a peremptory challenge on [juror Hall] because she lied to me." (35RT 5813.) In this context, information that Hall owned and carried a gun for protection was material to whether she could impartially weigh the evidence and credibility of witnesses and reach a fair and unbiased verdict. (*People v. Thomas* (1990) 218 Cal.App.3d 1477, 1484.)

Second, appellant also argues that Hall's failure to disclose her bipolar disorder was not a material misrepresentation that tended to show bias against the prosecution. (AOB 250-254.) Question 16 of the jury questionnaire asked: "Do you have any specific health problems or disabilities? If yes, briefly describe. If yes, would this health problem or disability make it difficult for you to serve as a juror in this particular case?" (Supp. II CT 3324.) Hall responded that she had "digestive problems." (*Ibid.*) Appellant contends that Hall's

failure to disclose her bipolar disorder was caused by the wording of the questionnaire because "a fair inference" is that she thought the question referred only to physical health problems. However, on its face, the question is not restricted to physical health, but refers to health in general. Furthermore, in Hall's case, her mental health disorder clearly had a physical affect on her health as evidenced by the fact that she had been taking medication for the disorder for 19 years. This was not a situation where she simply felt depressed or despondent. She suffered from a mental health disorder which altered her physiological and chemical balance.

In addition, contrary to appellant's assertion that Hall disclosed that she had seen a mental health professional in her response to question 42 [If you ever had any personal experience with psychiatrists, psychologists, or counselors, did this experience impress you: Favorably, Unfavorably, Does not apply], and that it was therefore the prosecutor's responsibility to question her on that issue, neither the question nor Hall's response of "favorably" (Supp. II CT 3332) indicates that she received treatment such that the prosecutor would be alerted to question her about the issue. The question merely asked if she had any "experience," not if she had received treatment.

Appellant again argues that the misrepresentation was not intentional. However, the fact that the disclosure may have been unintentional does mean that the withheld information was not material. Respondent submits that within the context of this case, information that Hall suffered from, and took medications for, a mental illness for 19 years was material. During the penalty phase retrial, appellant's primary argument was that the killings were triggered by his emotional and mental health problems, including depression, isolation, and stress caused by his job loss, unstable financial situation, and pressure to help his grandmother financially. In this context, information that Hall had suffered for nearly 20 years from a mental illness for which she took multiple

medications, including lithium, was material to whether she could impartially weigh the evidence and credibility of witnesses and reach a fair and unbiased verdict. (*People v. Thomas*, *supra*, 218 Cal.App.3d at p. 1484.)

Finally, appellant contends that Hall did not misrepresent information when she responded to question 23 of the questionnaire: "Have you, or anyone close to you, ever been arrested for or accused of a crime?" (Supp. II CT 3326.) Hall wrote "friend - outstanding warrants and possession of stolen property." (*Ibid.*) In fact, as revealed by her statements to other jurors and her admission to the trial court, Hall's "old babysitter's son" was incarcerated and had been institutionalized all his life. During deliberations, Hall's bias was revealed when she told her fellow jurors that she had a friend who would prefer to be imprisoned for life rather than receive the death penalty. Thus, within the context of this case where the jurors were deciding between the punishments of life in prison or the death penalty, Hall's misrepresentation was material to whether she could impartially weigh the evidence and credibility of witnesses and reach a fair and unbiased verdict. (*People v. Thomas*, *supra*, 218 Cal.App.3d at p. 1484.)

Even though Hall eventually disclosed all of the information regarding her gun ownership, mental illness, and arrested friend when questioned by the trial court, the court was justified in concluding that her concealment of it during voir dire demonstrated actual bias, particularly in light of her statements to other jurors which expressly revealed her bias. The trial court did not abuse its discretion in discharging Hall and seating an alternate in her place.

## XVII.

## INTERCASE PROPORTIONALITY REVIEW OF DEATH SENTENCES IS NOT REQUIRED BY THE FEDERAL CONSTITUTION

In Argument 17 of his opening brief, appellant contends that the California death penalty statutory scheme violates the Eighth and Fourteenth Amendments of the United States Constitution because it does not provide intercase proportionality review of sentences. (AOB 259-263.) Both the United States Supreme Court (*Pulley v. Harris* (1984) 465 U.S. 37, 50-51) and this Court (*People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Snow*, *supra*, 30 Cal.4th at pp. 126-127) have rejected the claim that the United States Constitution requires intercase proportionality review of death sentences. Appellant concedes that this Court has repeatedly held that intercase proportionality review is not constitutionally required. (AOB 260.) Having offered no compelling reason for reconsideration, appellant's claim fails.

Appellant further contends that the lack of intercase proportionality review violates the Equal Protection Clause of the United States Constitution because certain procedures, such as disparate sentence review utilized in non-capital cases, do not apply to death cases. (AOB 263-267.) This Court has explicitly rejected such arguments. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Cox* (1991) 53 Cal.3d 618, 691; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1287.) Appellant concedes that this Court has rejected the claim that failure to provide intercase proportionality review violates the constitutional guarantee of equal protection. (AOB 263-264.) Appellant has failed to provide this Court with any compelling reason to reconsider its prior rulings. Accordingly, his claim should be rejected.

## XVIII.

## CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS ARE NOT UNCONSTITUTIONAL

In Argument 18 of his opening brief, appellant "raises a number of . . . constitutional objections to the death penalty statute identical to those [the Court has] previously rejected." (*People v. Welch* (1999) 20 Cal.4th 701, 771; AOB 268-285.) To the extent appellant alleges statutory errors not objected to at trial, the issue is waived on appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 589.) Similarly, any complaints relating to instructions that were not erroneous but only incomplete are waived unless appellant requested clarifying or amplifying language. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 666.) Respondent will not "rehearse or revisit" the numerous claims previously and regularly rejected by this Court. (*People v. Ayala* (2000) 24 Cal.4th 243, 290 [internal quotation marks excluded].) Respondent simply identifies appellant's complaint and notes the Court's applicable opinions.

### A. Absence Of Reasonable Doubt Standard Is Not Unconstitutional

Appellant claims that California's death penalty statute and instructions are unconstitutional because the jury is not required to find, beyond a reasonable doubt, (1) the existence of aggravating factors (except for special circumstances under Penal Code section 190.2 and other crimes under Penal Code section 190.3, subdivision (b)), (2) that aggravating factors outweigh mitigating factors, or (3) that death is the appropriate penalty. (AOB 269-278.) This Court has repeatedly held that California law does not require a jury to find the existence of aforementioned factors beyond a reasonable doubt. (*People v. Jones* (2003) 30 Cal.4th 1084, 1126-1127; *People v. Martinez* (2003) 31 Cal.4th 673, 700; *People v. Cox* (2003) 30 Cal.4th 916, 971; *People v. Box* (2000) 23 Cal.4th 1153, 1217.) Contrary to appellant's assertion, the United

States Supreme Court decisions in *Jones v. United States* (1999) 526 U.S. 227, *Apprendi*, *supra*, 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, do not alter this conclusion. (*People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32 [finding *Apprendi* and *Ring* inapplicable]; accord, *People v. Martinez*, *supra*, 31 Cal.4th at pp. 700-701; *People v. Cox*, *supra*, 30 Cal.4th at pp. 971-972; *Nakahara*, *supra*, 30 Cal.4th at pp. 721-722; *People v. Smith* (2003) 30 Cal.4th 581, 642; *People v. Prieto*, *supra*, 30 Cal.4th at p. 272 ["*Ring* does not apply to California's penalty phase proceedings"].) Moreover, the United States Supreme Court decision in *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531, 159 L.Ed.2d 403], did not undermine any of this Court's earlier holdings on this issue because *Blakely* "simply relied on *Apprendi* and *Ring* . . . ." (*People v. Morrison* (2004) 34 Cal.4th 698.)

**B. No Burden Of Persuasion In The Penalty Phase**

Appellant also claims that California's death penalty statute is unconstitutional because "the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determination the jury had to make." (AOB 278; 278-280.) Appellant acknowledges that this Court has held otherwise, but asks the Court to reconsider its prior holdings. (AOB 278; citing *People v. Hayes* (1990) 52 Cal.3d 557, 643.) Appellant provides no compelling reason for doing so. This Court recently reaffirmed the holding of *People v. Hayes*, *supra*, 52 Cal.3d at p. 643, and reiterated that there was no burden of proof and no burden of persuasion in the penalty phase. (*People v. Lenhart* (2004) 32 Cal.4th 1107, 1135-1136; see also *People v. Michaels* (2002) 28 Cal.4th 486, 541; *People v. Jones, supra,* 30 Cal.4th at p. 1127.)

## C. Absence Of Unanimity Requirement Regarding Aggravating Factors Is Not Unconstitutional

Appellant contends that the jury must unanimously agree on which aggravating factors warrant death. (AOB 281-285.) This Court has held otherwise. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Kipp* (1998) 19 Cal.4th 353, 381.) Nor do *Ring*, *supra*, 536 U.S. 584, *Apprendi*, *supra*, 530 U.S. 466, or *Blakely*, *supra*, 124 S.Ct. 2531, alter this conclusion. (*People v. Morrison*, *supra*, 34 Cal.4th at p. 731; *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

## XIX.

## THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.88

In Argument 19 of his opening brief, appellant contends that CALJIC No. 8.88, the standard penalty phase concluding instruction given in this case, was constitutionally flawed. (AOB 286-298.)[46] Appellant raises several

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46. The trial court instructed the jury with CALJIC No. 8.88, as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without the possibility of parole, shall be imposed on the defendant. [¶] After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. [¶] The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of aggravating circumstances with the totality of the mitigating circumstances. [¶] To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. [¶] You shall now retire and select one of your number to act as foreperson, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree. [¶]

complaints about this instruction, each of which have been presented to and rejected by this Court in previous cases. Among his complaints are that the instruction failed: (1) to quantify the words "so substantial" so as to provide guidance to the jurors, resulting in a standard that was unconstitutionally vague (AOB 287-290); (2) "to inform the jurors that the central inquiry" was the appropriateness of the death penalty because it used the phrase "warrants death instead of life without parole" (AOB 290-292); (3) to instruct the jurors that they were required to return a sentence of life without the possibility of parole if the mitigating factors outweighed the aggravating factors, and thereby improperly reduced the prosecutor's burden of proof (AOB 293-297); and (4) to instruct the jury that neither party "bears the burden to persuade" the jury regarding the appropriateness of the death penalty (AOB 297-298.)

These challenges to CALJIC 8.88 have been rejected by this Court:

(1) The term "so substantial" is not unconstitutionally vague. (*People v. Carter* (2003) 30 Cal.4th 1166, 1226; see *People v. Millwee* (1998) 19 Cal.4th 96, 162-163 [We have repeatedly rejected claims that [CALJIC No. 8.88] is inadequate or misleading in describing when the balance of factors warrants the more serious penalty."].)

(2) The use of the term "warrants" in CALJIC No. 8.88 is not "too broad" or permissive," and it does not mislead a "jury into believing that it may impose death even when not the 'appropriate' penalty." (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1243; see *People v. Boyette*, *supra*, 29 Cal.4th at p. 465.) Contrary to appellant's suggestion,

> [CALJIC No. 8.88] as a whole conveyed that the weighing process is "merely a metaphor for the juror's personal determination that death is

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> Any verdict you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

(33RT 5626-5628.)

> the appropriate penalty under all of the circumstances." [Citation.] "There is no reasonable likelihood that the jury would have thought it could return a verdict of death if it did not believe that penalty was appropriate." [Citation.]

(*People v. Jackson*, *supra*, 13 Cal.4th at pp. 1243-1244, quoting *People v. Johnson* (1992) 3 Cal.4th 1183, 1250.)

(3) CALJIC No. 8.88 is not flawed because it "does not inform the jury that it is required to return a verdict of life imprisonment without possibility of parole if it finds the aggravating factors do not outweigh the mitigating factors." (*People v. Jackson*, *supra*, 13 Cal.4th at pp. 1243.) This Court has repeatedly explained that "'[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating,'" and that it is unnecessary to state the converse. (*People v. Jackson*, *supra*, 13 Cal.4th at pp. 1243, quoting *People v. Duncan* (1991) 53 Cal.3d 955, 978; see also *People v. Catlin, supra,* 26 Cal.4th at p. 174.)

(4) As previously discussed in Argument XVIII B., ante, there is no requirement to instruct the jury on the burden of persuasion of either party in the penalty phase of a capital case. (*People v. Lenhart*, *supra*, 32 Cal.4th 1107, 1135-1136; see also *People v. Hillhouse* (2002) 27 Cal.4th 469, 510-511; *People v. Box, supra,* 23 Cal.4th at p. 1216.)

Appellant's request that this Court reconsider its prior holdings are unpersuasive. Accordingly, his challenges fail.

# XX.

# THE INSTRUCTIONS REGARDING MITIGATING AND AGGRAVATING FACTORS IN SECTION 190.3 AND THE APPLICATION OF THESE FACTORS DID NOT RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

In Argument 20 of his opening brief, appellant sets forth a series of separate attacks on the mitigating and aggravating factors in Penal Code section 190.3, and on the death sentencing process. (AOB 299-315.) Preliminarily, appellant failed to raise these claims in the trial court; therefore, they have been waived. (See *People v. Williams* (1997) 16 Cal.4th 153, 270.) In any event, this Court has repeatedly rejected each of these claims. Appellant provides no new reason why this Court should reconsider its previous decisions. Thus, all of the claims should be rejected.

## A. Section 190.3, Factor (a), Does Not Result In The Arbitrary And Capricious Imposition Of The Death Penalty

Appellant contends the death penalty is invalid because section 190.3, factor (a), as applied, allows arbitrary and capricious imposition of death in violation of the Eighth Amendment to the United States Constitution.[47] (AOB 301-307.) This argument has been previously rejected and should be rejected here. (See, e.g., *People v. Maury, supra,* 30 Cal.4th at p. 439; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050-1051; see *Telopea v. California* (1994) 512 U.S. 967, 976 [explaining that 190.3, factor (a), was "neither vague nor otherwise

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47. Penal Code section 190.3, factor (a), states:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

improper under our Eighth Amendment jurisprudence"]. There is no need for this Court to revisit the issue.

## B. Trial Court Did Not Need To Delete Sentencing Factors From CALJIC No. 8.85

Appellant contends that the failure to delete "inapplicable" factors from CALJIC No. 8.85[48/] violated his federal constitutional rights under the Sixth,

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48. The trial court instructed the jury pursuant to CALJIC No. 8.85, as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. [¶] You shall consider, take into account and be guided by the following factors, if applicable. [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true. [¶] (b) The presence or absence of criminal activity by the defendant, other than the crime for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. [¶] (c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings. [¶] (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. [¶] (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. [¶] (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct. [¶] (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person. [¶] (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication. [¶] (i) The age of the defendant at the time of the crime. [¶] (j) Whether or not the defendant was an accomplice to the offense

Eighth, and Fourteenth Amendments. (AOB 307-309.) As appellant recognizes (AOB 308), this Court has repeatedly rejected identical arguments. (See, e.g., *People v. Cunningham* (2001) 25 Cal.4th 926, 1041; accord, *People v. Stanley* (1995) 10 Cal.4th 764, 842.) As this Court reiterated in *People v. Yeoman, supra,* 31 Cal.4th at pp. 164-165:

> Trial courts need not delete from the list of sentencing factors set out in CALJIC No. 8.85 those that may not apply. [Citation.] The failure to do so does not deprive defendant of his rights to an individualized sentencing determination [citation] or to a reliable judgment [citation].

Because appellant provides no basis for rejecting these cases, his claim fails.

### C. The Trial Court Did Not Err By Not Delineating Which Penalty Factors Could Only Be Mitigating

Appellant contends that the trial court's failure to instruct the jury which factors were aggravating, which were mitigating, or which could be either aggravating or mitigating deprived him of his Eighth and Fourteenth Amendment rights to a fair and reliable penalty determination. (AOB 309-310.) He argues that the use of the phrase "whether or not" – in this case, in factors designated as (d), (e), (f), (g), (h), and (j) could have led the jury to believe that the absence of any of these mitigating factors could constitute an aggravating factor. Respondent disagrees.

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> and his participation in the commission of the offense was relatively minor. [¶] (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. [¶] You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(32RT 5398-5400.)

Appellant is not arguing that the trial court's penalty instructions were inaccurate, but rather that the court should have given a further clarifying instruction stating that certain of the factors listed in CALJIC No. 8.85 could only be treated as mitigating. Appellant, however, made no request for such an instruction in the trial court. As such, he has failed to preserve this claim for appeal. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 503.)

Notwithstanding waiver, the claim is meritless because this Court has repeatedly rejected it. (See, e.g., *People v. Farnam, supra*, 28 Cal.4th at p. 191; *People v. Maury, supra*, 30 Cal.4th at pp. 443-444; *People v. Catlin, supra*, 26 Cal.4th at p. 178; *People v. Cunningham, supra*, 25 Cal.4th at p. 1041; *People v. Ochoa* (1998) 19 Cal.4th 353, 458; *People v. Williams, supra*, 16 Cal.4th at pp. 271-272.) As appellant offers no persuasive reason for this Court to revisit its longstanding rejection of such claims, the instant claim should similarly be rejected.

**D. Adjectives Used In Conjunction With Mitigating Facts Do Not Act As Unconstitutional Barriers To Consideration Of Mitigation**

Appellant asserts that the use of "restrictive" adjectives in the list of potential mitigating factors – i.e., the words "extreme" in factors (d) and (g), and "substantial" in factor (g) – impermissibly acted as unconstitutional barriers to consideration of mitigation by his jury in violation of the Sixth, Eighth and Fourteenth Amendments. (AOB 310.) This contention is without merit. This Court previously has held that the words "extreme" and "substantial," as set forth in the death penalty statute, do "not impermissibly limit consideration of mitigating factors in violation of the federal Constitution. [Citations.]" (*People v. Prieto, supra*, 30 Cal.4th at p. 276; *People v. Maury, supra*, 30 Cal.4th at p. 439, citing *People v. Barnett, supra*, 17 Cal.4th at pp. 1178-1179, *People v. Williams, supra*, 16 Cal.4th at p. 276, and *People v. Scott* (1997) 15 Cal.4th

1188, 1227-1228; see also *People v. Arias* (1996) 13 Cal.4th 92, 188-189 [words "extreme" and "substantial" are not impermissibly vague]; *People v. Stanley, supra*, 10 Cal.4th at p. 842 [same].) Appellant's contention should be rejected.

### E. Written Findings On Aggravating Factors Are Not Required

Appellant argues the jury should have been required to return written findings identifying the aggravating factors supporting the death verdict. (AOB 310-311.) This Court has previously rejected identical arguments. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Snow*, *supra*, 30 Cal.4th at p. 126; *People v. Yeoman, supra,* 31 Cal.4th at pp. 164-165; *People v. Martinez*, *supra*, 31 Cal.4th at p. 701; *People v. Lucero* (2000) 23 Cal.4th 692, 741.) Appellant provides no basis for rejecting those cases.

### F. Appellant's Equal Protections Rights Were Not Implicated By Absence Of The "Previously Addressed Procedural Safeguards"

Appellant contends the absence of the "previously addressed procedural safeguards" resulted in a denial of his equal protection rights, because, according to him, those safeguards are provided to non-capital defendants. (AOB 313-315.) Insofar as these unspecified "procedural safeguards" relate to penalty phase procedures, capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (See *People v. Johnson, supra,* 3 Cal.4th at pp. 1242-1243.) Insofar as appellant argues the lack of intercase proportionality review in capital cases amounts to a violation of equal protection, this Court has previously rejected this claim and should do so here. (See *People v. Cox, supra*, 30 Cal.4th at p. 970.)

For the foregoing reasons, appellant's challenge to California's death penalty procedures should be rejected.

## XXI.

## CALIFORNIA'S USE OF THE DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL LAW OR THE EIGHTH AMENDMENT

In Argument 21 of his opening brief, appellant contends that his death sentence violates international law and the federal constitutional ban on cruel and unusual punishment under the Eighth Amendment. (AOB 316-321.) The Court should reject appellant's argument that California's use of the death penalty violates international law as it has in the past. (See *People v. Snow, supra*, 30 Cal.4th at p. 126; *People v. Bolden* (2000) 29 Cal.4th 515, 567; *People v. Hillhouse, supra*, 27 Cal.4th at p. 511; *People v. Ochoa, supra,* 26 Cal.4th at p. 462; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1055; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779; see also *Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337, 370-376 [upholding Ohio's death penalty scheme against claims that it violated international law].) This Court has also rejected appellant's contention that California's use of the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment to the federal Constitution. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; *People v. Samayoa* (1997) 15 Cal.4th 795, 864-865.) Appellant does not provide sufficient reasoning to revisit the issue here, and thus, his claims should be rejected.

## XXII.

## THE PENALTY-PHASE SPECIAL INSTRUCTIONS WERE PROPERLY REJECTED

In Argument 22 of his opening brief, appellant contends that the trial court erred by refusing to instruct the jury with six defense-requested penalty phase special instructions regarding (1) mercy, compassion, and sympathy; (2) deterrence; (3) lingering doubt; and (4) character and background. (AOB 322-327.) Respondent submits that the trial court properly refused the instructions as they were either argumentative or duplicative of other properly given instructions.

### A. The Trial Court Properly Rejected The Defense-Requested Special Instructions Because They Were Argumentative Or Duplicative

This Court has explained:

> [T]he standard CALJIC penalty phase instructions "are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards." [Citation.] Moreover, the general rule is that a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative. [Citation.] Instructions should also be refused if they might confuse the jury. [Citation.]

(*People v. Gurule* (2002) 28 Cal.4th 557, 659.) "Although instructions pinpointing the theory of the defense might be appropriate, a defendant is not entitled to instructions that simply recite facts favorable to him. [Citation.]" (*People v. Gutierrez, supra,* 28 Cal.4th at p. 1159, original italics omitted.)

### 1. The Mercy, Compassion, And Sympathy Instructions

Appellant's trial counsel proposed the following two instructions regarding mercy, compassion, and sympathy:

> In determining whether to sentence the defendant to life imprisonment without the possibility of parole or to death, you may decide to exercise mercy on behalf of the defendant.

(31RT 5374)

> If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may on such sympathy and compassion alone reject death as a penalty.

A mitigating factor does not have to be proved beyond a reasonable doubt. (31RT 5387-5388.)

Appellant contends that the trial court erred in refusing these special instructions. However, this Court has rejected similar challenges in other cases. (See, e.g., *People v. Monterroso* (2004) 34 Cal.4th 743, 791-792; *People v. Smith, supra,* 30 Cal.4th at p. 638; *People v. Prieto, supra*, 30 Cal.4th at p. 271, citing *People v. Lewis* (2001) 26 Cal.4th 334, 393.)

Here, the jury was instructed with CALJIC No. 8.85, which this Court has held adequately covers the mercy instruction. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 271, citing *People v. Lewis*, *supra*, 26 Cal.4th at p. 393.) Additionally, the jury was also instructed with CALJIC No. 8.88, which instructed that a mitigating circumstance was "any fact, condition or event, which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty," and told the jury that "[y]ou are free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider." As such, the jury was adequately informed that the jury could take into account any sympathy it had

for appellant as a mitigating factor. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 403 ["a trial court need not give a specific 'mercy instruction,' even if requested," when the jury is instructed with CALJIC No. 8.85 and instructed that it is "free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors your are permitted to consider"].) Thus, in light of the other instructions given, "the rejected instruction[s were] cumulative." (*People v. Prieto, supra*, 30 Cal.4th at p. 271, footnote omitted.)

**2. The Deterrence Instruction**

Appellant's trial counsel proposed the following instruction regarding deterrence:

> In deciding whether death or life imprisonment without the possibility of parole is the appropriate sentence, you may not consider for any reason whatever the deterrent or non-deterrent effect of the death penalty or the monetary loss to the state of either execution or maintaining a prisoner for life.

(31RT 5375.)

In *People v. Benson* (1990) 52 Cal.3d 754, 807, this Court held that the trial court properly rejected a similar proposed instruction that stated the jury should not weigh "the deterrent or nondeterrent effect of the death penalty or the monetary cost to the State of execution or maintaining a prisoner for life" in determining whether to impose life imprisonment or death because neither party raised the issues of deterrence and cost at trial. Similarly, in this case, neither party argued this issue. Furthermore, any error in failing to give the instruction was harmless. (*People v. Hines* (1997) 15 Cal.4th 997, 1066-1067.)

### 3. The Lingering Doubt Instructions

Appellant's trial counsel proposed the following two instructions regarding lingering doubt:

> Although proof of guilt beyond a reasonable doubt has been found, you may demand a greater degree of certainty for the imposition of the death penalty.
>
> The finding of guilt is not infallible and any lingering doubt you entertain on the question of guilt may be considered by you as a factor in mitigation in determining the appropriate penalty.

(31RT 5377.)

> You may consider as a mitigating factor any lingering doubt that you may have concerning the defendant's guilt.
>
> Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and all possible doubt.

(31RT 5380.)

This Court has "repeatedly . . . held that although it is proper for the jury to consider lingering doubt, there is no requirement that the court specifically instruct the jury that they may do so." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1218, citing *People v. Staten* (2000) 24 Cal.4th 434, 464; see also *People v. Musslewhite* (1998) 17 Cal.4th 1216, 1272.)

Moreover, the jury was instructed it could consider the circumstances of the crime (Pen. Code, § 190.3, factor (a)), any other circumstances that extenuated its gravity (Pen. Code, § 190.3, factor (k)), and any sympathetic or other aspect of appellant's character or record that suggested a sentence other than death (CALJIC No. 8.85). This instruction, as noted in *People v. Sanchez* (1995) 12 Cal.4th 1, 77-78, is sufficiently broad to encompass any residual doubt any jurors might have entertained. Thus, appellant's claim of error must be rejected. (See *People v. Hughes, supra,* 27 Cal.4th at p. 405.)

#### 4. The Character And Background Instruction

Appellant's trial counsel proposed the following instruction regarding character and background:

> Evidence of the defendant's character and background may be considered only a factor in mitigation and cannot be used as a factor in aggravation.
>
> The prosecutor may rebut evidence of good character or childhood deprivation or hardship with evidence relating directly to the particular incidence or character traits on which the defendant seeks to rely and may argue that mitigation factor is inapplicable, but such evidence may not be used affirmatively as a circumstance in aggravation.

(31RT 5385-5386)

Again, CALJIC No. 8.85 covered these issues. The jury was instructed to reach its sentencing determination by weighing the factors in aggravation against the factors in mitigation and the applicable factors, which included consideration of appellant's character and background. In addition, contrary to the language of the proposed instruction, "the trial court had no obligation to advise the jury which statutory factors are relevant solely as mitigating circumstances and which are relevant solely as aggravating circumstances. [Citations.]" (*People v. Farnam, supra,* 28 Cal.4th at p. 191.) Therefore, the trial court did not err in refusing the proffered instructions.

## B. Harmless Error

Regardless, even if the trial court erred by failing to give any of the defense-prepared instructions, there is no reasonable possibility that appellant suffered prejudice from the lack of instruction. (See *People v. Jones, supra,* 29 Cal.4th at p. 1264; *People v. Brown* (1988) 46 Cal.3d 432, 448-449.) During closing argument of the penalty phase retrial, appellant's trial counsel adequately covered all of the topics in the proposed defense instructions and repeatedly referred to the standard instructions regarding those topics. He told the jury that they were to vote their own conscience and act as individuals when making a penalty decision, and also reiterated the warning in CALJIC No. 8.88 that weighing the evidence was not a mathematical formula and that each juror was to give whatever weight he or she felt each applicable factor deserved. Additionally, he argued that one factor in mitigation can outweigh more factors in aggravation. Moreover, as noted above, the standard instructions given informed the jury of the proper circumstances to take into account in deciding whether to impose death or life without the possibility of parole. In sum, there is no reasonable possibility that appellant was prejudiced. Thus, his instructional error claims should be rejected.

XXIII.

## CUMULATIVE ERROR DOES NOT WARRANT REVERSAL

In Argument 23 of his opening brief, appellant contends the cumulative effect of the alleged errors occurring during both the guilt and penalty phases require reversal of the death judgment. (AOB 328-330.) Respondent disagrees as no error occurred during either the guilt or penalty phase, and, to the extent there was error, appellant has failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 691-692; *People v. Ochoa*, *supra*, 26 Cal.4th at p. 458; *People v. Catlin*, *supra*, 26 Cal.4th at p. 180.) A defendant is entitled to a fair trial, not a perfect one. (*People v. Box*, *supra*, 23 Cal.4th at p. 1214.) Appellant received a fair trial.

## CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: April 17, 2006

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 56,485 words.

Respectfully submitted,

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## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Sergio D. Nelson***

No.: **S048763**

I declare:

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

On **April 17, 2006**, I served the attached

**RESPONDENT'S BRIEF**

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**SEE ATTACHED SERVICE LIST**

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **April 17, 2006**, at Los Angeles, California.

| Melissa Garcia | Melissa Garcia |
|---|---|
| Declarant | Signature |

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**Case No.: S048763**

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